JOINT ALP/ TAC SUBMISSION ON THE REFUGEES AMENDMENT BILL [B 11—2008]

INTRODUCTION

The AIDS Law Project (ALP) and Treatment Action Campaign (TAC) welcome the opportunity to make written submissions on the Refugees Amendment Bill [B 11—2008] ("the Bill").[1] While we support certain aspects of the Bill, we do have concerns about some of the objectives and provisions, as well as significant omissions that specifically relate to health and social services.

A number of organisations have endorsed this submission.[2] The ALP and TAC have also endorsed the submissions made by Lawyers for Human Rights (LHR) and the Legal Resources Centre (LRC). Kindly note that the ALP and TAC support the recommendations made by the LHR and the LRC. Given the substantive submissions made by these organisations and coupled with a short 16 day period to make written comments, the ALP and TAC have chosen to deal only with access to *health and social services* for refugees and asylum seekers and how and why this should be reflected in the Bill. We may seek to supplement our joint written submission with our oral submission should this be necessary. Kindly note that our decision not to comment on all aspects of the Bill should not be seen in any way as supporting or endorsing all of the objectives and/or remaining provisions of the Bill that are not specifically addressed in our submission.

The outline of our submission is as follows:

1. Executive Summary
2. Proposals regarding specific provisions in the Bill
3. Situational analysis of people seeking refuge in SA;
4. Constitutional obligations of the SA government to provide meaningful access to health and social services;
5. Summary of relevant international law on health access;
6. The experiences of refugees and asylum seekers in attempting to access health services through the public health sector;
7. Health conditions at immigration detention centres, and refugee reception offices (RROs) and immigration documentation queues and the situation of children.

EXECUTIVE SUMMARY

1. While the ALP and TAC supports certain aspects of the Bill, we have concerns about some of its objectives and provisions, as well as significant omissions that specifically relate to health and social services.

2. **We oppose the removal of the 'right to health services' contained in s27 (g) of the Refugee Act**. This provision should not be removed but strengthened.

    a. The taking away of express rights may result in a denial of rights and also a possible legal challenge on the unconstitutionality of the Act.
    b. The right to health services should extend to public health facilities, detention centres, police holding cells and immigration documentation queues.
    c. At present, despite the directives from the National Department of Health (NDoH) coupled with Constitutional and international obligations to provide meaningful access to health services, hospitals, clinics and other institutions appear to be unilaterally creating policies which deny refugees access to health care services which violate existing legal and human rights obligations, and undermine, in particular, the objectives of the *HIV and AIDS and STI Strategic Plan for South Africa* (NSP 2007 - 2011).

3. We believe that the provisions that purport to deal with **children** (accompanied and unaccompanied) are weak and require significant strengthening to conform to constitutional and international obligations to act in the 'best interests of the child' at all material times.
    a. Several issues relating to documentation, protection and places of safety must be addressed through the Refugee Act, as it is not sufficiently dealt with in the Child Care Act.

4. The Bill, as it currently stands, makes an unnecessary **distinction between "refugee" and "asylum seeker"** in a manner that is potentially inconsistent with the obligations of SA in the CRSR, which may lead to the violation of the rights of asylum seekers.

5. The Bill proposes to remove Section 6 of the Act, which expressly incorporated international treaties and declarations into the interpretation of the Act. **We oppose the removal of Section 6.**

6. ALP and TAC are concerned about the **health conditions at immigration detention centres, immigration queues and police holding cells**. The implications of reports of overcrowding, poor sanitary conditions, lack of regular access and visits by health care workers and/or observers and the clear limited capacity of such centres to provide health services results in the immediate and on-going risk of the spread of TB, including drug resistant TB and other public health problems.

7. We appeal to the Committee to **conduct an unannounced visit and investigate**, in particular, access to health services at the Musina detention centre (Army Base) and investigate the unlawful detention of children and alleged abuse carried out by officials in the employ of SAPS and the SANDF.

8. We are concerned with the inhumane conditions encountered by people when they enter **asylum application queues** at Refugee Reception Offices (RROs). Many spend days in the queue without access to shelter, water, sanitation or food for fear of losing their place in the queue. The Bill regrettably does not seek to address the health situation and health risks at these queues nor include minimum standards for queuing.

Recommendations on provisions in the Bill

We note with alarm that the Bill proposes to repeal **Section 27(g) of the Refugee Act (1998)**, which specifically provides for refugees to be

> "Entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time."

Also, while the Refugee Act states in section 27 that:

> "A refugee- … *(b)* enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act"

---the Bill proposes that this should be amended to read:

> "a refugee is entitled to … (b) full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996, (except those rights that apply only to citizens)".

While health rights are guaranteed in our Constitution to everyone, it should be explicitly referred to in the Refugee Act. The removal of **Section 27 (g)** of the Refugee Act would eliminate the explicit right to access health services for refugees and asylum seekers and create uncertainty in respect of rights that 'apply only to citizens'. The express removal of the right also suggests that what remains is less than what SA citizens get.

Since legislative history is relevant in statutory interpretation, the removal of a clause that expressly guarantees something, strongly suggests that that something is no longer guaranteed. This will exacerbate the crisis we are already facing and cause legislative confusion resulting in the matter possibly being resolved through litigation, that is, to declare the amended act unconstitutional.

Given the wide spread denial of health services coupled with uncertainty about the right to access to health services by refugees and asylum seekers dealt with in our submission (see below 'Access to Health Care Services') we support an explicit reference to the 'right to health' – it is warranted and should be retained. In addition, we set out why these rights must be incorporated into legislation that explicitly deals with three (3) places in particular:

1. Public health facilities
2. Detention centres and/or other places of safety; and
3. Places where refugees and asylum seekers 'queue' for immigration documentation.

