AIDS Law Project

18-MONTH REVIEW: JULY 2007 TO DECEMBER 2008

AIDS Law Project

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Cover
TAC members protesting outside the Pretoria High Court in support of the legal action against the SANDF's HIV testing policy, 15 May 2008
Photo: Sarah Makoe

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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.

ALP staff. Back row – from left: Brian Honermann, Adila Hassim, Phindile Mlotshwa, Mpho Maledimo, Jonathan Berger, Paul Booth, Muhammad Abdur-Rahim and Nasser Sujee. Front row – from left: S'khumbuzo Maphumulo, Meryl Federl, Gerniene Fortune, Mark Heywood, Shalom Ncala, Agnieszka Wlodarski and Sue Niekerk. Inserts – from left: Dan Pretorius and Nonkosi Khumalo

Foreword

An organisational review of the ALP: July 2007 - December 2008

By Vuyiseka Dubula, Chairperson of the Board of Directors

In July 2007, at the time of the publication of its last 18-month review, the ALP was still in its infancy. It had just re-fashioned itself as an independent not-for-profit organisation, having separated itself from the University of the Witwatersrand, moved offices, registered as a law clinic, complied with a range of corporate law requirements, appointed a Board of Directors, and commenced upon a new organisational life whilst pursuing essentially the same mission.

In November 2007, the ALP commissioned an independent evaluation to examine the organisation and report to the Board on its findings. The evaluators interviewed over 92 people, studied documents and publications of the ALP, conducted a careful review of legal files and interviewed current and previous members of staff.

The evaluation found that the ALP faced a number of internal challenges, in particular the need for better communication between staff and the need to reduce staff turnover. Importantly, however, it also praised the ALP's legal strategy and case management, the quality of its written submissions and noted that the UNAIDS Human Rights Adviser had described the ALP as "one of the three best [organisations working on law and human rights] in the world."

In the intervening year I am pleased to report – and I trust that that this review bears this out – that the ALP has improved its internal systems and that its output and impact have increased. There are a number of factors that have contributed to this:

The ALP's Board of Directors: The ALP's Board met five times between July 2007 and early 2009. The Board has been actively involved in providing oversight of the ALP's work, and in addition has served as a valuable sounding board to debate and fine-tune ALP strategy.

The unique combination of different skills, passions and disciplines – including a former Constitutional Court judge, one of South Africa's leading HIV epidemiologists, and a pioneer of the response to AIDS in the business sector, to name but a few – contained within the Board has proven to be invaluable.

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The relationship with the University of the Witwatersrand: Although the ALP has left Wits University, it retains a formal association with its School of Law. Ironically, this relationship has improved since

"independence". The ALP conceptualises, coordinates and teaches several courses, and has also participated in a range of seminars organised by the Law School – including an important one in October 2008 to honour Justice Edwin Cameron, the founder of the ALP.

In this regard, it is also significant that despite leaving academia in the formal sense, the ALP has continued to publish widely, including articles in peer-reviewed journals and chapters in academic books. In the period under review, members of staff published one book, three peer-reviewed journal articles, six book chapters and 11 opinion pieces in the popular media.[1]

The Relationship with the TAC: The ALP was instrumental in founding the TAC in 1998 and has worked closely with it ever since. There is an organisational and personnel overlap between the leadership of the two organisations, which occasionally leads to uncertainty externally about the lines between them. However, both organisations remain functionally separate with different management systems, funding streams and modes of operation.

In reality, the close relationship is greatly beneficial to both. The advantage occurs in part through the TAC's first-hand connection to affected communities, which brings issues and immediacy to the ALP, as well as its pioneering combination of social organisation and mobilisation, human rights advocacy and litigation. From the ALP's side, the organisation is able to collaborate with TAC on materials development, training, litigation and other forms of legal support, and combined advocacy that targets the Department of Health, Parliament and the South African National AIDS Council.

To achieve its work, the ALP depends upon maintaining a core of committed staff with skills, conscientiousness and reputations. However... staff retention is not easy. The two core disciplines the ALP depends upon are legal researchers and attorneys. Both are sought-after positions in the open market that can command high levels of remuneration.

Recently, both organisations were nominated for the Gates Award for Global Health – "established by the Bill & Melinda Gates Foundation to reward and exemplify organizations which have developed processes for improving health, especially in resource poor settings, with measurable results." The award, which "recognizes past achievements and the promise of continuing activity and improvement", will be presented in Washington DC in May 2009.

The ALP's donors: During the period under review, the ALP received support from the following donors: The Atlantic Philanthropies, the Embassy of Belgium, the Ford Foundation, HIVOS, the Levi's Foundation, the Royal Netherlands Embassy and the Swedish International Development Agency. Our financial statements for 2007 and 2008 are included in the appendices to this review.

Improved internal systems: The transition from Wits University has allowed the ALP vastly to improve its financial management and associated policies. By early 2009, the ALP's financial department was able to provide balances that were up-to-date. It also provides up-to-date reports to every meeting of the Board. There has also been improved communication within the organisation. In 2008, for example, there were 19 staff meetings.

The ALP's staff: During the period under review, the ALP's staff complement ranged between 14 and 19 members. The ALP is not an easy organisation to work for. Its desire to meet the needs of poor people, defend human rights and promote constitutionalism mean that pressure and stress are almost a constant. There is also an unpredictability to its work, which is often linked to the need to respond to key issues or crises that fall within the ALP's ambit but are not necessarily part of its formal workplan.

To achieve its work, the ALP depends upon maintaining a core of committed staff with skills, conscientiousness and reputations. However, as identified in the independent evaluation, staff retention is not easy. The two core disciplines the ALP depends upon are legal researchers and attorneys. Both

1. The journal articles and three of these chapters are forthcoming in 2009.

are sought-after positions in the open market that can command high levels of remuneration. In addition, the new South Africa has not established a tradition of social justice work, meaning that the best and brightest are often drawn out of public service. This affects the ALP, which is unable to compete with private sector salaries. One result is a high turn over of attorneys as members of staff leave for more lucrative positions in the corporate sector.

Importantly, however, the ALP has managed to retain a core group of senior staffers who have proven their dedication to social justice by remaining with the ALP for over five years. In particular, I would like to acknowledge the contribution made by senior attorney Fatima Hassan. Fatima first joined the ALP in 1997. Apart from a two-year period when she worked as a clerk at the Constitutional Court and then completed an LLM at Duke University, Fatima worked tirelessly to advance the mission of the ALP. In November 2008, she resigned to take up a position as Special Adviser to Barbara Hogan, the new Minister of Health. This is a tribute both to her and the ALP. She will be missed.

The ALP also benefits from new employees who joined in 2008, expressly because of their desire to use law to protect human rights. Yet in the course of the year, they have learnt how depressing it sometimes can be in dealing with the casualties of a failing health system, particularly in the context of the twin epidemics of HIV and tuberculosis.

In conclusion, it is important to note that 2008 was the 15th anniversary of the ALP. In recognition of this the Board of Directors and staff of the ALP have undertaken a retrospective analysis of the project's work and outcomes. Since 1993, the ALP has published three books, numerous peer-reviewed journal articles and book chapters, and tens of brochures, pamphlets and posters; and has also influenced the development of key policies such as the national *HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011*. In addition, the organisation has continually been involved in litigation that has led to successful judgments and settlements in all but a handful of cases.

Vuyiseka Dubula (TAC General Secretary and ALP Chairperson) addresses delegates at the 4th TAC National Conference, Ekhurhuleni, 14-16 March 2008(Reproduced with kind permission of CHMT

Fatima Hassan (appointed Special Advisor to the Minister of Health in November 2008)

On this foundation, we have thought deeply about what the ALP's focus and objectives should be going forward. Some of our ideas are reflected in the pages ahead. I hope that you find them both informative and thought-provoking.

Thank you.

People at the ALP

Board of Directors

Chairperson

- Ms. Vuyiseka Dubula: *General Secretary, TAC and person 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: *Programme Manager, Centre for Economic Governance and AIDS in Africa (CEGAA)*

Other Directors

- 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: *Co-founder and Deputy General Secretary, TAC and former head of the ALP (resigned from the Board with effect from 31 July 2008)*
- 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): Professor of Law and former Head of the School of Law, University of the Witwatersrand, Johannesburg (resigned from the Board with effect from 31 December 2007)*
- Prof. Sharon Fonn *(ex officio): Head of the School of Public Health, University of the Witwatersrand, Johannesburg*
- Mr. Mark Heywood *(ex officio): Executive Director, ALP*
- Prof. Philippa Kruger: *Law Clinic, University of the Witwatersrand, Johannesburg and member of the Board of the Legal Aid Board (resigned from the Board with effect from 30 September 2008)*
- Prof Marius Pieterse *(ex officio): Professor of Law, University of the Witwatersrand, Johannesburg*
- Ms. Theodora Steele: *Organising Secretary, Congress of South African Trade Unions (COSATU)*

Staff

• Muhammad Abdur-Rahim	*Financial Officer*
• Jonathan Berger	*Senior Researcher and Head of Policy & Research*
• Paul Booth	*Research Assistant to the Deputy Chairperson of SANAC (based at the ALP)*
• Althea Cornelius	*PA to the Executive Director and Organisational Secretary (resigned in December 2007)*
• Meryl Federl	*Information Officer*
• Susan Gatsinzi	*SANAC Law & Human Rights Sector Coordinator (resigned in June 2008)*
• Fatima Hassan	*Senior Attorney (resigned in November 2008)*
• Adila Hassim	*Advocate and Head of Litigation & Legal Services; and acting Executive Director (May to November 2007)*
• Mark Heywood	*Executive Director*
• Brian Honermann	*Researcher*
• Nonkosi Khumalo	*Researcher and Head of Public Education & Training*

- Heather Mangwiro *Attorney (resigned October 2007)*
- Mpho Maledimo *Administrator*
- S'khumbuzo Maphumulo *Attorney*
- Phindile Mlotshwa *Office Assistant*
- Shalom Ncala *Receptionist and acting SANAC Law & Human Rights Sector Coordinator*
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- Dan Pretorius *Attorney and Trainer*
- Pholokgolo Ramothwala *Researcher (resigned December 2007)*
- Lizette Schoombie *Deputy Director (resigned July 2008)*
- Fatima Shaik *Office Manager (resigned December 2007)*
- Bongumusa Sibiya *Paralegal (resigned December 2007)*
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- Teryn Allen: *intern from Georgetown University (June to November 2008)*
- Li Dan: *visitor from Korekata AIDS Law Center, Beijing, China (October 2007)*
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- Doron Isaacs: *research assistant on MSD case (August 2007)*
- Tinashe Mundawarara: *visitor from the HIV/AIDS, Human Rights and Law Project, Zimbabwe Lawyers for Human Rights (November 2008)*
- Dineo Thompson: *intern from Duke University School of Law (September to November 2008)*
- Kaja Tretjak: *intern from the Graduate Center, City University of New York (June to August 2008)*
- David Zoppo: *intern from the University of North Carolina – Chapel Hill (September to November 2008)*

Acknowledgements

Clients, deponents, witnesses and expert advisers

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- Cpl. Mpho Erens Banda: *South African National Defence Force (SANDF)*
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- Mr. Dai Ellis: *Executive Vice President, Access Programs, CHAI*
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- South African Security Forces Union (SASFU)
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- Treatment Action Campaign (TAC)
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- Dr. Thys von Mollendorff: *formerly superintendent, Rob Ferreira Hospital, Nelspruit*
- Prof. Robin Wood: *Director, Desmond Tutu HIV Research Centre, Institute of Infectious Disease and Molecular Medicine, UCT*

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- The Royal Netherlands Embassy
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- AIDS and Rights Alliance of Southern Africa (ARASA)
- AIDS Consortium
- Community Health Media Trust (CHMT)
- Congress of SA Trade Unions (COSATU)
- Health-e news service
- Joint Civil Society Monitoring Forum (JCSMF)
- Joint United Nations Programme on HIV/AIDS (UNAIDS)
- Lawyers for Human Rights (LHR)
- Legal Aid Board
- Legal Assistance Centre, Namibia
- Legal Resource Centre (LRC)
- Medicins Sans Frontieres (MSF)
- ProBono.Org
- Reproductive Health Research Unit (RHRU)
- Rural Doctors Association of South Africa (RUDASA)
- SA HIV Clinicians Society (SAHCS)
- SA Human Rights Commission (SAHRC)
- SA National AIDS Council (SANAC)
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- Treatment Action Campaign (TAC)
- Zimbabwe Lawyers for Human Rights (ZLHR)

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Introduction

No easy walk to constitutional governance: the small matter of a health system

By Mark Heywood

In our previous 18-month review, the AIDS Law Project (ALP) struck a relatively positive note in an introduction entitled "The End of Politics?". At that point, Cabinet had just adopted the national *HIV & AIDS and STI Strategic Plan, 2007-2011* (NSP) and the South African National AIDS Council (SANAC) was in the process of being reinvigorated.

Government as a whole had struck a new tone about how it would respond to the epidemic, particularly under the leadership of then Deputy President Phumzile Mlambo-Ngcuka and then Deputy Minster of Health Nozizwe Madlala-Routledge. We committed ourselves to "work[ing] to ensure that Cabinet acts swiftly in taking the policy decisions identified in the NSP as 'necessary requirements for an effective response'."

Writing in early 2009, it is clear that we were premature in our optimism. As this review shows, the ALP – ordinarily working in close collaboration with its ally, the TAC – accomplished a great deal in the last 18 months: ensuring the implementation of key aspects of the NSP; building SANAC and its structures; and promoting constitutional governance of the health system.

But ultimately it was to be the exigencies of party politics rather than its constitutional duties that often determined the course of the government's response to HIV and AIDS.

But ultimately it was to be the exigencies of party politics rather than its constitutional duties that often determined the course of the government's response to HIV and AIDS. As a result, it was primarily the unrelenting pressure of health activists, continuing to demand respect for and the protection, promotion and fulfilment of human rights, that brought results – particularly the increasing numbers of people benefiting from access to antiretroviral (ARV) treatment.

In this introduction I therefore examine a number of the issues – as well as the conclusions that flow from them – that dominated the ALP's work from July 2007 until the end of 2008.

Implementing the NSP and building SANAC

In June 2007, former Minister of Health Manto Tshabalala-Msimang hastily returned to office after a lengthy period of sick leave and a successful liver transplant, just in time for her department's annual budget vote in Parliament. Her absence had created the space for more urgency and partnership in tackling the country's crisis in health.

But her return immediately coloured the optimism that had emerged during the drafting of the NSP and the revival of SANAC, very soon leading to the renewal of tensions. Reports from senior officials within the Department of Health (DoH) indicated that Tshabalala-Msimang disapproved of the NSP, and refused to have anything to do with it. Similarly the collaborative efforts to respond appropriately to the extensively drug resistant (XDR) tuberculosis (TB) crisis, which began under Jeff Radebe's watch as acting Minister, came to a rapid end.

The ALP, TAC and our allies in civil society resolved not to be distracted by the former Minister. Instead, we concentrated on building on the policy foundations that had been established in her absence. In particular, the ALP began to invest time, resources and imagination into strengthening and using SANAC as a forum to develop an official and open discourse on the implementation of the NSP, bringing to it disputes and hopefully resolving them under its aegis. It has done – and continues to do – this in a number of ways.

Until Tshabalala-Msimang's departure from office in September 2008, maintaining forward movement through SANAC involved a silent war of attrition and working around her with other Ministers and officials, particularly the former Deputy President.

First, the ALP coordinated SANAC's Law and Human Rights (L&HR) Sector, which has become a valuable forum for better and wider collaboration on the human rights issues that have traditionally been the ALP's bread and butter. Today many more bodies are conscious of and are providing legal services to assist people in challenging HIV-related unfair discrimination.

This is done, for example, by a number of private law firms working effectively through the pioneering public interest clearing house ProBono.Org. In addition, the ALP established a joint training programme with the Legal Aid Board (LAB) and the South African Human Rights Commission (SAHRC) aimed at building capacity within Justice Centres and SAHRC offices in Mpumalanga and Limpopo to handle cases of HIV-related unfair discrimination. A report on this training and its outcomes in contained in chapter 4 of this review.

Second, in carrying out my responsibilities and duties as the deputy chairperson of SANAC, I have been able to pay attention to and facilitate the overall development of the institution and its structures, ensuring that it both maintained momentum and acquired definition. For example, one of the long-standing issues identified by the civil society sectors of SANAC was the need to build capacity in and professionalise the SANAC secretariat to ensure the efficient organisation of its committees and follow through on its recommendations.

Ultimately, this led to an agreement between the Deputy President – in her capacity as the chairperson of SANAC – and the new Minister of Health that the secretariat be re-constituted at the Development Bank of Southern Africa (DBSA) for a transitional period of two years, and that senior appointments – including a Chief Executive Officer – be made. This process is currently underway.

Third, SANAC has been an important forum both to advance important policy issues (such as voluntary medical male circumcision and improved prevention of mother-to-child HIV transmission (PMTCT) and ARV treatment protocols), as well as to report on and create wider awareness of human rights violations (such as HIV-related unfair discrimination in the South African National Defence Force (SANDF) and the victimisation of public sector doctors dedicated to providing the best available medical care). These issues are discussed in greater detail in chapters 1 and 2 below.

Until Tshabalala-Msimang's departure from office in September 2008, maintaining forward movement through SANAC involved a silent war of attrition and working around her with other Ministers

Swearing in of President Motlanthe's Cabinet: Barbara Hogan replaces Manto Tshabalala-Msimang as Minister of Health (Photo: Robert Botha)

and officials, particularly the former Deputy President. The former Minister often sought to bypass SANAC and to cloud, question and confuse its actual proceedings. But behind the scenes, the former Deputy President valiantly attempted to keep her under control and insist that she abide by the principles and "key messages on HIV prevention and treatment" that were adopted by both SANAC and government in late 2006.

Tshabalala-Msimang's removal from office in September 2008, coupled with the appointment of Barbara Hogan (as the new Minister of Health) and Dr. Molefi Sefularo (to fill the vacant position of her deputy), led to a dramatic change in official attitude towards SANAC. This also led to the opening up of opportunities for SANAC to provide leadership in the country's response to the epidemic.

This was evident towards the end of 2008 when SANAC was tasked with organising World AIDS Day events that promoted a different tone and set of messages and signalled to the world a new determination on HIV prevention. Parallel to this, Hogan requested SANAC to develop a social mobilisation plan aimed at improving the uptake and outcomes of the PMTCT programme. This plan was developed in late 2008 and presented to SANAC in early 2009.

Reviving the health system

One of the resolutions taken by the African National Congress (ANC) at its 52nd National Congress in December 2007 described education and health as "core elements of social transformation" that would be prioritised by government. A few weeks later, in its annual January 8th anniversary statement, the ANC reflected as follows:

> We must acknowledge that much is wrong in our public health care system. Though progress has been made, the country is still faced with significant challenges with respect to the quality

of care provided; the physical infrastructure, maintenance and management of public health facilities; the working conditions and remuneration of doctors, nurses and other health care workers; and the inequitable distribution of health care resources.

The ANC's sudden appreciation of the health crisis provided us with an opportunity to develop and apply arguments about health and human rights to policy development, an integral part of our work since 2004 when we began to prioritise research and advocacy on the state's duties in relation to health care services.

In part, this work has been based on the understanding that unless the systemic faults in the health system are fixed, the long-term sustainability of programmes – such as the ARV treatment programme – will be at risk. In addition, the ALP believes that government's obligations flowing from section 27 of the Constitution should not be left in abstract, but instead turned into tangible guidelines for policy-making and its implementation.

In early 2008, the ALP participated in two separate – albeit linked – ANC processes: Adila Hassim was invited to be a member of an internal ANC committee set up to investigate and make recommendations on the introduction of a system of National Health Insurance (NHI); and the ALP participated as an organisation in a more public process – hosted by the DBSA – to develop a "road-map" for health reform for the next government. These processes, and their uncertain outcomes, are summarised in the chapter on health sector reform in this review.

In early 2009, our Board of Directors agreed that the ALP should intensify its focus on health and human rights. This is necessary because our experience thus far reveals that few people responsible for the management of health service provision, whether in the public or private sector, understand the reach of the Constitution and its impact on their work – how it defines the contours for the management of the health system and particularly the duty to plan and oversee budgets appropriately.

Compounding this problem is the fact that across the political spectrum, from the privately owned health sector to the trade unions, an ideological approach to health exists and is vigorously defended. This type of approach seeks to bend the facts about the failings of health service delivery into a predetermined framework, ignoring complexity and avoiding nuance. Instead of seeking practical solutions to difficult problems, policy reform advocates from both the left and the right look for quick fixes and easy-blames.

But where we differ with the ideologues is in how we reach that goal – we focus on formulating a pragmatic approach that seeks to build consensus wherever possible and harness the resources and capacity that reside within both public and private sectors to advance the public interest.

For example, the growing inequality between the public and private health sectors has led to calls for the abolition of medical schemes, as if by doing so it will be easier to solve the underlying causes of the public health system's decay. But while an NHI system might appear equalising and thus politically radical, in and of itself it provides no substitute for ensuring effective management, accountability, transparency and appropriate resource allocation and oversight in both the public and private sectors.

The ALP has been consistent in its full support for the principle of health equity, which is based upon constitutional entitlements and the resultant duties imposed upon all funders and providers to ensure that there is universal access to quality health care services regardless of ability to pay. But where we differ with the ideologues is in how we reach that goal – we focus on formulating a pragmatic approach that seeks to build consensus wherever possible and harness the resources and capacity that reside within both public and private sectors to advance the public interest.

The politics of AIDS: undying denialism

In our previous review we heralded the adoption of the NSP and the end of AIDS denialism. In particular, we saluted Nozizwe Madlala-Routledge – at that time the Deputy Minister of Health – for her outspoken attempts to break with denialist mantras: by volunteering for a public HIV test; by talking about the epidemic as a crisis; by working openly with the TAC; and by promoting access to ARV treatment. However, soon after the former Minister's return to office in June 2007, Madlala-Routledge was ordered to stop speaking publicly on HIV and AIDS and to lower her profile.

For a few months, the conflict between the former Minister and her deputy simmered behind the scenes. But in July 2007, it broke to the surface following Madlala-Routledge's "unauthorised" visit to Frere Hospital in the Eastern Cape and her description of conditions at the hospital as a "national emergency". This led to senior officials in the DoH colluding in the manufacturing of charges against her for travelling to an international AIDS vaccine conference without presidential consent. On 8 August 2007, the eve of National Women's Day, former President Mbeki dismissed her after she had turned down his request that she resign.

The public controversy surrounding her dismissal marked a turning point in the politics of South Africa and the ANC. For the first time, a senior ANC official disputed the official denial of the health crisis, and stood her ground against the President – citing her duties of principle, truth and respect for the Constitution. On 12 August 2007, the former Deputy Minister told her side of the story in a press conference broadcast live on radio. In explaining her views of her constitutional duties, Madlala-Routledge exposed the lies of former President Mbeki and his Minister of Health.


Teaching with discipline and love
Meet America's classy first lady
The Times
Mbeki 'must account for 330 000 deaths'

Despite the earlier rapprochement with the government, the context demanded that the ALP and TAC speak out publicly in defence of the former Deputy Minister – pointing out that the former President had fired the wrong person and that his actions violated the spirit, if not the letter, of his constitutional powers to hire and fire members of his Cabinet. The ALP and others set up a special campaign fund to assist Madlala-Routledge with legal and other costs arising from her dismissal. But despite the furore surrounding the firing, former President Mbeki's position in the ANC – at that point – seemed secure: a special edition of his notorious weekly online letter in *ANC Today* was dedicated to justifying his actions.

With her nemesis now out of the picture, Tshabalala-Msimang attempted to reconsolidate her strength. However, because of the active role of the former Deputy President as chairperson of SANAC and leader of government's response to HIV and AIDS, the former Minister had to be more circumspect in public. But behind the scenes, she continued to act to undermine the NSP. Under her watch, the residue of AIDS denialism continued to be seen and felt throughout the country:

- German vitamin salesman Matthias Rath, whose arrival on South Africa's shores had been facilitated by AIDS denialists holding senior positions in government, continued to engage in his damaging activities. The TAC – with assistance from the ALP – challenged Rath on a number of fronts. Most importantly, the Legal Resources Centre (LRC) – acting on behalf of TAC – filed an application in the Cape High Court that aimed to stop Rath and get the DoH properly to enforce the Medicines and Related Substances Act 101 of 1965 against him.
- In a groundbreaking judgment handed down on 13 June 2008,[2] Justice Zondi prohibited Rath and his cronies from carrying out clinical trials without Medicines Control Council approval, as well from making false statements in respect of his products. In addition, he found that the state had failed to enforce its own legislation, despite the positive obligations the Constitution places on it. Interestingly, government chose not to appeal. As Rath did not prosecute his appeal timeously, it lapsed.
- In late 2007, the ALP and TAC continued to campaign for the PMTCT protocol to be brought in line with international good practice. Despite the Constitutional Court's 2002 decision in the *TAC* case clearly permitting such a development, Tshabalala-Msimang continued with her disingenuous claim that the judgment proscribed such a change. In accordance with SANAC's earlier recommendations, the revised protocol was eventually approved in late January 2008. It was reported that the former Minister cast the only dissenting vote at the National Health Council (NHC).
- The issue of PMTCT – in particular implementation of the revised protocol – was also raised by TAC at its meeting in March 2008 with the ANC's newly elected Deputy President and Secretary-General. At this meeting, the two senior ANC leaders spoke frankly of the obstacle represented by Tshabalala-Msimang. But despite this and the ANC's public disavowal of AIDS denialism, as well as strong statements about its commitment to tackle HIV made at its 52nd National Conference in Polokwane in December 2007, state-sponsored denialism was neither rooted out nor condemned. At times it seems as if party ties are more important than party policies, with the Constitution being the last thing on anyone's mind.
- Peggy Nkonyeni, the Member of the Executive Council (MEC) for Health in KwaZulu-Natal (KZN) and one of Tshabalala-Msimang's strongest provincial allies, colluded with her department in early 2008 in instituting disciplinary proceedings against Dr. Colin Pfaff on trumped-up charges of misconduct. As a doctor at Manguzi Hospital in KZN's rural north, Pfaff was "guilty" of using donor funds to implement an improved PMTCT protocol before the NHC had officially approved the changes.

Nkonyeni's fight with Pfaff – and later with his colleague Dr. Mark Blaylock – was drawn out through much of 2008. The ALP's role in providing Pfaff and Blaylock with legal advice and support is detailed in chapter 2 of this review. The combination of ALP interventions, TAC advocacy and investigative reporting by bodies such as the Health-e News Service eventually caused the MEC to back off. But by then, much irreparable damage had already been done – both to the doctors' careers and their patients' rights of access to health care services. Pfaff and Blaylock no longer work at Manguzi Hospital.

