AIDS law project
Info@alp.org.za
www.alp.org.za

+27 (0)11 356-4100 (tel)
+27 (0)11 339-4311 (fax)

PO Box 32361
Braamfontein 2017

6th floor, Unit 6/002,
Braamfontein Centre
23 Jorissen Street,
Braamfontein

04 March 2010

SUBMISSION ON THE DIVISION OF REVENUE BILL, 2010

Introduction

The AIDS Law Project (ALP) welcomes the opportunity to make this submission on the Division of Revenue Bill, 2010 (DORB)1 to the Select Committee on Appropriations ("the Committee"). Importantly, this is being done for the first time in terms of the Money Bills Amendment Procedure and Related Matters Act, 2009 ("the Money Bills Act"), which came into force on 16 April 2009. This submission is endorsed by the Public Service Accountability Monitor, the Treatment Action Campaign and the Rural Health Advocacy Project.

As an integral part of its mandate, the ALP seeks to defend and advance the right of everyone in South Africa to have access to health care services and to ensure that the state discharges its positive obligations in respect of this constitutionally protected right. These obligations include – but are not limited to – the taking of reasonable legislative measures to ensure that the public health system is financed adequately.

In our view, a proper budgeting system and process for the health care system and ensuring the efficient use of available resources is essential if government is to discharge its constitutional duty to respect, protect, promote and fulfill the right to have access to health care services, as guaranteed in section 27 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

Purpose and structure of this submission

Given the centrality of the right to health in the work of the ALP, much of the analysis in this submission is focused on the allocations for health and our concerns relating to budgetary problems historically experienced by the national Department of Health (DoH) and its provincial counterparts. However, we believe that many of the substantive issues and principles addressed have relevance for other departments, in particular the Department of Basic Education.[2]

1 Government Notice No. R 1013, *Government Gazette* No. 30402 (26 October 2007)

2 Service delivery for basic education shares a similar constitutional position as the right to health. Both basic education and health are concurrent powers shared between provincial and national spheres and both are basic rights guaranteed by the Constitution.

We do not intend in this submission to propose specific amendments to the DORB as tabled by the Minister of Finance on 17 February 2010. Instead, our goal is twofold: first, to stress the role Parliament is obliged by the Constitution to play in the passing of the national budget and to raise our concerns regarding the structure and implementation of the Money Bills Act; and second, to provide the Committee with an overview of the budgetary problems facing the health system and to provide some commentary on how such problems may be averted in the future.

This submission begins with a summary of our key recommendations. Thereafter it addresses the following issues:

- Implementation of the Money Bills Act;
- Equitable share allocations and provincial debt in the DORB;
- Conditional grant allocations and matching grant allocations; and
- Monitoring and evaluation of provincial programmes and budgets.

Summary of our key recommendations

In his 2009 State of the Nation Address, President Zuma raised concerns "about the deterioration of the quality of health care, aggravated by the steady increase in the burden of disease in the past decade and a half."[3] In his 2010 address, he reiterated that health is one of government's five priority areas. Given the consensus on health as a national priority, as well as the crisis in the health care system, it is imperative that the national and provincial departments of health are given the financial resources and oversight they need to carry out their constitutional and statutory mandates efficiently and effectively.

In summary, this submission recommends that Parliament –

- **Ensures that the Parliamentary Budget Office (PBO) is urgently established** and provided with the necessary financial and human resources it requires to begin its work on the 2011/12 financial year budget.
- **Reviews the financing of the negotiated occupation specific dispensations (OSDs)** for specific categories of health care workers to ensure sufficient resources have been allocated to provinces to cover the actual costs of implementing them on a province-by-province basis.
- **Engages the ongoing review of the equitable share formula** to ensure that a more nuanced approach to the financial requirements of different provinces is developed.
- **Includes matching-funds conditions to appropriate conditional grants** to ensure that programmes funded primarily through such grants are not

3 2009 State of the Nation Address available at: http://www.info.gov.za/speeches/2009/09060310551001.htm

undermined by failures of the provinces adequately to fund complementary programmes.

- **Calls on the Minister of Health publicly to release the Integrated Support Team (IST) reports** to enable Parliament to review the status and need for improved monitoring and evaluation of government programmes.

