

Chapter 4

SANAC and the implementation of the NSP

By Nonkosi Khumalo and Jonathan Berger

In our previous review, we detailed the developments that preceded Cabinet's adoption – on 2 May 2007 – of the national *HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011* (NSP) “as a strategic framework that will guide the national response to HIV and AIDS over the next five years.”¹ In his introduction to the review, Mark Heywood noted that there was “reason to believe that the development, finalisation and adoption of the NSP should now bring to an end a long period of confusion, conflict and recrimination regarding HIV/AIDS policy.” He expanded:

It should mark the beginning of a national consensus in respect of the objectives of HIV prevention and treatment programmes, as well as the strategies, policies and laws that are required to reach these objectives. If fully and robustly implemented, the NSP will provide an opportunity for South Africa to strengthen its ethical, social and legal fabric and to draw significant additional public and private sector funding to meeting the needs of the poor and vulnerable.

A significant part of the ALP's attention since then has been focused on ensuring that the structures of the South African National AIDS Council (SANAC) operate efficiently and effectively. Amongst other things, SANAC is tasked with coordinating the country's response to the epidemic across all government departments and civil society sectors and “[o]verseeing continual monitoring and evaluation of all aspects of the NSP.” In addition, its responsibilities include coordinating and strengthening surveillance systems and “[m]obilising resources for the effective functioning of SANAC and the implementation of the NSP”.² Simply put, the success or failure of the NSP will – in large part – depend on the success or failure of SANAC.

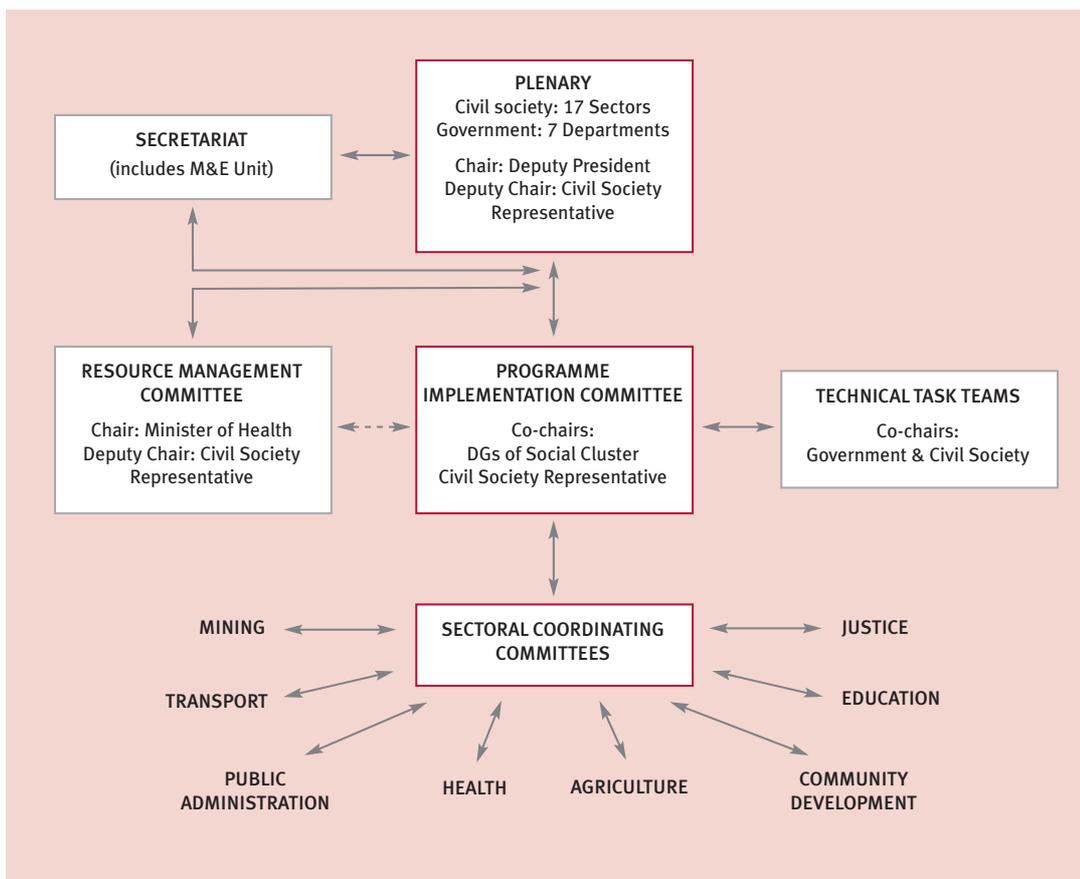
Quite unlike any other creation of the state, SANAC is an advisory, oversight and coordination body that brings with it a novel mode of democratic co-governance. Established by Cabinet primarily “to advise government on the development and implementation of appropriate HIV and AIDS policies and programmes,”³ SANAC brings together representatives and experts from government and civil society (which includes business and labour). Its key committees draw members from across departments and sectors, with each one being led jointly by a government and civil society representative.

