



AIDS Law Project

Annual Review 2005-2006

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Photo: Reuters/The Bigger Picture

Mission

Discrimination against people with HIV/AIDS undermines society's effort to prevent HIV infection and limit the impact of the HIV/AIDS epidemic on our society. Discrimination is also contrary to internationally accepted principles of human right. The AIDS Law Project operates according to the principles set out in the 1998 United Nations International Guidelines on HIV and Human Rights as well as Revised Guideline 6 which provides guidance on issues related to treatment and care.

In particular, the ALP focuses on removing obstacles that:

- Prevent people with HIV/AIDS from having access to adequate health care and treatment in both the private and public sectors;
- Prevent people with HIV/AIDS from contesting unfair treatment and discrimination and having access to legal remedies to protect their fundamental rights; and
- Deny people with HIV/AIDS access to employment, employee benefits, insurance, education and other services.

The AIDS Law Project aims to:

- Carry out litigation and legal advocacy campaigns to counter wrongs that have occurred and, where possible, to establish legal precedents that prevent them from recurring;
- Build capacity within existing legal advice service providers to offer free legal advice that

will empower people living with HIV/AIDS to seek legal remedies in response to acts of unfair discrimination;

- Carry out research to support policy formulation and legislation that brings about systemic and sustainable changes in the provision of public health and other public amenities;
- Conduct research and carry out legal campaigns to ensure the removal of barriers that unfairly limit access to health care services for people living with HIV/AIDS;
- Develop print and electronic media that creates an awareness of rights in government and civil society and promote effective monitoring, lobbying and advocacy;
- Establish and transfer skills and knowledge of HIV/AIDS and human rights to civil society organisations in other SADC countries and
- Establish greater paralegal capacity on HIV/AIDS and the law at the level of the community in South Africa.

The ALP is committed to a code of professional ethics, to respecting confidentiality and to the principle of the maximum inclusion of people living with or affected by HIV/AIDS. We will oppose all forms of unfair discrimination and promote a culture of human rights and equality for all.

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ALP staff members at the projects annual review in September 2005.

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Tshepo Hlatshwayo
Mapula Hlaba
Janet Coe

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The Community Agency for Social Enquiry	Adv Robert La Grange
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The AIDS Law Project rests all of its work in the conviction that the human rights which the South African constitution says belong to us, should not be respected in theory only, but should be a touchstone for assessing the behaviour of all its people and institutions.



Photo: Reuters/The Bigger Picture

Introduction

By Mark Heywood

The 2005 Annual Review of the work of the AIDS Law Project is divided into four sections (excluding appendices), which reflect on the main objectives and outcomes of our work on HIV, human rights and law. These four sections are:

1. Litigation and Paralegal services aimed at protecting and promoting human rights
2. Monitoring implementation of access to ARV treatment and other related health services
3. Keeping Pressure on the Availability and Affordability of Medicines
4. Using Law and Human Rights to Build A Better Health Service

From the reports it should be clear that during 2005 the ALP accomplished a great deal on a wide variety of issues. This is in part due to the ALP's ability to partner with a range of individuals and organisations, ranging from clients who are the victims of human rights violations, to organisations like the TAC that use human rights to motivate campaigns to ensure access for all people to HIV treatment and prevention in the midst of a national and global AIDS epidemic.

The ALP has been able to have an impact on a number of issues because it endeavours to maintain a high ethical standard and rests all of its work in the conviction that the human rights which the South African constitution says belong to us, should not be respected in theory only, but should be a touchstone for assessing the behaviour of all people and institutions, but especially that of the government. This is particularly important when dealing with the consequences of HIV, a virus that has reached epidemic proportions, and which spreads faster in the absence of respect for human dignity.

In 2005, and in the last 12 years, the ALP has been able to demonstrate that human rights can be protected and advanced and be meaningful to ordinary people. This is achieved through a combination of legal action, advocacy, public education and research. Different emphasis is placed on the different components of this equation depending on the issue, its urgency, and (usually) the willingness of government to address it.

Thus, all ALP staff work to provide and extend education on HIV and human rights by teaching and lecturing at conferences, seminars and workshops – more than 170 in 2005. Some ALP staff focus exclusively on research, with a view to drawing the strands of a problem together so that it can be more easily recognised and addressed; or with the aim of providing the raw material for legal papers, the strength of which will be tested in adversarial litigation – upon which people’s lives may well depend. Then the ALP has been fortunate to be able to employ lawyers, who work to apply professional skills that more often than not are not made available to the poor, in matters of public interest and social justice.

Given that the ALP’s objectives are rooted in human dignity, human rights and constitutionalism it remains sad that, in the eyes of some in the government and the ANC, the ALP is seen as an adversary. In ANC Today in November 2004, for example, the ALP was accused of being an “antagonistic tendency” and of “having an academic desire to test the limits of our constitution and the law in general in pursuit of [the ALP and TAC’s] subjective goals as lobby groups.” The ANC argued that the “constant threat of litigation” was “wasting the very limited resources we have as a country to address various social challenges facing us”.

However, (as this report again illustrates) litigation against government on issues linked to HIV has arisen primarily because a powerful faction of the government has continually tried to deny the magnitude of the HIV epidemic, and of the measures that must be taken to protect life through both HIV prevention and treatment. In this context, the conduct of the Minister of Health and her department is frequently out of keeping with the constitutional dictates of good governance. Further, instead of taking advantage of the breakthroughs and the orthodoxies of modern medicine, succour is given to proponents of superstition and denial (Matthias Rath, for example, whose activities are covered in this review).

Finally, it is important to report that in 2005 the ALP reached a watershed when, at the Project’s annual review in September, a decision was taken to leave the Centre for Applied Legal Studies (CALs) and establish the ALP as an independent organisation. This followed an independent evaluation of the ALP’s work, conducted by the Community Agency for Social Enquiry (CASE), which had recommended such a move.

In early 2006 the ALP also decided to leave the University of the Witwatersrand, where it has been based since it was established in 1993.

Both of these decisions were made in the best interests of the ALP’s mission and we will continue to have a close association with the University of the Witwatersrand. Therefore 2006 will not only see continued work on HIV and the challenge it poses to human rights, but also the establishment of the ALP as an independent legal entity governed by a Board of Directors. We look forward to reporting on this transition in 2007!

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SECTION

1

Protecting and Promoting Human Rights: Litigation and Paralegal Services

By Anneke Meerkotter, Chloe Hardy, Adila Hassim and Fatima Hassan

At its annual review meeting in August 2004 the ALP reassessed the focus of its litigation and paralegal services. The review reaffirmed the need for continued advocacy and litigation around vulnerable groups in the workplace, with a particular focus on domestic workers, private security industry workers, miners and health care workers. Workers in these sectors often face HIV related discrimination, forced HIV-testing and occupational health concerns relating to HIV infection and working conditions which could negatively impact on their health and immune system. Not surprisingly, therefore, these groups form the bulk of the work-related complaints received by the ALP.

The review reaffirmed the need for continued advocacy and litigation around vulnerable groups in the workplace, with a particular focus on domestic workers, private security industry workers, miners and health care workers.

The review also emphasized the need for the ALP to resolve the outstanding complaints lodged on behalf of clients with the Health Professions Council of South Africa (HPCSA). These cases tended to be drawn out by frequent delays in the allocation of hearing dates for professional conduct inquiries and by subsequent delays in the ratification of decisions by the Board. A key problem identified by the ALP was the tendency by these committees to favour the version of the health professional over that of the patient. Complainants also experienced

difficulty in testifying in unsupportive and adversarial proceedings.

The continued mandatory testing of recruits by the South African National Defence Force (SANDF) also concerned the ALP. The Project had tried to resolve this problem for almost a decade through continued engagement with the Department of Defence and the South African National AIDS Council (SANAC), but without a positive result.

Other potential areas of litigation identified were the failure of the Department of Correctional

Services (DCS) to provide antiretroviral treatment to prisoners in terms of the Operational Plan on the Management of HIV/AIDS; problems around the implementation of the policy to provide post-exposure prophylaxis (PEP) to rape survivors to prevent HIV; continued discrimination by the insurance industry through HIV testing requirements and HIV exclusion clauses in policies; and problems around the withdrawal of disability grants once recipients' health improved due to antiretroviral access.

In addition to litigation, the review meeting identified the need to increase access to plain language information on HIV/AIDS and the law, with a particular focus on the development of material on funerals, mortuaries, funeral policies, guardianship and distribution of deceased estates since this information is often sought by community service organizations. Complaints received from prisoners also indicated a dearth of information on how to apply for parole, prison conditions and complaints procedures for prisoners.

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Litigation

Unlawful Disclosure of HIV status

NM, SM & LH v Charlene Smith, Patricia de Lille and New Africa Books

In 2002, the names and HIV status of three women were disclosed without their consent in the biography of politician Patricia de Lille, authored by Charlene Smith and published by New Africa Books. The case, which hinges on the right to privacy, finally went to trial in the Witwatersrand Local Division of the High Court in April 2005.

The trial called de Lille and Smith to account for their disclosure. The plaintiffs also testified on the impact the publication of the book had on their lives. Their long-term HIV counselor and an expert psychologist also testified in their support. In addition, a prominent professor in journalism, Anton Harber, testified on the ethical responsibilities of journalists to consider the impact of their actions and to obtain informed consent prior to the disclosure of private medical information.

Unfortunately, in May 2005, when judgment was handed down, neither de Lille nor Smith was held liable by the Schwartzman J. However the books' publisher was instructed to pay each plaintiff R15 000 and to delete their names from all unsold copies of the book.

The plaintiffs were unhappy with this decision and made an application for leave to appeal the High Court's decision. This application was heard on 22 August 2005 before the trial judge and was refused. A subsequent application to the Supreme Court of Appeal was also refused. In December 2005 the plaintiffs filed papers in the Constitutional Court applying for leave to appeal to this court against the findings of the High Court. The case was argued before the Constitutional Court on 9 May 2006. Judgment was reserved.

Public Servants' Right to Criticize Government Policy

Gazidis v Minister of Public Services and Administration and others;
Naude v MEC for Health, Mpumalanga

The ALP acted for two public service doctors who had either been subjected to disciplinary proceedings for misconduct or dismissed as a result of voicing criticism of government's policy on HIV/AIDS.

In the case of Dr Costa Gazi, the ALP assisted Dr Gazi in his appeal to a full bench of the Transvaal Provincial Division of the High Court against a finding of misconduct against him in terms of public service legislation for 'prejudicing' the department after he criticized the government's failure to provide antiretrovirals to pregnant women to prevent mother-to-child transmission of HIV in 1999. This case was finally argued on 20 February 2006 and judgment was obtained in favour of Dr Gazi in March 2006.

The ALP also acted for Dr Malcolm Naude in an application to the Labour Court against the Mpumalanga MEC for Health's failure to employ him as a junior medical officer after he assisted the Greater Nelspruit Rape Intervention Project (GRIP) to provide antiretrovirals to women who have been raped in 2000. In September 2005 the ALP had to convene a pre-trial conference before a judge after the respondent's attorneys had unduly delayed the case. The case is still pending.

Both these cases originated from a time when the government's policy was to not provide anti-retrovirals for prevention of mother-to-child transmission, for rape survivors or for people living with HIV/AIDS and in a climate where the government's attitude was recalcitrant and obstinate.

Complaints against Health Professionals

Drs Labuschagne, Barnard, Steyn and Dukes

The HPCSA is a statutory council that governs the conduct of health professionals. One of its functions is to receive and investigate complaints of misconduct by health professionals. However, in practice the ALP has always found the HPCSA slow in its investigations and often prone to too readily accept the version of a doctor rather than a patient. However, after meetings between the ALP and the HPCSA, the HPCSA announced, towards the end of 2005, that it would fast-track HIV-related complaints.

