Cover
Top left: Activists celebrating outside the Constitutional Court after the handing down of judgment in NM and Others v Smith and Others
Top middle: TAC t-shirt
Top right: Delivering judgment in NM and Others v Smith and Others: Constitutional Court Justices Sachs, Nkabinde and O’Regan
Centre left: Shalom Ncala (ALP receptionist and presenter of SABC 1’s Siyayinqoba Beat It!) and Prudence Mabele (Positive Women’s Network) sharing a moment at the SANAC Law and Human Rights Sector consultation, 23 February 2007
Centre middle: Activists celebrating outside the Constitutional Court after the handing down of judgment in NM and Others v Smith and Others
Centre right: TAC demonstration outside the Third Session of the Conference of African Ministers of Health, 11 April 2007. (Courtesy of Oxfam GB/Marc Wegerif)
Bottom left: Remembering the Westville prisoners at a TAC march on the Union Buildings on the Global Day of Action, 23 August 2006
Bottom middle: Zackie Achmat (TAC chairperson and ALP board member) speaking at the opening of the ALP’s new offices in Braamfontein Centre, 15 September 2006. Justice Edwin Cameron (Supreme Court of Appeal) looks on.
Bottom right: Mark Heywood (ALP executive director) hosting a visit of legendary musician Carlos Santana to a rural HIV/AIDS project in Ingwavuma, northern KwaZulu-Natal
GET TESTED
GET TREATED
KNOW YOUR RIGHTS

www.alp.org.za
info@alp.org.za
011 356 4100 (t)
011 339 4311 (f)

AIDS law project
Contents

Mission Statement ................................................................. 4
Foreword ................................................................................ 5
Acknowledgements .............................................................. 7
People at the ALP ................................................................. 9

Introduction
  The End of Politics? ............................................................. 11

Section 1:
  Implementing the Operational Plan in Prisons ................... 21

Section 2
  Litigation, Legal Services and Access to Justice ............... 27

Section 3
  Public Education, Teaching and Training ......................... 43

Section 4
  Health Service Delivery and
  Health Sector Transformation ........................................ 51

Appendix A
  Oral presentations ............................................................. 61

Appendix B
  Publications .......................................................................... 69

Appendix C
  Written submissions .......................................................... 70

Appendix D
  Positions held by members of staff ................................... 70

Appendix E
  Draft Financials 2006 ........................................................ 72
Mission Statement

The AIDS Law Project (ALP) is a human rights organisation that seeks to influence, develop and use the law to address the human rights implications of HIV/AIDS in South Africa, regionally and internationally.

In particular, it uses legal and policy processes and litigation to protect, promote and advance the rights of people living with HIV/AIDS, as well as to change the socio-economic and other conditions that lead to the spread of infectious diseases and their disproportionate impact on the poor. In addition, it conducts and publishes research in order to assist with policy formulation and the development of appropriate legal and regulatory frameworks needed to respect, protect, promote and fulfil human rights.

Although the ALP maintains a focus on HIV/AIDS, it recognises that the progressive realisation of a set of human rights – and socio-economic rights in particular – is fundamental to sustainable progress in tackling the epidemic. Developing content and a better understanding of the duties of the public and private sectors regarding the right of people to health care is a particular objective of the ALP.

The ALP believes that empowering vulnerable people living with or affected by HIV/AIDS with knowledge of the law and human rights is effective and sustainable in tackling the epidemic. To this end, we work in partnership with other human rights organisations – particularly the Treatment Action Campaign (TAC) – to educate and train people about law, human rights and how they can use the legal framework.

The ALP is committed to the highest level of professionalism, accountability, transparency and respect for people’s equality, dignity, privacy and autonomy.
Foreword

By Johann Kriegler, Deputy Chairperson

It was a perfect autumn day on the Highveld, not a breath of air, the sun shining and not a cloud in the blue sky we salute in our national anthem. Millions of South Africans and many millions more around the world celebrated that magic moment when President Mandela, the universal icon of liberation, transformation and reconciliation, was sworn in at the Union Buildings. The realists among us knew that there was a long and hard road yet to be negotiated but few were aware of the deadly threat of HIV/AIDS lurking just below the horizon.

Now, thirteen years down the reconstruction road, the lofty promise of section 27 of the Constitution – the progressive realisation of the right to health care for all – remains a distant lodestar. Many in our country are still blind to the scourge of HIV/AIDS. Cultural taboos among the humble and denialism in high places linger on. Happily, however, there are many talented and dedicated people, some activists like Zackie Achmat and Mark Heywood battle-hardened in the struggle against apartheid, committed to this new struggle.

One of the significant participants in that campaign has for some years been the ALP, an agency functioning from within the Centre for Applied Legal Studies (CALS) in the School of Law at the University of the Witwatersrand. For operational reasons, partly because of its success, the project outgrew its academic environment and metamorphosed into an independent corporation. This, then, is our first report to donors, clients, well-wishers and other interested parties on behalf of the ALP in its capacity as a stand-alone entity. The report covers the period from January 2006 to the end of June 2007.
The transition has been smooth and largely uneventful, the emancipation a success. All the requisite legal formalities have been completed, staff, equipment and premises have been secured and we are now pursuing our own mission with our own vision under the general oversight of an independent board drawn from the widest possible spectrum of concerned experts.

The ALP will continue to ensure the provision of free legal advice to people living with HIV/AIDS and to organisations working to defend/advance their rights, inter alia by instituting and defending legal proceedings where appropriate. At the moment we are engaged in ongoing litigation with government relating to antiretroviral (ARV) treatment in prisons and we are planning to engage another department on matters of fundamental employment principles.

The ALP’s second major area of involvement – advocating and influencing the development and implementation of policy – will also enjoy continued support. The ALP has played a significant role in the formulation and adoption of the National Strategic Plan and our Executive Director Mark Heywood has recently been elected as deputy chairperson of the South African National AIDS Council (SANAC), chaired by Deputy President Mlambo-Ngcuka, thus adding lustre to our name.

In conclusion I would like to express the appreciation of the Board to a number of institutions and persons. In the first place the ALP wants to thank its donors for their generous and unstinting support in the past, not only financially but morally, and for the promise of support in the future. Next we want to say a sincere thank you to the University of the Witwatersrand and especially to those involved with CALS for their years of backing and advice that led to the ALP’s eventual independence. Lastly and especially, the Board wants to thank Mark Heywood and his remarkable team of bright young people for managing the transition so admirably. Well done to you.

June, 2007
Acknowledgements

Clients, deponents and expert advisors

- Dr. Steven Andrews
- Prof. Kader Asmal (MP)
- Baby A and her parents
- Dr. Mariette Botes, Elizabeth Malela, Anton Harber and all other expert witnesses in the Smith case
- Wynand Claasen
- Dr. Asraf Coovadia
- Dr. Marc Cotton
- EN, BM (deceased), DM, EJM, LM1, MAZ, MSM (deceased), ND, NS, SEM, TJX, TS, VPM (deceased), ZPM and LM2, and the HIV/AIDS Support Group at Medium B, Westville Correctional Centre
- Sizeka Maya, Nomafrika Velem, Neliswa Nkwali, Norute Nobola, Fanelwa Angel Gwashu, Dr. Eric Goemaere, Dr. Strinivasan (“Strini”) Govender, Sr. Nompumelelo Mantangana ("Sis Phumi"), Bulelwa Sekosana, Mandla Majola, Khanya Mkoko and all the others who assisted in the Khayelitsha case
- Kerry Cullinan and her staff at Health-e News Service
- Dominic Liber
- Prof. Leslie London
- Mr. and Mrs. Maimela
- Dr. Shuaib Manjra
- Dr. Michelle Meiring
- Dr. Tammy Meyers
- Dr. Harry Moultrie
- NM, SM and LH

• South African Security Forces Union (SASFU), in particular Themba Hlatshwayo (Deputy General Secretary), Sipho Mthethwa (Secretary, SASFU 121 branch, Mtubatuba), Philip Moshokoa and all other deponents and individual applicants in the SANDF case
• Dr. Francois Venter
• Willie Wandrag Legal Costs Consultants

**Donors**
- Atlantic Philanthropies
- The Ford Foundation
- HIVOS
- The Kingdom of Belgium
- The Royal Netherlands Embassy
- The Swedish International Development Cooperation Agency (SIDA)

**Lawyers**
- Adv. Daniel Berger SC
- Adv. Peter Hodes SC
- Adv. Gilbert Marcus SC
- Adv. Wim Trengove SC
- Adv. Nazreen Bawa
- Adv. Geoff Budlender
- Adv. Andrea Gabriel
- Adv. Anton Katz
- Adv. Rob Lagrange
- Adv. Philip Mokoena
- Adv. Mahlape Sello
- Cheadle, Thompson & Haysom Inc. Attorneys
- Suzette Gerber Attorneys
- Pillay Nichols Hlahane Attorneys
- DK Singh, Vahed & Partners
- Ms. Aniza van der Wath
- Van Heerden, Rudolph & Ellis Attorneys
- Mathew Walton
- Webber Wentzel Bowens

**Other partners and allies**
- AIDS and Rights Alliance for South Africa
- AIDS Consortium
- Community AIDS Response
- Steven Friedman
- Katherine McKenzie
- Legal Aid Board
- Legal Resources Centre
- Lesbian and Gay Equality Project
- Médecins Sans Frontières
- Oxfam Australia
- GeorgePillay and the Legal AID Clinic at the University of the Western Cape
- ProBono.org
- Simon Sephton and SiberInk Publishers
- Molly Slingsby
- South African Human Rights Commission
- South African Medical Association
- Staff at the Themba Lethu Clinic, Helen Joseph Hospital
- Treatment Action Campaign
- Tshwaranang Legal Advocacy Centre
- Zapiro (Jonathan Shapiro)
People at the ALP

Board of Directors

Chairperson
Ms. Vuyiseka Dubula - TAC Provincial Coordinator (Western Cape), gender activist and woman living openly with HIV

Deputy Chairperson
Justice Johann Kriegler - Former Justice of the Constitutional Court and chairperson of the Independent Electoral Commission during South Africa’s first democratic elections

Treasurer
Mr. Nhlanhla Ndlovu - Provincial manager (KwaZulu-Natal), Absolute Return for Kids (ARK) - South Africa

Prof. Quarraisha Abdool-Karim - Epidemiologist, Nelson Mandela School of Medicine, University of KwaZulu-Natal, and director of South Africa’s first HIV/AIDS and STD programme in the Department of Health (1994 – 1997)

Mr. Zackie Achmat - Chairperson of the TAC and former head of the ALP

Dr. Brian Brink - Senior vice-president (medical), Anglo American Corporation and member of the board of the Global Fund for AIDS, TB and Malaria

Prof Glenda Fick (ex officio) - Head of the School of Law, University of the Witwatersrand, Johannesburg

Prof. Sharon Fonn (ex officio) - Head of the School of Public Health, University of the Witwatersrand, Johannesburg

Prof. Philippa Kruger - Law Clinic, University of the Witwatersrand, Johannesburg, member of the Legal Aid Board and acting judge

Ms. Theodora Steele - Campaigns coordinator, Congress of South African Trade Unions (COSATU)

Vuyiseka Dubula (ALP chairperson)

Adila Hassim (ALP advocate and acting executive director)
Staff

- Muhammad Abdur-Rahim  Financial Officer
- Jonathan Berger  Senior researcher and head of policy, research and communications
- Thabo Boase  Attorney (resigned February 2007)
- Deena Bosch  Researcher (resigned October 2006)
- Althea Cornelius  PA to the Executive Director and project secretary
- Valerie Fichardt  Resource Centre coordinator
- Michelle Govender  Attorney
- Chloe Hardy  Paralegal coordinator
- Fatima Hassan  Senior attorney
- Adila Hassim  Advocate, head of litigation and legal services and acting Executive Director (May – October 2007)
- Mark Heywood  Executive Director
- Nonkosi Khumalo  Researcher and head of public education, teaching and training
- Genevieve Kieser  Acting project manager (May – August 2007)
- Lindiwe Kunene  Administrator (resigned January 2006)
- Mpho Maledimo  Administrator
- Heather Mangwiro  Attorney
- Anneke Meerkotter  Attorney (resigned March 2006)
- Phindile Mlotshwa  Office assistant
- Shalom Ncalo  Receptionist
- Dan Pretorius  Attorney and trainer
- Pholokgolo Ramothwala  Researcher
- Marlise Richter  Researcher (resigned August 2006)
- Mosa Seloane  Resource Centre coordinator (resigned December 2006)
- Fatima Shaik  Project manager
- Bongumusa Sibiya  Paralegal

Volunteers and interns

- Ogone Oscar Gaboutloelo
- Jean-Claude Kutende
- Chelsea Loughran
- Charmaine Madhlala
- Kgaogelo Nchape

10th Joint Civil Society Monitoring Forum meeting (Durban, 5 June 2007) – from left: Jack Lewis (Community Health Media Trust and series director of SABC 1’s Siyayingoba Beat It!), Pholokgolo Ramothwala (ALP researcher), Shalom Ncalo (ALP receptionist and presenter of SABC 1’s Siyayingoba Beat It!), Valerie Fichardt (ALP Resource Centre coordinator), Adila Hassim (ALP advocate and acting executive director) and Nonkosi Khumalo (ALP researcher)
Introduction

The End of Politics?

By Mark Heywood

2006 and 2007 will hopefully go down in history as the years which saw the end of denial, prevarication, obfuscation and conflict over HIV/AIDS policy in South Africa. They will hopefully represent the time when the country indeed crossed a Rubicon that led to a significant scaling up of our response to the HIV/AIDS epidemic in all areas where it has an impact on our society. If this change does prove true, it will represent the culmination of many individuals’ and organisations’ efforts to ensure the development and implementation of policies and practical interventions to stem the epidemic.

Amongst these organizations, the roles of the ALP and the TAC will stand out.

The 18-month period from January 2006 to June 2007 is characterized by a discernible thread of events that lead from conflict through tentative collaboration to consensus. Importantly, the scales appear to have tipped right in the middle of this period when our government realized that incessant, avoidable and unnecessary conflict – which largely had its roots in the mismanagement of the epidemic by the Minister of Health and her national department of health (DoH) – threatened South Africa’s moral standing in the global community. Equally important was the recognition that this mismanagement was hindering progress towards tackling the devastating impact of HIV/AIDS on adult, maternal and child morbidity and mortality, described by the Presidency as “an increasingly pronounced and unnatural hump among both males and females.”


Reprinted with kind permission of Zapiro
A never-ending conflict? January to September 2006

2006 did not have to run for long before the outbreak of renewed hostilities between government and civil society over the former’s response to HIV/AIDS. The initial spark was provided by President Mbeki’s public questioning of the impact of AIDS in the public service. An article published in City Press in February reported that “he had not been provided with any information indicating that public servants at different levels of government, like teachers, were dying.” Mbeki was quoted as follows:

People die from anything ... no-one has sounded the alarm where I work daily in the Presidency and nobody has said that there is a particularly alarming tendency of people dying. There has not been any indication... ; In the Presidency, nobody has said we are losing 10 percent of our staff every year because of Aids.²

In response, the TAC issued a strongly-worded press statement that accused Mbeki of continuing “to belittle HIV/AIDS related deaths to justify his personal denialism.” In addition, the statement noted as follows:

More seriously, the President’s denialism contributes directly to delayed testing, prolonged illness and premature deaths. TAC demands that the Cabinet and ANC NEC act to save lives. The time has come to put loyalty to the Constitutional rights to life, health, dignity and equality before loyalty to a leader in denial. President Mbeki deliberately minimizes deaths from HIV/AIDS related illness. His denial is deeply offensive to people who live with HIV/AIDS and our families who bury us.³

The conflict escalated shortly thereafter over the rushed and non-consultative process adopted by the DoH in drafting and finalising the country report on the measures South Africa had taken to implement the United Nations (UN) Declaration of Commitment on HIV/AIDS: “Global Crisis – Global Action” adopted at the UN General Assembly Special Session on HIV/AIDS (UNGASS) on 27 June 2001. Regrettably, the process to compile this report was rushed with the intention of excluding information and opinion that would have presented a less than glowing picture of the country’s response to the epidemic. Civil society organizations, HIV clinicians, epidemiologists, social scientists and other key stakeholders were denied the opportunity to make meaningful input into or debate the contents of the report.

The result was that South Africa’s country report became bitterly contested.⁴ It denied the bad, minimised the real challenges and eclipsed the many good examples of how – albeit in isolated and largely uncoordinated ways – some real progress had indeed been made. In response, the Joint Civil Society Monitoring Forum (JCSMF) – an ad-hoc body of civil society organisations that had been co-founded by the ALP in 2004 – wrote to the UN’s Secretary General on 6 April 2006 rejecting the report, calling on the UN to “critically assess the submissions made by our government”, and trusting “that the voice of civil society in SA is not silenced.”⁵ Inevitably, this conflict over the country report led to yet another related conflict.

Internationally, country reports were submitted to the UN in advance of the 2006 follow-up meeting to the 2001 UNGASS on HIV/AIDS – which included a two-day “comprehensive review of the...
progress achieved in realizing the targets set out in the Declaration of Commitment on HIV/AIDS on 31 May and 1 June, followed by a “High-Level Meeting” on 2 June 2006. In addition to examining progress post-2001, the three-day meeting was intended to reinvigorate the global response to HIV/AIDS. All UN member states were invited to send delegations representative of the different sectors in their respective societies. In addition, civil society organizations were invited to apply independently for accreditation.

Controversy erupted in South Africa when it was discovered that not only had the government officially objected to the inclusion of the ALP and TAC on a list of internationally accredited civil society organisations, but it had also managed successfully to have both organisations removed from the list. This level of undue interference had almost no precedent internationally. Even dictatorships such as Zimbabwe and China had not opposed the accreditation of independent NGOs from their countries.

There was no attempt by Thami Mseleku, Director-General (DG) of Health, to deny this action. Instead, it was simply “justified” on the basis that the ALP and TAC may have abused the high-profile international platform to paint a negative picture of South Africa, having “on previous occasions used such platforms to vilify the government and, particularly, President Thabo Mbeki.” Mseleku was quoted by the Health-e News Service as saying that “past experience has taught us that they [the ALP and TAC] use such platforms to rubbish what we are doing to tackle the problem.”