2. *Treatment Action Campaign and Another v Rath and Others* (12156/05) [2008] ZAWCHC 34; [2008] 4 All SA 360 (C) (13 June 2008)

In attacking Pfaff and Blaylock, Nkonyeni not only abused her position by issuing unlawful instructions to provincial health officials, but also wasted limited health department resources by commissioning an official – but unexplained – enquiry into the doctors' conduct. This was despite the fact that Pfaff and Blaylock had been forthright in declaring the source of their funds and the life-saving services they were providing to pregnant women and their children. According to one of the doctors, a member of the investigating team made it plain that the enquiry was not interested in whether their actions had saved lives or were in accordance with good medical practice, but only with whether they had broken unspecified "rules" by accepting a donation of medicines. Predictably, and despite requests made by the ALP, the results of the enquiry were never made public.

Tragically, Nkonyeni's denialist-inspired attacks on public sector doctors were nothing new. In May 2008, a similar case regarding political intimidation and abuse of power by another senior ANC politician went to trial.

Tragically, Nkonyeni's denialist-inspired attacks on public sector doctors were nothing new. In May 2008, a similar case regarding political intimidation and abuse of power by another senior ANC politician went to trial. At issue was the 2001 dismissal of Dr. Malcolm Naude because of his support for an NGO that had been providing ARV drugs – post-exposure prophylaxis (PEP) – to rape survivors in the Nelspruit area. In its decision in *Naude v MEC for Health, Mpumalanga*,[3] the Labour Court found that Naude's dismissal was directly related to the exercise of his freedom of conscience and was therefore automatically unfair.

Sibongile Manana, the MEC for Health in Mpumalanga at the relevant time, did not testify. Instead, she relied on a range of government officials to present lies and misrepresentations on her behalf. For example, Acting Justice Musi held that Mantwa Mnisi – the former MEC's legal advisor – was "also a very unreliable witness who tried everything to sugar coat [Manana's] words and deeds and if needs be at the expense of her own integrity."[4]

In confirming that a doctor "has a duty to adhere to professional ethical norms" and that "the dismissal of a medical practitioner for acting in accordance with the dictates of his or her professional ethics is … arbitrary and illegitimate", Acting Justice Musi held as follows:

> Ethical rules of a profession are part of the self-regulatory mechanisms that many professions set for their members. Ethical rules are normally objective moral codes or standards that members of a profession must abide. Those rules must be respected and obeyed. Ethical rules are the religious rules of a profession. Failure to observe those rules normally spells doom for the transgressor. If a member of that particular profession does not abide by those rules he/she risks being declared unfit to be a member of that profession.[5]

In awarding Naude R100 000 in compensation, the judgment described the former MEC as "tyrannical and dictatorial in her management style", further noting that "[h]er unrelenting opposition to [the NGO] and the supply of ARVs would not even allow her to make a concession for rape survivors who are children." In short, "[t]hose who opposed [Manana] became victims of her wrath."[6] Like Drs. Pfaff and Blaylock, Dr. Naude no longer works for the provincial department that seemed intent on forcing him out of service.

Some might argue that the ALP's successful use of the law and human rights in these cases is proof of the value of the Constitution and the efficacy of courts as arbiters of disputes. It is true that the ALP and its partners have scored important victories against abuses of public power. But what is

3. *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (JS331/2004) [2008] ZALC 158 (21 October 2008), which is discussed in further detail in chapter 2 below.
4. At paragraph 90
5. At paragraph 107
6. At paragraph 93

worrying is the pattern of largely unchecked government misconduct that emerges from these cases, casting serious doubt on the executive's respect for the rule of law.

First, as Acting Justice Musi found, government officials seem to have no compunction about lying before courts. Second, the former President and many members of his Cabinet and party seem to attach little value to judicial findings of unconstitutional behaviour (at least on issues such as these). For example, the two villains in the cases described above were both promoted. Nkonyeni was elected provincial treasurer of the ANC in KZN in November 2008. Manana was redeployed to the National Assembly. More recently, she was rewarded for wrecking Mpumalanga's health system by being made a member of the ANC's influential health and education committee.

The impression is that despite senior ANC leaders' frequent claims that they respect the independence of the judiciary, the rule of law and the Constitution, the requirements of constitutional governance have not been internalised into the workings of the ruling party. Instead, another set of rules – patronage and party loyalties – appears to have greater importance. Given the blurring of lines between party and state, this is cause for concern. For as the following section shows, the Constitution and its requirements have also not been internalised by many of the country's governance structures.

Ending 14 years of illegality in the SANDF

On 17 May 2008, a settlement between the South African Security Forces Union (SASFU) and the SANDF sought to bring to an end the latter's practice of mandatory HIV testing and the consequent blanket exclusion from employment, promotion and external deployment of all those who tested positive. This case, which ended when the settlement became an order of court, is described in detail in chapter 1. It brought to a climax 15 years of ALP lobbying, advocacy and litigation to end unfair discrimination in the workplace.

But within two weeks of the High Court's order, the Chief of the Army – Lieutenant-General Solly Shoke – defiantly told a newspaper that the SANDF could not appoint "sickly people": "Soldiers are not ordinary citizens. … Their discipline and reliability should never come into question." Unfortunately, his comments reflected a broader pattern – ignorance of legal duties arising from the Constitution and obliviousness to sound advice – that started before the litigation commenced, was evident during it, and continues till this day.

The Department of Defence could have established the medical facts about HIV infection and applied them objectively to the real requirements of service in the SANDF, stripping it of the machismo and comic-book exaggerations about military service that accompany defence forces worldwide.

The practice of mandatory HIV testing began before the advent of the Constitution. Indeed, the ALP first drew attention to concerns regarding the constitutionality of the practice in a letter written to Ronnie Kasrils – then the Deputy Minister of Defence – as far back as 1994. Although the SANDF is expressly excluded from the scope of ordinary labour legislation, it must abide by the Constitution and its provisions such as the rights to equality and fair labour practices.

The constitutional concern should have been relatively simple to address. The Department of Defence could have established the medical facts about HIV infection and applied them objectively to the real requirements of service in the SANDF, stripping it of the machismo and comic-book exaggerations about military service that accompany defence forces worldwide. But this did not happen. Instead, the ALP's concerns would take over 14 years to address.

Over these years, the ALP sought to engage the SANDF in various ways – through on/off litigation on behalf of a number of affected individuals (some of whom eventually died or gave up), as well as through officially established processes to examine the policy. The matter was raised with the Minister of Health, the Minister of Defence and the Deputy President. But all this was insufficient to dislodge a policy that ultimately appeared to be rooted in the private views and prejudices of a handful

of senior generals in the South African Military Health Services. Its continuation depended upon their privileged access to the most senior SANDF officials who do not understand HIV infection and disease, and their control over a large part of the military apparatus.

Xenophobia and the rights of refugees and asylum seekers

In any given year the ALP develops a set of activities and objectives. In so doing, however, the organisation knows that many things that will take up its time and energy cannot be planned for in advance. This was particularly the case with the outbreak of murderous xenophobia in April 2008, as well as various related events in the months leading up to the outbreak of violence countrywide.

The ALP's work on these issues began in earnest in January 2008 following a late night police raid on the Central Methodist Church in downtown Johannesburg, home to many refugees and asylum seekers. The police claimed that the raid was carried out as a crime prevention measure. This does not, however, explain why it was conducted at midnight or the degree of police brutality involved. In reality, it was an early manifestation of xenophobia. In response, the ALP rallied together with organisations such as the LRC, Lawyers for Human Rights (LHR) and Médecins Sans Frontières (MSF) to assist the foreign nationals who had been hurt and/or detained in the raid and who needed access to medical care.

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In particular, the ALP worked under the leadership of the LRC to secure the detainees' release, to ensure that they were able to access appropriate medical care and to prevent their deportation. After several days, most of the detainees were released. However, the delay in releasing a group of them and the callousness of the magistrate towards their plight led the LRC – with support from LHR, MSF and the ALP – to bring an urgent application in the Johannesburg High Court for their release.
In comments made from the bench before granting the order, Acting Justice Sutherland expressed shock at the contents of the founding affidavit, remarking that it reminded him "of grotesque abuses of what legal professionals dealt with 20 years ago." He continued:

> I do recall former President Mandela when he addressed the nation having said that "never again never again" will we have to deal with the characteristics of the apartheid regime. The irony, a decade after democracy is to witness in courts in our country such brutal and cruel treatment of human beings. This really is a shame.

In ordering that a complaint be referred to the Magistrates' Commission, Acting Justice Sutherland apologised to the applicants for the way they had been treated by the magistrate:

> It is inconsistent with the functioning of the court to treat humans as pieces of paper. It is inconsistent with the role of the judiciary to have an eye on the clock so at 4pm unprocessed people get slotted into the next day's lot.

As a result of this work, and particularly the demonstrable benefits of the collaboration between different human rights organisations, the ALP decided to establish an informal forum to pursue issues regarding migrants' rights: their right of access to health care services and the duty it places on the state to budget and plan, particularly in the context of the crisis in Zimbabwe and the presence of millions of Zimbabweans in South Africa. A detailed memorandum on these issues was prepared for SANAC and tabled at a plenary meeting on 4 March 2008.[7]

7. The report, which was also submitted to Parliament, is available online at *http://www.pmg.org.za/files/docs/080326sanac.pdf*

In addition, the ALP prepared and presented a joint submission with the TAC on the Refugees Amendment Bill [B 11—2008], focusing in particular on ensuring access to health care services for refugees and asylum seekers. This area of work, was interrupted by a more immediate challenge – in May 2008, foreign nationals became the target of vicious attacks in townships across Gauteng. These attacks, which eventually resulted in many deaths, spread to Cape Town within weeks.

In Cape Town, the ALP's Fatima Hassan and the national and Western Cape offices of the TAC were at the heart of coordinating a civil society response that aimed both to stop the attacks and to provide humanitarian relief to survivors. This involved monitoring, ensuring the provision of medical care, putting pressure on UN agencies and the provincial and city governments to respond appropriately, and legal action to compel the authorities to respond. This intervention lasted for nearly six months and placed extreme pressure on both the ALP and the TAC.

Both organisations have been widely commended for their response. For example, in the report of an enquiry into allegations of the inadequacy of the response of the UN High Commissioner for Refugees (UNHCR) to the xenophobia, the UNHCR's Inspector General's office noted as follows:

> A few individuals and organisations were very prominent within South Africa society, with a high degree of credibility and respect based on their earlier successes in advocating for the rights of people – including the AIDS Law Project with regard to the rights of people living with HIV/AIDS. The Project has a long tradition of active advocacy, including mass protests and litigation to achieve their aims. As a result of their efforts, and those of others, refugees and asylum seekers now have equal access to anti-retroviral drugs in the country. In the context of the response to the xenophobic violence, these organizations were assessed by the inquiry panel to have played a key role, especially at the very initial stages of the displacement, including the provision of coordination amongst civil society actors in the Western Cape province. This was highly appreciated by all stakeholders, including the displaced.[8]

The politics of law

The outbreak of xenophobic violence had many causes. Social services are strained by the refugee crisis, unemployment is extremely high in the worst affected communities, and the law and the Constitution appear to offer little succour or protection to the poorest of the poor. In the face of social insecurity, communities are prey to criminal and xenophobic elements that exploit and take advantage of desperate people's legitimate fears and concerns.

However, the failure of the Constitution in such circumstances largely reflects a failure of government – and not the possibilities that inhere within it. This introduction has illustrated how a daily disregard of the Constitution already infects many of our government departments. However, another defining characteristic of the 18-month period under review has been the swirling of politics around the law.

Faced with growing social and political challenges, government and the ANC sometimes seem to have only just begun to grapple with what it really means to be accountable under a supreme law. In particular, it seems that politicians and bureaucrats baulk at the role that courts must play when they fail to fulfil their responsibilities in terms of the Constitution and the law generally.

Much sound and fury has been catalysed by the travails of ANC President Jacob Zuma. A deliberate strategy exists among his supporters in the tripartite alliance to suggest that law is being manipulated for political ends – by institutions such as the National Prosecuting Authority (NPA) and the judiciary. Those in the ANC who are uncomfortable with this strategy – and there are many – keep quiet.

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8. *Report of the Ad Hoc Inquiry into UNHCR's Response to the 2008 Xenophobic Crisis in the Republic of South Africa: Report to the High Commissioner for Refugees*, 14 January 2009, at paragraph 83 (on file with the ALP)

It is quite possible that the law was or is being used against Jacob Zuma for political ends. But the most reasonable and responsible approach that could be taken by the ANC leaders, and Zuma himself, would be to disentangle politics from law and let the "facts" of the allegations against him be subjected to objective processes of law. Acting in this way would be to display trust in the Constitution and the courts.

Instead, whilst casting dangerous aspersions on the law, the ANC and its president have simultaneously used the law to tie the Zuma issue in knots. An ethical approach – and once upon a time the ANC was known for its ethics – would be to admit that the *prima facie* case against Zuma requires his temporary withdrawal from politics and the rapid testing of the allegations in court.

Unfortunately, this has not been the route followed. Instead, the law is being used to wage war on the law, with some judges being pitted against others. Senior ANC leaders have raised questions about the independence of the judiciary, describing certain judges as "counter-revolutionary". The judiciary is certainly not above reproach. Indeed, the Supreme Court of Appeal has itself expressly recognised that "[t]he judicial cloak is not an impregnable shield providing immunity against criticism or reproach."[9] However, as Chief Justice Pius Langa and others have also pointed out, criticism should be fair and tempered. Comments such as those of the ANC overstep the bounds of appropriate criticism of the judiciary.

Legitimate criticism is different from slander, the effect of which is to sow uncertainty and confusion about law amongst millions of people, eroding the foundations that underpin the rule of law, particularly institutions such as the Constitutional Court. One may be forgiven for thinking that this is preparing "the masses" for the day when the ANC overtly or covertly undermines the basic structure and foundational principles of the Constitution.

Despite these dangers, there have also been positives. In July 2008, for example, Deputy Chief Justice Dikgang Moseneke addressed an ALP seminar on health systems reform where he gave an important speech on the right to health. Then in December 2008, Justice Edwin Cameron – the founder of the ALP – was finally appointed to the Constitutional Court. With judges of the calibre of Moseneke and Cameron, all is far from lost, and much will now depend upon what civil society does to deepen social commitment to the Constitution.

It might be asked what relevance this has to health and AIDS? The answer, however, is straightforward.

The work of the ALP – and many similar organizations – is *a priori* based on an acceptance of the Constitution, the separation of powers between Parliament, the executive and the judiciary, and the duties of politicians and civil servants that flow from the Constitution. If this premise proves false, then the possibility of using the Constitution and the independent institutions that it created to advance human rights will fall away.

The work of the ALP – and many similar organizations – is a priori based on an acceptance of the Constitution, the separation of powers between Parliament, the executive and the judiciary, and the duties of politicians and civil servants that flow from the Constitution.

In such a situation, the testing of reason, evidence and ethics against the notion that people have inherent rights and their governments corresponding duties, will give way to power cliques and intrigue. It is thus perhaps ironic that at the same time as the United States tries to re-discover its democracy, South Africa is in danger of losing its. In such a situation, the possibilities for the work of the ALP will fall away, even whilst the need for human rights will remain or get stronger.

Cyril Ramaphosa has recently written that "[o]ur Bill of Rights has changed the character of the battle for justice rather than ending it." According to him, "courts remain sites of intense contestation in which the moral and political conflicts of our society continue to be fought out."[10] With this in

9. *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) at paragraph 39
10. *Foreword to Dennis Davis and Michelle le Roux, Prececedent & Possibility: the ab(use) of law in South Africa (Double Story Books: Cape Town, 2008)*

Trudie Harrison (Mosamaria AIDS Ministry) and S'khumbuzo Maphumulo (ALP attorney) working to end the Free State ARV treatment moratorium in February 2009 (Reproduced with kind permission Health-e News Service)

mind, the ALP plans to pay attention to these issues in the year ahead. It is hoped that by the time we release our next review our elected leaders will have chosen wisely.

Conclusion

As we look forward, it is not yet clear whether the next period will be one of opportunity or threat or both. The removal of President Mbeki has brought AIDS denialism to an end. A new Minister of Health – with a track record of personal integrity, passion and commitment to constitutionalism – has been appointed. The ALP has largely completed its litigation agenda and established far-reaching jurisprudence regarding non-discrimination, equality and health service delivery.

But on the other side of the scale are burgeoning problems in the health system itself, problems that might accurately be described as the legacy of the Mbeki/Tshabalala-Msimang axis of AIDS denial. These problems will test even the best health minister because they will challenge the capacity and commitment of government to finance the constitutional promise of health care, as well as to mop up the tragedy of AIDS denial by not shirking from its financial cost.

A harbinger of this was the crisis resulting from the moratorium imposed in November 2008 on new patients being initiated onto ARV treatment in the Free State, which is explained in more detail in chapter 3 of this review. This unlawful moratorium was introduced with the ease of a pen's sweep across a page, but probably cost thousands of lives. Not only did it test the DoH, but it also tested whether civil society can remain vigilant, alert and able to deploy its own resources against unconstitutional governance.

So, with these uncertainties in mind, the ALP will intensify the focus of its work on human rights and health sector reform, hoping that the application of the Constitution can deliver for the right of access to health care services generally what is has thus far delivered for the right of access to ARV treatment in particular. It is against this yardstick that our future work will have to be measured.

Chapter 1

Ending unfair discrimination in the military

By Adila Hassim

> [T]he devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. They must be protected against prejudice and stereotyping. We must combat erroneous but nevertheless prevalent perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive.
>
> Ngcobo J in *Hoffmann v South African Airways*[1]

Eight years after its *amicus curiae* intervention in the *Hoffmann* case, the ALP succeeded in bringing the same reasoning to bear against the HIV testing policy of the South African National Defence Force (SANDF). This argument was at the heart of the complaint that the ALP had been pursuing for close to 14 years in order to bring an end to unfair discrimination against people with HIV in the military.

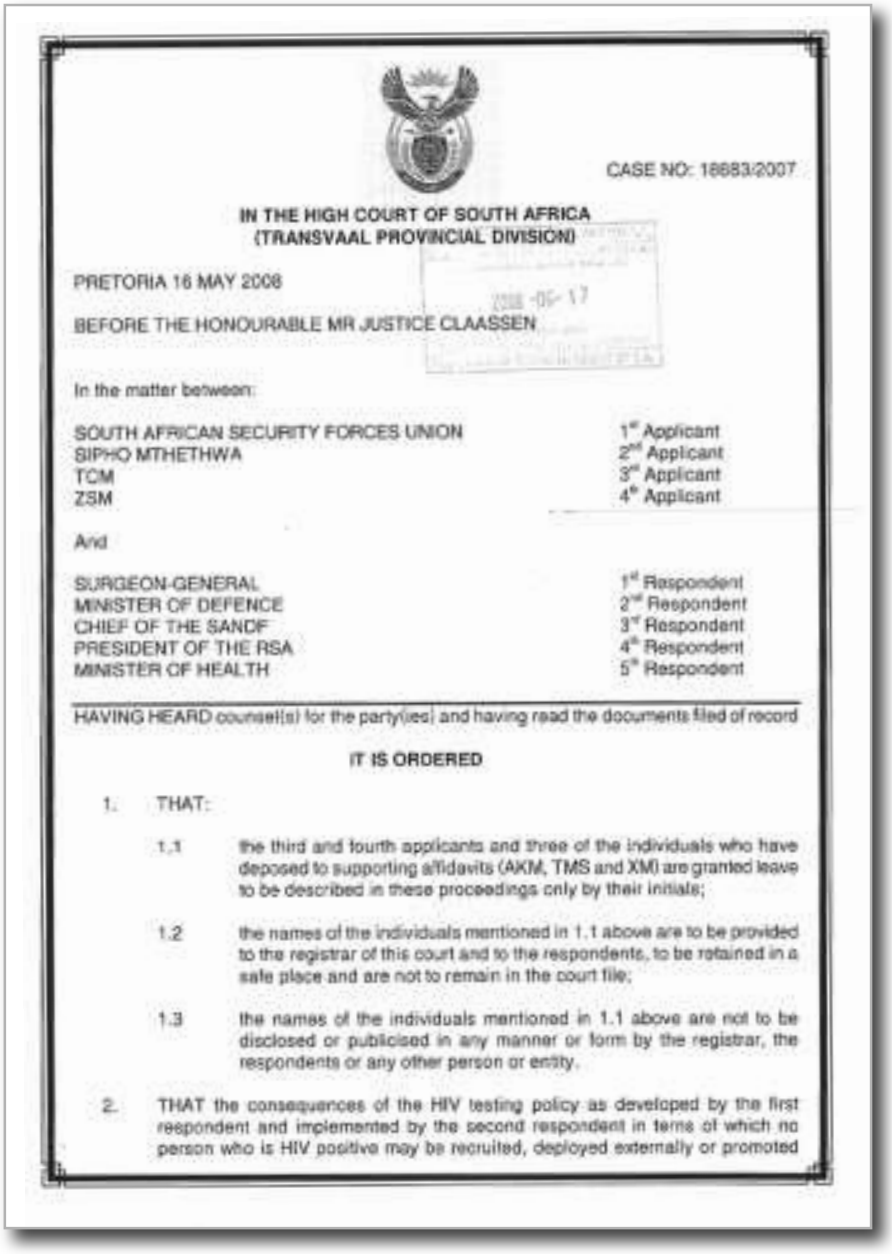
In our last review, we chronicled that the ALP, acting on behalf of South African Security Forces Union (SASFU) – a military union – and several individuals, had just filed papers in the Pretoria High Court in the case of *South African Security Forces Union and Others v Surgeon-General and Others*.[2] At issue was the SANDF's policy that people with HIV are by definition unfit to be employed in the military, regardless of their actual state of health or category of work for which they would be responsible.

Hence TCM, a trumpeter who had passed his auditions admirably and had been offered a job in the airforce band, was later told that he could not be employed due to his HIV status. Similarly Sipho Mthethwa, an ex-Umkhonto we Sizwe (MK) soldier who spent his time in the SANDF training soldiers for external deployment, was himself denied the opportunity of deployment and promotion due to his HIV status.

1. 2001 (1) SA 1 (CC) at 35
2. Case number 18683/07, High Court of South Africa (Transvaal Provincial Division) (settlement made an order of court on 16 May 2008)

The case eventually came before court on 15 May 2008. Despite persisting in their opposition, the respondents initiated settlement talks shortly after the close of the applicants' oral argument on the first day of the hearing. Later that day, they also informed us that the President – the fourth respondent who was cited in his capacity as Commander-in-Chief – had withdrawn his opposition to the case. After further consultation, the parties reached a settlement on largely similar terms to the relief sought in the notice of motion.

In essence, the respondents – the Surgeon-General, the Minister of Defence, the Chief of the SANDF and the President[3] – conceded that the HIV testing policy was unconstitutional on five separate grounds, and that the SANDF bears a duty urgently to remedy the situation. This was made an order of court by Justice Roger Claassen in the following terms:



CASE NO: 18683/2007

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA 16 MAY 2008

BEFORE THE HONOURABLE MR JUSTICE CLAASSEN

In the matter between:

SOUTH AFRICAN SECURITY FORCES UNION	1st Applicant
SIPHO MTHETHWA	2nd Applicant
TCM	3rd Applicant
ZSM	4th Applicant

And

SURGEON-GENERAL	1st Respondent
MINISTER OF DEFENCE	2nd Respondent
CHIEF OF THE SANDF	3rd Respondent
PRESIDENT OF THE RSA	4th Respondent
MINISTER OF HEALTH	5th Respondent

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS ORDERED

1. THAT:

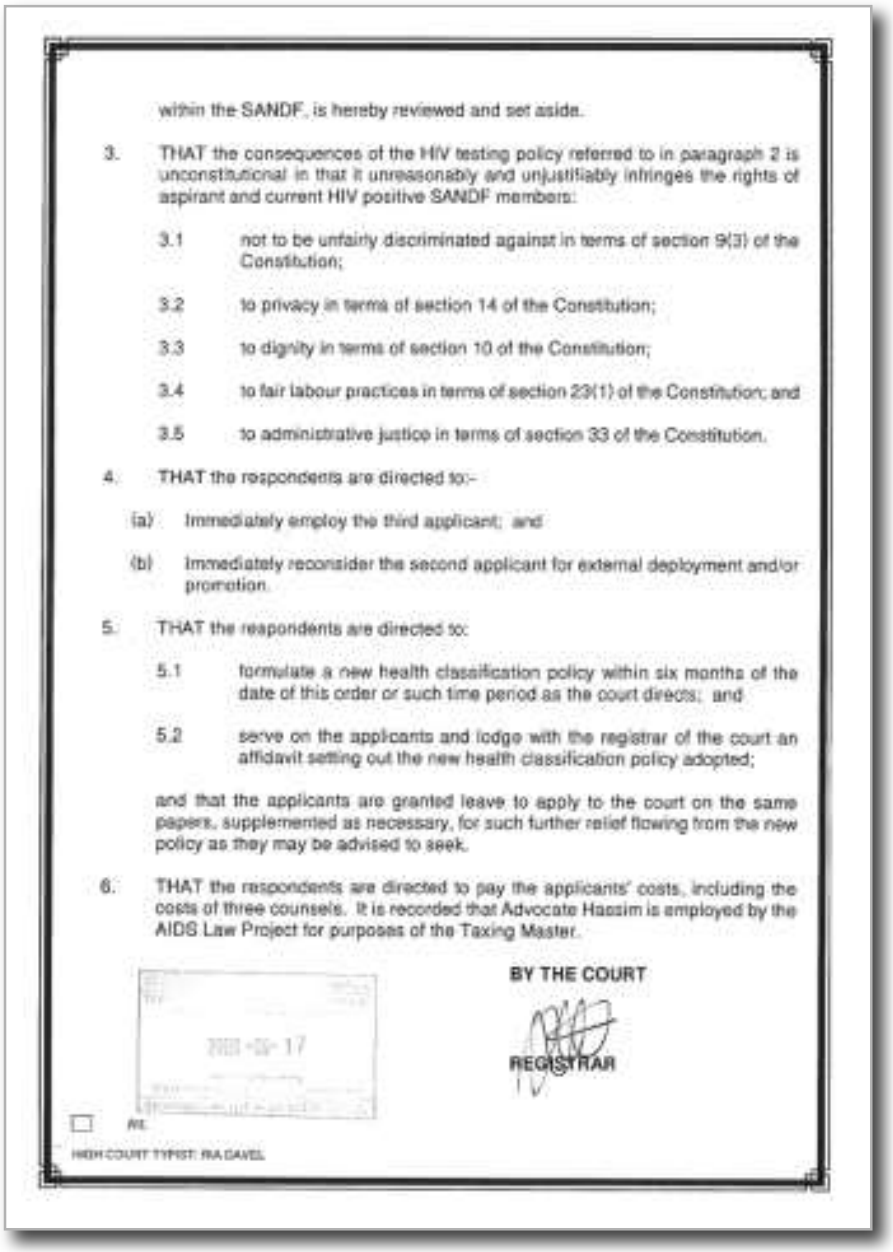
1.1 the third and fourth applicants and three of the individuals who have deposed to supporting affidavits (AKM, TMS and XM) are granted leave to be described in these proceedings only by their initials;

1.2 the names of the individuals mentioned in 1.1 above are to be provided to the registrar of this court and to the respondents, to be retained in a safe place and are not to remain in the court file;

1.3 the names of the individuals mentioned in 1.1 above are not to be disclosed or publicised in any manner or form by the registrar, the respondents or any other person or entity.