In the case of *VRM v Dr Labuschagne*, the ALP had obtained judgment against the HPCSA in an appeal to a full bench of the Transvaal Provincial Division of the High Court in 2003. The case concerned the doctor's failure to adhere to the HPCSA's ethical guidelines on the management of patients with HIV by testing VRM without her informed consent and pre- and post-test counseling and without informing her of the test result. The outcome of the judgment was that the Preliminary Inquiry Committee was ordered to investigate and hear any matter in which there was an opposing version from the health professional and the patient, as opposed to it accepting the doctor's version. The matter was sent back to the committee for a disciplinary hearing, which took place in August 2004. The doctor was charged with 6 different offences, but only found guilty of failing to tell VRM of her HIV+ test result. He received a suspended sentence. However, the committee's decision had to be referred to the HPCSA's Board for ratification, but frequent bureaucratic delays meant that only happened in June 2006.

In the case of *David Patient v Dr Barnard*, a review application was made to the Transvaal Provincial Division of the High Court against the decision of the Preliminary Inquiry Committee not to call an essential witness to testify in a matter. The matter concerned the discriminatory treatment towards Mr Patient because of his HIV status. The review application was unopposed and the matter was referred back to the disciplinary committee, where it was finally heard in March 2006.

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In the case of *MM v Dr Steyn*, the complaint concerned the testing of a domestic worker for HIV and disclosing the result to her employer resulting in her subsequent dismissal. The ALP assisted the HPCSA's pro forma complainant preparing for the case. The doctor was found not guilty after the Disciplinary Committee accepted his version based on medical notes over the client's version, for which she had no supporting evidence. However, the client was satisfied with the outcome, as she felt that the doctor was unlikely to violate the rights of future patients, which was her concern in laying the complaint. The ALP also assisted the HPCSA

in preparing for another disciplinary hearing against a doctor who was accused of refusing to provide ARV drugs to a patient who owed him money for other medical services. The doctor was found not guilty after contradictions in the complainant's testimony emerged. The ALP paralegals sat as observers in the hearing, and were satisfied that despite problems with the proceedings, including a lack of translators for witnesses, the process was on the whole fair. The ALP has established a better working relationship with the HPCSA, and will continue to bring problems with the complaints procedure to the attention of the Council.

Workplace Discrimination on the Basis of HIV status

*JLT v Department of Defence,
CN v Erasmus*

In the case of *JLT v Department of Defence*, JLT was refused deployment after an HIV test. The ALP wrote to the Department of Defence (DOD) requesting reasons for their decision. The DOD responded that their decision was in line with the prerogative of the Surgeon-General of the Department of Defence to determine health standards and with operational requirements and was in the best interests of JLT's health. The ALP engaged with several experts to prepare reports challenging the SANDF's current policy.

The ALP also acted for a domestic worker who was dismissed because of her HIV status in 2004. The case was brought to the Labour Court. An expert affidavit was prepared by explaining the insignificant risk of HIV transmission from a domestic worker in the workplace. A pre-trial conference was convened in January 2006 and the matter was settled in CN's favour after the close of pleadings.

Defamation or Truth Telling?

Pekane v TAC and Mthembu

Dr Daisy Pekane, the CEO of Natalspruit Hospital sued the TAC and Gordon Mthembu (chairperson of TAC Gauteng province) for defamation as a result of the contents of a memorandum that was handed over to the Health MEC in protest of conditions at Natalspruit Hospital. The memorandum criticized Dr Pekane's management of the hospital and recorded a number of concerns, including infant deaths that had increased under her management, poor quality of care and low staff morale.

The TAC, represented by the ALP, filed a plea defending the action on the basis that the contents of the memorandum were true and in the public interest.

In an attempt to advance the interests of the community served by Natalspruit Hospital, the matter was eventually settled. In terms of the settlement agreement, the TAC and Mr Mthembu apologized to Dr Pekane to the extent that the memorandum may be interpreted as a personal attack on her. Dr Pekane agreed to work with the community and TAC in order to address the concerns that were raised in the memorandum.

Protecting Prisoners Rights to Access ARV Treatment

EN & Others v Government and Others

Preparation for litigation against the Westville Correctional Centre in Durban, the Department of Correctional Services (DCS) and the Department of Health began in October 2005. The matter came to the ALP's attention in September 2005 that prisoners at Westville Correctional Centre (WCC) were unable to access ARV treatment. After consultation with some HIV positive prisoners, the ALP immediately wrote to the DCS and the WCC authorities to notify them of this complaint and asked that those prisoners whose HIV infection met clinical guidelines for ARV treatment are provided access to it.

Despite undertakings by the DCS at a meeting held with the ALP in December 2005 that they would work expeditiously to provide prisoners with access to ARV treatment, they were very slow to act. It then became clear to the ALP that urgent litigation would be necessary. The application was heard in the Durban High Court on 30 May 2006. A precedent setting judgment in favour of the prisoners was handed down on June 22 2006.

Implementation of Infection Control Policies in Health Establishments

IH & AO v Department of Health, Western Cape and others

The ALP is acting as attorneys in a case in the Cape High Court, for two parents acting on behalf of their daughter, who are suing the Western Cape Province after their baby was infected with HIV after birth in either Red Cross Children's Hospital or Mowbray Maternity Hospital. The case raises impor-

tant issues around the inadequate implementation and lack of prioritization of infection control policies in health establishments. The ALP has consulted with various experts in preparation for trial.

Protecting Public Health and the Integrity of Medicines Control

Litigation against and by multinational vitamin salesman Matthias Rath

One area of work that was not planned for, but which has preoccupied the ALP has been in litigation against medical charlatans. One such case has involved Matthias Rath, the controversial owner of a multinational vitamin company, who makes unfounded claims that his vitamins are a cure for everything from cancer to HIV. He has been condemned by the medical fraternity internationally and has a number judgments against him in Europe. During 2005 Rath continued to attempt to establish a base in South Africa, hoping to take advantage of high-level political denial about HIV and opposition to the use of antiretroviral medicine.

A major part of his campaign has been to attempt to discredit and defame organisations such as the TAC, as well as to use his substantial financial resources to deepen the fear and confusion of HIV.

In May 2005 the TAC (represented by the Legal Resources Centre) sought an urgent interim interdict in the Cape High Court to prevent Rath and his Foundation from making false claims about TAC's sources of funding and its relationship with pharmaceutical companies -- on the grounds that making such claims was defamatory of the TAC. The case was heard before three judges (at the request of Rath's lawyers) in May and June 2005. During the case, the Traditional Healers Organisations (THO), who have been funded by Rath, intervened as a party to the case.

Judgment was delivered on 3 March 2006. A unanimous court held that Rath and the Foundation were interdicted pending the final determination of the case from publishing any further statements which alleges that the TAC is a front for pharmaceutical companies or that the TAC targets poor communities as a market for the drug industry in order to promote the interests of pharmaceutical companies. The court also held that the TAC could sue Rath for defamation despite not alleging or incurring patrimonial loss as a result of the defamation.

Linked to the case, in June 2005, the TAC (this time represented by the ALP) launched legal proceedings in the Cape High Court against Rath to seek a final interdict that would prevent Rath from defaming the TAC. Rath defended the case and initially sought to except to the particulars of claim on

the grounds that TAC could sue for defamation because it did not allege that it suffered financial loss as a result of the alleged defamation. The exception was set down to be heard on 6 April 2006. But on the morning of 6 April 2006, the exception was withdrawn with a tender of costs. The case continues.

In about September 2005, Rath responded to growing criticism of him in the media particularly by journalists and prominent doctors and politicians by simultaneously commencing legal action against nearly 25 individuals, organisations and journalists! It appears that such drastic legal action

Rath responded to growing criticism of him in the media, particularly by journalists and prominent doctors and politicians, by simultaneously commencing legal action against nearly 25 individuals, organisations and journalists!

was intended to stop widespread criticism of his conduct – in promoting vitamins as a substitute for ARVs. But far from having this effect, all of the defendants refused to settle and defended their right to make statements about Rath and his unscrupulous activities. They all indicated that they would defend their right to free speech and fair comment in the public interest.

In these cases the ALP acts for Prof Kader Asmal (a senior ANC and former member of the Cabinet), Dr Eric Goemaere (the Head of Mission of MSF in South Africa), and Anso Thom (a journalist) and Health-e News.

As a first step, because Rath is not a South African citizen, each of the defendants asked him to furnish security for costs, ranging from R150 000 – R 400 000.

It seems that this was too much even for Rath's deep pocket because, in yet another retreat, in early 2006, Rath withdrew (with a tender of costs) the legal cases against Goemaere, Health-e and its

journalists and others. He continues with his case against Professor Kader Asmal.

As part of the ongoing Rath saga, in October 2005, the TAC was forced to launch legal proceedings against the Medicines Control Council (MCC), the Minister of Health, Western Cape Health MEC Pierre Uys, Rath, and a clutch of AIDS denialists (including Anthony Brink and Sam Mhlongo). The aim was to seek an interdict to prevent Rath and his associates from continuing to make false claims about his products and to stop them from conducting illegal human experiments. The litigation also seeks an order from the court to compel the MCC to take the necessary legal action (as is within their powers) against Rath. This was necessary because, despite a lengthy complaint that was submitted to the MCC by the TAC in early 2005 (with the assistance of the ALP), that detailed Rath's illegal activities, to date, the MCC has failed to take any steps against Rath or put an end to his illegal activities (which it is obliged to do). The case is pending.

Summary of paralegal work and key outcomes

The social justice litigation described above often involves a number of people and has a far-reaching impact (if successful). However, there are many areas of life where the law clearly prohibits unfair discrimination, but where violations continue. In recognition of this throughout 2005 the ALP continued to provide a paralegal service, where staff and volunteers provide assistance to people experiencing discrimination and needing advice. This service is vital because it is the test of whether or not the law works for poor people. As the table below illustrates, advice is provided on a wide range of matters. But particularly with regard to unfair dismissals on the basis of HIV status, the ALP was successful in a number of matters, either resolving the matter equitably or obtaining settlements for clients.

Some examples of paralegal interventions include:

- **LM v AVBOB:** The ALP assisted in obtaining a deceased person's medical records from her employer, as AVBOB was refusing to process a funeral insurance claim without the information. The records had been lost by the employer (the SA Police Service), but with the ALP's intervention, they were recovered, and the claim was paid out.
- **CO v Department of Home Affairs:** The client was unable to obtain ARV treatment or a disability grant because she had lost her identity document, and the Department of Home Affairs insisted that, although they had her name and date of birth, they would not attempt to trace her records unless she produced a form signed and stamped by the last school she had attended. The client had last attended a rural primary school over 20 years ago, and the school had not kept records going back that far. The ALP arranged for the client to receive ARV treatment from a local hospital without an ID book.
- **LM v Mr Price:** The client started ARV treatment, and her doctor advised her to take two months sick leave, as she was experiencing side effects, and needed time to adjust to the medication. She was granted extended sick leave, but when she reported back to work in good health after two months, her manager tried to pressurise her to resign. When she refused to do so she was told to report for an incapacity hearing. The ALP assisted her to prepare for the hearing, and she was reinstated in her job.
- **JB v Call Force Direct:** The client was dismissed after her HIV status became known to the company where she had been placed on an out-sourcing contract. The matter was settled, and she was awarded substantial financial compensation.
- **ZZ v Discovery Health:** The client's medical aid refused to pay for her baby's hospitalisation, because the child, who subsequently died, had not been tested for HIV. The ALP referred a complaint to the medical scheme's Disputes Committee on the basis that the medical aid did not have a right to require members or their dependants to test for HIV. The medical aid settled the matter, and the hospital fees were paid in full.

Throughout 2005, the ALP continued to provide a paralegal service, where staff and volunteers provide assistance to people experiencing discrimination and needing advice.