The scale of the international outrage combined with the publicly-announced intention of the ALP and TAC to consider legal action to review the rationality of the decision to compel the government to seek a compromise position. According to some reports, President Mbeki was forced to intervene, challenging the Minister of Health regarding the negative image this created of South Africa. And backtrack it did, publicly inviting Sipho Mthathi – the TAC’s General Secretary – to be part of the official government

---

delegation. However, the invitation to Mthathi was in her personal – and not representative – capacity, and the ALP remained excluded.

After careful consideration, Mthathi declined the invitation, primarily on the basis that the terms of participation for country delegates would restrict honest, open and robust discussion. She explained her decision in an open letter to the Minister:

I have been invited in my personal capacity, and not as a representative of TAC. For this reason I feel compromised in our organisation’s ability to speak out on behalf of its wide membership and in relation to our key AIDS objectives. I struggle to extricate my personal capacity from my capacity as a member of an organisation which the department had elected to vote against its accreditation for UNGASS. For me such a ‘principled decision’ by officials of our department of health is irreconcilable with democratic principles of governance and remains unacceptable. It also stands in sharp contrast to the very ethos of the 2001 UNGASS Declaration on AIDS, which I am confident will be reinforced in the declaration to come out of the UNGASS meeting in May.  

Efforts from within the UN and by a number of foreign governments and international NGOs to have the ALP and TAC reinstated came too late. Nevertheless, the ALP and TAC were indeed able to participate in UNGASS 2006 under the umbrella of accredited international NGOs. In particular, Nkhensani Mavasa – the TAC’s Deputy Chairperson – addressed the opening plenary of UNGASS on behalf of civil society internationally and representing the International Women’s Health Coalition.

Having already caused enough embarrassment to the country by attempting to exclude the ALP and TAC, South Africa’s official government delegation went a step further – actively campaigning against Africa’s Common Position to the UN General Assembly Special Session on AIDS (June 2006) adopted at the Special Summit of the African Union on HIV/AIDS, Tuberculosis and Malaria (ATM) – under the theme “Universal Access to HIV/AIDS, Tuberculosis and Malaria Services by a United Africa by 2010” – held in Abuja in early May.

Notwithstanding reactionary positions adopted by countries such as South Africa, Gabon, Egypt and the United States, active lobbying by a wide range of civil society actors from across the world ensured that the high-level meeting of 2 June 2006 eventually adopted the Political Declaration on HIV/AIDS. Whilst justly criticized in some quarters because of the political compromises – such as an inability expressly to name vulnerable populations such as commercial sex workers – it represents, the Political Declaration did indeed represent an advance. Importantly, it provides all of us with an important instrument that can be used to hold governments – including our own – to account in respect of certain key actions and activities that they themselves have agreed are necessary to combat the epidemic.

Unfortunately, although not unpredictably, these noble commitments made at the international level had little impact domestically. In South Africa, for example, disputes continued to rage over key policy issues: the pace at and the manner in which ARV treatment was to be provided in the public sector; the Minister of Health’s succour to a range of AIDS denialists, charlatans and quacks; and the constitutional duty of the state to ensure access to ARV treatment for some of the most marginalized and vulnerable in South African society. In a largely predictable pattern, these disputes fed into a much broader questioning of the government’s integrity and commitment to managing HIV/AIDS.

---

The most public example of the ongoing conflict manifested itself in a protracted legal battle regarding the management of HIV/AIDS within the prison system. This time, the ALP and TAC found themselves in a conflict with government regarding unsuccessful non-litigious attempts to protect prisoners from avoidable illness and indignity caused by AIDS. The narrow legal issue centred on the government’s positive obligation to provide prisoners with adequate medical treatment. This case, which focused specifically on the rights of inmates living with HIV/AIDS at Westville Correctional Centre (Durban, KwaZulu-Natal), resulted in some of the boldest judicial pronouncements on government’s constitutional obligations since the advent of South Africa’s democracy.\(^\text{10}\)

Once again, the resort to legal action demonstrated the value of South Africa’s constitutional dispensation – with its express protection of civil, political, social and economic rights – as a basis for resolving what may otherwise have appeared as irresolvable. The three key judgments in the prisoners’ favour – the initial judgment as well as two decisions regarding its execution – confirm Chief Justice Pius Langa’s assertion that “in our new constitutional order we have recognized the fact that human rights are an entitlement, not privileges, and those that are not able to access or vindicate their rights, including PLHA [people living with HIV/AIDS], must demand those rights without apology.”\(^\text{11}\)

Parallel to the litigation and following another predictable – and by now well-established – pattern, the ALP and TAC linked the ongoing litigation to a public mobilization campaign that questioned the government’s morality in denying prisoners access to potentially life-saving medicines whilst at the same time dealing sensitively with the legitimate concerns regarding limited access to ARV treatment in the public sector more broadly. Thus a joint ALP/TAC opinion piece in the daily Cape Argus asserted

---

\(^{10}\) The Westville case is explained later in more detail in section 1 (Implementing the Operational Plan in Prisons).

\(^{11}\) The Chief Justice’s comments are available online at: http://www.alp.org.za/modules.php?op=modload&name =News&file =article&sid=280
that “[t]he Westville prisoners’ judgment will help us to put more pressure on the minister of health to do her job and is likely to lead to the restoration of health and dignity for many of their fellow human beings.”

Throughout the denialist years (1999 through to 2006), government has – at key points – been sensitive to questioning by the international community about its handling of the epidemic. It was therefore a fortunate coincidence that TAC’s new civil disobedience campaign, which was launched following the death of “MM” – one of the original 15 individual prisoner applicants in early August 2006 – and which openly called for the Minister of Health to be dismissed, as well as the growing frustration and anger about the state’s inappropriate response to HIV/AIDS, coincided with the XVI International AIDS Conference held in Toronto, Canada.

An intense national and international media spotlight on South Africa at the conference was catalysed by three distinct – but related – events: the controversy that erupted over South Africa’s official “garlic, lemon and vegetable” display booth; the TAC demonstrations following MM’s death during the conference; and unambiguous criticism of the South African government made by Stephen Lewis, then the UN Secretary-General’s Special Envoy on HIV/AIDS in Africa.

These three streams of discontent converged at a plenary presentation to the 10 000-plus conference delegates entitled “The price of political denial”, where I reiterated TAC’s demand for an end to the Minister’s term of office and called for the stepping up of international pressure on South Africa. The remainder of the plenary session – watched by a sniggering Minister of Health seated in the front row of the auditorium – played out against the backdrop of a silent row of demonstrators holding placards demanding her removal.

Re-finding a common ground: September 2006 to May 2007

The events in Toronto and the embarrassment they brought on various ministers – in particular Minister of Social Development, Dr Zola Skweyiya – were reported to be the straw that broke the camel’s back. Significantly, within weeks of the International AIDS Conference, Cabinet held three

Whilst initially somewhat defensive in its collective response to the international debacle, condem-
ning — without any evidence — “the conduct of all those who were involved in the destruction of the
South African stand”, Cabinet eventually responded more appropriately.

After its second meeting, Cabinet publicly announced that there would be a new approach, which
included resuscitating the Inter-Ministerial Committee (IMC) on AIDS, tasking the Deputy President
to oversee the restructuring of the South African National AIDS Council (SANAC) and resolving the
disputes that were dividing society. In Cabinet’s own words:

\begin{quote}
All the political bickering can only serve to demotivate everyone. All the negative energy
needs to be re-directed towards supporting and strengthening all these constituencies. There
are challenges and we know that with all our best intentions in the world, we may not be able
to assist everyone all the time, but we are turning the corner.
\end{quote}

Although denied publicly, Cabinet also effectively reigned in the Minister of Health and prevented her
from making statements that were at odds with the official policy on HIV/AIDS. Fortunately, the shift
in approach indeed proved to be more than mere window-dressing. It marked the beginning of a new
period, led directly by the Deputy President, who within weeks initiated meetings with the ALP, TAC
and other stakeholders in an attempt to rebuild trust and agree on the fundamental programmes and
key messages concerning HIV/AIDS. At its 20 September meeting, during which the Deputy President
briefed her colleagues on the progress of the IMC on AIDS, Cabinet expressly “endorsed interaction
with stakeholders such as … the Treatment Action Campaign”.

From September 2006 to June 2007, the ALP was intricately involved in two aspects of the new
approach: the restructuring of SANAC, and thereafter, consultation regarding and the final drafting of a
new national strategic plan (NSP) on HIV/AIDS. This would not, however, prove to be an easy period.

What soon became clear was that there were deep divisions within government itself concerning
how to respond to the epidemic. Even though the Minister of Health was on sick leave, she continued to make her resistance
to change felt, particularly by making full use of her denial-alliance with her DG.\footnote{The DG, Thamsanqa Mseleku, has made no bones about his opposition to “Western” medicine and medical concepts. In SANAC
meetings in May 2006, for example, he cast doubt on the accepted epidemiology of HIV infection. He continues to promote
untested “traditional medicines” at the expense of proven and registered products. In 2006, he used his office to order the
release of a batch of unregistered medicines imported by AIDS denialist and vitamin salesman Matthias Rath which had been
stopped in Cape Town by customs officials.} For example, on a number of occasions
the DoH released media statements making unprovoked
attacks on the ALP and TAC.\footnote{On 4 December 2006, for example, Sibani Mngadi, the Minister of Health’s press spokesperson, issued a media release questioning
the academic and personal integrity of ALP senior attorney Fatima Hassan. The ALP and TAC responded with a joint media statement,

It appeared as if the DoH wanted to make
the restructuring of SANAC and the writing of a
new NSP as superficial as possible.

and http://www.info.gov.za/speeches/2006/06092016241001.htm respectively.}
\[\text{\footnotesize 15. The DG, Thamsanqa Mseleku, has made no bones about his opposition to “Western” medicine and medical concepts. In SANAC
meetings in May 2006, for example, he cast doubt on the accepted epidemiology of HIV infection. He continues to promote
untested “traditional medicines” at the expense of proven and registered products. In 2006, he used his office to order the
release of a batch of unregistered medicines imported by AIDS denialist and vitamin salesman Matthias Rath which had been
stopped in Cape Town by customs officials.}
\[\text{\footnotesize 16. On 4 December 2006, for example, Sibani Mngadi, the Minister of Health’s press spokesperson, issued a media release questioning
the academic and personal integrity of ALP senior attorney Fatima Hassan. The ALP and TAC responded with a joint media statement,
You may be wondering where are the officials from the Department of Health who were invited to attend this dialogue. My office has been in regular contact with them and they have indicated their willingness and excitement about coming to join you. They, like you had set aside everything to be here. However, they have been told to wait for the instructions of the Director General of Health, Mr Thami Mseleku who has given strict orders that they cannot come until he says so. I am saddened by this but hopeful also that all will soon realise that the time for fighting one another has passed.17

This non-cooperation was further evidenced in both the process of restructuring SANAC and the “review” of the old 2000 – 2005 strategic plan, which, like the drafting of the country report for UNGASS 2006, was hurriedly undertaken – with little resort to scientific evidence and a surprising admission that there were no real indicators against which to measure progress. Of concern was the danger that such an approach would be carried through into the drafting of the new NSP.

Although great effort was being put into broad consultation, the impression was given that the new NSP would be based on a set of lowest common denominators rather than on an appropriate assessment of the nature and extent of the South African epidemic, the resources available to the country to combat it, new knowledge generated by research and internationally agreed commitments and targets. It was therefore unsurprising that draft 8 of the NSP – initially presented by the DG in November 2006 as the final draft – represented a very poor attempt to capture a serious new strategy.

Acting quickly, the TAC took the lead – with other sectors of civil society who formed part of SANAC – in persuading the Deputy President to delay the finalisation of the NSP and to submit the draft to a special task team of experts who would evaluate it and refine it on the basis of scientific knowledge and understanding. This was a significant departure because the Deputy President had been committed to launch the NSP on 1 December, World AIDS Day. But instead of doing this, the day was used to unveil key consensus messages about HIV/AIDS and to make public the agreement on a new structure for SANAC. The willingness of the Deputy President to delay the NSP’s finalisation was itself a confirmation of the new political will.

In early 2007, the Deputy President appointed the expert task team composed of many of the persons recommended by the ALP and TAC. For the first time in a decade, the scientific community was brought meaningfully back into a consideration of HIV/AIDS policy in dialogue with senior DoH officials, members of Parliament and civil society activists. Under the control of the task team, draft 8 of the NSP went through a very intensive reworking, with all of its major targets being assessed and evaluated. In another important departure, economists – including a senior official from the Treasury – calculated the costs of the core activities set out in the NSP.

In March 2007, a new draft was produced and placed before a genuinely national consultative meeting, where it was interrogated and debated, with proposals for amendments being put forward. This meeting of 500 people was a genuine exercise of democracy in health policy-making. Proposals made were incorporated into the final version of the NSP that was adopted by SANAC on 30 April and approved by Cabinet on 2 May “as a strategic framework that will guide the national response to HIV and AIDS over the next five years.”18


In early April 2007, President Mbeki told the London-based Financial Times that he had never disputed the connection between HIV and AIDS, claiming he had been the victim of a misunderstanding:

17. The Deputy Minister’s address is available online at http://www.nelsonmandela.org/nsp/depminister.pdf.
So I say alright let's respond comprehensively to everything that causes immune deficiency. That's where you get the story that I have denied a connection. Nobody has ever shown me, where I did. They say it. But you say where, when. They can't. It was never said I never did. In the medical textbooks there are many things that cause immune deficiency. You will find therefore in the South African HIV and AIDS programme it will say that part of what we have got to do is we have to make sure that our health infrastructure, our health system, is able to deal adequately with all of the illnesses that are a consequence of AIDS. Whether it is TB or meningitis or whatever, which are in the medical literature, the medical system must be able to respond to those. The medical system and the totality of government policy must be able to address this matter of immune deficiency from wherever it arises. So you will find that in policy. It derives from an understanding. It is not complicated.

This is neither the place nor the time to contradict the President – the historical record speaks for itself. Importantly, there is 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. 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 for meeting the needs of the poor and vulnerable.

In particular, the NSP makes an unambiguous commitment to:

- Strengthen co-ordination among all sectors of civil society involved in treatment, care and support activities;
- Ensure the effective implementation of policies and strategies to mitigate the impact of HIV, in particular on orphans and vulnerable children, youth headed households, older people, and the health and education systems;
- Addressing HIV/AIDS as a human rights issue and the identification of a range of activities to improve access to justice to enable people to challenge human rights violations immediately and directly;
- Creating a culture of self-knowledge regarding HIV status that is firmly situated within a human rights commitment to the rights to privacy and non-discrimination, proposing that by 2011, 70% of people in South Africa should have tested voluntarily for HIV;
- The implementation of a policy that will see HIV testing services being routinely offered by health care providers, particularly to users of health services who may be at higher risk of HIV infection, proposing that by 2011, 95% of all public and private facilities in South Africa will routinely offer HIV testing services;
- The provision of appropriate and quality care for all people with HIV, including ARV treatment at the point where it becomes clinically necessary, proposing that by 2011, 80% of adults needing ARV treatment should be receiving it – translating into ±1.625 million adults having been initiated on ARV treatment by 2011;

---

19. Lionel Barber (editor of the Financial Times) and Alec Russell (Southern Africa correspondent) interviewed President Mbeki in his official residence in Pretoria on Sunday 1 April. The published interview is available online at http://www.ft.com/cms/s/d3d49b5c-e132-11db-bd73-000b5c0621.html

20. See, for example, Mark Heywood, “The Price of Denial”, (2004) 5:3 Development Update 93
• Bringing down the prices and ensuring the sustainability of supply of all HIV-related medicines, including ARVs, with recognition of the need to ensure that our laws permit the compulsory licensing of medicines – to ensure access to generics – if and when this is deemed necessary; and

• Developing and implementing an effective monitoring and evaluation framework, which is to include a focus on human rights, stigma and access to legal services.

As already mentioned, a preliminary costing of the NSP was conducted with the direct involvement of the Treasury. This is a first regarding health service delivery in South Africa, providing an example that the ALP believes should be followed in respect of all health care services that the government is constitutionally required to provide. In particular, it is significant that the NSP was costed by first identifying the HIV-related services that need to be provided, rather than by working within budgets that have been determined without reference to the actual need for services.

The costing of the NSP at R45 billion – for an initial five years and largely in respect of its main components – provides a major challenge for South Africa and the world. If indeed allocated and spent, this amount would represent a massive additional investment in health care and social support. But, as the Deputy President correctly said at the national consultation on the NSP in March 2007, the first challenge will be to ensure that existing budgetary allocations of R14bn (2007 – 2009) are fully utilized. This is not just a challenge for government but for all of us in civil society.

Conclusion: New Challenges for the AIDS Law Project?

In February 2006, the ALP hosted a conference on the theme of improving access to legal services for marginalized and poor people in South Africa, with a particular focus on people living with HIV/AIDS. In his keynote address, Chief Justice Pius Langa unequivocally stated that “[t]he debate on the justiciability of socio-economic rights is one that has long been settled in South Africa.” He explained:

All rights in the bill of rights including socio economic rights are justiciable. The gap between the protection of rights offered by the Constitution as well as a myriad of legislation, and the reality experienced by PLHA on a day to day basis is one of enforcement. ... It is one thing to articulate the right, as we lawyers quite often do. It is quite another thing to take by the hand those who need to access the right, that is, the weak and the poor, the ill and those suffering from societal deprivation by reason of discrimination and stigmatisation. I accordingly plead for a collective effort by all branches of society.

As suggested by Justice Langa – and echoed in other settings by Deputy Chief Justice Dikgang Moseneke – the next phase of South African legal history should see human rights lawyers and activists focusing less on establishing rights (whose justiciability is now beyond doubt) and more on their implementation and accessibility. As explained later in this review in section 2 (Litigation, Legal Services and Access to Justice), legal services providers need to identify the roles they can play in the implementation of the NSP, with human rights activists recognising the NSP’s potential to catalyse greater access to and the availability and affordability of legal services.

The NSP provides government with a challenge, as well as an opportunity – once and for all – to move beyond the conflict of the past. The ALP will work to ensure that Cabinet acts swiftly in taking the policy decisions identified in the NSP as “necessary requirements for an effective response.” This will be a key part of our work in the years ahead.