Furthermore, the proposed changes to Section 21 includes the addition of a new **Section 21B**.

Of particular concern is **Section 21B. (2)**, which states,

> "Any refugee whose child is born in the Republic must, within one month of the birth of his or her child, register such a child as a dependent at the Refugee Reception Office that **processed** his or her application" (emphasis added).

The proposed Section 21B is wholly unrealistic. Many refugees and asylum seekers leave the area where they originally entered and/or applied to regularise their stay in SA. Many women (and men) obtain documentation in one part of the country and then move and live in another part. For example, if a woman obtains her documentation in Pretoria and then moves to Cape Town, falls pregnant and then gives birth there, it is unreasonable to expect her to travel *within a month* (or at all) back to Johannesburg to register her child with the RRO that processed her application as proposed in the Bill.

The committee is well aware that health and other demands of a one month old baby as well of those of a post-natal mother do not permit long-distance travel, particularly within a period as short as this following birth. Furthermore, where parents cannot afford to pay for an air, train or bus ticket –they will be guilty of contravening the law simply because they have no money. This section therefore needs to be revised. Also, in cases where a mother / father is **still being processed**, the child should automatically be included in that process.

Our Constitution and international law (dealt with below under 'Constitutional and International law on health access for non-citizens) explicitly provide for the right of refugees and asylum seekers to access health care services including emergency care. It is therefore imperative that a clear and unambiguous right to access health care services in line with established government policy be inserted in the Bill to protect refugees **and** asylum seekers (though see our submissions on this artificial distinction below).

Finally, retaining an explicit reference to 'health services' is similar to the proposed addition of sub section (f) under section 27 of the principal Act to "*seek employment"* under section 21 of the proposed Bill.

Section 27 should include a clause (g), stating: (s21 of Bill) "the right to access the same basic health services and basic education guaranteed to citizens and residents of the Republic" Section 27A should include a clause (e) stating: (s21 of Bill) "the right to access the same basic health services and basic education guaranteed to

citizens and residents of the Republic"

Section 21B (2), should be amended to: (s14 of Bill)
"Any refugee already processed whose child is born in the Republic must within a reasonable time period of the birth of his or her child, register such a child as a dependent at the nearest / any Refugee Reception Office (RRO). Any refugee who is in the process of being processed whose child is born in the Republic can include his or her child in that process at the Refugee Reception Office (RRO) that is processing the application.
Section 27 A (s 22 of Bill)
Remove the words: "in so far as those rights apply to an asylum seeker" from, proposed subsection (d).

Children
Under Insertion of sections 21A and 21B in Act 130 of 1998: (s 14 of Bill)
1. The term unaccompanied child[3] needs to be further defined and in line with the Children's Act and with UNHCR definitions.
2. The Department of Social Development must be given overall responsibility to coordinate support for children in refugee/asylum-seeker communities with the Departments of Home Affairs, Safety and Security and Education as well as with Refugee Associations.
3. The Department of Social Development should have a designated person in all major centres to focus on children in need under these circumstances, who must act in the best interests of children at all times.
4. Documentation must be fast-tracked for children in these circumstances so that Social Assistance Grants especially Foster Care Grants are accessed immediately.

Refugee v asylum seeker

The Bill, as it currently stands, also makes an unnecessary **distinction** between "refugee" and "asylum seeker" in a manner that is potentially inconsistent with the obligations of SA in the *Convention and Protocol Relating to the Status of Refugees* (CRSR) (discussed below under 'International law'), which may lead to the violation of the rights of asylum seekers. While there is nothing inherently incorrect in the definition of "refugee" meaning "any person who has been granted asylum in terms of this Act" and the definition of "asylum seeker" meaning "a person who is seeking recognition as a refugee in the Republic", the *CRSR's* relevant definition (amended by the protocol) of refugee is broad enough to potentially encompass both definitions:

> any person who: . . . (2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.[4]

The importance of the distinction drawn here is that the CRSR does not specifically provide for an "interim" status while a refugee application is processed. Since it is the State's bureaucracy that results in the delay in granting of refugee status, the benefits of such status should be conferred upon an asylum seeker stemming from when the initial application for asylum is made at a RRO.[5] While SA certainly has the right to interrogate an asylum seeker's status and application for asylum, it should do so with the presumption that the asylum seeker will prevail and grant the individual the full rights allotted to a refugee in terms of the CRSR, which includes the right to access to courts,[6] to engage in gainful employment,[7] housing,[8] public education,[9] and social security,[10] amongst other rights. Only after an application for asylum has been denied could these rights not be afforded in terms of SA's obligations under the CRSR.

In addition, we are concerned that the Bill proposes to remove **Section 6** of the Act, which expressly incorporated *international treaties and declarations* into the interpretation of the Act. These treaties and declarations are part of the international legal obligation to protect at a minimum the following set of rights:

1. Right to Dignity (UDHR, CCPR, ACHPR).
2. Right to life, liberty and security of person (UDHR, CCPR, ACHPR, CAT).
3. Freedom of thought, conscience and religion (UDHR, CCPR, ACHPR).
4. Freedom of movement and association (UDHR, CCPR, ACHPR).
5. Right to enjoy and practice one's culture, religion and language (UDHR, CCPR, ACHPR, CESCR, CERD).
6. Right to state protection from discrimination (CERD).
7. The right of refugees to be protected on the same terms as Nationals in certain circumstances (CRSR).
8. Right to an adequate standard of living (UDHR, ACHPR, CESCR, CERD, CRSR). This includes the right to the "best attainable standard of physical and mental health", housing, education, and a minimum standard of social security. Governments are expected to ensure that these rights are fulfilled, to the maximum ability of their available resources, for citizens and non-citizens. Refugees and asylum-seekers, in particular, are entitled to the same social security as citizens with regards to health, disability, unemployment, old age and any other condition that is subject to a national social security scheme.
9. Right to equality in labour conditions and regulations (CRSR).

