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## **SUBMISSION ON THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 2000**

**JOINT MONITORING COMMITTEE ON THE IMPROVEMENT OF THE  
QUALITY OF LIFE AND THE STATUS OF WOMEN**

**&**

**JOINT MONITORING COMMITTEE ON THE IMPROVEMENT OF THE  
QUALITY OF LIFE AND THE STATUS OF CHILDREN, YOUTH AND  
PERSONS WITH DISABILITIES**

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**Endorsed by the AIDS Legal Network**

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## **INTRODUCTION**

The AIDS Law Project (ALP) welcomes the opportunity to make this submission on the Promotion of Equality and Prevention of Unfair Discrimination Act (“the Act”) to the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women and the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Children, Youth and Persons with Disabilities (“the Joint Monitoring Committees”). In particular, we welcome the invitation to provide recommendations on the strengthening of the Act and its implementation.

A human rights research and advocacy organisation, the ALP provides free legal advice and litigation services to advance the rights of people living with HIV/AIDS (PLWHAs). It aims to use and develop the law to –

- Ensure that PLWHAs have access to appropriate health care services – in particular services for the treatment and prevention of HIV/AIDS-related opportunistic infections and the treatment for HIV infection itself – and legal services to protect and advance their rights;
- Ensure that people vulnerable to HIV infection have access to appropriate prevention services;
- Improve access to the legal system to protect fundamental rights; and
- Combat HIV-related discrimination and human rights violations.

The ALP has been intimately involved in research, advocacy, policy and legal developments in relation to HIV/AIDS and human rights since 1993, regularly providing its clients with legal advice and litigation services in relation to many of the issues raised in this submission. In addition, we have a long history of engaging with Parliament and the Equality Review Committee (ERC) on the inclusion of HIV/AIDS status in the list of prohibited grounds of unfair discrimination in the Act.

## **PURPOSE OF THIS SUBMISSION**

The call for public submissions makes it plain that Parliament’s review of the Act will focus on the impact of the statute on women and persons with disabilities. Our submission deals squarely with two issues: the proposed express inclusion of HIV/AIDS status as a prohibited ground of unfair discrimination; and access to legal

services necessary for the proper implementation of the Act. We believe that the successful resolution of both issues will go a long way towards mitigating the impact of the HIV/AIDS epidemic on groups – such as women, children and persons with disabilities – that are disproportionately affected, both in terms of vulnerability to HIV infection and in dealing with the impact of the epidemic on families and communities.

In this submission we explain the rationale underpinning our key recommendations:

- The express inclusion of HIV/AIDS status as a prohibited ground of unfair discrimination in terms of section 1 (xxii)(a) of the Act; and
- Implementing and/or amending the Act to ensure that every person – and poor people in particular – is able to vindicate his or her right to equality and freedom from unfair discrimination, in accordance with the right of access to courts in section 34 of the Constitution of the Republic of South Africa, 1996.

But before doing so, we set the context within which our recommendations are to be considered, by addressing the following issues:

- Extent of the HIV/AIDS epidemic;
- Vulnerability of children orphaned by AIDS and persons with disabilities;
- The importance of protecting PLWHAs from unfair discrimination; and
- The ALP's engagement with the Act.

We do not specifically address the issue of women's vulnerability. Instead, we simply refer to – and endorse the findings and recommendations of – the report entitled “How Best Can South Africa Address the Horrific Impact of HIV/AIDS on Women and Girls”, which was unanimously adopted by the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women on 21 November 2001.

## **THE CONTEXT**

### **Extent of the HIV/AIDS epidemic**

South Africa has one of the highest HIV prevalence rates in world and is estimated – alongside India – to be home to the largest number of PLWHAs in any country.

According to the national Department of Health, more than five million people in South Africa were estimated to be living with HIV/AIDS in 2005.<sup>1</sup> The table below, entitled “HIV and AIDS Estimates for South Africa in 2005”, illustrates the disproportionate burden of adult women (aged 15 and above), who account for more than 56% of all PLWHAs in South Africa. It also shows that 235 060 children were estimated to be living with HIV/AIDS in 2005.<sup>2</sup>

Parameter	Estimate
<b>Adults age 15-49 years</b>	
HIV prevalence (%)	18.78
Number living with HIV (millions)	
Total	4.90
Men	1.96
Women	2.94
<b>Adults age 15+ years</b>	
HIV prevalence (%)	16.25
Number living with HIV (millions)	
Total	5.30
Men	2.19
Women	3.12
<b>Children age 0-14 years</b>	
Number living with HIV (thousands)	235.06
<b>Total population</b>	
Number living with HIV (millions)	5.54

Source: Department of Health, “National HIV and Syphilis Prevalence Survey, South Africa, 2005”

The impact of the epidemic was eloquently expressed by the Deputy Minister of Health, Mrs Nozizwe Madlala-Routledge, in a press release issued on behalf of the Department of Health earlier this week (19 September 2006):

“We are all in pain. Despite the tremendous efforts being made in our country by both government and civil society, we continue to lose people

<sup>1</sup> Department of Health “National HIV and Syphilis Prevalence Survey, South Africa, 2005”, Pretoria: Department of Health, 2006.