21. See above note 11
22. See, for example, the transcript of an SAfm radio interview (The After 8 Debate) with the Deputy Chief Justice Moseneke, 28 February 2007
Section 1

Implementing the Operational Plan in Prisons

By Jonathan Berger

The State is required to take reasonable legislative and other measures. ... The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State’s obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State’s obligations. 1

Introducing N v Government of the Republic of South Africa

From April 2004, the ALP devoted a significant share of its resources towards monitoring the implementation of the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa (Operational Plan), adopted by Cabinet on 19 November 2003. Amongst other things, the Operational Plan details a public sector ARV treatment programme that makes reference to the provision of appropriate care in prisons. ...
After consultation with some HIV positive prisoners, the ALP immediately wrote to the DCS and the WCC authorities to notify them of this complaint and asked that those prisoners whose HIV infection met clinical guidelines for ARV treatment are provided access to it. Despite undertakings by the DCS ... that they would work expeditiously to provide prisoners with access to ARV treatment, they were very slow to act.

Thus despite assurances from DCS officials with whom the ALP met in December 2005 that they would indeed ensure the prisoners’ access to ARV treatment, little progress was made. Numerous attempts by the ALP to follow up on the commitments made at the December meeting proved fruitless. It soon became clear that nothing short of litigation would help to break the inertia. Thus papers were filed in the Durban High Court in April 2006 on behalf of fifteen prisoners at WCC and the TAC, alleging that government was unreasonably restricting access to ARV treatment. In particular, the case sought an order compelling the state “with immediate effect to provide antiretroviral treatment, in accordance with the ... Operational Plan, to the First to Fifteenth Applicants, and any and all other similarly situated prisoners” at WCC.

### Outcome of the application

The matter – which was the first major challenge to the implementation of the Operational Plan to go to court – was argued before Justice Pillay at the end of May 2006. A few weeks later – on 22 June 2006 – the state was ordered immediately to remove all restrictions to ARV treatment at WCC. It was also ordered to file an affidavit within two weeks setting out the steps it intended to take to make ARV treatment available to all prisoners at WCC who wanted and needed it. This did not happen. Instead, government applied for leave to appeal.

The ordinary effect of any application for leave to appeal against a decision of the High Court is to suspend the operation of the order pending the outcome of the appeal. However, the rules of court make provision for successful applicants to approach the court for an order to compel implementation in certain circumstances, such as those applicable to this case. This is indeed what happened, with the applicants arguing as follows:

The very purpose of the main application has always been to expedite the ARV treatment to which the inmates are entitled under the Constitution. Their case has always been that the respondents have ‘delayed without good cause in circumstances where life and death mattered’. It was also why this court concluded that its intervention was necessary. It concluded that ‘intervention by this court is called for to ensure that the respondents urgently comply with their constitutional and statutory obligations not only to the first fifteen applicants ... but also to similarly situated prisoners’. That is the purpose of the main order. It is to avoid further delay and to ensure that the inmates get the urgent medical treatment to which they are entitled under the Constitution ...

The question in these circumstances is whether the implementation of this court’s main order should again be suspended and delayed until after the appeals in this matter have been finalised. We submit that it would be outrageous to do so. It will not only perpetuate the ongoing violation of the inmates’ constitutional rights but will unlawfully cause them suffering they are entitled to avoid, permanent damage to their health against which they are entitled to be protected and for some of them avoidable death against which they have a right to be protected.

---

2. N v Government of Republic of South Africa (No 1) 2006 (6) SA 543 (D)
3. Heads of Argument at paragraphs 9 and 10 (footnotes omitted)
Yet despite the order compelling the state to act, it still did not implement the original order. Instead, it filed an application for leave to appeal against the interim implementation order. This was indeed surprising, as the law on the issue was decidedly against the granting of leave in such circumstances. Justice Nicholson, who heard the second application to compel the state to implement the original order of 22 June 2006, explained in his judgment of 28 August 2006:

> The authorities do not view with particular favour appeals from implementation orders. These have taken place – I gather – on extremely rare occasions. It is somewhat ironic and sad that both occasions relate to the government seeking to avoid the effect of court orders for the provision of ARVs.

By the time the second application to compel was brought, the irreparable harm that the applicants had sought to guard against had finally arrived. On 6 August 2006, MM – the seventh applicant – died of an AIDS-related illness. Despite being diagnosed with a similar illness (and therefore eligible for ARV treatment) in November 2003, he only received access on 12 July 2006. By then – some 32 months later – it was too late. But for others it was not, with Justice Nicholson’s decision finally getting the state to act. In his strongly worded judgment handed down on 28 August 2006, Justice Nicholson ordered the respondents to implement the original orders “unless and until” set aside on appeal. This included the obligation to file an affidavit “setting out the manner in which it … [would] comply with … [the] order” by 8 September 2006.

---

4. N v Government of Republic of South Africa (No 2) 2006 (6) SA 568 (D)
5. N v Government of Republic of South Africa (No 3) 2006 (6) SA 575 (D) at paragraph 15
Implementation of the order

The state’s affidavit, which was indeed filed on this date, was unfortunately found to be wanting in several respects, leaving far too many questions unanswered. Most troubling was that it showed that the government had a particularly narrow understanding of Justice Pillay’s order, failing to understand the relationship between the provision of ARV treatment and other essential interventions. Disturbingly, such an approach flies in the face of much rhetoric over the years regarding a comprehensive and holistic approach to the epidemic. In particular, concerns regarding the following issues were raised:6

- The identification of prisoners at WCC in need of ARV treatment;
- HIV and CD4 count testing;
- Opportunistic infections;
- Nutrition, the timing of meals and the so-called “wellness programme”;
- HIV prevention interventions;
- Co-operation between respondents;
- Internal monitoring and evaluation; and
- Independent assessment of implementation of the plan.

The state’s reply to the ALP’s commentary indicated that the parties were indeed quite far apart. As a recent journal article notes:

In reply, the State provided important new information on various aspects of its HIV/AIDS programme at WCC but also disputed many of the allegations. When read together with its affidavit of 8 September 2006, the reply does not adequately address all of the applicants’ concerns. The stage was thus set for ongoing legal proceedings.7

The broader political context, however, suggested that an out-of-court settlement was indeed possible. As the same journal article recorded:

[T]he parties were poised to consider the possibility of resolving the outstanding issues through negotiations instead of unnecessary further litigation. According to the applicants, “there is sufficient common ground between the parties upon which a final settlement in this matter may be negotiated”.

Initially, settlement talks did not go well. A first meeting between the parties’ representatives – which took place at WCC in mid-December 2006 – ended when the ALP and TAC delegation walked out after it had become obvious that the government’s representatives had not been mandated to address the eight areas of concern that had been raised in advance of the meeting – both in court papers and in correspondence. Instead, the state delegation was only prepared to discuss the actual provision of ARV treatment at WCC and not the provision of comprehensive HIV-related services, as indeed required by the Operational Plan.

After leaving the meeting, TAC representatives sent a letter to the Deputy President in which they expressed concern regarding the failed meeting and requested that she intervene – particularly given the applicants’ continued willingness to discuss a settlement and the significant developments that were taking place more broadly and which ultimately culminated in the development and adoption

6. For further discussion on the deficiencies in the plan, see Adila Hassim and Jonathan Berger, “Case review: Prisoners’ right of access to anti-retroviral treatment” (2006) 7(4) ESR Review 18 at 18 – 19
7. Ibid at 18 - 19
of a new national HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011 (NSP). In January 2007, the TAC received a response from the Minister of Correctional Services in which he expressed regret at the way the meeting had ended, invited the parties to continue negotiating and mandated his deputy – Ms Loretta Jacobus – to deal with the matter.

Settlement negotiations

Two processes then followed in parallel: the resumption of settlement negotiations as well as the continuation of the legal process. Given the history of the matter, which showed that progress did not happen in a vacuum but only when DCS felt under pressure to act, we realised that mere talks – without anything further – would not suffice. We therefore decided to proceed with a settlement meeting (21 February 2007) as well as to set the matter down for a hearing to determine the reasonableness of the state’s plan for providing ARV treatment at WCC – as contemplated by the original court order – some three weeks later (15 March 2007). The mid-March deadline, in our view, would give the talks a sense of urgency. It did.

At the first settlement meeting in 2007, the parties agreed to set up a small task team – with representation from the ALP, TAC, DCS and the DoH – mandated to thrash out the substance of a settlement based on the eight areas of concern as set out in the ALP’s correspondence. The task team was to work quickly and to report back to a second meeting of the principals, which was to take place before the March 15th deadline.

This is what in fact happened. Two full-day task team meetings (28 February and 5 March) and numerous electronic notes between the parties resulted in a draft National Framework for a Comprehensive HIV and AIDS Plan for Correctional Centres (National Framework), which was tabled at the second settlement meeting for discussion. The parties debated – and reached consensus – on the handful of issues that the task team had been unable to resolve. The task team was then mandated to finalise the text of the National Framework, based on the agreements reached at that meeting. In addition, the parties’ legal teams were mandated to finalise the settlement – which was to incorporate the finalised National Framework, understood by all to be the very basis upon which the case was to be settled.

But then the state’s legal team intervened and the deal was scuppered. While the National Framework was indeed finalised, it did not become part of any settlement agreement. Instead, the state shortly thereafter reneged on what had been agreed to at the second settlement meeting – apparently on the basis of its legal team’s advice – and simply returned to the very narrow position it had originally adopted at the December 2006 meeting. At this stage – the afternoon of 14 March 2007 – it was too late for the hearing to continue, so a postponement was sought and obtained. Notwithstanding the state’s bad faith, the hearing was postponed indefinitely because, at that point, we still believed that a settlement was possible.

Where to from now?

The NSP recognises the need for individual departments – such as DCS – to develop and implement sector-specific strategic and operational plans:

It is envisaged that all government departments and sectors of civil society will use this plan as a basis to develop their own HIV and AIDS strategic and operational plans to achieve a focussed, coherent, country-wide approach to fighting HIV and AIDS. ... After it has been adopted by SANAC, the NSP should be used in developing sector plans at national, provincial and district level. Yearly operational plans should be based on realistic objectives that are linked to the NSP’s objectives, interventions and targets.8

---

8. NSP at pages 54 and 145 respectively
In addition, the NSP recognises prisoners as one of a number of populations of people at higher risk of HIV infection:

Incarceration is a risk factor for HIV and is correlated with unprotected sex and injecting drug use in correctional facilities, but may also include risk of blood exposure as a product of violence and other factors. Interventions for risk reduction include provision of voluntary testing and counselling, condom provision, addressing rape, and addressing intravenous drug use. Male prisoners are predominantly vulnerable but risks extend to female prisoners. Little is known about the extent of HIV in South African correctional services, nor the relationship between known risk factors and HIV acquisition in South Africa.9

DCS has been informed that we are keen to finalise the already agreed-upon National Framework as a sector-specific strategic plan. It remains to be seen whether the state will show the requisite leadership and rise to the challenge, as set out in the NSP, or if the issue of access to comprehensive HIV-related services in prisons cross the countries has to be resolved through adversarial litigation. Our choice is to partner with government in addressing the management of HIV/AIDS in prisons. We hope that they too will choose the non-confrontational route.

But in respect of WCC itself, it appears as if the hearing into the reasonableness of the state’s plan for that facility will indeed take place. While there have been some positive developments – such as increased access to condoms and three meals now being served at three distinct mealtimes – the overall situation at WCC remains unacceptable. Access to HIV testing services, for example, remains extremely limited. Concerns about the quality and quantity of food served remain. Other non-negotiable concerns have yet to be addressed. Unless and until the provision of ARV treatment at WCC is indeed done in accordance with the Operational Plan, as required by the now year-old order of Justice Pillay, the resumption of legal proceedings seems all but inevitable.
Section 2

Litigation, Legal Services and Access to Justice

By Adila Hassim

The past 18 months at the ALP have seen a sustained programme of litigation and legal services aimed at advancing our key priorities in respect of the rights to equality and access to health care services. Our work in this area has strengthened our recognition of the inherent value of and the need to ensure access to legal services, uncovering some of the barriers that stand in the way of people challenging inequality and violations of other rights:

- A lack of information about the rights enshrined in the Bill of Rights, as well as the lack of effective mechanisms for the realisation of these rights;
- The inaccessibility of legal services, particularly for civil claims and human rights matters; and
- The unjustifiably high cost of private legal representation, particularly when viewed in the absence of a comprehensive state legal assistance programme.

Simply put, constitutional rights are largely bereft of meaning for those without the capacity to assert them. The ALP’s recent victory in NM and Others v Smith, De Lille and New Africa Books, a landmark case dealing with the right to privacy and the obligations it imposes, is testament to this fact. As such, it is appropriate that this section of the review begins with some reflections on this case.
Money, power and justice: NM v Smith

The applicants in NM v Smith are three unemployed women – all living with HIV – who live in informal settlements in and around Atteridgeville, Tshwane. The case arose as a result of the disclosure of their identities and HIV status in a biography of Independent Democrats’ leader Patricia de Lille written by Charlene Smith, a journalist who has written extensively about women, gender-based violence and HIV/AIDS.

NM and her co-applicants argued that the disclosure of their names and HIV status in the book – without their consent – was an invasion of their rights to privacy, dignity and psychological integrity, having a significant impact on their mental and intellectual well-being. Initially, all they sought from the defendants was an apology and the removal of the offending passages from all unsold copies of the book. But when this was denied, they approached the Witwatersrand High Court asking for an order directing the defendants to issue a private apology to each of them; ensure that the offending passages in all unsold copies of the book were excised or removed; and pay damages of R200 000 to each plaintiff.

It was common cause that the three women had not – in fact – consented to their names and HIV status being made public. Yet they lost. The High Court’s Justice Schwartzman found that neither Smith nor de Lille had intended to invade the privacy of the three women, that they had both acted reasonably and that there was no legal duty on them to have obtained express informed consent from the women. However, the fact that the women had asserted their rights through legal action after the publication of the book meant that they were entitled to have their names removed from the book and to limited damages from the publisher. Each woman was awarded R15 000.

First the High Court and then the Supreme Court of Appeal refused to grant leave to appeal. On behalf of the three women, the ALP then approached the Constitutional Court. The matter was heard on 9 May 2006. The judgment, which was only delivered an agonizing 11 months later, found all three defendants – Smith, de Lille and the publisher – liable for violating the women’s rights and ordered them collectively to pay each applicant the sum of R35 000 in damages.

There are many aspects of the case and the Constitutional Court judgment that deserve analysis. For the purpose of this review, however, we highlight just one: that the three women would not have been able to vindicate their rights had it not been for the free legal services that they were able to access, in particular those provided by prominent and committed advocates. During the course and aftermath of this case, much talk has indeed been made about money. Smith herself, in referring to the “industry” of AIDS, accused the ALP of using the case to generate donor funding.¹ This is hardly worth a reply. Suffice it to say that the case was driven by the intense need, not to mention the inalienable – yet so elusive – right of the applicants to vindicate their rights and thereby assert their dignity. And to do so with little or no means, except their slowly growing courage.

Writing for the majority of the Constitutional Court, Justice Madala was reproving of the attitude of the High Court to the case:

The indignity experienced by the applicants as a result of the disclosure of their names, seems to have been treated lightly by the court a quo. The case of the applicants was reduced to a malady that had befallen ‘lesser men or women’. They were regarded as poor, uneducated, coming from an insignificant informal settlement and their plight disclosed in the book was not likely to spread far beyond the community where they resided. There was, in my view, a total disregard for the circumstances of the applicants and the fact that because of their disadvantaged circumstances their case should have been treated with more than ordinary sensitivity.²

---

2. Judgment at paragraph 53
On the eve of the trial, an offer of settlement was made – R35 000 for each of the applicants, but without any admission of liability. For the three women, this was a sobering moment. It must have been tempting for them to accept the certainty of monetary recompense and to avoid the daunting task of having to testify in court. But they could not escape the fact that there would be no vindication of their rights: that the conduct of two powerful and public women – Smith and de Lille – was responsible for the harm that they had suffered following the disclosure of their private medical facts. So they chose to proceed with the trial.

In holding Smith and the publisher liable – albeit on a different legal basis to that of the majority – Chief Justice Langa recognised the inherent value of vindication. He quoted from an earlier judgment of Justice Sachs dealing with the publication of defamatory material: “[t]he true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.”

Regarding the question of money, the Chief Justice took special note of the context of this case and the extreme power imbalance between the litigants. Disagreeing with the majority that the refusal of the settlement offer should attract a costs order, he said:

There is a danger that the risk of adverse costs orders, despite ultimate success, might permit rich and powerful defendants to prevent the law from adapting to meet constitutional imperatives by throwing money at plaintiffs who cannot afford to take that chance. It already takes immense courage for ordinary people to take large powerful defendants to court and the additional peril of an adverse costs order will mean even fewer plaintiffs get their day in court. That could easily have happened in this case and the liability of media defendants for disclosing private medical facts would have remained unquestioned. The achievement of our constitutional vision should not be obstructed by the vested interests of those who have the money to protect them.

In this case, the applicants’ acquiescence could not be bought. But for others, the outcome may be different. Without the guarantee of legal representation, such a victory – with justice serving the poor – cannot be secured. And without being able to recoup costs, one wonders just how many poor litigants will in future have no choice but to succumb to the temptation to settle for money instead of vindication.

Other litigation at the ALP

The ALP has continued to strive to provide high quality legal services for the purpose of advancing constitutional rights. This has taken the form of either litigation in the High Court and the Constitutional Court, or through the provision of paralegal services and general legal advice. To describe every case worked on by the ALP during the period of review would consume too much space. Instead, this section highlights key cases worked on during this period, some of which are still in the early stages of litigation.

Ongoing litigation

EN and Others v Government of Republic of South Africa and Others

This case – which focuses on prisoners’ access to ARV treatment at Westville Correctional Centre (WCC) – drew the ALP into a legal vortex for a large part of 2006. Unfortunately it has yet to be finally

---

3. Judgment at paragraph 119, quoting Sachs J in Dikoko v Mokhatla 2006 (6) SA 235 (CC) at paragraph 109
4. Paragraph 120.
resolved, despite the ALP having secured three substantive judgments in our clients’ favour. As is described in greater detail in section 1 (Implementing the Operational Plan in Prisons), the ALP first filed papers in the Durban High Court in April 2006. It did this after having engaged in lengthy correspondence and negotiations with the DCS and the DoH, starting as early as October 2005. Further correspondence and negotiations subsequent to the court victories were supposed to have resolved the matter. They have not.