1. See <http://www.info.gov.za/speeches/2007/07050311151002.htm>
 2. Clause 5.1.5, SANAC Procedural Guidelines
 3. Clause 1

This chapter considers the structure of SANAC and its committees, and the work of the ALP that relates to SANAC. It starts by providing an overview of the structure, aiming to highlight the body's potential role in the development, refinement and implementation of the country's response to the epidemic. The remainder of the chapter is thereafter divided into three parts. First, it summarises the ALP's work in SANAC over the period under review, including its participation in the setting up of key SANAC structures. Second, it considers our focus on implementing "NSP Priority Area 4 – Human Rights and Access to Justice".⁴ Finally, it considers the future of SANAC, critically reflecting on the progress to date and the challenges that have arisen. In so doing, it makes recommendations regarding SANAC's location and structure.

SANAC structures

To date, the first two (of three) tiers have been established.⁵ The Plenary, which constitutes SANAC's political leadership, sits at the top. Chaired by the country's Deputy President, with a deputy chairperson from civil society, the Plenary is composed of Ministers from seven government departments and leaders from seventeen civil society sectors. Sent to the Plenary to represent the Law & Human Rights (L&HR) Sector, Mark Heywood was subsequently elected by civil society members of the Plenary as SANAC's deputy chairperson, a position he has officially held since 10 September 2007.



4. Much of our litigation and health sector reform work supports priority area 4. In this regard, see chapters 2 and 3 respectively.

5. The primary objectives of the Sectoral Coordinating Committees (SCCs), which comprise SANAC's third tier, are to ensure that "the implementation of sectoral specific programmes is effectively coordinated and reviewed ... and ... the PIC is regularly provided with information regarding sectoral specific programmes to enable it to make appropriate recommendations in this regard to the *Plenary*." The SCCs cover the following eight sectors: public administration; mining; transport; agriculture; community development; education; justice; and health.

Two structures sit at the second tier: the Programme Implementation Committee (PIC) and the Resource Management Committee (RMC), both of which are accountable to the Plenary. Although tasked with very different functions, the two committees depend greatly upon a complementarity of their work. It is therefore regrettable that SANAC's Procedural Guidelines are silent on their relationship.

The PIC's primary function is "to share experiences, review the implementation of programmes and strategies of the NSP and make recommendations to the *Plenary*."⁶ As SANAC's "engine room", it is powered by Technical Task Teams (TTTs) – standing sub-committees that provide expert advice on the four priority areas of the NSP, as well as on communications.⁷

In respect of SANAC's finances, it is worth noting that although a trust was established early in the 2000s to fund SANAC structures and activities, it has largely remained dormant since then.

To date, only three of the five TTTs are fully functional: these are the TTTs dealing with prevention, communications, and treatment, care and support. Inactive for many months, the TTT on human rights and access to justice only began to meet early in 2009. Co-chaired by one representative from each of the L&HR Sector and the Department of Justice & Constitutional Development (DoJ&CD), this sub-committee has a key

role to play in ensuring that the NSP is implemented in a manner that respects, protects, promotes and fulfils human rights.⁸

One of SANAC's greatest challenges is financial sustainability – mobilising resources for its own effective functioning. This is an issue that is separate from the larger question of ensuring that there are sufficient resources to implement the NSP and realise its ambitious targets. In respect of SANAC's finances, it is worth noting that although a trust was established early in the 2000s to fund SANAC structures and activities, it has largely remained dormant since then. Initially, government provided the SANAC Trust with an amount of R30 million – this money has done nothing over the years other than acquire interest.