<sup>2</sup> Children in this context were defined as people under the age of 14. The two most likely sources of infection for this group are mother-to-child transmission of HIV (MTCT) and sexual assault.

to the scourge of HIV/AIDS. On average, according to the Medical Research Council findings for the year 2005/06 every day in South Africa over 800 people die and a thousand are infected. We are losing people in the prime of their lives. We are losing our children and youth, our future. We are losing mothers and fathers and seeing an ever-growing number of orphans and child-headed families. Our health professionals are in pain facing a pandemic for which there is as yet no cure.”<sup>3</sup>

The Deputy-Minister’s observations come less than two weeks after Statistics South Africa released its adult mortality report dealing with an “extensive evaluation of adult mortality in South Africa from 1997 to 2004.” That report, based on actual death certificates, indicates the extent of the epidemic as well as its disproportional impact:

“Changes in death rates between 1997 and 2004 differed by sex and age. In this period, *death rates for females age 20-39 more than tripled and for males age 30-44 more than doubled.* By 2004, for those aged 20-44, female death rates were higher than those for males. *Female death rates rose to a peak at age 30-34*, which was not surpassed until age 60-64. For both males and females at age 15-19 and 55-64 death rates declined (males age 15-19) or increased by 20% or less.

*HIV death rates have a distinctive pattern by age in which there is an increase to a given age and then a rapid decline at older ages. This peak occurs at 30-34 for females and at 35-39 for males.* Many HIV deaths are registered as being due to some other cause of death. This problem is aggravated by the fact that HIV is not a reportable disease in South Africa, unlike some other communicable diseases. Based on the age pattern of death rates by sex, it is likely that a high proportion of deaths registered as due to parasitic diseases, parasitic opportunistic infections, certain disorders of the immune mechanism and maternal conditions (females only) are actually caused by HIV.”<sup>4</sup> (Emphasis added)

### **Vulnerability of children orphaned by AIDS and persons with disabilities**

A recent research report has once again drawn attention to the fact that children orphaned as a result of AIDS (so-called “AIDS orphans”) are disproportionately affected by the epidemic that threatens their survival.<sup>5</sup> The report shows how in

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<sup>3</sup> “Statement on the TAC’s invitation to a ‘people’s parliament’ by Mrs Nozizwe Madlala-Routledge, Member of Parliament”, available online at <http://www.info.gov.za/speeches/2006/06091913451001.htm>

<sup>4</sup> BA Anderson and HE Phillips, “Adult mortality (age 15-64) based on death notification data in South Africa: 1997-2004”, Report No. 03-09-05 (Pretoria: Statistics South Africa) at xv, available online at <http://www.statssa.gov.za/publications/Report-03-09-05/Report-03-09-052004.pdf>

<sup>5</sup> UNICEF, UNAIDS and PEPFAR “Africa’s Orphaned and Vulnerable Generations: Children affected by AIDS” (August 2006), available online at [http://www.unicef.org/publications/files/AOVB\\_Report\\_prepublication\\_PDF.pdf](http://www.unicef.org/publications/files/AOVB_Report_prepublication_PDF.pdf)

comparison to other children, AIDS orphans are at a higher risk of missing out on receiving an education, living in homes with inadequate food and suffering from anxiety.

Persons with disabilities are also particularly vulnerable to HIV/AIDS. Research indicates that it is often assumed that persons with disabilities have little – or no – risk of HIV infection, because society generally regards them as not being sexually active or not engaging in risky behaviour.<sup>6</sup> Indeed, a report in *The Lancet* indicates that –

“those with disability – and disabled women in particular – are likely to have more sexual partners than their non-disabled peers. Extreme poverty and social sanctions against marrying a disabled person mean that they are likely to become involved in a series of unstable relationships.”

Other factors that increase the vulnerability of persons with disabilities to HIV infection include high levels of sexual abuse, low literacy rates, lack of access to health care services and the general lack of safer sex education.