As a result of this high-profile litigation, the ALP has received an increasing number of queries and requests for similar assistance from prisoners across the country. Where we are unable to provide litigation services, we refer prisoners to a couple of organisations with which we have established working relationships: the Lawyers for Human Rights Prisoners Project and the Civil Society Prison Reform Initiative at the University of the Western Cape’s Community Law Centre. Where we are able to assist, we do so. For example, we recently assisted an awaiting trial prisoner whose sudden incarceration was threatening to disrupt access to ARV treatment at a public sector clinic that he had already secured. Though our intervention, he was able to secure free bail (with the assistance of the Legal Aid Board) and to receive an emergency supply of ARV medicines.

South African Security Forces Union (SASFU) and Others v Surgeon-General and Others

Acting on behalf of SASFU and individual members of the South African National Defence Force (SANDF), the ALP filed papers in the Transvaal High Court on 14 May 2007 challenging the SANDF’s policies on HIV testing insofar as employment, deployment, promotions and transfers are concerned. This case is the culmination of a 13-year long process of engagement, which has seen little to no movement on the part of the SANDF in respect of these policies.

The HIV testing policies are mainly implemented through the Comprehensive Health Assessment (CHA), an annual medical examination which includes physical, mental and audiometric tests to determine levels of fitness. On its own – and without anything else – an HIV positive result adversely affects a potential recruit’s opportunity for employment, as well as a member’s opportunities for deployment and promotion. The net result is a blanket exclusion of HIV-positive people from employment, foreign deployments and promotions, regardless of their actual level of fitness, state of health and their job category or mustering.

Over the years the SANDF has justified its HIV testing policies and their implementation on the following grounds:

- The military has a duty to protect the Republic of South Africa;
- There is a need to keep HIV prevalence in the military low;
- People living with HIV are medically unsuitable for the SANDF, being unable to withstand stress, physical exercise and adverse climatic conditions, amongst other challenges;
- Foreign deployment conditions are too harsh for people living with HIV;
- HIV positive members pose a risk to others; and
- There is a need to comply with the United Nations Regulations regarding the deployment of peacekeepers.

The ALP has put up expert evidence which clearly demonstrates that the “justifications” are not supported by scientific or medical evidence. The evidence shows that there is no basis for the assumption that HIV infection in and of itself renders a person physically unfit or mentally unstable. To the contrary, the evidence shows that HIV-positive people, who are asymptomatic, are able to undertake
difficult physical activity with no adverse effects on their health – in fact, regular exercise is beneficial to their health. In addition, the papers show that the SANDF’s policies are neither in line with current United Nations policy nor government’s strategy to respond to HIV/AIDS, as outlined in the 2003 Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa and the new Cabinet-approved national HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011 (NSP).

The respondents have indicated that they are opposing the relief sought and will seek to defend the policies. We trust that the SASFU case will demonstrate that the policies, through the implementation of CHA, are unconstitutional in that they violate rights to fair labour practices, privacy, dignity, just administrative action and freedom from unfair discrimination on the basis of HIV status.


**TAC and Others v MSD and Abbott**

Acting on behalf of the TAC and others, the ALP has been in discussions with Abbott Laboratories SA (the local subsidiary of US-based Abbott Laboratories) and MSD (the local subsidiary of US-based Merck & Co.) – for two and five years respectively – regarding the need for the two pharmaceutical companies to grant multiple licences for the local production and/or importation of key patented ARV medicines. In the case of MSD, progress has been agonizingly slow – effectively a single licensee in respect of the drug efavirenz, and only as a stand-alone product. Abbott, on the other hand, has refused to license any company in respect of its combination drug lopinavir/ritonavir. It has, however, agreed not to enforce its patent on the drug ritonavir – but with strict terms and conditions attached that render the “concession” of limited practical application.
Letters of demand were sent to the companies on 21 May 2007. The responses were less than satisfactory: Abbott requested a further meeting, whereas MSD simply committed itself to consider granting further licences. As neither company acceded to the ALP’s demands, the lengthy correspondence and record of discussions to date will form the basis of a detailed complaint to the Competition Commission that is in the process of being researched and drafted. As much work has already been completed, we anticipate filing the complaint in the third quarter of 2007.

In short, the complaint will allege that by refusing to license additional companies on reasonable terms, and by refusing to permit Aspen Pharmacare – MSD’s sole licensee – to bring co-formulated or co-packaged versions of efavirenz and other ARV products to market, MSD violates certain provisions of the Competition Act 89 of 1998 dealing with abuse of dominance. By refusing to license, MSD threatens access to treatment for HIV/AIDS by –

- Threatening the sustainability of supply of efavirenz (especially in the context of the new treatment targets set in the new NSP);
- Preventing cheaper generic products from being brought to market; and
- Preventing co-formulated and co-packaged ARV products containing efavirenz from being brought to market.

With regard to Abbott, the ALP will make similar allegations regarding its absolute refusal to license in respect of lopinavir/ritonavir and ritonavir. In respect of both companies, the complaint will argue that the particular circumstances of the refusals do not justify the conduct. In particular, much attention will be placed on the claims that neither Abbott nor MSD is profiting from sales of the relevant ARV products in South Africa: Abbott claims it is selling its products at a loss; MSD claims it is selling at cost.

**TAC and Others v Minister of Health, Provincial Government of the Western Cape and Others**

In June 2007, the ALP represented the TAC and five individuals – including patients and the parents of patients who access chronic medication at public health facilities – in challenging the summary dismissals of 41 Khayelitsha-based health care workers during the public sector strike. The case was supported by senior health workers, including doctors and nurses.

The state’s earlier failure to respond appropriately to the disruption in health service delivery resulted in an urgent application being filed on Friday 15 June 2007. The matter was argued in the Cape High Court less than a week later – on Thursday 21 and Friday 22 June 2007 – in a courtroom filled with hundreds of supporters. A few days later – on Tuesday 26 June 2007 – Justice Desai gave his decision, effectively compelling the state “to restore and guarantee the provision of reasonable functioning health services in Khayelitsha”.

The application was brought against the provincial Minister of Health in the Western Cape, the provincial Director-General for Health in the Western Cape, the national Minister of Health and the Minister of Public Service and Administration. It requested – amongst other things – that the High Court declare the conduct of the respondents to be a violation of the constitutional rights of patients in Khayelitsha. This is because the dismissals – and not the strike – were responsible for the disruption of essential health care services at the Khayelitsha facilities. The dismissed health care workers included nurses, pharmacists, data capturers and support staff – some of whom were not on strike but instead on leave.

In particular, the case argued that the dismissals would result in an irreparable human resources crisis in Khayelitsha, that the replacement of the dismissed staff would be extremely difficult – particularly given pre-existing staff shortages – and that even in the best (and very unlikely) scenario it would take at least four to eight weeks to replace them. In addition, it further argued that the conse-
quences of treatment interruption in the case of HIV and other chronic conditions are dire, such as limiting future treatment options and/or even death. In addition, the case pointed to the public health risks associated with drug resistance that develops from the interruption of ARV treatment.

In the circumstances, our papers argued that the dismissals breached several provisions of the Constitution, including the right to have access to health care services in section 27 (which includes the right to emergency medical treatment in section 27(3)), as well as the rights to just administrative action (section 33), equality (section 9), life (section 11) and dignity (section 10). In addition, the papers argued that the conduct of the DoH also violated the state’s express obligations in terms of sections 7(2) and 195 of the Constitution.

Although represented by two separate sets of legal teams, the respondents’ arguments were similar. They opposed the application on numerous grounds – the court had no jurisdiction to hear what they
described as a labour matter “disguised” as a constitutional matter; the case was moot, because the strike was about to end; and the state had acted lawfully in dismissing striking workers. Importantly, they failed to respond in any substantial detail to the allegations made by our clients regarding the disruption of health services in Khayelitsha as a result of the dismissals. Instead, they simply claimed that the situation improved after the dismissals – an argument rejected by Justice Desai.

In giving judgment to a packed court, Justice Desai found that the state had indeed acted unconstitutionally – by dismissing health workers in the absence of any contingency plan to ameliorate the disruption in services. He granted interim relief, further directing the respondents to return to court on 20 August 2007 to present argument as to why the order should not be made final and why they should not be ordered to pay our costs.

The day after the judgment, the dismissed health workers tendered their services, but were not reinstated. The ALP thereafter requested that the state set out the steps they it was taking to comply with the court order, based on reports it had received that the “reasonable functioning of health services” had not been restored. The state refused to do this, unambiguously stating that it would not reinstate the dismissed workers. Yet shortly thereafter, a public announcement indicated that the strike had ended – the agreement between government and labour including the reinstatement of all dismissed workers, not only the Khayelitsha health care workers.

Closed files
Of the numerous files that were closed during this period, five are deserving of special mention:

- UNGASS 2006;
- Costa Gazi;
- Maimela;
- Baby A; and
- SK v African Life and BoE.

UNGASS 2006
Mark Heywood’s introduction entitled “The End of Politics?” sets out the context within which the ALP and TAC considered legal action to review the rationality of government’s decision to object to their inclusion on a list of civil society organisations that were accredited to participate in the United Nations General Assembly Special Session on HIV/AIDS meeting (UNGASS 2006) in New York in late May and early June 2006. What this section addresses is the significant work done by the ALP in preparation for urgent litigation to enable the two organisations to attend UNGASS 2006.

In response to the exclusion, a letter – co-signed by Sipho Mthathi (TAC’s General Secretary) and Mark Heywood – was sent to the Minister of Health setting out the organisations’ concerns and requesting her to confirm or deny whether it was in fact true that the government had objected to their participation. Although there was no formal response to the letter, the DG of Health was quoted in press reports as confirming that this was true. The ALP then wrote to the Minister and DG, requesting written reasons for this decision and advising that we were seeking legal advice. No satisfactory response was received. After consulting with senior counsel we drafted motion papers seeking an urgent hearing to challenge the Minister’s decision on the basis of it being – legally speaking – irrational, so-called “rationality review”.

In giving judgment to a packed court, Justice Desai found that the state had indeed acted unconstitutionally – by dismissing health workers in the absence of any contingency plan to ameliorate the disruption in services.
But before filing the papers, the ALP and TAC sought and managed to secure a meeting with the DG to discuss the only other remaining option (other than an order of court) – that being to include representatives of the ALP and TAC in the official South African country – not government – delegation. The DG assured the ALP and TAC representatives that this was indeed the course of action that would be followed, resulting in us not proceeding with litigation. Much to our dismay, we later realised that the DG had been somewhat disingenuous in his communications with the ALP and TAC in that meeting. The official government offer to be part of the country delegation was limited to Mthathi – and only in her personal capacity. Heywood’s article explains why Mthathi refused the offer, why litigation did not proceed and how both the ALP and TAC nonetheless managed to participate in UNGASS 2006.5

Costa Gazidis v Minister of Public Services and Administration

This case involved an appeal by Dr Costa Gazi – a prominent member of the Pan Africanist Congress (PAC) and a doctor employed at a public health facility in the Eastern Cape – against a conviction for misconduct under section 20(f) of the Public Service Act following his criticism of the former Minister of Health and her national department’s prior policy regarding the prevention of mother-to-child transmission of HIV (PMTCT). In particular, Gazi had remarked to a news reporter that the Minister should be charged with manslaughter.

Gazi lost his case in the Transvaal High Court, but was successful on appeal before a full bench (three judges) of the same court. In its decision, the appeal court made certain strident comments against government:

Counsel for the respondents conceded that the decision not to supply AZT to HIV-positive mothers amounted to a conscious, deliberate and informed policy to sacrifice the life of babies that would contract HIV/AIDS because their mothers were not treated with AZT, in

5. It was made clear that the organizations would pay their own way, even though government would pay for other organizations that it included in the country delegation.
order to save the expense that would have had to be incurred if AZT was to be supplied to mothers suffering from the infection who were on the verge of giving birth. ... It is hardly surprising that some members of the medical profession and of the public at large would describe this policy as a murderous one.  

In addition to recognising the immediate and devastating impact of a poor PMTCT policy on the lives of babies born with HIV and those of the mothers and families who have to care for them, this case is important because it reinforces the right of health care workers to speak out – in particular against government policies that are believed to be unreasonable and in conflict with the Constitution as well as ethical obligations.

**Ntsoaki Mississippi Maimela and Another v Michael Ncobo**

This case involved an application by grandparents for the custody of a child shortly after the death of the latter’s mother – the daughter of the applicants – of an AIDS-related illness in June 2001. At the time, the minor child was living with her grandparents. But in December 2001, the child’s father accused the couple of abusing her, following which he had her forcibly removed from the home where she had lived for much of her life.

In September 2002, the ALP launched an application on behalf of the grandparents to compel the father to disclose the child’s whereabouts, to grant the grandparents reasonable access to her pending an application for custody, and to have the family advocate investigate and report on the matter. The application was granted. However, on the two occasions in 2002 when Mrs. Maimela tried to gain access to the child – with the involvement of the police and her attorney – she was refused access by a hostile father.

In December 2003, after finding out that the child was living with the father’s sister at a shebeen in Katlehong, Mrs. Maimela requested – and obtained – assistance from the local police station to gain de facto custody of the child. She was then assessed by a psychologist who found that the environment to which she was exposed when in the custody of her father seriously threatened her physical, emotional and social well-being.

In February 2004, the ALP launched an urgent application for custody on behalf of the grandparents. Interim custody was granted in February 2004, with a final custody order eventually being granted in April 2007. Apart from the better living conditions that the custody order has brought for the child, it has also enabled the grandparents to access social assistance.

**IH and AO v MEC for Health, Western Cape and Another (“the Baby A case”)**

In mid-2001, a few months after “Baby A” was born to HIV-negative parents at the Red Cross Children’s Hospital (RCCH) in Cape Town, she tested HIV-positive. Possible routes of infection – such as a blood donation and unclean containers – were apparently ruled out by an internal investigation. While she had been fed with expressed breast milk, the possibility of infected milk as a route of transmission was neither explored nor investigated. Disturbingly, the RCCH refused to accept responsibility for this nosocomial (hospital acquired) infection and did not agree to conduct any detailed or external investigation into the source of infection. It did, however, agree and in fact started to provide her with ARV medicines in 2002 – at no cost to Baby A’s family.

At the same time, Baby A’s parents approached the ALP for legal assistance. A delictual (damages) claim against the RCCH and the Western Cape Provincial Department of Health was launched in the

---

6. Unreported decision of the Transvaal High Court in case number A2050/04 (24 March 2006) at paragraphs 43–44
Cape High Court in 2003. The case never got to trial, but was instead settled by the ALP in early 2007. This is largely because in addition to the emotional trauma caused by the long and drawn out preliminary legal proceedings, A – now no longer a baby – was found by a medical assessment in mid-2006 to have severe learning and behavioural problems, under-developed abilities and in need of education for learners with special needs, which her parents cannot afford. In the result, the RCCH were approached – and indeed agreed – to commence settlement negotiations.

A comprehensive medical and financial settlement was investigated and negotiated. This process included neuro-behavioural, genetic, medical and actuarial assessments. The actual terms of the settlement agreement – which was finally entered into in February 2007 and made an order of court – are confidential. In short, they provide for a substantial financial payment as well as a comprehensive undertaking to provide all medically-related care for the rest of A’s life. A trust has been set up to administer the funds and secure A’s future financial, medical and other needs.

Unfortunately, Baby A’s case is not unique. But while physicians have acknowledged that infection control (IC) policy and practice in South Africa is largely inadequate, with it remaining a low-profile aspect of health care that ordinarily falls under the watch of over-worked nurses who are often not properly supervised, real change has yet to occur. Although the Western Cape Provincial Department of Health recognizes the need to improve infection control, it has not done so thus far. What this case and many other examples of nosocomial infections (such as klebsiella) show is that improving IC in health facilities must become a priority.7 As a country, we cannot afford to allow more families to go through the same trauma as that experienced by Baby A and her family.

**SK v African Life and BoE**

In the last few years the ALP has dealt with several paralegal matters relating to claims for life insurance payouts that had been repudiated on the basis of so-called “AIDS-exclusion clauses” – which initially precluded payouts in respect of policyholders who were HIV-positive at the time of death but which later were limited to AIDS-related deaths. As of January 2005, the Life Offices’ Association (LOA) and its member companies – accounting for about 95% of the industry – stopped using such exclusion clauses at all. However, existing clauses (in old policies) continued to be enforced.

In February 2007, following significant pressure from the ALP, the LOA took a decision to abandon its practice. At a joint LOA/ALP press conference on 27 March 2007, it was announced that LOA members would no longer enforce old AIDS-exclusion clauses. The pressure was occasioned by the case of SK v African Life and BoE, which was settled following the direct intervention of the LOA, resulting in ex-gratia payments being made to the ALP clients. In SK’s case, a claim had been repudiated following the AIDS-related death of a policy holder who was HIV-negative at the time he took out his policy.

The new LOA practice does not, however, resolve the problem of access to affordable insurance products for people living with HIV – it only covers AIDS-exclusion clauses in policies taken out by HIV-negative people. The ALP will continue to engage with the insurance industry with a view to ensuring that affordable insurance products are indeed developed and offered to people living with HIV. We view insurance as a form of private social security, to which the Constitution guarantees access. As such, the state has an obligation to regulate appropriately in the event that the industry is not open to engagement on how best to ensure that people living with HIV are able to access affordable cover.

**Paralegal services**

A large part of the legal services that the ALP provides is through paralegal advice. It would be too lengthy to describe all the complaints that are handled. Instead, what follows are two tables that set

---

7. In this regard, see section 4 (Health Service delivery and Health Sector Transformation) insofar as it addresses the ALP’s engagement with the DoH regarding XDR TB.
January – December 2006

<table>
<thead>
<tr>
<th></th>
<th>J</th>
<th>F</th>
<th>M</th>
<th>A</th>
<th>M</th>
<th>J</th>
<th>J</th>
<th>A</th>
<th>S</th>
<th>O</th>
<th>N</th>
<th>D</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>5</td>
<td>9</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>38</td>
</tr>
<tr>
<td>Death</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Gender</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Info &amp; research</td>
<td>4</td>
<td>2</td>
<td>5</td>
<td>1</td>
<td>4</td>
<td>4</td>
<td>7</td>
<td>2</td>
<td>7</td>
<td>4</td>
<td>4</td>
<td>9</td>
<td>42</td>
</tr>
<tr>
<td>Insurance</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>Medical aids</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>Not HIV-related</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>Prisons</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>Social security</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>Testing</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>Treatment &amp; medical</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>Violence &amp; harassment</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>Wilful transmission</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Workplace</td>
<td>6</td>
<td>8</td>
<td>7</td>
<td>0</td>
<td>14</td>
<td>13</td>
<td>18</td>
<td>9</td>
<td>17</td>
<td>9</td>
<td>3</td>
<td></td>
<td>113</td>
</tr>
<tr>
<td>Monthly total</td>
<td>22</td>
<td>26</td>
<td>26</td>
<td>20</td>
<td>35</td>
<td>33</td>
<td>47</td>
<td>34</td>
<td>39</td>
<td>31</td>
<td>26</td>
<td>12</td>
<td>350</td>
</tr>
</tbody>
</table>

out the categories and numbers of complaints that have been received and dealt with by our paralegal officers during the period under review. The tables indicate that our paralegal officers have provided a wide range of legal services to many people living with or affected by HIV/AIDS.

