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SUBMISSION ON GREEN PAPER: NATIONAL STRATEGIC PLANNING

The AIDS Law Project (ALP) is a not-for-profit organisation that seeks to use and develop the law to defend and enforce constitutionally protected rights. While initially established in 1993 to protect and advance the rights of people living with HIV/AIDS, the ALP has in recent years expanded its focus to deal more broadly with constitutional rights and the obligations – both positive and negative – that they place on public and private bodies. An integral part of this work has focused on the state’s positive obligations in respect of constitutionally entrenched socio-economic rights, with a particular focus on the right to have access to health care services.

Much of what is contained in the *Green Paper: National Strategic Planning* (“the Green Paper”) – which was published for public comment in September 2009 – resonates strongly with our experiences over the past 16 years. On the issue of medicines, for example, we have noted the lack of a coherent interdepartmental plan for the pharmaceutical industry and the subsequent policy disconnects between relevant national government departments, including trade and industry (“the dti”), science and technology, health and the National Treasury. This undermines access and weakens the state’s ability to discharge its constitutional obligations.

In a few areas, however, we have seen the advantages of collaborative planning within government as well as between government departments on the one hand and social partners – business, organised labour and civil society – on the other. Consider, for example, the national *HIV and AIDS Strategic Plan for South Africa, 2007-2011* (“the NSP”),¹ a co-ordinated plan and multi-sectoral country response to the epidemic. Developed under the auspices of the South African National AIDS Council (SANAC), at the time led by former Deputy President Phumzile Mlambo-Ngcuka, the NSP provides the overarching framework for a range of policies, programmes and targeted interventions across sectors and departments.

In respect of the four key priority areas identified, the NSP details a comprehensive set of goals. In respect of each goal it sets out objectives, interventions, targets and related timelines, and the bodies responsible for leading implementation. As an evidence-based plan, the NSP clearly reflects the process by which it was

¹ The NSP is available online at <http://www.info.gov.za/otherdocs/2007/aidsplan2007/index.html>

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AIDS Law Project, a section 21 company (2006/021659/08) and a registered law clinic,
is formally associated with the School of Law at the University of the Witwatersrand, Johannesburg.

Income Tax Exemption Reference Number: PBO 930022549
Nonprofit Organisation Registration Number: 055-382-NPO

developed. It thus serves as model for collaborative planning, with the state providing appropriate leadership to and building a principled partnership with its social partners. Unfortunately, however, implementation was initially characterised by some unilateralism on the part of the state. More recently, SANAC – as an institution – has increasingly assumed its rightful role as contemplated by the NSP.²

ALP’s interest in the Green Paper

Our interest in making this submission to the Presidency and Parliament’s Ad Hoc Committee on the Green Paper on National Strategic Planning stems from our commitment to defend and enforce human rights and to ensure that the state discharges its constitutional obligations in accordance with its democratic mandate and the rule of law. Thus while we broadly support the substantive content of the Green Paper, we nevertheless do so subject to the following concerns:

1. Whilst making numerous references to the Constitution and its foundational values, the Green Paper is silent on Constitutional Court jurisprudence that provides much needed guidance on the appropriate relationship between short-, medium- and long-term planning, especially in relation to the realisation of socio-economic rights;
2. The Green Paper advances an impoverished notion of consultation, focusing strongly on the need to secure stakeholder buy-in at the expense of placing substantive value on the process itself;
3. Given the Green Paper’s commitment to “build[ing] a developmental state with strategic, political, administrative and technical capacities to lead the nation in social development”,³ one would expect the issue of health planning to feature more prominently;
4. The proposed structure of the National Planning Commission (NPC), whilst providing the semblance of independence, would ensure that the body serves as nothing more than an advisory panel to the Minister in the Presidency for National Planning (“the Minister”); and
5. In seeking to allocate various powers and functions to the Minister, the NPC and the latter’s secretariat based in the Presidency (“the secretariat”), the Green Paper does not adequately address the relationship between the Minister, the NPC and the secretariat on the one hand (“the Ministry”) and other national government departments on the other.

Constitutional Court and short-, medium- and long-term planning

The Green Paper’s various references to the Constitution and its foundational values

² Bureaucratic delays in establishing a strong SANAC secretariat with a monitoring and evaluation unit have – to some extent – undermined the efficient and effective implementation of the NSP.

