In keeping with our new Constitution and the culture we have embraced after the end of apartheid, HIV prevention and treatment in South African AIDS has always been approached from a human rights perspective. Complex issues of HIV transmission, stigma, testing, disclosure, access to treatment have been debated and constructed overriding in terms of human rights claims, entitlements and duties. It should be noted, however, that while on paper government policy and legislation has always shown a commitment to human rights, a number of progressive changes to South Africa’s policy framework on HIV came about only as a result of litigation and pressure by civil society groups.¹

The NACOSA (National AIDS Convention of South Africa) plan adopted by the Government of National Unity in August 1994, expressed a clear commitment to human rights (at least in principle) and informed the South African government’s AIDS response from 1994-1999. In 1999, a human rights task team was convened that included representation from civil society, government, business and the faith-based community. This task team drew up proposals on HIV/AIDS and human rights for consideration by the Inter-Ministerial Committee on HIV/AIDS². A number of the task team’s recommendations were adopted under the “Human and legal rights” section of the “HIV/AIDS/STI Strategic Plan for South Africa, 2000-2005”, and launched in June 2000³. (The human rights sections of the Strategic Plan are set out in Annexure A of this document).

The Strategic Plan noted the importance of monitoring, and committed government to the following: “Effective monitoring and evaluation tools will be developed and

¹ See for example the case of the Treatment Action Campaign and other vs the Minister of Health and Others 2002 (5) SA 721 on the provision of nevirapine to prevent mother-to-child transmission of HIV and See the case of EN and others vs the Government of the Republic of South Africa and others on the issue of providing treatment to prisoners with HIV/AIDS.
customised for each intervention”. Regrettably these tools were never developed nor employed to assess South Africa’s response to the epidemic. In 2003 the Department of Health conducted an interim review of the Strategic Plan, but by the end of 2006, no formal monitoring or evaluation of the Strategic Plan had been done (The 2003 interim evaluation of the sections pertaining to the “human and legal rights” is contained in Annexure B of this document). It is vital that the Strategic Plan is properly evaluated and that the lessons learnt from its implementation inform South Africa’s future responses and strategies to the epidemic.

While South Africa’s human rights response to HIV/AIDS should be measured against specific criteria developed in line with its strategies and policies, it is equally necessary to examine it in line with international benchmarks. The United Nations’ “International Guidelines on HIV/AIDS and Human Rights” is a useful tool in this regard. These Guidelines set out detailed strategies and principles for a comprehensive human rights approach to the epidemic against which South Africa’s progress can be measured.

This Discussion Paper will briefly assess South Africa’s approach to the epidemic in terms of the 12 Guidelines. The full text of the Guidelines is set out in Annexure C, while a short summary of the individual Guidelines will serve as headings for the discussion. The paper will conclude with a number of recommendations that flow from point raised in the discussion.

GUIDELINE 1 An effective national framework for the response to HIV/AIDS

South Africa has, on the whole, set clear policies and frameworks for its response to the epidemic. However, the failure of key bodies, particularly the SA National AIDS Council, together with a refusal by senior politicians to recognise the scale of the crisis and to respond according to international best practice, has undermined this framework. In addition, the resistance of the Minister of Health, supported by the government, to introducing anti-retroviral treatment has delayed both treatment and prevention strategies at enormous cost.

GUIDELINE 2: Ensure community consultation and that community organizations are enabled to carry out their activities

4 Ibid p.33
Although lip-service is paid to community consultation, this has never taken place in a systematic and thorough way. It has also been hindered by the weakness of SANAC. The Department of Health and Department of Social Development fund and support many Community based organisations and NGOs, which provide vital services in some communities. But, there is a lack of transparency in funding, and systems do not seem to exist to ensure that all NGOs & CBOs conduct themselves in a proper manner.

**GUIDELINE 3: States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS**

In 2005 the new National Health Act came into force. This Act is an important framework for all health policy and law, and, if properly implemented, should assist HIV prevention and treatment. The biggest problem in this area has been the unwillingness of the Ministry of Health to enforce its own legislation, particularly against those, such as Mathias Rath and Tine Van der Maas, who openly flout the law by claiming that their substances have medicinal properties.