The tables suggest that there is a need to expand paralegal services more broadly – amongst advice offices and other social and legal organizations – so that the public is not solely reliant on the ALP. While our main objective is to undertake work that will have a public impact, we see from the tables that many complaints in fact deal with issues that have already been settled in law. For example, despite a strong legal framework that prohibits unfair discrimination in the workplace on the basis of HIV/AIDS status, a large number of complaints we receive deal with workplace issues. Fortunately, a single letter alerting the employer to the relevant provisions of the law is often all that it takes to resolve matters successfully.

**Advocacy on access to legal services**

In addition to the direct provision of litigation and legal services, the ALP also began to initiate discussions in the broader legal services environment as to how best to ensure that various service providers work in a more coherent and collaborative manner, and that the legal profession plays its part in ensuring greater access to legal services for those who cannot ordinarily afford them. In this area of work, five activities of the ALP are particularly noteworthy:

*The two tables set out the categories and numbers of complaints that have been received and dealt with by our paralegal officers ... and indicate that they have provided a wide range of legal services to many people living with or affected by HIV/AIDS.*
### January – 13 June 2007

<table>
<thead>
<tr>
<th>Section</th>
<th>J</th>
<th>F</th>
<th>M</th>
<th>A</th>
<th>M</th>
<th>J</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children</td>
<td>5</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>16</td>
</tr>
<tr>
<td>Death</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Gender</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Info &amp; research</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td>2</td>
<td>26</td>
</tr>
<tr>
<td>Insurance</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>6</td>
<td>0</td>
<td>13</td>
</tr>
<tr>
<td>Medical aids</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>Not HIV-related</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Prisons</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Social security</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Testing</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Treatment &amp; medical</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Violence &amp; harassment</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Wilful transmission</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>Workplace</td>
<td>2</td>
<td>13</td>
<td>6</td>
<td>8</td>
<td>13</td>
<td>1</td>
<td>43</td>
</tr>
<tr>
<td><strong>Monthly total</strong></td>
<td><strong>17</strong></td>
<td><strong>43</strong></td>
<td><strong>40</strong></td>
<td><strong>28</strong></td>
<td><strong>45</strong></td>
<td><strong>7</strong></td>
<td><strong>180</strong></td>
</tr>
</tbody>
</table>

- The conceptualization and co-hosting of a conference on access to legal services;
- The creation of a Law and Human Rights Sector Working Group under SANAC that is particularly focused on the implementation of the new NSP and the legal services necessary for its implementation;
- A written submission to the Department of Justice on the draft Legal Services Charter, and subsequent participation – as civil society representatives – in the Legal Services Charter Working Group (which comprises the various sectors that make up the legal services environment);
- Submissions to Parliament – regarding separate reviews of the Equality Act and the Chapter 9 institutions – that address access to legal services concerns; and
- Providing training for community justice practitioners.

This section will focus on the first four areas of activity. Section 3 (Public Education, Teaching and Training) deals with community justice practitioner training, an integral part of the ALP’s public education and training programme.
Access to legal services 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 ALP, the Centre for the Study of AIDS at the University of Pretoria, the Acornhoek Advice Centre and the Street Law Programme at the University of the Witwatersrand, Johannesburg. Delegates at the conference – which was opened by Chief Justice Pius Langa – included representatives of legal service and human rights organisations, the Legal Aid Board (LAB), the South African Human Rights Commission (SAHRC), the Commission on Gender Equality, paralegal advice offices, the TAC, community-based organisations, private law firms and several donor organisations.

The conference was necessitated by the acknowledgement that, despite a progressive constitutional and legal framework in South Africa, poor people – including those living with HIV/AIDS – do not have access to legal services (and therefore justice) in order to assert their rights. Simply put, it is crucial for advice offices, community justice organizations, law clinics and private law firms to work together to increase access to legal services. With this in mind, conference delegates committed themselves to working together to achieve the following goals:

- Building legal capacity within communities for human rights work;
- Promoting the use of law to ensure social justice;
- Concerted lobbying and advocacy for access to legal services; and
- Creating a collaborative network to facilitate the sharing of information and access to legal services.

The working group that was set up as a result of the conference was unable to remain focused. For a while, the ALP acted as the secretariat. This was, however, not sustainable. While the working group still has the potential to be a useful vehicle for advocating for access to legal services, the ALP has decided instead to focus its attention on building the SANAC Law and Human Rights Sector Working Group, which in any event is largely composed of many of the key stakeholders represented on the conference working group.

SANAC Law and Human Rights Sector Working Group

This committee was born out of the SANAC law and human rights sector consultation – held on 23 February 2007 – that sought input from the sector on the then draft NSP, as well as to elect a sector representative to SANAC. The consultation, which was co-hosted by the ALP and Webber Wentzel Bowens, drew a diverse range of participants – including public interest organizations, private law firms, the LAB and the SAHRC – and provided the space for an energetic and forward-looking discussion on the legal and human rights aspects of the HIV/AIDS epidemic and social needs more broadly.

So successful was this meeting that it was decided that a smaller working group should be constituted to continue to provide input into national HIV/AIDS policy, monitor and assist with implementation, and to ensure a tight collaborative network in order to enhance access to legal services. The Working Group includes representation from the ALP, the Lesbian and Gay Equality Project, the Legal Resources Centre, the SAHRC, the South African Medical Association, the LAB, Tshwaranang Legal Advocacy Centre and the private legal profession. The ALP currently acts as its secretariat, having convened two meetings since the consultation to discuss the role of the Working Group and its individual members in making the NSP work.

Recently, the Working Group issued a press statement welcoming the NSP’s adoption and the unambiguous commitments that it contains. In the statement, the Working Group called on “all providers of legal services in South Africa to identify the roles they can and should play in its implementation, as well as to recognize the potential of the NSP to act as a catalyst in ensuring much greater
access to, and the availability and affordability of, legal services.” It also called upon government to maintain and strengthen the momentum that has been created during the development of the NSP to ensure its swift and appropriate implementation.

**Draft Legal Services Charter**

The experience of the ALP as a legal services provider, as well as its understanding of the barriers that limit access to services provided the context against which our submission on the Department of Justice’s draft Legal Services Charter was made. Whilst recognising the need for government to address the issues identified in the draft charter, we understand that the process is still in very embryonic stages – both in terms of concept and procedure. As such, we believe that an urgent matter that can and should still be addressed is whether a charter – essentially a Black Economic Empowerment Charter – is indeed the best vehicle for addressing access to legal services.

For us, the starting point is section 34 of the Constitution which places an obligation on the state to ensure access to justice. In giving effect to this right, we believe that the state should take the following steps:

- Develop a comprehensive framework for the realisation of the right to access to justice, including access to legal services;
- Allocate an adequate budget for the implementation of the framework that includes increased funding for the LAB and relevant Chapter 9 institutions (including the SAHRC) for the provision of free legal services in civil and human rights matters; and
- Ensure that appropriate legislation is in place as a necessary first step.

In addition to raising these and other substantive concerns, the ALP’s submission takes issue with the lack of consultation and transparency in the process thus far. It also makes further recommendations regarding the substance of the draft Charter, including the need for an evidence-based process, legislative amendments and a clear delineation of objectives, tasks and responsibilities.

To date, the ALP has yet to receive a response from the department or the drafting team regarding its submission. In addition, it has yet to hear if its nomination to the drafting team – proposed by a member of the drafting team alongside the names of two other organizations to represent civil society – has been confirmed. At the time of writing, it was unclear who had been appointed to the drafting team to represent the interests of civil society.

**Submissions to Parliament**

In a submission made on 23 February 2007 to Parliament’s Ad Hoc Committee on the Review of State Institutions Supporting Constitutional Democracy, the ALP recommended that the mandate of the SAHRC – as set out in its empowering legislation, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”) and the Promotion of Access to Information Act 2 of 2000 (PAIA) – be expanded to ensure better implementation and use of the Equality Act and PAIA. Consistent with our views regarding access to legal services and the obligations placed on the state in this regard by section 34 of the Constitution, our submission spoke about the need to expand this mandate to secure “a role for the SAHRC that is both educative and facilitative – ensuring that people are aware of their rights (as set out in the two statutes) and are, in fact, able to prosecute their rights claims, regardless of their economic status.”

In support of our recommendations, we drew attention to a previous submission to Parliament in which we spoke about an expanded SAHRC mandate in respect of the Equality Act.8

---

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 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. But part of our frustration, however, lies with the somewhat limited role ascribed to the SAHRC by the Act.\(^9\)

**In our submission to the Ad Hoc Committee we expanded:**

Our major concern, however, was that “[a]lthough empowered to institute action on behalf of rights claimants, the SAHRC is not recognised by the [Equality] Act in a manner that recognises the full import of section 34 of the Constitution”. ... In our view, when section 34 is read in the context of section 7(2) – which requires the state to “respect, protect, promote and fulfil the right in the Bill of Rights” – and section 9(4) – which requires legislation along the lines of the Equality Act – of the Constitution, alternative forms of dispute resolution appear to be envisaged. ... We remain of the view that the SAHRC’s mandate needs to be expanded in this or some other comparable way, to ensure that the rights guaranteed by the Constitution – and expanded upon in the Equality Act – do not simply remain on paper but are actually realised. This, in our view, is a way for the SAHRC actively to promote respect for and ensure the protection, development and attainment of human rights.

**Conclusion**

The ALP is proud to record that most of our legal interventions during this period have been successful. While much of our work is planned in advance, the nature of litigation is that we often have to respond swiftly to matters as and when they arise. The successful balance has been as a result of the work of assiduous and committed staff members, who often have to work long hours in planning and strategising cases in order to ensure the efficient delivery of legal services. The achievements have also been as a result of committed members of the Bar who have enthusiastically (and, at times, at cost to themselves) rendered their services to the ALP. In gratitude, we list their names in the acknowledgements section of this review.
Section 3

Public Education, Teaching and Training

By Nonkosi Khumalo

The new national HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011 (NSP) makes an unambiguous commitment to addressing HIV/AIDS as a human rights issue, identifying a range of activities to improve access to justice to enable people to challenge human rights violations immediately and directly. In particular, priority area 4 of the NSP recognises that continued stigma and discrimination present a major challenge to the management of the HIV/AIDS epidemic. With this in mind, it identifies the human rights and legal services sectors as key stakeholders, committing them to achieving a range of important goals, including:

- Ensuring public knowledge of and adherence to the existing legal and policy framework;
- Mobilising society and building leadership of people living with HIV in order to mitigate against stigma and discrimination; and
- Mobilising society to promote gender and sexual equality to address gender-based violence.

These goals are shared by the ALP’s public education, teaching and training programme, which has grown out of our experience in providing legal advice, paralegal and litigation services (see section 2: Litigation, Legal Services and Access to Justice) and also complements and strengthens the ALP’s policy, research and monitoring work. Although still in its infancy, its reach is already particularly broad – targeting community justice workers, legal advice and services providers, magistrates, health care workers and students of law and public health. While the ALP has provided public education and training services for many of these sectors in the past, it is only now – through the programme’s formalization – that this is being done in a coherent and coordinated fashion.
The ALP’s public education, teaching and training work is focused on the following four pillars:

- Access to community justice;
- Access to legal services;
- Mobilised and rights-literate health care workers and users; and
- Workplace training programmes.

**Access to community justice**

The main objective of this pillar of work is to develop a cadre of HIV/AIDS activists in local communities with the ability to identify relevant social justice and/or legal issues, as well as to ensure that such issues are appropriately addressed within the framework of the law. In particular, this is to be done by –

- Identifying community activists with the potential to be trained as community justice workers;
- Identifying networks of legal services providers in local areas to mentor community justice workers as well as to assist in ensuring that legal matters are appropriately referred and addressed;
- Establishing and nurturing relationships with these legal service providers to ensure that appropriate assistance is indeed available within communities; and
- Ensuring that appropriate cases are referred to the ALP and other public impact litigation centres.

The first access to community justice training workshop, which took place at the Elijah Barayi Training Centre in Johannesburg from 11 – 15 July 2006, was co-planned by the ALP, the TAC, the Centre for the Study of AIDS (University of Pretoria) and the Street Law programme at the University of the Witwatersrand, Johannesburg. Attended by 41 TAC members from the six provinces – Gauteng, Limpopo, Mpumalanga, KwaZulu-Natal, the Western Cape and the Eastern Cape – where the TAC has a formal presence, the workshop focused on the following key areas:

- An introduction to human rights, South African law and the Constitution;
- HIV/AIDS as a human rights issue;
- Legal services providers, such as the South African Human Rights Commission (SAHRC) and the Legal Aid Board (LAB); and
- Practical skills such as letter writing and conflict resolution.

An evaluation of the workshop indicated that too many topics and issues were covered in a limited period. As a result, there was insufficient time adequately to address issues that were initially identified as important – substantive issues such as sexual violence and access to social grants. Follow-up
training, to be held later this year, will be significantly more focused. With the theme “Gender, Gender-based violence and HIV”, this training will address domestic violence and sexual offences. It will have a particular focus on practical legal skills such as affidavit drafting and the laying of charges, as well as taking participants through the procedures that need to be followed if justice is to be obtained following domestic violence and/or sexual assault.

Access to legal services

This aspect of the ALP’s training, targeted mainly at formal legal practitioners – including legal officers of statutory bodies (such as the SAHRC and the LAB) and magistrates – as well as future legal practitioners (law students), seeks to build capacity on the following key aspects of service provision in relation to HIV/AIDS:

- Understanding of legal and human rights issues relating to HIV/AIDS;
- Ability to identify HIV-related matters requiring legal intervention;
- Successfully litigating HIV-related discrimination matters;
- Ability to address HIV-related matters through alternative dispute resolution mechanisms; and
- Providing more effective education and information to members of the public on HIV/AIDS and human rights.

SAHRC and LAB training

The first training on access to legal services for the SAHRC and the LAB was held from 13 – 15 June 2007 at the SAHRC’s offices in Johannesburg. In addition to a large delegation from the LAB (25 participants) and a relatively small group of legal officers from the SAHRC, the group included 15 TAC members – including community justice workers and treatment literacy trainers – who are active in their respective communities and openly living with HIV/AIDS. The decision to include a sizeable delegation of activists in training for legal practitioners was deliberate – a conscious attempt to bring different skill sets and experiences together.

The training covered the following topics:

- The basic science of HIV infection and its treatment;
- The NSP, with a special focus on priority area 4 (human rights);
- Health, the Constitution and public impact litigation; and
- Specific legal issues: gender and HIV/AIDS; employment; access to social security and community justice.

In particular, it provided legal practitioners with an opportunity to learn more about the medical management of HIV, how organisations such as the ALP have dealt with HIV/AIDS-related cases, and how they could provide legal services to people who need – but are not able to afford – such services. But perhaps the reflections of workshop participants are most telling:
This workshop tackled issues that have now become prominent in our communities and constituencies and need more exposure.

[The session on HIV Virology, management and treatment ... was very useful, easy to follow for “lay people” like us lawyers who do not know these things hence can’t handle the cases appropriately.

This workshop was very useful because we deal with lots of cases in our communities and don't know how the law works...The constitution and public impact litigation by Adila Hassim made me relate more on the ... pending [TAC] cases.

Very useful and informative as I didn't know about some things like the Equality Act and court procedures. I now understand the different kinds of remedies one seeks in courts (e.g. supervisory order), what evidence is brought to which court, that you don't bring in new evidence at the constitutional court, and what principles guide / should guide each court. Now I will be able to assist in my province and in TAC districts and branches.

Similar training has to take place for magistrates and judges so that they understand where lawyers and community members are coming from and the issues they deal with ... if they are not on board, it might be a waste of our time, energies and resources.

I now understand the different kinds of remedies one seeks in courts ... Now I will be able to assist in my province and in TAC districts and branches.

Follow up training will take place in October 2007.

Social context training for magistrates

The final comment quoted above – which was made by a TAC community activist – highlights the need for the ALP’s training to include not only those who seek to use the law to advance social justice but also those who are called upon to apply the law. As part of Justice College’s social context training for magistrates, which aims to sensitize these judicial officers to social issues which are often the subject of misunderstanding, misinformation and stigma, the ALP has provided training on HIV/AIDS and human rights – in particular focusing on the ways in which courts can and should interpret and enforce the law to protect and promote the rights of people living with HIV/AIDS.

In 2006, the ALP participated in two Justice College social context training workshops – one on 11 July in the North West; and a second on 29 August in Mpumalanga. A further training workshop – which once again included the ALP’s input on HIV/AIDS and the law – took place on 27 June 2007 in the Eastern Cape.

Teaching at the School of Law (University of the Witwatersrand, Johannesburg)

As it has done for the past few years, the ALP continued in 2006 and 2007 to coordinate and teach a course in HIV/AIDS and the law for intermediate and final year LLB students. The popular elective – 38 students registered for 2007’s course – continues to be taught collectively by various ALP staff members, with a few classes being delivered by guest lecturers, including the TAC’s Johanna Ncala (basic science and epidemiology) and Justice Edwin Cameron of the Supreme Court of Appeal (criminal law). In addition to the LLB course, the ALP has been working with the School of Law to conceptualise and develop an LLM programme in health law. This specialised programme, which will be on offer from 2008, will include courses taught by senior ALP staff members.
Mobilised and rights-literate health care workers and users

The ALP currently receives more referrals from health care workers than from advice office workers and other legal practitioners. Such workers are frequently the only professionals with whom patients have contact – and often the first people to whom they turn – after experiencing unfair discrimination in a health sector context, whether on the basis of HIV/AIDS status or otherwise. It is therefore vital that health care workers have a basic understanding of the law insofar as it relates to HIV/AIDS and health care provision more broadly, so that they are better able to make appropriate referrals.