Quantitative summary of paralegal assistance:

Issue	01/05	02	03	04	05	06	07	08	09	10	11	12	Total
Children	3	2	1	0	0	0	0	0	1	2	3	0	12
Confidentiality	8	3	2	3	4	4	2	4	2	1	2	2	37
Death	1	0	2	0	0	0	1	0	0	1	0	0	5
Gender	-	-	-	-	-	-	0	1	1	0	0	0	2
Information and Research	5	3	1	0	3	0	3	3	1	3	4	1	27
Insurance	7	3	2	0	2	2	2	1	3	1	4	0	27
Medical Aids	0	0	5	0	1	1	1	1	1	0	0	0	10
Miscellaneous	6	2	3	0	1	1	0	1	1	2	1	1	19
Not HIV-related	2	1	1	0	0	1	0	7	1	0	0	1	14
Prisons	1	0	2	0	1	3	3	2	1	1	1	1	16
Social Security	1	2	3	0	1	1	0	0	2	0	1	0	11
Testing	5	1	0	2	1	2	1	1	1	3	1	1	19
Treatment and Medical	1	0	4	0	1	3	1	0	3	0	5	1	19
Violence and Harassment	4	0	0	0	0	0	1	0	1	1	1	0	8
Wilful transmission	2	1	0	0	1	1	0	0	0	0	0	1	6
Workplace	29	10	9	2	9	7	12	12	12	2	8	2	114
Total													346*

* Please note that due to problems with the data-capturing system, many cases where the ALP provided once-off telephonic legal advice were not captured during 2005.

Teaching, Training, Education and Media

The ALP continued its training relationships and commitments with organizations such as Community AIDS Response, the Helen Joseph Hospital VCT counsellor training programme, the Red Cross, the Justice College social context training programme for Magistrates, and the Wits University Public and Development Management School's training for public health care officials. On average a total of 3 presentations are given per week by ALP staff!

The ALP also conceptualised and co-ordinated an LLB course on AIDS and the Law for the third year running.

In addition, staff provided training for a wide range of community-based organisations, support groups, government departments and private sector companies.

Summary of ALP Presentations:

Sector	Government	NGO	Education	Health	Religion	Other	International	Total
Number	25	54	25	28	1	36	13	171

A full list of all workshops and seminars conducted by ALP staff is provided in the appendix.

In addition to training, there is a need to continually improve access to information regarding HIV/AIDS, human rights and the law. In recognition of this the ALP distributes its pamphlets free of charge on request (see table below). The ALP also tries to respond to emerging issues. So, for example, in 2005:

- The ALP published a comprehensive pamphlet entitled “Living and Dying: Legal Issues Made Simple”.
- In response to various complaints from prisoners relating to delaying in and refusals of parole applications for prisoners with AIDS and lack of access to antiretrovirals and adequate nutrition, the ALP published a poster and pamphlet setting out prisoners’ rights.
- The ALP was requested to compile a booklet on the legal requirements for the registration of children’s homes for CHOMP (the Children’s Home Outreach Medical Programme), a collective of paediatricians providing medical services to children’s homes. CHOMP had identified the need for such a booklet to assist many children’s homes who provide important services to children living with or orphaned by HIV but are unregistered and therefore not entitled to subsidization by the state because of the onerous and complicated requirements for registration.

In response to various complaints from prisoners relating to delaying in and refusals of parole applications for prisoners with AIDS and lack of access to antiretrovirals and adequate nutrition, the ALP published a poster and pamphlet setting out prisoners’ rights.

Finally, staff of the ALP continue to be contacted frequently by the media, either for public comment or for background briefing on issues. Interactions with the media are recorded in staff’s monthly reports and are summarised below:

Distribution of ALP publications

Name of publication	Number of copies distributed
HIV/AIDS Current Law & Policy: Testing for HIV: Privacy and Confidentiality	8 382
HIV/AIDS Current Law & Policy: Testing for HIV: Know your rights	8 026
HIV/AIDS Current Law & Policy: Testing for HIV: Women, HIV and AIDS	16 408
HIV/AIDS Current Law & Policy: Testing for HIV: Your rights at the workplace	7 275
HIV/AIDS Current Law & Policy: Testing for HIV: Your rights in prison	4 502
Preventing HIV after rape: Steps you can take to protect your health	11 777
HIV/AIDS & the workplace: Your rights as a domestic worker	10 679
Guidelines on HIV/AIDS and the Law for Advice and Legal Office Workers	8 103
Living and Dying: Legal issues made simple	205
2003 Annual Report	115
2004 Annual Report	346
Poster: Preventing HIV after Rape	461
Poster: HIV/AIDS and the Workplace: Your rights as a domestic worker	1 406
Poster: HIV/AIDS: Know your rights	1 926
Poster: Get tested, Get treated, Stand up for your rights! (Prisons)	0
TOTAL	73 676

ALP in the media

Media	Total
Radio	
Local	70
International	18
TV	
Local	30
International	12
Print	
Local	113
International	28
Total	271

Resource Centre

The number of visitors to the Resource Centre (RC) is approximately 12 per month. In addition, there are many phone enquiries. Visitors include University of the Witwatersrand students and outside visitors. Students tend to come in when they need to work on assignments, hence the busiest time being between end-April and early June. They come in to access reading material specifically related to the HIV/AIDS & the Law course offered by the ALP.

At other times, an average of 4 people come in every month, whilst others call from non-governmental organizations (NGOs), government departments, companies and private individuals who require the ALP's publications.

Outside visitors are usually overseas researchers. Researchers and students are the people who actually make use of the physical space of the RC.

University of the Witwatersrand staff, especially from the libraries, call on the RC in three instances: 1) to enquire about information on a particular subject related to HIV/AIDS; 2) enquire about the HIV/AIDS & the Law manual; or 3) for directing people to us.

Website: ALP Mailing Lists

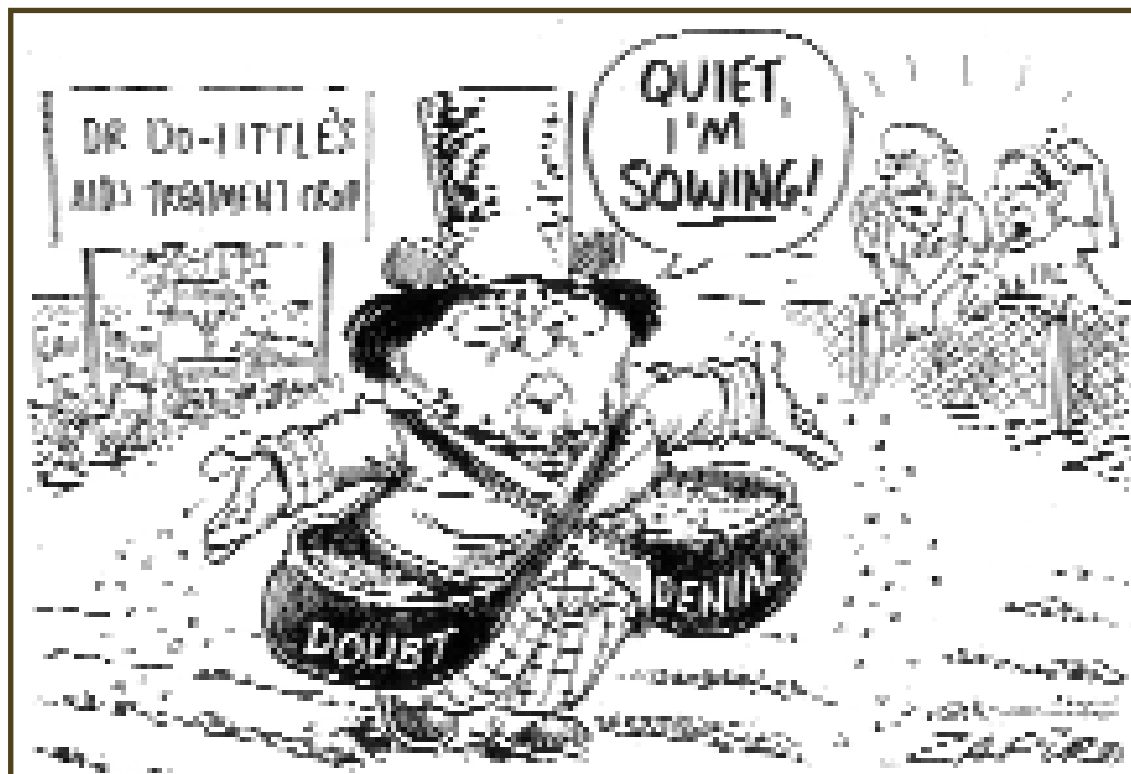
Members	Number of Members
ALP activists, general mailing list	525
ALP media	105
Human Resources for Health, a mailing list set up by the ALP to distribute information to health workers and researchers	86
Total	716

How many people visit the website?

Year 2005	Unique visitors	Number of visits	Pages
Total	11 021	17 138	239 842

The table above shows vital statistics regarding the ALP website. Unique visitors refer to each log in to the site. That means a total of 11 021 different people logged on to the site during 2005. Number of visits refers to how many times those 11 021 people logged on to the site. The same person can come back several times. Pages and hits refer to the actual pages viewed on the site, whether it was the homepage, “about us” page or HIV/AIDS & the law manual page.

The majority of the website’s visitors are from South Africa, educational institutions from the USA, Canada, France and Australia.



SECTION

2

Monitoring Implementation of Access to Antiretroviral Treatment and Related Health Services

By Fatima Hassan and Deena Bosch

Since 1998, the TAC and its allies have led a lengthy public campaign for access to ART through the public health sector. Eventually, on 8 August 2003, the Cabinet made a commitment to provide ART treatment, and two months later the government published the *Operational Plan on Comprehensive HIV and AIDS Care, Management and Treatment for South Africa* (the Operational Plan).

In 2005, according to the National Department of Health (NDoH), there were 192 public health facilities providing HIV/AIDS-related services and the total number of people on treatment in both the public and private sector stood at approximately 180 000. About 100 000 people were accessing ART in the public sector, with an additional 90 000 – 100 000 receiving it in the private and not-for-profit sectors.¹

ALP and Civil Society Monitoring of the Operational Plan

As described in earlier annual reports, the ALP and TAC have played a major part in securing the right of access to care and treatment. But it has always been appreciated that whilst victories in court are important, they will come to nought if they are not monitored and if pressure is not maintained to ensure implementation.

With this in mind, in 2004 the ALP spearheaded a meeting of health activists that resolved to set up the Joint Civil Society Monitoring Forum (JCSMF), an ad-hoc body, made up of a number of civil

1. Hassan F, Tracking patient numbers in the private sector – January 2006. Available from author. Hassan F and Bosch D, Monitoring the provision of ARVs in South Africa – a critical assessment. ALP Briefing for TAC NEC. 17 and 18 January 2006. CAPE TOWN. Available from author. This includes a provincial assessment and comparison over 7 time intervals. And see Social Cluster briefing: Parliamentary Media 10 February 2006, available at www.doh.gov.za/docs/pr/2006/pro210.html where the Minister's stated that there are 229 sites treating 117 897 patients on ARVs at the end of December 2005. One of the key challenges of the programme is the ability of government and other key stakeholders to collect and access accurate data and information about the programme.

society and private sector organisations, including the TAC and ALP. Over time the JCSMF has become the most important civil society watchdog of the Operational Plan. The ALP is the convenor of the JCSMF.

The JCSMF is exclusively dedicated to monitoring the implementation of the Operational Plan. By the end of 2005, it had met on six separate occasions in six different provinces.

Date	Location	Theme
September 2004	Pholokwane, Limpopo	General assessment of the ARV roll-out
November 2004	Bloemfontein, Free State	Contribution of NGOs
February 2005	Durban, KwaZulu-Natal	Paediatric care
May 2005	Nelspruit, Mpumalanga	Nutrition
August 2005	Khayelitsha, Western Cape	General assessment
November 2005	East London, Eastern Cape	Contribution of donor programmes

After each meeting, the JCSMF issues public reports containing resolutions and recommendations for improving the pace and manner of implementation. These are usually drafted and disseminated by the ALP.

As the table shows, each JCSMF meeting is theme based. In addition to its meetings the JCSMF also disseminated information and materials through its members who in their day-to-day work collect information relevant to the Operational Plan.

The JCSMF's uniqueness lies in its ability to provide an opportunity for willing stakeholders to meet quarterly to share information and experiences about the programme. In doing so, it allows members and broader interested parties, including people living with HIV/AIDS, to be alerted to operational issues that require resolution as well as identify the successes and limitations of the programme. Through such monitoring, members of the JCSMF have been able to campaign, lobby and litigate on certain issues affecting the implementation of the programme (TAC, ALP and ODAC on access to information, ALP on drug procurement, PSAM and IDASA ABU on budgetary under spending etc).

