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Joint Treatment Action Campaign and AIDS Law Project Submission to the Panel for the Independent Assessment of Parliament

Executive Summary

The Treatment Action Campaign (TAC) and the AIDS Law Project (ALP) welcome this opportunity to make a submission to the Panel for the Independent Assessment of Parliament. The TAC and ALP are civil society organizations dedicated to upholding the rights of people to have access to health care services, to ensuring that the state discharges its positive constitutional obligations in respect of that right, and to ensuring a comprehensive response to HIV/AIDS both domestically and internationally. As civil society organizations, we take our responsibility of commenting on and debating the implications of relevant draft legislation and regulations seriously.

The Constitution places specific obligations on Parliament which are essential to maintaining our democratic form of government. Amongst these requirements are the obligations to involve the public in the legislative process, provide guidance and limits on the powers of the executive, and maintain active oversight over the actions of governmental officials. In the experience of the Treatment Action Campaign (TAC) and the AIDS Law Project (ALP) there is a tendency, particularly in the Portfolio Committee on Health, to defer substantive matters of policy to the Executive in ways which fail to uphold these constitutional obligations and which the Constitutional Court has made clear in multiple decisions, threatens the ability of citizens to uphold their rights.

In particular, statutory bodies such as the Medicines Control Council and the Health Professions Council of South Africa, which are intended to be independent bodies, have had their independence from the executive compromised by the appointment powers granted to the Minister of Health. Such lax delegation of powers not only undermines the credibility of the statutory bodies themselves, but also the quality of the advice and policy recommendations given to the Minister. We submit that this failure to provide adequate guidance and oversight over the Department of Health ultimately leads to greater centralization of authority in the executive than is desirable or constitutionally permissible and to an environment where the statutory and constitutional limits and obligations placed on the executive are disregarded.

Finally, there are several instances in which enacted legislation has not appropriately linked different statutory bodies together so that they may collaboratively develop national health policy recommendations. In addition, certain acts have not sufficiently recognized the links between different pieces of legislation such that gaps in regulation and policy are not created.

Introduction

The Treatment Action Campaign (TAC) and the AIDS Law Project (ALP) welcome this opportunity to make a submission to the Panel for the Independent Assessment of Parliament. The TAC and ALP are civil society organizations dedicated to upholding the rights of people to have access to health care services, to ensuring that the state discharges its positive constitutional obligations in respect of that right, and to ensuring a comprehensive response to HIV/AIDS both domestically and internationally. As civil society organizations, we take our responsibility of commenting on and debating the implications of relevant draft legislation and regulations seriously. Since 2002 in particular, TAC and the ALP have made 15 submissions to parliamentary committees, as is shown in Annexure A below.[1] In addition, both organizations have taken the opportunity regularly to make formal submissions to relevant government departments on draft bills and regulations.

Our goal in this submission is to inform the Panel of what we have observed in our experience of interacting with Parliament over the years. While we have had positive experiences with a number of parliamentary committees, we are particularly concerned about the Portfolio Committee on Health's often negative reception to our constructive criticism of health bills, the Department of Health (DoH) and the Ministry of Health. Specifically, our submission is relevant to the following three aspects of the Panel's mandate, as expressed in the call for submissions:

- that Parliament scrutinizes and oversees Executive action and provides a national forum for public consideration of issues
- that Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
- the extent to which there is cooperation with other organs of state and also to which Parliament assists in maintaining and guarding the independence of the legislature.

The TAC and ALP are in agreement with these ideals. Parliamentary oversight of the Executive is essential to proper administration of the government. Our experience and observations, however, have shown that Parliament, particularly in the Portfolio Committee on Health (Health Committee) has failed to actively oversee the activities of the DoH and permitted the concentration of authority and national health policy in the position of the Minister of Health, rather than in Parliament or independent statutory councils.