This is the focus of the ALP’s training in this sector, which recognises that:

- The provision of voluntary counselling and testing (VCT) services – the entry point to accessing comprehensive HIV-related prevention and/or treatment services – often requires counsellors to have a basic understanding of issues such as HIV and insurance, future planning and wilful transmission of HIV, so that they are better able to advise and refer their clients appropriately;

- The absence of a human rights culture in many health care facilities remains a problem, evidenced by the numerous complaints that the ALP continues to receive regarding rights violations committed by health care workers; and

- Training can help to prevent rights violations, either by making health care workers aware that they can be held accountable for violating patients’ rights or by encouraging other health care workers to report colleagues who commit violations.

In addition to working with health care workers, the ALP’s training in the health sector includes a particular focus on users of the health system. This allows us to reach people who would otherwise not have access to information regarding their rights – for example, people living with HIV/AIDS who do not ordinarily have the resources to contact legal services providers such as the ALP or are not involved with community-based organizations such as the TAC – and to keep in touch with the issues that affect such people.
Training for VCT counsellors at Helen Joseph Hospital

The department of psychology at Helen Joseph Hospital runs an annual series of courses for nurses, doctors and lay counsellors who provide VCT services. These courses are attended by a range of health care providers from Helen Joseph Hospital, nearby Coronation Hospital and primary health care clinics in the area. As part of each training course, the ALP provides training on HIV/AIDS and the law – with a particular focus on confidentiality, informed consent and making appropriate referrals for patients who experience HIV-related unfair discrimination. During the period under review, the ALP has provided training at Helen Joseph on ten separate occasions: August 2006 (three sessions); November/December 2006 (three sessions) and February to May 2007 (four sessions).

Red Cross home-based care programmes

Red Cross South Africa provides home-based care services to people living with HIV/AIDS. In the past, the ALP has provided training on HIV/AIDS and the law to home-based caregivers employed by the Red Cross. In June 2006, the ALP provided training to caregivers at Red Cross Soweto, which included a particular focus on ensuring that caregivers are aware of their duties regarding confidentiality and access to health care services, and are able to refer clients to legal services providers if they experience unfair discrimination or have difficulty accessing essential socio-economic entitlements such as health care services.

As part of each training course, the ALP provides training on HIV/AIDS and the law – with a particular focus on confidentiality, informed consent and making appropriate referrals for patients who experience HIV-related unfair discrimination.
Training for public health care officials, School of Public & Development Management (P&DM), University of the Witwatersrand, Johannesburg

P&DM conducts a training course for health care workers in management positions within the public health care system, which includes a module on HIV/AIDS and the law in the workplace provided by the ALP. The module, which aims to build the capacity of managers in the public health system, includes a focus on the importance of confidentiality within the workplace, the labour law framework and its implications for the management of HIV/AIDS within the workplace, and integrated wellness programmes within the workplace. Trainings were conducted in June and October 2006. The first training in 2007 was postponed as a result of the public sector strike in June 2007.

Workplace training programmes

Despite the existence of a comprehensive labour law framework that protects the rights of workers living with HIV/AIDS, unfair discrimination in the workplace remains widespread. With this in mind, the ALP’s focus on the workplace includes training targeted at –

- Union officials and full-time shop stewards (or anyone in a workers’ organization whose task is taking up workplace cases), who need to know how to defend workers against unfair labour practices, unfair discrimination in the workplace and unfair dismissals;
- Ordinary workers, who need to know their rights in respect of these issues, especially on the topics of workplace HIV policies, testing, confidentiality and access to treatment; and
- Atypical or unorganized workers, who need access to similar information.

The training completed in 2007 has focused on specific requests for assistance in updating/revising HIV/AIDS workplace policies and programmes, including:

- A one-day workshop in Namibia for officials (including two secretaries-general) of mineworkers’ unions in Botswana, Namibia and South African aimed at harmonising a proposed draft regional collective agreement on HIV/AIDS – to be negotiated by the unions in the future – to cover all De Beers diamond mines in the region; and
- Input into a two-day meeting of construction-sector shop stewards from the National Union of Mineworkers (NUM) focusing on workplace protections for people living with HIV/AIDS.

In collaboration with various unions, the ALP has plans to provide follow-up training, including a five-day pilot workshop in August 2007 for public sector workers – through the sub-region of the Public Service International (PSI) in South Africa – covering current workplace rights issues and skills training in case handling. Similar pilot workshops later in the year – for a small general workers’ union and a large private sector union – are planned.

Further training plans include reaching out to workers more broadly through the development, publication and distribution of resource materials, including an updated ALP booklet on workplace rights and a poster for union offices setting out key workplace rights and giving details of resource organisations. We are hoping to engage the various workshop participants on how to reach atypical and/or unorganized workers.
“This is an excellent introduction to the many issues that need to be addressed in health law and human rights. I welcome the consideration of new challenges to the right to health and the key issues in responding to the AIDS epidemic in Southern as well as South Africa. This is essential reading for policymakers and programme implementers alike.”

Dr Peter Piot
Executive Director of the Joint United Nations Programme on HIV/AIDS (UNAIDS)

“I welcome the publication of this book because it will help all those who have rights and responsibilities in relation to health, to understand their duties. For government officials and civil servants it will be a valuable resource because it describes and explains simply the legal framework we have created since 1994 to try to deliver all aspects of health care. For health users it will be a valuable resource because it describes how the entire health system works, rather than just the part they encounter. It should empower users by teaching them about law, about where responsibility lies and about their own responsibilities.”

Ms Nozizwe Madlala-Routledge
Deputy Minister of Health, South Africa
Section 4

Health Service Delivery and Health Sector Transformation

By Fatima Hassan and Jonathan Berger

In a written submission made to the South African Human Rights Commission (SAHRC) on 17 April 2007, the ALP argued that “rights violations lie at the heart of the problem – and that recognition and the discharging of the state’s positive duties in respect of health care access are central to the solution.” At the SAHRC’s public hearings into the right to have access to health care services held some six weeks later, the ALP’s oral submissions focused attention on the scope and nature of the state’s positive constitutional obligations regarding health care access, as well as two specific aspects of health sector transformation – human resource planning and needs-based budgeting.¹

Disturbingly, government’s response – given by the Minister of Health a few days before she officially resumed office – displayed a remarkable lack of appreciation for the constitutional framework within which health policy is to be developed and implemented and public health services provided. In particular, she underscored government’s understanding of the SAHRC process as one “that it is not meant to test or measure whether and to what extent the government is committed to ensuring access to health services” or is “meant to put the Commission in judgement [sic] over our commitment to these rights.”²

In an apparent retort to the ALP’s submission, she remarked as follows:

I would therefore not agree with the stakeholders that have given the impression that following these hearings the Commission must hold the government bound to certain methodologies

---

1. The ALP submission is available online at http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=359
2. The Minister's address is available online at http://www.doh.gov.za/docs/sp/sp0530-f.html
of policy development, or budgeting for the realization of the right to health care services. ... 

Do we need to get into an exercise, which will be very expensive and costly, of determining for all these areas and others the extent and the resource requirements of the backlogs, in order to determine a needs based budget for the realization of the rights in the Constitution? ... 

It is my submission Chairperson, that policy choices and budget processes must be left to government. This then allows for contesting views from various constituencies to input, influence, and even act in any other legal ways, to ensure that they are listened to by government. That is democracy.

Our submission had argued:

that an analysis of the relevant data, statistics, laws and court decisions will lead the SAHRC to concluding that defining the essential package of health services to which all people in South Africa are – by law – entitled is both long overdue and urgent; ... that only by engaging in such a process would it be possible to cost the health service accurately; ... [and] that government has consistently and deliberately avoided developing and implementing a methodology for calculating the needs of the public health system – and that consequently public health care is chronically underfunded, resulting in government’s own policy framework and major objectives for health being undermined.
Agreeing with the ALP that an appropriate way forward may be to release an interim report for comment, Commission chairperson Jody Kollapen alerted the Minister to the provisions of section 184 of the Constitution which mandate the SAHRC – amongst other things – to monitor, assess, investigate and report on the observance of human rights, and “to take steps to secure appropriate redress where human rights have been violated.” Quite clearly, the Constitution enjoins the SAHRC to sit in judgment of the steps taken by the Minister and her department to realise the right to health.

The SAHRC public hearings into the right to health came at the end of a period during which the ALP has actively participated in shaping public discourse, policy and practice regarding health service delivery and health sector transformation. In so doing, it has been both proactive and reactive – developing and publishing resource materials, in particular its new flagship publication entitled Health & Democracy: a guide to human rights, health law and policy in post-apartheid South Africa; actively participating in two key policy development processes; making written submissions on draft regulations and legislation; and monitoring implementation of the public sector antiretroviral (ARV) treatment programme. In this article, we focus attention on some of the highlights of the ALP’s work in these areas over the period January 2006 through June 2007.

### Health & Democracy

Speaking at the launch of Health & Democracy in the foyer of the Constitutional Court on 27 February 2007, Deputy Minister of Health Nozizwe Madlala-Routledge noted that “one of the exciting things about this book is that it is … the first time that all of our health law and policy has been described in one place.” Indeed, one of the key objectives of the publication is to “demystify the complex web of health-related law and policy”. Bringing together topics such as the rights and duties of health care workers, the Constitution and public health policy, the private health care sector and traditional and alternative health care, Health & Democracy provides activists, lawyers, policy makers and service providers with a comprehensive understanding of health, human rights and the law.

In her keynote address, the Deputy Minister expanded on the links between the three:

- But the important thing for me tonight is to say that the recognition of human rights in our law begs another important set of questions. These are:
  
  1. Are we doing enough to educate our communities about their rights to health?
  2. Are we doing enough to educate healthcare workers and managers about their duties under these laws?
  3. Are we doing enough to allocate our limited resources correctly to respond to the growing disease burden?
  4. How can we assist poor communities so that they have access to legal services when they are forced to resort to the law to either protect rights or to demand them when we fail to meet our obligations as a government (at whatever level)?

The ALP sees the publication of Health & Democracy as an integral part of its broader work, whether in the field of access to legal services (see section 2: Litigation, Legal Services and Access to Justice) or public education and training (see section 3: Public Education, Teaching and Training). Importantly, as recognised by the Deputy Minister, we need to “ensure that we take advantage of the framework described in this book but also fill the gaps in policy and law that may continue to have an effect in denying people access to basic healthcare services.”

---

3. The Deputy Minister’s keynote address is available online at http://www.info.gov.za/speeches/2007/07022812451001.htm
Key policy development processes

The ALP continues to participate in two key policy development processes: the health charter and the pharmaceutical sector strategy. The former, driven primarily by the Department of Health (DoH), has limped along from crisis to crisis. In stark contrast, the latter, located at the National Development and Labour Council (NEDLAC) and largely driven by the Presidency in terms of the Accelerated and Shared Growth Initiative for South Africa (AsgiSA), appears to be flourishing. Neither process, however, appears close to finalisation.

Health charter

Following an unsuccessful attempt by the DoH to issue a health charter for public comment without adequate consultation in November 2005, the Health Charter Steering Committee (HCSC) was established in early 2006. Given that one of the major criticisms of the aborted DoH process had been the exclusion of NEDLAC from the process of negotiating the draft charter, the mandate of the HCSC included negotiating a health charter for South Africa that was to be tabled at NEDLAC for discussion and adoption. Unfortunately, a hastily-made decision of the DG of Health saw the membership of the HCSC – comprising representatives of the public, labour, civil society, hospital, health financing, pharmaceutical, health support and health professional sectors – being heavily weighted in favour of the private sector.

Two senior staff members of the ALP represent civil society in the HCSC. Whilst the negotiations have yet to result in a final document, all sectors have already agreed that the charter should include a commitment to making a basic package of services available to all South Africans regardless of their income or place of residence. Notwithstanding this progress, the negotiations reached a crisis point in October 2006 when labour and civil society insisted that the charter could not be finalised without it being referred to NEDLAC for discussion. At the time of writing, there was still significant confusion amongst the constituencies regarding the continued role of the HCSC, particularly in relation to NEDLAC. The labour and civil society constituencies have recently been invited to indicate which sections of the draft charter they wish to re-negotiate or amend. The process is on-going.

Pharmaceutical sector strategy

AsgiSA – government’s “integrated package of measures aimed at stimulating economic growth and reducing poverty and unemployment” – has identified a range of sectors – including pharmaceuticals – for “strategic promotion”. One of the key reasons for identifying this particular sector was a clear recognition of the centrality of medicines and other pharmaceutical products in the provision of health care services. Once identified, the next step taken by the Presidency – in its capacity as the driving force behind AsgiSA – was to commission a study into the growth potential of the sector and whether it should be selected as an “AsgiSA priority”.

The consultancy that was commissioned in early 2007 to research and produce the report operated under the guidance of the NEDLAC Chemical Sector Summit’s pharmaceuticals committee, to which a senior ALP researcher was appointed to represent the interests of civil society. To date, the consultants’ report – which concludes that the sector is indeed of strategic significance but that there are numerous factors impeding its growth potential – has been finalised but not yet released. The committee is still engaged in debate regarding the most appropriate way forward. Importantly, the process holds out the potential for addressing some – if not many – of the regulatory obstacles that stand in the way of access to essential medicines.
Key submissions on draft legislation, regulations and policies

During the period under review, the ALP made numerous submissions to national departments and Parliament on proposed health- and health-related laws and policies, all of which have implications for health service delivery and health sector transformation. These submissions were ordinarily accompanied by direct engagement with the relevant government departments through letters and oral presentations. The following key ALP submissions are summarised below:

- Intellectual property rights from publicly financed research framework;
- Health Professions Amendment Bill;
- Criminal Law (Sexual Offences and Related Matters) Amendment Bill;
- Risk Equalisation Fund; and
- Draft Methodology for International Benchmarking of Medicine Prices.

Intellectual property rights from publicly financed research framework

In March 2006, the ALP participated in a consultation hosted by the Innovation Fund on the Department of Science and Technology’s draft Intellectual Property Rights from Publicly Financed Research Framework. Shortly thereafter, the ALP made a formal written submission that – in principle – supported “the need for – as well as the substance of – the policy framework”. In general, the submission considered “how best to ensure that agreements entered into by inventors, institutions and industry … [in respect of inventions flowing from publicly-financed research] are indeed in the public interest.” In particular, we argued as follows:

While we continue to advocate for the development of an intellectual property framework in South Africa that generally facilitates access to essential products, our primary concern is that the legislation and regulations … that will result from this process make particular provision for ensuring access to the products of research that were developed using public resources. Not only is this desirable from a developmental perspective, but in our view is also required by the Constitution, as read in the light of Article 15 of the International Covenant on Economic, Social and Cultural Rights, which guarantees everyone “the right to enjoy the benefits of scientific progress and its applications”. In respect of research conducted – either in part or in whole – using public resources, the obligation on the state to ensure that the benefits are generally accessible is further strengthened.

A revised framework was approved by Cabinet at the end of May 2007, as was a draft bill that has since been published for comment. The ALP looks forward to further participation in this important area of health-related policy development and is currently drafting its response to the draft bill.

Health Professions Amendment Bill

This submission was made against the backdrop of a report issued by the Public Protector in 2001 in response to a complaint lodged earlier by the ALP regarding problems many of our clients had experienced with the Health Professions Council of South Africa (HPCSA). After investigating the ALP’s complaint and meeting with both the ALP and the HPCSA, the Public Protector had made various recommendations. Although the specific cases that formed the basis of the complaints have subsequently been resolved, the Public Protector’s recommendations had not been implemented in any meaningful manner. The ALP therefore recommended that Parliament’s Portfolio Committee on Health use the opportunity presented by the amendment bill to address the recommendations. Disturbingly, this recommendation fell on deaf ears.
The ALP’s submission focused primarily on three areas: the composition and powers of – and the appropriate roles to be played by – the HPCSA and professional boards; the conduct of unregistered professionals and inquiries into unprofessional conduct; and human resources for health. Of the almost twenty recommendations made, only part of one recommendation was incorporated into the second version of the Bill. Disturbingly, this was done in a manner that undermines the rationale underpinning our proposal. At the time of writing, the bill had been returned by the National Council of Provinces (NCOP) to the National Assembly for consideration of its proposed amendments.

Criminal Law (Sexual Offences and Related Matters) Amendment Bill

For several years the ALP has been an active member of the Sexual Offences Bill Working Group, which has focused on ensuring that the criminal law be amended to address sexual offences comprehensively and constitutionally. Despite a stated commitment by government to ensuring that this indeed happened, the finalisation and passage of the amendment bill was delayed for years. The bill was recently adopted by the National Assembly and at the time of writing was being considered by the NCOP.

Our most recent submission on the bill (August 2006) focused on the chapter dealing with “services for victims of sexual offences and compulsory HIV testing of sexual offenders”. While – in principle – we supported the right of a survivor of sexual assault to ascertain the status of the alleged offender, we nevertheless argued that this right can only be properly realised if certain conditions are met – a limited incursion of the rights of the alleged offender; the provision of PCR blood tests that establish the presence of HIV itself rather than mere antibodies to the virus; and the provision of a full package of support services for the survivor. In addition, we questioned the wisdom of the bill restricting the availability of post-exposure prophylaxis services – to reduce the risk of HIV infection following sexual assault – to “designated” public health facilities.

Risk Equalisation Fund

The Draft Medical Schemes Amendment Bill considers the establishment of a Risk Equalisation Fund (REF) within the medical schemes industry, to ensure that no individual scheme carries a disproportionate share of the risk that may come with the law’s prohibition of risk rating. In other words, given that people at high risk of ill health cannot – by law – be excluded from scheme membership, how best should the risk be shared amongst schemes? In its submission, the ALP proposed that the REF form part of broader health care reform aimed at the ultimate realisation of National Health Insurance (NHI), with the risk being shared across the public and private sectors. Further to our submission, the DoH has invited the ALP to engage on the ongoing policy process.