We oppose the removal of section 6 from the Act -
Human rights belong to all human beings, regardless of citizenship.
Non-citizens are therefore equally entitled, without being unfairly discriminated against, to the rights outlined in the UDHR and other agreements that have been signed and ratified by SA.

HIV and AIDS and STI National Strategic Plan for South Africa (2007 -2011)

All sectors in SA, including government, have recognised and included protections for vulnerable groups through the *National Strategic Plan* (NSP) by outlining the right to access HIV prevention, treatment and support services16 (see pages 32 and 56 in particular, attached marked **RAB 1**). The NSP specifically identifies refugees, asylum seekers and foreign migrants as marginalized groups, making proper policy interventions for HIV prevention, treatment, and support necessary. For this reason, our submission draws heavily on a written submission made and endorsed by eighteen (18) law, health and human rights organisations on 1 March 2008, which was submitted to the *South African National AIDS Council* (SANAC) on the *Health Situation of Vulnerable Groups in SA* (SANAC submission), attached and marked **RAB 2**. The SANAC submission has already been forwarded to the SANAC secretariat for inclusion on the agenda of the next SANAC plenary (the planned 4th March 2008 SANAC plenary was postponed). Copies have also been sent to various government ministries. It is important to note that several government ministries are represented at SANAC including the Departments of Health and Social Development.

Situational analysis of the people who seek refuge in SA

According to the SANAC Submission already referred to above, 'South Africa has become a primary destination for people from across the African continent who have been forced to leave their own countries to seek refuge and safety elsewhere. On a weekly basis, thousands of people from across Africa cross into SA to seek refuge from persecution, starvation and then also to get access to emergency medical services, maternal health services and access to chronic medication for HIV and/or TB. People come from many countries but mainly from the DRC, Ethiopia, Angola, Sudan, Somalia, Malawi, Mozambique, Zimbabwe, Nigeria, Uganda, and Rwanda.

While at present, the majority of people seeking refuge and assistance in SA through regular crossings of SA's borders are from DRC, Somalia and Ethiopia it is estimated that Zimbabweans make up the majority of people irregularly crossing the borders of SA. It is estimated that there are between 1 and 4 million Zimbabwean refugees in SA at present. In 2007, it is estimated SA deported an average of more than 20 000 Zimbabweans per month. Human Rights Watch (HRW) as at February 2008, documented a severe health and political crisis in Zimbabwe, which has led to thousands of Zimbabweans fleeing to SA and elsewhere. According to human rights groups

and AIDS organizations in Zimbabwe, the socio-economic situation is worsening particularly for people living with HIV/AIDS. People are struggling with services such as transport, the costs of accommodation, food insecurity and lack of basic health care services. Many people have also lost gainful employment due to companies and organisations closing down. User fees for health services have reportedly been reintroduced at the end of 2007 and due to excessive inflation, each health visit can potentially cost in the region of ZW$10 million. While good health and a balanced diet are necessary for patients on ARVs who are living with HIV, this has become almost impossible in Zimbabwe because of food insecurity and the loss of employment. It is important to note that HRW has estimated that the current HIV prevalence in Zimbabwe is 15% of its adult population.'[11]

Constitutional Law on Health Access for Non-Citizens

Under our Constitution's Bill of Rights, which must be interpreted in conformity with norms of international human rights law,[12] SA has an obligation to uphold the socio-economic rights of non-citizens. The state must "respect, protect, promote and fulfill" the rights guaranteed in the Bill of Rights including the rights to equality, dignity, life, access to housing and health care, food, water and social security. No one may be refused emergency medical treatment. These rights are to be upheld in a non-discriminatory manner in keeping with the Constitutional values of human dignity, equality and freedom.

The Constitution and the Refugee Act guarantee and recognise the right of 'everyone' to access health care –refugees, asylum seekers and undocumented persons are therefore equally protected. The right of detainees to receive medical treatment is also contained in section 35(2)(e) of the Constitution. Refugees and asylum-seekers are therefore by law entitled to the same healthcare services, as SA citizens. This includes the right to access treatment for chronic diseases such as HIV and TB.[13] The Constitutional Court has recognized that "[p] eople who are living with HIV/AIDS are one of the most vulnerable groups in our society."[14] To that end, refugees and asylum seekers who are living with HIV face an additional vulnerability that the state must seek to protect against. The Constitutional Court has also recognised that particular attention must be given to the needs of vulnerable groups when implementing socio-economic rights. In *Grootboom* the Court held that "[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."[15] To respect, protect and fulfill its socio-economic rights obligations, SA must take steps to 'progressively realize' these rights within its available resources.[16]

International Law on Health Access for Non-Citizens

The fundamental international human rights principle of non-discrimination prohibits discrimination against non-citizens on grounds of nationality.[17] Several international instruments protect the rights of non-citizens. These include the Universal Declaration of Human Rights (UDHR), which is generally regarded as customary international law that all states are required to uphold; the African Charter on Human and People's Rights (ACHPR) which has been signed by all SADC countries;[18] the International Covenant on Civil and Political Rights (CCPR);[19] the International Covenant on Economic, Social and Cultural Rights (CESCR);[20] the Convention on the Elimination of All Forms of Racial Discrimination (CERD);[21] the Convention and Protocol Relating to the Status of Refugees (CRSR);[22] the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment (CAT);[23] and the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live (Declaration on Non-Nationals).

Article 12 of the *CCPR* protects the right of *everyone* to enjoy the highest attainable standard of health.[24] This right imposes an obligation on SA to take necessary steps for the prevention, treatment and control of epidemics, endemics, occupational and other diseases and to create conditions, which would assure to all medical service and medical attention in the event of sickness.[25] In meeting this obligation, SA is required to ensure that appropriate goods, services and information for the prevention and treatment of STDs, including HIV/AIDS, are available and accessible to all those living in SA.