The JCSMF is the only forum of its kind in Africa. It brings together a combination of researchers, public and private health providers and activists. Its diversity means that the government cannot easily dismiss the findings of its collective monitoring. In addition, its meetings in provinces has forced provincial health departments to meet with civil society as well as account for policies and programmes in an open and public forum. At times it has even alerted provincial departments to specific areas that require monitoring and change (be it missing food parcels in Mpumalanga, to addressing the issue of lay counsellors in North West).

On specific resolutions it has managed to mobilise health care workers with a view to pursuing specific objectives (for example lobbying by paediatricians after the JCSMF meeting on paediatric access resulted in a joint working group being set up by the NDoH).

Finally, the forum's information sharing system assists a range of other organisations with collating and collecting data (see, for example, recent reports by ICASO and the South African Human Rights Commission as well as the private sector). In addition, it has also assisted donors to plan appropriately by identifying real needs of real communities. They, like journalists and AIDS NGOs, rely heavily on the JCSMF to get a sense of the pulse of the programme.

The JCSMF is the only forum of its kind in Africa. It brings together a combination of researchers, public and private health providers and activists. Its diversity means that the government cannot easily dismiss the findings of its collective monitoring.



Photo: Reuters/The Bigger Picture

Monitoring of Provinces by the ALP

In addition to the JCSMF, the ALP and TAC has also been doing monitoring work in specific provinces and at a national level in both the public and private sector. To date, the TAC and ALP have issued annual reports on the Operational Plan in 2004 and 2005.² These reports highlight the successes and weaknesses of the current programme and have been widely distributed and relied upon.

The ALP also monitors the extent of provision of private sector treatment particularly services provided by workplace treatment programmes. In 2005 we collated data on private sector coverage – something that government had not done.

In May 2005, as part of our monitoring work, the ALP appointed a full time staff member in our Cape Town office to start to conduct field visits in different provinces – monitoring ‘from the ground up’. In 2005 visits were made to Mpumalanga and Limpopo – two provinces whose approach to the ARV roll-out has been lacklustre and uncommitted

Reports on the findings of these visits were provided to key partners in each province with a view to strengthening the role of community organisations in those areas. Attention was drawn to the fact that one of the main barriers was the slow and cumbersome accreditation process before hospitals or clinics are allowed to commence ARV treatment. Health care facilities that considered themselves ready to provide ARVs to patients were made to wait for months before they were accredited. As a result, the ALP recommended that the accreditation process in both provinces become a provincial responsibility.

In 2005, the ALP was appointed as the SA Country research team by the International Treatment Preparedness Coalition (ITPC), and contributed to compiling a report card that includes an assessment of the scale up of ARV treatment in six countries including South Africa. In December 2005 *“Missing the Target - A Report on HIV/AIDS Treatment Access from the Frontlines”* was released.³ The ITPC report identified several barriers to increasing the pace of the rollout and has been widely quoted by several leading organisations including UNAIDS. Thus, our national monitoring work was used to benefit international and regional processes.

Despite the efforts of the ALP and others hard information about the programme is generally not easily available. Aside from a handful of short parliamentary press briefings, the Department of Health and the Minister had not, by December 2005, compiled or publicly presented a qualitative assessment of the programme - some 2 years after its adoption. There has therefore been no qualitative reporting to the public, parliament or SANAC. Ironically, the NDoH repeatedly claims to be responsible for the “the largest ARV programme in any developing country” – but has little evidence to confirm this.



Photo: Reuters/The Bigger Picture

2. 'Our People Are Suffering - We Need Treatment', Updated First Report on the Implementation of the Operational Plan for the Comprehensive HIV/AIDS Care, Management and Treatment for South Africa (Operational Plan), July 2004.

'Let Them Eat Cake' - A short assessment of Provision of Treatment and Care 18 months after the adoption of the Operational Plan. June 2005.

Both reports are available at www.alp.org.za and www.tac.org.za

3. See section on South Africa at page 73. <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=271>

SECTION

3

Keeping Pressure on the Availability and Affordability of Medicines

By Jonathan Berger

Medicines form an integral part of any evidence-based, rights-affirming and comprehensive approach to the prevention and treatment of HIV infection, other sexually transmitted infections (STIs) and AIDS-related opportunistic infections. In particular, antiretroviral (ARV) medicines have revolutionised the way in which we are now able to prevent and treat HIV infection.

For most of the 1990s, HIV was seen as an “automatic death sentence”. But today, for those with access to ARVs, HIV infection can be transformed into a chronic, manageable illness, extending the quality and quantity of life for people living with HIV/AIDS (PLWHAs). In addition, ARVs are used as prophylaxis – to prevent HIV infection from mother-to-child during pregnancy, labour or breastfeeding, following a needlestick injury with HIV-infected blood or in the aftermath of sexual assault.

Essential medicines need to be accessible, meaning physically available, and financially affordable. In other words, access to medicines can only be assured if a sustainable supply of affordable medicines can be guaranteed.

But the existence of essential medicines is not enough. In addition to being developed and registered for use, they also need to be accessible, meaning physically available *and* financially affordable. In other words, access to medicines can only be assured if a sustainable supply of affordable medicines can be guaranteed.

The ALP’s work on medicines access relies heavily on the fundamental right of access to essential medicines, an integral part of the constitutional guarantee that every person in South

Africa has access to health care services, as well as the obligations that the right places on the state. This work is based on three pillars:

- First, the understanding that essential medicines are public goods and that access to them is a human right;

- Second, that all laws and regulations that govern the availability and affordability of essential medicines be interpreted and applied in the context of a fundamental entitlement to these public goods; and
- Third, that the state is mandated by the Constitution to take reasonable measures to ensure that people are able to access essential medicines.

With this in mind, the ALP's access to medicines work is broadly divided into two areas of focus: the development of an appropriate legal framework, and using existing laws to increase access. Together, these areas of work are undertaken to ensure that the state is able to provide a continuous supply of essential medicines to those reliant on the public sector for their health care, as well as to ensure access for those who – for reasons of choice or necessity – obtain their medicines in the private sector.

Development of an appropriate legal framework

In 2005, the ALP focused on three key issues: the legal challenge to the medicine pricing regulations issued in terms of the Medicines and Related Substances Act, 101 of 1965; the amendment of the Patents Act, 57 of 1978; and the proposed amendment to the World Trade Organization's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs):

- The pricing regulations: this work involved acting on behalf of the TAC in its intervention as *amicus curiae* (friend of the court) when the matter reached the Constitutional Court, as well as work that followed the handing down of judgment in the matter. This intervention is described in further detail below.
- The Patents Amendment Bill: this work was largely limited to the drafting and oral presentation of a submission on the proposed amendment, dealing with patents reliant on bioprospecting (of indigenous biological resources and knowledge) and benefit sharing agreements. The submission was also used as an opportunity to sensitise Parliament to the need for further and broader amendments to increase medicines access.
- The TRIPs amendment: this work involved participation in a stakeholder consultation as well as the drafting of a written submission on the approach we suggested the South Africa government take in respect of the amendment that is supposed to give effect to Paragraph 6 of the *Declaration on the TRIPs Agreement* and public health (and thereby ensure that developing countries without pharmaceutical manufacturing capacity are able to access cheaper generic products from countries with capacity).

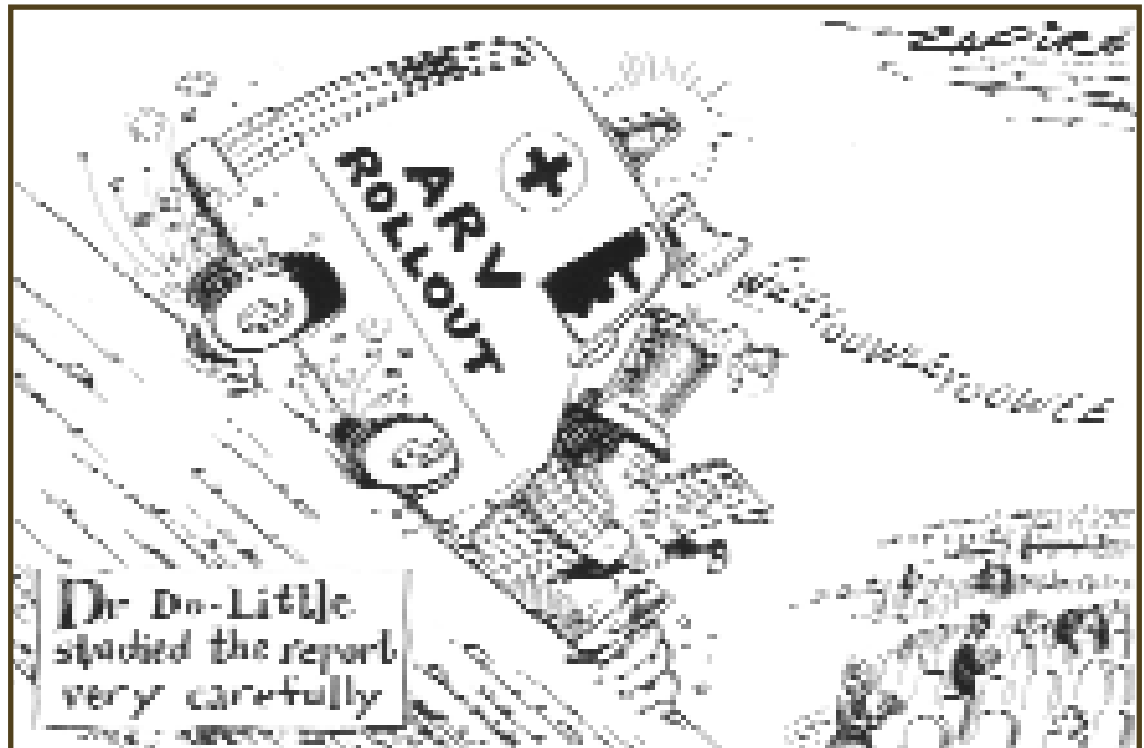
In addition, the focus on the legal framework continued to be the subject of much advocacy work, including the drafting of opinion pieces that were published in the mainstream press, as well as the delivery of various conference and workshop presentations.

Medicine pricing regulations

In early 2005, after the state had lodged an application for leave to appeal against the decision of the Supreme Court of Appeal (SCA) regarding the challenge to the regulations, the ALP began taking steps on behalf of the TAC to be admitted as *amicus curiae*. The application to be admitted was successful, resulting in the TAC's evidence being admitted to the record and its legal team being given an opportunity to advance legal argument in writing and during the hearing of the matter in mid-March.

The *amicus* intervention focused on the narrow issue of relief – on the “nature of the remedy that ... [would] be appropriate if the appeal ... [were] to be dismissed, either in part or in whole.” In short, the TAC argued in support of a remedy that would not simply declare certain of the pricing regulations as unconstitutional, as the SCA had in fact done, but would also “supervise the process of amendment and redrafting” of the Medicines Act and the pricing regulations, if necessary. This would be to ensure stakeholder buy-in in respect of the “procedure in terms of which the defects in the regulations (and the Act, if applicable) will be remedied.”

Linked to the *amicus* intervention was the conceptualising, planning and organisation of a public



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meeting dealing with certain of the key issues and controversies raised by the case. Work for the meeting, which was held on the day before the Constitutional Court hearing of the matter, included the preparation of various documents for release to the public. These documents included a summary of the legal arguments to be advanced, a press statement and an updated version of a Q&A fact sheet on the medicine pricing regulations previously drafted for the TAC by the ALP.

Some of the ALP's arguments were directly incorporated into the Constitutional Court's decision, which upheld the general validity of the regulations, amended some of them to make them compatible with the Constitution, and declared the dispensing fee, the most hotly contested provision – unconstitutional.

Some of the ALP's arguments were directly incorporated into the Constitutional Court's decision, which upheld the general validity of the regulations, amended some of them to make them compatible with the Constitution and declared the dispensing fee – the most hotly contested provision and the main source of conflict between government and the pharmacists who challenged the laws – unconstitutional. It is unclear to what extent the ALP's legal arguments and evidence influenced the outcome. What is clear is that the outcome against which the TAC sought to guard – a completely unregulated market and ongoing (and paralysing) hostility between the key role-players – was indeed averted.