The government is to be commended for passing legislation to recognise and regulate traditional health practitioners. But here too, insufficient has been done to inform health users about key standards for medicine.

**HIV as notifiable disease?**

In April 1999, the Department of Health sent out draft regulations that would make HIV/AIDS a notifiable disease. This ran counter to a human rights approach to the epidemic which emphasises patient autonomy and confidentiality and led to strong criticism from AIDS advocacy groups. As a result of pressure by civil society, these Regulations were never passed into law.

**HIV-testing**

The Department of Health has recently indicated that it intends to change its approach to HIV-testing. In “The National Policy on Counselling and Testing for HIV in South Africa” it would appear that the new approach would be based on a “routine offer of an HIV-test” to all health care clients and any person motivated to know their HIV status. This is a marked departure from Voluntary Counselling & Testing, which is distinctly client-initiated. While the Policy is still in draft format and requires much

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work and wider consultation, the change in approach to HIV-testing signified by the Department’s draft should be encouraged and supported. It is also important that an independent body is established to monitor potential human rights violations that might arise with the implementation of a new HIV-testing policy.

**GUIDELINE 4: States should review and reform criminal laws and correctional systems**

*Sexual Offences Bill*

International bodies have pointed out the dangers of creating specific HIV-related crimes, as it could discourage health seeking-behaviour, create barriers to knowing one’s HIV-status and would increasing stigma. The Criminal Laws (Sexual Offences and related Matters) Amendment Bill (commonly called the Sexual Offences Bill) in South Africa has been debated since 1997, and various versions of the Bill have included sections that would make it a criminal offence to have unprotected sex when a person knows that s/he is HIV-positive. The August 2006 version of the Bill has fortunately excluded these proposed provisions, but it is necessary that civil society is vigilant so that these sections do not find their way into later versions of the Bill.

*Prisons*

The conditions of the South Africa’s correctional systems pose an ongoing threat to the rights of prisoners (a vulnerable group to HIV) and have created an environment where HIV is readily transmitted. The implementation of the HIV/AIDS policies of the Department of Correctional Services has not been uniform and there are reports of distressingly high levels of sexual violence, the lack of availability of condoms and lubricant, and most recently, a deplorable lack of treatment to prisoners with HIV/AIDS who urgently require it. It is vital that the full report produced by the Jali Commission of Inquiry which documents human rights abuses in prisons is made

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available to the public, and its recommendations are speedily implemented. Civil society should demand a plan for health in prisons, and insist that prison health care be taken over by the Department of Health.

**GUIDELINE 5: States should enact or strengthen anti-discrimination and other protective laws**

*South Africa’s legal framework*

South Africa boasts one of the strongest HIV/AIDS legal frameworks in the world and discrimination against people with HIV/AIDS (PWAs) is prohibited. This principle is thoroughly established in South African legislation and jurisprudence. South African law and policy contain numerous explicit provisions against AIDS discrimination. For example, the Employment Equity Act prohibits unauthorised employment-related HIV testing. It also provides that no person may unfairly discriminate against an employee or job applicant in any employment policy or practice on the basis of twenty listed grounds unless it is an inherent requirement of the job. ‘HIV status’ is listed as one of the grounds upon which an employee may not be discriminated against. Both the National Policy for Health Act and the National Education Policy Act contain provisions for the drawing up of policies on HIV/AIDS. Following these directives, the ‘National Policy on Testing for HIV’ was published in August 2000, while the Minister of Education launched the ‘National Policy on HIV/AIDS for Learners and Educators’ in 1999.

The Medical Schemes Act ensures that medical schemes may not exclude any person on the basis of ‘health status’ if she or he is able to pay their contributions (this includes PWAs). HIV-associated diseases are a category under the ‘Prescribed Minimum Benefits’ - PMBs set out the minimum package of care that medical aid schemes have to provide. Current PMBs provide for compulsory cover of medical and surgical management for opportunistic infections and anti-retroviral therapy, and must be available immediately without the imposition of a waiting period.