Draft Methodology for International Benchmarking of Medicine Prices

Building on an earlier submission (March 2006) made in response to the call for submissions – amongst other things – on a methodology for conforming to international benchmarks of the prices of medicines, the ALP made a further submission on the issue in April 2007 in response to a Government Gazette publication of a draft methodology in late 2006. As was the case with the earlier submission, the ALP expressed “support for the development and implementation of an appropriate benchmarking methodology as one of a range of regulatory tools that are necessary for ensuring access to a sustainable supply of affordable essential medicines.”

In addition to making specific recommendations regarding the draft regulations, the new submission used the opportunity provided by the notice and comment process “to consider the relationship between ... [the methodology] and other available regulatory tools, particularly given the structural factors that result in unjustifiably high medicine prices.”

The submission argued as follows:
Notwithstanding our recognition that there is no magic bullet for ensuring a sustainable supply of affordable essential medicines, we are nevertheless of the view that the single most important challenge to address – the underlying cause of unjustifiably high medicine prices – is the lack of competition in respect of many (ordinarily patented) medicines. Simply put, the lack of competition is a result of one or more of the following factors:

- Market exclusivity as a result of patent protection;
- Delays in the market entry of generic competitors following patent expiry or the grant or issue of licences, including – but not limited to – delays in the drug registration process; and
- An insufficiently-sized “market”.

In all of the above cases, the market simply cannot be left to regulate itself. The primary role of government in this regard, wherever appropriate, is to facilitate an environment that permits the market entry of generic competitors.

As the time of writing, the DoH had yet to make public the process in terms of which it would go about finalising the regulations. Given the conflict generated by the publication of the Medicine Pricing regulations in 2004/2005, government would be wise to proceed with this process with caution and after having properly consulted stakeholders.

**Monitoring the ARV treatment programme**

By the end of May 2007, three and a half years after Cabinet had approved the *Operational Plan on Comprehensive Care and Treatment for HIV and AIDS* (the Operational Plan), a combined total of approximately 357 000 people with HIV – including approximately 25 000 children – were estimated to be accessing ARV treatment in South Africa. Of these people, between 235 000 and 257 000 people were being treated in the public sector, with between 100 000 and 120 000 people receiving treatment in the private (including the not-for-profit) sector.

These figures are estimates because to date, government and the private sector have yet to make their data on patient numbers publicly available. Instead, the slow and burdensome responsibility for extracting and collating information from provincial health departments, medical schemes, pharmaceutical companies, disease management programmes and others has fallen primarily on the shoulders of the ALP – working both in its own name and as an active member (and co-founder) of the Joint Civil Society Monitoring Forum (JCSMF).

**In-house monitoring**

The ALP’s monitoring work since January 2006 has continued to include field assessments (KwaZulu-Natal and the Eastern Cape in particular), as well as ongoing engagement with public health officials (district, provincial and national), health care workers, donor agencies, the private sector, medical schemes and people living with HIV/AIDS. In addition, we have continued to advise and provide information to international organisations, international foundations, the private sector, donors, multilaterals and the JCSMF. As already mentioned, we have continued to collect data on treatment sites and numbers of patients across all provinces and within the private sector.

Central to our monitoring is the way in which we use the data and information gathered, as well as how we engage with the numerous stakeholders who support this work. In particular, we have provided legal advice and other support to organisations, users of health care services and health care workers on an ongoing basis. For example, we have focused on assisting people living with HIV/AIDS to overcome the many hurdles they may face in accessing ARV treatment and other HIV-related services.
In addition, we assisted the “Concerned Paediatricians” group in establishing a working group on paediatrics with the DoH. This opened the door for engagement on increasing the availability of PCR HIV testing in the country, as well as revising current paediatric ARV treatment guidelines. More recently, we worked closely with other organisations such as TAC, Médecins Sans Frontières and the AIDS and Rights Alliance for Southern Africa to facilitate a meeting between the Ministry of Health – then under the leadership of Acting Minister Jeff Radebe – and civil society to discuss an action plan for dealing with Extensively Drug Resistant (XDR) tuberculosis.

The ALP’s work in South Africa also feeds into broader civil society monitoring of ARV treatment programmes in the developing world. We continue to act as the South African country research team for the International Treatment Preparedness Coalition (ITPC), which released two reports in 2006:

- Missing the Target #2 – Off target for 2010: How to avoid breaking the promise of universal access – Update to ITPC’s AIDS treatment report from the frontlines (24 May 2006); and
- Missing the Target #3: Stagnation in AIDS treatment scale up puts millions of lives at risk – Second six-month update to ITPC’s AIDS treatment report from the frontlines (28 November 2006)

**JCSMF**

The ALP has continued to convene the JCSMF, which to date has met on ten separate occasions in eight different provinces. After each meeting, the JCSMF has issued a public report containing resolutions and recommendations aimed at improving the pace at and the manner in which the Operational plan is implemented. The ALP has played – and continues to play – an integral role in ensuring that JMCSF meetings are well-conceptualised, planned and hosted, and that accurate minutes – incorporating resolutions and recommendations – are recorded and distributed.

During the period under review, the JCSMF hosted the following four meetings:

- 7th meeting: Orkney, North West (3 March 2006) – Assessment of the North West provincial ARV treatment programme and the private sector’s contribution to implementing HIV/AIDS treatment and care;
- 8th meeting: Johannesburg, Gauteng (9 June 2006) – National assessment of the Operational Plan two-and-a-half years since its adoption, with a particular focus on the Gauteng provincial programme;
- 9th meeting: Cape Town, Western Cape (5 October 2006) – New models for scaling up VCT in South Africa; and
- 10th meeting: Durban, KwaZulu-Natal (5 June 2007) – Unpacking the National Strategic Plan on HIV/AIDS and STIs 2007-2011 (NSP).

The most recent meeting, which took place just before the opening of the 3rd South African AIDS Conference, was addressed by the Deputy Minister of Health who spoke about the role of partnerships in keeping the NSP alive. The ALP’s Mark Heywood gave an overview of the NSP, with the Reproductive Health and HIV Research Unit’s Dr Francois Venter responding on key implementation issues. A clear message coming from all speakers was that bodies such as the JCSMF and its constituent members have crucial roles to play in monitoring the NSP’s implementation.
Towards National Health Insurance?

While the ALP and many other organisations continue to play crucial roles in ensuring health service delivery and health sector reform, the broader goal – that of substantive health sector transformation – still remains elusive. Since 1995, the objective of national health policy has been to introduce a mandatory contributory environment in addition to the non-contributory tax-funded public health system. In 1997, the White Paper for the Transformation of the Health System proclaimed that one of the objectives of post-apartheid health policy is to promote equity and to develop a single, unified health system. Yet to date, South Africa continues to be home to an iniquitous two-tier health system.

To be fair to government, it is important to acknowledge that various progressive regulatory measures – such as the REF and low income medical schemes (LIMS) – are being put in place. The ALP’s view, however, is that such developments must form part of broader health sector transformation, in particular the development, adoption and implementation of a unified health system. Indeed, this is what was proposed in the report of the Committee of Inquiry into the Various Social Security Aspects of the South African Health System (the Taylor Report), which recommended that –

In the medium- to long-term South Africa [should] move toward a National Health Insurance system compatible with multiple funds and a public sector contributory environment as defined in the 1995 NHI Committee Report. The last phase envisages the implementation of a universal contributory system, which would to a substantial degree replace general tax funding a source of revenue. ... The final phase essentially envisages the establishment of a
contributory environment for all groups and individuals assessed to be in a position to contribute toward the health system. These contributions would not replace medical scheme contributions, but rather fund a proposed subsidy provided to medical schemes. All contributions and general tax allocations should ultimately be allocate[d] to the public sector and medical schemes based on a risk-adjusted equity formula.

Our concern, however, is that many of the measures taken to date – as part of the move towards implementing social health insurance (SHI) – have been limited to the private sector, with very little understanding of SHI as a step towards NHI and not an end in and of itself. Of further concern is that while a Ministerial Task Team (MTT) on SHI has been set up, an NHI task team has yet to be appointed – SHI without NHI may very well lead to an even more fragmented and unequal health care system.

Perhaps the final word – for now – should go to the ANC Policy Discussion Document on Social Transformation, which – in section 11 – clearly calls on government to “speed up the implementation of the National Health Insurance (NHI) scheme.” Importantly, the discussion document recognises that NHI “enhances the equitable access by the general public to health care and reduces the inequities between the private and public health providers”. Although somewhat short on detail as to how this will happen, its mere existence on the ANC’s policy agenda at this point provides some degree of hope for the future of health service delivery and health sector transformation in South Africa.
Appendices

Appendix A: Oral presentations

Jonathan Berger

- 17 February. HIV and Access to Legal Services Conference, School of Law, University of the Witwatersrand, Johannesburg. “Using Public Interest Litigation to Improve Access to Public Services: Learning from Key Social Security and Health Cases”.
- 31 February and 1 March. Briefing for congressional staffers (US Senate and House of Representatives), Washington DC. Potential impact of a TRIPs+ US-SACU free trade agreement on access to treatment for HIV/AIDS.
- 28 April. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Access to health care services”.
- 5 May. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Access to prevention and treatment services for HIV/AIDS”.
- 8 May. World Trade Organization (WTO) advanced training course, Johannesburg. “TRIPs and public health: a (South) African perspective”.
- 16 August. International AIDS Conference, Toronto. “No time to wait: taking legal action to increase access to HIV medicines”.

1. Appendices A, B and C do not reflect the full output of the ALP. For example, they do not make reference to a range of other materials, such as newsletters, internal memoranda, legal opinions and legal pleadings. Rather, the appendices merely serve as a record of the public output of the project insofar as oral presentations, publications and written submissions are concerned.
• 16 August. XVI International AIDS Conference, Toronto. “Lessons from South Africa? Litigating for treatment access in prisons”.

• 17 August. XVI International AIDS Conference, Toronto. “HIV/AIDS and South Africa’s War on Science”.

• 3 October. 2nd Priorities in AIDS Care & Treatment (PACT) Conference, Cape Town. “Prevention and care for vulnerable groups: prisoners and HIV”.

• 4 October. United Nations Conference on Trade and development (UNCTAD)/Trade Law Centre for Southern Africa (tralac) workshop on competition provisions in regional trade agreements, Cape Town. “Utilising TRIPs flexibilities on competition law to ensure a sustainable supply of affordable essential medicines: a focus on South Africa”.

• 19 October. UNCTAD seminar on Intellectual property arrangements: implications for developing country productive capacities in the supply of essential medicines, Geneva. “Using TRIPs competition rules to ensure fair licensing terms for developing country producers” and “IP licensing: experiences from India and South Africa”.

• 28 November. WTO workshop on the TRIPS Agreement and Public Health, Geneva. “Implementing TRIPs flexibilities on access to medicines: a focus on Southern Africa”.


• 15 February. Seminar, WCL, American University, Washington DC. “TAC v MSD and Abbott: complaint to the Competition Commission of South Africa on refusals to licence”.


• 23 February. Ad Hoc Committee on the Review of State Institutions Supporting Constitutional Democracy, Parliament, Cape Town (with Fatima Hassan).

• 27 February. Health Portfolio Committee, Gauteng Legislature, Johannesburg. “Submission on the Health Professions Amendment Bill [B 10—2006]”.

• 21 March. UNCTAD regional workshop on developing local productive and supply capacity in the pharmaceutical sector – the role of intellectual property rights, Addis Ababa. “The role of civil society in the use of TRIPs flexibilities: a focus on South Africa”.

• 30 March. School of Public Health, University of the Witwatersrand, Johannesburg. “Using the right to health to ensure a sustainable supply of affordable HIV-related medicines”.

• 20 April. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Access to health care services”.

• 20 April. Centre for Applied Legal Studies (CALS)/School of Law, University of the Witwatersrand, Johannesburg. “What’s left on the shopping list? Ideas on using litigation, law and legal advocacy in advancing lesbian and gay equality”.

• 4 May. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Access to prevention and treatment services for HIV/AIDS”.


• 28 May. National Strategic Plan (NSP) research colloquium, Cape Town. “Session overview: ‘Human rights and law reform’”.


• 7 June. Oral abstract session, 3rd South African AIDS Conference, Durban. “Using the law to ensure a sustainable supply of affordable medicines: compelling MSD and Abbott to license”.

• 7 June. ALP/TAC working lunch meeting, 3rd South African AIDS Conference, Durban. “Towards a national framework for a comprehensive HIV and AIDS plan for correctional centres: implementing the NSP in prisons”.

Thabo Boase

Michelle Govender

- 12 April 2007. Bioethics Department, School of Public Health, University of the Witwatersrand, Johannesburg. Lecture for health professionals.
- 7 June. ALP/AC working lunch meeting, 3rd South African AIDS Conference, Durban. “Update on EN and Others v Government of the Republic of South Africa and Others”

Chloe Hardy

- 3, February, 24 February, 3 March, 10 March, 5 May, 19 May, 11 August, 15 August, 25 August, 3 November, 17 November, 1 December, 13 April 2007 and 4 May. VCT counsellors training programme, Helen Joseph Hospital, Johannesburg. “HIV and the law”.
- 23 March. UNISATU Conference on HIV and Labour, Johannesburg. “HIV and the law in the workplace”.
- 27 March and 6 April. Masters in Bioethics class, School of Public Health, University of the Witwatersrand, Johannesburg. “HIV and life insurance”.
- 4 April. Barloworld peer educators training, Boksburg. “HIV, insurance and future planning”.
- 21 April. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV, insurance and social security”.
- 5 May. Training for treatment literacy practitioners, TAC, Johannesburg. “HIV and social grants”.
- 9 June. Red Cross home-based care givers, Soweto. “HIV and the law”.
- 17 August. Commission on Gender Equality, Johannesburg. ALP submission to the CGE on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill.
- 26 October. Esselyn Street Clinic medical staff training, Johannesburg. “HIV and the law in health care settings”.
- 14 November. Webber Wentzel Bowens and Health Systems Trust, Seminar on Sexual Violence in the Public Sphere: Myths, Facts and Responses, Johannesburg. “The Right to Access to PEP and Other Services for Rape Survivors”.
- 30 November. Gauteng Department of Transport and Public Works, World AIDS Day indaba for shop stewards, Johannesburg. “HIV and Workplace Rights (including recommendations from the ALP workplace discussion paper)”.
- 1 December. Garden City Clinic, World AIDS Day Event for nurses and counsellors, Johannesburg. “HIV and the Law in Health Care Settings: the challenge of prevention”.
- 15 March. Department of Trade and Industry wellness programme review and strategic planning, Pretoria. “HIV workplace policies”.
- 22 March. Embassy of Ireland and Irish Aid, Pretoria. “HIV and workplace policies”.
- 23 March. Right to Care, medical ethics seminar for doctors, Johannesburg. “Right to health care”.
- 30 March. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV and insurance”.
• 8 June. Netcare HIV training course for nurses, Johannesburg. “HIV and the law in health care settings”.

• 13 – 15 June. ALP training on HIV and the law for the Legal Aid Board, SAHRC and TAC, Johannesburg. “Access to PEP for rape survivors”, “HIV testing, informed consent and confidentiality” and “Access to social security”.

• 20 June. CALS, University of the Witwatersrand, Johannesburg. “HIV and social security: beyond grants vs. treatment”.

Fatima Hassan


• 17 February. HIV and Access to Legal Services Conference, School of Law, University of the Witwatersrand, Johannesburg. “Are chapter 9 institutions hindering or promoting social justice”.

• 23 February. ARK Trustees Briefing, Cape Town. “Wither the roll out?”

• 23 March. Harold Wolfe Memorial Trust, University of Cape Town, Cape Town. “Are we in denial about HIV/AIDS in SA?”


• 4 May. International Health Programme, Boston Public Health Students, Cape Town. “Health activism – the role that Treatment Action Campaign has played in campaigning for health services”.

• 17 May. LIMS Trade Conference, Johannesburg. “Is LIMS an appropriate response to an ailing and skewed health system?”

• 19 May. Black Sash End Poverty Seminar, Cape Town. “How ill health fuels poverty and poverty ill health”.

• 30 May. UNGASS civil society orientation session, New York. “Monitoring for change – experiences from the ITPC and SA” Round table discussion with 5 other monitoring efforts”.


• 14 August. XVI International AIDS Conference Toronto. “Human rights and access to treatment”.

• 14 August. XVI International AIDS Conference Toronto. “Getting the balance right. Integrating HIV prevention and treatment programming”.

• 17 August. XVI International AIDS Conference Toronto. “PLWHA and challenging barriers to accessing drugs”.

• 26 September. TAC Seminar on making false claims about medicines, University of Cape Town, Cape Town. “The legal framework governing and regulating the sale, advertising and distribution of medicines in South Africa”.

• 5 October. 9th Joint Civil Society Monitoring Forum, University of Cape Town, Cape Town. “An overview of the state of the roll out - 34 months later”.

• 1 December. Department of Land Affairs, Cape Town. “HIV/AIDS and the workplace – what needs to be done”.

• 16 April 2007. Terry Sanford Institute for Public Policy, Duke University, Durham, NC, USA. “Law in the struggle for affordable AIDS medicines in South Africa”.

• 23 April. JOHAP Learnership Programme, Oxfam, Durban. Keynote address: “Gender, treatment and HIV/AIDS”.


• 25 May. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Public Impact Litigation and HIV/AIDS”.

• 8 June. 3rd SA AIDS Conference, Durban. Closing Plenary: “Summary and findings of Track 3: Human Rights, social sciences and ethics”.

Adila Hassim


Adila Hassim
• 31 March. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV/AIDS and the Constitution”.


• 27 September. Faculty seminar, School of Law, University of the Witwatersrand, Johannesburg. “Lessons from the Westville prison case”.

• 4 October. South African Medical Device Industry Association. “Should science inform public health policy??”


• 2 March. Centre for Human Rights, University of Pretoria. “Litigating socio-economic rights”.

• 16 March. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV/AIDS and the Constitution”

• 11 April. 121 South African Infantry Battalion, Mtubatuba. “Human rights and legal issues raised by the SANDF practice of HIV testing” (with Mark Heywood).

• 8 May. School of Law, University of the Witwatersrand, Johannesburg. “Litigating the Right to Health”.

• 10 May. Research Day, School of Public Health, University of Witwatersrand, Johannesburg. “Health Rights and Policy”.

• 31 May. Public Inquiry into Access to Health Care Services, SAHRC. ALP submission (with Jonathan Berger).

• 7 June. 3rd SA AIDS Conference, Durban. Roundtable presentation: “Realising Equitable Health Care: Constitutional Rights and Duties”.