Implementation of the Money Bills Act

The Constitution vests Parliament with the responsibility for establishing budgeting procedures and passing the annual national budget. More fundamentally, Parliament has the responsibility to ensure that the manner in which resources are raised, appropriated and ultimately spent advances the constitutional project, the cornerstone of which is the Bill of Rights and the obligation it imposes on the state to respect, protect, promote and fulfill those rights, including the progressive realisation of the right to have access to health care services.

At the heart of Parliament's role in this regard is section 214 of the Constitution requiring Parliament to legislate the equitable division of revenue throughout the country. While the Minister of Finance is required in terms of the Public Finance Management Act, 1999 (PFMA) to table the budget (including the DORB and the Appropriations Bill, amongst others), it is Parliament's role to engage substantively with the tabled bills, pass and take final responsibility for the implementation of the national budget. This is a responsibility not to be taken lightly or on a *pro forma* basis.

The Money Bills Act, as required by section 77(3) of the Constitution, provides Parliament for the first time with the statutory powers necessary to fulfill its constitutional mandate in respect of the budget. However, implementation of the Money Bills Act must be prioritised urgently by Parliament. Given the limited timeframes in the Monet Bills Act and the complexity of the budget, there is insufficient time to engage substantively with the DORB as tabled. However, for Parliament to implement fully this constitutional mandate for the 2011/12 financial year it is essential that the PBO be established urgently.

Parliamentary Budget Office

The Money Bills Act recognises that Parliament, on its own, is ill equipped for the mammoth task of tackling the entire budget within the very tight timeframes required. To support Parliament in this endeavor, it creates the PBO tasked with supporting the implementation of the Money Bills Act and undertaking research and analysis for the committees on finance and appropriations.[4] The Money Bills Act, however, provides little guidance on how the PBO is to conduct its research and provides little direction to National Treasury on how to include the PBO in the budgeting process.

4 Section 15

We believe that to carry out its obligations, the PBO – at minimum – requires the following:

- Sufficient financial resources;
- A sufficient number of knowledgeable members of staff with appropriate skills and experience to engage with the budget and budgetary processes; and
- An observational role in the National Executive's development of the annual budget.

Without sufficient resources, the PBO will be unable to fulfill its mandate on behalf of Parliament. In this regard, section 15(10) of the Money Bills Act requires Parliament to provide the PBO with an annual transfer of funds from its budget. While it is understood that the PBO has yet to be established, it is concerning that Parliament's budget – as tabled – contains no line item for the PBO and makes no reference to the PBO's establishment or envisioned levels of funding.[5]

If the PBO is to be established in the 2010/11 financial year to begin working on the 2011/12 financial year budget, this omission should be rectified when the Committee considers the Appropriation Bill in the coming months by providing the PBO with a budget sufficient to begin its work, with additional resources to be allocated in the adjustment Appropriation Bill later in the year once the structure of the PBO has been finalised.

As for the role the PBO should have in the budget process, to perform its duties adequately, the PBO must have access to the information on the basis of which National Treasury develops the annual budget. In this regard, the PFMA requires National Treasury to promote transparency, co-ordinate intergovernmental financial and fiscal relations, and to manage the budget preparation process.[6] In fulfillment of these obligations, the Committee should stress to National Treasury the expectation that there be an open relationship between the PBO and National Treasury in which the PBO will be invited to key meetings in the budget development process and supplied with all relevant and appropriate documents produced throughout this process.[7]

The broad framework for the development of the budget is set out in National Treasury Guidelines issued in May each year. Given the timeframes set out in the

5 Estimates of National Expenditure, Vote 2
6 Sections 6(1)(b), (c) and (g)
7 While a full review of the budget process should be undertaken to determine which documents and meetings are appropriate, we note in particular meetings between national and provincial treasuries, draft estimate chapters submitted to National Treasury and involvement as an observer

Treasury Guidelines: Preparation of Expenditure Estimates for the 2010 Medium Term Expenditure Framework (May 2009),[8] it is apparent that the PBO must be established urgently to enable it to begin its work on the 2011/12 budget. As the Treasury Guidelines indicate, this work ordinarily begins at the end of May.

Importantly, the PBO must remain independent of the process in terms of which the National Executive – under the leadership of National Treasury – develops the annual budget. It is a necessary albeit insufficient condition for the PBO to be an observer of that process. In addition, the PBO should regularly solicit assistance from civil society organisations and experts with knowledge in particular fields. Civil society organisations and specific experts, such as health economists, are able to provide specific insight into budgeting issues.

