



1 October 2007

Dr BM Nyembezi: Head of Department
Department of Health, KwaZulu-Natal
Private Bag X9051
Pietermaritzburg 3200

Attention: Ms. S. Moonsamy

Per fax (033) 845 0370 and per e-mail (sherlene.moonsamy@kznhealth.gov.za)

Dear Dr Nyembezi

SUBMISSION ON THE KWAZULU-NATAL HEALTH CARE BILL, 2007

1. The AIDS Law Project (ALP) welcomes the publication of the draft KwaZulu-Natal (KZN) Health Care Bill, 2007 (“the KZN Bill”) for public comment prior to it being tabled in the provincial legislature.¹ In our view, the KZN Bill has the potential to complement the broad legislative framework provided by the National Health Act, 2003 (“the Act”). In particular, it has the potential to provide much the needed detail in respect of which the Act expressly authorises the provinces to legislate, thereby enabling provincial and local government authorities to render health care services in accordance with the needs of the people of KwaZulu-Natal.
2. Yet in certain respects, the KZN Bill seeks to go beyond the express mandate assigned by the Act. In others, it does not go far enough in discharging the obligations as set out Act. Our primary concern, therefore, is that if passed in its current form, the KZN Bill may arguably conflict with the Act in a manner contemplated by section 146 of the Constitution. Simply put, the KZN Bill raises constitutional concerns by unnecessarily departing from or narrowing the broad framework provided by the Act. In so doing, it risks undermining the manner in

¹ KwaZulu-Natal Provincial Gazette: Gazette Extraordinary Vol. 1, No. 27 (21 August 2007)

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which the Act and the Constitution contemplate the provision of provincial health care services.

3. This brief submission does not attempt to consider the KZN Bill in its entirety. Instead, it simply sets out what we believe is the appropriate mandate for provincial health legislation of this nature, further seeking to identify the manner in which the KZN Bill is at odds with this mandate. It does this in two ways. First, it addresses the broad mandate issues in this letter itself. Second, it identifies key aspects of the provincial legislative agenda mandated by the Act and assesses the extent to which the KZN Bill discharges this identified mandate. This is done in the annexure to this letter. Together, the letter and the annexure are intended to guide the KZN Department of Health in finalising the draft legislation and the provincial legislature in its deliberations on the tabled KZN Bill.

4. According to section 25(1) of the Act, the role of each member of an executive council (MEC) responsible for health in a province is to “ensure the implementation of national health policy, norms and standards in his or her province.”² Importantly, clause 3 of the KZN Bill provides for the provincial statute to “be interpreted and implemented within the context of the Constitution, national policy framework, national legislative framework, national norms and standards, as well as transversal provincial legislation and policy relating to health matters”. Additionally, clause section 5(e) of the KZN Bill states that one of the provincial statute’s objects is to “determine and provide for the development and implementation of provincial health policies, framework, norms and standards in accordance with ... national health legislation and policies, framework, norms and standards ... and the [National] Health Act, 2003”.

5. Unfortunately, there are several provisions in the KZN Bill that deviate from or undermine this mandate. For example, clause 2 of the KZN Bill ordinarily restricts the application of the provincial statute to residents of KZN who are South African citizens, permanent residents or persons who are “entitled to public health services in terms of international and bi-national conventions, treaties and agreements to which the Republic of South Africa is a signatory”. Whilst seemingly broad, this exhaustive list in fact cuts back on the objects of the Act, including section 2(a)(ii)

² See also section 104(1)(b) of the Constitution which deals with the legislative authority of provinces, providing for provincial legislation “with regard to ... any matter within a functional area listed in Schedule 4” and “any matter outside ... [the] functional areas [listed in Schedules 4 and 5], and that is expressly assigned to the province by national legislation”.

which notes that these include “to regulate national health and to provide uniformity in respect of health services across the nation by establishing a national health system which provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford.” The population of South Africa includes, but is not limited to, the three categories of persons expressly identified in clause 2 of the KZN Bill.

6. In contrast to clause 2 are clauses 5(a), (b) and (c) of the KZN Bill, which respectively state that its objectives include the following:
 - To “give effect to and regulate the alienable right of each person to have their dignity respected and protected”;
 - To “respect protect, promote and fulfil the right to the progressive realisation of access to health care services conferred by section 27 of the Constitution, subject to available resources”; and
 - To “respect, protect, promote and fulfil the right of children to basic health care conferred by section 28(1)(c) of the Constitution”.

7. In our view, the KZN Bill – if adopted in its current form – is likely to result (at best) in some level of confusion, or (at worst) in unnecessary conflict between KZN on the one hand and national government on the other. Of greater concern is that this may confuse health care providers, who may not know which statute to follow. As our example shows, the confusion may result in health care providers in KZN unlawfully denying the provision of health care services to persons who, in terms of the Constitution and the Act, are indeed entitled to access such services. While there is nothing problematic with the KZN Bill seeking to provide further clarity, it can only do so in a manner that does not cut back on the rights recognised by the Act.

8. The example highlights the dangers inherent in any provincial legislative process regarding a substantive area in which national legislation already exists. To avoid the potential for unnecessary conflict, as well as to ensure that KZN is complying with its constitutional and statutory mandate in respect of the provision of health care services, we propose that the KZN Bill be amended so that it –
 - Does not repeat anything already addressed in the Act, unless necessary;

- Makes express reference to the relevant section(s) of the Act as and when they are relied upon or alluded to; and
 - Largely restricts itself to giving full and meaningful effect to the issues in respect of which the Act mandates provincial legislation.
9. In this regard, we have prepared an annexure that seeks to identify the essential provincial legislative agenda mandated by the Act and assesses the extent to which the KZN Bill discharges this mandate. To the extent that the KZN Bill goes beyond this mandate, we recommend that serious consideration be given to removing the unnecessary and potentially problematic provisions. To the extent that the KZN Bill fails to address specific issues in respect of which the Act requires provincial legislation, we suggest that the provincial statute be supplemented accordingly.
10. Should you have any need to seek clarity regarding this submission, please do not hesitate to contact us on 011 356 4100, bergerj@alp.org.za or vukeyaa@alp.org.za. Should you require any assistance in taking the legislative process forward, please feel free to contact us to establish how and in what way we may support you in this important area of work.

Yours sincerely

Jonathan Berger
Senior researcher

Amelia Vukeya
Researcher