The *UN Committee on the Elimination of Racial Discrimination* has reiterated that discrimination against non-citizens is prohibited.[26] Non-citizens must have non-discriminatory access to socio-economic rights[27] including an adequate standard of *physical and mental health*.[28] In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from:

> [D]enying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.[29]

SA is also under an obligation to fulfill the four interrelated elements of the right to health: availability, accessibility, acceptability and quality.[30] Special attention should be given to address the needs of vulnerable and disadvantaged groups such as asylum-seekers, women and those living with HIV.[31]

General Comment 14 of the *Committee on Economic, Social and Cultural Rights* on the right to the highest attainable standard of health says clearly that "the committee interprets the right to

health as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health such as …access to health related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health –related decision-making at the community, national and international levels."[32]

The *Joint U.N. Program on HIV/AIDS* (UNAIDS) and the *Office of the U.N. High Commissioner for Human Rights* (UNHCR) have also developed specific guidelines on HIV/AIDS and Human Rights. A range of documents developed by various U.N. agencies, emphasize the links between HIV/AIDS and human rights and highlight how the violations of human rights drive the epidemic.

Access to health care services for non-citizens

> *A young Zimbabwean woman was arrested and denied access to her 5-month-old baby, whom she was exclusively breastfeeding. She was allowed to breastfeed the baby only twice on the day of her arrest, and the baby was not permitted to stay with her in the mixed cell of men and women. A policeman commented about Zimbabweans 'renting babies' in order to get out of jail and that she didn't have a 'human right' to breastfeed. She was released on 29 February 2008 purportedly to be deported. [SANAC submission at page 4]*

Even though the Constitution guarantees the right of 'everyone' to access health services including emergency care according to a 2008 report by the *International Federation of Human Rights* (IFHR)[33], which represents 155 human rights organisations globally, health rights are regularly denied to people who are not South African. The report states that:

> *[*M]igrants find it hard to access health services and facilities, even for emergency cases. They may be faced with medical staff who keep them waiting for abnormal length of time, provide them with exams and treatment which are below the minimum standards, verbally abuse them, attend them in a South African language they may not understand, treat them with little sensitivity and attention to their pain or specific conditions, have them pay outpatient fees, or deny them access to hospitals either straightforwardly or on the claim that they do not have adequate documentation75.
>
> In an extreme case, "a pregnant Somali woman was refused service on the grounds that (a) delivery, unless problematic, did not constitute an emergency and (b), she could not pay the additional fee levied on foreigners (which, as a refugee, she is not required to pay). As a result, she ultimately delivered the child on the pavement outside the hospital [only for her child to pass away] a few weeks later.
>
> This is an extreme example, but speaks to broader patterns of exclusion from effective protection" (Landau, 2006). For non-emergency cases, most migrants are reluctant to go to hospitals, which they see as linked to official institutions, hence that may be unsympathetic to them or may even report undocumented migrants to law enforcing officers. As a result, most of them prefer to go to private doctors, in particular those from the same national origin or working with migrant communities. Many migrants also do not consult doctors at all or do not follow adequate treatment, for lack of knowledge or money. This situation exposes them, as well as the South African population, to heightened health risks. [page 31]

In the context of HIV/AIDS and the demand for antiretroviral (ARV) medicines, the National Department of Health (NDoH) issued a letter on the issue of accessing ARVs without an identity

document in 2006 (after reports from human rights organisations that people were being turned away from ARV services if they did not have a valid SA Identity Document (ID)).

In 2007 the NDoH issued two Directives; an ART Directive in April and a Revenue Directive in September. The 2006 letter and the 2007 Directive are attached marked **RAB 3 and RAB 4**. The letter and Directives clarify that refugees and asylum seekers – with or without a SA ID document, asylum permit / documentation– shall be exempt from paying for services related to the provision of diagnostic services as well as antiretroviral (ARV) medicines subject to certain provisos relating to membership of any medical scheme. This is particularly appropriate given the right that patients have to access ARVs and the challenges that refugees and asylum seekers face in accessing documentation from the Department of Home Affairs (DHA) within a reasonable time period.[34]

However, at present, despite the directives from the National Department of Health (NDoH) coupled with Constitutional and international obligations to provide meaningful access to health services, like the IFHR, we have also found that hospitals, clinics and other institutions appear to be unilaterally creating policies which deny refugees access to health care services which violate existing legal and human rights obligations, and undermine, in particular, the objectives of the NSP. In addition, the conditions of detention and the conditions in which people have to queue for asylum applications are inconsistent with the rights contained in our constitution. These conditions are increasing the risk of ill health and suffering. In particular, it increases the risk of the spread of Tuberculosis (TB) including drug resistant TB. Below we deal with access health services in the public sector and the conditions at detention centres and asylum 'queues'.

Access to health services in the public health sector

Research conducted in the greater Johannesburg metropolitan area indicates that refugees and asylum seekers in need of ARVs face several challenges in accessing treatment through the public sector. These include the charging of excessive fees, lack of knowledge or the inability to enforce rights to health care, and denial of care on the basis of lacking South African identification.[35] Even if non-citizens secure access through the public health care system, when their CD4 counts reach the point where initiation of ARV treatment is medically indicated, instead of referring patients to an appropriate ARV treatment site as is legally required, local government clinics refer refugees, asylum seekers and other non-citizens out of the public sector and directly into the already overburdened and under-resourced nongovernmental (NGO) sector in order to access ART. In addition, budgetary excuses for denying access to ARVs are also frequently cited when it comes to treating refugees and asylum seekers. Some health care workers are known to claim that a facility does not have the budget to look after 'additional' patients who happen to be

non-South African. Recently, the ALP was requested to assist non-citizen patients who were turned away from hospitals in Cape Town when seeking access to HIV related services. In other words, available research gives us a glimpse into the severity of the problem. In many others parts of the country such as Durban and Musina, we are also receiving reports of patients being turned away from life saving treatment because of their nationality.