### **The importance of protecting PLWHAs from unfair discrimination**

In addition to the wide-ranging physical and socio-economic effects of HIV/AIDS on the lives and well-being of people and communities, the epidemic is also accompanied by high levels of unfair discrimination and stigma that are levelled against PLWHAs.<sup>7</sup> Because of this, as well as the negative impact of stigma and discrimination on efforts to prevent new HIV infections and provide appropriate treatment and care for PLWHAs, it is vital that the rights of this group of vulnerable people are afforded express legal protection. This much was recognised by the Constitutional Court in the case of *Hoffmann v South African Airways*:

“People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been

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<sup>6</sup> Nora Ellen Grocea "HIV/AIDS and people with disability" *The Lancet* Volume 361, Issue 9367, 26 April 2003, pp. 1401-1402

<sup>7</sup> See, for example, Marlise Richter, "Aiding Intolerance and Fear: the nature and extent of AIDS discrimination in South Africa" 2002 (2:5) *Law, Democracy & Development* 195

stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating.”<sup>8</sup>

The importance of protection against unfair discrimination on the basis of HIV/AIDS was recognised by Parliament in drafting the Act:

“In view of the overwhelming evidence of the importance, impact on society and link to systematic disadvantage and discrimination on the grounds of HIV/AIDS status ... special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of ‘prohibited grounds by the Minister’”<sup>9</sup>

In the schedule to the Act entitled “Illustrative List of Unfair Practices in Certain Sectors”, unfair discrimination on the basis of HIV/AIDS status in the insurance sector is cited as an example of unfair practice. Item 5(c) of the schedule provides the following example: “Unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status.”<sup>10</sup>

Women, children and persons with disabilities are particularly affected by HIV/AIDS. Subgroups of PLWHAs (such as women, children and persons with disabilities), who are likely to experience overlapping and reinforcing forms of oppression and injustice, would benefit from express and accessible legal protections against unfair

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<sup>8</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at paragraph 25 (footnotes omitted)

<sup>9</sup> Sections 34(1) and 34(1)(a) of the Act

<sup>10</sup> It should also be noted that HIV is mentioned in regulations subsequently issued in terms of the Act: Annexure C of the regulations, which contains a Code of Practice aimed at improving understanding of the Act “to enhance efforts for effective implementation”, lists a number of examples of unfair discrimination. Under the heading “Rendering of Goods and Provisioning of Services”, it notes that one “may not unreasonably refuse to grant a service to persons solely on the basis of their HIV/AIDS status.” (Government Gazette, Vol. 466, 30 April 2004 No. 26316)

discrimination on the basis of HIV/AIDS status. Building on this logic, we support the express inclusion of HIV/AIDS status – as well as the other three contested grounds (nationality, socio-economic status and family responsibility and status) – on the list of prohibited grounds of discrimination expressly recognised by the Act.

### **The ALP's engagement with the Act**

The Act was drafted to give effect to section 9(4) of the Constitution which required national legislation to “be enacted to prevent or prohibit unfair discrimination”. The Act was passed by Parliament on 2 February 2000.<sup>11</sup> Together with socio-economic status, nationality, family responsibility and family status, HIV/AIDS status was originally included on the list of prohibited grounds of discrimination in the Bill submitted to Cabinet. Regrettably, Cabinet decided to remove these five grounds from the Bill.

Following a process of public participation, Parliament decided to create a mechanism within the Act for the future inclusion of these grounds to be reconsidered.<sup>12</sup> The Act thus makes provision for the establishment of the ERC,<sup>13</sup> which was tasked – amongst other things – with making a recommendation to the Minister on whether the four contested grounds should be included in the Act. The ERC was established in September 2000 and the sections setting out the Committees function and powers came into operation on the same day.

The ALP recognized the importance of the Act and its potential in playing a positive role in the lives of PLWHAs from early on in the legislative drafting process:

- In a number of formal submissions, we proposed the express inclusion of HIV/AIDS status in the Act.<sup>14</sup>

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<sup>11</sup> For more information on the history of the Act, see chapter 9.6 in Currie and de Waal (eds) *The Bill of Rights Handbook*, 5<sup>th</sup> edition (Lansdowne: Juta & Co, Ltd, 2005)

<sup>12</sup> C Albertyn et al (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (Wits University Press, 2001) at 81

<sup>13</sup> Sections 32-34 of the Act

<sup>14</sup> See AIDS Law Project “Submission on the Promotion of Equality and Prevention of Unfair Discrimination Bill”, 17 November 1999 and AIDS Law Project “An Examination of Methods of Protection Proposed for HIV/AIDS in the Equality Legislation”, Research Brief for the Equality Legislation Drafting Unit, 3 December 1998.

- In August 2001, when the possibility of including additional grounds of non-discrimination to the newly passed Act was discussed, the ALP submitted written recommendations to the Equality Review Committee (ERC) in the wake of further research it had conducted on the nature of discrimination on the basis of HIV/AIDS status in South Africa.<sup>15</sup>
- The ALP was also asked to comment on the chapter on HIV/AIDS status to be included in the Equality Legislation Project Research Report to inform the ERC's recommendation on the issue to the Minister of Justice and Constitutional Development ("the Minister").<sup>16</sup>

In 2005, the ALP became increasingly concerned that the ERC had seemingly failed to make a recommendation to the Minister as directed by section 34 of the Act and that the initial process had lost momentum. It therefore contacted the Department of Justice and Constitutional Development ("the Department") and the head of the ERC – the chairperson of the South African Human Rights Commission, Mr Jody Kollapen – for further information. At the beginning of 2006, it became apparent that the memorandum that the ERC had drafted, which recommended that all the proposed grounds referred to in section 34 of the Act be expressly included,<sup>17</sup> had not been finalized and could thus not be presented to the Minister.<sup>18</sup>

We have been advised that the ERC has made suggested amendments to various documents prepared by the ERC's secretariat based at the Department, and that when these amendments have been made, they will be submitted to the Minister.<sup>19</sup> One of the documents submitted to the secretariat is the ERC's recommendation on the additional grounds to the Act. We have not had sight of that document. We

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<sup>15</sup> For the final research findings, see AIDS Law Project "Discrimination and HIV/AIDS" *AIDS Law Project Occasional Paper* May 2003, Commissioned by the Department of Health.