The Constitutional Court's decision is long and complex, being made up of a unanimous court summary and five separate judgments on the merits, as well as three short concurring judgments. In justifying the remedy it ordered, the Court held as follows:

“Bearing in mind the important constitutional purpose served by the pricing system, we are satisfied that the correct remedy in the present case is to preserve as much of the scheme as is possible, as long as this can be done in a manner that serves the main object of section 22G of the Medicines Act. The main object of section 22G is to make medicines more accessible and more affordable by means of a transparent pricing system.”⁴

4. at paragraph 16

In his leading judgment, former Chief Justice Arthur Chaskalson expanded on the role of government in ensuring access to medicines. Not only is the state “entitled to adopt, as part of its policy to provide access to health care, measures designed to make medicines more affordable than they presently are”⁵, but enhancing “the accessibility and affordability of medicines ... is an obligation of the state which in terms of section 27 of the Constitution is obliged to take reasonable measures to enhance access to health care.”⁶

In the wake of the decision, the ALP limited its input to two matters. First, it drafted a simple summary of the key elements of the very lengthy and complex Constitutional Court decision, which was distributed widely in a TAC electronic newsletter. Second, acting in its own name and on behalf of the TAC, the ALP drafted a submission for the Department of Health on the implications of the court decision for the development and implementation of an appropriate dispensing fee to replace the one that had been declared unconstitutional and therefore invalid.

Using Existing Laws to Increase Access to Essential Medicines

The ALP’s work in 2005 again included a focus on using and developing the law to increase access to a sustainable supply of affordable medicines. This work was once again conducted in close collaboration with the TAC.

In 2002 and 2003 the ALP and TAC had worked closely together on the *Hazel Tau* complaint before the Competition Commission, which resulted in GlaxoSmithKline (GSK) and Boehringer Ingelheim (BI) effectively being forced to license a number of generic pharmaceutical companies on reasonable terms to import and/or produce a range of ARVs. That settlement first brought affordable generic ARVs to the private sector market in 2004.

In May 2005, government announced the result of the public sector ARV tender. South Africa’s Aspen Pharmacare, which – in terms of volume – was awarded the lion’s share of the tender, was able to supply generic ARVs at affordable prices as a direct result of the *Tau* settlement. Prior to the settlement, Aspen had been licensed by GSK and BI but on particularly unreasonable terms – in the case of GSK, for example, subject to a 30% royalty rate. Without the reduction of that royalty rate to 5%, Aspen’s products produced under licence from GSK would have cost at least 35% more. A conservative estimate puts government’s savings in the tens of millions of rands. Ironically, in view of the ongoing conflict with the ALP, the government owes this saving to our work!

However, unlike some previous years, 2005 did not see significant ALP activity in this area, only resulting in a single (albeit significant) gain in medicines access. Instead, the bulk of the work done has the potential to be used as a base for further action in 2006 and 2007. In general, the work focused on three issues:

- demands for licensing,
- the clarification of pharmaceutical company policy on patent protection and enforcement, and
- medicine pricing.

The highlights in respect of each area are briefly set out below.

Licensing

Of the seven key drugs used for treating adults in the state’s public sector ARV treatment programme, access to a sustainable supply has yet to be achieved in respect of efavirenz (marketed by MSD as Stocrin®) and lopinavir/ritonavir (marketed by Abbott Laboratories as Kaletra®). By the end of 2005, the public sector remained reliant on single suppliers for each of the drugs, despite already having experienced a number of shortages in respect of efavirenz. The actual supply of lopinavir/ritonavir has not yet become an issue, largely because of the limited demand as a result of the medicine’s status as a second-line regimen drug.

5. at paragraph 32

6. paragraph 314

The ALP met – and engaged in correspondence – with MSD and Abbott regarding the licensing of generic companies to produce and/or import generic efavirenz and lopinavir/ritonavir products. In addition, it initiated and engaged in correspondence with the Department of Health regarding the Minister’s failure to take appropriate action against the two companies. To date, neither company has acceded to the ALP’s demands in this regard, nor has the Minister taken any action, despite section 4 of the Patents Act empowering her to issue licences to generic companies for the local production and/or importation of generic versions of the relevant ARV medicines.

By the end of 2005, the ALP – in consultation with legal counsel and the TAC – took a decision to pursue this matter by way of a complaint to the Competition Commission regarding unreasonable (and therefore unlawful) refusals to licence. The groundwork completed in 2005 makes it plain that unless an action of this sort is indeed pursued in 2006, MSD, Abbott and the government will allow the status quo to remain – the ever-present danger of ARV stockouts.

Clarifying policy

To avoid being compelled to issue licences to generic companies, some pharmaceutical companies have adopted different approaches to the question of medicines access. Unfortunately, little information on their policies was publicly available. With this in mind, the ALP wrote to two companies (Roche and Gilead) for clarity:

- Roche confirmed that it does not enforce whatever patents it has in South Africa on HIV medicines, including ARVs and medicines for the treatment of AIDS-related opportunistic infections.
- Gilead confirmed that its ARV medicines are either not patented in South Africa (tenofovir disoproxil fumarate) or are patented but the patents remained unenforced (emtricitabine).

In other words, there are no patent barriers in this country preventing companies from producing and/or importing generic versions of Roche’s HIV medicines or Gilead’s ARVs. However, this may not resolve the problems of access given that the right to import products is reliant on the ability to export in countries where the medicines are in fact produced. Patent barriers to export in such countries could effectively deny imports into South Africa. This is an area for further work in 2006 and beyond.

Pricing

The focus of the work on reducing the prices of HIV medicines was action on the excessively priced amphotericin B (AmB), an essential antifungal drug that is no longer protected by patent but which nevertheless enjoys a *de facto* monopoly in South Africa. AmB, which is marketed by Bristol Myers-Squibb (BMS) as Fungizone[®], is used in the early stages of treating cryptococcal meningitis, a common cause of death amongst people living with HIV/AIDS in this country. Initially brought to the attention of the ALP by a researcher at the Desmond Tutu HIV Centre in Cape Town, the matter was pursued on behalf of the TAC and the Southern African HIV Clinicians’ Society.

The focus of the work on reducing the prices of HIV medicines was action on the excessively priced amphotericin B (AmB), an essential antifungal drug that is no longer protected by patent but which nevertheless enjoys a *de facto* monopoly in South Africa.

Despite an initial response that seemed to indicate a willingness on the part of BMS to fight, the matter was resolved within a relatively short time through a series of letters that were faxed between legal representatives. On 28 April 2005, a little over ten weeks after sending the letter of demand, the ALP informed BMS’s legal representative that in the light of his client’s “decision to lower the price of Fungizone[®] in South Africa to R22.60, effective 1 July 2005 and applicable in both the public and private sectors, ... [it had] advised ... [the TAC and the Southern African

HIV Clinicians’ Society] not to pursue this matter by way of legal action”. In effect, the new price represented a reduction of more than 80% and 85% of the public and private sector prices of Fungizone[®] respectively.

In many ways, the particular facts and timing of the Fungizone® matter represented the perfect case. Coming hot on the heels of the *Hazel Tau* victory in 2003, BMS was on the back foot from the start. In addition, its product was already off patent. Moreover, the substantially lower price for the same medicine in Great Britain appeared to provide clear evidence of price gouging in South Africa. The facts spoke for themselves and BMS acted rationally. Understandably, but regrettably, it persisted in the argument that it had “no legal obligation” to reduce the price of the medicine.



Photo: Shayne Robinson/SAPA

SECTION

4

Using Law and Human Rights to Build A Better Health Service

By Adila Hassim

A growing key strategic area of the ALP's work is a recognition of the need to focus on strengthening the health system in general, in order to facilitate access of everyone, including people living with HIV/AIDS, to health care services. With 1 500 new HIV infections daily in South Africa, the burden on an already weak health system will become weightier. It is critical therefore that strategies to strengthen the health system recognize the impact of HIV/AIDS on the system and the people that drive that system.

In order to give meaning to the constitutional right of access to health care services, health sector transformation is necessary. This means that we need to address such issues as

- the manner in which health care is financed in South Africa,
- the lack of competition in the provision of health care services (especially in the hospital sector and pathology sector),
- the human resources crisis and quality of care.

Written Submissions to Parliament and the Department of Health

In 2005 the ALP made five submissions to the Department of Health and Parliament regarding draft policies and bills that have significant implications for health sector transformation. These submissions were accompanied by direct engagement with the relevant government departments through letters and oral presentations. In addition, several consultations were held with civil society that aimed to begin to build consensus and a more vocal coalition on issues of public health.

The ALP's written submissions are summarised below:

The Charter of the Public and Private Health Sectors of the Republic of South Africa (the draft Health Charter) 15 August 2005

For several years the Ministry of Health has been promising to develop a Health Charter that, it hoped, would unify all stakeholders in health care around the duty of government to progressively improve the quality and accessibility of health care in SA. The draft Health Charter, which was first published in July 2005, identified four areas of focus: access, equity and quality of health care services, and Black Economic Empowerment (BEE). Regrettably, however, much of it deals with BEE rather than the other three goals related to health service delivery.

The ALP's submission set out a vision of a unified health care service, in which everyone would be entitled to basic health care services regardless of ability to pay, health status or place of residence. The submission then identified the aspects of health sector transformation that the draft Health Charter fails to address, such as the setting of targets and timeframes to bring about greater access to health care services, proper regulation of the private sector to address spiralling costs and remedying imbalances between the sectors by increasing government funding for health. With regard to BEE, we stated that we do not believe that health sector transformation could be achieved through transfer of ownership in the private sector alone. We stressed the need for broad-based BEE, where there would truly be skills transfer and an improvement in quality of service.

The ALP's submission set out a vision of a unified health care service, in which everyone would be entitled to basic health care services regardless of ability to pay, health status or place of residence.

After this submission was made, there were further developments with regard to the Health Charter. In particular, in November 2005 a new Health Charter Steering Committee was set up by the Department of Health, which is made up of representatives of stakeholders including the private sector, labour, civil society and the public sector. Two ALP staff members (Adila Hassim and Fatima Hassan) are civil society representatives on the Steering Committee.

The Strategic Framework for the Human Resources for Health Plan (the HRH document) 14 September 2005

The development of a Human Resource Plan for Health has been a key part of SA health policy since the advent of democracy in 1994. Health activists expected that this document would provide a plan for addressing the human resources crisis in the health sector. However, when a draft was released in mid 2005 its weakness was that it largely restates the historic challenges and provides a 'framework' for the development of a plan. Like the draft Health Charter, it also omits to deal with a range of essential issues. For example, it is devoid of priority setting and fails to consider issues such as inter-sectoral cooperation (for example between the departments of education and health on the training of health care workers (HCWs)), the conditions of service of HCWs, the appropriate role of the private sector and the impact of HIV/AIDS on individual HCWs and on the health system as a whole.

The ALP's submission, therefore, was largely based on setting out the state's constitutional obligations to develop a proper plan. While we pointed out that with ongoing consultation, the document could be refined, we also indicated that all stakeholders need to move with urgency to develop a national Human Resources for Health Plan that satisfies the constitutional obligations placed on the state.

The Nursing Bill [B26 – 2005], 10 October 2005

The ALP welcomed the initiative to repeal the old Nursing Act and provide for greater accountability of the South African Nursing Council (SANC). However, the Bill provides only for direct accountability of the SANC to the Minister of Health and not to the Forum of Statutory Health Professional Councils (the FSHPC), as established by the National Health Act, or Parliament. Our submission provided input on how this could be changed.

In addition, the submission noted that the Bill seems to have been drafted in a vacuum, with no regard to the broader legislative and policy objectives in the health sector. It does not take account of the human resources crisis (which the SANC would and should be directly involved in addressing) and the relevant provisions of the National Health Act. Further, the Bill contains various provisions that may in fact undermine policies that seek to improve nursing capacity, for example the provision that allows for immediate removal of a nurse from the register for failing to comply with administrative requirements – such as notification of change of address.

Our submission stressed that the provisions of the Bill should be directed to the objective of strengthening the SANC in order to protect the public interest, to ensure efficient regulation of the profession and to ensure that that the SANC provides guidance to the Minister, the National Health Council and the FSHP as to the various challenges that face the nursing profession and therefore the health system as a whole.

