ANNEXURE 1: AIDS LAW PROJECT ENGAGEMENT WITH CHAPTERS 9s

This document briefly sets out how the ALP has engaged – both formally and informally – with the four identified institutions: the SAHRC, the CGE, the Public Protector and the AG. It was largely against this backdrop that we analysed the relevant provisions of the Constitution and the statutory framework and made our limited set of recommendations.

Engagement with the SAHRC

In terms of its constitutional mandate, the SAHRC is tasked not only with promoting respect for and the protection, development and attainment of human rights, but it is also mandated to monitor and assess the observance of human rights. One of the ways in which this is to be done is by requiring relevant organs of state – annually – to provide it with information on what they are doing towards realising rights to housing, health care, food, water, social security, education and the environment. In this way, the SAHRC's focus aligns closely with ours – in particular our concern with realising the right to have access to health care services in general and HIV treatment and prevention services in particular.

Of the four institutions that that are considered in this submission, the ALP has worked – and continues to work – most closely with the SAHRC. While the mandates of certain other Chapter 9s (such as the CGE in particular) may be somewhat similar, the current leadership of the SAHRC is such that close relationships with institutions of civil society organisations are both encouraged and facilitated. The same cannot be said of the CGE, with whom we do not work closely (if at all) and from whom we have come to expect little. The difference between the two is clearly one of leadership, with the SAHRC's chairperson – Mr Jody Kollapen – playing a central role in reaching out and being responsive to organisations such as ours.

Our current working relationship with the SAHRC does not, however, capture the complexity of the strained relationship that it has had over the years with many civil society bodies such as ours. On at least three occasions in our dealings with the SAHRC, we have been disappointed at the body's failure to discharge its constitutional obligations with integrity: the first of these relates to the failure of the Health Professions Council of South Africa (HPCSA) in the early to mid-1990s to hold certain health professionals to account, with the second and third relating to the TAC case against the Minister of Health regarding the prevention of mother-to-child transmission of HIV (PMTCT).

HPCSA

The ALP laid a complaint against the HPCSA with the Public Protector in January 2001 regarding the body's ongoing failure to hold certain health professionals to account.[1] The Public Protector released his report in July 2001, in which he made six recommendations regarding the conduct of the HPCSA. All of these were aimed at addressing the long delays in processing complaints. The report also suggested that issues not dealt with in their report should be referred to the SAHRC.[2] When it became clear at a later point that the Public Protector's recommendations were not being implemented, we approached the SAHRC once again for assistance. At this point, we had already discussed the possibility – which never materialized – of an SAHRC *amicus curiae* intervention in a relevant case brought by the ALP on behalf of an individual complainant against the HPCSA. To date, the SAHRC has failed to address our concerns regarding the functioning of the HPCSA

PMTCT

In the TAC's politically controversial PMTCT challenge, neither the SAHRC nor the CGE appeared as *amicus curiae* or expressed any public position on the case. Instead, the SAHRC was besieged by in-house boardroom disputes, which finally spilled into the media. After deciding – and seeking permission from the parties – to intervene as *amicus*

[1] This complaint is discussed in further detail below.

[2] The report, a copy of which is available upon request, does not provide any further information.

curiae, the SAHRC later backtracked after certain of its commissioners decided against such an intervention.[3] The official reason – that the SAHRC had nothing to add to the arguments already made by the parties to the litigation – does not sit comfortably with the original position adopted by the commission.[4]

A few months after the Constitutional Court handed down its decision, the TAC and ALP uncovered compelling evidence that the PMTCT judgment was not being implemented in Mpumalanga.[5] We immediately requested that the SAHRC visit Mpumalanga and investigate our allegations.[6] We did so because the SAHRC has search and subpoena powers that civil society lacks. It has the power to enter public health facilities and compel public servants to speak – and to protect them if they feared losing their jobs.