We do note up front that our submission focuses primarily on the Health Committee and other portfolio committees only when they have addressed issues relevant to our work in health policy. Our submission will first address the constitutional obligations of Parliament prior to addressing the following themes which have emerged from our submissions and which are relevant to the inquiry of this Panel:

- Insufficient oversight and guidance of the Executive
- Lack of critical investigations of actions of the Executive
- Failure to adequately link relevant legislation and national policies in a cohesive manner

[1] Both the TAC and the ALP have made numerous submissions prior to 2002. The TAC was formed in 1998 and the ALP in 1994 and both have been active in providing public input since those dates.

I. Constitutional Requirements

The Constitution places certain obligations on Parliament, in particular, on its role in overseeing executive action. This section is intended to provide the legal background upon which we make our submission and forms the basis of why we feel Parliament has failed on several occasions to adhere to its constitutional obligations.

Specific provisions of the Constitution

There are a number of provisions in the Constitution governing the role and responsibility of Parliament. Broadly, these provisions deal with two significant duties of Parliament: to maintain oversight and accountability of the Executive to Parliament; and to ensure public participation in political processes so as to uphold the fundamental tenet of our constitutional democracy: that government is 'based on the will of the people'. Key provisions include the following:

- Preamble: 'the foundations for a democratic and open society in which government is based on the will of the people.'
- Section 42(3): 'National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'
- Section 44(4): 'When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution'
- Section 55(2): 'The National Assembly must provide for mechanisms –
  (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
  (b) to maintain oversight of –
    (i) the exercise of national executive authority, including the implementation of legislation; and
    (ii) any organ of state.'
- Section 59(1): 'The National Assembly must –
  (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- conduct its business in an open manner, and hold its sittings, and those of its committees, in public'[2]

Participatory democracy

A defining feature of democracies, and our constitutional democracy in particular, is the right of citizens to participate in the law-making process.[3] While participation is partly effected through representative bodies, the Constitution (through the above provisions) and the Constitutional Court have made it clear this is not enough.[4] Direct participation by individuals and groups is a necessary component of our democracy, and Parliament bears a positive duty to facilitate participation. This duty is central to the requirements of

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[2] Identical provisions exist for the National Council of Provinces and for provincial legislatures are in sections 72 and 118 of the Constitution, respectively.

[3] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paragraphs 111-3.

[4] *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) at paragraph 60.

accountability, responsiveness and openness of government. This has been firmly articulated by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others*:[5]

> Our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. Indeed, one of the goals that we have fashioned for ourselves in the Preamble of the Constitution is the establishment of "a society based on democratic values, social justice and fundamental human rights." The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process. (footnote omitted)[6]
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> . . .
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> In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of a representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[7]

The objectives of public participation in law-making are to ensure 'legislation is both informed and responsive', to 'minimise dangers of arbitrariness and irrationality', to ensure 'legislators are aware of the concerns of the public' and to promote legitimacy of the legislation.[8]

That the ALP and TAC have made 15 submissions to Parliament over the last five years is evidence that Parliament has created the space for the public to comment on draft legislation. However, the quality and effectiveness of that participation cannot rest on simply providing a space for submitting comments. For legislation to be informed, responsive, rational and legitimate, constructive debate and engagement with the drafters is necessary. While it cannot be expected that comments and recommendations from the public will always be incorporated, Parliament must always substantively address the concerns and recommendations submitted to the committees regardless of whether the concerns are ultimately incorporated, amended, or rejected. Failure to do so is a dereliction of Parliament's constitutional duties. In this regard, we submit that the contents of our various

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5 *Doctors for Life International v. Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC)

6 *Id.* at paragraph 111.

7 *Id.* at paragraph 115.

8 *Id.* at paragraph 205.

submissions have frequently been ignored by Parliament. This is so if one has regard to the extent to which our concerns have been substantively debated as reflected in the parliamentary minutes of the Portfolio Committee on Health, which show an additional degree of hostility to our criticism of legislation that increasingly centralizes powers in the Executive in a manner inconsistent with the Constitution. We provide specific examples of this below.

Parliamentary Oversight

The Constitutional Court in *Dawood v. Minister of Home Affairs; Shalabi v. Minister of Home Affairs; Thomas v. Minister of Home Affairs* ("*Dawood*") set the constitutional standard for the legislative granting of discretionary powers and oversight of the Executive by Parliament. Justice O'Regan, writing for a unanimous court, stated:

> In a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the legislature and on the Executive and its officials. The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers.