SANAC's resource mobilisation role also includes fundraising for additional resources for the country's response to the epidemic and functioning as South Africa's Country Coordinating Mechanism (CCM) for the Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM) – the latter "primarily through the work of the RMC."⁹ The RMC is thus tasked with two key roles: doing much of the work of a CCM; and mobilising additional resources for the country's response to the epidemic. Importantly, SANAC – as a whole – is South Africa's CCM. The RMC has been delegated the power to execute its key functions, with its decisions ultimately subject to the Plenary's oversight.

Unfortunately, the RMC – although technically "functioning" – has been plagued by difficulties. Under the chairpersonship of the former Minister of Health, it suffered from uncertainty, inefficiency, communication breakdowns and a lack of will to make it work. The most visible consequence of this was the failure of South Africa to secure grants from the GFATM for several years – costing the country hundreds of millions of rands. Starting in late 2008, however, processes were put in place to strengthen the RMC.¹⁰ These developments were linked to the overall strengthening of the secretariat, which is discussed below.

SANAC's day-to-day functioning is the domain of its secretariat, which is tasked with carrying out "its administrative, logistical and technical functions as directed by the *Plenary* and the *Chairperson*

6.. Clause 8.1, SANAC Procedural Guidelines

7. The Guidelines make provision for TTTs on "any other areas as directed by the PIC".

8. Despite – or perhaps because of – the existence of a strong research sector, the research, monitoring and surveillance TTT has found it difficult to distinguish between its work and that of the broader sector (which has an established working group and three research sub-committees). In early 2008, it was agreed that the focus of this TTT would be limited to monitoring and evaluation, an area in which advice and research is vital.

9. Clause 5.1.5, SANAC Procedural Guidelines

10. South Africa failed in two applications (Rounds 7 and 8). The deadline for GFATM Round 9 applications is June 2009. To overcome problems and weaknesses, the RMC has formally contracted the Development Bank of Southern Africa to provide management support. In addition, it is receiving technical assistance from international development partners and has assembled an experienced writing team.

and *Deputy Chairperson of SANAC*.¹¹ Based upon a PIC recommendation taken at a meeting on 16 October 2008, the Plenary resolved on 28 November 2008 to mandate SANAC's chairperson and deputy chairperson to re-establish the secretariat outside the Department of Health (DoH). Subsequently, the chairperson formally requested the Development Bank of Southern Africa (DBSA) to "host and offer agency services" to SANAC for a period of about eighteen months.¹²

At the time of writing, the DBSA was working towards concluding a SANAC business plan and a memorandum of understanding for presentation to its board by mid-March 2009. In the interim, agreement has been reached between SANAC, the DBSA and the DoH on the appointment of four senior managers to the SANAC secretariat. This senior management team will be based at the DBSA and will be given responsibility for re-establishing the secretariat so that it can play its central role in coordinating and monitoring the implementation of the NSP.

Integral to the work of the secretariat is its Monitoring and Evaluation (M&E) Unit, "a central coordinating body of the NSP".¹⁴ As part of the secretariat, the M&E Unit is accountable to the Plenary. In addition, it is required to "report to the PIC on the implementation of its mandate at least twice a year."¹⁵ Disturbingly, we may reach the mid-term review of the NSP in mid-2009 without the M&E Unit having been established. The absence of monitoring and evaluation systems may prove to be the Achilles heel of the NSP. Without constant inquiry into the impact of NSP activities such as HIV prevention and treatment, it is hard to refine programmes, target resources or convincingly guide the country towards the defeat of this epidemic.

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ALP participation in SANAC structures

ALP staffers have been active in a wide range of SANAC-related activities, both as part of their ordinary ALP work and as an integral part of the L&HR Sector. In addition, Mark Heywood – in his capacity as deputy chairperson – has actively participated in SANAC's day-to-day functioning and has tried to fill the gaps that exist in the absence of a properly staffed secretariat. This has included the employment a full-time research and administrative assistant responsible not only for the coordination of SANAC's civil society sectors, but also for assisting the secretariat with the coordination of all SANAC meetings, activities and projects.¹⁶ In this regard, Heywood has attempted to assist civil society sectors by improving communication and forging consensus amongst them on key strategic issues.