The SAHRC agreed to investigate and did indeed send a commissioner and a researcher to the Mpumalanga. But to date, a report has never been issued – we simply do not know what happened after the investigation. Instead, implementation of the PMTCT programme in Mpumalanga began only after the Legal Resources Centre filed court papers on behalf of the TAC in a contempt of court application against the Minister of Health and the former member of the executive council (MEC) for health in Mpumalanga.[7] Once again, direct legal action taken by a civil society organisation – and not the constitutionally and statutorily mandated work of a Chapter 9 institution – was necessary.

Engagement with the CGE

As we have already mentioned, we do not work closely with the CGE. But despite our reservations about the body,[8] we invited a member of the CGE's Legal Department to join a working group formed in the wake of the conference entitled "Improving Access to Legal Services to Challenge HIV-related discrimination and Claim Socio-Economic Rights" that was spearheaded and co-hosted by the ALP in February 2006.[9] Although the person concerned was of the view that it is important for the CGE to be involved in this process, she had to refer the request to a plenary meeting of the CGE for permission. At the time the person concerned left the CGE's employ late last year, she had still not received a response to her request to join the working group.

From our perspective, the CGE's failure to engage with the PMTCT case is most telling. Throughout the entire case, it remained silent. Thus the first socio-economic rights case on health, gender and reproductive choice to reach the Constitutional Court was simply ignored by the CGE. It did not seek to intervene as *amicus curiae*, nor did it issue any statements in support of women rights of access to reproductive health care services. The CGE's track record on HIV/AIDS, largely indicating an unwillingness to address the issue at all, shows that the body is failing to address one of the key threats to the rights of women and girls in South Africa. In this light, people are right to question why the CGE

[3] See Mark Heywood, "Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health" (2003) 19 *South African Journal on Human Rights* 278 at 299 to 300.
[4] Ibid. See also "HRC 'Has Nothing New to Add'" (Mail & Guardian, 23 November 2001), available online at http://www.aegis.org/news/dmg/2001/MG011109.html.
[5] See Mark Heywood, "Contempt or compliance: The TAC case after the Constitutional Court judgment" (2003) 4:1 *ESR Review* 7
[6] A copy of the complaint is available upon request.
[7] The former MEC is now a Member of Parliament who sits on the Portfolio Committee of Health.
[8] We generally no longer refer complaints to the CGE for fear of them not being addressed appropriately.
[9] 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.

avoided engaging in this manner given its general acceptance of the importance of *amicus curiae* submissions and its willingness in numerous other matters to intervene.[10]

Engagement with the Public Protector

The Public Protector has had numerous occasions to deal with HIV- and health-related complaints.[11] Our direct experience, however, is limited to the two complaints that we lodged – one in respect of the HPCSA issue discussed above, the second regarding the Mpumalanga government's interference with the provision of post-exposure prophylaxis (PEP) services to reduce the risk of HIV transmission following rape. These two complaints are addressed below.

HPCSA

As already mentioned, July 2001 saw the Public Protector issuing a report in response to a complaint lodged by the ALP regarding problems many of our clients had experienced with the HPCSA.[12] After investigating the ALP's complaint and meeting with both the ALP and the HPCSA, the Public Protector made various recommendations. Although the specific cases which formed the basis of the complaint were subsequently resolved, the Public Protector's recommendations – which had the potential to go some way towards ensuring better protection for patients' rights generally – were never implemented.[13]

We drew this fact to the attention of Parliament's Portfolio Committee on Health during the public hearings on the Health Professions Amendment Bill [B 10—2006] last year, stressing that the Bill provided "the ideal opportunity for these recommendations to be codified in an amended Health Professions Act … and thereby given the force of law."[14] This did not happen. In addition, the Public Protector never addressed the HPCSA's failure to implement its recommendations, citing a controversial High Court ruling holding in support of its alleged lack of jurisdiction to deal with the matter.[15]

Had the Public Protector's recommendations been implemented by the HPCSA, it would never have been able to absolve the doctor whose conduct was the subject of *VRM v*

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[10] See the text accompanying notes **Error! Bookmark not defined.** to **Error! Bookmark not defined.** above

[11] See above note **Error! Bookmark not defined.**

[12] A copy of the report (reference 7/2 – 0488/01) is available upon request.