<sup>16</sup> Such a recommendation would be in terms of section 34 of the Act

<sup>17</sup> According to this Memorandum "Family Responsibility" and "Family Status" were combined to form one ground known as "Family Responsibility and Status".

<sup>18</sup> During 2006, the ALP wrote to all the members of the ERC urging them to finalise the memorandum and to present it to the Minister. We directed a number of letters to the head of the ERC to request an update on the matter, and were informed in June 2006 that the memorandum had been finalised, but that the process would be delayed because the Minister had to reappoint members of the ERC's because its term had expired. At that point it appeared that it was only when the members of the ERC have been newly appointed, that the memorandum could be presented to the Minister.

<sup>19</sup> We were also informed that the ERC's term expired in September 2005, and that it was mandated to submit a number of reports the Minister by the end of its term.

therefore do not know whether it recommends the express inclusion of HIV/AIDS status, as was indeed the case in a previous draft memorandum of the ERC.<sup>20</sup>

The fact that no formal recommendation on the additional grounds has been made to this Minister is of particular concern, given that the Act – which was passed more than six years ago – contains an expressly directive that the ERC to make its recommendations “within one year” of its establishment. The equality courts have been functioning since June 2003. The regrettable and inordinate delay of the ERC to make its recommendations to the Minister in a timely manner means that a valuable window of opportunity for using the Act to address unfair discrimination on the basis of HIV/AIDS status has been lost.

### **WHY THE EXPRESS RECOGNITION OF HIV/AIDS STATUS IS NECESSARY**

Human rights abuses and the denial of equal access to public and private resources have characterised individual and societal responses to HIV/AIDS and PLWHAs since the first cases of AIDS were detected in the early 1980s in South Africa. While discrimination has manifested itself in the denial of resources, services and accommodation, it is also present in the continuing stigmatisation and marginalisation of PLWHAs.

Many of the people who have sought legal advice and support at our offices have recounted stories of rejection, violence, humiliation, death, abandonment and brutality. While there is a high level of awareness of HIV/AIDS in South African society, stigma and prejudice still characterise many of the interpersonal and institutional responses to those living – or suspected to be infected – with HIV. Such conduct offends the very essence of our new constitutional democracy that aims to create “a society based on democratic values, social justice and fundamental human rights”.<sup>21</sup>

The “Objects” of the Act make it clear that the intention of the legislation is, amongst other things, to “give effect to the letter and spirit of the Constitution”, to promote equality and to promote the “equal enjoyment of all rights and freedoms by every

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<sup>20</sup> Draft Memorandum faxed to the ALP on 29 August 2005 by the ERC secretariat

<sup>21</sup> Preamble to the Constitution

person”.<sup>22</sup> We submit here – as we have done in many instances in the past – that effective protection of PLWHAs requires express protection against unfair discrimination on the basis of HIV/AIDS status. In our view, PLWHAs cannot simply rely on the equality courts to develop the Act so that the term “any other ground” or “disability” is interpreted to include HIV/AIDS status. While we believe that the *Hoffmann* decision obliges judicial officers to develop the law in such a way, unless and until this happens, PLWHAs face unnecessary additional hurdles.

Consider for as an example the term “any other ground”. If a complainant has been subjected to unequal and unfair treatment because of his or her HIV status, he or she will first have to prove that the discrimination suffered:

- Causes or perpetuates systemic disadvantage;
- Undermines human dignity; or
- Adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a listed ground.<sup>23</sup>

Similarly, if a complainant wants to argue that discrimination on the basis of HIV/AIDS status constitutes a “disability”, he or she will have to advance a number of complex arguments on why HIV status is perceived socially as a disability, relying heavily on foreign case law. To our knowledge, no South African court has interpreted the term disability to include HIV/AIDS. In *Hoffmann*, the Constitutional Court expressly declined to do so.

While these approaches are technically possible, they are unlikely to be accessible to people with low literacy levels and/or formal education, who are most likely unable to access legal services to vindicate their rights claims. Instead, those most likely to be able to make use of the Act are the rich (who have access to lawyers) and those whose cases are taken up by public interest organisations such as ours. Given the levels of poverty in South Africa and the limited reach of bodies such as the ALP, the vast majority of rights claimants will remain unassisted.