Thus, while all organs of the state are bound by the Bill of Rights, Parliament holds a special responsibility to secure the rights so enshrined. As the court noted, officials in the Executive are frequently untrained in constitutional law and lack sufficient time and resources to carefully analyze each action of a department to adequately protect against violations. Without guidance from Parliament, the Executive, either willingly or not, is likely to overstep their constitutional limits. More importantly, without clear legislation, those adversely affected by official use of discretionary powers are left with little guidance as to how to enforce their rights, or whether such a right would exist at all. As the court stated, "[i]f rights are to be infringed without redress, the very purposes of the Constitution are defeated."

In the context of socio-economic rights, such as the right to health, legislative guidance and leadership become increasingly important due to the difficulty in identifying individual violations and seeking a proper judicial remedy. While these rights can and must at times be enforced through judicial intervention, socio-economic rights (and the concomitant duties on the Executive and Parliament) are intricately intertwined with governmental policy, which is meant to be steered by Parliament. When Parliament abdicates this responsibility by deferring substantive policy issues to the discretion of departmental officials, the enforceability of socio-economic rights is diminished and ultimately leaves decisions regarding these rights in the hands of the judiciary. Unfortunately, while the judiciary is constitutionally obligated to enforce progressive realization of rights where Parliament or the Executive have failed to do so, it is poorly positioned and ill-equipped to create cohesive national policy. Parliament has substantially greater research capacities, expertise and democratic authority to engage in large-scale policy discussions and determinations.

Proper parliamentary oversight requires Parliament to take an active role in ensuring the Executive does not overstep its authority. This requires parliamentary committees to be proactive in soliciting information, monitoring regulations from the drafting stages through implementation, and maintaining oversight over Members of the Cabinet. This includes ensuring that independent committees or councils which Parliament tasks with implementing

portions of an Act are appropriately funded, structurally free from improper ministerial influence, and accountable to the people and to Parliament.

II. Insufficient Oversight and Guidance of the Executive

Statutory bodies such as South African Nursing Council (SANC),[9] the Medicines Control Council (MCC),[10] and the Health Professions Council of South Africa (HSPCA)[11] are intended to be independent of the Executive in order to provide the Minister with independent advice and insight. Unfortunately, each of these statutory councils were structured in ways which compromise their independence.

- SANC: Section 5 of the Nursing Act 33 of 2005 (Nursing Act) provides the Minister with the authority to appoint the entire 25 member body of SANC. The guidance provided to the Minister in this regard requires the Minister to receive nominations from interested groups and appoint members based on the qualifications laid out in the Act. The Minister is also entitled to select the chairperson of the council. The Minister is also permitted to disband the SANC for failure to comply with the Act, but no guidance is provided as to the restrictions or determination of such a violation.[12]
- MCC: Section 3 of the Medicines and Related Substances Act (Medicines Act) provides the Minister of Health with the authority to appoint all members of the MCC. No guidance is provided in the Act as to how the Minister is to exercise this authority. The Minister also has authority to disband the MCC.[13]
- HPCSA: Section 5 of the Health Professions Amendment Bill 2006 intends to cut the number of members designated by professional boards from 25 to 16 and discard the 9 members of the council appointed by the provinces. Additionally, the 16 members from the professional boards will be appointed by the Minister after receiving nominations. The Minister is also given the authority in section 6 of the bill to disband the HPCSA for failure to comply with the Act, but no guidance is provided as to the restrictions or determination of such a violation.[14]

The Health Committee was made aware of these concerns through submissions from the public, including those from the TAC, the ALP, the Democratic Nursing Organization of South Africa, the South African Dental Association, the South African Medical Association and others.[15] In each case, however, the Health Committee disregarded these concerns. In the case of the Nursing Act, the Health Committee stated the appointment of the SANC by the Minister is adequately checked since the appointment power is limited to the nominations received. Unfortunately, the committee substantially overestimates the limitation this places

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9 Established in section 2 of the Nursing Act 33 of 2005.