Review of the Money Bills Act

While the Money Bills Act provides Parliament with the authority it requires to fulfill its constitutional obligation to take responsibility for the budget, we believe there are substantial structural flaws in the legislation that will ultimately prevent Parliament from performing its duties properly. In particular, the requirement that the fiscal framework, DORB and Appropriation Bill be considered in isolation rather than as a cohesive whole, as well as the extremely short timeframes for each to be considered, will undermine Parliament's ability to engage substantively .

These structural flaws should be reviewed in the medium-term with a view toward amending the Money Bills Act. While we will not expand further on this point in this submission, we request the opportunity – at the Committee's convenience – to make further submissions in this regard.

Equitable share allocations and provincial debt

Over the past few financial years, provinces have continually overspent provincial budget allocations in both health and education. While some of these over-expenditures can be attributed to poor financial management systems and failures at the provincial level, others are attributable to failures in the national budgeting and allocation process. This section of the submission analyses such problems in relation to two issues: the OSD for nurses and other categories of health care workers; and the problem of rolling debt for provincial departments of health.

It should be noted up front that much of the information presented here comes from two of the reports of the ISTs that were established by the former Minister of Health, Barbara Hogan in February 2009. The ISTs were formed to investigate and review the underlying causes of provincial health budget overspends. As stated in both the

---

in the Medium Term Expenditure Committee.

Free State and Limpopo IST reports:

> *During the course of the 2008/09 financial year it became apparent that there was a negative difference between what was budgeted for in the health system and what was required to implement agreed upon policies. This was associated with overspending in most of the provinces undermining the capacity of the Health Ministry and the National and Provincial Department's of Health to revitalise and reorient South Africa's response to the HIV pandemic and to support health systems strengthening to improve health outcomes.*[9]

These reports have yet to be made public. Despite repeated attempts to get official copies of all the IST reports, the ALP has only been able to access leaked copies of the reports for the Free State and Limpopo. While access to the additional IST reports would enable a fuller national picture of the problems faced at both the national and provincial level, we believe these two reports provide a sufficient picture of the broad problems facing all provinces in the budgeting for the delivery of health care services and expenditure of provincial health budgets.

OSD

In 2008, the DoH negotiated and agreed to the OSD for nurses. The OSD has been widely cited in the media and in other reports as one of the largest factors in provincial overspending over the past two financial years. As stated in both the Free State and Limpopo IST reports, the flaws in the implementation of the OSD stem from a lack of communication, costing exercises of national policy decisions and insufficient allocation of resources to implement.[10] In respect of the latter, the Eastern Cape Provincial Department of Health has acknowledged that it ran out of funds to pay the OSD for nurses.

While National Treasury did attempt to cushion the impact of the OSD by allocating additional resources through the Adjustment Appropriation Act, 2008, this allocation was according to the standard equitable share distribution formula, not on a costing exercise meant to cover the actual expenses being faced in each province. As the Free State IST report states:

> *Occupational Specific Dispensation (OSD) – the implementation and costing of this policy resulted in higher expenditure than the amount*

---

8 Available at: http://www.treasury.gov.za/publications/guidelines/2010%20MTEF%20guidelines.pdf

9 Free State Department of Health: Report of the Integrated Support Team, 24 April 2009 at Executive Summary [hereinafter Free State IST Report]; Limpopo Department of Health: Report of the Integrated Support Team, 11 May 2009 at Executive Summary [hereinafter Limpopo IST Report].

10 Free State IST report at Executive Summary; Limpopo IST report at Executive Summary.

> *provided for in the budget. The additional amount allocated for OSD by the National Treasury was based on an equitable share calculation, and not on actual human resource (HR) figures from the PERSAL system. The underfunding for this OSD amounted to R92 million for the 2008/09 financial year.*[11]

For the 2010/11 financial year, the DoH has negotiated an OSD for each of an additional number of categories of health workers (doctors and pharmacists in particular). The Explanatory Memorandum to the Division of Revenue Bill makes clear that the OSD has been taken into account by increasing the baseline allocations to the equitable share for provinces.12 However, such allocations are again subject only to the standard equitable share formula, which will distribute such additional funding in a blunt manner.