*The Equality Act*

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13 Act 55 of 1998
14 Act 116 of 1990
15 Act 27 of 1996
16 Act 131 of 1998
Section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act ('the Equality Act') prohibits unfair discrimination on the ground of ‘disability’ (which may include HIV and AIDS, though disability is not so defined in the Act). Section 34(1) of the Act contains specific directive principles on ‘HIV/AIDS status’, while section 32 provides for the establishment of an Equality Review Committee (ERC) mandated to meet within one year of promulgation of the Act to make recommendations to the Minister of Justice on whether ‘HIV/AIDS status’ should be included in the Act as prohibited grounds of unfair discrimination. It is highly regrettable that by 2006, the ERC has not yet made this recommendation to the Minister. Current processes at the Department of Justice and Constitutional Development and the Equality Review Committee indicate that there may be a movement to include “HIV/AIDS status” as an additional ground to the grounds for non-discrimination in the Act. It is important that this process is speedily concluded.

The Schedule attached to the Equality Act, entitled ‘Illustrative list of unfair practices in certain sector’, contains under the heading Insurance Services the example of ‘unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status’. The issue of blanket denial of certain financial services, life insurance in particular, remains a serious matter.

However, although South Africa has a good legal framework, it is weakened by the lack of public education about human rights generally and specifically about HIV.

17 Act 4 of 2000
18 The Act contains a wide definition of ‘HIV/AIDS status’ under section xiv:
“HIV/AIDS status” includes actual or perceived presence in a person’s body of the Human Immunodeficiency Virus (HIV) or symptoms of Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status
19 The other grounds proposed for inclusion in section 34 consist of socio-economic status, nationality, family status and family responsibility. The latter two were combined as one ground.
2222 Section 5(c) of the Schedule
There is no monitoring of levels of stigma or discrimination, by government, NGOs or bodies such as the Human Rights Commission. In addition, as described below, most people are unable to access legal services that would allow them to protect or claim their rights.

**GUIDELINE 6: Enact legislation to provide for the regulation of HIV-related goods, services and information**

South Africa has amended its Medicines legislation in order to be able to reduce the prices of essential medicines, including anti-retrovirals. Our Patents Act also permits the government to use measures such as Compulsory Licensing if needed to prevent patent abuse. However, a largely progressive and purposeful legal framework has been weakened by three main causes:

a. Government has been unwilling to use its powers against pharmaceutical companies or other manufacturers of HIV related goods, such as the female condom, in order to get the best possible prices. This will present new problems in the near future.

b. The conduct of the Health Department, in particular a lack of meaningful consultation, has led to poor implementation of essential provisions and regulations of laws, leading to litigation and delays with implementation, for example of the dispensing fee for pharmacists.

c. There has been evidence of political interference with statutory bodies such as the Medicines Control Council. In addition the MCC is vastly under-resourced and is unable to deal timeously or efficiently with applications for the registration of new or essential medicines.

**GUIDELINE 7: Implement and support legal support services and provide free legal services to enforce those rights**

In February this year a civil society conference was convened on the topic of “HIV and Access to Legal Services”\(^{23}\). It brought together a wide range of non-governmental organisations, community-based organisations, paralegals/advice office workers, representatives from the South African Human Rights Commission

and the Commission for Gender Equality, and service providers whose work focuses on ensuring that poor and other marginalized people are able to use the law to defend and advance their rights. The conference issued a number of resolutions, which are attached as Appendix D. The main barriers to access to justice for PWAs were identified as the following:

- Lack of information about the content of human rights
- Lack of mechanisms for the realization of human rights
- The inaccessibility of legal services (particularly for civil and human rights matters) and
- Unjustifiably high cost of private legal representation, in the absence of a comprehensive state legal assistance programme.