10 Established in section 2 of the Medicines and Related Substances Act 101 of 1965.

11 Established in section 2 of the Health Professions Act 56 of 1974.

12 Nursing Act section 5(7)(a); The ramifications of permitting the Minister to disband the council without clear guidance or procedures to determine whether violations have occurred was demonstrably shown in the Virodene incident with the MCC. *The Virodene Affair (III)* documents how Minister of Health Zuma and other members of the ANC unhappy with the determination of the MCC in refusing to permit clinical trials of Virodene, unceremoniously replaced the chairman of the MCC and other members of the MCC through mere accusations of improper motivation. The Commission for Conciliation, Mediation, and Arbitration ultimately found there were "no convincing operational reasons" for the removals.

13 See, *The Virodene Affair*, note 12.

14 Health Professions Amendment Bill 2006 section 6(g);

15 See Health Portfolio Committee, 2 August 2006, Health Professions Amendment Bill [B10-2006]: Public Hearings

on the Minister, evidence of which can be seen in the recent regulations promulgated under the Nursing Act. The concerns around the Minister's power to appoint the chairperson were put aside with the acknowledgment that it would be a "token exercise" to leave the authority to appoint the chairperson with the council since all the council members were appointed by the Minister in any case.[16]

If the provisions for appointment of the members of SANC are contrasted with those for appointment of members of the National Council for Correctional Services (NCCS), it becomes clear there is substantially greater latitude granted to the Minister of Health by the Health Committee than is permitted by the Portfolio Committee on Correctional Services (Correctional Services Committee). The Correctional Service Act builds into the procedures for appointment of council members a role for legislative oversight.[17] The Correctional Services Committee meetings on the Correctional Services Amendment Bill reflect substantial concerns surrounding the powers of the Minister with regard to parole policy and a of providing the Minister of Correctional Services with a "blank check."[18] Ultimately, the Correctional Services Committee gave authority to the National Council on Correctional Services to set minimum sentences subject to ratification by the Minister of Correctional Services.[19] This strikes a much better balance than is seen in the Health Committee which has been actively hostile or defensive against submissions which suggest limiting the power of the Minister of Health in relation to statutory councils.[20]

The hearings convened by the Correctional Services Committee are a good example of appropriate parliamentary oversight. There were two main themes that emerged from our submission on the Correctional Services Amendment Bill as well as from civil society as a whole.[21] These were 1) the threat to the independence of the Office of the Inspecting Judge and 2) the need for an ongoing oversight role for parliament beyond the passing of legislation.

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[16] Health Portfolio Committee, 18 October 2005, Nursing Bill: Deliberations

[17] Section 83(2)(h) of the Correctional Services Act provides that leaves the appointment of four members of that council, while still in the ultimate hands of the Minister, subject to consultation with the Correctional Services Committee. Building in such procedures enables the committee to maintain active oversight of the department and the Minister.

[18] *See*, Correctional Services Portfolio Committee, 7 September 2007, Correctional Services Amendment Bill: Department Response to Submissions, Correctional Services Portfolio Committee, 11 September 2007, Correctional Services Amendment Bill: Deliberations.

[19] Correctional Services Amendment Bill [B32B-2007] section 55.

[20] Examples include: During the ALP's oral presentation to the Health Committee on 17 September 2002, Mr. Ngculu of the committee accused the ALP and TAC of "impugning the government" with regard to the suggestion that the bill should lay out qualifications for members of the MCC rather than leave the appointment process unguided. Portfolio Committee on Health, 17 September 2002, Medicines and Related Substances Amendment Bill: Hearings; Throughout the oral submissions by the South African Dental Association, there is an active defense of giving greater authority to the Minister of Health; In the Health Committee's deliberations on the Nursing Act, it was determined, against the advice of multiple submissions, that permitting the SANC to select its own chairperson rather than the chairperson being appointed directly by the Minister of Health would be a "token exercise" since all the council members were appointed by the Minister anyway; Unlike in the Correctional Services Act which provided the National Council on Correctional Services with the power to set minimum prison sentences subject to the ratification of the Minister, the Health Committee in the Nursing Act left final decision making authority on matters on which the council has the greatest expertise with the Minister "after consultation with the Council." Nursing Act section 31(2).