ALP staff members have participated in the following SANAC areas of work during the period under review:

- Identified the need for and led an ad hoc PIC task team assigned the responsibility to draft a set of rules and procedures for all SANAC structures – SANAC's Procedural Guidelines;¹⁷

11. Clause 11.2, SANAC Procedural Guidelines

12. Letter from the Deputy President of the Republic of South Africa to the CEO of the DBSA, 4 November 2008 (on file with the ALP)

14. Clause 11.6.2, SANAC Procedural Guidelines

15. Clause 11.6.3

16. The office of the deputy chairperson is supported by a grant from the Bill and Melinda Gates Foundation, which is administered by the Human Sciences Research Council. Because of the lack of capacity of the existing secretariat, the deputy chairperson's research and administrative assistant has effectively been forced to play a much stronger administrative and coordination role than originally anticipated.

17. The task team relied heavily on the law firm Webber Wentzel – and in particular Umutyana Rugege and Moray Hathorn from its pro bono department – for technical and drafting expertise. The ALP assumed responsibility for presenting the draft procedural guidelines to the PIC, as well as for effecting final amendments as proposed by the PIC.

- Coordinated the L&HR Sector Working Group, in part by employing and hosting a sector coordinator;
- Represented the L&HR sector on the PIC;
- Set up and participated as a member in the work of the TTT on human rights and access to justice; and
- Conceptualised and hosted key civil society meetings and made submissions to the PIC on a range of human rights issues such as access to health care services for refugees, a new approach to voluntary counselling and testing, voluntary medical male circumcision as a prevention intervention and the need for a chronic illness grant.

Implementing the NSP: a focus on priority area 4

Public education and training

Much of the ALP's work in this area has focused on public education and training. In collaboration with the Legal Aid Board (LAB) and the South African Human Rights Commission (SAHRC), the ALP considered how best to feed into and support the work of these two crucial institutions in ensuring access to legal services to address HIV/AIDS-related discrimination and related issues. This resulted in a series of training workshops in Limpopo and Mpumalanga for LAB and SAHRC lawyers and trainers learning alongside TAC activists based in the two provinces.¹⁸

The first cycle of workshops (25 – 27 March 2008 in Limpopo and 18 – 20 June 2008 in Mpumalanga) focused on the legal aspects of HIV/AIDS in the workplace. The second cycle (25 – 27 August 2008 in Limpopo and 10 – 12 November 2008 in Mpumalanga) concentrated on gender-based violence, HIV/AIDS and the law. While the ALP was largely responsible for logistics, ALP and TAC trainers facilitated the workshops jointly. Most of the participants came from LAB justice centres and TAC district structures,¹⁹ with only a handful attending from the SAHRC.²⁰

An interesting feature of the workshops was that they brought together legal practitioners with little understanding of the science of HIV (and its prevention and treatment) with treatment-literate community-based activists who in turn had little understanding of the day-to-day realities of legal practice. Both groups had much to learn – from the facilitators as well as from each other. For example, TAC participants were able to assist in demystifying complex scientific concepts and to relate the lived experiences of communities. In turn, LAB and SAHRC participants were able to share their experiences as practitioners. This dynamic mix of participants meant that the workshops had to address two key aspects of each theme: the scientific issues at play, as well as the application of the relevant legal framework.

Participants, who were clearly hungry for information, made suggestions on the topics they would like future training sessions to address. As is apparent from the list below, these topics include a focus on medical and public health information as well as legal questions that are particularly relevant to poor people living in rural areas and in provinces that are under-resourced and often left outside the ambit of civil society actions:

18. The ALP also ran other training workshops.

19. The Mpumalanga workshops were attended by 15 LAB legal professionals from the following six justice centres: Middelburg, Nelspruit, Witbank, Piet Retief, Secunda and Ermelo. TAC's 15 representatives came from the Gert Sibande, Ehlanzeni and Nkangala districts. The Limpopo workshops reflected a similar breakdown: 15 LAB legal professional from five justice centres (Modimolle, Makhado, Polokwane, Thohoyandou and Tzaneen) and 17 TAC representatives from the Mopani, Vhembe, Capricorn and Waterberg districts.