The recommendations of this conference should inform the legal sector’s response to the epidemic, and assist government, the private sector and civil society to increase access to justice for PWAs.

**GUIDELINE 8: Promote a supportive and enabling environment for women, children and other vulnerable groups**

**The Constitution**

South Africa’s Constitution explicitly protects and promotes the rights of women, children and marginalized groups and contains arguably the most progressive Bill of Rights in the world. In relation to vulnerable groups in terms of HIV/AIDS, it explicitly prohibits discrimination on the basis of race, gender, sex, sexual orientation and disability amongst other grounds. The Equality Act discussed above creates an additional and more accessible mechanism to protect the rights of vulnerable groups.

**Gender Based Violence**

South Africa’s levels of sexual violence and abuse remain amongst the highest in the world. While South Africa has an exemplary range of laws and policies that aim to protect women against gender based violence and mitigate its effects, there is wide

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criticism about the implementation of these laws and policies. Inequality characterizes most of South Africa’s gender relations. Various forms of violence against women and girls, and the inability of the legal system to effectively prosecute the majority of offenders continues to fuel the HIV epidemic.

Sex Work

Sex work remains criminalized under South African law. This increases the vulnerability of sex workers to HIV/AIDS, violence and abuse. When the Constitutional Court was asked to adjudicate the constitutionality of the sections of the Sexual Offences Act that criminalise sex work in 2002, the Court found that these sections were not unconstitutional. The Court maintained that decisions about the decriminalization of sex work is best left to Parliament, but disappointingly Parliament has not yet dealt with this issue.

GUIDELINE 9: States should promote the distribution of creative education explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS

The most comprehensive household study on HIV prevalence in South Africa – the South African National Prevalence, HIV Incidence, Behaviour and Communications Survey (2005) – briefly discussed levels of stigma in South Africa. The study found low levels of stigma, but that “varying proportions of respondents showed some degree of negative attitude and perception in relation to [PWAs]” While stigma is notoriously hard to measure, the experiences of civil society organisations at the “HIV and Access to Legal Services” conference indicate that a substantial number of PWAs continue to be subjected to AIDS stigma and discrimination.

Stigma can be mitigated by the reduction of ignorance and fear about the epidemic. It is therefore essential that knowledge and information about the modes of transmission, ways to prevent and treat HIV, and the rights of PWAs are made widely

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26 In the case of Jordan and Others v S and Others 2002 (6) SA 642 (CC)
available and accessible. The public messages of the loveLife campaign and government’s Khomanani AIDS campaign have often been criticised for being obscure, confusing, inaccessible and avoiding political issues such as engaging with AIDS denialism.  

South Africa requires clear and unambiguous information about HIV and AIDS, which is accessible to marginalised as well as illiterate groups in particular.

GUIDELINE 10: Government and the private sector should develop codes of conduct regarding HIV/AIDS

Workplace Policies

South Africa’s Employment Equity Act explicitly outlaws pre-employment HIV-testing without permission from the Labour Court. In addition, the Minister of Labour launched a “Code of Good Practice on Key Aspects of HIV/AIDS and Employment” in 2000. This Code was published under the Labour Relations Act and the Employment Equity Act, and recommends that all workplaces develop HIV/AIDS policies. While the Department of Health reported that “In 2000/01 most national government departments developed HIV and AIDS workplace policies”, it is not clear to what extent the private sector and civil society have followed suit. There is also no system for monitoring the implementation of workplace policies, or of assisting small and medium enterprises with HIV in the workplace.

Pre-employment HIV Testing

The South African National Defence Force (SANDF), the National Intelligence Agency and the Secret Service are explicitly excluded from the ambit of the Employment Equity Act. The SANDF continues to enforce a policy of pre-employment and pre-deployment HIV-testing. Linked this SANDF members complain of violations of privacy, and of other rights to promotion and training. The SANDF employs over 100,000 people. It’s continuance of this practice, without challenge from the Department of Heath, undermines other workplace efforts.

GUIDELINE 11: States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including

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those of people living with HIV/AIDS, their families and communities.