[21] The ALP's submission to the Correctional Services Committee is available at: http://dedi20a.your-server.co.za/alp/images/upload/ALP-TAC%20submission%20on%20the%20Correctional%20Services%20A-B%202007.pdf

The Chair of the Portfolio Committee addressed these concerns, and this is reflected in the later version of the Bill. While, our specific recommendation that the Office of the Inspecting Judge should be strengthened was not incorporated, the later draft retained the independence of the Office. In addition, the Bill requires that certain regulations are to be tabled before parliament once drafted, thereby maintaining an ongoing oversight of the Executive.[22]

Finally, on several occasions, the TAC and ALP have noted delays in the implementation of legislation which have raised concerns for us. The Constitutional Court has made clear that the Executive cannot use the Executive public powers to "veto or otherwise block" implementation of an Act.[23] This must include the authority to promulgate regulations. Unfortunately, the DoH has a history of delaying regulations. By way of example, in the ALP's submission to the South African Human Rights Commission (HRC) we raised our concerns surrounding the implementation of the National Health Act (NHA).[24] According to the section 3(1)(d) of the NHA, the Minister of Health must:

> Within the limits of available resources . . . ensure the provision of such essential health care services, which must **at least** include primary health care services, to the population . . . as may be prescribed after consultation with the National Health Council. (our emphasis)

Primary health care services are defined by the Act as "such health care services as may be prescribed by the Minister", with essential health services being defined as "those health services prescribed by the Minister to be essential health services after consultation with the National Health Council". [25] In turn, health services are defined to include:

- *health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;*
- *basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution;*
- *medical treatment contemplated in section 35(2)(e) of the Constitution; and*
- *municipal health services.*

Unfortunately, two years after the Act went into effect, no regulations required of the Minister of Health by the NHA have been promulgated, which includes defining both primary and essential health services. This means the baseline for the right to health still does not exist, that it is impossible to cost the health service and thereby determine objectively what can be afforded. Delays in writing regulations have been seen in other cases as well.[26] It is Parliament's constitutional obligation to ensure the Executive performs the duties the legislature has assigned to it. This includes holding ministers responsible for failure to implement legislation by creating regulations. It is also Parliament's obligation to ensure the protection and promotion of rights, especially where the rights require progressive realization by the state.

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[22] Correctional Services Amendment Bill [B32b 2007] section 94(n)

[23] *Ex Parte Minister of Safety and Security and Others: In re: S v Walters and Another* 2002 (4) SA 612 (CC) paragraph 73.

[24] ALP, *Submission to the South African Human Rights Commission Enquiry into Access to Health Care Services*, at section 4.1, available at: http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=359

[25] National Health Act section 1.

[26] For example, in the long process leading to the Medicines and Related Substances Amendment Act of 2002, there were several delays in implementation of the Medicines and Related Substances Control Amendment Act 90 of 1997.

We submit that the ramifications of the Health Committee's lax control of the Minister can be further seen in the most recent draft regulations promulgated by the department. While both of these examples show where the DoH has overstepped statutory authority, we submit part of the reason behind these overly aggressive regulations is the failure of Parliament to regularly check the actions of the department and the Minister in particular. Parliamentary committees must be aware of the regulations being promulgated under the authority granted by the legislature to ensure incidents like the below are not finalized.

Nursing Regulations

According to section 58(1)(a) of the Nursing Act the Minister may make regulations relating to the appointment of Nursing Council members in terms of section 5(1) of the Act which sets the qualifications of Council members. But section 5(1) must be read in conjunction with section 5(2)(a), which states:

> The members [of the Council] must be appointed by the Minister on the basis of the nominations made by interested parties, after publication of a notice in the Gazette inviting nominations for new members.