20. While three SAHRC representatives attended the Mpumalanga workshops (the national HIV/AIDS coordinator and two staff members from the Nelspruit office), only two attended the Limpopo workshops (the national coordinator and a legal officer from the Polokwane office)

- Drug-resistant tuberculosis and isolation;
- The constitutional rights of refugees, asylum seekers and other foreign nationals;
- Access to information and the use of the Promotion of Access to Information Act 2 of 2000 in a manner that does not impede access to justice; and
- Access to housing.

Reflections on workshop content and impact on work as legal practitioners and community advocates

Enlightening particularly on the medical aspects of HIV ... I have learnt to appreciate the seriousness and urgency required to deal with HIV in our society ... I have also learnt a lot about dealing with HIV in the workplace and should in future know where to go if one encounters related problems. *LAB participant*

I have learned about how to use the [C]onstitution by quoting the acts/sections when advising people as I'm working with people living with HIV and I have to stand for what I say as a member of TAC. *TAC participant*

The trainings were very useful in that they provided us with information so that we are able to advise our clients in an informed manner. *LAB participant*

The workshops yielded a mixed bag of results. On the positive side, they have developed some capacity beyond the ALP to use the law to deal with a range of HIV/AIDS-related complaints. With their focus being limited to two provinces, the workshops have given rise to requests to expand the training to LAB and SAHRC structures in other provinces. In the two provinces already reached, the workshops have given rise to a growing network of legal practitioners and community-based activists, opening up opportunities for them to work together to increase access to justice for those most in need.

The workshops presented a number of challenges that need to be carefully examined. Because of their location, it is nigh impossible for the ALP to put an M&E system in place and thereby assess their impact. In addition, it brought to the fore concerns regarding the in-house training capacity of the ALP, as well as the sustainability of a programme that is overly reliant on a handful of facilitators.

The NSP envisages large-scale training on legal and human rights issues relevant to HIV. Our experience has graphically revealed the demand for this type of training. But our experience also suggests that the ALP is not the most appropriate organisation to conduct the work. Instead, there is a need for a discussion within the L&HR sector and between the sector and the DoJ&CD to develop a plan on how best to ensure that this important work is done in the next period.

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Expanding access to legal services

In our previous review, we identified the “need to expand paralegal services more broadly – amongst advice offices and other social and legal organisations – so that the public is not solely reliant on the ALP.” With this in mind, we closed our paralegal unit in 2007 but continued to provide ad hoc advice as and when people phone, e-mail, fax or come to our offices. Our main focus was intended to be on working with our partners in the L&HR Sector to ensure that such services become more widely available. It is unfortunate that access to civil legal services for poor and middle class people across South Africa is exceedingly limited.²¹

But a relatively recent development provides some cause for hope as well as a model that could be replicated in other provinces. From 15 April 2008, ProBono.Org – “a non-profit clearing house for public interest law matters” – began running a weekly HIV/AIDS Legal Clinic at its offices in Pritchard Street in Johannesburg.²² Staffed by volunteer attorneys from a range of private law firms, the clinic assists clients in a number of different ways, including the provision of legal advice and other free legal services. Where it is not possible for matters to be resolved immediately, the client is taken on as a pro bono client of the relevant attorney’s firm.

In preparation for the launch of the clinic, the ALP ran a training workshop for volunteer attorneys. The initial workshop, which was hosted by Webber Wentzel’s pro bono department on 2 April 2008, focused on the basic science of HIV infection and its treatment, the state’s constitutional obligations regarding the provision of health care services, and HIV/AIDS in the workplace. A follow-up workshop for volunteer attorneys, held some three months later on 22 July 2008, focused on the criminal law and “harmful HIV-related behaviour” – including the issue of criminalisation and the wilful transmission of HIV.

The ALP is committed to popularising ProBono.Org’s services and providing ongoing training for volunteer attorneys and technical and strategic assistance on complicated matters. In addition, we intend to follow up on cases we refer to the clinic, as well as to consider ways in which similar clinics can be set up in other provinces. For example, participants at the training workshops proposed that similar clinics be set up in Limpopo and Mpumalanga. In addition, we attach particular importance to collaboration with the LAB, which has more than 100 justice centres throughout South Africa and a senior management team that recognises the challenges of HIV and is committed to expanding access to legal services.