Access to health services at immigration detention centres

In addition to refugees and asylum seekers being turned away from public health facilities, they face severe health related challenges at immigration detention centres where they are often kept pending deportation (note that in many of these cases the deportation proceedings are irregular and subject to challenge).

The Committee is well aware that there are five detention centres in SA. The ALP and TAC submit that they pose serious public health risks for refugees, asylum seekers and undocumented persons in SA as well as the general population outside these centres. The centres do not conform to international human rights standards and take away people's dignity. The conditions of detention are in our view inconsistent with the protections guaranteed by our Constitution and international law. Yet, despite a constitutional right to access health care services, there is no provision in our law that specifically regularises on-going and unhindered access to detention facilities by external health care workers. As a result, often detainees do not access timely health related services and are unable to access chronic medication. It appears that where the DHA provides medical services to immigration detainees at Lindela and perhaps others they have contracted this to a company called *Bosasa*. We cannot find anything in our law that allows a detainee to obtain the medical assistance of an external health care worker without going through the DHA and Bosasa. This in our view is problematic.

Conditions at detention centres such as Lindela Repatriation Centre[36] and at the Musina SMG Military Base are worrying from a public health perspective. The implications of reports by the TAC and other organisations working in Musina and at Lindela of overcrowding, poor sanitary conditions, lack of regular access and visits by health care workers and/or observers and the clear limited capacity of such detention centres to provide health services results in the immediate and on-going risk of the spread of Tb including drug resistant TB and other health problems such as viral hepatitis B, depression, anxiety, muscular pain, hypertension, diabetes, poor oral health, intestinal parasites, delayed growth in children.[37] These issues must therefore be addressed through legislation.

To illustrate the dire conditions of detention, about a week ago the TAC conducted a field visit of Musina[38]. The visit revealed that:

a. The illegal deportation of mainly Zimbabweans is occurring on a daily basis from Musina. However, people who have been deported to Zimbabwe invariably make their way back into SA --at times within hours of their deportation. This tragic situation is now akin to a 'game' between refugees and the border police.
b. The migrant population in Musina is not aware of their legal and health rights and therefore does not easily access health and other social services.
c. The biggest challenge facing health facilities in Musina is the increasing demand for health services and in particular ARV medicines. This is occasioned by the non-availability of ARVs in Zimbabwe due to drug shortages and / or the cost of ARVs. As far as we are aware there is no national or provincial plan in place to deal with the increase in demand for health related services.
d. Medical services are not available at the detention centre in Musina (SMG Military Base):
    i. The centre is situated at a South African Army Base but is apparently under the control of the Department of Home Affairs and the SAPS.
    ii. In a busy month, it is estimated that about 12 000 refugees and asylum seekers are deported from here. Deportations are carried out twice a day at 10am and 3pm without following due process.
    iii. The detention centre is a warehouse that is divided into two sections for males and females. There are toilet facilities on the outside of the building. Inside, the conditions are poor. The sanitation (toilet) conditions are extremely poor and the lack of proper hygiene is obvious. This is despite the fact that Section 3 of Annexure B that form part of Regulations to the Immigration Act provide that:
    (a) Every detainee shall keep his or her person, clothing, bedding and room clean and tidy;
    (b) The Department shall provide the means to comply with item 3(a)
    There is inadequate ventilation; people sleep on a concrete floor, garbage is thrown everywhere. It smells strongly of urine and human excrement. Flies, dirt and old food are lying on the floor.
    iv. While there are water taps there was no evidence of running water.
    v. Detainees reported that their food was inadequate.
    vi. Detainees are reportedly not informed of their rights to access health care services nor are they able to demand access to health services from the SAPS or army officials. An ambulance is supposedly called for emergencies but there is no medical equipment on-site.
    vii. Infection control in the detention centre is poor and there is a serious and immediate risk of the spread of Tb including drug resistant TB. Despite this the SAPS has reportedly not shown any concern on the basis that

'no one is detained for longer than twenty four hours' – the latter is in fact a direct admission of a serious human rights violation – the lack of due process in deportation proceedings as it is inconceivable that a hearing is afforded to such a person within 24 hours (before a Magistrate as is legally required).

viii. Finally, there was insufficient time to properly investigate and fully question all detainees.

We therefore appeal to the Committee to conduct an unannounced visit and investigate, in particular, the nutrition and food policies in the centre, the detention of children and the alleged abuse carried out by officials in the employ of SAPS and the SANDF.

e. It has also been reported that young women are subject to sexual violence and assault including rape when crossing the Zimbabwean border at Beit Bridge and when they first arrive in SA. Many girls are also reported to engage in transactional sexual relationships due to their poor economic status. Apart from the fact that sexual assault and rape constitute crimes and requires prosecution, it presents a serious public health problem.
    i. Sexual violence survivors require counseling and access to post exposure prophylaxis (PEP) to prevent HIV transmission;
    ii. In many cases maternal health services including contraception are necessary;
    iii. In some cases termination of pregnancy services are required.
f. Children who cross the border into SA are reportedly abused. We have been informed that they do not have access to legal recourse if they are sexually assaulted, although the SAPS in Musina maintain that they investigate and take up these cases. We do not have any statistics from Musina SAPS on cases prosecuted.

The situation of accompanied and unaccompanied children

Stories from KwaZulu Natal:

A parent, from Mozambique, who was recognised as a refugee, brought his child with him who was also born in Mozambique. When the father died, the child was left in SA. The child does not have a birth certificate and having difficulties in accessing social services.