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<sup>22</sup> Section 2(b)(i)-(iii)

<sup>23</sup> Section (xxii)(b)(i)-(iii)

If HIV/AIDS status were to be listed as an express prohibited ground, any discrimination alleged on this basis would automatically assumed to be unfair, unless the respondent were able to prove otherwise. In contrast, if a PLWHA were to use the Act as it currently reads, he or she would be burdened by having to provide additional proof of discrimination – either that the discriminatory act could be interpreted to fall under “disability” discrimination, or that it constitutes another ground under the Act.

Explicit protection would not only assist PLWHAs to bring cases of unfair discrimination to court, but it would also carry symbolic importance. It would give public and legislative recognition to that fact that such discrimination is a social ill that it affects a large – albeit vulnerable – section of our population. It will demonstrate Parliament’s commitment to assisting particular marginalized groups – and in particular PLWHAs – and to increase their access to justice. Such a development would be in accordance with various regional and international commitments that South Africa has made towards recognising and protecting the rights of PLWHAs.<sup>24</sup>

## **ACCESS TO JUSTICE**

A common theme already identified in this submission is that of access to justice, a key component of our work at the ALP. In February of this year, for example, the ALP spearheaded and co-hosted a conference entitled “Improving Access to Legal Services to Challenge HIV-related discrimination and Claim Socio-Economic Rights”.<sup>25</sup> During this conference, which began with a keynote address by Chief Justice Pius Langa,<sup>26</sup> it was clear that there are a number of fundamental barriers in the way of poor and other marginalized people accessing justice. In particular, the conference identified the following barriers:

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<sup>24</sup> See, for example, South Africa’s commitments in terms of the “Declaration of Commitment” of the United Nations General Special Assembly Special Session (UNGASS) on HIV/AIDS. Section 58 of the Declaration commits leaders of countries to enact appropriate legislation that will protect the rights of PLWHAs. See also the “Abuja Declaration and Plan of Action”, the SADC “Statement on Regional Responses to HIV/AIDS in Southern Africa” and the “SADC Plan of Action on HIV/AIDS”.

<sup>25</sup> This conference was co-hosted by the AIDS Law Project, the Centre for the Study of AIDS, the Acornhoek Advice Centre, and the Street Law Programme at the Faculty of Law at the University of the Witwatersrand. The conference was attended by more than 150 delegates from civil society and government.

<sup>26</sup> Justice Langa’s speech, which recognises the need to increase access to legal services, is available online at <http://dedi20a.your-server.co.za/alp/images/upload/Chief%20Justice%20Langa.pdf>

- Lack on information about the content of human rights;
- Lack of mechanisms for the realization of human rights;
- The inaccessibility of legal services (particularly for civil matters); and
- Unjustifiably high costs of private legal representation, in the absence of a comprehensive state legal assistance programme.

The conference resolutions are attached to this submission as Annexure A. One of the resolutions directly applicable to any assessment of the Act provides as follows:

Making greater use of the designated Equality Courts, established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, and utilising alternative *fora* such as the Human Rights Commission and the Commission on Gender Equality as an effective way of advancing substantive equality and challenging unfair discrimination.

While it clear that organisations and individuals who assist poor and marginalized people have the intention of utilising the Act in future, delegates did not indicate that they were currently making use of the equality courts. This is worrying as the conference brought together a number of non-governmental organisations, community-based organisations, paralegals/advice office workers, representatives from the chapter 9 institutions and service providers whose work focuses on ensuring that poor and other marginalized people are able to use the law to defend and advance their rights.

**Limited access to the equality courts**

If few or no people in this group were utilising the Act or did not know how it functioned, it is indicative of an insufficient level of awareness and use of the Act. This lack of awareness about the equality courts is borne out by research of a number of organisations. In their enquiry, the Centre for the Study of Violence and Reconciliation notes the following:

For the [Equality] Courts to make a meaningful impact, public awareness and other aspects of access, such as the provision of competent translation and interpretation services, as well as the focus on the challenging of attitudes of

offenders in the orders and remedies handed down by the presiding officer must occur.<sup>27</sup>

Reports by the Institute for Democracy in South Africa (Idasa)<sup>28</sup> and the South African National Anti-Discrimination Forum – FAZE2<sup>29</sup> note the same problem. In addition, the Idasa report highlights numerous additional concerns, such as members of the courts – as well as assessors and interpreters – needing more training on the Act and its implementation. It further recognizes the need for the Department to address budgetary matters, given that some courts had indicated that the lack of funds was preventing them from establishing an equality court, or from undertaking training or public awareness campaigns.