Materials development on sexual violence and the law

In early 2008, the ALP and Community Health Media Trust (CHMT) began collaborating on a documentary film on gender-based violence and the law. CHMT is a well-respected not-for-profit company that has produced HIV/AIDS public health education material since 1998 and has twice been cited by the Joint United Nations Programme on HIV/AIDS (UNAIDS) as an example of best practice.²³

The ALP played a threefold role in this process: first, it advised CHMT on the content of the documentary; second, the ALP’s Nonkosi Khumalo both narrated the documentary and conducted interviews with judges, legal practitioners, prosecutors, service providers, a survivor of gender-based violence and a victim’s family; and third, the ALP raised funds to financially support the documentary.

21. In this regard, see Mark Heywood and Adila Hassim, “Remedying the Maladies of ‘Lesser Men and Women’: The Personal, Political and Constitutional Imperatives for Improved Access to Justice”, (2008) 24 *South African Journal on Human Rights* 264 (forthcoming in 2009)

22. ProBono.Org also runs a weekly clinic for refugees and asylum seekers. This much-needed service helped to pick up the increased demand for legal services in the wake of the xenophobic violence that swept parts of South Africa in 2008. In the ten months after the HIV clinic was started, 155 people had been seen. Approximately half of them sought assistance regarding employment issues. Other main issues included invasions of privacy, insurance, pensions and allegations of wilful HIV infection.

23. Siyayinqoba Beat It! – the brand under which CHMT produces its material – provides reliable, scientifically-based information. According to <http://www.beatit.co.za>, the series is intended to enable its audiences, regardless of HIV status, “to respond positively to the impact of the epidemic in their lives”, with “the television and video medium [used] to overcome the language and literacy barriers to understanding HIV/AIDS information.”

The documentary will be broadcast on SABC TV in mid-2009. Preparatory work on a series of supporting training materials is due to start in the near future, which will be used by a broad range of organisations and institutions working to prevent, address and mitigate the impact of gender-based violence.

Future of SANAC and the NSP

The L&HR Sector has created the *potential* for more effective collaboration on human rights issues that are directly and indirectly related to HIV. If the ALP works effectively and consistently with its partners in the sector, it ought to be possible to mobilise greater resources for human rights work, conduct much broader public education and create a wider base for ensuring access to legal services. The NSP endorses wide and ambitious campaigns addressing unfair discrimination and promoting human rights education and access to justice. This is an invitation to scale up work on human rights on the basis of a Cabinet-approved policy. The challenge is how this can be done.

The ALP's commitment to an efficient and effective SANAC, which underpins one of its priority work areas, means that we will continue to participate actively in a range of different structures – from the Plenary down to the TTTs and the SCCs! Along with all civil society representatives on the Plenary, Mark Heywood has been asked to extend his term as deputy chairperson for a further 12 months. This means that he is likely to remain closely involved and active in SANAC activities until at least the end of 2009. In addition, the ALP remains committed to ensuring that the RMC becomes fully functional, the secretariat is appropriately resourced and the establishment of its M&E Unit is prioritised.

The relocation of the secretariat to the DBSA should provide SANAC structures with much-needed administrative and technical support. The appointment of a Chief Executive Officer and a strong senior management team is also likely to reduce the administrative burden on the office of the deputy chairperson. A strengthened civil society and a more efficient and effective secretariat will go a long way to ensuring that SANAC is able to perform the advisory, coordination and oversight role for which it was originally constituted.

In the medium to long term, when partnerships have strengthened and trust between government and civil society has been restored, SANAC – as an organisation – will need to be formalised. Its procedural guidelines expressly state that it is “not a juristic body” and that they “do not create an association or any other form of body corporate, nor do they create a contract.” In most other African countries, national AIDS councils take the form of statutory bodies or other juristic entities. As was recently recommended to the country's Parliament by a visiting delegation of the United Nations Inter-Parliamentary Union (IPU), perhaps now is the time for South Africa to follow suit.

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