• 13 June. ALP training on HIV and the law for the Legal Aid Board, SAHRC and TAC, Johannesburg. “Access to health care services: Making the Constitution work”.

Mark Heywood


• 17 – 18 February. HIV and Access to Legal Services Conference, School of Law, University of the Witwatersrand, Johannesburg. “Making the law work for the poor – the litmus test of HIV” and closing summary of conference outcomes.

• 22 February. IDASA/Fair Lady Conversation series, Cape Town. “How important is political will and leadership for an effective response to the HIV and AIDS pandemic?”

• 1 March. Centre for Human Rights, University of Pretoria, Pretoria. “The right to health – the example of Treatment Action Campaign”.

• 4 March. TAC/SANNU leadership workshop, Johannesburg. “Human Resources Plan”.

• 14 March. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Public Impact Litigation”.

• 22 March. Launch of South African Journal of International Affairs publication on HIV/AIDS. Respondent to Nana Poku.

• 23 March. UNISATU Conference, Johannesburg. “Progress with Medical Treatment for HIV/AIDS”.

• 31 March. Ford Foundation staff, Johannesburg. Facilitated discussion on HIV/AIDS in the workplace and Ford’s policy.


• 11 April. Chris Hani Institute seminar, Johannesburg. “HIV prevention and national responses”.

• 19 April. UNAIDS Global Reference Group, Geneva. “Male circumcision, human rights, law and ethics”.

• 23 April. Closing summary at TAC Satellite Conference on HIV Prevention, Cape Town.

• 29 April. SASFU Second National Congress, Pretoria. “HIV testing in the military”.


• 17 May. Public Health Association Conference, Midrand. “Crisis in Health Care”.


• 6 June. Perinatal HIV Research Unit Seminar, Johannesburg. “Human rights and ethical issues linked to male circumcision”.

• 9 June. 8th Joint Civil Society Monitoring Forum, Johannesburg. Summary and consensus points.

• 12 June. TAC leadership training, Limpopo. “Overview of the National Health Act”.


• 10 July. ALP/TAC training for Community Justice Activists. Introduction.

• 13 July. HEARD workshop, University of KwaZulu-Natal, Durban. Training on HIV/AIDS and the Law.

• 18 – 21 July. Temple University/CHAIN NGO training on Legal Advocacy, Beijing. “The work of the ALP and Treatment Action Campaign” and “Summary of outcomes of the workshop”.

• 2 August. SANGOCO National Leadership School, Johannesburg. “Civil society responsibilities in Treatment Action Campaign in tackling HIV”.

• 14 August. XVI International AIDS Conference, Toronto. “HIV testing in the era of treatment scale up – a human rights perspective”.


• 16 August. XVI International AIDS Conference, Toronto. “Advancing Health Workforce Capacity in Delivering Care, Treatment and Support” – Human Rights and Health Workers”.

• 16 August. Canadian AIDS Legal Network and Open Society Institute satellite meeting on HIV/ANDS and the Law, Canada and Beyond, XVI International AIDS Conference, Toronto. Keynote speaker

• 17 August. XVI International AIDS Conference, Toronto. Plenary address: “The Price of Political Denial” and Meet the Plenary Speakers Question and Answer Discussion.

• 21 August. TAC Gauteng leadership, Johannesburg. “What happened in Toronto and what next?”


• 26 October. HIV Clinicians Society, Johannesburg. “HIV Testing”.

• 27 – 28 October. Civil Society Conference, Johannesburg. Report back to plenary on commission on SANAC.


• 30 November. SANPAD researchers, Durban. “Health Research and Human Rights”.

• 8 December. TAC Gauteng leaders. “What have we achieved in 2006”.


• 14 February. UNAIDS and WHO staff members, Geneva. “What is happening with the development of South Africa’s National Strategic Plan?”

• 28 February. Centre for Human Rights, University of Pretoria, Pretoria. “Mobilising for Socio-economic rights: the example of TAC”.


• 11 April. 121 Battalion, Mtubatuba. “Human rights and legal issues raised by the SANDF practice of HIV testing” (with Adila Hassim).

• 21 April. WISER Amatya Sen seminar, University of the Witwatersrand, Johannesburg. “Health and social justice”.

• 30 April. SANAC, Benoni. Short input on plans for law and human rights in relation to the NSP.

• 5 May. Johannesburg Schools Junior Council, Magaliesburg. “Dealing with HIV and AIDS at school”.

• 11 May. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg, “Health research: South Africa’s legal framework”.

• 23 May. Poor Global Health Programme, University of Nijmegen, The Netherlands. “Health activism and human rights”.

• 14 February. Peter Piot, Joint United Nations Programme on HIV/AIDS (UNAIDS) and WHO staff members, Geneva. Resolutions and summary of the UNAIDS Global Reference Group meeting.

• 14 February. UNAIDS and WHO staff members, Geneva. “What is happening with the development of South Africa’s National Strategic Plan?”
• 28 May. European Congress of Tropical Medicine, Amsterdam, The Netherlands. “South Africa’s National HIV/AIDS Strategic Plan (2007-2011): the opportunity for health equity, the embodiment of health rights”.


• 5 June. Joint Civil Society Monitoring Forum, Durban. “South Africa’s National Strategic Plan – where next?”

• 8 June. 3rd South African AIDS Conference, Durban. Short address to closing plenary: “Where to after the NSP and the Durban Declaration?”

• 12 June. Meeting of European Union donor governments, Pretoria. Short input on the NSP.

• 13 June. ALP training on HIV and the law for the Legal Aid Board, SAHRC and TAC, Johannesburg. “Human rights aspects of South Africa’s National Strategic Plan”.


Anneke Meerkotter

• 24 February 2006. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Medical malpractice and HIV”.

• 7 April. CSVR/Tshwaranang roundtable on GBV and HIV. “Wilful transmission”.

• 5 May. TAC Gauteng Treatment Literacy Practitioners, University of the Witwatersrand, Johannesburg. “Wills”.

• 18 May. TAC volunteers, Cape Town. “Sexual Offences Bill”.

Dan Pretorius

• 18 February 2006. HIV and Access to Legal Services Conference, School of Law, University of the Witwatersrand, Johannesburg. “Labour: Access to Justice Concerns”.

• 3 March. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV and employment”.

• 8 May. TAC workshop on criminal law, Johannesburg. Facilitated closing session with focus on S v Zuma judgment

• 28 November. Ditsela national educator’s conference, Benoni. “HIV and workers”.


• 23 February 2007. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV and labour law” (with Chloe Hardy).

• 24 April. National Union of Mineworkers (NUM), Mineworkers’ Union of Namibia (MUN) and Botswana Mining Workers’ Union (BMWU), Windhoek. Presented workshop on drafting a harmonized collective agreement on HIV workplace policy and programmes for De Beers in Southern Africa.

• 12 June. NUM construction sector, Johannesburg. Workplace policies.

• 14 June. ALP training on HIV and the law for the Legal Aid Board, SAHRC and TAC, Johannesburg. HIV and employment case studies.

Pholokgolo Ramothwala

• 6 March 2007. TAC Gauteng NSP Imbizo. “HIV and the law”.

• 22 March. NUM Rustenburg regional committee. Work of the ALP and TAC.

• 6 April. TAC Limpopo treatment practitioners. “HIV and the law”

• 6 June. Roundtable, 3rd South African AIDS Conference, Durban. HIV testing.

• 7 June. TAC skills building workshop, 3rd South African AIDS Conference, Durban. HIV and assisted reproduction.

• 14 June. ALP training on HIV and the law for the Legal Aid Board, SAHRC and TAC, Johannesburg. Testing and confidentiality.

• 26 June. Limpopo house of traditional leaders. “Culture and HIV – the role of traditional leaders.”
Marlise Richter

- 2 February. TAC Gauteng treatment literacy. “HIV/AIDS and the law”
- 3 February. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Introduction to the course and basic facts of HIV”.
- 17 February. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV and human rights”.
- 3 March. Bioethics Department, School of Public Health, University of the Witwatersrand, Johannesburg. “Traditional healing in South Africa”.
- 18 March. TAC Gender Reference Group meeting, Gordon’s Bay, Cape Town. “How do the ‘blind spots’ in HIV and AIDS discourse affect the experiences on not only HIV positive women, but women in general?”
- 12 May. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “HIV/AIDS and gender”.
- 23 June. School of Law, University of the Witwatersrand, Johannesburg. “HIV and Disability Grants in the Context of ARV Treatment: Is a ‘Basic Income Grant’ the answer?”
- 31 August. Gender Education and Research Agency, Braamfontein. “HIV/AIDS & Gender”.
- 16 October. HIV Management Course, Sandton. “Disability Grants and ARVs”.
- 14 October. Medico-legal services, Department of Health – Health & Hope in our Hands workshop, Gauteng. “Sexual Offences Bill”.

Bongumusa Sibiya

- 14 October. SASFU, Durban. “HIV/AIDS in the SANDF”.
- 27 November. TARA Hospital, Johannesburg. “Access to PEP for health care workers”.
- 12 January 2007. Emplisweni Clinic for Health Care Workers, Sebokeng. Overview of training to be provided.
- 1 March 2007. Methodist Church, Diepsloot. “Possible interventions by religious institutions to combat HIV/AIDS”.
- 30 March. LLB course: HIV/AIDS and the law, University of the Witwatersrand, Johannesburg. “Social assistance”
Appendix B: Publications

- Jonathan Berger, “A is for arrogant, B is for brazen”, *Mail & Guardian* (31 March 2006)
- Nathan Geffen, Jonathan Berger and Cynthia Golembeski, “ARV ruling for prison spotlights access to health for all”, *Cape Argus* (29 June 2006)
- Chloe Hardy and Marlise Richter, “Disability Grants or ARVs? The predicament of people living with HIV and the implications for health care practitioners in South Africa”, *Transcript* (November 2006)
- Fatima Hassan, “Roll out, what roll out?”, *Mail & Guardian* (15 September 2006)
- Mark Heywood and Francois Venter, “‘Guinea pig’ story on HIV prevention worrying”, *City Press* (11 February 2007)
- International Treatment Preparedness Coalition (including Fatima Hassan), “Missing the Target #2 – Off target for 2010: How to avoid breaking the promise of universal access – Update to ITPC’s AIDS treatment report from the frontlines”, available online at http://www.aidstreatmentaccess.org/itpcupdatefinalpdf
- Pholokgolo Ramothwala, “A hollow victory”, *Mail & Guardian* (20 April 2007)
- Pholokgolo Ramothwala, “Catch a wake up: we are all at risk to HIV”, *Student Choice* (1 June 2006)
Appendix C: Written submissions

- Fatima Hassan, “Submission on the draft regulations relating to the obtainance of information and processes of determination and publication of reference price lists”, Department of Health (27 February 2007)
- UNAIDS Global Reference Group (including Mark Heywood), “Submission on provider-initiated testing and counselling”, WHO (January 2007)

Appendix D: Positions held by members of staff

Jonathan Berger
- Chairperson, Lesbian and Gay Equality Project
- Community constituency representative, Pharmaceutical Sub-sector Task Team, NEDLAC
- Steering Committee member, International Rectal Microbicides Working Group
- Honorary research fellow, School of Law, University of the Witwatersrand, Johannesburg

Deena Bosch
- Board member, Community Health Media Trust
- Board member, Social Change Assistance Trust

Chloe Hardy
- Member of Helen Joseph Hospital CHRU Community Advisory Board
- Member, joint civil society/labour caucus on HIV/AIDS at NEDLAC
Fatima Hassan
- Co-coordinator, Joint Civil Society Monitoring Forum
- Civil society representative, Health Charter Steering Committee
- South African country team research representative, International Treatment Preparedness Coalition
  Chairperson, Track 3 (Social and Economic Sciences, Human Rights and Ethics), 3rd South African AIDS
  Conference, Durban (5 - 8 June 2007)
- Chief Rapporteur, Key Challenge 5 (Scaling up Access to Treatment), XVI International AIDS Conference,
  Toronto (13-18 August 2006)
- Board member, Médecins Sans Frontières (MSF) South Africa
- Honorary research fellow, School of Law, University of the Witwatersrand, Johannesburg

Adila Hassim
- Civil society representative, Health Charter Steering Committee
- Board member, Southern African AIDS Trust
- Honorary research fellow, School of Law, University of the Witwatersrand, Johannesburg

Mark Heywood
- National Treasurer, TAC
- Chairperson (since August 2006) and member, UNAIDS Global Reference Group on HIV/AIDS and Human
  Rights
- Member, Johannesburg AIDS Council
- Deputy Chairperson (since June 2007) and Legal and Human Rights Sector representative, SA National
  AIDS Council
- Steering Committee member, AIDS and Human Rights Alliance of Southern Africa (ARASA)
- Board member, Amandla AIDS Advisory Fund
- Senior honorary research fellow, School of Law, University of the Witwatersrand, Johannesburg

Nonkosi Khumalo
- Steering Committee member, ARASA

Dan Pretorius
- Part-time commissioner, Commission for Conciliation, Mediation and Arbitration (CCMA)
- Member, joint civil society/labour caucus on HIV/AIDS at NEDLAC

Marlise Richter
- Steering Committee member, ARASA (until her resignation from the ALP in August 2006)

Shalom Ncala
- Siyayingqoba Beat It! presenter
Appendix E: Draft Financials 2006

At the time of publishing this review, the ALP was in the process of resolving queries that relate to its transfer from the University of the Witwatersrand, Johannesburg. As a result, the ALP has been unable to finalise its 2006 financial statements in time.

### Abridged Income Statement

**for the period 12 July 2006 to 31 December 2006**

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INCOME</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grants</td>
<td>6 027 000</td>
<td>9 571 026</td>
</tr>
<tr>
<td>Donations</td>
<td>19 995</td>
<td>-</td>
</tr>
<tr>
<td>Litigation costs recovered</td>
<td>159 858</td>
<td>10 236</td>
</tr>
<tr>
<td>Sale of manuals</td>
<td>22 484</td>
<td>24 317</td>
</tr>
<tr>
<td>Interest received</td>
<td>97 879</td>
<td>28 537</td>
</tr>
<tr>
<td>Sundry income</td>
<td>3 639</td>
<td>90 269</td>
</tr>
<tr>
<td>Refunds</td>
<td>8 355</td>
<td>-</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>EXPENDITURE</strong></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Administration fees</td>
<td>623 261</td>
<td>736 727</td>
</tr>
<tr>
<td>Consultations</td>
<td>29 425</td>
<td>-</td>
</tr>
<tr>
<td>Conferences, meetings and seminar</td>
<td>535 163</td>
<td>297 151</td>
</tr>
<tr>
<td>Courier, printing, postage and stationery</td>
<td>45 485</td>
<td>-</td>
</tr>
<tr>
<td>Evaluation</td>
<td>-</td>
<td>63 383</td>
</tr>
<tr>
<td>Legal and consultation fee</td>
<td>377 489</td>
<td>670 408</td>
</tr>
<tr>
<td>Office expenses</td>
<td>81 019</td>
<td>108 063</td>
</tr>
<tr>
<td>Publications</td>
<td>480 848</td>
<td>537 617</td>
</tr>
<tr>
<td>Refreshments</td>
<td>2 585</td>
<td>3 047</td>
</tr>
<tr>
<td>Rent, water, electricity, repairs &amp; maintenance</td>
<td>109 347</td>
<td>-</td>
</tr>
<tr>
<td>Salaries, wages and contributions</td>
<td>4 028 828</td>
<td>3 642 256</td>
</tr>
<tr>
<td>Salary levy - Wits</td>
<td>421 190</td>
<td>544 056</td>
</tr>
<tr>
<td>Staff development</td>
<td>23 473</td>
<td>29 022</td>
</tr>
<tr>
<td>Sundry expenses</td>
<td>25 671</td>
<td>6</td>
</tr>
<tr>
<td>Telecommunications and IT support</td>
<td>69 340</td>
<td>1 427</td>
</tr>
<tr>
<td>Travel and accommodation</td>
<td>437 886</td>
<td>189 104</td>
</tr>
</tbody>
</table>

| **(Deficit)/Surplus for the period** | (951 800) | 2 902 118 |
| **Transfer to equipment fund**      | (214 645) | (94 521) |
| **Balance at the beginning of the period** | 4 640 626 | 1 921 328 |
| **Transfer to projects**             | -         | (88 299) |
| **Balance at the end of the period** | 3 474 181 | 4 640 626 |
Abridged Balance Sheet

as at 31 December 2006

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INCOME</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>R 4 276 403</td>
<td>R 5 574 317</td>
</tr>
<tr>
<td>Non current assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equipment</td>
<td>R 189 175</td>
<td>R 94 521</td>
</tr>
<tr>
<td>Current assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade and other receivables</td>
<td>R 110 498</td>
<td>-</td>
</tr>
<tr>
<td>Rental deposit</td>
<td>R 6 500</td>
<td>-</td>
</tr>
<tr>
<td>Amount due from CALS</td>
<td>-</td>
<td>R 5 479 796</td>
</tr>
<tr>
<td>Cash and cash equivalents</td>
<td>R 3 970 230</td>
<td>-</td>
</tr>
<tr>
<td>Total assets</td>
<td>R 4 276 403</td>
<td>R 5 574 317</td>
</tr>
</tbody>
</table>

**RESERVES AND LIABILITIES**

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>R 3 663 356</td>
<td>R 4 735 147</td>
</tr>
<tr>
<td>Capital and reserves</td>
<td></td>
<td></td>
</tr>
<tr>
<td>General fund</td>
<td>R 466 557</td>
<td>R 219 089</td>
</tr>
<tr>
<td>Programmes fund</td>
<td>R 3 007 624</td>
<td>R 4 421 537</td>
</tr>
<tr>
<td>Equipment fund</td>
<td>R 189 175</td>
<td>R 94 521</td>
</tr>
<tr>
<td>Current liabilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade and other payables</td>
<td>R 100 272</td>
<td>-</td>
</tr>
<tr>
<td>Amount due to CALS</td>
<td>R 512 775</td>
<td>-</td>
</tr>
<tr>
<td>Deferred income</td>
<td>-</td>
<td>R 839 170</td>
</tr>
<tr>
<td>Total reserves and liabilities</td>
<td>R 4 276 403</td>
<td>R 5 574 317</td>
</tr>
</tbody>
</table>