In its Annual Report 2004/2005, the South African Human Rights Commission highlights the following additional problems:

While the Commission has achieved success with all the cases it has lodged with the Equality Courts on behalf of applicants, the Commission's monitoring process reveals that these courts are not user friendly and accessible to people who cannot afford legal representation.<sup>30</sup>

This lack of awareness about the courts and their inaccessibility to poor people are distressing. The aim of the Act is precisely to assist those sectors of society who are the most marginalized and the most vulnerable, and to reach those who cannot access justice through ordinary means. This it does not seem to be done.

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<sup>27</sup> P Lane, "South Africa's Equality Courts: An Early Assessment", Race & Citizenship in Transition Series, 2005, available online at <http://www.csvr.org.za/papers/paprctp5.htm>

<sup>28</sup> S Seedat, "EQUALITY COURTS: A report by PIMS-SA at Idasa, available online at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1352>

<sup>29</sup> See "Comments on the South African Government's First Country Report on the Implementation of the International Convention of the Elimination of All forms of Racial Discrimination (CERD)", alternate report by South African Civil Society Organisation made to the United Nations Committee on the Elimination of Racial Discrimination, compiled by the South African National Anti-Discrimination Forum - FAZE 2, available online at [http://www.ohchr.org/english/bodies/cerd/docs/Alternative\\_Report\\_by\\_SAF\\_Civil\\_Society\\_Org\\_Englis\\_h.doc](http://www.ohchr.org/english/bodies/cerd/docs/Alternative_Report_by_SAF_Civil_Society_Org_Englis_h.doc)

<sup>30</sup> SAHRC Annual Report 2004/05, Available from [http://www.sahrc.org.za/sahrc/cms/downloads/SectionTwo2004\\_2005.pdf](http://www.sahrc.org.za/sahrc/cms/downloads/SectionTwo2004_2005.pdf)

These sentiments are echoed by the SAHRC's recent visit to Equality Courts in the Free State Province. The SAHRC noted that they were concerned by "the under-utilisation of the equality courts" and that "this under-utilisation maybe due to the lack of awareness of the equality courts and the remedies that could provide in the event of unfair discrimination on the prohibited grounds" See SAHRC "Equality Courts inefficient in Free State Province" September 2006, Available [http://www.sahrc.org.za/sahrc/cms/publish/cat\\_index\\_26.shtml](http://www.sahrc.org.za/sahrc/cms/publish/cat_index_26.shtml)

In our view, there are at least three ways in which access to justice may be improved. First, it is vital that the Department publicise the functions and powers of the equality courts and take steps to address the low levels of awareness of the Act. Second, the Department has to investigate ways in which access to legal services may be enhanced. This may include – but is not necessarily limited to – appropriate regulation of the legal sector. Third, the role of the SAHRC in relation to the Act has to be reconsidered.

### **The role of the SAHRC**

The SAHRC has a particular role to play in relation to the Act. It is empowered and/or mandated to –

- Institute proceedings under the Act;<sup>31</sup>
- Promote equality;
- Monitor equality plans contemplated in section 25 of the Act;
- Compile a report “on the extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic”;<sup>32</sup> and
- Monitor regular progress reports in cases where reporting has been ordered by equality courts.<sup>33</sup>

These specific roles are in addition to the SAHRC’s constitutional mandate to “investigate and report on the observance of human rights and to take steps to secure appropriate redress when human rights have been violated”,<sup>34</sup> as amplified by the Human Rights Commission Act 54 of 1994.

It is critical the SAHRC plays a proactive and dedicated role in creating awareness about the equality courts and their powers and remedies. It should be involved actively in empowering people to use the Act, to ensure that the Act becomes fully operational, and to monitor the functioning of the equality courts. In addition, it must

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<sup>31</sup> Section 20(1)(f)

<sup>32</sup> Section 28(2)

<sup>33</sup> Section 21(m)

<sup>34</sup> Section 184 of the Constitution

make full use of its powers to institute action on behalf of complainants and thereby assist poor people to access justice.

We have been critical of the SAHRC and have expressed disappointment at its failure to tackle many rights violations with the necessary urgency, its failure to intervene in politically charged court cases, not adequately using its powers of search and subpoena and not fully holding government accountable.<sup>35</sup> But part of our frustration, however, lies with the somewhat limited role ascribed to the SAHRC by the Act.

Although empowered to institute action on behalf of rights claimants, the SAHRC is not recognised by the Act in a manner that recognises the full import of section 34 of the Constitution, which grants everyone –

“the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.”

Section 34 must be understood in the context of section 7(2), which requires the state to “respect, protect, promote and fulfil the right in the Bill of Rights.” Simply put, sections 7(2) and 34 – read alongside section 9(4) and the Act – seem to suggest alternative forms of dispute resolution.

One such mechanism may be that which has been adopted by the Competition Act 89 of 1998, which sets up a competition authority composed of the Competition Commission, Competition Tribunal and Competition Appeal Court. In short, the Commission investigates and “prosecutes” consumer complaints, the Tribunal adjudicates and the Appeal Court takes on the role of an ordinary court of appeal. If such a model were to be applied to the Act, it would see the SAHRC taking on the role of investigator (of rights violations) and “prosecutor” (before the equality courts). This would ensure that access to resources (including legal resources) would not be determinative of access to justice, as appears to be the case at the moment.