A child who entered SA to be with his father who was living with HIV. The father subsequently died. The fathers partner took care of the child but then she also died. It has been reported that no one knew what to do with the child, as the child had no documentation.

We believe that the Bill superficially addresses the issue of children, whether accompanied or unaccompanied. Below we set out why this aspect of the Bill requires significant strengthening. At the outset, we believe that the *best interests of the child* must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the safety and well-being of the child as the first priority.

Situation at Lindela

In 2004, the Centre for Child Law and Lawyers for Human Rights brought an urgent application on behalf of undocumented unaccompanied foreign children who were detained in Lindela Repatriation Centre, together with adults, and who were facing imminent deportation.
The Court granted an interdict of deportation and appointed a curator *ad litem* for the children. It rejected government's argument that the Child Care Act did not apply to unaccompanied foreign children and prohibited the Department of Home Affairs to detain any further children in Lindela.
We have received unconfirmed reports that children who are not admitted into Lindela are left at the gates of a neighbouring children's prison, run by Bosasa. Further, that accompanied children are taken with their mothers to a prison or police station instead of Lindela so as to comply with the court order. This does not satisfactorily resolve the issue of accompanied minors either.

The Bill proposes section 21 A through which 'unaccompanied children' will purportedly dealt with through the Child Care Act. But the provisions of the Child Care Act are not sufficient to deal with a situation where a child is granted asylum. We therefore propose that additional provisions are required to supplement the Child Care Act given the unique circumstances of these children.

We support the LHR's submission that it is unclear from the Bill which department/officials are responsible to provide assistance to unaccompanied children. The Act needs to be more specific about who is to provide this assistance and how these children should be treated in the asylum process.

Situation at Musina

We note that the Bill does not even contemplate to deal with the issue of accompanied children and their locale and conditions of detention. This is worrying given that the TAC and other organisations have personally witnessed children being kept at the Musina detention centre.
Section 1 of the Immigration Act (2002) contemplates that minors will be kept 'separate' from adults in detention centres but that minors will not be separated from their parents. Given this requirement, it is unclear to us why children are being kept in detention in Musina or what plans are in place to address the requirements of the Immigration Act and the court order (Lindela) referred to above.

We submit that the detention of a child (accompanied or unaccompanied) must be in line with the conditions as contemplated in Section 28(1)(g) of the South African Constitution, taking into consideration the principle of family unity and the best interests of the child. The *varying capacities of a child based on age and maturity* needs to be considered in situations where the asylum/refugee status of a child in need of care and protection is undetermined. The state needs to take initiative, coordinate and support a child in such situations through the necessary processes- this is in line with the Children's Act.

Child rights organisations (Children's Sector at SANAC) have commented that children whose asylum or refugee status is not yet determined are not considered in the Bill. They report that in the case of a child that does not have documented refugee status, accessing the necessary identity document in order to access social grants and services is near impossible especially in the case of a child who is in need of care and protection. As a result, caregivers cannot access foster grants. These children also have problems getting access to primary education as a result of the lack of requisite documentation. These issues should be addressed through the Refugee Act, as it is not dealt with in the Child Care Act. For this reason the Bill requires strengthening under s14 (21 of the Act).

We therefore support the Children's Sector in calling for:

Sections 21A and 21B of principal Act:

1. The term *unaccompanied child*[1] needs to be further defined and in line with the Children's Act and with the UNHCR definitions.[39]
2. The Department of Social Development must be given overall responsibility to coordinate support for children in refugee/asylum-seeker communities with the Departments of Home Affairs, Safety and Security and Education as well as with Refugee Associations.
3. The Department of Social Development should have a designated person in all major centres to focus on children in need in these circumstances who must act in the best interests of the child at all times.
4. Documentation must be fast-tracked for children in these circumstances so that Foster Care Grants can be immediately accessed.

1. There are various delineations that this term does not address adequately, separated children, abandoned children, children in need of care and protection, children in trouble with the law and so forth.

In addition, given reports of abuse and sexual abuse of children and young girls, the Departments of Social Development and Home Affairs with other state bodies must ensure the safety and protection of children entering the country, as refugees or asylum-seekers, and in particular those who have no adult care giver. They must be proactive in **preventing harm** and in particular:

1. Protect children from assault or trafficking
2. Ensure that they obtain documents and support them in access to state services such as health care, grants, and education.
3. Help them maintain links where possible with their extended families and encourage them to keep records of their home and family of origin.

The situation at RROs (asylum queues)

The SANAC Submission at page 6 sets out in detail the inhumane conditions encountered by people when they enter asylum application queues. Many spend days in the queue without access to shelter, water, sanitation or food for fear of losing their place in the queue. The Bill regrettably does not seek to address the health situation and health risks at these queues nor include minimum standards for queuing.

The situation on arrest

The SANAC submission also sets out the facts relating and subsequent developments related to the infamous and brutal 31 January 2008 Methodist Church Raid by the SAPS. In that case, over 500 people were arrested and many were kept in detention in police cells over the weekend (48 hour rule meant that they were only entitled to a first court appearance on the Monday following their midnight arrest on Wednesday). The majority were detained for about 4.5 days until their release on the Monday afternoon. Those who were arrested **are not** criminals.

The abuse directed at people who were seeking refuge at the Methodist church did not stop with the raid, theft, physical assault and their arrest. It continued over the weekend when the majority of those arrested (subsequently released with all charges withdrawn) were denied access to health services, humanitarian health care workers and lawyers. In this respect, we refer the Committee to the SANAC submission at page 3 and in particular to the affidavit submitted to the JHB Magistrates Court by Médecins Sans Frontières SA (MSF SA) explaining in detail the several frustrated attempts made by MSF and lawyers to get access to patients who were arrested and who required chronic medication and/or urgent medical attention. The affidavit paints a grim picture of rights being denied and fundamentally an inability of state officials to understand what 'access to health care services including emergency care' means. The MSF affidavit is attached marked **RAB 5**.