Unfortunately, the draft regulations deviate substantially from the requirements of the Act. For instance, draft regulation 3(1) does not permit all interested parties to nominate members of the council whose qualifications are set out in sections 5(1)(b)(i – vii) of the Act. Instead, the draft regulations identify specific parties from whom the Minister will request a single nomination each. This denies interested parties their statutory right to nominate prospective council members and thereby unlawfully restricts the pool of candidates from which appointments to the Council may be made.[27]

Regulations relating to the Labelling and Advertising of Foodstuffs

The Minister's authority to promulgate regulations is in section 15 of the Foodstuffs, Cosmetics, and Disinfectants Act 54 of 1972 (Foodstuffs Act), the various subsections of which limit the Minister's authority to proscribe, prohibit, or restrict by way of regulation. However, draft guideline 13 attached to the draft regulations, sets out a process by which the Minister will appoint an *ad hoc* independent expert panel to advise the Director of Food Control on whether to approve certain "enhanced function claims" which are regulated by draft regulation 61. The power to approve claims is fundamentally different from the power to deny claims because of the difference in accountability. In particular, a system of approval based on advice from an independent panel provides little possibility for persons adversely affected by decisions of the panel to vindicate their rights, as the only remedy would be to challenge the decision based on the inadequate protections of administrative law.[28]

III. Parliamentary Investigations of Actions of the Executive

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[27] For a more complete analysis of the draft regulations, see our submission to the DoH available at: http://server.alp.org.za/submissions/nursingregulationssubmission.pdf

[28] For a more thorough analysis of the draft regulations, see the joint ALP and TAC submission to the DoH available at: http://server.alp.org.za/submissions/foodstuffsregulationssubmission.pdf

Parliament has been given the power to investigate matters of public import, including the power to subpoena witnesses and evidence. As a part of that responsibility, Parliament should be willing to use its authority to investigate incidents involving Ministers for failing to enforce legislation or when actions of Ministers potentially violate an Act. In particular, the TAC and ALP submit there has been substantial evidence of public knowledge on the following issues for some time, none of which have resulted in public hearings or investigations by the Health Committee:

- The failure to prevent the sale of products claiming to treat or cure HIV/AIDS but which are unregistered under the Medicines and Related Substances Act;
- The relationship between the Minister of Health and other members of the DoH and Matthias Rath;
- The relationship between the Minister of Health and Tine van der Maas;
- Why the DoH/Minister of Health have issued two statements in support of *Ubhejane*, an untested and unregistered product whose manufacturer claims it treats AIDS;
- Why the DoH/Minister of Health have not upgraded to a dual-antiretroviral regiment for the prevention of mother-to-child transmission despite all scientific evidence showing dual therapy is more effective;
- The Department of Correctional Services and the DoH's slow implementation of treatment for HIV positive prisoners throughout the country.

IV. Failure to Adequately Link Relevant Legislation and National Policy in a Cohesive Manner

There are several examples where legislation has failed to adequately link different aspects of national health policy or ensure consistency between cross-referenced acts. For example, the Nursing Act was designed such that the SANC reports to the Minister and is not linked to nor incorporated into broader national policy bodies such as the National Health Council or the Forum of Statutory Health Professional Councils (FSHPC) established under the National Health Act. The same is true of the Health Professions Amendment Bill which does not link the HPCSA with the FSHPC. This leaves the independent structures designed by the NHA, which are tasked with creating national health policies without the input from other councils on issues such as human resources shortages and strategies and planning, and makes the task of formulating cohesive national policy significantly more difficult. Instead, SANC, the HPCSA, and the NHC all report to the Minister in parallel.

Centralizing this knowledge within the office of the Minister limits the effectiveness of these statutory policy advisory bodies. These bodies are the proper place for national health policy to be designed as a greater level of independence from the Executive and specialized expertise exist within the councils than in the DoH. Creating parallel avenues of reporting which all lead back to the Minister pushes control of health policy further into the hands of the Minister. This is improper. The framework for independent councils should be one of interaction amongst the councils established via procedures in the individual acts which can then provide the Minister with cohesive strategies and policy recommendations developed through the input of all the relevant councils. The structure as it stands has the councils operating in isolation with a centralized information repository within the office of the Minister. Interaction amongst the various councils would allow for greater competencies in planning and policy making for human resource shortages and execution of the obligations under section 27of the Constitution.