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<sup>35</sup> See F Hassan, “Are Chapter 9 institutions helping to deliver justice?”, Conference on Improving Access to Legal Services to Challenge HIV-related discrimination and Claim Socio-Economic Rights, available online at [http://dedi20a.your-server.co.za/alp/images/upload/Hassan%20F\[2\].pdf](http://dedi20a.your-server.co.za/alp/images/upload/Hassan%20F[2].pdf)

## **CONCLUSION**

The proper functioning of the equality courts is an essential component in South Africans' continued hope and trust in the values and principles of the Constitution. The Act has an important role to play in educating people about human rights, the evils of unfair discrimination, the power of the law and how it can change people's damaging attitudes. It is the duty of the SAHRC, the Department, the equality courts and civil society to ensure the Act's success.

We appeal to the Joint Monitoring Committees to engage the ERC and the Minister on the matter of the proposed additional grounds to the Act – to urge them to conclude this process speedily, and to do so in a way that includes legislative protection for the greatest number of vulnerable and marginalized groups. In addition, we invite the Joint Monitoring Committees carefully to scrutinise the roles and responsibilities of the Department and SAHRC in relation to the Act, and to make clear recommendations about how these can be improved.

We thank you for the opportunity to make these submissions. Please do not hesitate to contact us if you have any queries.

**Marlise Richter and Jonathan Berger**

**22 September 2006**

**Johannesburg**

## ANNEXURE A

### CONSENSUS STATEMENT ON IMPROVING ACCESS TO LEGAL SERVICES FOR PEOPLE LIVING WITH HIV/AIDS

#### FROM THE CONFERENCE ON HIV AND ACCESS TO LEGAL SERVICES HELD AT WITS UNIVERSITY, 17 – 18 FEBRUARY 2006

*“The rights-based approach to HIV/AIDS recognizes that violations of fundamental rights such as the right to non discrimination, the right to health, the right to food and water, the right to social security, the right to privacy and the rights of women are all contributing factors that exacerbate the spread of HIV/AIDS and its consequences... The rights based approach asserts the entitlements of people affected by HIV/AIDS rather than their needs. The point of departure is therefore that ... [people living with HIV/AIDS] and those affected by it are not charity cases which society can either deal with or ignore at its leisure, but that they are fundamentally entitled to receive the assistance that their condition requires.” – Chief Justice Pius Langa, opening address to the conference*

On 17 and 18 February 2006, over 150 delegates participated in a conference entitled “Improving Access to Legal Services to Challenge HIV-related Discrimination and Claim Socio-Economic Rights”. Co-hosted by the AIDS Law Project, the Centre for the Study of AIDS, Acornhoek Advice Centre and the Street Law Programme at the University of the Witwatersrand, the conference was opened by Chief Justice Pius Langa. Delegates included representatives of legal service and human rights organisations, the Legal Aid Board, the Human Rights Commission and Commission on Gender Equality, paralegal advice offices, the Treatment Action Campaign, community-based organisations, private law firms and several donor organisations.

Conference delegates acknowledged that, despite the progressive nature of South Africa’s Constitution and Bill of Rights, the comprehensiveness of the statutory and common law framework and the constitutional right to have disputes resolved before the courts, most poor and marginalized groups, including people living with HIV and AIDS (PLWHAs) do not have access to justice. Barriers identified included:

- Lack of information about the content of human rights
- Lack of mechanisms for the realization of human rights

- The inaccessibility of legal services (particularly for civil and human rights matters) and
- Unjustifiably high cost of private legal representation, in the absence of a comprehensive state legal assistance programme.

The HIV / AIDS pandemic has brought the urgency of improving access to the justice system has come to the fore: PLWHAs continue to face stigma and discrimination in all spheres of life, and increasing numbers of poor and marginalized groups, such as women and children, urgently need to access their basic human rights to education, health care, housing and food. For many, access to justice is literally a matter of life or death. With this in mind, conference delegates recognized that access to legal services must become a greater priority for the government and all organisations that work in the field of law and human rights.

In reaffirming the centrality to our democracy of the rule of law and the independence of the judiciary, and recognizing the potential of the Bill of Rights to be a living instrument to drive development and equity, conference delegates committed themselves to working together to achieve the following goals:

### **Building capacity for human rights work**

1. Supporting the work and building the capacity of paralegals and community justice workers, particularly in under-resourced and rural communities, to ensure improved access to information about human rights and accessible and appropriate legal services necessary for claiming these rights. Such capacity building interventions should be conducted within an ethos of equal partnership and should be guided by the needs of community-based organisations, to ensure that they do not undermine existing relationships between advice offices and communities.
2. Increasing advocacy for greater government funding for the Legal Aid Board, particularly in respect of civil and human rights matters, in order to realize the constitutional right to have disputes that can be resolved through the application of the law decided in a court or other appropriate legal forum.