South Africa has no independent body or institution to monitor the development and implementation of HIV/AIDS and human rights. The South African Human Rights Commission (SAHRC) is constitutionally mandated, amongst other things, to “monitor and assess the observance of human rights in the Republic”.31 It currently has no directive to monitor human rights in relation to HIV/AIDS and it should be explicitly given the mandate to do so.

GUIDELINE 12: States should cooperate through all relevant programmes and agencies of the United Nations system

It is vital that South Africa builds a close relationship with UN agencies such as UNAIDS, as well as with the WHO. Regular reporting and implementation of UNAIDS guidelines are vital components to mitigating the epidemic. Commitments that government has made such as under the UNGASS “Declaration of Commitment on HIV/AIDS” should be carefully monitored in collaboration with civil society.

Recommendations:

This paper has briefly dealt with some - but by no means all – of the issues raised by South Africa’s implementation of the “International Guidelines on HIV/AIDS and human rights”. The following key human rights areas require urgent attention:

1. Government and Civil Society should work together to increase access to justice for PWAs by building the capacity of, and supporting paralegals and community justice workers. It should raise awareness and educate people about human rights, the workings of Equality Courts (established in terms of the Equality Act) as well as the Human Rights Commission and the Commission on Gender Equality as an effective way of advancing substantive equality and challenging unfair discrimination;

2. Government should ensure the on-going implementation and monitoring of women’s rights, and invest substantially more resources and political will into the reduction and mitigation of gender based violence;

3. Government should ensure that the Sexual Offences Bill, as well as any other future law or policy, do not create HIV-specific crimes as these will be ineffective and stigmatise and criminalise people with HIV;

31 Section 184(1)(c)
4. Sex work should be decriminalised;
5. Government should expedite the process of proposed amendments to the Equality Act to include the specific prohibition of AIDS discrimination;
6. The SANDF’s policy of HIV-testing of recruits should be challenged and struck down;
7. The South African Human Rights Commission should be mandated to monitor human rights in relation to HIV/AIDS. Particular attention should be paid to the implementation of new HIV-testing models and potential human rights violations that may become associated with it.
**Annexure A**


### PRIORITY AREA 4: HUMAN RIGHTS

#### GOAL 14: CREATE AN APPROPRIATE SOCIAL ENVIRONMENT

<table>
<thead>
<tr>
<th>Objective</th>
<th>Selected Strategies</th>
<th>Lead Agencies</th>
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</table>
| Develop a National Inter-Sectoral Campaign on Openness and Acceptance of People Living with HIV/AIDS | a) Promote open discussion of sexual practices in various sectors of society  
b) Promote voluntary testing and counseling services  
c) Target awareness regarding rights and responsibilities of people living with HIV/AIDS in 4 key areas: employment rights, education, health care and social service rights | SANAC, Government Departments, NGOs, all Sectors, SABC |
| Create a legal and policy environment which protects the rights of all persons infected and affected by HIV/AIDS by 2005 | a) Review existing legislation and ensure the protection of rights of people living with HIV/AIDS  
b) Develop policy on the management of mentally challenged HIV positive persons  
c) Review and enact new Children’s Law to take into account the needs of children infected and affected by HIV/AIDS | DOJ, DCH, SALC |
| Monitor human rights abuses and develop enforcement mechanisms for redress | a) Statutory commissions (HRC and CGE) to set up a discrimination database to collect information on the nature and extent of discrimination against people affected by HIV/AIDS  
b) Improve access to justice for people infected / affected by HIV/AIDS | DOJ, HRC, CGE |