2. THAT the consequences of the HIV testing policy as developed by the first respondent and implemented by the second respondent in terms of which no person who is HIV positive may be recruited, deployed externally or promoted

3. No relief was sought against the Minister of Health, who was the fifth respondent.



within the SANDF, is hereby reviewed and set aside.

3. THAT the consequences of the HIV testing policy referred to in paragraph 2 is unconstitutional in that it unreasonably and unjustifiably infringes the rights of aspirant and current HIV positive SANDF members:

3.1 not to be unfairly discriminated against in terms of section 9(3) of the Constitution;

3.2 to privacy in terms of section 14 of the Constitution;

3.3 to dignity in terms of section 10 of the Constitution;

3.4 to fair labour practices in terms of section 23(1) of the Constitution; and

3.5 to administrative justice in terms of section 33 of the Constitution.

4. THAT the respondents are directed to:-

(a) Immediately employ the third applicant; and

(b) Immediately reconsider the second applicant for external deployment and/or promotion.

5. THAT the respondents are directed to:

5.1 formulate a new health classification policy within six months of the date of this order or such time period as the court directs; and

5.2 serve on the applicants and lodge with the registrar of the court an affidavit setting out the new health classification policy adopted;

and that the applicants are granted leave to apply to the court on the same papers, supplemented as necessary, for such further relief flowing from the new policy as they may be advised to seek.

6. THAT the respondents are directed to pay the applicants' costs, including the costs of three counsels. It is recorded that Advocate Hassim is employed by the AIDS Law Project for purposes of the Taxing Master.

BY THE COURT

REGISTRAR

AR

HIGH COURT TYPIST: RA DAVEL

The arguments

At the outset, the applicants clarified that this case was not about the relevance of testing for HIV in the military context but rather the consequences of the HIV testing policy. In particular, they strongly objected to the denial of employment, external deployment and promotion of people with HIV in the SANDF without an individualised health assessment.

Through expert scientific and medical evidence, the applicants sought to refute the assumption that all people with HIV are unfit for military service, showing that it is based on stereotypes and therefore amounts to unfair discrimination. In addition, they argued that the policy is unconstitutional in that it violates the rights to fair labour practices, just administrative action, privacy and dignity.[4]

4. The full set of papers is available at *http://www.alp.org.za/index.php?option=com_content&task=view&id=43&Itemid=85*.

The applicants led evidence by several experts on the following key issues:[5]

- The nature and disease progression of HIV – the evidence shows that with advances in knowledge about treatment, HIV has become medically manageable.
- The effect of antiretroviral therapy (ART) on disease progression and viral replication – the evidence demonstrates that viral replication can be halted with the use of ART, allowing most people to continue normal, active lives.
- The drug regimen has drastically improved so that the pill burden may be reduced to one pill once a day.
- Neurological impact – the evidence shows that there is no causal relationship between early stage HIV infection and neuropsychological impairment.
- The effect of stressors (such as climate or combat) – the manner in which stress is handled differs from person to person, meaning that there is nothing inherent in HIV that renders people less able to cope with stress.
- Risk to others – statistically, the risk of HIV transmission from an injured soldier to another is extremely low, especially when universal precautions (e.g. surgical gloves) are used. In fact, soldiers face a vastly higher risk of death and injury from combat itself.
- Analogous physically demanding work environments – despite exposure to extremely harsh conditions in the mining sector (such as excavating up to three kilometres underground, noise, falling rocks and extreme heat), miners with HIV remain healthy with appropriate treatment and care

In addition to this evidence, the applicants demonstrated that similar HIV testing policies in foreign militaries (such as Namibia, Australia, Canada and Mexico) were also found to be unlawful. As a result of legal challenges, these countries were forced to adopt individualised health assessments rather than blanket exclusions on the basis of HIV status alone. In the context of the Australian case, Justice Michael Kirby had the following to say:[6]

> In the case of disability (including HIV), knowledge of the causes and approaches to the reasonable adjustments envisaged by the Act progresses over time. ... In the circumstances of the employment to which the Act is addressed, it would be as well, in my respectful opinion, if the courts were to avoid the preconceptions that lie hidden, and not so hidden, in tales of Tuscan soldiers wallowing in blood (however vivid may be the poetic image), or in descriptions of regimental life and soldierly duty in the heyday of the British Empire (however evocative may be the memories). ...
>
> [I]n other countries where the military is subject to civil power, constitutional norms or applicable principles of human rights enable and oblige the courts to scrutinise such decisions strictly and, when authorised by law, to decline to give them effect. ...

5. The ALP is very grateful to the generous expert assistance that was provided on a pro bono basis by Prof. Leslie London, Dr. Francois Venter, Dr. Shuaib Manjra, Dr. Brian Brink, Prof. Robert Schooley, Prof. Trefor Jenkins and Mr. Richard Elliot.
6. *X v The Commonwealth* 200 CLR 177 at 230-1 (internal citations omitted)

> Generally speaking, the courts in the United States and Canada have been consistent and principled in recent years in their insistence that the civil norms of non-discrimination reach into the military and must be obeyed by them. This is certainly what happened when challenges were mounted in the courts against unjustifiable and universal exclusions expressed in terms of race, the exclusion of women from military institutions or from combat duties, and the automatic discharge of military personnel on grounds of their sexuality. ...
>
> The universal exclusion of recruits on the grounds of their HIV status is simply the latest in a succession of such grounds.

In addition to the foreign precedents, the UN policy regarding HIV testing in its peacekeeping forces is clear. In December 2000, the Executive Director of the Joint United Nations Programme on HIV/AIDS (UNAIDS) established the UNAIDS Expert Panel on HIV Testing in UN Peacekeeping Operations to analyse and formulate a comprehensive position on the issue of HIV testing. The Panel reached a number of conclusions, including that voluntary counselling and testing should be made available to peacekeeping personnel within a context of non-discrimination and access to care and support; and that eligibility for recruitment to peacekeeping operations should be based on *"fitness to perform the duties of peacekeepers during deployment"*, to be determined by an individualised medical assessment.[7]

The respondents' written argument skirted these legal arguments and evidence. In the main, the SANDF attempted to show that the military context is unique. However, no credible evidence was led to contradict the conclusions of the applicants' experts.

At the heart of the respondents' case was their claim that while the policy did amount to discrimination, such discrimination was fair. Yet at the same time, in their replying affidavit they conceded that the policy did *not* constitute "a fair balance between force health protection, combat-readiness and gainful employment of a soldier in a hostile environment".[8]

The SANDF's case was replete with such anomalies. Consider the following:

- The SANDF implemented a policy that contradicted Cabinet resolutions taken in 1997 that prohibited the exclusion of individuals with HIV from the military.
- The South African Air Force has a policy where pilots, who are required to maintain high levels of physical and mental fitness, are allowed to fly regardless of HIV status on condition that they satisfy certain objective health criteria.
- The Surgeon-General's policy on non-discrimination in respect of members with HIV was not implemented.
- While the SANDF argued that members with HIV are by definition not "combat-ready" and therefore not deployable abroad, they nevertheless deployed members with HIV to remote areas within South Africa's borders.
- For several years, the SANDF itself had been conducting a review of its policy of not deploying members with HIV externally. Indeed, the South African Military Health Service (SAMHS) published a Position Paper in 2005 that proposed external deployment of soldiers with HIV who have a CD4 count above 350.

There was no attempt by the SANDF to explain any of these anomalies. Instead, right up until the day of the hearing, they persisted in the argument that the policy was rational, fair and constitutional.

7. Report of UNAIDS Expert Panel on HIV Testing in UN Peacekeeping Operations at 3528 – 3549
8. Answering Affidavit, volume 23, page 2663, paragraph 269.14

The Zimbabwe Study

By far the most troubling aspect of the SANDF's legal defence was their introduction of and reliance upon a study entitled "The Type, Intensity, Frequency and Duration of Exercise Causes Rapid Deterioration in HIV Seropositives (HIV-SP) Leading to Opportunistic Infections and an Early Onset of Full Blown AIDS (FBA) During Military Training".[9] The study was introduced into evidence by Dr. Martin Rupiya, at the time a Project Manager for the Military Aids Project at the Institute for Security Studies in Pretoria.

According to this study, 120 Zimbabwean soldiers were divided into two groups on the basis of HIV status. They were then observed during a six-month period of intensive training. At the end of the period, it was concluded that the type, intensity, frequency and duration of the training resulted in reduced immune response, opportunistic infections and death amongst those soldiers with HIV.

The applicants' experts trenchantly criticised the study. In his affidavit, Prof. Trefor Jenkins, one of the foremost ethicists in South Africa, compared it to experiments "conducted by Nazi doctors during the Second World War" and stated that it was "akin to thawing people after they have been frozen in order to see what temperatures the human body can withstand."[10] In a similar vein, Prof. Leslie London compared it to the infamous Tuskegee syphilis experiment.[11]

London went further. He explained that the study was not methodologically sound because it exhibited no compliance with standard scientific research methods. It was undated, not peer-reviewed, sought to prove a pre-conceived hypothesis, did not provide vital information (such as the criteria for selecting the participants, their general state of health and whether they were on ART) and the statistical findings in some instances were so implausible as to be impossible.[12]

That the Surgeon-General, who is responsible for military health policy, could place his reliance on such evidence is surprising. Military health policy (as with all medical policies) is meant to keep pace with advances in medical and scientific knowledge. Perhaps more importantly, the Surgeon-General is entrusted with the development of health policy in a manner that accords with the highest ethical standards.

After the order

With this order, the ALP laid to rest the last remaining major HIV-related employment discrimination case. The court order is a precedent that fortifies the legal framework that seeks to protect the equality rights of people living with HIV. However, as we have long understood, a groundbreaking precedent does not automatically change the lives of those who are vindicated.

Knowing this, the ALP continued to engage with the Department of Defence (DoD) in relation to implementation of the court order, including making an offer to assist with the redrafting of the health classification policy. The ALP suggested that the South African National AIDS Council (SANAC) and its expert technical task teams are ideally placed to advise on a new policy because of the wide-ranging expertise resident within such


News

PRETORIA NEWS

HIV+ soldiers fight for their rights in SANDF

Court hears exclusion policy is unconstitutional, offensive, demoralising

9. Unpublished and undated paper authored by SMT Mudambo Kaka, T Marufu and A Tafirenyika
10. Affidavit of Trefor Jenkins, page 3405 of the record
11. Affidavit of Leslie London, pages 3311-3312 of the record
12. Ibid

structures. Indeed, one of the very purposes of SANAC is to advise on policy development in relation to HIV and AIDS.

The ALP's offer was simply ignored. Instead, the SANDF drafted a revised health classification policy that it made available in November 2008. After consultation with experts and its clients, the ALP provided comments on this draft. At the time of writing, the parties had agreed on a process in terms of which the revised policy would be finalised.

In line with the court order, TCM took up his position in the airforce band on 1 August 2008. Regrettably however, Sipho Mthethwa has yet to obtain any relief. The ALP has raised this in correspondence and meetings with the SANDF. The official justification for his non-deployment is that the SANDF deploys force structure elements and not individuals. In addition to being inconsistent with reports that the ALP has received from SANDF members, this position is in any event in violation of the court order insofar as it relates to Mthethwa. The ALP will continue to press for his external deployment.

At the time of writing, the parties had agreed on a process in terms of which the revised policy would be finalised.

The ALP has also received reports of ongoing acts of unfair discrimination against SANDF members with HIV. On 10 September 2008, the ALP obtained 12 affidavits from serving members of the 6 South African Infantry ("SAI") Battalion in Grahamstown. We later obtained a further set of 13 affidavits from members of the 4 SAI Battalion in Middelburg. Collectively, these affidavits confirm that:

- SANDF members with HIV continue to be discriminated against solely on the basis of their HIV status by being excluded from external deployment; and
- The Officers-Commanding of the relevant battalions consistently state that the order of the court will not be implemented unless and until they receive instructions from the DoD to deploy members with HIV.

These affidavits were sent to the SANDF on 12 September 2008 and 3 December 2008 respectively. At the time of writing this review, the SANDF had yet to abide by the court order and discontinue this unconstitutional practice.

Conclusion

This case illustrates the strengths and limitations of litigation. Despite years of attempted engagement and consultation with the DoD, it was not until the ALP seriously pursued legal proceedings that we were able to make any progress in resolving the constitutional concerns regarding the SANDF's HIV testing policy.

Prior to this, apparent advances turned out to be fleeting and disregarded by the DoD – such as a May 1997 letter from then Deputy Minister of Defence Ronnie Kasrils informing the ALP that "Cabinet agreed that being HIV positive should not exclude any candidate from appointment in any section of the Public Service including the Departments of Defence, of Safety and Security and of Correctional Services".[13]

Attempts over the years to get clarity from the DoD regarding the implementation of the HIV testing policy were also unsuccessful. It was only through litigation that the DoD was forced to respond to the ALP in writing. Even then the letters preceding litigation went unanswered by the DoD – the ALP first received a written response in the form of an answering affidavit.

13. This did not apply to certain job categories that were said to require extreme physical fitness.

It was also through litigation that TCM was employed as a trumpeter in the military. The litigation finally resulted in the SANDF and DoD conceding that the policy was unlawful and required urgent revision. This would not have been the case in the absence of litigation.

Yet the full implementation of the court order remains elusive. Why this should be the case, given that the order was an agreement between the parties, is inexplicable. For Sipho Mthethwa and many others, whether chefs, drivers, logisticians or soldiers, unfair discrimination on the basis of HIV status is still felt.

While the ALP is committed to trying to resolve this situation, there is little that can be achieved if we continually meet resistance from the SANDF. For this reason, we are of the view that SANAC should be tasked with the responsibility of ensuring that a fair and lawful HIV testing policy is finally implemented in the military.

End HIV discrimination in the army

Help us to protect workers' rights

The SANDF has, until the end of November, to come up with a policy on health assessments, which does not discriminate against soldiers or employees living with HIV.

The South African Security Forces Union (SASFU) won a court order on 16 May 2008 from the Pretoria High Court, protecting HIV positive workers' rights. This order included provisions that:

- The South African National Defence Force (SANDF) can no longer automatically exclude HIV positive people from recruitment, external deployment and promotion
- The SANDF must amend its policy on health classifications within six months. This new policy should allow for individual health assessments of the actual state of fitness of each SANDF soldier or employee, instead of the SANDF rejecting people on the basis of their HIV status.

This court order was granted against:

- The Surgeon-General of the South African Medical Health Services,
- The Minister of Defence,
- The Chief of the SANDF, and
- The President of the Republic of South Africa.

SASFU took this dispute to court to challenge the unfair consequences of the former SANDF policy. This policy on HIV testing provided that no person who tested HIV positive should have been recruited, deployed outside South Africa's borders or promoted beyond the rank of non-commissioned officer.

Chapter 2

Litigation and legal services

By Brian Honermann and Jonathan Berger

Over the past 18 months, the ALP has continued to use litigation and provide other legal services to protect and advance the rights of people living with HIV, as well as to achieve other key objectives set out in our mission statement. In this regard, we continue to push for increased access to health care services, for greater accountability on the part of government officials, and for health care workers – particularly in the public sector – to be permitted and enabled to provide the most appropriate medical care in the circumstances.

As always, access to justice, particularly for those living with HIV, has also remained a key theme of our work in general. However, as chapter 4 explains, the ALP decided in 2007 to close down its paralegal unit and to focus instead on building capacity within the broader law and human rights sector to deliver such services. As our previous 18-month review explained:

> [T]here 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 ... 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.[1]

Several of the cases considered in this review have been on the ALP's books for an extended period of time. We are happy to report that almost all of these cases have been successfully resolved. At the time of writing, only one case – *Treatment Action Campaign v Minister of Correctional Services and Another* – remains live. Judgment in this case, which deals with a request for access to a report of the Judicial Inspectorate of Prisons, was delivered on 30 January 2009. Three weeks later, the state filed its application for leave to appeal. As is explained below, the ALP already has a copy of what we have long referred to as the "MM report".

This chapter focuses on three categories of cases: professional ethics, dual loyalties and political intimidation; holding the state to account; and ensuring access to health care services. In addition, it

1. At page 38

considers a number of important matters that do follow these trends. It does not address two central aspects of the ALP's work over the period under review: the struggle to bring the protocol dealing with the prevention of mother-to-child transmission of HIV (PMTCT) in line with international good practice; and the successful challenge to the military's HIV testing policy. Instead, these matters are addressed in Mark Heywood's introduction and chapter 1 respectively.

Professional ethics, dual loyalties and political intimidation

In our previous review, we reported that Dr. Costa Gazi – who, whilst working at Cecilia Makiwane Hospital in East London in 1999, was disciplined for publicly criticising a former Minister of Health – had been successful in his appeal before a full bench of the Pretoria High Court. In this review, we report on three similar matters involving public sector doctors who have suffered the consequences of exercising their right to freedom of conscience. The first case involves Dr. Malcolm Naude and his lengthy legal battle to overturn his unfair dismissal from service at Rob Ferreira Hospital in Nelspruit, Mpumalanga. The second and third matters involve Drs. Colin Pfaff and Mark Blaylock and their battles to withstand political intimidation at Manguzi Hospital in rural KwaZulu-Natal (KZN).

Naude v MEC for Health and Social Services, Mpumalanga

Naude's case arose as far back as 2001, shortly after he was appointed a junior medical officer at Rob Ferreira Hospital. At that time, the Greater Nelspruit Rape Intervention Project (GRIP) – another ALP client – was resisting eviction from the hospital by the then MEC for Health, Sibongile Manana. GRIP had found itself in the MEC's firing line because of the post-exposure prophylaxis (PEP) services it was providing to rape survivors.[2] So too did the hospital's superintendent, Dr. Thys von Mollendorff, who had given GRIP permission to do so.[3]

Dr. Malcolm Naude, formerly of Rob Ferreira Hospital, Nelspruit, Mpumalanga

Naude's "sin" was to depose to an affidavit in support of GRIP's attempts to remain in the hospital and provide the much-needed services. Manana – a disciple of the former Minister of Health who had also publicly stated opposition to the use of anti-retroviral (ARV) medicines – took swift action. Whilst on a leave of absence to work in the UK to pay off his student debt, Naude was dismissed. It would take almost seven years for his case to come to trial in the Labour Court.

In response to his claim of unfair dismissal, Manana claimed that her department had not employed Naude after his term as a community service doctor ended. This was contrary to the established practice in Mpumalanga in terms of which community service doctors were routinely offered full-time employment, in large part because of the difficulties in recruiting and retaining medical personnel in the province. In his judgment delivered on 21 October 2008,[4] Acting Justice Cagney Musi found that the MEC's witnesses were not credible in their denials that Naude had been employed, finding that he had indeed been dismissed for exercising his freedom of conscience:

> [Naude] took a principled stance against the [MEC's] policy not to give rape survivors access to ARVs. [The MEC] did not even want doctors to prescribe ARVs for patients in order for them

2. At the time, the public sector did not provide PEP services. Importantly, GRIP also provided much needed counselling services to rape survivors, as the hospital only had four counsellors in its employ. As a funded not-for-profit organisation, GRIP did not charge for its services.
3. Dr von Mollendorff was dismissed for allowing GRIP to operate within the hospital. While he was ultimately successful in challenging his dismissal, this happened only after he left the public sector's employ.
4. *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (JS331/2004) [2008] ZALC 158 (21 October 2008)

> to purchase it, with money that GRIP sourced, at a private pharmacy. Von Mollendorff was requested, no instructed, to convey this to the doctors at [Rob Ferreira Hospital]. He informed the doctors but also requested them to act according to their consciences.
>
> [Dr Naude's] stance against the [MEC's] irrational policy in favour of his conscience and professional ethics was in my view the determinant and, dare I say, the only reason why he was dismissed. His dismissal was therefore automatically unfair.[5]

Children paid heavy price for former MEC's ARV refusal

Shocking testimony at dismissal hearing

BY POLOKO TAU

Former Mpumalanga Health MEC Sibongile Manana was scolded last on preventing ARV provision to rape survivors that she made an exception for children.

Anita Kleinsmidt, a former attorney for the Aids Law Project, told the Joburg Labour Court yesterday that attempts to convince Manana otherwise were met with strong opposition.

Intervention Project (Grip) to vaccate the premises of Rob Ferreira Hospital, where it ran its programme.

Grip funded doctors' prescriptions for ARVs, known as post-exposure prophylaxis, at a time when the Mpumalanga Department of Health opposed the prescribing of the drugs, which are said to lessen the chances of rape survivors contracting HIV.

"We then asked the MEC to make exception for child rape

SIBONGILE MANANA

didn't want ARVs on hospital premises."

Kleinsmidt believes Nkosi

The Star (15 May 2008)

Naude was awarded R100 000 in compensation. After returning from the UK in early 2002 he continued studying and thereafter entered private practice. In January 2009, Naude left for a six-month contract in Australia. He is planning to return to South Africa thereafter.

Pfaff, Blaylock and the MEC for Health in KwaZulu-Natal

In his introduction entitled "No easy walk to constitutional governance: the small matter of a health system", Mark Heywood describes the politics surrounding the MEC's attacks on Colin Pfaff and Mark Blaylock. This chapter sets out the facts of the two cases, as well as the steps taken by the ALP and others to protect the doctors. Tragically, as indicated in Heywood's introduction, the 2008 cases show that the only thing we learn from history is that we learn nothing from history. Despite "losing" the battle to discipline Pfaff and Blaylock, Nkonyeni's attacks resulted in the two doctors being driven out of KZN.

Dr. Mark Blaylock, formerly of Manguzi Hospital, Umkhanyakude District, KwaZulu-Natal (Reproduced with kind permission Health-e News Service)

Pfaff's case began in 2007, when – as Chief Medical Officer at Manguzi Hospital– he began to implement an improved PMTCT protocol using donor funds he had secured from a UK-based not-for-profit organisation. The key elements of the improved protocol, which are now an integral part of accepted Department of Health (DoH) policy, had not yet been implemented in the public sector outside of the Western Cape. Instead, the PMTCT programme was still making use of its initial protocol adopted as far back as 2001, at a time when the programme was restricted to two "pilot sites" per province.

Manguzi's PMTCT programme did not initially make headlines. Instead, Pfaff, Blaylock and their dedicated staff quietly went about their business of deliver-

5. At paragraphs 107 and 110

ing quality health care services in this rural part of the province. Towards the end of 2007, however, their programme caught the MEC's attention. Like Manana, Tshabalala-Msimang and Mbeki, Nkonyeni also opposed the use of ARV medicines. She too was determined to undermine their use and promote traditional medicines and other unproven remedies instead.

Like Manana, Tshabalala-Msimang and Mbeki, Nkonyeni also opposed the use of ARV medicines. She too was determined to undermine their use and promote traditional medicines and other unproven remedies instead.

For his efforts, Dr Pfaff was threatened in early 2008 with disciplinary action – for "wilfully and unlawfully" rolling out "dual therapy" for the purposes of PMTCT. The widely used misnomer – the intervention is prophylactic rather than therapeutic – refers to the use of two ARV medicines for PMTCT, ordinarily AZT from 28 weeks of pregnancy until delivery, as well as a single dose of nevirapine during labour and an additional dose of nevirapine for the newborn within 72 hours of delivery. The old protocol is limited to a dose of nevirapine for both mother and child.

As if to up the ante, Nkonyeni visited Manguzi Hospital on 12 February 2008 and told hospital staff the following:

> AZT is toxic and must be controlled. Dual therapy has not yet been agreed upon. … We have a problem with doctors who work in rural areas. They do not care about people. It is all about profit, not about caring for people. … I have heard that ARVs have bad side effects, especially [in] children.

Upon hearing of the MEC's speech attacking him, Pfaff and their colleagues, Blaylock removed a picture of her from the hospital wall. In anger and disgust, he placed it in the bin, an action for which he was subsequently required to apologise.

Although the ALP did not formally represent Pfaff in defending the disciplinary charges, it assisted him throughout his ordeal – drafting crucial letters to provincial health authorities on his behalf, providing legal advice and ensuring that his case received significant public exposure. Under pressure from many sides, Nkonyeni's department eventually withdrew the charges against him. But despite this, the MEC dispatched a task team to Manguzi Hospital to "investigate the conduct" of Pfaff and Blaylock.

Nkonyeni used her budget speech of 29 April 2008 to "justify" her decision to appoint the task team "as a matter of urgency".[6] After claiming that she had "been informed by media reports and managers and staff in the department of other allegations of racism, ill treatment of staff and abuse of departmental facilities by Dr Blaylock and some doctors operating at some … rural facilities", she proceeded to abuse her constitutional privilege to defame Blaylock by setting out the allegations in some detail.

While Pfaff was interrogated about the provision of HIV-related services at Manguzi Hospital, the task team questioned his colleague about the issues that Nkonyeni had already identified in the KZN Legislature. Blaylock denied the allegations, all of which were subsequently rebuked in a statement issued by his colleagues at the hospital. To date, the task team's report of its "investigation" has not been made public.

Acting on behalf of Pfaff and Blaylock, the ALP filed a complaint in early May 2008 with the South African Human Rights Commission (SAHRC). The complaint requested the SAHRC urgently to investigate whether the MEC's conduct – including the appointment of the task team – violated the rights of Pfaff, Blaylock and those who are reliant on Manguzi Hospital for their medical care. In particular, it asked the SAHRC to investigate the impact of the conduct on:

6. The budget speech is available at *http://www.kznhealth.gov.za/speeches/budget2008.pdf*

- The right to have access to health care services;
- The right to basic health care services for children;
- The right to just administrative action;
- The right to freedom of expression;
- The right to have one's dignity respected; and
- The right to fair labour practices.

Nkonyeni furnished her response to the complaint on 25 August 2008.[7] It makes for interesting, albeit disturbing, reading. Importantly, the MEC admitted that disciplinary action was initiated against Pfaff "for implementing dual therapy prior to the national policy being approved for rollout throughout the country." In addition, she confirmed that "Blaylock was charged following the incident where he allegedly threw an official photograph of [her] in the dustbin in the presence of patients and other health care professionals."

Whilst reminding the SAHRC that "discipline is an administrative function … which is implemented … at institution level and supported centrally at head office", Nkonyeni nevertheless admitted that she "only intervened where it was incumbent upon [her] to do so and where [she] was of the opinion that the behaviour of one or both of the doctors posed a risk to the treatment and lives of public health care users at Manguzi Hospital." She expressly denied exceeding her legal authority, claiming instead that her interventions were statutorily required.