[13] The Public Protector's recommendations included the following:

- The Council should be required to educate health professionals regarding the ethical guidelines, and these guidelines should be used as the measure of a health professional's conduct during preliminary inquiries.
- The Council should regulate the time limit given to medical professionals to respond to complaints, particularly where the lifespan of the patient is shortened. If there is no response from a medical professional within the prescribed period, the matter should be referred for a hearing.
- Records should be kept of the preliminary committee proceedings, which can be made available to the complainant if necessary. Detailed reasons for preliminary inquiry decisions should be given.
- The Council should include the involvement of a person who will champion the rights of the patient in the preliminary inquiry stage.

[14] In addition, we made the following recommendation regarding legal action we had taken to compel the HPCSA to discharge its statutory role appropriately:

> "Codify the legal developments set out in the full bench decision in *VRM v Health Professions Council of South Africa* [unreported judgment of the High Court (Transvaal Provincial Division) in case no: 1679/2002 (10 October 2003), a copy of which can be made available if required] … dealing with material disputes of fact between the versions of the complainant and the registered professional in respect of whom a complaint has been lodged."

[15] Following a further ALP compliant lodged in November 2002, the Public Protector claimed that it does not have jurisdiction over the HPCSA in light of the Pretoria High Court decision in *Korf v Health Professions Council* 2000 (3) BCLR 309(T), where it was held that the HPCSA is not an organ of state. This decision appears directly to contradict the very clear provisions of section 239 of the Constitution, which defines an organ of state particularly broadly.

Health Professions Council of South Africa,[16] a high court case brought on behalf of the applicant by the ALP. Following the full bench decision in that case, which deals primarily with material disputes of fact between the versions of a complainant and the registered professional in respect of whom the relevant complaint has been lodged with the HPCSA, an HPCSA disciplinary committee dismissed the original complaint on the basis that health professionals "cannot be expected to know about all of the guidelines of their professions." One of the Public Protector's recommendations was that the HPCSA should be required to educate health professionals regarding the ethical guidelines.

PEP

In September 2001, the ALP lodged a complaint with the Public Protector regarding the Mpumalanga government's interference with the provision of post-exposure prophylaxis (PEP) services to reduce the risk of HIV transmission following rape.[17] In particular, the complaint concerned the conduct of the then Member of the Executive Council (MEC) for Health – Ms Sibongile Manana – in respect of the Greater Nelspruit Rape Intervention Project (GRIP). While the ALP was assured that four of the five specific issues addressed in the complaint would be investigated,[18] we have yet to receive or indeed become aware of any report on the alleged investigation.

Engagement with the AG

Acting on behalf of the TAC in 2004, we brought evidence to the attention of the AG regarding financial mismanagement and irregularities on the part of the national Department of Health ("the DoH") in respect of its continued funding of the National Association of People Living with HIV/AIDS (NAPWA). This, we alleged, was in violation of the Public Finance Management Act 1 of 1999 ("the PFMA"). The AG immediately responded by agreeing to conduct a forensic investigation and after several months' uncovered serious breaches of the PFMA and certain other laws by both the DoH and the DSD. It concluded its investigations with certain recommendations that were submitted to the two government departments. These appear to have caused the temporary de-registration of NAPWA as an NPO.

However, despite the crucial importance of ensuring that public funding for NGOs is appropriately used, the findings and recommendations have never been made public, nor have they been communicated to Parliament by either the DoH or the DSD. The office of the AG indicated to us that a summary would ordinarily be made available through its annual report to Parliament. But this was not to be the case – no reference to this investigation and the recommendations were to be found in the 2005 annual reports of the DoH and the DSD. To date, we have been unable to find an explanation. It appears that despite a lengthy forensic investigation and uncontroverted prima facie evidence of numerous irregularities, political interference appears to have rendered the investigation meaningless.

[ENDS]

[16] See above note 14

[17] A copy of the complaint is available online at http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=218.

[18] The Public Protector's jurisdiction in respect of the fifth issue, dealing with problematic comments made by the former MEC in the Mpumalanga provincial Legislature, was allegedly precluded by parliamentary privilege.