Compensation for Occupationally Acquired HIV infection

For several years the ALP has been concerned by problems experienced by health care workers in applying for compensation after occupationally acquired HIV. In the past we have assisted a number of clients with submitting these complaints to the Compensation Commissioner. In recognition of this in 2005 the ALP drafted a submission to the Department of Labour on its Draft Circular Instruction on Compensation for Occupationally Acquired HIV. We also submitted an article to the Industrial Law Journal to encourage debate on this issue.

The Draft Revenue Laws Amendment Bill (DRLAB), 18 October 2005

Certain provisions of this draft Bill are aimed at providing tax relief for registered income tax payers who use the private health care system. The ALP supports the provisions to the extent that they draw in more people to the private sector than would otherwise have occurred – thus reducing the burden on the public sector. However, our submission placed on record that in the broader context of ensuring access to health care services, we also need measures that subsidise the health care costs of those who fall below the income tax threshold. In our view, the tax rebates granted by the draft bill constitute indirect state subsidies for users of private health care.

Our submission also focused on the issue of the ‘off-site’ provision of employer-funded health care services, which currently falls within the definition of taxable ‘fringe benefits’. While we welcomed the proposal to exempt such services from fringe benefit tax (FBT), we noted that it was clumsily drafted so as to leave a large number of such health services within the definition, in conflict with the purpose of the amendment.

For many years we lobbied business to make ARVs available to workers who did not earn enough to join a medical scheme. At the time the public sector was not providing ARVs. When businesses such

Our law was amended so that no tax is paid on such benefits. This is a victory for low-income earners and their partners and children who are accessing ARV treatment through their employers at health facilities outside of the workplace.

as de Beers, Anglo American, BP, Daimler Chrysler, BMW, Sasol, ESKOM, and others started providing ARVs to their employees, those receiving the benefit outside of the workplace had to pay ‘tax’ because it was regarded as a fringe benefit. National Treasury invited the ALP to suggest an alternative formulation to deal with the issue of FBT. The new provision takes into account parts of our submission. Effective 1 March 2006, our law was amended so that no tax is paid on such benefits. This is a victory for low-income earners and their partners and children who are accessing ARV treatment

through their employers at health facilities outside of the workplace. It appears from this draft Bill that there has been limited consultation with the Department of Health regarding the interventions that are already being pursued by the Council for Medical Schemes to address inequitable access to private health care services. Our submission therefore urged the National Treasury to work together

with the department on this issue as we remain concerned that the new law also provides substantial additional tax relief for middle and high-income earners who belong to medical schemes.

“Health Rights, Law and Policy: A Handbook”

In keeping with the growing focus on broader issues of health sector transformation, the ALP has identified a need for better public information and understanding of health rights and the South African health system. To this end we have begun to write a handbook which explains, accurately yet simply, the South African health system, including its history and possible future transformation. This book will be the first comprehensive description of the health system, relevant law (including updated information on legislative changes) and the meaning of these for the exercise of the right to health care and other fundamental rights of health care workers, policy makers and users of the health system.

The book is premised in the understanding that fundamental rights, law and policy are inextricably related. Whether you approach the health system as a user, employee, policy or law maker, each of these elements will be relevant to your interaction with the health system. The constitutional protection of the right of access to health care services is dependent on an appropriate and dynamic interface between these three elements. This book will critically examine the changes that have taken place since 1994, and makes proposals for the future transformation of the health system.

The Health Handbook is being edited by Mark Heywood, Adila Hassim and Jonathan Berger. Various members of the ALP staff have contributed chapters to the book.

The ALP has contracted with SiberInk Inc to publish the book. It is currently going through a process of peer review and editing. It is envisaged that the book will be launched in 2006.

We believe that greater regulation is necessary, and will continue to engage with these and other governmental institutions in an effort to promote the constitutional vision of equitable access to health care services.

Conclusion

The foregoing illustrates that the legislative and policy reform that is taking place in relation to health care services is fragmented and at times inconsistent. The 1997 White Paper for the Transformation of the Health System in South Africa proclaims that one of the objectives of health policy in the new South Africa is to promote equity and to develop a single, unified health system. Despite this, the expensive private health sector continues to grow. Access to health care services still depends on one's ability to pay and where one lives. The regulatory authorities, such as the Competition Commission and Tribunal and the Council for Medical Schemes have been important players in regulating the private sector. However, we believe that greater regulation is necessary, and will continue to engage with these and other governmental institutions in an effort to promote the constitutional vision of equitable access to health care services.

APPENDIX

A

Presentations and papers of workshops, seminars and conferences

Jonathan Berger

- 19 January. TAC secretariat, Cape Town. TAC litigation strategy.
- 24 January. TAC NEC, Cape Town. TAC litigation strategy.
- 28 January. ALP staff meeting, Johannesburg. Private research on social assistance litigation and jurisprudence.
- 11 February. Young Communist League leadership, Johannesburg. “Resexualising the epidemic: desire, risk and HIV prevention”.
- 18 February. TAC Gauteng leadership, Johannesburg. Briefing on potential litigation.
- 25 February. Human Rights Institute of South Africa workshop, Johannesburg. “A rights-based approach to HIV/AIDS”.
- 1 March. Sowetan/Sunday World newspaper briefing for journalists, Johannesburg. “Implementation of the public sector antiretroviral treatment plan”.
- 7 March. Johnnic Communications intern training programme, Johannesburg. “HIV/AIDS: law, policies and politics”.
- 20 March. Lawyers’ Collective conference, Mumbai, India. “Advancing public health by other means: using competition policy to increase access to essential medicines”.
- 9 April. Zimbabwe Lawyers for Human Rights (ZLHR) HIV/AIDS and human rights consultation, Harare, Zimbabwe. “Revised Guideline 6 and South Africa: a case study”.
- 9 April. ZLHR HIV/AIDS and human rights consultation, Harare, Zimbabwe. “Patents, medicines and the right to health”.
- 30 April. TAC NEC, Cape Town. Briefing on work of the ALP’s Law & Treatment Access Unit.

- 6 May. HIV/AIDS and the Law class, University of the Witwatersrand, Johannesburg. "Access to treatment for HIV/AIDS: Part one – access to health care services".
- 13 May. HIV/AIDS and the Law class, University of the Witwatersrand, Johannesburg. "Access to treatment for HIV/AIDS: Part two – access to essential medicines: using the law to make medicines cheaper".
- 13 May. World Health Organization's Commission on Intellectual Property, Innovation and Health, Pretoria. "Patents, Innovation and Public Health: a focus on HIV/AIDS".
- 9 June. South African AIDS Conference, Durban. "Realising the right of access to medicines: how well are we doing?"
- 20 June. National Labour and Economic Development Institute workshop, Johannesburg. "Construction of a poverty line in South Africa: perspective of the Constitution".
- 2 August. National Assembly, Parliament of South Africa, Cape Town. Joint ALP/TAC submission on the Patents Amendment Bill, 2005, Portfolio Committee on Trade and Industry
- 13 August. Botswana Network on Ethics, Law and HIV/AIDS meeting, Gaborone, Botswana. "Ensuring access to a sustainable supply of affordable medicines".
- 17 August. University of South Africa/United Nations Development Programme (UNDP) training workshop, Johannesburg. "The role of advocacy in scaling up access to treatment for HIV/AIDS: Putting the spotlight on South Africa's Treatment Action Campaign".
- 3 October. TAC Gauteng PEC, Johannesburg. Briefing on monitoring implementation of the Operational Plan.
- 24 October. World Bank Institute/African Regional Intellectual Property Organization capacity building workshop, Addis Ababa, Ethiopia. "Implementing TRIPs in accordance with the Doha Declaration: legislating to ensure access to a sustainable supply of affordable essential medicines".
- 25 October. World Bank Institute/African Regional Intellectual Property Organization capacity building workshop, Addis Ababa, Ethiopia. "(Non) voluntary licensing of antiretroviral medicines: learning from recent South African experience".
- 25 October. World Bank Institute/African Regional Intellectual Property Organization capacity building workshop, Addis Ababa, Ethiopia. "Compulsory licensing: what TRIPs, Doha and the August 30th decision allow".
- 26 October. World Bank Institute/African Regional Intellectual Property Organization capacity building workshop, Addis Ababa, Ethiopia. "Key facts on South Africa's ARV treatment programme".
- 2 November. Sexual and Reproductive Health Law class, University of Toronto, Canada. Edited version of "Resexualising the epidemic: desire, risk & HIV prevention".
- 2 November. Law and Globalisation seminar, University of Toronto. Edited version of "Patents and public health: principle, politics and paradox".
- 29 November. African Union Commission continental forum on HIV/AIDS and human rights, Addis Ababa, Ethiopia. "A rights-based approach to HIV/AIDS".
- 8 December. UNDP satellite meeting, International Conference on HIV/AIDS and Sexually Transmitted Infections in Africa (ICASA) 2005, Abuja, Nigeria. "Using TRIPs flexibilities to access essential medicines".

Michelle Govender

- 4 June. Centre for Advanced Study of International Development (CASID) Conference, London, Ontario, Canada. "Domestic violence as a human rights issues: A South African perspective and international critique".

Chloe Hardy

- 27 January. CROP Law and Poverty Conference, University of Johannesburg, Johannesburg. "Choosing Antiretrovirals or Choosing Grants: HIV and Disability Grants".
- 1 February. Bread for the World Workshop on HIV and gender mainstreaming for civil society,

Johannesburg. "HIV and the Law in the Workplace".

- 3 March. Institute for Advanced Journalism, Johannesburg. "HIV and the Law in the Media".
- 9 March. Helen Joseph Hospital social workers, Johannesburg. "HIV and the Law".
- 18 March. HIV and the Law LLB course, Wits University, Johannesburg. "HIV and the Law in the Workplace".
- 1 April. Helen Joseph Hospital social workers, Johannesburg. "HIV and the Right to Healthcare".
- 12 May. Wits School of Public and Development Management course for public health officials, Johannesburg. "HIV and the Law in the Workplace".
- 26 May. Barloworld HIV peer educators training, Benoni. "Wills and Future Planning".
- 27 May. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 10 June. Employee Assistance Practitioners Association, Johannesburg. "HIV and the Law in the Workplace".
- 13 June. City of Johannesburg human resources officials, Johannesburg. "HIV and the Law in the Workplace".
- 21 June. UNISATU trade union training, Johannesburg. "HIV and the Law in the Workplace".
- 24 June. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 28 June. Wits Medical School Bioethics Masters programme, Johannesburg. "HIV and Life Insurance".
- 12 July. Justice College social context training for Magistrates, Durban. "HIV, Human Rights and the Law".
- 14 July. St Francis Clinic support group, Ekurhuleni. "HIV and Disability Grants".
- 15 July. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 19 August. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 24 August. Planned Parenthood Association farm workers project, Johannesburg. "HIV and the Law in the Workplace".
- 25 August. Jewish Women's Benevolent Society, Johannesburg. "HIV and the Law".
- 29 August. Department of Trade and Industry, HR managers training, Pretoria. "Voluntary Counselling and Testing in the Workplace".
- 8 September. Employee Assistance Practitioners Association Annual General Meeting, Durban. "HIV and the Law in the Workplace".
- 14 September. Wits School of Public and Development Management course for public health officials, Johannesburg. "HIV and the Law in the Workplace in Health Care Settings".
- 23 September. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 2 October. Treatment Action Campaign treatment literacy trainers, Johannesburg. "HIV and Disability Grants".
- 4 October. Justice College social context training for Magistrates, Makopane. "HIV, Human Rights and the Law".
- 5–6 October. University of Limpopo Access to Justice Cluster, Polokwane. Two-day training programme for paralegal and attorneys.
- 11 October. Centre for the Study of AIDS, University of Pretoria, paralegal training programme, Pretoria. "HIV and the Law".
- 21 October. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 11 November. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 25 November. Community AIDS Response, training for counsellors, Johannesburg. "HIV and the Law".
- 25 November. Crosby Primary Health Care Clinic, training for doctors and nurses, Johannesburg. "HIV and the Law".
- 25 November. Helen Joseph Hospital VCT counsellors training, Johannesburg. "HIV and the Law".
- 1 December. Garden City Clinic, staff World AIDS Day workshop, Johannesburg. "HIV in the

Health Care Setting”.