Nkonyeni's response is replete with gratuitous attacks on the ALP, seeking to cast significant doubt on our bona fides. More serious, however, are the elements of AIDS denialism that pepper the document. At no point has anyone made out a case that Pfaff and Blaylock were providing patients with inappropriate or substandard care. To the contrary, they were providing the best care possible in the circumstances without imposing any additional burden on public sector resources. Yet, on more than one occasion, the MEC's response raises the spectre of threats and risks to the health of public sector users.

The ALP filed its reply on 2 December 2008. At the time of writing, some three months later, the SAHRC has yet to make any public pronouncements on its investigation. Unfortunately, this is not the first time the SAHRC has taken its time to investigate HIV-related matters. If and when its report is finalised, it will be too late for the two doctors at the centre of the controversy. At the time of writing, Pfaff was no longer working in Manguzi, but had opted instead to work for a not-for-profit service provider in Mpumalanga. Blaylock, who has left both KZN and the country, is now based in Ghana.

The aftermath

Recent developments in the Free State suggest that the conduct of the former Minister of Health and a few of her provincial counterparts – Manana and Nkonyeni in particular – has given rise to the development and festering of a climate of fear amongst health care workers in the public sector. As we noted in a report on the ARV treatment moratorium in the Free State that lasted from November 2008 to February 2009 and resulted in at least 30 additional deaths each day:[8]

> Few public sector doctors working in the provinces from which we have received complaints are willing to go on the record. Most are fearful of retributive action being taken against them, as happened to public servants such as Drs Pfaff and Blaylock (2008 at Manguzi Hospital, KwaZulu-Natal), Dr Costa Gazi (1999 at Cecilia Makiwane Hospital, East London) and Drs

7. The ALP has a copy of the response on file.
8. Information provided by Dr. Francois Venter, president of the Southern African HIV Clinicians Society.

> Naude and von Mollendorff (2001 at Rob Ferreira Hospital, Nelspruit, Mpumalanga). We believe that many more complaints and much better information would be available if health care workers were actively encouraged to speak out about their concerns in the public health facilities in which they work.[9]

Shortly before its public release, the report was sent to Barbara Hogan, the new Minister of Health. In a statement that was to have been read out on the Minister's behalf at a civil society meeting in the Free State on 26 February 2009, Hogan addressed these concerns head on.[10] In contrast to her predecessors, who had sought to prevent health care workers from speaking out, the new Minister praised those who had done so:

> I would particularly like to applaud health care providers and community organisations who raised the alarm about these issues. By doing so, you are working in the public interest and I wish to encourage you to continue to alert us to these issues through the appropriate channels without any fear of reprisal. My door is open and you are welcome to contact my offices at any time. ...
>
> ... At the National Health Council later this week, I will be requesting all provincial health departments to alert us to any stock-outs and shortages that they may face BEFORE any stock-outs occur. However, the continued vigilance of health care providers and members of [civil] society in drawing attention to problem areas as and when they occur is crucial to providing early warnings so that we can intervene timeously.[11]

Holding the state to account

While ensuring a rights-based response to the HIV epidemic and access to health care services remain at the core of the ALP's work, much of our work seeks to locate health sector reform within a context informed by the Constitution and the broader obligations it places on the state. As chapter 3 shows, this increasingly means a dedicated focus on issues of governance and accountability.

Treatment Action Campaign v Minister of Correctional Services and Another

MM,[12] an inmate at Westville Correctional Centre (WCC) and an applicant in the case that resulted in the Minister of Correctional Services and others being compelled to ensure access to ARV treatment at WCC, died in August 2006.[13] MM's medical records showed that he was HIV positive, but had only been put on ARV treatment a few weeks before his death. According to government's own ARV treatment guidelines, MM should have been initiated on ARV treatment in November of 2003 – some 32 months earlier.

Shortly after MM's death, the TAC – a co-applicant in the WCC case – requested that the Judicial Inspectorate of Prisons (JIOP) conduct an investigation into MM's death and other related matters at WCC. This investigation took place and was completed in or around December 2006. According to the JIOP, its report on the investigation ("the MM report") was sent to Ngconde Balfour – the Minister of Correctional Services – shortly thereafter. Our repeated efforts – as TAC's legal representatives – to gain access to the MM report were unsuccessful.

As there is strong evidence to suggest that MM's death was caused by the delay in accessing ARV treatment, the TAC felt compelled to invoke legal proceedings to secure a copy of the MM report. After

9. *Antiretroviral Treatment Moratorium in the Free State: November 2008 – February 2009*, available at *http://www.alp.org.za/pdf/PressReleases/ConsolidatedReport_FreeState_final20090211.pdf 10*
10. The meeting was postponed until a later date
11. The statement is on file with the ALP
12. We use the initials MM in order to protect the privacy of his family.
13 An update on this case is provided below.

the provisions of the Promotion of Access to Information Act 2 of 2000 ("PAIA") were exhausted, the TAC instructed us to file an application on its behalf in the Pretoria High Court to compel the Minister to act.

Amongst other things, the TAC requested the court to direct the Minister to ensure that it is provided with a copy of the MM report. No order was sought against the JIOP, the second respondent in the case. The JIOP did not oppose the application and was cited only for its interest in the matter. The matter was argued in the Pretoria High Court on 11 December 2008.

Court orders Balfour to release report to TAC

FRANNY RABKIN

THE Treatment Action Campaign (TAC) on Friday won a two-year battle to force Correctional Services Minister Ngconde Balfour to release a report on the death of an HIV-positive inmate at the Westville Correctional Centre in Durban.

The inmate, referred to as MM to protect the privacy of his family, died of AIDS in prison in August 2006 after being denied early access to antiretroviral treatment.

Judge Brian Southwood of the Pretoria High Court ordered the minister to hand over unedited, electronic and hard copies of the report. Balfour, who was not present in court, was also ordered to pay all punitive costs.

According to the TAC, the prisoner's condition was such that he should have been on antiretrovirals from November 2004.

MM's medical records showed that he was HIV-positive and a few months prior to his death a medical report said he suffered "bleeding piles, painful rashes on both ears, fungal infections, TB, body rash, general itchiness, oral thrush, lesions, penile sores, mouth sores, septic sores on knees and painful feet".

But he was put on treatment only three weeks before he died and after a court ordered this.

It was for this reason, and because of other deaths in the prison, that the TAC requested the Judicial Inspectorate of Prisons to investigate "culpability" in his death. The inspectorate said it sent its report to the department in December 2006.

Southwood ordered that the report be given to the TAC, saying that Balfour and the department's conduct in dealing with the TAC's application was "reprehensible".

JUSTICE DELAYED: **Jonathan Berger of the AIDS Law Project says it shouldn't have taken two years to get access to the report on an HIV-positive man who died in jail.**

Balfour had opposed the application largely on technical grounds. Southwood said it was "disturbing that (Balfour) has relied on technical points which have no merit and instead of complying with its constitutional obligations has waged a war of attrition in the court".

He also dismissed the minister's assertion that he didn't have the report, saying it was "so far-fetched and untenable that it must be rejected".

Southwood also rejected the argument that to deliver the report would be disclosing confidential personal records.

MM's father had said in an affidavit that he objected to access being granted and that it was "an invasion of privacy of the deceased and our family. As a family we would like the deceased's soul to rest in peace."

But Southwood said MM's name had not been disclosed and there was no evidence that there would be an unreasonable disclosure of personal information.

Jonathan Berger of the AIDS Law Project, which represented the TAC, said: "There was no violation of anyone's rights and there is also a broader public interest in identifying if negligence on the part of any correctional service official was responsible for MM's death."

He said the AIDS Law Project was pleased that it was vindicated but it left a "bit of a sour taste, that it took two years to get access".

Berger said the Promotion of Access to Information Act was being used by some government departments to deny people access to information – rather than to facilitate access, which was its purpose.

Correctional Services spokesman Manelisi Wolela said the department "noted the judgment" and had instructed its lawyers to study it, after which a decision on how to proceed would be taken.

The Weekender (31 January 2009)

In his judgment of 30 January 2009,[14] handed down just a few days shy of two years since the TAC first requested the document, Justice Brian Southwood harshly rebuked the Minister for effectively forcing the TAC to litigate. In ordering the MM report to be provided to the TAC, he commented on the shameful manner in which Balfour and his department had handled the request for the document:

> The papers in this case demonstrate a complete disregard by the Minister and his department of the provisions of the Constitution and PAIA which require that records be made available. There is no indication in the first respondent's papers that the Department complied with its obligations under PAIA at any stage. The information officer allowed both the request and the internal appeal to go by default and did not consider it necessary to provide the applicant or the court with any reasons for doing so. Only after proceedings were instituted did the Minister and the Department attempt to justify the failure to hand over the report and then on spurious grounds. It is disturbing that the first respondent has relied on technical points which have no merit and instead of complying with its constitutional obligations has waged a war of attrition in the court. This is not what is expected of a government Minister and a state department. In my view, their conduct is not only inconsistent with the Constitution and PAIA but is reprehensible. It forces the applicant to litigate at considerable expense and is a waste of public funds.[15]

On 10 February 2009, the ALP received a copy of the MM report from the JIOP. Despite being requested by the TAC to "investigate culpability in the death of 'MM'",[16] former Inspecting Judge Nathan Erasmus relied almost exclusively on the evidence supplied by the TAC and an in-house "investigation" conducted by the Department of Correctional Services (DCS). Most disturbingly, there is no evidence in his report to suggest that he consulted any independent experts at any point. In considering why it took 32 months for MM to be initiated on ARV treatment, the former inspecting judge appears to have relied largely – if not exclusively – upon explanations provided by DCS and its officials.

It is therefore unsurprising that no one in the department is held to account. Instead, some blame is apportioned to McCords Hospital, a not-for-profit private institution that assists the state by putting public sector patients onto ARV treatment. Without any evidence to support his conclusion that McCords was "supposed to treat [MM]", and notwithstanding the fact that the facility is not a designated public sector site, Justice Erasmus nevertheless refers to it as the "designated hospital". Implicit in his finding is that McCords is – at least in part – responsible for the delay.

Amongst others, the MM report also raises the following concerns:

- The report provides no evidence to support its finding that MM's "medical condition was also of such a nature that the onset of treatment was not possible due to secondary infections."
- The report correctly identifies the issue as whether MM would have survived had he been initiated earlier. But instead of addressing the 32-month delay head on, it suggests that "the onset of other infections" or other "external factors" may have "prevented the introduction of a treatment regime". There is no evidence to suggest that this was put to an independent medical expert.

14. *Treatment Action Campaign v Minister of Correctional Services and Another* (18379/2008) [2009] ZAGPHC 10 (30 January 2009)
15. At paragraph 36
16. Annexure AA2 to the founding affidavit, at paragraph 1

- The report correctly notes that MM "would have at least qualified for ARV treatment during 2003." But, once again, it raises the possibility of ill health being responsible for non-initiation: MM "was constantly ill with opportunistic diseases that could have delayed the activation of ARV treatment." Again, no evidence is provided for this conclusion.
- Despite being prescribed, the report suggests that ARV treatment may not have been the solution to MM's "myriad of medical problems", and that "without fully investigating the connection between the collective diagnosis and treatment ... [i]t is impossible to conclude whether any of the actions or omissions above contributed to the ultimate death."

Nevertheless, Justice Erasmus's report concludes with four important recommendations: first, HIV/AIDS in prisons must be addressed as a matter of urgency; second, government agencies and departments must co-operate with and assist DCS to deal with HIV/AIDS in prisons; third, access to ARV treatment and HIV testing services in prisons must be promoted as a matter of urgency; and fourth, medical parole provisions are not working and should be revisited.

So where to from here?

As already mentioned in the introduction to this chapter, Balfour has applied for leave to appeal against Justice Southwood's judgment and order. If leave to appeal is granted, whether by the High Court, Supreme Court of Appeal or the Constitutional Court, the matter will not be argued until after the 22 April 2009 elections. By then, the current Minister – against whom findings were made in his official capacity – may very well be out of office. Further, we already have a copy of the report, which by then will have been made public, further rendering the appeal academic.

Of greater concern than any potential appeal is the reality that PAIA, which is meant to give effect to the constitutional right of access to information, is frequently used by many government departments to frustrate access

Of greater concern than any potential appeal is the reality that PAIA, which is meant to give effect to the constitutional right of access to information, is frequently used by many government departments to frustrate access – to delay the provision of information for months and years without explanation and few ramifications. At most, courts may hand down a punitive costs order, as Justice Southwood did in this case. Ultimately, however, this becomes the burden of tax-payers. Unless and until Ministers are compelled to pay themselves, such orders will have no impact on their errant behaviour.

Access to health care services

Ensuring access to health care services remains at the core of the ALP's work. In the period under review, we initiated legal action to address a concern already highlighted in the previous review (MSD), invoked the provisions of PAIA once more (Western Cape budget cuts) and sought to ensure final resolution of two existing cases (WCC and Khayelitsha). These cases, which were all aimed at realising the right to have access to health care services, are discussed below.

Treatment Action Campaign v MSD and Merck

In our previous review, we anticipated filing a new complaint in the second half of 2007 against various patent holders regarding their refusals to license generic drug companies on reasonable terms.[17] After further discussions with Abbott Laboratories, which went some way towards addressing our concerns, we decided only to pursue the matter against US-based Merck & Co. and its local subsidiary MSD (Pty) Ltd. On 6 November 2007, the ALP – acting on behalf of the TAC – filed its complaint with the Competition Commission of South Africa.[18]

17. At pages 31 – 31
18. Case number 2007Nov3328

Prior to filing the complaint, the ALP – once again on behalf of TAC – had engaged with MSD for almost six years regarding the need for it to grant multiple licences on reasonable terms for the local production and/or importation of a range of generic efavirenz (EFV) products. Progress over the years was agonizingly slow:

- MSD first licensed Thembalami Pharmaceuticals to produce stand-alone EFV products in April 2004. Thembalami, a joint venture between South Africa's Adcock Ingram and the South African subsidiary of India's Ranbaxy Laboratories, did not survive long enough to bring any EFV products to market.
- Some time after Thembalami's collapse, MSD licensed Aspen Pharmacare – in July 2005 – on substantially similar terms. Only in February 2008 did Aspen manage to get an EFV product registered by the Medicines Control Council (MCC).
- In late August 2007, three months after the ALP sent a final letter of demand to MSD, a second generic company – Adcock Ingram – was licensed. While TAC welcomed this move, it recognised that this did not address all of its concerns, necessitating the filing of the complaint.

Two thirds of people starting ARV treatment in the public sector take EFV as one of their three drugs. Yet at the time the complaint was lodged, the state was paying far more for EFV than the combined price of the other two drugs in the regimen. Even though several generic companies across the world manufacture a wider range of cheaper EFV products than are produced by Merck, most of these could not be sold in South Africa unless and until such companies were licensed by Merck. Furthermore, there had been at least three stockouts of EFV in southern Africa as a result of supply problems.

The main reason for these three problems is that Merck – through MSD – effectively had a monopoly on the sale of EFV in South Africa. As the exclusive rights holders, MSD and Merck had refused licences to at least two generic manufacturers. While they had granted licences to two local companies, the terms of such licences were unreasonable, with neither company being able to bring generic EFV products to market until early 2008. In contrast, the two companies that had been refused licences had registered generic EFV products with the MCC and could have brought their medicines to market immediately if and when licensed.

The complaint alleged that MSD and Merck were violating the Competition Act 89 of 1998. In particular, it argued that their refusal to license EFV to a sufficient number of generic companies on reasonable terms threatened access to comprehensive treatment for HIV/AIDS by:

- Preventing cheaper generic EFV products from being brought to market;
- Preventing co-formulated and co-packaged ARV products containing EFV and at least one other ARV medicine from being brought to market;[19] and
- Placing the sustainability of supply of EFV products in South Africa under threat because of the risk of stockouts.

TAC's complaint was also aimed at helping to implement the national *HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011* (NSP), which states as follows:

19. Co-packaged products are products which contain two or more drugs in a single blister-pack or package. Co-formulated products are products which combine two or more drugs into a single pill.

> The cost implications of the NSP are large, in some options exceeding 20% of the health budget without considering the costs arising from the effect of the epidemic on hospital and primary care services. In attempting to increase the feasibility of this plan ... [a]ttention should be placed on increasing the affordability of medicines.

Throughout the course of the Commission's investigation, TAC remained open to further discussions with MSD. It publicly stated that it had no interest in protracted litigation, preferring instead for the parties to negotiate a settlement in the public interest. TAC made it clear that if such a settlement could be reached, as was the case in 2003 with GlaxoSmithKline and Boehringer Ingelheim, it would be prepared to withdraw its complaint.[20]

No formal settlement was reached. Instead, MSD acceded to TAC's demands. Thus on 30 May 2008, TAC announced that MSD was no longer acting in an anticompetitive way, paving the way for the market entry of a wide range of affordable EFV products. Based on correspondence between the ALP on the one hand and MSD and the Competition Commission on the other, TAC announced that MSD had:

- Licensed four generic drug companies – two local producers and two locally-based importers – to bring stand-alone EFV products to market;
- Agreed that all four licensees are entitled to bring co-packaged products containing EFV to market;
- Agreed that all four licensees will not unreasonably be refused consent to bring co-formulated products containing EFV to market;
- Agreed that all licensed products can be sold to both public and private sectors in South Africa and ten other southern African countries (Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Mauritius, Namibia, the Seychelles, Swaziland and Zimbabwe); and
- Waived any right to a royalty.

On the basis of these significant developments, the Competition Commission had informed the ALP that there was no reason to refer the complaint to the Competition Tribunal for adjudication. Both the ALP and TAC agreed with this assessment. Because MSD had agreed to grant multiple licences on reasonable terms, which was always the central demand, TAC decided that it too would not refer the matter to the Tribunal. It was of the view that there was no compelling purpose served by referring what by then was largely a historical complaint. Instead, TAC committed itself to ensuring that the reasonable terms of the licensing agreements were appropriately implemented.

The impact of these developments has been profound. In terms of the 2008 ARV tender, for example, the state is now able to procure 600mg EFV tablets – the adult formulation – for less than half the price it secured in the 2004 tender. The same cannot be said in respect of other formulations, largely because of delays in securing MCC registration. On a more positive note, the MCC finally registered the first co-packaged product containing EFV in December 2008 – a product that also contains the fixed-dose combination product of AZT and lamivudine. We trust that additional combination products will soon follow.

20. Information on the complaint against these two companies is available at *http://www.tac.org.za/newsletter/2003/ns10_12_2003.htm*

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

In our last review, we highlighted this case that sought primarily to ensure timely access to ARV treatment for all inmates with HIV at WCC in Durban. As we explained, our settlement talks in the case – which started some time after government began implementing Justice Pillay's original order – had led the ALP and TAC to work closely with DCS and DoH officials in developing and finalising a *National Framework for a Comprehensive HIV and AIDS Plan for Correctional Services*. At the time, all parties appeared to be keen to resolve the case by dealing comprehensively with HIV and AIDS throughout the correctional service system.

Through no fault of our own, the National Framework did not form the basis of a final settlement in the case. Instead, as the review noted, we were "keen to finalise the already agreed-upon National Framework as a sector-specific strategic plan" – to have the substance of the document formally included in official DCS policy. Notwithstanding some degree of optimism on this front, we were nevertheless still concerned about the situation at WCC. We took the view that "[u]nless and until the provision of ARV treatment at WCC [was] indeed done in accordance with the Operational Plan [for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa], as required by the … order of Justice Pillay, the resumption of legal proceedings seemed all but inevitable."[21]

After much deliberation, we decided against going back to court. Amongst other reasons, we recognised that the formal legal process of a supervisory order – which would have involved returning to the Durban High Court for a decision on the reasonableness of government's revised plan for providing ARV treatment at WCC – would not have addressed the fundamental challenge of implementation. Simply put, the court proceedings in question – based on somewhat outdated papers – were not best suited to addressing this concern. In addition, the TAC was actively involved at facility level in solving problems directly with DCS officials.

Amending DCS policy

Despite our decision to focus on the broader policy, movement was slow. In early September 2007, we were asked by a senior DCS official to finalise the National Framework and put it in a form ready for principals to sign – not as a settlement in the case but rather simply as an agreement between the parties. This request was apparently made on behalf of Loretta Jacobus, the Deputy Minister of Correctional Services. Yet the agreement was never signed. Instead, DCS finalised its own *National Framework for the Implementation of Comprehensive HIV and AIDS Programmes for Offenders and Personnel* in October 2007.

On 21 November 2007, we wrote to the Deputy Minister noting that "[w]hile we had hoped for the parties to adopt the [earlier] framework as a written agreement, our primary concern [was] that the substantive issues it addresses … expressly be incorporated into existing DCS policy and programmes." When the parties met on 13 December 2008, we focused primarily on how best to reconcile the two separate documents, with the ALP committing itself first to making written comments on the DCS policy. As we explained in a follow-up letter to the Deputy Minister:

> In particular, these submissions will consider possible areas of conflict between the DCS policy and the task team framework, as well as substantive issues in the task team framework that may not have been addressed – adequately or at all – by the DCS policy. In addition, the submissions will consider aspects of the adopted DCS policy that may need to be strengthened.

At the end of January 2008, the ALP provided detailed comments on the DCS policy. In turn, these provided the basis for further discussions and debates. Over the following five months, the parties narrowed down the areas of disagreement, with the ALP making one final submission on proposed wording at the end of March. In a final meeting held on 24 June 2008, broad agreement was reached on most of the outstanding issues.

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21. At page 26

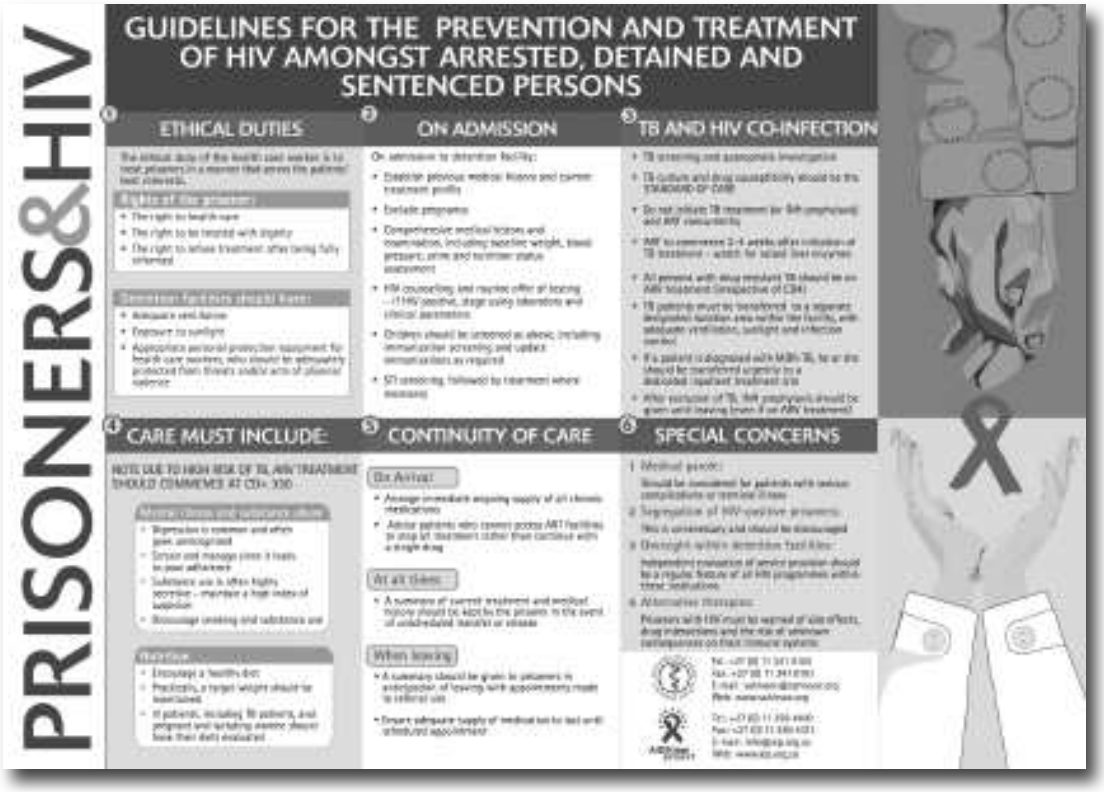
Where agreement could not be reached on the substance of any particular matter, we agreed on the process in terms of which it would be addressed. Importantly, Dr. Nomonde Xundu – at the time a senior health official – committed the DoH "to discussing and debating the relevance of the soon-to-be released Southern African HIV Clinicians Society [(SAHCS)] … guidelines on the prevention and treatment of HIV infection in detention centres."[22]

SAHCS guidelines

The process to develop the guidelines to which Dr. Xundu referred began in early September 2007 when the SAHCS brought together a group of experts to develop a set of guidelines for dealing comprehensively with HIV within prisons and other detention centres in southern Africa. Because of our work at WCC, the ALP's Jonathan Berger was invited to join the group. So too was the director of HIV and AIDS at DCS, who was unfortunately unable to secure the requisite permission.

The guidelines were published in the Autumn 2008 edition of the *Southern African Journal of HIV Medicine*. They "are primarily aimed at promoting best practice for the prevention and treatment of HIV infection and related co-morbidities in detention facilities." In particular, they are intended to:

- Provide guidance to [health care workers] working with prisoners, whether within or outside a detention facility … with a particular focus on their ethical and clinical responsibilities;
- Frame the expectations of prisoners and their families regarding appropriate levels of health care; and
- Guide governments, professional bodies and other organisations involved in the development and implementation of HIV-related policy in respect of prisoners.



22. ALP letter to the Deputy Minister of Correctional Services dated 30 June 2008

While the document is not official policy, "it should nevertheless be considered as current good practice when policy is formulated."

The guidelines were formally released at a press conference at the TB Conference in Durban in early July 2008. In addition, their publication in the journal meant that they were distributed to the thousands of SAHCS members across the region – the vast majority of whom are employed in the public sector. Included in the publication was a full-colour, easy-to-read poster that captures the key elements of the guidelines. The poster was jointly published by the ALP and the SAHCS.

Way forward

In July 2008, Jonathan Berger – who had been leading the ALP's work in this area – went on six months' sabbatical leave. Unfortunately, the member of staff tasked with taking this matter forward failed to do so. At the time of writing, we do not know whether the agreed changes have indeed been incorporated into DCS policy and implemented.

Based on frequent complaints we continue to receive from inmates across the country, we are doubtful that there has been progress in the absence of pressure.

Based on frequent complaints we continue to receive from inmates across the country, we are doubtful that there has been progress in the absence of pressure. Further, there is no tangible evidence to show that DCS has implemented an appropriate monitoring and evaluation (M&E) system to deal with the twin epidemics of HIV and TB. This strongly suggests the need for independent M&E by bodies such as the JIOP and the SAHRC.[23]

One final issue remains: the status of the appeals against two of Justice Pillay's orders.[24] Despite numerous requests to the State Attorney in KZN for information on whether the respondents intend to prosecute the appeals, the ALP has yet to receive any response. Our most recent communication made it plain that we are of the view that the appeals are now deemed to have lapsed, and in the result, we are proceeding to prepare a bill of costs.