Denial of health services

We are concerned that all detainees (adults and children) who are in need of essential and basic medical treatment are being denied access to it. For these reasons, the Committee must apply its mind to whether there is a Constitutional basis for continuing to permit such detention centres to exist in SA, and assess whether they should be closed down and/or investigated. In the interim, at the very least, inhumane conditions must be remedied immediately with specific attention to the issue of children and their parents.

If detention centres are to continue to exist in SA, then the issue of access to health and legal services must be specifically provided for in legislation, without which organisations on the ground will have to persistently seek legal relief to secure the realisation of basic constitutional rights.

At present, in respect of legislative guidance on detention conditions we note that:

Section 23 of Refugees Act states that:

> A detainee must be held "in the manner and place … with due regard to human dignity".

Section 34 of the Immigration Act states that:

> An "illegal foreigner" may be held "in a manner and at a place determined by the Director-General" and that that detention must be "in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights" (section 34(1)(e)).

Minimum standards for detention are found in the Immigration Regulations [*Regulation 28(5) Annexure B*]. Annexure B makes provision for detainees to be provided with

> "adequate space, lighting, ventilation, sanitary installations and general health conditions and access to basic health facilities" (1(a)).

1(f) of Annexure B provides that:

> *"there may be a deviation from the above standards if so approved by the Director-General at a particular detention centre: Provided that such deviation is for purposes of support services or medical treatment: Provided further that there shall not be any deviation in respect of sleeping accommodation."*

Unfortunately, we do not know what 1(f) (italicized above) purports to mean.

In any event, while the Regulations deal somewhat with conditions of detention, we believe that the Refugee Act (and Immigration Act) should be strengthened in this respect given the gross abuse of human rights detailed above. Where there are clear violations of such standards (example, Musina) then decisive action has to be taken against those responsible for the detention of such persons and those responsible for the administration and day to day running of such centres (Lindela).

The situation at RRO (asylum queues)

The SANAC submission at pages 6-7 sets out in detail the inhumane conditions encountered by people when they enter asylum application queues. Many spend days in the queue without access to shelter, water, sanitation or food for fear of losing their place in the queue. The Bill regrettably does not seek to address the situation at these queues or include minimum standards for queuing.

The Committee should note that for these and other reasons dealt with in this submission there is a growing call on the SA government to ratify two major international human rights instruments:

1. The International Covenant on Economic, Social and Cultural Rights; and
2. The International Convention on the Rights of Migrant Workers and members of their families.[40]

In addition, we call on the Committee to consider steps for SA to ratify the *SADC Protocol on the Facilitation of Movement of Persons*[41], and respect the *Resolution on Migration and Human Rights* adopted by the ACHPR at its 42nd Ordinary Session held in Brazzaville, Congo, from 15-28 November 2007.[42]

Ends

[1]Drafted by Fatima Hassan, senior attorney ALP. hassanf@alp.org.za. With research assistance from ALP interns Jacqueline Greene and Brian Honerman and contributions the SANAC Children's Sector. We will be making an oral submission before the Portfolio Committee on Home Affairs on 26 March 2008.

[2] This submission is endorsed by the

1. AIDS and Rights Alliance of Southern Africa (ARASA),
2. AIDS Consortium
3. Children's Rights Centre (CRC),
4. Consortium for Refugees and Migrants in South Africa (CoRMSA) and Forced Migration Studies Programme (FMSP) (Wits),
5. Lawyers for Human Rights (LHR)
6. Legal Resources Centre (LRC),
7. People Against Suffering, Suppression, Oppression and Poverty (PASSOP),
8. Public Interest Law Unit at Webber Wentzel Bowens Attorneys,
9. Rural Doctors Association of South Africa (RuDASA),
10. Southern African HIV/AIDS Clinicians Society (SAHCS),
11. South African Council of Churches (SACC),
12. Wits Law Clinic, and
13. Young Women Across Borders

[4] 1951 Refugee Convention and its 1967 Protocol (acceded to by South Africa on July 12, 1996).

5Several sections of the CRSR contemplate this broader meaning. For instance, article 31 which forbids contracting states from punishing refugees who enter their boarders illegally under the title "Refugees Unlawfully in the Country of Refugee" states: 1.The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This section prevents punishment prior to any determination of the asylum seeker's status as well as after such status is granted. The same should be true for all protections in the CRSR.

6 CRSR, article 16

7 CRSR, articles 17-20

8 CRSR, article 21

9 CRSR, article 22

10 CRSR, article 24

[11] Human Rights Watch Volume 18, No. 5(A) 16.

[12][12] Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 2, s.39(1)(b). Interpretation of the Bill of Rights must consider international law.

[13] It is important to note that in 2004, in a landmark decision, the Constitutional Court rejected the government's argument that persons illegally in the country had no rights and were protected only by international law. It specifically indicated that the right to freedom and personal security and the rights of detained persons are integral to the values of the Constitution and cannot be denied to undocumented migrants. See '*Surplus People? Undocumented and other vulnerable migrants in South Africa'* Report by International Federation of Human Rights (IFHR), January 2008 No 486/2. Copy available at http://www.fidh.org/IMG/pdf/za486a.pdf.

[14] *Hoffman v South African Airways* 2001 (1) SA 1 (CC), para 28.

[15] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), para 44.

[16]UN, *CESCR General Comment 3: The Nature of State Party Obligations* (1990); Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Maastricht, 2-6 June 1986); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht, 22-6 Jan 1997. To fulfill socio-economic rights of those most vulnerable, the *Grootboom* principle requires the state to "devise, fund, implement and supervise measures to provide relief to those in desperate need."