In terms of the Constitution there are two options that could be utilised to allocate such funds in a more efficient and targeted manner, which would further enable National Treasury to monitor provincial allocations in accordance with the increase in funds. The first would be by allocating OSD-related increases through a conditional grant. The second is to allocate such funds through a targeted equitable share formula distinct from that used for the larger provincial allocation. We recommend that further research be done to advise the Committee on the most appropriate way to address this concern.

Provincial debt

Although the OSD was a main driver of higher provincial department overspending, it was not the sole cause. The IST reports make clear that overspending in health in the Free State and Limpopo began prior to the implementation of the OSD.13 In both provinces, other drivers of provincial overspending were non-OSD related salary increases, medical inflation and higher numbers of patients receiving antiretroviral (ARV) treatment through the public health system than were originally forecast (discussed later in this submission).[14]

In the Free State, these over-expenditures resulted in the provincial department of health issuing a moratorium on initiating new patients on ARV treatment from November 2008 through March 2009. The Southern African HIV Clinician's Society estimated that the moratorium was resulting in an additional 30 deaths for each day that the moratorium was in force.[15]

---

11 Free State IST Report at 3.7.

12 Division of Revenue Bill, Explanatory Memorandum to the division of revenue at page 54, 56, Table W1.1. [hereinafter Explanatory Memorandum]

13 Free State IST Report at 3.1; Limpopo IST Report at 2.1.

14 *Id.*

15 At the time, there was a dispute between the claim of the Free State Department of Health that it

At present, third quarter provincial department of health financial reports to National Treasury raise concerns that, if spending continues at pace, three provinces – the Eastern Cape, KZN and Gauteng – risk overspending their departmental budget by more than a billion rand unless drastic cut backs in service delivery are implemented.[16] In addition to failures in monitoring and evaluation of provincially run programmes, the IST reports identify two issues that seem to lie at the heart of continued overspending in provincial departments of health and the confusion over sufficient available funds.

The first issue relates to accounting and reporting practices. According to the IST reports, the provincial departments of health use a cash-based accounting system, in which only cash flow is reported, but not the accrual of expenses that must be paid, resulting in "significantly understated" reported overspending.[17] Such flawed reporting mechanisms must be addressed in order to enable provincial and national government to identify crises early and accurately, and to take appropriate remedial action.

This leads to the second issue, which relates more directly to the equitable share allocations and negotiations between National Treasury and its provincial counterparts that should be taken into consideration. According to the Limpopo IST report, the Limpopo Department of Health and Social Development faced an existing debt of R400 million at the end of the 2008/09 financial year – of this, R291 million was for overdrafts on the budget and the remainder was in the form of accruals not reflected in provincial reporting.[18] The report states that the department will not be able to manage this debt based on standard departmental practices and recommends the existing debt be settled and not remain with the department.[19]

Such problems are not limited to Limpopo. While provincially accumulated debt should not be paid off at will by the national government or given uncritical credence in the equitable share formula, it is important to recognise, as the IST reports do, the impact that such provincial or departmental debt has on service delivery. In our view, the cost and impact of such errors in the accounting practices and spending of the provincial departments must not fall on the poor who rely on the public health system for access to health care.

---

had exhausted its budget and National Treasury claiming that provincial reports indicated that the Free State still had sufficient resources (based on provincial reporting in terms of the PFMA).

16 See Provincial Revenue Fund Statements available at: http://www.treasury.gov.za/comm_media/press/monthly/monthly_2010.aspx

17 Free State IST Report at 3.1

18 Limpopo IST Report at 2.15.1.

19 *Id*. at 2.15.9.

Finally, we believe that the equitable share formula should generally be more nuanced. As indicated earlier, medical inflation rose at a rate faster than expected leading in part to provincial overspending, yet the Medium Term Expenditure Framework utilises the consumer price inflation rate across all departments, leading to underfunding in those departments, such as health, where inflation rates are higher. Additionally, the equitable share formula takes no cognisance of the different cost factors in relation to the provision of rural health care. More rural provinces are expected to provide substantially higher cost health care services on a *per capita* basis on the same funding portfolio as urban provinces creating systemic inequalities between the provinces. It is understood that the equitable share formula is currently under review.[20] In our view, Parliament and the Committee in particular must take an active role in that process.

Conditional grants allocations

Conditional grants are the main method by which national government is able to implement national priorities in areas of concurrent national and provincial legislative competence by providing provinces with ring-fenced funding to implement those priorities.[21] For the purposes of this section, we will focus on the Comprehensive HIV and AIDS Grant ("the HIV Conditional Grant"), though our comments are likely relevant to other conditional grants as well.