Western Cape budget cuts

In late 2007, the Western Cape began implementing the *Comprehensive Service Plan for the Implementation of Healthcare 2010* (CSP). The CSP's intention was to expand access to primary health care by increasing the number of primary health care level beds available throughout the province. To cover the costs of this expansion, tertiary level facilities – including academic training hospitals and specialist units – were to have many of their beds cut. The provincial health department argued that the current structure of the health care system was resulting in the oversupply of costly higher-level secondary and tertiary services at the expense of ensuring access at the primary level.

While the goal of the CSP is admirable, the ALP and TAC were concerned about its implementation and impact over the long term. In particular, we focused on two issues: first, the cutting of tertiary level services had already begun without any corresponding increase in primary level services; and second, the manner in which the CSP was to be implemented threatened to disrupt the necessary balance between the provision of primary, secondary and tertiary level health care services. But before we could act, we needed to ensure that we were in possession of all the relevant facts.

Our early requests for information resulted in official responses demanding that we invoke the provisions of PAIA to apply for access to particular documents. An internal communication, which appears to have been inadvertently included in correspondence with the ALP, indicated that the provincial health department was intent on using PAIA to deny access to as much information as it was able to do. Despite not getting access to everything we needed, our investigations came to a halt when the provincial health department managed to secure an additional R332 million from both national and provincial treasuries. The additional funds allowed the hospitals to halt any further bed cuts and to re-instate many of those that had already been cut.

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23 Such roles for the JIOP and the SAHRC were identified in the negotiated framework that was originally to have formed the basis of a settlement in the case.

24. These relate to the merits of the original case as well as the application for Justice Pillay's recusal.

Treatment Action Campaign and Others v Minister of Health, Provincial Government of Western Cape and Others

Our previous review discussed this case regarding the summary dismissal of 41 striking health care workers in June 2007 and the ALP's and TAC's innovative response focusing on access to health care services. The dismissals – which occurred in the context of a nation-wide public sector strike – were challenged on the basis that they (and not the strike itself) were responsible for the disruption of essential health care services at particular public sector facilities in Khayelitsha. In his order handed down on 26 June 2008, Justice Siraj Desai effectively compelled the respondents "to restore and guarantee the provision of reasonable functioning health services in Khayelitsha, including emergency, chronic, child and reproductive services". The respondents were further ordered to return to court on 20 August 2007 to "show cause … why final orders should not be made".[25]

Political developments superseded the legal issues – the affected health care workers were reinstated within days of the order. This did not, however, stop the respondents from filing an application for leave to appeal. Argument in this application had to be postponed because the written judgment had yet to be delivered. The original return was set for 20 August 2007 – the date upon which the written decision was finally handed down. But once again the matter was postponed, again by agreement of the parties. The matter eventually lapsed after the respondents failed to have it set down.

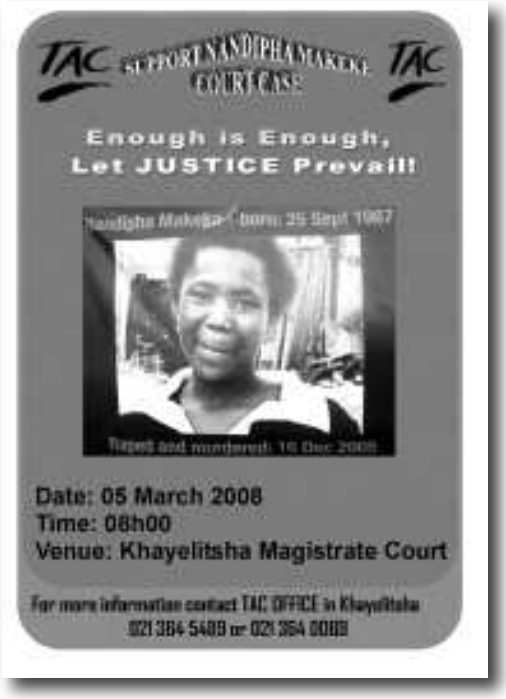
Responding to clients' needs

Although the ALP closed down its paralegal unit in 2007, it continues to respond to client-initiated requests for legal services. In addition to providing legal advice and referral services as a matter of course, we also take legal action on behalf of clients on a case-by-case basis. While such cases needn't fall within ALP-identified areas of focus, they must nevertheless advance our broad mandate in respect of HIV/AIDS and access to health care services. Below are two examples of cases taken up in this way.

Treatment Action Campaign and Others v Yanga Janet

On 16 December 2005, 18 year-old Nandipha Makeke – a TAC member from Khayelitsha – was kidnapped, gang-raped and murdered. Along with three others, Yanga Janet was arrested two months later.[26] After several delays, Janet and one of his co-accused were released on 31 March 2008 due to a lack of evidence – the remaining two co-accused were convicted of the crimes on 2 April 2008.

Upon his release from custody, Janet and other members of his gang began a campaign of harassment and intimidation in which TAC members were threatened with assault and murder. Due to concerns for the safety of TAC members in Khayelitsha generally, as well as the safety of three activists in particular, TAC members in Khayelitsha



TAC poster calling for members of the community to attend the trial of Nandipha Makeke's murderers (Reproduced with kind permission of the TAC)

25. At page 33
26. Janet was also charged with the attempted murder of TAC activist Mandla Nkunkuma – the former allegedly shot the latter in the back on the same day Makeke was murdered. While this case of attempted murder remains open, there has been little movement by the investigating officers – despite Nkunkuma having followed up on several occasions.

were asked to stop wearing their "HIV positive" t-shirts. On 1 April 2008, the three activists were moved into a safe house at TAC's expense.

On 8 April 2008, the ALP filed papers on TAC's behalf seeking an immediate interdict preventing Janet, either personally or through others, from intimidating, harassing or assaulting any TAC members and/or damaging and/or destroying any property owned by TAC or TAC members. The interdict was granted on the same day and remains in effect.

LM v SpectraMed

In October 2008, LM and her dependant child became members of SpectraMed, a registered medical scheme. In so doing, she dealt with SpectraMed's direct sales department through a "product specialist" agent. During the consultation, LM voluntarily disclosed her HIV status while asking questions regarding the scope of SpectraMed's ARV treatment programme.

During the consultation, LM was encouraged by the agent to purchase additional "top-up" cover to provide additional coverage in the event that a doctor charged rates above those reflected in the National Health Reference Price List. Concerned that she might be liable for such charges in the event she was involved in an accident and required emergency medical care,[27] LM chose to purchase the additional cover. Only then was she informed that another company provided the top-up cover.

A month later, LM was informed that the separate company required additional information to approve her top-up cover package, specifically information regarding her HIV diagnosis and clinical condition. At this point, she approached the ALP for advice and assistance. Thereafter, we assisted her in lodging a complaint with the Council for Medical Schemes (CMS), which has acknowledged receipt and is continuing to investigate the matter.

The ALP recognises that some of the problems in this matter may have arisen from the Supreme Court of Appeal's decision in *Guardrisk Insurance Co (Ltd) v Registrar of Medical Schemes and Another,*[28] which opened the door for short-term insurers to offer products similar to those offered by medical schemes but without having to meet the additional regulatory requirements as set out in the Medical Schemes Act 131 of 1998.[29]

But in addition, the complaint also raises concerns regarding the following four practices: first, a top–up cover provider discriminating against applicants with HIV; second, a medical scheme selling both medical scheme coverage and short-term insurance packages offered by third parties; third, a medical scheme disclosing a client's HIV status to a short-term insurance provider; and fourth, a medical scheme selling short-term insurance products that complement cover they are already required to provide in terms of the Act.

On 24 February 2009, the CMS informed LM that it expects to finalise its investigation in March 2009. Given the issues at stake, it is likely that the matter will require further attention.

Conclusion

As this chapter shows, only few cases were pursued during the period under review. Collectively, however, they teach the ALP at least three valuable lessons. First, successful litigation does not end with a court judgment. To the contrary, turning a legal victory into substantive change requires ongoing monitoring, advocacy and engagement. Second, one may win the battle but nevertheless lose the war – our decade-long struggle to defend doctors who act in accordance with their ethical obligations and consciences bears testament to this conclusion. Third, realising a right to have access to health care services necessarily requires a focus on broader questions of governance and accountability. These lessons have already been incorporated into our plans for 2009 and beyond.

27. We were advised that this was an example that was frequently used by the sales agent
28. [2008] ZASCA 39 (28 March 2008)
29. For more on this issue, see chapter 3.

Chapter 3

Rethinking health reform: constitutionalism, law and policy

By Jonathan Berger and Adila Hassim

The ALP has been engaging with the subject of health sector reform since 2004, as an inevitable and necessary development of its work on protecting the health and equality rights of people living with HIV/AIDS. This is because the HIV epidemic places the failings of the health system as a whole in sharp relief.

The extreme shortage and inequitable distribution of human resources, the skewed expenditure on health between the private and public sectors, the inadequacies of the institutional and regulatory framework, and the disparities between provinces in the effective use of financial resources are some of the challenges that encumber the health system.

In order to realise progressively the rights of everyone to have access to health care services, all of these challenges need to be addressed. Our role, however, has to be somewhat more limited – we simply don't have the time, resources or capacity to deal with every challenge. Instead, the ALP focuses its attention on reforming two core aspects of the health system:

- The institutional and regulatory framework – to ensure that decision-making powers are allocated to the appropriate persons at the appropriate levels of the system; that the quality of services is improved; and that oversight, accountability and governance in general are effective; and
- Health financing – to ensure reform of the fiscal system so that the development and implementation of health budgets are efficient and effective; the introduction of a national health insurance (NHI) system – for which the ALP has long called – that will ensure access to health services regardless of ability to pay; and the appropriate regulation of private health service costs and health product prices.

In addition, the ALP has a history of focusing on the affordability, availability and accessibility of medicines. We have made use of constitutional law, administrative law, intellectual property law and competition law in order to promote access to essential medicines. Our work in this area will continue.

The priorities broadly outlined above are consistent with a number of research areas that were identified in early 2008, such as fiscal federalism, budgeting processes and governance. These issues

proved to be central to the crisis that emerged in the Free State in late 2008.

As stated in the introduction to this review, the MEC for Health in the Free State announced a moratorium on the initiation of new patients on antiretroviral (ARV) treatment in November 2008. This decision – which was part of a general cutback on health service delivery in the province – was made as a result of a financial crisis brought on by improper budgeting, a lack of oversight of expenditure, the erroneous implementation of the Occupation Specific Dispensation for nurses, and spending pressures due to medical inflation.

The ALP – together with a range of partners including the Treatment Action Campaign (TAC), the Southern African HIV Clinicians Society, the South African Council of Churches, the Mosamaria Catholic Mission, and individual health care workers in the Free State – brought the moratorium and its implications to the attention of the provincial and national departments of health and finance.

TAC members protest outside Parliament against the ARV moratorium in the Free State, 11 February 2008 (Budget Day) (Reproduced with kind permission of Health-e News Service)

The ALP also undertook site investigations and interviews that formed the basis of a report into the Free State that was sent to the Minister of Health in February 2009. While a fuller report of our intervention in the Free State will be the subject of the next review, it is important to note here that we are witnessing the direct effect of the mismanagement of the health system for the past ten years. In short, the new Minister of Health is now saddled with the burden of picking up the pieces of a crumbling health system.

The financial and health crisis in the Free State is not restricted to that province. A number of provinces – Mpumalanga and the Eastern Cape in particular – are in a similar predicament. The broad issues of national oversight of the provinces and accountability between spheres of government, as well as the budgeting process and financial governance, will therefore remain key focus areas of the ALP's work in 2009.

In this chapter, we elaborate on the health sector reform work we have undertaken during the period under review. We start first with an examination of the ALP's activities in health policy reform. Thereafter, we consider our participation in various law reform processes, including amendments to national health statutes and the development and processing of other health-related legislation. Finally, we briefly look at a key ALP publication that focuses on the National Health Act 61 of 2003.

Policy development in health

At the ANC's 52nd National Conference held in Polokwane in December 2007, health and education were confirmed as priorities for reform and policy development by the ANC. This is also reflected in the ANC election manifesto that states that –

> The ANC government will aim to reduce inequalities in our health system, improve quality of care and public facilities, and boost our human resources and step up the fight against HIV and AIDS and other diseases. Health reforms will involve mobilisation of available resources in both private and public health sectors to ensure improved health outcomes for all South Africans.

A direct consequence of Polokwane has been an increased drive by the ANC to convene processes aimed at implementing the resolution, with the development of policy and law for the implementation of NHI at the top of its agenda. As part of its updated health agenda, the ANC reaffirmed its 1994 Health Plan commitment to introducing NHI. While this has long been a part of ANC health policy, its development and implementation has been slow.

ANC's NHI Committee

In June 2008, the ANC formed a committee to kick-start a plan for NHI implementation. Initially, the committee did not include anyone with specialist knowledge of law and human rights. This omission was brought to the attention of senior ANC leaders who agreed that the ALP's head of litigation and legal services – Adila Hassim – would join the committee to provide a legal and human rights perspective. The ANC stressed that this was an internal process and that its deliberations were confidential. This was fully supported by the ALP.

However, during the course of working on this committee, several ANC members questioned the bona fides of Hassim's participation. It seems that this was a result of her submissions that pointed out not only the strengths of the proposed policy and legislation, but also its weaknesses. In so doing, the ALP sought to ensure, as far as is reasonably possible, that any resultant law and policy would be insulated from legal attack. Eventually, the ALP had no choice but to discontinue its participation on the committee in order to retain its integrity and independence.

Apart from the informal contributions made to the committee, the ALP submitted two memoranda for the committee's consideration: the first addressed the principles for NHI and a process for implementation;[1] and the second concerned the three key pieces of health legislation that were before Parliament at the time and are discussed below in this chapter.[2]

Later in the year the committee's policy on NHI was finalised and adopted by the ANC's National Executive Committee. According to the 2009/2010 health budget summary, a working group has been established within the Department of Health (DoH) to "develop policy proposals and the legislative framework to facilitate the creation of NHI by 2011/12".[3]

The ALP fully supports – and always has – the development of policies to ensure universal access to health care services, regardless of one's ability to pay and where one lives in the country.

The ALP fully supports – and always has – the development of policies to ensure universal access to health care services, regardless of one's ability to pay and where one lives in the country. However, we have concerns with the current proposal of a full implementation of NHI within five years. This does not mean that critical steps that are aimed at increasing access to quality health care services should not take place with urgency,[4] but rather that the premature introduction of a poorly conceptualised NHI will further destabilise an already weakened health system.

DBSA and the Health Roadmap

In July 2008, Jay Naidoo of the Development Bank of Southern Africa (DBSA) and Zweli Mkhize – head of the ANC's influential health and education committee – co-chaired an open and broadly consultative process aimed at providing a plan for health reform for the next administration. Participants generally acknowledged that South Africa's health outcomes are worsening, and that our health indicators compare badly with countries that have been ravaged by war or are less developed.

The process followed a path of diagnosing the state of the public health care system, evaluating the system, reaching findings, and making recommendations for short-term interventions.[5] Five working groups were formed: human resources for health; health financing; strategic health

1. ALP Comment on NHI Proposal, 22 August 2008 (on file with Adila Hassim)
2. The Three Health Bills, 24 August 2008 (on file with Adila Hassim)
3. Budget summary for health at page 285
4. Some of these steps were identified in the DBSA process described below.
5. The final phase would be to facilitate the implementation of the recommendations.

programmes (including the national *HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011* (NSP)); diagnosis of the health system; and results-based improvement of service delivery. The ALP participated in the first three of these working groups, as well as in all the plenary discussions. During the roadmap process, the sudden political turn of events occurred with the ANC's recall of Thabo Mbeki as President. This was accompanied by a mini-Cabinet reshuffle, which included removing Manto Tshabalala-Msimang from her health portfolio and appointing Barbara Hogan in her place.

In November 2008, a document recording the findings and recommendations of the roadmap process was produced. This was the basis of the development of a 10-point plan that was agreed to by all the participants, and adopted by Minister Hogan. As articulated above, some of the key aspects of the 10-point plan are part of the ALP's work agenda on health sector reform.

ALP seminars

Apart from participation in these formal processes, the ALP felt that wider knowledge and debate on critical areas of health reform and the constitutional framework that governs this was necessary. Two seminars were held in 2008, with the objective of deepening discussion of the issues.

Deputy Chief Justice Dikgang Moseneke at the ALP's seminar on "Rethinking Health Reform"

Rethinking Health Reform

On 21 July 2008, the ALP hosted a public seminar on health sector reform. Its primary aim was to deepen our understanding of the policy and legal developments that have taken place since 1994 regarding health sector reform. Attended by trade union officials, human rights and health activists, members of the private health sector, academics and health policy-makers, the seminar was addressed by Prof. Larry Gostin (Georgetown University Law Center), Deputy Chief Justice Dikgang Moseneke, Jody Kollapen (South African Human Rights Commission), Tebogo Phadu (NEHAWU and ANC) and the ALP's Adila Hassim.

5. The final phase would be to facilitate the implementation of the recommendations.

Prof. Larry Gostin and Dr Adila Hassim at the ALP's seminar on 'Rethinking Health Reform".

The seminar was important for bringing together people who do not ordinarily speak to each other and who do not necessarily agree on what type of health sector reform is necessary and how it should be undertaken. The value of the debate was to distil the points of consensus so that there is at least a common basis for moving forward. The ALP will build on the discussion that took place in this seminar in order to grow a coalition that supports basic principles underpinning health sector reform and the appropriate introduction of NHI.

TB, public health and individual rights

On 7 November 2008, the ALP hosted a seminar entitled "Protecting Public Health and Human Rights in the Response to TB in South Africa: State and Individual Responsibilities". As with the earlier seminar on health sector reform, participants were addressed by a wide range of speakers: Dr. Lindiwe Mvusi (DoH); Bruce Margot (Church of Scotland Hospital, KZN health department); Dr. Virginia de Azevedo (City of Cape Town and Médecins Sans Frontières); Desire Schouw (TB/HIV Care Association), the TAC's Lesley Odendal and the ALP's Mark Heywood and Adila Hassim.[6]

The seminar brought together civil society organisations, business representatives, public and private TB doctors and government departments to discuss the current response to the TB epidemic in South Africa. In particular, the seminar focused on the government policy of using forced isolation as a preventative measure against the spread of drug-resistant TB (DR-TB) and whether this policy sufficiently protects individual human rights to dignity, liberty and freedom.

Brian Honerman (ALP researcher) and Fatima Hassan (former ALP senior attorney) join fellow activists in drawing attention to the lack of progress globally in dealing with TB/HIV co-infection, XVII International AIDS Conference, Mexico City, 3-8 August 2008 (Courtesy of the International AIDS Society/Mandaphoto)

6. All the presentations are available at *http://www.alp.org.za/index.php?option=com_content&task=view&id=68&Itemid=13#P1*

The ALP's position on isolation as a response to DR-TB is that any policy that sufficiently understands and respects the human rights of patients will not undermine public health, and, in fact, will promote public health by encouraging TB patients to trust the public health system. In its implementation, however, the current policy of isolation fails sufficiently to respect the rights of individuals, without any corresponding public health benefit. If anything, the policy undermines public health.

In its implementation, however, the current policy of isolation fails sufficiently to respect the rights of individuals, without any corresponding public health benefit. If anything, the policy undermines public health.

Over several months in 2008, the ALP visited seven of the DR-TB facilities in the country as well as both of the community-based care programmes for DR-TB that are operating in KZN and the Western Cape. Based on the various site visits undertaken by the ALP and the presentations at this seminar, the ALP has drafted a report on a legal and human rights approach to TB. Unfortunately, the finalisation and distribution of this report has been delayed. The ALP hopes to release this report in the near future.

Law reform

The dying days of an administration are often characterized by a frantic last-minute attempt to change the legislative framework. Departing ministers, eager to ensure that they leave behind a legacy, rush into overdrive. Unfortunately for South Africa, the period under consideration in this review was no different, with almost 110 bills being tabled in Parliament.

The third and fourth quarters of 2007 saw the formal tabling of 13 and 14 bills respectively, with a further 14 being tabled in the first quarter of 2008. From April to June 2008, however, the quarterly average increased by almost 3.5 fold – to 47. Thereafter, the third quarter returned to normal, with the tabling of 13 bills. Only eight bills were tabled in the shortened fourth term.

A few factors help explain the autumn rush. First, the end of June 2008 was Parliament's cut-off date for the processing of legislation in 2008. Second, the last term before the 2009 elections – the first quarter of 2009 – was largely devoted to the State of the Nation Address and the national budget. Third, the incoming Parliament is likely to include many new members.

The flurry of activity in Cape Town had an impact on the workload of the ALP. In addition to a dedicated focus on three health bills developed and tabled during this period, the ALP also contributed in one way or another to five health-related bills, covering a range of diverse topics – refugee and prisoner rights, intellectual property, substance use and insurance.

This part of the review considers these areas of law reform, with a particular focus on the work of the ALP in this regard. In addition, it summarises the ALP's submissions on a range of other legislative developments, including the KwaZulu-Natal (KZN) Health Care Bill, 2007 and a range of draft regulations published by the DoH for comment.

Amendments to national health statutes

On 2 June 2008, the former Minister of Health published bills in the *Government Gazette* seeking to amend three key pieces of health legislation: the Medicines and Related Substances Amendment Act 101 of 1965, the Medical Schemes Act 131 of 1998, and the National Health Act 61 of 2003. In so doing, she noted her intention to table the bills in Parliament.

Some six weeks before, the DoH had published draft versions of these bills for public comment. Despite very tight timeframes, the ALP made written submissions to the DoH on two of the three draft bills – the first dealing with the regulation of medicines and the second with the regulation of private health service pricing. Both submissions were followed by oral presentations.

In this section the review reflects on the ALP's interventions in respect of these bills. While the ALP made a significant contribution in the area of medicines regulation, it was unable to convince the

DoH of the need for more appropriate private sector regulation. It was also unable to ensure that much needed amendments to the Medical Schemes Act were processed.

Medical Schemes Amendment Bill [B 58—2008]

In a letter addressed to the speaker of the National Assembly (NA) and the chairperson of the National Council of Provinces (NCOP), the ALP and TAC expressed concern "that Parliament … [had] been inundated with a flurry of legislative proposals" that were likely to place "severe pressure … [on it] to process … [the bills] with undue haste."

With this in mind, the ALP and TAC recommended that only one of the three bills be processed. In expressly recognising that all three carried "significant ramifications for the future of health service delivery and health sector transformation in the country", the letter noted that only the Medical Schemes Amendment Bill required "urgent attention and passage through Parliament".

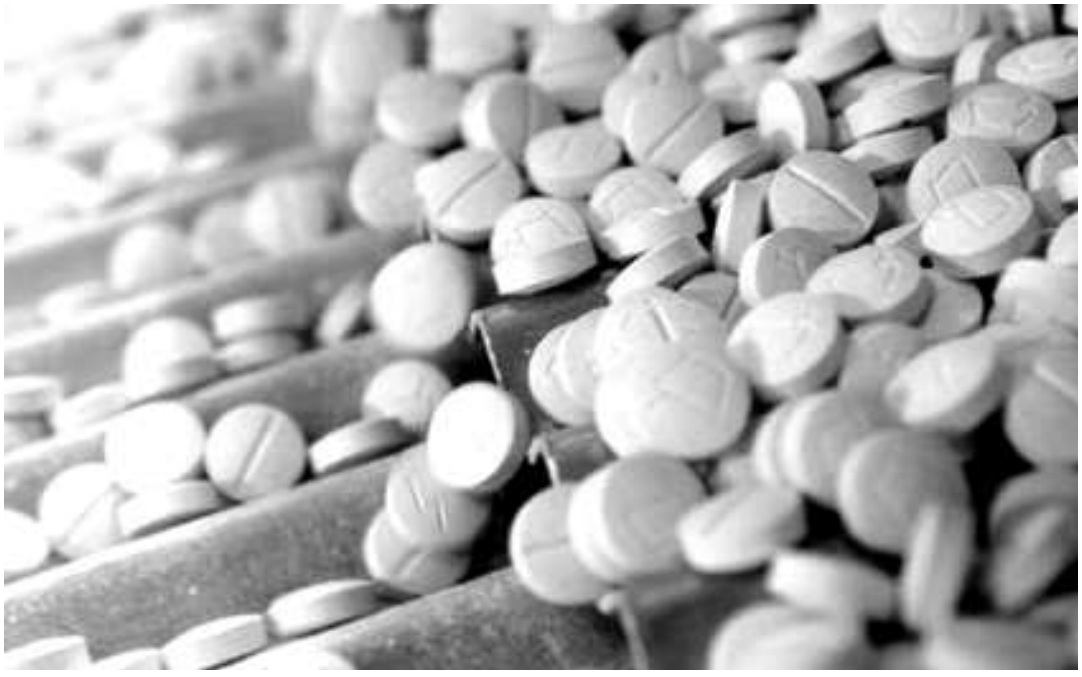
Despite these and other compelling arguments, the Portfolio Committee on Health – without responding to the letter or providing any public explanation – decided to proceed only with its deliberations on the proposed amendments to the Medicines Act.

In particular, the letter noted that a failure to process the bill in 2008 would leave open a legal loophole for "financial service providers to begin introducing health insurance products designed to lure young and healthy persons away from the medical schemes environment." In turn, this would "leave older and sicker persons behind, effectively undermining the ability of schemes to keep contributions and benefits at current levels."

Despite these and other compelling arguments, the Portfolio Committee on Health – without responding to the letter or providing any public explanation – decided to proceed only with its deliberations on the proposed amendments to the Medicines Act. The Medical Schemes Amendment Bill was effectively put on ice indefinitely, seemingly regardless of the consequences.

Medicines and Related Substances Amendment Bill [B 44—2008]

Bill B 44—2008 was formally introduced into Parliament on 17 June 2008, with public hearings before the Portfolio Committee on Health scheduled for 5 and 6 August 2008. This made it plain that the



Reproduced by kind permission of Stavros Nicolaou of Aspen Pharmacare)

intention was to process the Bill before the end of the year. Given the need for fundamental amendments, the ALP and TAC – who made a joint submission – believed it more prudent for the Bill to be finalised after the 2009 elections. This was not to be.

In addition to a number of substantive concerns, the process in terms of which the Bill had been developed was also troubling. In this regard, we identified two fundamental flaws. First, we noted problems with the composition and conduct of the ministerial task team whose report was to have formed the basis of the Bill. Second, we drew attention to the DoH's failure seriously to consider public submissions on an earlier version of the Bill.

Yet despite our concerns with process, we focused primarily on substance. In particular, we argued that contrary to its stated purpose, the Bill – if enacted into law – would not ensure the effective and efficient regulation of medicines and other health products in South Africa. Instead, we submitted that it had the potential "to undermine the scientific governance of medicines and other health products" in either or both of two ways.