#### GOAL 15: DEVELOP AN APPROPRIATE LEGAL AND POLICY ENVIRONMENT

<table>
<thead>
<tr>
<th>Objective</th>
<th>Selected Strategies</th>
<th>Lead agencies</th>
</tr>
</thead>
</table>
| Develop policy and legislation relating to HIV/AIDS and employment | a) Finalise the Code of Good Practice on HIV/AIDS in the Workplace, and accompanying regulations, to enforce workplace HIV/AIDS policies  
b) Support the development of workplace HIV/AIDS policies | DOL, DCH |
| Develop policy and legislation relating to HIV/AIDS, commercial sex workers and sexual assault | a) Develop criminal law mechanisms which protect the rights of victims of sexual violence  
b) Investigate the provision of PEP to the victims of sexual violence  
c) Investigate decriminalising commercial sex work | DOJ, DCH, SALC |

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8. HUMAN AND LEGAL RIGHTS

8.1 Goal 14: Create an appropriate social environment

This goal focuses on the promotion of openness around HIV and AIDS, addressing stigma and discrimination, encouraging disclosure, promoting VCT, increasing awareness of rights, ensuring the management of mentally challenged HIV positive persons, and monitoring human rights abuses.

Addressing stigma and discrimination is a complex issue, and is not the sole responsibility of government, but rather a societal response is required. Some specific activities in this regard include:

- The Department of Health has designed 6 mass communication campaigns for 2003 to address a variety of issues, including stigma and discrimination.
- The Department has spearheaded the appointment of people living with HIV and AIDS (PLWHA) in other government departments to address stigma and discrimination at the workplace. In addition Government has entered into a partnership with The Policy Project to conduct a study and document best practices relating to stigma. The results of the study will uniform the implementation of stigma-based progress in 10 government departments.
- A PLWHA toolkit focusing on advocacy and meaningful involvement of PLWHA has just been completed. This will assist PLWHA to be involved, even at policymaking level.
- There is an ongoing training for worker organisations with regard fundamentals of HIV and AIDS, and HIV and AIDS and the law so as to be able to deal with stigma and discrimination at the workplace. This intervention is focusing on training in the three major labour federations.
- The Department of Health mandated the organisation Strategy and Tactics, together with the AIDS Law Project, to conduct a research on stigma and discrimination. The final report will be submitted at the end of February 2003.
- The Department in collaboration with Policy Project, through the Centre of Study of AIDS at the University of Pretoria, has mandated SIYAMKE'LA project to conduct research on stigma and document indicators to be used in mitigating stigma against PLWHA. The project started in November 2002 by the formation of reference groups that hold quarterly meetings. The research will cover three sectors, namely media in relation to reporting about HIV and AIDS issues; faith-based organisations in relation to PLWHA and government departments as representing employers in relation to PLWHA.
- It has been shown that there is a higher incidence of mental illness among HIV and AIDS survivors, particularly depression. This could be explained in two ways: survivors getting depressed by awareness of the consequences of their illness, or as a result of the biological degeneration of the brain. Either way, it means that a lot of HIV positive people, especially children, are likely to be more depressed than the general population. Depressed people are generally less likely to comply with treatment, and this would require more attention. The Department of Health is researching the issue of mental health and HIV and AIDS, with a specific focus on children. A document on the management of the spread of HIV and AIDS among the mentally ill in hospital settings is being finalised.

8.2 Goal 15: Develop an appropriate legal and policy environment

This last goal in the Strategic Plan focuses mainly on HIV and AIDS and the workplace, and legislation relating to commercial sex workers. Issues in this goal that relate to the provision of post-exposure prophylaxis to survivors of sexual assault have already been addressed in the prevention section.

In 2000/01 most national government departments developed HIV and AIDS workplace policies. Some provinces opted for the development of a single provincial policy, binding all provincial departments. The amendment of the Public Service regulations in June 2002 constitutes a binding policy framework for all departments (national and provincial). The policy framework for departments is rooted in human rights principles and prescribes programmes in line with the Strategic Plan priority areas on prevention, care and support.