At present the HIV conditional grant is under-performing its objectives. One key reason for this is that conditional grants are provided with insufficient cognisance of how conditional grant-funded programmes are affected by equitable share funded programmes. A frequent complaint from National Treasury with regard to provincial delivery of health care services is that provinces are not allocating resources to provincial departments of health in line with the proportions indicated in the equitable share formula. Both the Free State and Limpopo IST reports cite such failures of provincial legislatures as a source of ongoing problems.[22]

We believe that national government should utilise its authority in providing conditional grants to provinces to ensure funding in respect of the conditional grant programmes is adequate. If we look at the conditions in the HIV Conditional Grant, they provide few actual conditions other than where such funds must be spent. Of concern is that they do not recognise the importance of adequately funding those aspects of provincial health systems necessary for proper implementation of the HIV sub-programme in each province.

While these conditions are made somewhat firmer in the business plans that the

20 Expanatory Memorandum at 60 - 61.
21 Schedules 4 and 5 of the Constitution
22 Limpopo IST Report at 2.1; Free State IST Report at 3.3

DoH and National Treasury must still approve, such plans relate only to the implementation of the HIV sub-programme. In our opinion, these conditions do little to ensure a functional environment in which the HIV sub-programme is to operate. It does little good to fund HIV sub-programmes adequately or substantially through a conditional grant allocation if the remainder of the provincial health care system is chronically underfunded.

We believe that the DORB should impose an additional condition on certain conditional grants through a matching funds requirement. For example, the HIV Conditional Grant could include an additional condition that provincial budgets must allocate a minimum of 26% of equitable share funding to health care to be eligible to access conditional grant funding. Importantly, this recommendation also achieves the same objectives of the recommendation of the Financial and Fiscal Commission (FFC) to remove health and education funding from provincial equitable shares (as described in the Explanatory Memorandum to the DORB):

> *The FFC recommends that the education and health services should be taken out of the provincial equitable share, and that those components be converted into separate block: conditional grants from the national government to provinces. Under a block grant, the provincial governments will have the obligation to spend the grant in the particular expenditure area (for example, primary education) but they will also be free to determine how the funds are used within that area. Education and health will remain concurrent responsibilities of the national government and the provinces. In the reformed expenditure assignment system, these services will be explicitly recognised as "delegated" responsibilities from the national government to provinces.*[23]

Monitoring and evaluation of provincial programmes and budgets

As discussed above, the OSD became one of the main cost drivers leading to provinces over-spending provincial budgets. However, both the Free State and Limpopo IST reports identify unexpected increases in the number of patients on ARV therapy in each province as a third cause. The fact that provinces have seemingly "over-performed" their targets has, unfortunately, far less to do with over-performance than with inadequate monitoring and evaluation (M&E) programmes able to forecast patient need in the province. As stated in the Limpopo IST report:

> *Monitoring and evaluation (M&E) systems are inadequate and are undertaken to comply with requirements of the Provincial Legislature or the National Department, rather than to provide information to the different*

23 Explanatory Memorandum at 61.

> *levels in the LDHSD, for managing the health service. The M&E component of the service is under-resourced, fragmented and data collected are not analysed, interpreted or used for decision-making. In addition there is little or no feedback of information from one level to the next.*[24]

Inadequate M&E systems will inevitably lead to failures to budget according to actual needs in each province and ultimately to further over-expenditures. This is in accordance with the findings of both the Free State and Limpopo IST reports.25 In this regard, there is great public interest in having all the IST reports published and we call on the Committee to inquire on their status and to hold further public hearings on the reports or to allow the ALP and other civil society organisations to brief the Committee on the issues raised in the reports – including M&E – that fall within its mandate.

Conclusion

Once again, the ALP thanks the Committee for the opportunity to make this submission. Should the Committee desire, the ALP is both able and willing to make an oral submission at the public hearings scheduled for 5 March 2010. In any event, should the committee have further questions on this submission, members of the ALP will be in attendance at the hearings. In addition, any questions can be sent to Brian Honermann at honermannb@alp.org.za or by phone at 011 356 4100.

---

24 Limpopo IST Report at Executive Summary. *See also*, Free State IST Report at Executive Summary.

25 Limpopo IST Report at 2.6.