First, we described the Bill as "inappropriately – and arguably unconstitutionally – allocating broad powers to the Minister."[7] Second, we saw the Bill "[r]eplacing a semi-independent Medicines Control Council with a health products regulatory authority that is effectively to operate as a line function within the DoH". In addition, we alleged that much of the Bill's substance was not supported by the task team report, with many of its provisions being understood to undermine key recommendations in the report.

Despite receiving a somewhat hostile response from the Portfolio Committee's chairperson, many of our substantive concerns were in fact considered and addressed. In our view, the committee made real progress in addressing the more egregious aspects of the former Minister's draft legislation in Bill B 44B—2008, which it adopted on 3 September 2008. While some concerns remained, the amended bill represented a decisive break from its executive-minded predecessor.

Once adopted by the NA, the amended Bill was put before the Select Committee on Social Services in the NCOP for consideration. In its deliberations, the committee considered further amendments aimed at strengthening the health products regulatory authority's mandate and independence. On 22 October 2008, it adopted a set of further amendments. The new proposals, which were adopted by the NCOP some three weeks later, only went part of the way towards addressing our remaining concerns.

The Portfolio Committee considered the NCOP's version of the bill shortly thereafter, rejecting a handful of key proposed amendments. On 21 November 2008, the NA passed Bill B 44D—2008 – only a slight improvement on its earlier version. While still representing a significant departure from the former Minister's Bill, this final version does not go far enough to ensure that the new regulatory authority will be able to operate independently, accountably and openly, as the Constitution requires.

Once the amendment is enacted, which will happen if and when the President assents to and signs the Bill, the focus will shift back to the DoH and its regulation drafting process. Given the relative lack of detail in the bare-bones legislation, as well as its repeated references to regulations, this process is likely to provide the ALP and TAC with further opportunities for our concerns to be addressed expressly in law.

National Health Amendment Bill [B 65—2008]

Although described by the ALP as one of "the most important pieces of health legislation to be proposed in recent years", the draft National Health Amendment Bill ("the draft Bill") presented us with cause for concern. On the one hand, the draft Bill introduced – for the very first time – a statutory mechanism for the regulation of all prices in the private health sector.[8] As our submission to the DoH noted, this "is central to the constitutional project of progressively realising the right of access to health care services."

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7. At the time of the oral presentation, the ALP and TAC made it clear to the Portfolio Committee on Health that this was not a personal attack on the former Minister. Instead it was a principled objection to a Minister having broad powers over an independent regulatory authority. We stand by our principled opposition to the overly broad powers.
8. To date, only medicine prices have been subjected to regulation.

On the other hand, the ALP noted that the draft Bill – in its published form – would not be able to meet its objective of "regulating the manner in which the cost and prices of health care services are arrived at in order to limit unreasonable and unsustainable cost escalation through profiteering from private health care." Thus, while we recognised the need – and constitutional duty on government – to regulate the private sector appropriately, we took issue with what we submitted was a fatally flawed piece of draft legislation.

In particular, we raised the following concerns, arguing that these deficiencies would render the legislative intervention ineffective, open government up to a barrage of unnecessary and avoidable litigation, and delay any reasonable regulation of private health services:

- The lack of consultation in the process of developing the draft Bill;
- The lack of independence of the proposed regulatory mechanism, which, if brought into existence in the manner proposed in the draft bill, would potentially be subject to undue political interference;
- Provisions authorising the inappropriate and/or largely unguided delegation of authority; and
- Numerous ambiguities and gaps in the draft Bill.

Despite our input, which proposed that the draft Bill be rewritten to achieve its aims in a constitutionally defensible manner, the DoH apparently succumbed to industry pressure. Bill B 65—2008, the version that was tabled in Parliament in June 2008, departs significantly from the draft originally published for public comment. In particular, it proposes a self-regulation mechanism that is unlikely to satisfy any party other than those whose conduct requires regulating. If adopted in its current form, the Bill will not assist government in discharging its constitutional duties.

As already mentioned, the Bill has not yet been processed by Parliament. This is unlikely to occur until sometime after the 2009 national and provincial elections. Given Minister Hogan's fresh and rational approach to the regulation of the private health sector, which seeks to limit the possibility of conflict whilst recognising the need for appropriate state intervention, we are optimistic that the Bill will be subject to a significant rewrite. As always, the ALP remains willing and able to assist in this regard.

Other legislative developments in health

Subordinate health legislation

In addition to these submissions on draft health statutes, the ALP also focused some attention on the development of subordinate health legislation. During the period under review, we commented on a draft set of guidelines for the management of DR-TB as well as draft regulations relating to –

- The nomination and appointment of members to the Nursing Council;
- The labelling and advertising of foodstuffs;
- Foodstuffs for infants, young children and children; and
- Communicable diseases

The submission on the draft **guidelines for the management of DR-TB**, which was made jointly with the TAC and the AIDS and Rights Alliance for Southern Africa (ARASA), focused primarily on the fact

that the proposals – whilst significantly better than the previous guidelines – fell short of international best practice. In particular, they did not incorporate the *World Health Organization Guidelines for the Programmatic Management of Drug-Resistant Tuberculosis Emergency Update 2008*.

Further, the draft guidelines, whilst beginning to address human rights considerations, "contain[ed] several omissions [and] misstatements of law and the contents of rights." In addition, they failed to provide "specific guidance to health care workers on how to enforce the policies … such as isolation and the treatment of patients without [their] consent", such as would sometimes be the case when forced isolation is justified. The joint submission provided recommendations on how to address these human rights concerns.

In short, we argued that the primary legislation did not permit the ministerial role envisaged in the draft regulations, in effect breaching the constitutional principle of legality.

Our submission on the draft **Nursing Council regulations** focused primarily on the disconnect between the Minister of Health's statutory powers set out in the Nursing Act 33 of 2005 and those in the proposed regulations.[9] In short, we argued that the primary legislation did not permit the ministerial role envisaged in the draft regulations, in effect breaching the constitutional principle of legality. Our concerns were not addressed, with the promulgated regulations being largely indistinguishable from the published draft.

In a follow-up letter to the former Minister of Health, we argued that the Act "does not provide authority for the promulgation of the final regulations in their current form" and that she had therefore "acted unlawfully". We requested that the nomination and appointment process be placed on hold, and that she "convene an urgent meeting with all relevant stakeholders to consider how best to remedy the constitutional defects in the final regulations." The letter was copied to the Portfolio Committee on Health in the NA.

Despite reminder letters to the former Minister and the Committee's chairperson, neither responded. Eventually, some six months after the first letters were sent, the ALP received a substantive response from the Director-General of Health, denying that the former Minister had acted unlawfully. In the meantime, the members of the new Nursing Council had already been appointed. Given other more pressing areas of work and limited capacity, the ALP decided not to pursue this matter for now.

Our primary aim in making a submission on the **draft foodstuffs regulations** was to ensure the existence of a comprehensive legal framework that protects the health of the public against those involved in advancing anti-science agendas. In particular, our submission sought to ensure that "the public is reasonably protected from false or misleading labels and/or advertisements which could potentially endanger their health." We wanted to ensure that the final promulgated regulations "serve as an effective tool to enforce appropriate labelling and advertising, … and allow the people of South Africa to make informed, evidence-based decisions about their nutrition and diet."

In a joint submission with the TAC on the **draft regulations on foodstuffs for infants, young children and children**, we focused on the manner in which the proposals sought to regulate the advertising and provision of breast-milk substitutes. In particular, the submission raised concerns regarding the draft regulations' failure to deal appropriately with those circumstances in which breast-milk poses a danger to infants – such as is the case when a lactating mother is HIV-positive. Our submission thus proposed that "the regulations must provide sufficient room for information (including advertising by manufacturers) to be disseminated which accurately describes circumstances in which formula feeding is a safer option for infants."

Despite the ALP's work on TB having revealed the urgent need for updated **regulations on communicable diseases**, we found ourselves having to call for redrafted regulations to be published for public comment. As we explained in our submission in April 2008:

9. For example, the Act makes provision for the appointment of three members of the 25-person council to "represent communities". (Section 5(1)(b)(vii)) It also expressly grants all interested parties the right to submit nominations from which the appointments are to be made. (Section 5(2)(a)) Yet the regulations make it plain that MECs for Health are each to nominate a person to represent communities. (Regulation 3(1)(g)) From these nine nominees, the Minister of Health is tasked with appointing three.

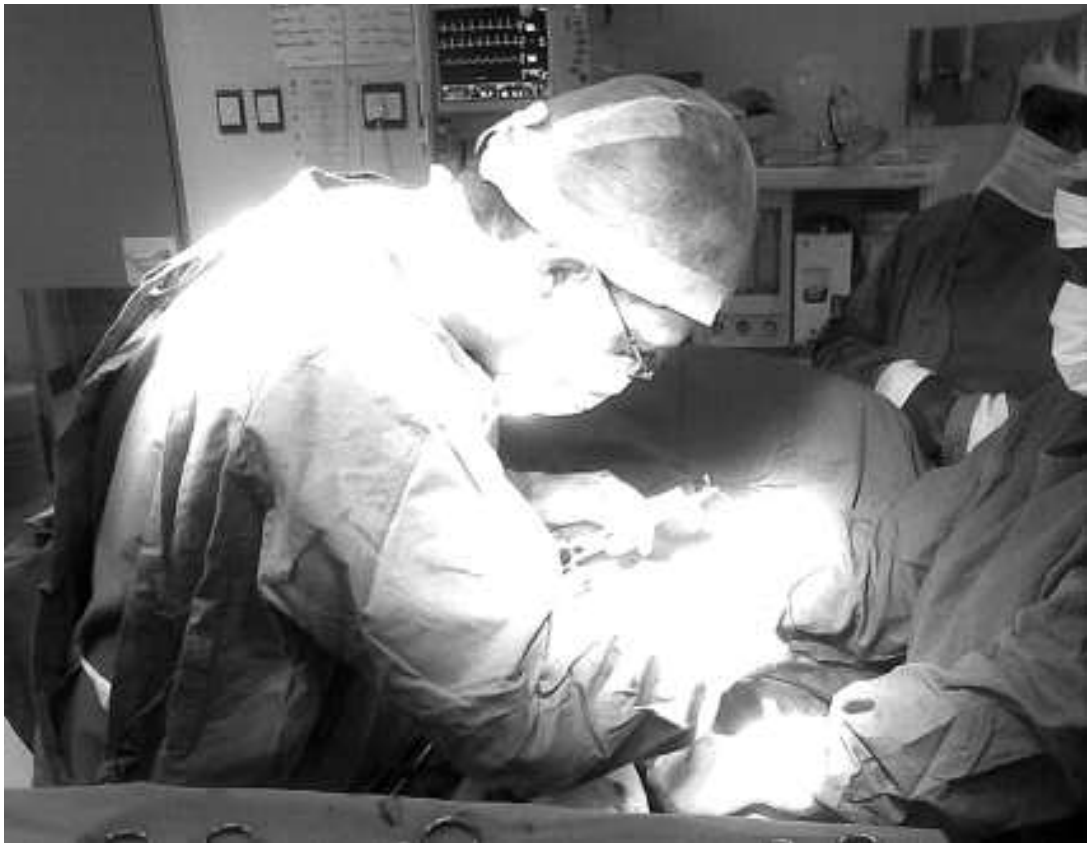
> Because of the poor conditions of the draft regulations as they have been put out for comment, it is difficult to make all the substantive recommendations which the ALP and the TAC would have were the draft regulations in better condition. For that reason, as well as the important constitutional concerns which result from these regulations, we recommend that, prior to finalising these regulations, they are re-drafted based on the comments received and put through an additional period for public comment prior to being finalised.

Despite our difficulties in making sense of the draft regulations, we provided input on a range of substantive issues, focusing on the need for redrafted provisions to establish a framework for the implementation of a proper infection control policy. In addition, the submission drew attention to a number of technical and procedural concerns, such as definitional errors, apparent contradictions between different provisions, and the lack of sufficient space for community involvement.

Despite the urgent need for redrafted regulations, the ALP had received no response to our submission on the draft regulations by as late as September 2008. Through informal communication with the DoH, the redrafted regulations were provided to us. Upon perusal, however, it was evident that little had changed since the previous draft. Thus on 18 September 2008, we provided further comment on the draft regulations, suggesting the reformulation of a number of provisions. At the time of preparing this review, the regulations have still not been finalised.

KZN Health Care Bill, 2007

In welcoming the publication of the draft KZN Health Care Bill, the ALP noted that it "ha[d] the potential to complement the broad legislative framework provided by the National Health Act, 2003". Nevertheless, our submission was quick to focus on what the ALP had identified as the two funda-



Doctors performing surgery at Manguzi Hospital, KZN.

mental flaws in the Bill: an expansion, in certain areas, beyond the express provincial mandate set out in the National Health Act; coupled with a failure to discharge certain obligations required by the national statute.

We argued that the Bill, if passed in its published form, "raise[d] constitutional concerns by unnecessarily departing from or narrowing the broad framework provided by the Act." We further submitted that this "risk[ed] undermining the manner in which the Act and the Constitution contemplate the provision of provincial health care services." In support of our broad submissions, we provided detailed comment on the manner and the extent to which the Bill was at odds with the Act.

But in other respects, the Bill is disappointing, such as by limiting access to health care services to citizens, permanent residents and those entitled to care in terms of international treaties, arguably in conflict with section 27 of the Constitution.

A revised Bill, tabled in the KZN Legislature in 2008, reflects significant changes from the previous draft, including a large number of new provisions that seem to have been drafted with our recommendations in mind. For example, it now sets out the powers and functions of the MEC for Health in some detail. But in other respects, the Bill is disappointing, such as by limiting access to health care services to citizens, permanent residents and those entitled to care in terms of international treaties, arguably in conflict with section 27 of the Constitution.

Health-related legislation

Recognising that the legislative framework relevant to the delivery of health care services extends far beyond the world of the DoH, the ALP remained actively involved in a range of non-health law reform and development processes during the period under review. Interestingly, the ALP's focus in this area went beyond the health-specific provisions of the Bills under consideration. This was most noticeable in our submission to Parliament on the Correctional Services Amendment Bill.

Correctional Services Amendment Bill [B 32—2007]

The ALP's submission on Bill B 32—2007 focused primarily on the proposed amendments to the structure, mandate and staffing of the Judicial Inspectorate of Prisons (JIOP), "an independent office under the control of the Inspecting Judge" tasked with facilitating "the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions in prisons".[10] Instead of strengthening the JIOP, as we recommended, the Bill sought to remove its independence completely and locate it firmly within the Department of Correctional Services (DCS).

For example, it sought to replace the Inspecting Judge with an Inspector-General for Correctional Services, either a sitting or retired judge, or simply a legal practitioner with "not less than 10 years' experience in legal practice". Unlike the Inspecting Judge, the Inspector-General was to have no power to appoint assistants, determine his or her staffing requirements, or hold his or her staff to account. Instead, the Bill envisaged staff being seconded directly from and accountable to DCS. Simply put, the JIOP was to be turned from an independent oversight body into an in-house DCS directorate.

The ALP was not alone in its concern. A range of other organisations – including the Civil Society Prison Reform Initiative at the University of the Western Cape's Community Law Centre, the Centre for the Study of Violence and Reconciliation, the South African Human Rights Commission and the Legal Resources Centre (LRC) – expressed similar positions on the proposed changes to the JIOP. In response, the Portfolio Committee on Correctional Services – under the strong leadership of Dennis Bloem – expressly recognised the need for an independent oversight body such as the JIOP.

The Correctional Services Amendment Act 25 of 2008 retains the JIOP, albeit now renamed as the Judicial Inspectorate for Correctional Services.[11] Once in force, the Amendment Act should go some

10. In addition, we addressed provisions of the Bill dealing with three other areas of concern: the rights of inmates (including the provision of health care services); the rights of members (including potential conflicts between the Bill and members' ethical and professional obligations); and the unjustifiable expansion of the Minister's authority (mostly in relation to granting of parole). In respect of each area of concern, we made specific recommendations.
11. The JIOP will change names as soon as the Amendment Act comes into force.

way towards strengthening the body. This is because in addition to the appointment of a Chief Executive Officer, who is to be identified by the Inspecting Judge, it makes provision for greater technical and organisational support. Importantly, all staff and assistants will be required to perform their functions "as authorised and directed by the Inspecting Judge".

Refugees Amendment Bill [B 11—2008]

Given that Parliament gave interested parties only 16 days to make submissions on Bill B 11—2008, as well as the fact that the ALP endorsed the detailed submissions made by Lawyers for Human Rights and the LRC, our submission focused primarily on those provisions of the Bill dealing with access to health care and social services for refugees and asylum seekers. As a secondary focus, it addressed health-related concerns in respect of immigration detention centres, asylum application queues and police holding cells, such as shelter, water, sanitation and food.

In our submission, we considered the proposed amendments to section 27 of the Refugees Act 130 of 1998. Amongst other things, subsection (g) of that provision states that a refugee "is entitled to the same basic health services and basic primary education which the inhabitants of the Republic [of South Africa] receive from time to time." In contrast, the Bill proposed a redrafted section that excludes any direct reference to health and education. Despite our and others' protestations, section 21 of the Refugees Amendment Act 33 of 2008 – which inserts a new section 27 into the principal Act – is largely indistinguishable from that proposed in the Bill.

The Amendment Act expressly sets out certain rights of asylum seekers, including, for example, the right to remain in the country pending the finalisation of an application for asylum. Unfortunately, however, the Amendment Act also expressly limits the rights of asylum seekers to those rights in the Bill of Rights that "apply to an asylum seeker", without providing any guidance on what this means. In addition, by making no reference to certain rights contained in the revised section 27 (such as the right to seek employment), the Amendment Act further limits the rights of asylum seekers (which are likely to be clarified by way of litigation).

Prevention of and Treatment for Substance Abuse Bill [B 12—2008]

In recognising that "several higher-risk groups, such as … drug users, face barriers to accessing HIV prevention and treatment services, because their activity is unlawful", the NSP recommends the "finalisation and implementation of the Prevention [of] and Treatment for Substance Abuse Bill, and its incorporation of HIV harm reduction measures." With this in mind, the ALP sought to play a catalysing role in ensuring strong civil society participation in the processing and finalisation of this key piece of legislation.

Prior to the period under review, the ALP had worked closely with ARASA on its submission to the Department of Social Development (DSD) on an earlier draft version of the Bill. That submission – which the ALP and TAC endorsed – welcomed the draft Bill, noting its potential to advance "a set of medically sound interventions regarding substance use." Disturbingly, it also noted the following fundamental failures of the draft Bill:

- To acknowledge that substance use is a chronic and relapsing medical condition;
- Sufficiently to recognise the links between substance use, HIV/AIDS and other infectious diseases; and
- To include key interventions to prevent and treat substance use and associated harms.

Bill B 12—2008, which was tabled in Parliament in February 2008, did not go particularly far in addressing our concerns. A new submission, once again endorsed by the ALP and TAC, pointed out that while the DSD had indeed taken some of the earlier proposals into account, the tabled Bill

similarly failed to address what ARASA had previously identified as "fundamental failures". In addition to joining ARASA in making oral submissions on the Bill before the Portfolio Committee on Social Development, the ALP also joined forces with a range of other civil society organisations arguing for similar amendments. Despite all their efforts, progress was limited and slow.

A new submission, once again endorsed by the ALP and TAC, pointed out that while the DSD had indeed taken some of the earlier proposals into account, the tabled Bill similarly failed to address what ARASA had previously identified as "fundamental failures".

The ALP then approached the Minister of Social Development, Dr. Zola Skweyiya, requesting an urgent meeting to address two key concerns: first, the Bill's failure to incorporate HIV reduction measures, as recommended by the NSP; and second, the apparent reluctance of the Committee – as exhibited at its public hearings on the Bill – to implement such measures. While pointing out that the Committee's subsequent deliberations had suggested "some movement" on the issues, the ALP's letter asked Skweyiya "to ensure that the processing of the Bill … [did] not take place in a manner that undermines the NSP and our collective response to HIV and AIDS." In his response, Skweyiya stated that he would "personally raise the matter with Mr Mike Masutha, Chairperson of the Portfolio Committee".

On 18 November 2008, Masutha's committee adopted Bill B 12D—2008.[12] This Bill, which expressly recognises the link between substance abuse and "HIV and AIDS and other health conditions", also calls for the Central Drug Authority – an intersectoral statutory body – to develop effective HIV prevention strategies as an integral part of prevention, early intervention, reintegration and aftercare services. It does not, however, recognise substance use as a chronic and relapsing medical condition. Nor does it include key interventions to prevent and treat substance use and associated harms. Thus while HIV prevention in the context of substance use is clearly on the agenda, the NSP's call for harm reduction measures will have to be addressed by the regulation drafting process. We trust that Minister Skweyiya – or his successor – will ensure that this indeed takes place.

Insurance Laws Amendment Bill [B 26—2008]

In mid-2008, the ALP became aware of proposed amendments to the Short-term Insurance Act 53 of 1998 that – if passed in the proposed form – would have permitted the Minister of Finance to control a key area of private health sector regulation. In particular, the proposals would have permitted the Minister, *after* consultation with his or her counterpart in health, effectively to exempt a number of health insurance products from the operation of the Medical Schemes Act 131 of 1998. As noted in an ALP letter to the Director-General of the National Treasury dated 4 June 2008:

> "[W]e are concerned about the effect that the Bill may have on the medical scheme environment …. With regard to risk-rating, our concern is that younger and healthier individuals may choose to subscribe to the minimum cover of [a] medical scheme, and 'top-up' through a separate health insurance product. The movement of healthier individuals out of medical schemes will undermine the cross-subsidisation of risk that takes place through community rating. … If this occurs, the cost of medical scheme cover will rise as will the dependency on the public sector. This is precisely the situation that the Medical Schemes Act attempted to reverse in 1998."

The ALP subsequently established that these concerns, which were shared by the Council for Medical Schemes, were considered and – in large part – addressed. Thus in our follow-up letter to the National Treasury dated 12 June 2008, we indicated that – having read the latest draft of the Bill – we were "largely satisfied that our concerns … [had] been addressed in relation to the overlap between insurance products and the medical schemes environment." While the Bill still made provision for the exemption of certain health insurance products, it entrenched a number of safeguards.

12. Bill B 12D—2008 is the version of the Bill as amended by the Select Committee on Social Services in the NCOP.

Section 52 of the Insurance Laws Amendment Act 27 of 2008 inserts a new section 70(2A) into the Short-term Insurance Act that empowers the Minister of Finance, *in* consultation with the Minister of Health, to make regulations allowing for exemptions. In addition, the section sets out a number of conditions that must be met in making the regulations, including the following:

- There must be consultation between the National Treasury, the Registrar of Short-term Insurance and the Registrar of Medical Schemes; and
- The Minister of Finance must have "regard to the objectives and purpose of the Medical Schemes Act" and must publish draft regulations for public comment and "submit the regulations to Parliament, while it is in session, for parliamentary scrutiny at least one month before their promulgation."

These safeguards will go a long way towards ensuring that the exemption power is not used to allow for health insurance products to be introduced by stealth. Further, the consultation requirements and the need for parliamentary scrutiny will ensure that substantive concerns such as those raised in the ALP's letter to the National Treasury are in fact addressed. The power to grant exemption may remain, but its exercise is now heavily constrained.

Intellectual Property from Publicly Financed Research & Development Bill [B 46—2008]

Unlike its interventions in respect of other bills, the ALP's input in this important area focused on the Bill's development *before* it was tabled in Parliament. In our previous review, we wrote about the ALP's participation in the development of the Intellectual Property Rights from Publicly Financed Research Framework, including our participation in a consultation hosted by the Department of Science and Technology (DST). Since then, we have made two further submissions on earlier drafts of the Bill.

In July 2007, we made a written submission on the first draft Bill published by the DST for public comment. That submission, which noted that the draft bill went "a significant way towards ensuring access to the benefits of publicly funded research", focused on three areas – licensing conditions, private funding and government walk-in rights. In respect of each of these three areas the ALP's submission sought to ensure that the private sector does not unduly benefit from publicly financed research.

In March 2008, the ALP participated in a further stakeholder consultation on a revised version of the Bill. Following the consultation, we made one final submission that focused primarily on a handful of technical issues. In addition, it addressed a number of substantive issues raised by participants at the consultation. Some of these inputs had sought unreasonably to advance narrow private interests at the expense of the broader public interest.

In addition, it addressed a number of substantive issues raised by participants at the consultation. Some of these inputs had sought unreasonably to advance narrow private interests at the expense of the broader public interest.

On 17 December 2008, the President assented to the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008. The main object of the Act is to ensure that "intellectual property emanating from publicly financed research and development is identified, protected, utilised and commercialised for the benefit of the people of the Republic [of South Africa], whether it be for a social, economic, military or any other benefit." Amongst other further objects, the Act "seeks to ensure that … where necessary, the State may use the results of publicly financed research … in the interest of the people of the Republic.

Importantly, section 14(1) of the Act – which makes provision for the acquisition of intellectual property rights by the state – makes it plain that the "rights acquired by the State … are additional to the rights granted to the State in terms of any other legislation". For example, the state remains

entitled to make use of its various powers in the Patents Act 57 of 1978, such as the authority in section 4 to use an invention for a public purpose. The new Act simply grants additional powers in respect of inventions that owe their existence – even if only in part – to public funding.

Draft Regulations in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act

Having been actively involved in making submissions on various drafts of the legislation, both on our own and as a member of the Sexual Offences Working Group, the ALP felt it necessary to use the regulation drafting process to raise concerns that had yet to be addressed. In addition to raising concerns about alleged procedural irregularities and a rushed public consultation process, the submission focused on three key issues that have implications for the rights of rape survivors and their alleged offenders: HIV testing; access to post-exposure prophylaxis (PEP) services; and time-consuming procedures.

We therefore recommended that all health facilities should be able to initiate rape survivors on PEP and then refer them to designated facilities for further care.

On **HIV testing**, the submission recommended that the regulations specify that a polymerase chain reaction (PCR) test be used to establish the serostatus of rape survivors and their alleged offenders. This is because the window period for standard antibody tests can last anywhere from three weeks to six months. A PCR test, on the other hand, can establish HIV status within days of infection. The empowering provision in the Amendment Act merely refers to "any validated and medically recognised test for determining the presence or absence of HIV infection in a person".

The focus of our concerns regarding **access to PEP services** considered the limitation of service provision to "designated health facilities". While recognising "that full PEP requires training of health care workers who are able to monitor and explain the importance of PEP and how the treatment works", we expressed concern that the designated facility requirement did not "adequately consider the need for PEP to be started as soon as is reasonably possible after the incident." We therefore recommended that all health facilities should be able to initiate rape survivors on PEP and then refer them to designated facilities for further care.