[17] See the common non-discrimination article in each of the major UN international human rights treaties such as: UDHR, ICCPR, ICESCR, ICERD, CEDAW, CRC, CAT, ICRMW. While South Africa has yet to officially ratify the ICESCR and ICRMW, it is still constitutionally obligated under s39(1)(b) to refer to the norms set out in international law while interpreting rights entrenched in the Bill of Rights.

18 African Charter on Human and Peoples Rights, opened for signature June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5,21 I.L.M. 58, art. 5 (1982) (ratified by South Africa on July 9, 1996).

19 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (ratified by South Africa on December 10, 1998).

20 SA date of ratification, 10 March, 1999

21 SA date of ratification, 9 January, 1999

22 1951 Refugee Convention and its 1967 Protocol (acceded to by South Africa on July 12, 1996).

23 SA date of ratification, 9 January, 1999.

24 ICCPR article 12.

25 Id. article 12(2)(c - d)

[26] UN Committee on the Elimination of Racial Discrimination 64th Session, *General Recommendation 30: Discrimination against non-citizens* (2004) UN Doc. No. CERD/C/64/Misc.11/rev.3.

[27] UN Committee on the Elimination of Racial Discrimination 64th Session, *General Recommendation 30: Discrimination against non-citizens* (2004) UN Doc. No. CERD/C/64/Misc.11/rev.3, para.s 29-38.
[28] UN Committee on the Elimination of Racial Discrimination 64th Session, *General Recommendation 30: Discrimination against non-citizens* (2004) UN Doc. No. CERD/C/64/Misc.11/rev.3, para 36. "Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services."
[29] UN, *CESCR General Comment 14: The right to the highest attainable standard of health* (2000), para 34.
[30] UN, *CESCR General Comment 14: The right to the highest attainable standard of health* (2000).
[31] Convention on the Elimination of Discrimination Against Women (1979) entered into force 3 Sept 1981; UN, *CEDAW General Comment 24: Women and Health* (1999) para 6.

[32] On nondiscrimination and equal treatment and in particular on health services, *General Comment 14* states: By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programs designed to eliminate health-related discrimination can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3 paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low cost targeted programs.

[33] See '*Surplus People? Undocumented and other vulnerable migrants in South Africa'* Report by International Federation of Human Rights (IFHR), January 2008 No 486/2. Copy available at http://www.fidh.org/IMG/pdf/za486a.pdf.

[34]'Access to ART' Letter, N D Kalombo, Project Manager NDoH, undated (2006);
ART and Revenue Directives: BI/429/ART 20 April 2007 and BI 4/29 REFUG/ASYL 8 2007 19 September 2007.
Article 27 of CRSR makes the provision of identity papers to refugees in the territory an obligation of the state if the individual does not possess a valid travel document. Given this obligation, under international law, it is inappropriate for a person who has attempted an application for asylum or whose application is still pending to be denied access to health care services on the basis of not having a valid identification document when he or she approaches a public health facility.

[35] Vearey, J. and Palmary, I. (2007) Assessing non-citizen access to antiretroviral therapy in Johannesburg, Forced Migration Studies Programme, University of the Witwatersrand quoted in JOINT SUBMISSION TO THE SOUTH AFRICAN NATIONAL AIDS COUNCIL PLENARY 4 MARCH 2008.
[36] In 1999, the SA Human Rights Commission acted against the Minister of Home Affairs to obtain the release of refugees who were unlawfully detained for over 120 days at Lindela repatriation centre. The Pretoria High Court granted the urgent release of those refugees and ordered the Department of Home Affairs to regularly report on the persons detained in Lindela (providing details of name, origin, length of detention, etc.). See '*Surplus People? Undocumented and other vulnerable migrants in South Africa'* Report by International Federation of Human Rights (IFHR), January 2008 No 486/2. Copy available at http://www.fidh.org/IMG/pdf/za486a.pdf.
[37] The Royal Australian College of General Practitioners, backgrounder on Health Care For Refugees And Asylum Seekers at http://www.racgp.org.au/refugeehealth.
[38] A TAC Task Team carried out a field visit to Musina from 11 to 13 March 2008.

[39] *UNHCR's Strategy and Activities concerning Refugee Children:* Refugee children in need of care are 'UNACCOMPANIED AND SEPARATED CHILDREN' and include the SEPARATED CHILD, UNACCOMPANIED CHILD, CHILD IN FOSTER CARE, CHILD IN INSTITUTIONAL CARE, and NEGLECTED CHILD WITH EXTENDED FAMILY.

[40] INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (Art. 2, para. 1), adopted by General Assembly resolution 45/158 of I 8 December 1990. Article 28: "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment." A "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. (Art. 2). SA has NOT yet ratified the Migrant Worker Convention.
[41] The Protocol on the Facilitation of Movement of Persons posits that the building of the Southern African Development Community (SADC) must occur through freedom of movement across borders, which will bolter political and economic progress through trade and regional tourism. The Protocol was signed at the SADC Silver Jubilee Summit in Gaborone, Botswana in August 2005. Member states will not require visas for 90-day stays, and states will facilitate permanent and temporary residence from citizens of other member states, as well as work permits. Member states must also make travel documents readily available to their citizens, and agree to "[harmonise] travel whether by air, land or water and to increase and improve travel facilities especially between mutual borders. The overarching goals of the Protocol are to remove impediments in the movement of people in the SADC. Signed 18 August 2005.

http://www.sardc.net/Editorial/Newsfeature/05821005.htm;
http://www.iss.co.za/af/regorg/unity_to_union/pdfs/sadc/protocolmoveaug05.pdf

[42] http://www.achpr.org/english/communiques/communique42_en.html