In a similar vein, an important aspect of the ALP's submission to the Portfolio Committee on Finance on the Draft Revenue Laws Amendment Bill 31 of 2005 (DRLAB) was link between the Medical Schemes Act and the exemptions provided for under the DRLAB, in particular, the scope of coverage for dependents of members. The Medical Schemes Act defines "dependent" as:

> *(a) the spouse or partner, dependant children or other members of the member´s immediate family in respect of whom the member is liable for family care and support; or*
> *(b) any other person who, under the rules of a medical scheme, is recognised as a dependant of such a member and is eligible for benefits under the rules of the medical scheme.*[29]

The scope of coverage for employees under DRLAB, however, were ultimately left in a confused state, only extending to the "employee or his or her spouse or children" in some circumstances, and extending to "dependents" in others.[30] The result is a confusing patchwork of different tax exemptions, depending on what service is provided to who and when.

The point of this observation is that parliamentary committees and departments need to be aware of the language used across different interlinking Acts. Cross-Committee and cross-departmental collaboration to this end is essential to avoid gaps in coverage, promote solid and efficient policy, and avoid confusion.

V. Conclusion

The ALP and TAC once again thank the Panel for the opportunity to make this submission. Should the Panel require any further input and/or clarifications on this submission, please contact Brian Honermann at (011) 356 4108 or by e-mail at honermannb@alp.org.za. The ALP and TAC are also willing to make oral submissions to the Panel if and when required.

22 October 2007

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[29] Medical Schemes Act 55 of 2001 section 1.

[30] For example, section 55 of the Draft Revenue Laws Amendment Bill grants protections for an "employee or his or her spouse, child, relative or dependent" while section 60 extends benefits to employees "and the spouses and children of" employees in one location and to "dependents" of an employee in another. Such changing applications can make application of the law needlessly complicated, inefficient, and unfair.

Annexure A

Submissions to Parliament by the Treatment Action Campaign and the AIDS Law Project since 2002

Date	Submission Matter	Committee
21 June 2002	Medicines and Related Substances Amendment Bill 2002	Portfolio Committee on Health
31 July 2002	Medical Schemes Amendment Bill 2002	Portfolio Committee on Health
6 February 2003	Compulsory HIV Testing of Alleged Sexual Offenders Bill	Portfolio Committee on Justice and Constitutional Development
21 February 2003	HIV/AIDS Care, Treatment and Prevention: Briefing by TAC, ALP, and NAPWA	Portfolio Committee on Health
31 July 2003	National Health Bill	Portfolio Committee on Health
10 October 2005	Nursing Bill	Portfolio Committee on Health
18 October 2005	Draft Revenue Laws Amendment Bill 2005	Portfolio Committee on Finance
25 July 2005	Patents Amendment Bill 2005	Portfolio Committee on Trade and Industry
February 2006	Civil society input to the African Peer Review Mechanism process – The HIV Epidemic: A discussion of the response of the South African Government	African Peer Review Mechanism
22 September 2006	Review of the Promotion of Equality and Prevention of Unfair Discrimination Act	Joint Monitoring Committee on the Improvement of the Quality of Life and the status of Women & Joint Monitoring Committee on the Improvement of the Quality of Life and the status of Children, Youth and Persons with Disabilities
15 August 2006	Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2006	Portfolio Committee on Justice and Constitutional Development
21 July 2006	Health Professions Amendment Bill 2006	Portfolio Committee on Health
30 January 2007	Review of State Institutions Supporting Constitutional Democracy	Ad Hoc Committee on the Review of State Institutions Supporting Constitutional Democracy
12 September 2007	Public Hearings on Workplace Discrimination	Portfolio Committee on Labour
4 September 2007	Correctional Services Amendment Bill 2007	Portfolio Committee on Correctional Services