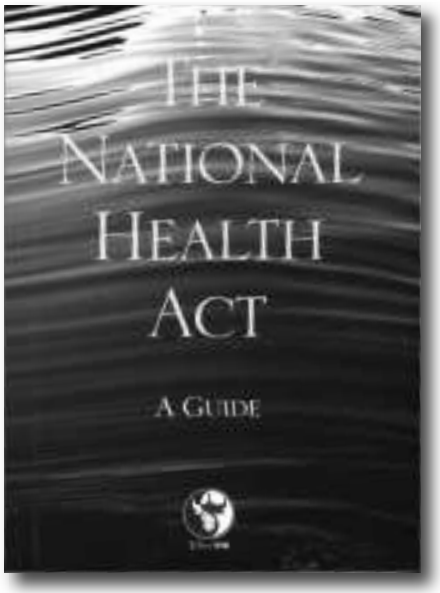
Finally, the submission pointed out that the **time-consuming procedures** to be followed before a compulsory HIV test could be performed on an alleged sexual offender would mean that it would be "the exception rather than the rule" for the provisions to be used so as to "provide the survivor of a sexual assault with any closure within a reasonable timeframe." We therefore argued that should the Department of Justice and Constitutional Development (DoJ&CD) be unable to "find a way to significantly streamline this process", the "constitutionality of the draft regulations and the Act itself" would be drawn further into question.

Unfortunately, our submission had no impact on the final form of the published regulations. This is unsurprising, given the tight timeframes within which the draft regulations were finalised. Given the lengthy delay in processing the amendment legislation in Parliament, the DoJ&CD appeared intent on rushing the regulation drafting process. Interested parties were only given three weeks to make input, with the final regulations being published less than two months after the closing dates for submissions. The result, unfortunately, reflects this rush.

Publications

In addition to the numerous submissions and policy documents discussed above, a number of ALP staff members also worked on a range of other publications during the period under review. A full list of published book chapters, journal articles and opinion pieces is set out in the annexures to this review. In addition to these, the ALP developed and finalised a guide to the National Health Act 61 of 2003, which was published in late 2008 by *Siber* Ink as Hassim, Heywood, Berger and Honermann, *The National Health Act: A Guide*.

The NHA is arguably the most important statute passed by Parliament to give effect to the right



of everyone to have access to health care services. The ALP's guide aims to make the legislation easily accessible to the public at large, putting an annotated text of the NHA into the hands of ordinary people in communities and organizations. In so doing, the guide should help to ensure that that they can start to organise and mobilise to demand the full implementation of their health rights.

The guide starts by locating the Act in its proper context and providing commentary of three key issues: getting access to health care, getting involved in the health system, and health planning and budgeting. Thereafter, it provides a running commentary on the full text of the legislation. Amongst other things, it notes which sections have and have not been implemented, provides information on the status of regulations referred to by the text, and identifies relevant case law.[13]

Conclusion

Over the past 18 months, the ALP has made a number of written and oral submissions on law reform and health policy. However, the impact of these submissions is questionable. Judging from the comments of independent reviewers, the submissions are generally thought to be of a high quality. Yet there is very little evidence that they are considered by the DoH. Indeed, the ALP has experienced resistance to our submissions and recommendations by Parliament as well, which is somewhat more disturbing.

The constitutional premise of accountable and responsive government, as well as that of participatory democracy, has been severely undermined in our interactions with the DoH under the leadership of the former Minister. The elemental nature of these principles was voiced by Justice Ngcobo in *Doctors for Life v The Speaker of the National Assembly:*

> The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness". Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.[14]

Given our experience, the ALP has questioned the value of continuing to produce submissions on draft laws and policies where we are not certain that they will even be considered. Through our focus on various aspects of health law and policy, we have developed the capacity for continued applied work in this area. With the appointment of Barbara Hogan as the new Minister of Health, we are hopeful that we will be able to have our ideas heard through means other than litigation.

13. The guide ends with three appendices: a list of regulations published under the Act; brief summaries of other important health legislation and policy documents; and contact information for important regulatory councils, oversight bodies and other health organisations.
14. 2006 (6) SA 416 (CC) at paragraph 111

Chapter 4

SANAC and the implementation of the NSP

By Nonkosi Khumalo and Jonathan Berger

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

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

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

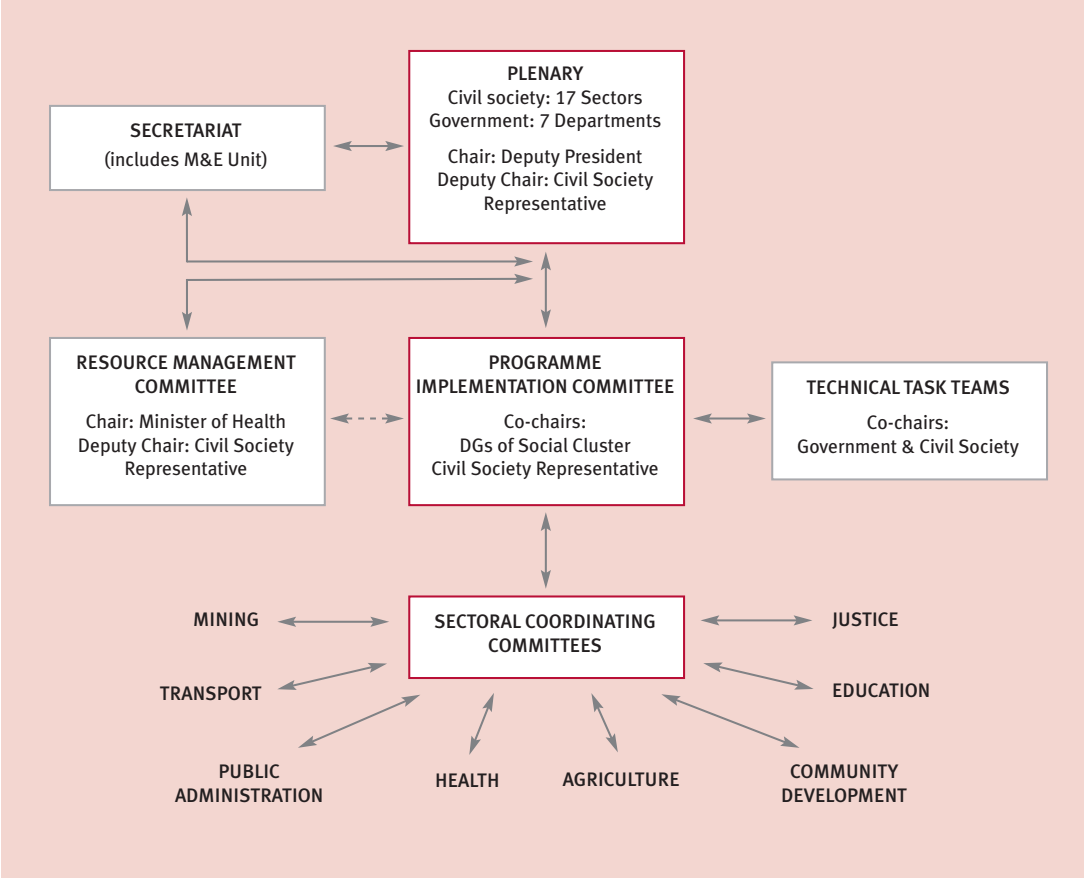
Quite unlike any other creation of the state, SANAC is an advisory, oversight and coordination body that brings with it a novel mode of democratic co-governance. Established by Cabinet primarily "to advise government on the development and implementation of appropriate HIV and AIDS policies and programmes,"[3]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

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

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

SANAC structures

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



4. Much of our litigation and health sector reform work supports priority area 4. In this regard, see chapters 2 and 3 respectively.
5. The primary objectives of the Sectoral Coordinating Committees (SCCs), which comprise SANAC's third tier, are to ensure that "the implementation of sectoral specific programmes is effectively coordinated and reviewed ... and ... the PIC is regularly provided with information regarding sectoral specific programmes to enable it to make appropriate recommendations in this regard to the *Plenary.*" The SCCs cover the following eight sectors: public administration; mining; transport; agriculture; community development; education; justice; and health.

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

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

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

To date, only three of the five TTTs are fully functional: these are the TTTs dealing with prevention, communications, and treatment, care and support. Inactive for many months, the TTT on human rights and access to justice only began to meet early in 2009. Co-chaired by one representative from each of the L&HR Sector and the Department of Justice & Constitutional Development (DoJ&CD), this sub-committee has a key role to play in ensuring that the NSP is implemented in a manner that respects, protects, promotes and fulfils human rights.[8]

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

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

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

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

6.. Clause 8.1, SANAC Procedural Guidelines
7. The Guidelines make provision for TTTs on "any other areas as directed by the PIC".
8. Despite – or perhaps because of – the existence of a strong research sector, the research, monitoring and surveillance TTT has found it difficult to distinguish between its work and that of the broader sector (which has an established working group and three research sub-committees). In early 2008, it was agreed that the focus of this TTT would be limited to monitoring and evaluation, an area in which advice and research is vital.
9. Clause 5.1.5, SANAC Procedural Guidelines
10. South Africa failed in two applications (Rounds 7 and 8). The deadline for GFATM Round 9 applications is June 2009. To overcome problems and weaknesses, the RMC has formally contracted the Development Bank of Southern Africa to provide management support. In addition, it is receiving technical assistance from international development partners and has assembled an experienced writing team.

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

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

Without constant inquiry into the impact of NSP activities such as HIV prevention and treatment, it is hard to refine programmes, target resources or convincingly guide the country towards the defeat of this epidemic.

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

ALP participation in SANAC structures

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

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

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

11. Clause 11.2, SANAC Procedural Guidelines
12. Letter from the Deputy President of the Republic of South Africa to the CEO of the DBSA, 4 November 2008 (on file with the ALP)
14. Clause 11.6.2, SANAC Procedural Guidelines
15. Clause 11.6.3
16. The office of the deputy chairperson is supported by a grant from the Bill and Melinda Gates Foundation, which is administered by the Human Sciences Research Council. Because of the lack of capaity of the existing secretariat, the deputy chairperson's research and administrative assistant has effectively been forced to play a much stronger administrative and coordination role than originally anticipated.
17. The task team relied heavily on the law firm Webber Wentzel – and in particular Umunyana Rugege and Moray Hathorn from its pro bono department – for technical and drafting expertise. The ALP assumed responsibility for presenting the draft procedural guidelines to the PIC, as well as for effecting final amendments as proposed by the PIC.

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

Implementing the NSP: a focus on priority area 4

Public education and training

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

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

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

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

18. The ALP also ran other training workshops.
19. The Mpumalanga workshops were attended by 15 LAB legal professionals from the following six justice centres: Middelburg, Nelspruit, Witbank, Piet Retief, Secunda and Ermelo. TAC's 15 representatives came from the Gert Sibande, Ehlanzeni and Nkangala districts. The Limpopo workshops reflected a similar breakdown: 15 LAB legal professional from five justice centres (Modimolle, Makhado, Polokwane, Thohoyandou and Tzaneen) and 17 TAC representatives from the Mopani, Vhembe, Capricorn and Waterberg districts.
20. While three SAHRC representatives attended the Mpumalanga workshops (the national HIV/AIDS coordinator and two staff members from the Nelspruit office), only two attended the Limpopo workshops (the national coordinator and a legal officer from the Polokwane office)

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

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

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

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

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

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

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

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

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Expanding access to legal services

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

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

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

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

Materials development on sexual violence and the law

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

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

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21. In this regard, see Mark Heywood and Adila Hassim, "Remedying the Maladies of 'Lesser Men and Women': The Personal, Political and Constitutional Imperatives for Improved Access to Justice", (2008) 24 *South African Journal on Human Rights* 264 (forthcoming in 2009)
22. ProBono.Org also runs a weekly clinic for refugees and asylum seekers. This much-needed service helped to pick up the increased demand for legal services in the wake of the xenophobic violence that swept parts of South Africa in 2008. In the ten months after the HIV clinic was started, 155 people had been seen. Approximately half of them sought assistance regarding employment issues. Other main issues included invasions of privacy, insurance, pensions and allegations of wilful HIV infection.
22. Siyayinqoba Beat It! – the brand under which CHMT produces its material – provides reliable, scientifically-based information. According to *http://www.beatit.co.za*, the series is intended to enable its audiences, regardless of HIV status, "to respond positively to the impact of the epidemic in their lives", with "the television and video medium [used] to overcome the language and literacy barriers to understanding HIV/AIDS information."

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

Future of SANAC and the NSP

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

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

In the medium to long term, when partnerships have strengthened and some degree of trust between government and civil society has been restored, SANAC – as an organisation – will need to be formalised.

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

In the medium to long term, when partnerships have strengthened and trust between government and civil society has been restored, SANAC – as an organisation – will need to be formalised. Its procedural guidelines expressly state that it is "not a juristic body" and that they "do not create an association or any other form of body corporate, nor do they create a contract."[24] In most other African countries, national AIDS councils take the form of statutory bodies or other juristic entities. As was recently recommended to the country's Parliament by a visiting delegation of the United Nations Inter-Parliamentary Union (IPU), perhaps now is the time for South Africa to follow suit.

24. Clause 1, Procedural Guidelines

Appendix A: Key Developments in Politics, Law and AIDS

KEY DEVELOPMENTS IN POLITICS	KEY DEVELOPMENTS IN LAW	KEY DEVELOPMENTS IN AIDS	KEY ALP SUBMISSIONS & SEMINARS
		1 December 2006: Presidency announces Record of Agreement on restructuring of South African National AIDS Council (SANAC).	
		23 February 2007: First meeting of SANAC's Law & Human Rights Sector.	
		30 April 2007: First Plenary meeting of SANAC: National Strategic Plan on HIV & AIDS and STIs (NSP) is endorsed.	
		3 May 2007: Cabinet adopts NSP as official policy.	
		5 – 8 June 2007: 3rd South African AIDS conference in Durban.	
8 August 2007: Dismissal of Deputy Minister of Health, Nozizwe Madlala-Routledge.			*21 August 2007:* 11th Joint Civil Society Monitoring Forum (JCSMF) meeting resolves that Department of Health (DoH) Human Resources for Health Plan is inadequate and should be challenged.
		10 September 2007: SANAC Plenary meeting: Mark Heywood confirmed as deputy chairperson.	*4 September 2007:* ALP/TAC oral submission to Parliament on Correctional Services Amendment Bill.
		16 November 2007: South Africa's application to Round 7 of Global Fund fails.	

KEY DEVELOPMENTS IN POLITICS	KEY DEVELOPMENTS IN LAW	KEY DEVELOPMENTS IN AIDS	KEY ALP SUBMISSIONS & SEMINARS
		28 November 2007: SANAC Plenary meeting: Deputy President and Director-General of Health (DG) commit government to finalising revised PMTCT protocol within two weeks.	
16 – 20 December 2007: ANC's 52nd National Conference: Jacob Zuma replaces Thabo Mbeki as party president.			
30 January 2008: Central Methodist Church raided by police. Over 300 people – mostly Zimbabwean refugees and asylum seekers – arrested and detained.			*18 January 2008:* 12th JCSMF meeting: Calls for immediate announcement of new PMTCT protocol. Also raises concerns about upcoming ARV tender.
		11th February 2008: National Health Council (NHC) adopts amended PMTCT protocol.	
			18 March 2008: Memorandum submitted to DoH on concerns relating to 2008 ARV medicine tender specifications. *19 March 2008:* Memorandum to ANC on drug resistant TB. *25 March 2008:* Written submission to Department of Justice & Constitutional Development on draft regulations in terms of Criminal Law (Sexual Offences and Related Matters) Amendment Act.

KEY DEVELOPMENTS IN POLITICS	KEY DEVELOPMENTS IN LAW	KEY DEVELOPMENTS IN AIDS	KEY ALP SUBMISSIONS & SEMINARS
			26 March 2008: Joint ALP/TAC oral submission to Parliament on Refugees Amendment Bill.
	8 April 2008: TAC seeks interdict to prevent Yanga Janet from intimidating, harassing and assaulting TAC members in Khayelitsha – interdict granted on same day.		*29 April 2008:* ALP written submission to DoH on draft communicable disease regulations.
12 May 2008: Xenophobic attacks break out in Gauteng and later in Western Cape. *30 May 2008:* Constitutional Court issues statement on complaint to Judicial Service Commission (JSC) alleging Justice Hlophe improperly tried to influence two judges in Jacob Zuma matter.	*12 – 16 May 2008:* Dr. Malcolm Naude's case on unfair dismissal heard in Labour Court in Johannesburg. *15 – 16 May 2008:* Case against SANDF's HIV testing policy argued in Pretoria High Court. *16 May 2008:* Settlement with South African National Defence Force (SANDF) made an order of court: SASFU and Others v Surgeon General and Others.	*26 May 2008:* National workshop on Provincial AIDS Councils – agreed that councils to be represented on SANAC. *27 May 2008:* SANAC Civil Society meeting SANAC Plenary meeting: • Procedural guidelines adopted. • DoH and civil society sectors agree to convene joint workshop of local experts to discuss voluntary medical male circumcision. • Resolved to bring public and private ART treatment into uniformity.	*16 May 2008:* Written submissions to DoH on draft National Health Amendment Bill and Medicines and Related Substances Amendment Bill. *20 May 2008:* Meeting with DoH to discuss submissions on draft health bills. 27 May 2008: Joint ALP/TAC written submission to SANAC plenary on access to health care for refugees.
6 June 2008: Justice Hlophe asks Minister of Justice for leave of absence. *10 June 2008:* Justice Hlophe lodges complaint with JSC alleging Constitutional Court judges violated his rights.	*1 June 2008:* TAC announces successful outcome of Competition Commission complaint against MSD and Merck.	*10 – 11 June 2008:* UN High-Level meeting on AIDS in New York. Delegation led by Deputy President includes Minister of Health, DG and four SANAC civil society representatives. Mark Heywood addresses conference by live video link-up.	*4 June 2008:* Written submission to National Treasury on Insurance Laws Amendment Bill. *12 June 2008:* Further written submission to National Treasury on Insurance Laws Amendment Bill.

KEY DEVELOPMENTS IN POLITICS	KEY DEVELOPMENTS IN LAW	KEY DEVELOPMENTS IN AIDS	KEY ALP SUBMISSIONS & SEMINARS
	13 June 2008: Judgment handed down in TAC and Another v Matthias Rath and Others, establishing duty on state to enforce scientific governance of medicines as per Medicines and Related Substances Act 101 of 1965.		*30 June 2008:* ALP/TAC written submission to Parliament on Medicines and Related Substances Amendment Bill.
		1 – 4 July 2008: First national conference on TB, Durban. *10 July 2008:* First Plenary meeting of Development Bank of Southern Africa (DBSA) "Health Roadmap process". *31 July 2008:* SANAC Plenary meeting. *July 2008:* Adila Hassim becomes member of ANC committee on National Health Insurance (NHI).	*21 July 2008:* ALP hosts seminar on health reform: Deputy Chief Justice Moseneke is key speaker.
		5 August 2008: Deputy President Phumzile Mlambo-Ngcuka attends International AIDS conference in Mexico – Minister of Health does not attend. Deputy President calls for national HIV prevention campaign.	*5 August 2008:* ALP/TAC oral submission to Parliament on Medicines Amendment Bill. *10 August 2008:* ALP/TAC written submission to Parliament regarding proposed amendments to Medicines Amendment Bill.
20 September 2008: Recall of President Mbeki by ANC.	*12 September 2008:* Justice Nicholson hands down judgment in favour of Jacob Zuma.	*3 September 2008:* Adila Hassim resigns from ANC NHI committee.	

KEY DEVELOPMENTS IN POLITICS	KEY DEVELOPMENTS IN LAW	KEY DEVELOPMENTS IN AIDS	KEY ALP SUBMISSIONS & SEMINARS
25 September 2008: Kgalema Motlanthe is sworn in as President. Barbara Hogan replaces Manto Tshabalala-Msimang as Minister of Health.	*25 September 2008:* Justice Hlophe wins first round in High Court case against Constitutional Court judges regarding violation of dignity. Appeal pending. *26 September 2008:* Justice Hlophe indicates intention to sue Constitutional Court judges in R10 million defamation claim.	*25 September 2008:* New Deputy President Baleka Mbete replaces Phumzile Mlambo-Ngcuka as SANAC chairperson.	*10 September 2008:* 13th JCSMF meeting resolves that further action needed to give full effect to rights of prisoners, sex workers, refugees, asylum seekers, displaced and undocumented persons, men who have sex with men and other sexual minorities. *18 September 2008:* Written submission to DoH on "revised" draft communicable disease regulations. *29 September 2008:* Further ALP/TAC written submission to Parliament regarding proposed amendments to Medicines Amendment Bill.
	21 October 2008: Judgment handed down in Labour Court in favour of Dr Malcolm Naude in case against former MEC for Health in Mpumalanga.	*16 October 2008:* SANAC Programme Implementation Committee (PIC) meeting: • Mandates deputy chairperson and PIC co-chair to develop proposal to restructure and relocate SANAC secretariat outside DoH. • Resolves that DoH must convene national meeting toward developing policy on voluntary medical male circumcision. • Resolves that sex workers be represented on SANAC.	
		8 November 2008: Plenary meeting adopts Roadmap for Health Reform at DBSA in presence of new Minister of Health.	

KEY DEVELOPMENTS IN POLITICS	KEY DEVELOPMENTS IN LAW	KEY DEVELOPMENTS IN AIDS	KEY ALP SUBMISSIONS & SEMINARS
		10 November 2008: News of Free State shortage of ARVs is reported. *13 November 2008:* South Africa fails in Round 8 application to Global Fund. *28 November 2008:* SANAC plenary agrees on World AIDS Day plan, PMTCT social mobilisation and continuation of secretariat move to DBSA.	*7 November 2008:* ALP hosts seminar on TB, public health and human rights.
	11 December 2008: Case to compel Minister of Correctional Services to provide access to Judicial Inspectorate of Prisons (JIOP) report on death of ALP client in prison argued in Pretoria High Court. Treatment Action Campaign v Minister of Correctional Services and Another. *31 December 2008:* President Kgalema Motlanthe appoints Justice Edwin Cameron to the Constitutional Court.	*1 December 2008:* World AIDS Day is organized by SANAC. National minute of silence is televised live. 15 minute work stoppage across the country. Text messages promote ARV treatment, HIV testing and PMTCT.	
12 January 2009: Supreme Court of Appeal (SCA) reverses Justice Nicholson's judgment of September 2008.	*30 January 2009:* Judgment handed down ordering Minister to provide access to JIOP reports.		*22 January 2009:* ALP writes letters to Ministers and MECs of Health and Finance regarding moratorium on ARV treatment in the Free State.

Appendix B: Publications

- ALP Newsletter (April, July, September and December 2008)
- Jonathan Berger, "Litigating for Social Justice in Post-Apartheid South Africa: a Focus on Health and Education" in Varun Gauri and Daniel M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, New York: 2008)
- Jonathan Berger, "Getting to the Constitutional Court on Time: a Litigation History of the Road to Same-sex Marriage" in Shaun de Waal et al (eds.), *To Have and to Hold: the Legal Steps to Same-sex Marriage* (Jacana Media (Pty) Ltd, Johannesburg: 2008)
- Jonathan Berger, "AIDS" in Krista Johnson Dates and Sean Jacobs (eds.), *Encyclopedia of South Africa* (Lynne Rienner Publishers, Boulder, CO: forthcoming in 2009)
- Fatima Hassan, "Summary of Track 3 – 3rd South African AIDS Conference", *AIDS Analysis of South Africa* (July 2007). Also published as Fatima Hassan, "Summary of Track 3 – 3rd South African AIDS Conference", (2007) 28 *Southern African Journal of HIV* Medicine 11
- Fatima Hassan, "Conditions in camps getting worse", *Cape Times* (28 September 2008)
- Fatima Hassan and Mark Heywood, "Counter point – the wrong Minister was fired", *Mail & Guardian* (16 August 2007)
- Adila Hassim, "Providing a health budget that respects equality", *Business Day* (20 February 2008)
- Adila Hassim, Mark Heywood, Jonathan Berger and Brian Honermann, *The National Health Act: a guide* (*Siber* Ink, Cape Town: 2008)
- Mark Heywood, "HIV in the military", *Sunday Independent* (8 June 2008)
- Mark Heywood, "Male Circumcision", in Lance Gable et al, *Legal aspects of HIV/AIDS: a guide for policy and law reform* (World Bank, Washington DC: 2007)
- Mark Heywood, "Political climate dangerous for poor most of all", *Business Day* (28 July 2008)
- Mark Heywood, "The Achilles heel? The impact of HIV/AIDS on democracy in South Africa" in Salim S. Abdool Karim and Quarraisha Abdool Karim (eds.), *HIV/AIDS in South Africa* (Cambridge University Press, New York: revised version of 2005 publication forthcoming in 2009)
- Mark Heywood, "Should Wealthy Nations Promote anti-AIDS efforts in Poor Countries: A response to Garrett and Schneider", (forthcoming in 2009 in *Congressional Quarterly*)
- Mark Heywood, "South Africa's Treatment Action Campaign: Combining Law and Social Mobilisation to Realize the rights to Health", (2009) 1 *Journal of Human Rights Practice* (forthcoming in 2009)
- Mark Heywood, and Adila Hassim "Remedying the Maladies of 'Lesser Men and Women': The Persona, Political and Constitutional Imperatives for Improved Access to Justice", (2008) 24 *South African Journal on Human Rights* 264 (forthcoming in 2009)
- Brian Honermann, "SANDF Unable to defend an Unethical HIV Study", *Business Day* 23 June 2008)
- Brian Honermann, "Act in Need of Intensive Care", *Business Day* (18 January 2008)
- Brian Honermann, "Know your rights when you get tested", *The Times* (6 July 2008)
- Amy Kapczynski and Jonathan Berger, "The Story of the TAC Case: the Potential and Limits of Social Justice Litigation in South Africa" in Deena Hurwitz et al (eds.), *Human Rights Advocacy Stories* (West Academic Press, New York: 2008)
- Dan Pretorius, "Unlocking labour laws", (2007) 31.3 *South African Labour Bulletin* 15
- Pholokgolo Ramothwala, "Widows constitutional rights ignored", *City Press* (15 September 2007)
- Pholokgolo Ramothwala, "AIDS, law and culture", *Mail & Guardian* (10 October 2007)