Other significant issues include:

- The Department of Labour launched the Code of Good Practice on HIV and AIDS in the workplace in 2001 to set guidelines for addressing HIV and AIDS in the workplace.
- The King Commission has recommended that companies listed on the JSE report on the HIV and AIDS workplace policy programmes. This decision has not yet been implemented.
- In October 2002 the International Bar Council held a one-week conference in Durban, with a one-day meeting to discuss HIV and AIDS in relation to human rights. Different papers were delivered to share different countries’ perspective and experiences of how discrimination and stigma is impeding on the progress in the fight against HIV and AIDS and what could be the role of the judiciary to tackle the barriers caused by discrimination and stigma. It transpired from the deliberations that lawyers and the judiciary need to be more active in the fight against HIV and AIDS. An important question was raised on whether countries should enact HIV and AIDS legislation or follow the South African example of having pieces of legislation that encompasses HIV and AIDS. The South African approach to HIV and AIDS legislation was commended.
GUIDELINE 1: States should establish an effective national framework for their response to HIV/AIDS, which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV/AIDS policy and programme responsibilities across all branches of government.

GUIDELINE 2: States should ensure, through political and financial support, that community consultation occurs in all phases of HIV/AIDS policy design, programme implementation and evaluation and that community organizations are enabled to carry out their activities, including in the field of ethics, law and human rights, effectively.

GUIDELINE 3: States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

GUIDELINE 4: States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

GUIDELINE 5: States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies.

GUIDELINE 6: States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV/AIDS prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV/AIDS and related opportunistic infections and conditions. States should take such measures at both the domestic and international levels, with particular attention to vulnerable individuals and populations.

GUIDELINE 7: States should implement and support legal support services that will educate people

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affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of ministries of justice, ombudspersons, health complaint units and human rights commissions.

GUIDELINE 8: States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.

GUIDELINE 9: States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS to understanding and acceptance.

GUIDELINE 10: States should ensure that government and the private sector develop codes of conduct regarding HIV/AIDS issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.

GUIDELINE 11: States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV/AIDS, their families and communities.

GUIDELINE 12: States should cooperate through all relevant programmes and agencies of the United Nations system, including UNAIDS, to share knowledge and experience concerning HIV-related human rights issues and should ensure effective mechanisms to protect human rights in the context of HIV/AIDS at international level.

Annexure D

CONSENSUS STATEMENT ON IMPROVING ACCESS TO LEGAL SERVICES FOR PEOPLE LIVING WITH HIV/AIDS

FROM THE CONFERENCE ON HIV AND ACCESS TO LEGAL SERVICES

HELD AT WITS UNIVERSITY, 17 – 18 FEBRUARY 2006

“The rights-based approach to HIV/AIDS recognizes that violations of fundamental rights such as the right to non discrimination, the right to health, the right to food and water, the right to social security, the right to privacy and the rights of women are all contributing factors that exacerbate the spread of HIV/AIDS and its consequences… The rights based approach asserts the entitlements of people affected by HIV/AIDS rather than their needs. The point of departure is therefore that … [people living with HIV/AIDS] and those affected by it are not charity cases which society can either deal with or ignore at its leisure, but that they are fundamentally entitled to receive the assistance that their condition requires.” – Chief Justice Pius Langa, opening address to the conference

On 17 and 18 February 2006, over 150 delegates participated in a conference entitled “Improving Access to Legal Services to Challenge HIV-related Discrimination and Claim Socio-Economic Rights”. Co-hosted by the AIDS Law Project, the Centre for the Study of AIDS, Acornhoek Advice Centre and the Street Law Programme at the University of the Witwatersrand, the conference was opened by Chief Justice Pius Langa. Delegates included representatives of legal service and human rights organisations, the Legal Aid Board, the Human Rights Commission and Commission on Gender Equality, paralegal advice offices, the Treatment Action Campaign, community-based organisations, private law firms and several donor organisations.