- 5 December. University of Limpopo Access to Justice Cluster, Polokwane - follow-up training for paralegal and attorneys. “HIV and Health Rights”.

Fatima Hassan

- 27 January. Bread for the World/ CMDS, Cape Town. “AIDS in the workplace – the role of workplace policies”.
- 31 January. Civil society meeting on aspects relating to treatment for children, Durban. “An overview of the national ARV programme”.
- 18 February. 3rd Joint Civil Society Monitoring Forum (JCSMF) meeting, Durban. “Where are we now – review of the Operational Plan”.
- February. Treatment Action Campaign Secretariat Meeting, Cape Town. “Litigation update and summary of TAC cases”.
- February. SALGA and Cities Network, Symposium on HIV/AIDS in the Municipal Workplace, Cape Town Provincial Legislature. “ARV treatment in SA – from zero to”?
- 19 March. Lawyers Collective Conference on IP Law and Access to Medicines – South-South dialogue, Mumbai, India. “HIV/AIDS – The moment is now”.
- 2 April. TAC branch, University of Cape Town, Cape Town. “Role of law in health care”.
- 3 April. 7th AIDS Impact conference, ‘The moment is now’, plenary session. “HIV/AIDS and human rights”.
- 6 May. TAC PWA Summit, Western Cape. “HIV and the law – consent and confidentiality”.
- 24 May. TAC briefing on Rath case to partner organisations, Cape Town. “Implications of legal cases”.
- 4 June. 2nd SA AIDS Conference, Durban. Plenary session: “Keeping the human response alive: emerging HR issues”.
- 8 June. TAC MSF satellite conference, 2nd SA AIDS Conference, Durban. “Outcomes of joint ALP/TAC report on Operational Plan”.
- 8 June. World Economic Forum African Chapter, Cape Town. Round table on WPTP – critique of response by business to AIDS in the WAP.
- 10 August. Civil Society Health Charter meeting, Johannesburg. “ALP/TAC joint charter submission”.
- 19 August. TAC Western Cape Leadership school, Cape Town. “The draft health charter – ALP/TAC responds”.
- 24-25 August. BONELA Botswana MPs and House of Chiefs, Gaborone, Botswana. “Advocating for human rights approaches to HIV/AIDS in SA – using the courts”.
- 26 August. TAC Western Cape Provincial Congress, Cape Town. “The health charter – an update”.
- 30 August. ACCESS/IDASA workshop on children and access to assistance, Cape Town. “Children and the ARV roll out – where do they feature?”
- 5 September. Task Team on Health Charter National Department of Health, Pretoria. “ALP submission on the draft health charter”.
- September. ARK UK Trustees and ARK SA, Cape Town. “Overview of the Operational Plan – role of ARK.”
- September. International Development Legal Organisation (Rome), Cape Town. “Role of civil society in promoting women’s rights and community responses to HIV/AIDS.”
- September. International Development Legal Organisation. “Setting priorities for action, best practices and examples”.
- 22 October. Montessori – Early Learning Foundation, Cape Town. Half-day workshop on HIV educators, learners, policy, recommendations, lessons.
- 15 November. 6th JCSMF, East London. “Monitoring the operational plan- a focus on EC and

donor contributions”.

- 1 December. Parliamentary ad hoc committee on African Peer Review Mechanism (APRM) Corporate Governance, Cape Town. “HIV/AIDS and corporations: meeting human rights and social responsibility”.
- 2 December. Save the Children Sweden, Pretoria. “Emerging issues on children and HIV/AIDS”.
- 5-8 December. World Economic Forum Global Health Initiative, Nairobi, Kenya. “Building health care systems in SSA”.
- 11-12 December. Symposium of AIDS and citizenship in Southern Africa: Practitioner and Activist perspective, Cape Town. Panel discussion on general issues affecting implementation.
- 11-12 December. Symposium of AIDS and citizenship in Southern Africa: Practitioner and Activist perspective. “Missing the target – report from the frontlines”.

Adila Hassim

- 4 March. Civil Society Human Resources for Health seminar. The state’s legal obligation to develop a Human Resources plan for the health sector.
- 13 April. CALS seminar. The Khosa case and its implications for limitations clause analysis in the context of social rights.
- 22 April. LLB lecture. HIV/AIDS and the Constitution.
- 24 September. TAC National Congress. A People’s Health Service.
- 14 May. Zimbabwe Lawyers’ for Human Rights HIV/AIDS and Human Rights Consultation on the Role of the Judiciary, Legislature and Legal Profession. HIV/AIDS and the Law.
- 14 May. Zimbabwe Lawyers’ for Human Rights HIV/AIDS and Human Rights Consultation on the Role of the Judiciary, Legislature and Legal Profession. Linking HIV/AIDS and Human Rights.
- 08 October. Foundation for Human Rights Consultation. Challenges of HIV/AIDS in South Africa and the SADC Region.

Mark Heywood

- 19 January. Treatment Action Campaign Secretariat, Cape Town. “Assessment of TAC: should we plan for another 5 years?”
- 25 January. Treatment Action Campaign National Executive Committee, Cape Town. “Organisational challenges for TAC in 2005”.
- 27 January. CARE SA and Lesotho, Johannesburg. “TAC’s advocacy strategy”.
- 25 February. Wits University LLB students, Johannesburg. “History and politics of HIV/AIDS”.
- 28 February. TAC Gauteng Strategic Planning meeting, Johannesburg. “The challenges of 2005”.
- 1 March. ILO/NALEDI conference, Johannesburg. “The way social movements can extend access to health care in the informal sector”.
- 19 March. Lawyers Collective Conference on Extending Access to Health Care in Developing countries, Mumbai, India. “3 x 5”.
- 21 March. Facilitated ‘Resolutions’ session of Lawyers Collective Conference, Mumbai, India.
- 31 March. Speech to TAC Western Cape Public meeting. “The fight back against Dr Rath”.
- 12 April. Oxfam American Regional Consultation on HIV and Gender, Pretoria (?). “Status, implications and policies needed to realize HIV/AIDS and women’s rights”.
- 14 April. National Union of Mineworkers (NUM) Health and Safety Committee, Johannesburg. Programme to train peer educators in the construction sector.
- 4 May. Harold Wolpe Memorial Lecture, Constitution Hill, Johannesburg. “Social movements and the State”.
- 13 May. South African National AIDS Council (SANAC) PWA Sector workshop, Pretoria.
- 8 June. TAC/MSF Satellite Conference, Durban. Closing remarks.

- 9 June. SA AIDS Conference, Durban. "Routine HIV testing".
- 21 July. HEARD, Durban (private work). "Overview of legal and human rights issues related to HIV"
- 30 July. TAC Eastern Cape Provincial Congress, East London. "National overview of TAC's achievements and challenges"
- 5 August. Centre for the Study of AIDS, University of Pretoria. "Human rights and routine HIV testing".
- 13 August. BONELA, Gaborone, Botswana. "Equity and access".
- 31 August. Sociology students, University of the Witwatersrand, Johannesburg. "The treatment debate and the ARV roll-out".
- 1 September. Department of Health, Pretoria. Oral submission on Health Charter (with Jonathan Berger and Fatima Hassan).
- 13 September. Institute of Retirement Funds, Cape Town. "The impact of HIV/AIDS on retirement funds".
- 15 September. ALP Review Meeting, Johannesburg. "Overview of challenges facing the ALP".
- 19 September. TAC Gauteng delegation to National Congress, Johannesburg. "Politics and TAC".
- 20 September. IRENSA Conference, Cape Town. "HIV/AIDS – a research participant's perspective".
- 21 September. Members of Board of Trustees, Atlantic Philanthropies, Cape Town. "The work of the ALP on health sector transformation and reducing medicine prices".
- 24 September. TAC National Congress, Cape Town. Facilitated commission on health service transformation (with Adila Hassim).
- 25 September. TAC National Congress, Cape Town. Treasurer's Report.
- 7 October. Gauteng AIDS Conference, Johannesburg. Chaired parallel session.
- 13 October. UN Agencies, Pretoria. "HIV/AIDS and Human Rights".
- 20 October. ARASA Regional Planning Meeting, Johannesburg. "The role of civil society in treatment advocacy and literacy".
- 21 October. South African National AIDS Council, Pretoria. (?)
- 27 October. Ditsela, Johannesburg. "Challenges facing TAC and HIV prevention and treatment".
- 29 October. Graduate Clinical HIV/AIDS Management Diploma, University of KwaZulu-Natal, Durban. "Critical legal issues".
- 5 November. Methodist Church HIV co-ordinators, Johannesburg. "Treatment, TAC and Rath".
- 2 December. Seminar on Reinventing Development, Centre for Commonwealth Studies, University of London, London. "Re-inventing development: lessons from rights-based practice".
- 6 December. Open Society Initiative (OSI) seminar on Global Health Governance, Salzburg, Austria.

Anneke Meerkotter

- 11 January. Eye Bank, Pretoria. "Organ transplants and HIV".
- 8 March. Excellante International day workshop, Johannesburg. "HIV in the workplace".
- 11 March. LLB course, Wits University, Johannesburg. "Medical malpractice and HIV".
- 29 April. LLB course, Wits University, Johannesburg. "Insurance, social assistance and HIV".
- 23 May. Industrial Health Research Group/African Diamond Workers' Network Workshop, Johannesburg. "Legal aspects of HIV/AIDS in relation to mine workers".

Nolutando Ntlokwana

- 6 May. TAC, Cape Town. "Reporting rape and how to get a protection order in cases of domestic violence".



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Marlise Richter

- 25 January. Law & Poverty workshop, Randse Afrikaanse Universiteit, Johannesburg. Discussant on paper entitled "The utilisation of the social security rights of children to alleviate poverty in South Africa".
- 25 January. Bioethics Lecture, Wits University Medical School, Johannesburg. "Traditional healers in South Africa".
- 19 February. HIV/AIDS and the Law LLB lecture, Wits University, Johannesburg. "The epidemiology and science of HIV".
- 4 March. HIV/AIDS and the Law LLB lecture, Wits University, Johannesburg. "HIV and Human Rights".
- 11 March. HIV/AIDS and the Law LLB lecture, Wits University, Johannesburg. "Research Methodology".
- 16 March. Department of Health/GAPSA, Kempton Park. "HIV/AIDS and the Workplace".
- 1 April. HIV/AIDS and the Law LLB lecture, Wits University, Johannesburg. "Children and HIV".
- 20 May. HIV/AIDS and the Law LLB lecture, Wits University, Johannesburg. "HIV and Gender".
- 9 June. South African AIDS conference, Durban. "Disability Grants and PWAs: What happens with the Advent of Treatment?" (presentation co-authored with Chloe Hardy).
- 29 June. Wits Law School Case Note Seminar, Muldersdrift. "Bucleuch case note".
- 2 August. Right to Care, Krugersdorp. "HIV/AIDS and the Law".
- 17 August. CALS Seminar, Johannesburg. "Some issues on the implementation of the Promotion of Access to Information Act".
- 29 August. Wits School of Public Health, Johannesburg. "HIV/AIDS and the Law".

- 6 September. WISER, CALS and Wits Law School, Johannesburg. Law and Society: Education. Discussant of session on "Private Voices, Legal Listeners".
- 8 November. ARASA Train-the-trainer, Kempton Park. "Gender and HIV".
- 24 November. Kagiso Youth Centre, Kagiso. "HIV/AIDS and the Law".
- 5 December. Polokwane legal advice offices, Polokwane. "HIV & Gender".
- 5 December. Polokwane legal advice offices, Polokwane. "Basic Science of HIV".
- 5 December. Polokwane legal advice offices, Polokwane. "Social Security".