Appendix C: ALP written submissions

- "Draft Intellectual Property Rights from Publicly Financed Research Bill", Department of Science and Technology (18 July 2007)
- "Correctional Services Amendment Bill [B 32 – 2007]", Portfolio Committee on Correctional Services, Parliament (30 August 2007)
- "Panel for the Independent Assessment of Parliament" (22 September 2007)
- "Draft Nursing Council Regulations", Department of Health (28 September 2007)
- "Draft Regulations Relating to the Labelling and Advertising of Foodstuffs", Department of Health (September 2007)
- "KwaZulu-Natal Health Care Bill, 2007", KwaZulu-Natal health department (1 October 2007)
- "UNGASS Composite Index Survey on HIV/AIDS", Department of Health (November 2007)
- "Draft Regulations Relating to Foodstuffs for Infants, Young Children and Children", Department of Health (25 January 2008)
- "Draft Intellectual Property Rights from Publicly Financed Research and Development Bill, Department of Science and Technology (11 March 2008)
- "Regulations in Terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act", Department of Justice & Constitutional Development (25 March 2008)
- "Draft Regulations Regarding Communicable Diseases", Department of Health (29 April 2008)
- "Draft Medicines and Related Substances Amendment Bill, 2008", Department of Health (16 May 2008)
- "Draft National Health Amendment Bill", Department of Health (16 May 2008)
- "Insurance Laws Amendment Bill", National Treasury (4 and 12 June 2008)
- "Medicines and Related Substances Amendment Bill [B 44—2008]", Portfolio Committee on Health, Parliament (30 June 2008)
- "Draft VCT policy", Department of Health (18 July 2008). Also submitted to SANAC on 22 July 2008
- "Text of proposed amendments to the Medicines and Related Substances Amendment Bill [B 44—2008]", Portfolio Committee on Health, Parliament (10 August 2008)
- "HIV/AIDS workplace discrimination", Portfolio Committee on Labour, Parliament (12 September 2007)
- "Draft Regulations Regarding Communicable Diseases (revised)", Department of Health (18 September 2008)
- "Text of proposed amendments to the Medicines and Related Substances Amendment Bill [B 44B—2008]", Select Committee on Social Services, Parliament (29 September 2008)

Appendix D: Oral Presentations

Jonathan Berger

- 1st August 2007. Human Sciences Research Council (HSRC) colloquium on National Health Insurance, Pretoria. "Health service delivery planning as an integral part of the funding debate"
- 4 September 2007. Portfolio Committee on Correctional Services, Cape Town. ALP submission on the Correctional Services Amendment Bill, 2006
- 7–9 September 2007. Student Seminar for Law and Social Justice, Onrus. Various presentations
- 12 September 2007. Human Rights Development Initiative (HRDI) training, Pretoria. "Human rights obligations of states to regulate the pharmaceutical industry to ensure access to medicines"
- 14 September 2007. People-to-people documentary film festival, Johannesburg. Panel discussion on HIV, the media and documentary film making.
- 3 October 2007. Perinatal HIV Research Unit (PHRU) Priorities in AIDS Care and Treatment (PACT) conference, Johannesburg. Panel discussion on men and HIV
- 10 October 2007. Centre for the Study of Violence and Reconciliation (CSVR) workshop on sexuality, violence and HIV in prisons, Johannesburg. Presentation on the national framework for the prevention and treatment of HIV in prisons
- 16–17 October 2007. Commonwealth Secretariat workshop for government officials in Botswana on implementing TRIPs flexibilities to ensure access to medicines, Gaborone. Presentation on using competition policy to increase access to medicines and briefing on proposed amendments to provisions dealing with patents in the Industrial Property Act, 1996
- 25 October 2007. Norad and Norwegian Royal Ministry of Foreign Affairs meeting on HIV/AIDS, human rights and legislation, Oslo. Presentation on the use of the criminal law to address HIV/AIDS
- 15 November 2007. PEPFAR Partners in PMTCT meeting, Ekhurhuleni. Presentation on PMTCT and human rights (from informed consent to early treatment of infected infants)
- 27 November 2007. National civil society conference on the NSP, Ekhurhuleni. Plenary presentation on draft SANAC Rules of Procedure
- 29 November 2007. Clients of Macquarie First South (Johannesburg). Briefing for fund managers on the ARV market
- 5 December 2007. Clients of Macquarie First South (Cape Town). Briefing for fund managers on ARV treatment
- 18 January 2008. Joint Civil Society Monitoring Forum (JCSMF) meeting, Cape Town. "2008 ARV tender: concerns about access to EFV and TDF products"
- 29 January 2008. University of the Witwatersrand, Johannesburg: masters class (health law module), Steve Biko Centre for Bioethics. "The Constitution, legal action and the right to health: the TAC experience"
- 14 February 2008. University of the Witwatersrand, Johannesburg: undergraduate health sciences class (human behavioural sciences). "Access to medicines: the why, what and how"
- 27 February 2008. University of the Witwatersrand, Johannesburg: LLM class (Medicines, rights and regulation). "Enforcing the Medicines Act: the law" (facilitated discussion)
- 28 February 2008. Southern African HIV Clinicians Society (SAHCS): Johannesburg branch meeting, Johannesburg. "The ABC of drug access: reflections of a Pharma-basher"
- 29 February 2008. University of the Witwatersrand, Johannesburg: MPH class. "Accountability and participation in the health system: reflections on the experience of the TAC and ALP"
- 12 March 2008. Centre for Human Rights, University of Pretoria: LLM class. "Social movements and socio-economic rights: a focus on TAC's use of legal action to ensure the realisation of the right to health"

- 19 March 2008. University of the Witwatersrand, Johannesburg: LLM class (Medicines, rights and regulation). "TRIPs, Doha and the politics of access to medicines" (part one)
- 29 March 2008. Southern African Litigation Centre (SALC): workshop for private legal practitioners, Gaborone. "Conducting public impact litigation on HIV/AIDS – Learning from a South African case study: NM, SM and LH v Smith, de Lille and Another"
- 29 March 2008. SALC: workshop for private legal practitioners, Gaborone. "Litigating for access to comprehensive services in prisons – Learning from another South African case study: EN and Others v Government of the RSA and Others"
- 2 April 2008. University of the Witwatersrand, Johannesburg: LLM class, Medicines, rights and regulation. "TRIPs, Doha and the politics of access to medicines" (part two)
- 4 April 2008. University of the Witwatersrand, Johannesburg: LLB class, HIV/AIDS and the law. "Access to health care services"
- 4 April 2008. Webber Wentzel, Johannesburg: ALP/ProBono.org Access to Justice seminar. "Law in the time of HIV/AIDS – Ensuring access to appropriate health care services: a focus on TAC and the ALP"
- 11 April 2008. University of the Witwatersrand, Johannesburg: LLB class, HIV/AIDS and the law. "Access to prevention and treatment 'goods' for HIV/AIDS"
- 19 April 2008. Lawyers' Collective, Global South Dialogue on Trade, IPRs and Access to Medicines and Treatment, Delhi. "Using competition law in South Africa"
- 30 April 2008. University of the Witwatersrand, Johannesburg: LLM class (Medicines, rights and regulation). "Case studies on patent law: scope of patentability" (facilitated discussion)
- 7 May 2008. University of the Witwatersrand, Johannesburg: LLM class (Medicines, rights and regulation). "Amending the Patents Act in the post-TRIPs era"
- 13 May 2008. Centre for Human Rights, University of Pretoria: human rights and access to medicines seminar, Pretoria. "Litigation strategies to increase access to medicines: a focus on South Africa's TAC and ALP"
- 14 May 2008. University of the Witwatersrand, Johannesburg: LLM class (Medicines, rights and regulation). "Intellectual property and competition law"
- 2 July 2008. TB conference, Durban. Press conference and launch of Southern African HIV Clinicians Society (SAHCS) "Guidelines for the prevention and treatment of HIV in arrested, detained and sentenced persons"
- 5 August 2008. Portfolio Committee on Health, Parliament. Submission on the Medicines and Related Substances Amendment Bill [B 44—2008] (with Zackie Achmat)
- 25 August 2008. University of California, Berkeley School of Law. Presentation on the work of the ALP
- 25 August 2008. University of California, Berkeley School of Law: JD class (World Trade Law). Presentation on the ALP's work on international trade law
- 15 September 2008. International Health Department, Georgetown University School of Nursing and Health Studies: MPH class (HIV/AIDS: Who shall live, who shall pay, what can be done?). "Prevention of mother-to-child transmission of HIV in South Africa"
- 2 October 2008. O'Neill Institute for National and Global Health Law, Georgetown University Law Center. Presentation to O'Neill fellows on the work of the ALP
- 7 October 2008. O'Neill Institute for National and Global Health Law, Georgetown University Law Center: JD/LL.M class (Health Law Colloquium). Participation in health law panel
- 7 October 2008. Georgetown University Law Center: JD/LL.M class (Health and Human Rights). "The story behind the TAC case: before, during and after the litigation"
- 13 October 2008. University of Virginia School of Law: Human Rights Program. "Health rights and HIV in South Africa: impact of the Constitutional Court's decision in the Treatment Action Campaign case"
- 17 October 2008. Global Campaign for Microbicides, Washington DC. Presentation to staffers on the work of the ALP

- 22 October 2008. Washington College School of Law, American University: JD class (Intellectual Property and Human Rights). "Access to medicines and the law: focus on a comprehensive legal framework"
- 30 October 2008. The World Bank, Washington DC. "Socio-economic rights in the private sector: law and the regulation of pharmaceutical products in South Africa"
- 12 November 2008. University of Toronto Faculty of Law: Health Law Club. Brief overview of sabbatical research project
- 14 November 2008. University of Toronto Faculty of Law: JD/LL.M class (Sexual and Reproductive Health Law). "Legal institutions and the right to health: a focus on public health funding"
- 20 November 2008. University of Toronto Faculty of Law: Health Law and Policy seminar series. "Institutions matter: the right to health, the regulation of medicines and the South African Constitution"
- 24 November 2008. Yale Law School: Universities Allied for Essential Medicines panel on access to medicines. "Taking on the international IP system one lawsuit at a time? Towards a comprehensive regulatory framework"
- 25 November 2008. Munk Centre for International Studies, University of Toronto. "Competition law, refusals to license and the right of access to medicines: a South African case study"
- 1 December 2008. University of Toronto. "World AIDS Day 2008: SANAC and South Africa's National Strategic Plan"
- 3 December 2008. World Trade Organization, Geneva: Workshop on the TRIPs agreement and public health. "Implementing TRIPs flexibilities on access to medicines: a South African case study"

Fatima Hassan

- 12-13 July 2007. University of the Western Cape School of Public Health: Winter School. "The implementation of the Operational Plan and its implications for the success of the NSP"
- 7 August 2007. Deneys Reitz Attorneys, Cape Town. "The law and HIV – role of legal professionals"
- 14-16 August 2007. University of Cape Town School of Public Health: Law, Health and Human. Various classes
- 21 October 2007. Duke University, Durham, North Carolina: Duke Law and AIDS Clinic and Consortium on Southern Africa (COSA). "Law and the struggle for treatment in South Africa"
- 30 October 2007. Duke University, Durham, North Carolina: School for Public Policy. "Finding the right ingredients to cook the perfect pot of rice: civil society and its role in the struggle against AIDS"
- 2 August 2008. International AIDS Conference, Mexico City: Ford Foundation Pre-Conference. "Litigating Rights in South Africa"
- 5 August 2008. International AIDS Conference, Mexico City. "Fighting for Medicines in South Africa"
- 8 October 2008. Social Justice Coalition: Irene Grootboom lecture series, Cape Town. "Refugees and the right to equality – what does it mean?"
- 9 October 2008. Filmmakers Against Racism, Cape Town. Panel member on refugee rights and xenophobia
- 17-21 October 2008. International Treatment Preparedness Coalition (ITPC) conference, Amsterdam. Discussion of models of strengthening civil society communication, policy and advocacy
- 30 October 2008. A national priority? TRC recommendations and the need for redress, Cape Town. Speaker on health panel: response of government to HIV/AIDS in the last 10 years – what have we missed?
- 5 November 2008. South African Business Coalition on HIV/AIDS (SABCOHA) conference. Panel member on leadership on AIDS
- 6-9 November 2008. Closing the gap in a generation: health equity through action on the social determinants of health conference, London. Poster presentation on health care access for migrants, asylum seekers and refugees

Adila Hassim

- 14 March 2008. Workshop for ALP staff. "Litigating in the ALP"
- 2 July 2008. TB Conference, Durban: Round table debate. "TB, public health and individual rights: a constitutional perspective"
- 2 July 2008. TB Conference, Durban: SAHCS skills-building workshop. "TB and human rights"
- 9 July 2008. University of the Witwatersrand, Johannesburg: School of Law. "Reasonableness in health: Post-TAC case"
- 21 July 2008. ALP seminar on health sector reform, Constitution Hill. "Rands, Resources and Rights: rethinking health reform"
- 21 July 2008. SANAC NGO sector, Johannesburg. Presentation on the chronic illness grant
- 7 August 2008. University of the Witwatersrand, Johannesburg: School of Law. "SANDF and its aftermath"
- 1 September 2008. University of the Witwatersrand, Johannesburg: LLM class. "Legislative and executive responses to the White Paper on Transformation of the Health Sector"
- 9 September 2008. Training for TAC, Johannesburg. "Current Health Reform Processes"
- 29 September 2008. Workshop for ALP staff. "Public interest law at the ALP"
- 7 November 2008. ALP seminar on TB, Health Precinct, Hillbrow. "Public health individual rights and state duties"

Mark Heywood

- 30 January 2008. EU+ Donors' meeting. Presentation on progress with SANAC
- 12 February 2008. Panel for the Independent Assessment of Parliament. Oral presentation of ALP/TAC submission
- 13 February 2008. South African Council of Churches. Presentation on PMTCT
- 20 February 2008. ALP/ARASA seminar, Cape Town. "Politics of Global Health"
- 29 February 2008. University of the Witwatersrand, Johannesburg: LLB class. Lecture on the politics of AIDS
- 1 March 2008. TAC Gauteng Congress. Keynote address
- 11 March 2008. Royal Netherlands Embassy partners meeting. "Politics and AIDS" and "What we Expect from Donors"
- 12 March 2008. South African Council of Churches. Presentation to youth leaders on the challenges of HIV
- 15 March 2008. TAC National Congress. Treasurer's Report
- 27 March. TAC donors meeting. Report
- 11 April 2008. SANAC Law & Human Rights Sector consultation. "Overview of Progress at SANAC"
- 15 April 2008. Swedish Ambassadors from southern Africa countries. Presentation on strategic priorities on HIV
- 16 April 2008. University of the Witwatersrand, Johannesburg: LLM class (Medicines, rights and regulation). "Debunking Conglomo-talk" – presentation on the PMA case
- 22 April 2008. HIV Local Government Learning Event. "Progress with SANAC"
- 25 April 2008. University of the Witwatersrand, Johannesburg: LLB class (HIV/AIDS and the Law). Lecture on HIV testing and confidentiality
- 20 May 2008. Pan African Business Council. Keynote speaker at gala dinner
- 23 May 2008. SANAC Disability Sector: report launch. Keynote speaker
- 10 June 2008. United Nations High Level meeting on AIDS, New York. Keynote civil society speaker (via video link)

- 11 June 2008. Children's Sector HIV Network Summit. Keynote speaker
- 3 July 2008. TB conference, Durban. Plenary presentation: "TB and human rights – time to demand"
- 18 July 2008. Centre for the AIDS Programme of Research in South Africa (CAPRISA) 5th anniversary celebration, Durban. Keynote address
- 21 July 2008. ALP seminar on health sector reform, Constitution Hill. Presentation on summary of discussions
- 22 July 2008. SANAC NGO sector consultation. Update on SANAC
- 19 August 2008. SANAC research sector meeting on human resource issues. Presentation on challenges facing the sector
- 22 August 2008. Reproductive Health & HIV Research Unit (RHRU), Johannesburg. Panellist on debate on TB
- 31 August 2008. South African Medical Association conference. "Health reform and human rights: the 10 commandments"
- 10 September 2008. University of Witwatersrand, Johannesburg. "Practical experience of legal campaigns around social and economic rights"
- 12 September 2008. South African Democratic Nursing Union (SADNU), Bloemfontein. "Human resource issues for nurses: challenges and how to overcome them"
- 3 October 2008. SANAC Prevention Task Team Workshop. Introductory remarks
- 6 October 2008. PHRU's PACT Conference, Johannesburg. Presentation on budgeting for AIDS
- 7 October 2008. AIDS Foundation of South Africa (AFSA) Gala Dinner, Durban. Keynote address
- 10 October 2008. University of Witwatersrand, Johannesburg: School of Law symposium honouring Justice Edwin Cameron. Presentation on access to legal services
- 13 October 2008. EU+ Donors meeting. Presentation on progress with SANAC and the NSP
- 15 October 2008. Seminar on European Social Models for Health Care. Presentation on the South African health system
- 16 October 2008. SANAC Programme Implementation Committee. Presentation on priority work areas
- 23 October 2008. Gauteng AIDS Summit, Johannesburg. Keynote address
- 23 October 2008. Private Sector Strategic Workshop, Cape Town. Keynote address
- 28 October 2008. Oxfam Regional Seminar, Johannesburg. "TAC's Advocacy: Lessons and Learnings for Civil Society"
- 28 October 2008. Indaba of the National House of Traditional Leaders, Pretoria. Presentation on the NSP and its intersection with traditional health practices
- 5 November 2008. Private Sector Conference, Johannesburg. Panellist on the role of the private health sector in responding to AIDS
- 8 November 2008. Health Roadmap process, Development Bank of Southern Africa. Presentation at the final plenary meeting on SANAC and World AIDS Day, 2008
- 10 November 2008. NEDLAC. Presentation on plan for World AIDS Day 2008
- 12 November 2008. Private Sector Strategic Workshop, Durban. Keynote address
- 17 November 2008. SANAC Resource Mobilisation Committee (RMC). "The Deputy Chairperson's views on the Role and Responsibilities of the RMC
- 24 November 2008. UNAIDS Symposium to remember the legacy of Dr Jonathan Mann, Geneva. Panellist
- 6 December 2008. Korekata Law Centre training for Chinese lawyers, Wuhan, China. "Law and human rights: approaches to HIV"

- 9 December 2008. Institute for Health Law, Tsinghua University, Beijing, China. Lecture on AIDS, Human Rights and Law

Brian Honermann

- 29 May 2008. Wits Business School, Johannesburg: HIV/AIDS in the Workplace Research Symposium. Presentation on the SANDF case

Nonkosi Khumalo

- 19 – 24 November 2007. TAC/ALP workshop on gender-based violence. Presentation
- 4 – 6 December 2007. Diakonia Council of Churches. Presentation
- 28 – 29 June 2008. Ermelo Legal Aid Board. Presentation on community awareness on HIV/AIDS and the law
- 5 – 6 July 2008. Piet Retief Legal Aid Board. Presentation on community awareness on HIV/AIDS and the law
- 24 - 27 August 2008. ALP/TAC training on access to justice, Limpopo. Facilitator/trainer
- 10 - 12 November 2008. ALP/TAC training on law and violence against women, Mpumalanga. Facilitator/trainer

Dan Pretorius

- 1 August 2007. University of Witwatersrand School of Public and Development Management: public service managers' course. "HIV/AIDS and the Law"
- 28 August 2007. Helen Joseph hospital: trainee VCT counsellors, nurses and doctors. Training on HIV/AIDS and the law
- 13 – 17 August 2007. Public Service International SA affiliates: organizers in the health, education, police and municipal workers' unions. Training on HIV/AIDS and the law
- 29 August 2007. University of the Witwatersrand, Johannesburg: public health law course for doctors and public health managers. "Healthcare users' rights and healthcare workers' rights"
- 13 September 2007. Islamic Care Society. Training for social workers on HIV/AIDS and the law
- 24 October 2007. Justice College, Bloemfontein. Training for magistrates on HIV/AIDS and the law
- 8 November 2007. Diakonia AIDS Ministry. "HIV/AIDS: Workplace and Law"
- 13 November 2007. South African Commercial, Catering and Allied Workers' Union (SACCAWU). Training for Ackermann's shop stewards on HIV/AIDS and the law
- January 2008. TAC treatment literacy update course, Cape Town. Presentation on how to take up workplace complaints from workers living with HIV
- 6 February 2008. University of the Witwatersrand, Johannesburg: Public and Development Management School. One-day training on HIV/AIDS and the law for managers from the Gauteng health department
- 15 February 2008. Helen Joseph Hospital: trainee VCT counsellors. Presentation on HIV/AIDS and the law
- 20 – 21 February 2008. Industrial Health Research Group conference on unions and health and safety issues, Cape Town. Presentation to 200 trade unionists on HIV in the workplace (discrimination disputes and workplace policies)
- 22 February 2008. University of the Witwatersrand, Johannesburg: LLB class (HIV/AIDS and the Law). "HIV/AIDS and Employment"
- 29 February 2008. University of the Witwatersrand, Johannesburg: LLB class (HIV/AIDS and the Law). "HIV/AIDS and the Constitution"
- 27 March 2008. LAB/SAHRC/TAC training, Polokwane. Presented section on HIV in the workplace

- 2 April 2008. Webber Wentzel, Johannesburg: ALP/ProBono.org Access to Justice seminar. Presentation on HIV workplace disputes
- 25 April 2008. University of the Witwatersrand, Johannesburg: LLB class (HIV/AIDS and the Law). Lecture on social security, insurance and HIV/AIDS
- 6 May 2008. Right to Care: course on HIV Management for Doctors, Johannesburg. "HIV, Law and Ethics"
- 19 – 20 June 2008. LAB/SAHRC/TAC training, Nelspruit. Presented sections on testing, privacy and workplace rights
- 25 June 2008. Justice College, Pretoria: training session for magistrates. Presentation on HIV/AIDS and the law
- 29 – 30 May 2008. Wits Business School, Johannesburg: HIV/AIDS in the Workplace Research Symposium. Presented discussion points for roundtable discussion on discrimination in the workplace
- 25 June 2008. Justice College, Pretoria. Training for magistrates on HIV and the law
- 9 July 2008. Wits P&DM School, Johannesburg. Presentation on HIV and the law to health sector managers
- 18 July 2008. Helen Joseph Hospital, Johannesburg. Training for VCT trainees
- 30 July 2008. Wits P&DM School, Johannesburg. Training on HIV and the law for health sector managers

Amelia Vukeya

- 24 October 2008. Fordham University Conference on the role of customary law in the 21st century, Gabarone, Botswana. "Customs and HIV/AIDS in South Africa: Engaging Traditional Leadership in the Fight Against HIV/AIDS"

Agnieszka Wlodarski

- 18 July 2008. SANAC Law and Human Rights Sector. Presentation on ALP's TB work and relevant cases

Appendix E: Positions held by members of staff

Jonathan Berger

- Honorary research fellow, School of Law, University of the Witwatersrand, Johannesburg
- Law & Human Rights Sector representative, SANAC Programme Implementation Committee
- Visiting researcher, O'Neill Institute for National and Global Health Law, Georgetown University Law Center (September to October 2008)
- Visiting scholar, International Programme on Reproductive and Sexual Health Law, University of Toronto Faculty of Law (November to December 2008)
- Member of the South African Human Rights Delegation to Israel and Palestine (July 2008)

Fatima Hassan

- Convenor, Joint Civil Society Monitoring Forum (until November 2008)
- Board member, Médecins Sans Frontières (MSF) South Africa (resigned November 2008)
- Honorary research fellow, School of Law, University of the Witwatersrand, Johannesburg
- South African country team research representative, International Treatment Preparedness Coalition (until November 2008)

- Member, Western Cape Civil Society Task Team on Xenophobia (2008)
- Member of the South African Human Rights Delegation to Israel and Palestine (July 2008)
- Fleishman Fellow, Duke University, Durham, North Carolina (October to November 2007)

Adila Hassim

- Honorary research fellow, School of Law, University of Witwatersrand, Johannesburg
- Board member, Southern African AIDS Trust (SAT)
- ANC National Health Insurance Committee (resigned September 2008)
- Member, Health Advisory Committee, Project 25: Statutory Law Review, South African Law Reform Commission

Mark Heywood

- Chairperson, UNAIDS Global Reference Group on HIV and Human Rights
- Board member, Amandla AIDS Advisory Trust
- Honorary senior researcher, School of Law, University of Witwatersrand, Johannesburg
- Distinguished visitor, O'Neill Institute for National and Global Health Law, Georgetown University Law Center
- Phyllis W. Beck visiting Professor of Law, Temple University, Philadelphia (October to November 2007)
- Deputy Chairperson, SANAC
- Member, TAC secretariat
- Editorial board member, Journal of Human Rights Practice, *Oxford University Press*

Brian Honermann

- James E. Tolan Fellow in International Human Rights, Fordham University (September 2008 to August 2008)

Nonkosi Khumalo

- Chairperson, TAC
- Law & Human Rights Sector representative, SANAC Programme Implementation Committee
- Board member, AIDS and Rights Alliance for Southern Africa (ARASA)

Shalom Ncala

- Siyayinqoba Beat It! Presenter

Dan Pretorius

- Part-time commissioner, Commission for Conciliation, Mediation and Arbitration (CCMA)
- Board member, Southern African AIDS Trust (SAT)

Appendix F: Financial statements

AIDS Law Project
Association Incorporated Under Section 21
Registration No: 2006/021659/08

Income statement

	31 Dec 2008 Unaudited R	31 Dec 2007 Audited R
INCOME	**9 464 733**	**7 972 353**
Grants	8 978 366	7 355 180
Donations	520	17 900
Donations - Support Nozizwe Fund	-	87 050
Litigation costs recovered	80 658	10 000
Recoveries	30 000	-
Sale of ALP publications	1 307	80 243
Interest received	364 548	330 457
Sundry income	9 334	91 523
EXPENDITURE	**9 261 163**	**7 396 980**
Assets under R5 000	15 926	11 073
Bank charges	-	70
Consultations	163 674	247 118
Conferences, meetings and seminars	478 685	178 000
Courier, printing, postage and stationery	178 201	148 458
Evaluation	167 370	85 428
Legal and consultation fees	427 732	169 113
Publications	564 698	224 277
Refreshments and cleaning	44 991	48 418
Rent, water, electricity, repairs & maintenance	626 449	520 058
Salaries, wages and contributions	5 288 553	4 842 367
Staff development	33 707	14 379
Sundry expenses	252 501	27 147
Telecommunications and IT support	297 299	318 561
Travel and accommodation	291 912	331 078
Training and workshops	429 465	231 435
Surplus for the year	**203 570**	**575 373**

Balance sheet

	31 Dec 2008 Unaudited R	31 Dec 2007 Audited R
INCOME	**3 841 188**	**6 088 480**
Non current assets	**379 552**	**280 909**
Equipment	379 552	280 909
Current assets	**3 461 636**	**5 807 571**
Trade and other receivables	239 670	152 611
Accrued grant income	225 687	-
Amount due from CALS	40 062	40 062
Cash and cash equivalents	2 956 217	5 614 898
Total assets	**3 841 188**	**6 088 480**
RESERVES AND LIABILITIES	**3 841 188**	**6 088 481**
Capital and reserves	**1 344 076**	**1 140 506**
Director's reserve fund	964 524	812 617
Programmes fund	-	46 980
Equipment fund	379 552	280 909
Current liabilities	**2 497 112**	**4 947 975**
Trade and other payables	32 422	32 422
Deferred income	2 457 434	4 908 297
Interest received in advance	7 256	7 256
Total reserves and liabilities	**3 841 188**	**6 088 481**

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AIDS law project