### **Promoting the use of law to ensure social justice**

3. Working to mobilize vulnerable communities to claim their human rights, and assisting to build capacity within social justice movements to take advantage of legislation and jurisprudence that may be used to protect and promote human rights, and improve access to socio-economic rights.
4. Developing a formalized referral system that links community justice workers, paralegal advice offices and legal service providers, to ensure that clients are able to exercise their rights by accessing legal advice and information, paralegal interventions or litigation services.
5. Ensuring that successful social justice litigation is accompanied by appropriate public education and mobilization and followed by the necessary monitoring, in order to translate court victories into meaningful changes in the lives of those for whom they are intended to benefit.
6. Making greater use of the designated Equality Courts, established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, and utilising alternative *fora* such as the Human Rights Commission and the Commission on Gender Equality as an effective way of advancing substantive equality and challenging unfair discrimination.
7. Examining the role of the Institutions created in terms of Chapter 9 of the Constitution, and seeking ways of utilising their monitoring, reporting and oversight powers and functions to ensure justice for the poor and marginalised.

### **Lobbying and Advocacy**

8. Working with all University Law Schools to ensure that curricula reflect the needs and realities of our society, and that human rights and social justice law are taught and promoted as viable career choices for students.
9. Popularising, working with, and monitoring the services of the Chapter 9 Institutions, particularly the Human Rights Commissions and the Commission on Gender Equality, which are both constitutionally and legally obliged to promote, protect and advance human rights.
10. Building on current *pro bono* initiatives in collaboration with the legal profession, and encouraging private practitioners to engage in more *pro bono* work.
11. Engaging with the legislative processes involving the Legal Practices Bill and the Constitution 14<sup>th</sup> Amendment Bill to ensure an appropriate statutory framework.

**Communication and coordination on the right to justice and access to the courts**

12. Participating in a collaborative network with other legal service providers, advice offices, social justice organizations and relevant institutions, in order to:
- a. Share information, expertise and resources
  - b. Identify organizations able to offer training in law and human rights and those in need of training
  - c. Developing a mechanism to collect data on the types of social justice cases being dealt with by legal service providers, advice offices, and other organizations nationally
13. The conference agreed that the network should be coordinated by a working group, and will work towards a more coordinated response to the provision of legal services to the poor. The working group has subsequently been established.

The statement is supported by the following participating organisations:

AIDS Consortium	AIDS Foundation SA	ANDnetworks
AIDS Law Project	AIDS Legal Network	Acornhoek Advice Centre, Wits
ATICC	Black Panther Communications	Black Sash
Botswana Network on Ethics, Law & HIV/AIDS (BONELA)	CAJ News	Centre for Applied Legal Studies, WITS
Centre for the Study of AIDS (CSA)	CHOMP	Commission on Gender Equality
Community Law Centre	Democratic Alliance	Department of Justice
Equality Courts	Ekhaya Service Foundation	Forced Migration Studies Programme, WITS
Gauteng Dept of Public Transport	Heal the World Child Foundation	Herschel Legal Advice Centre
HIVOS	Home of Saints	HOSPERSA
Hospice Association of Witwatersrand	Human Rights Commission	HURISA
Ipelegeng Youth Leadership Development Forum	Ikageng Community Advice Centre	Khanya-Ukukhanya Home Based Care
Kubonakele Human Rights & Justice Centre	Lawyers for Human Rights	Langelihle Productions

Legal Aid Board	Legal Resources Centre	Lesedi Legal Aid Centre
Lethabong Legal Advice Centre	Lifeline, Johannesburg Lifeline, Soweto	Limpopo Access to Justice Cluster
Mindman Pty Ltd	Mpumalanga Access to Justice Cluster	Norwegian Centre for Human Rights (NCHR)
Northwest University, Community Law Centre	Open Society Institute – Law and Health Initiative	Office of the Public Protector
Open Democracy Centre (ODAC)	People Opposing Women Abuse (POWA)	Positive Women’s Network
Reisimuimpumelelo Advice Centre	Reproductive Health & HIV Research Unit	Rhodes University Legal Aid Clinic
Royal Netherlands Embassy	Rural AIDS Development Action Research Prog (RADAR)	SA Football Players Union (SAFPU)
SADTU	SCAT	Street Law
Swedish Embassy	Tlhabologang AIDS Project	The Zimbabwean
Treatment Action Campaign	Thuso Advice & Development Centre	Tshedimoso Health Network
Tshikululu Social Investments	Tswelopele Rural Community Outreach (TRCO)	UNAIDS
UWC Law Clinic	University of North West	Wardle, Ndhlela & Mahlangu Consultants
We Care Community Project	Webber Wentzel Bowens	Westville Campus Law Clinic
WITS School of Law	Women’s Legal Centre	Women on Farms Project