Conference delegates acknowledged that, despite the progressive nature of South Africa’s Constitution and Bill of Rights, the comprehensiveness of the statutory and common law framework and the constitutional right to have disputes resolved before the courts, most poor and marginalized groups, including people living with HIV and AIDS (PLWA’s) do not have access to justice. Barriers identified included:

- Lack of information about the content of human rights
- Lack of mechanisms for the realization of human rights
- The inaccessibility of legal services (particularly for civil and human rights matters) and
- Unjustifiably high cost of private legal representation, in the absence of a comprehensive state legal assistance programme.
The HIV / AIDS pandemic has brought the urgency of improving access to the justice system has come to the fore: PLWHA’s continue to face stigma and discrimination in all spheres of life, and increasing numbers of poor and marginalized groups, such as women and children, urgently need to access their basic human rights to education, health care, housing and food. For many, access to justice is literally a matter of life or death. With this in mind, conference delegates recognized that access to legal services must become a greater priority for the government and all organisations that work in the field of law and human rights.

In reaffirming the centrality to our democracy of the rule of law and the independence of the judiciary, and recognizing the potential of the Bill of Rights to be a living instrument to drive development and equity, conference delegates committed themselves to working together to achieve the following goals:

**Building capacity for human rights work**

8. Supporting the work and building the capacity of paralegals and community justice workers, particularly in under-resourced and rural communities, to ensure improved access to information about human rights and accessible and appropriate legal services necessary for claiming these rights. Such capacity building interventions should be conducted within an ethos of equal partnership and should be guided by the needs of community-based organisations, to ensure that they do not undermine existing relationships between advice offices and communities.

9. Increasing advocacy for greater government funding for the Legal Aid Board, particularly in respect of civil and human rights matters, in order to realize the constitutional right to have disputes that can be resolved through the application of the law decided in a court or other appropriate legal forum.

**Promoting the use of law to ensure social justice**

10. Working to mobilize vulnerable communities to claim their human rights, and assisting to build capacity within social justice movements to take advantage of legislation and jurisprudence that may be used to protect and promote human rights, and improve access to socio-economic rights.

11. Developing a formalized referral system that links community justice workers, paralegal advice offices and legal service providers, to ensure that clients are able to exercise their rights by accessing legal advice and information, paralegal interventions or litigation services.
12. Ensuring that successful social justice litigation is accompanied by appropriate public education and mobilization and followed by the necessary monitoring, in order to translate court victories into meaningful changes in the lives of those for whom they are intended to benefit.

13. Making greater use of the designated Equality Courts, established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, and utilising alternative fora such as the Human Rights Commission and the Commission on Gender Equality as an effective way of advancing substantive equality and challenging unfair discrimination.

14. Examining the role of the Institutions created in terms of Chapter 9 of the Constitution, and seeking ways of utilising their monitoring, reporting and oversight powers and functions to ensure justice for the poor and marginalised.

**Lobbying and Advocacy**

15. Working with all University Law Schools to ensure that curricula reflect the needs and realities of our society, and that human rights and social justice law are taught and promoted as viable career choices for students.

16. Popularising, working with, and monitoring the services of the Chapter 9 Institutions, particularly the Human Rights Commissions and the Commission on Gender Equality, which are both constitutionally and legally obliged to promote, protect and advance human rights.

17. Building on current *pro bono* initiatives in collaboration with the legal profession, and encouraging private practitioners to engage in more *pro bono* work.

18. Engaging with the legislative processes involving the Legal Practices Bill and the Constitution 14th Amendment Bill to ensure an appropriate statutory framework.

**Communication and coordination on the right to justice and access to the courts**

19. Participating in a collaborative network with other legal service providers, advice offices, social justice organizations and relevant institutions, in order to:
   a. Share information, expertise and resources
   b. Identify organizations able to offer training in law and human rights and those in need of training
   c. Developing a mechanism to collect data on the types of social justice cases being dealt with by legal service providers, advice offices, and other organizations nationally

20. The conference agreed that the network should be coordinated by a working group, and will work towards a more coordinated response to the provision of legal services to the poor. The working group has subsequently been established.
The statement is supported by the following participating organisations:

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<tr>
<th>Organisation Name</th>
<th>Supporting Organisation 1</th>
<th>Supporting Organisation 2</th>
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<td>AIDS Consortium</td>
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<td>AIDS Legal Network</td>
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<td>Positive Women's Network</td>
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