Bongumusa Sibiya

17 July. St Francis Clinic, Benoni. "HIV/AIDS and the Law".

APPENDIX

B

Publications by staff members

Jonathan Berger

Academic

- Edwin Cameron and Jonathan Berger, "Patent and Public Health: Principle, Politics and Paradox", (2005) 131 Proceedings of the British Academy 331
- Also published as Edwin Cameron and Jonathan Berger, "Patent and Public Health: Principle, Politics and Paradox", in David Vaver (ed), Intellectual Property Rights (Routledge, London: 2005)
- Jonathan Berger, "Advancing Public Health by Other Means: Using Competition Policy", in Pedro Roffe et al, Negotiating Health: Intellectual Property and Access to Medicines (Earthscan, London: 2005)

Memoranda

- "A Rights-based Approach to HIV/AIDS". Prepared for HURISA's African Human Rights Camp (25 February 2005)
- "Regulatory options for ensuring access to a sustainable supply of affordable medicines". Edited and updated 2004 version (27 May 2005)
- "'Let them eat cake' - a short assessment of provision of treatment and care 18 months after the adoption of the Operational Plan". Co-authored with Fatima Hassan and Mark Heywood (June 2005)
- Legal report for the TAC NEC meeting of 22/23 July 2005 (19 July 2005)
- Legal report for the TAC National Congress of 23-25 September 2005 (28 July 2005)
- "Ensuring access to essential medicines and diagnostic and monitoring services: what has hap-

pened so far and what more needs to be done?" Report prepared for the TAC National Congress, 23-25 September 2005 (2 August 2005)

- Legal opinion on Appendix F of the Advertising Standards Authority of South Africa's code. Prepared to assist the TAC in defending a complaint (10 October 2005)

Submissions

- Joint AIDS Law Project (ALP)/Treatment Action Campaign (TAC) submission on the Patents Amendment Bill, 2005 (Portfolio Committee on Trade and Industry, national Assembly, Parliament of South Africa).
- Joint ALP/TAC submission on the "Strategic Framework for the Human Resources for Health Plan: Draft for Discussion" (Department of Health) – co-authored with Adila Hassim.
- Joint ALP/TAC submission on an appropriate dispensing fee in terms of the Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances, following the Constitutional Court's decision in Minister of Health v New Clicks SA (Pty) Ltd (Pricing Committee and Department of Health).
- ALP submission on the negotiating position South Africa should adopt in respect of the then proposed amendment to the TRIPs Agreement, to give effect to Paragraph 6 of the Doha Declaration on the TRIPs Agreement and public health (Department of Trade and Industry).

Other publications

- "What about Big Pharma?" Mail & Guardian, 28 January 2005
- "Aspen in Perspective". Financial Mail, 29 July 2005
- "Aids Law Project sets the record straight". Business Report, 11 August 2005
- "Domestic needs first in patent reform". Business Day, 1 September 2005
- Regular contributor on legal developments to the TAC's "Equal Treatment"

Deena Bosch

- September. AIDS Law Project (ALP) Report on the Status of the Implementation of the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa in Limpopo.
- December. AIDS Law Project (ALP) Report on the Status of the Implementation of the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa in Mpumalanga.

Michelle Govender

Academic

- Gray, Govender, Gengiah & Singh "Health Legislation" in Ijumba, Petrida & Barron, Peter [eds] South African Health Review (2005).
- Singh JA, Govender M and Reddy N. South Africa a Decade After Apartheid: Realizing Health Through Human Rights (2005) Georgetown Journal on Poverty Law & Policy XII (3): 355-388.

Chloe Hardy

Other publications

- "Disability grant or antiretroviral therapy? A grim choice for people with HIV/AIDS in South Africa", AIDS Analysis Africa, Oct/Nov 2005, pp.4-5 (with Marlise Richter).

Fatima Hassan

Academic

- September. Southern African Journal of HIV Medicine. "Keeping the human rights response alive in the 21st century".

Memoranda

- June. “Let them eat cake” - A short assessment of provision of treatment and care 18 months after the adoption of the Operational Plan. Updated Second Joint Report on the Implementation of the Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa. AIDS Law Project and Treatment Action Campaign.
- July. TAC NEC and National Congress for 2005. “Report and update on the national roll out”.
- “Missing the Target - A Report on HIV/AIDS Treatment Access from the Frontlines.”
- International Treatment Preparedness Coalition (ITPC) 28 November 2005, 6 country report card. (South African chapter)
- South Africa Joint Civil Society Monitoring Forum: Resolutions
 - a. 1st meeting: September 2004, Polokwane, Limpopo
 - b. 2nd meeting Bloemfontein, Free State
 - c. 4th meeting Nelspruit, Mpumalanga
 - d. 6th meeting East London, Eastern Cape
 - e. 7th meeting, Orkney, North West

Submissions

- 12 October. Parliamentary Committee on Health, Parliament, Cape Town. ALP submission on Nursing Bill (drafted by Adila Hassim).
- 24 October. Parliamentary Portfolio Committee on Finance, Parliament, Cape Town. Submission on draft revenue laws amendment bill, 2005 – sections dealing with medical contributions and expenses.
- October. ALP recommendations to Treasury for improvements to the DRLAB – sections dealing with Workplace Treatment Programmes, Department of Finance, National Treasury, Pretoria.
- 13 December. ALP submission and recommendations on ‘HIV/AIDS and corporations: meeting human rights and social responsibility’. Parliamentary ad hoc committee on African Peer Review Mechanism (APRM) -- Corporate Governance, Parliament, Cape Town.

Other

- January. AIDS Bulletin, Metropolitan. “Analysis of ARV programme after one year”.
- March. Sunday Independent. “Treatment roll out and children”.
- April. Mail & Guardian Health supplement. “Civil society and monitoring the roll out”.
- March. “The treatment roll out and children”. Guest columnist, Sunday Independent Newspaper.
- April. “Civil society and monitoring the roll out – what is the JCSMF?” Mail and Guardian Newspaper Health supplement.
- 15 August. Joint ALP/TAC submission: The Charter of the Public and Private Health Sectors of the Republic of South Africa (“the Charter”).
- 28 November. ITPC. “Missing the target – report from the frontlines”.
- December. “Public interest lawyering – Necessary, Yes. Pointless No”. Unpublished. AIDS Law Project.

Mark Heywood

Academic

- Chapter on AIDS and Politics in “HIV/AIDS in SA” eds Karim & Karim. Cambridge University Press.
- “The Routine Offer of HIV Counseling and Testing: A Human Right” Health and Human Rights, Vol.8, No.2, 13-19: 17.
- Chapter on “Shaping, Making and Breaking the Law in TAC’s Campaign for a National Treatment Plan” for University of Oslo book on the Politics of Socio-Economic Rights.
- “Scaling Up HIV Testing in Resource-Constrained Settings: Debates on the Role of VCT and

Routine 'Opt-In s Opt-Out' HIV Testing". Southern African Journal of HIV Medicine, September 2005.

Memoranda

- Co-authored ALP/TAC submission on Health Charter (with Fatima Hassan).
- National Treasurer's Report for TAC Congress.
- Worked on TAC discussion document "TAC and Politics".
- Evaluated abstracts for SA AIDS Conference.
- Finalized ALP annual report.
- Finalised TAC annual report.

Other publications

- Guidance Note for UN High Commission on Human Rights on 'Human Rights and 3 x 5" (private consultancy).
- Submitted article for COSATU book on Ten Years of Democracy on "The trade union response to HIV/AIDS".

Anneke Meerkotter

Academic

- "Comments on the Draft Circular Instruction Regarding Compensation for Occupationally Acquired HIV Infection and AIDS" Industrial Law Journal July 2005, 1151-1165

Submissions

- "Draft Circular Instruction regarding compensation for occupationally acquired HIV" ALP submission to the Department of Labour, February 2005

Marlise Richter

Academic

- "Affirmation to Realisation of the Right of Access to Information: Some issues on the Implementation of Promotion of Access to Information Act " Law, Democracy & Development, Vol. 9 No. 2, 2005 pp. 219-234

Submissions

- 15 March "Comments on the Gender Research Project Submission on the National Department of Social Development on the Regulations in terms of the Social Assistance Act, 2004" Letter to National Department of Social Development endorsing the Gender Research Project submission, with additional comments.
- 7 November Submission to Parliamentary Select Committee on Social Services on "Clauses 129 and 134 of the Children's Bill".

Other publications

- "Disability grant or antiretroviral therapy? A grim choice for people with HIV/AIDS in South Africa" AIDS Analysis Africa, Oct/Nov 2005, pp.4-5 (with Chloe Hardy).
- "A new feminism" Mail & Guardian, 9-14 December 2005, p.19.

APPENDIX

C

Major written submissions on policy and law

- March 2005. Legal papers in: *Minister of Health and Another v New Clicks South Africa (Pty)Ltd and Others* Available: <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=219> (Constitutional Court)
- April 2005. Legal papers in: *NM & Others v Charlene Smith, Patricia De Lille and New Africa Books (Pty) Ltd* Available: <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=246> (Constitutional Court)
- ALP Submission on the proposed amendment to the TRIPS Agreement to give effect to Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health (Department of Trade and Industry)
- 25 July 2005. Joint ALP/TAC submission on the Patents Amendment Bill [B17 2005] (Parliament)
- 15 August 2005. Joint ALP/TAC submission on the Charter of the Public and Private Health Sectors of the Republic of South Africa (Department of Health)
- 14 September 2005. Joint ALP/TAC submission on a Strategic Framework for the Human Resources for Health Plan (Department of Health)
- October 2005. Submission on the South African Medical Association Human Rights and Ethical Guidelines on HIV (not for public comment)
- 10 October 2005. Submission on the Nursing Bill [B26 2005] (Parliament)
- 18 October 2005. Submission on the Draft Revenue Law Amendment Bill, 2005 (Parliament)
- 30 October 2005. Submission to the Parliamentary Joint Ad-hoc committee on socio-economic development (The National Working Group on the Sexual Offences Bill)
- 25 November 2005. Submission on an appropriate dispensing fee as envisaged by Section 22G of the Medicines and Related Substances Act, 1965 (Department of Health)
- 1 December 2005. Submission on the African Peer Review Mechanism (APRM) HIV/AIDS and corporations: meeting human rights and responsibility (Parliament)

Table of major written submissions on policy and law in 2005

	Name of submission	Date
1	African Peer Review Mechanism (APRM) Submission to Parliament: HIV/AIDS and corporations: meeting human rights and responsibility	1 December 2005
2	Submission on an appropriate dispensing fee as envisaged by Section 22G of the Medicines and Related Substances Act, 1965	25 November 2005
3	Submission to the Parliamentary Joint Ad-hoc committee on socio-economic development (The National Working Group on the Sexual Offences Bill)	30 October 2005
4	Draft Revenue Law Amendment Bill, 2005	18 October 2005
5	Submission on the Nursing Bill [B26 2005]	10 October 2005
6	Submission to the South African Medical Association Human Rights and Ethical Guidelines on HIV (not for public comment)	October 2005
7	Joint ALP/TAC Submission on A Strategic Framework for the Human Resources for Health Plan	14 September 2005
8	Joint ALP/TAC Submission on The Charter of the Public and Private Health Sectors of the Republic of South Africa	15 August 2005
9	Joint ALP/TAC Submission on the Patents Amendment Bill [B17 2005]	25 July 2005
10	ALP Submission on the negotiating position South Africa should adopt in respect of the then proposed amendment to the TRIPS Agreement, to give effect to Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health (Department of Trade and Industry)	
11	Legal papers in: NM & Others v Charlene Smith, Patricia De Lille and New Africa Books (Pty) Ltd Available: http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=246	April 2005
12	Legal papers in: Pharmaceutical Society of South Africa (PSSA)/New Clicks and Others v Manto Tshabalala-Msimang N.O. Available: http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=219	March 2005

APPENDIX

D

Positions held by staff

Jonathan Berger

- Director, TAC Treatment Project.
- Chairperson, Lesbian and Gay Equality Project.

Mark Heywood

- National Treasurer, Treatment Action Campaign.
- Member, UNAIDS Global Reference Group on HIV/AIDS and Human Rights.
- Member, Johannesburg AIDS Council.
- Legal and Human Rights sector representative, SA National AIDS Council (SANAC).
- Trustee, AIDS and Human Rights Alliance of Southern Africa (ARASA).
- Board member, Amandla AIDS Advisory Fund.

Marlise Richter

- Advisory Board member, ARASA.