³ Green Paper at page 8

obscure the fact that the document fails to engage at all with the Constitutional Court's jurisprudence on the relationship between short-, medium- and long-term planning. Had it seriously considered this case law, the Green Paper may very well have approached the issue of "trade-offs" in a more nuanced and balanced manner. Instead, it repeatedly addresses the issue in a manner that strongly suggests that short-term needs may ordinarily be sacrificed at the altar of long-term planning.

Writing on behalf of a unanimous court in *Government of the Republic of South Africa v Grootboom*,⁴ Justice Yacoob made it plain that a constitutionally defensible plan is not necessarily premised on trade-offs but rather seeks to achieve an appropriate balance between short-, medium- and long-term needs. Thus in dealing with the right in section 26 of the Constitution to have access to adequate housing and the obligations it places on the state to plan accordingly, he held as follows:

The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.

...

Those 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. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁵

The state had argued that the "provision [of housing] for people in desperate need would detract significantly from integrated housing development".⁶ In essence, it sought the Court's stamp of approval for what the Green Paper refers to as "a long term perspective to frame shorter term trade-offs".⁷ While Justice Yacoob held that the absence of a component in the programme dealing with urgent needs "may have been acceptable if the nationwide housing programme would [have] result[ed] in affordable houses for most people within a reasonably short time",⁸ he nevertheless found – in the circumstances of the case – that this would not be possible.

In holding that the state failed to give effect to its constitutional obligations in respect of the right to have access to adequate housing, Justice Yacoob made the following points on access to housing that collectively provide guidance in respect of national

⁴ 2001 (1) SA 46 (CC)

⁵ *Ibid* at paragraphs 43 and 44

⁶ *Ibid* at paragraph 64

⁷ Green Paper at page 4

⁸ *Grootboom* at paragraph 64

planning relating to all constitutionally protected socio-economic rights:

- “[T]hose in desperate need ... are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives”;⁹
- When “people in desperate need are left without any form of assistance with no end in sight ... [t]he consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme”;¹⁰
- “[A] co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government *in consultation with each other* as contemplated by Chapter 3 of the Constitution”;¹¹ and
- “Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state’s section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met.”¹²

To repeat: the starting point cannot be an implicit acceptance of the need to make short-term trade-offs in the name of long-term growth and development. To do so would be to ignore the needs of the truly vulnerable, run the risk of acting unconstitutionally and place the attainment of the long-term vision in question.

Directly linked to the issue of short-, medium- and long-term planning is the manner in and the extent to which the state regulates the private sector as an integral part of the reasonable plans it adopts to realise socio-economic rights progressively. Consider, for example, the Constitutional Court’s approach in *Grootboom* to the role of the state in respect of the private sector:

For those who can afford to pay for adequate housing, the state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance.¹³

Yet the Green Paper appears to take a different approach to the private sector. In considering how to change the structure of our economy, for example, the Green Paper asks how “the State [can] be more effective in intervening to address market

⁹ Ibid at paragraph 66

¹⁰ Ibid at paragraph 65

¹¹ Ibid at paragraph 40 (emphasis added)

¹² Ibid

¹³ Ibid at paragraph 36

failures or guide private sector activity.”¹⁴ In describing the type of society projected by *South Africa Vision 2025*, it talks about the private sector being “afforded an environment to invest and make competitive returns while promoting the common interests of the nation.”¹⁵ Where the Green Paper does speak directly to private sector regulation, it simply talks about “regulating market activity by such means as licensing in relevant industries, ensuring competitive behaviour, consumer protection and so on”.¹⁶ Collectively, such comments suggest an approach that does not fully appreciate the dictates of the Constitution insofar as they relate to planning.

Meaning, purpose and manner of consultation

In explaining the need for a vision and a long-term strategic plan, the Green Paper speaks to three key elements:

- The value of longer term planning for the country and all sectors;
- Achieving greater coherence in government’s work; and
- Mobilising society “around a commonly agreed set of long-term goals”.¹⁷

While we are broadly in agreement with this analysis, we are nevertheless concerned by the use of terminology that suggests an impoverished understanding of consultation. As a whole, the Green Paper focuses strongly on the need to secure stakeholder buy-in, seemingly at the expense of placing substantive value on the process itself. Not only does this undermine the process, it also runs counter to the Constitutional Court’s understanding of the nature of our democracy and the value of stakeholder engagement. As (now) Chief Justice Ngcobo stated in respect of consultation during the lawmaking process in *Doctors for Life International v Speaker of the National Assembly*:¹⁸

[O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.¹⁹

In reaching this conclusion, Chief Justice Ngcobo focused attention on the value of consultation, including but not limited to the substantive input from stakeholders that has the potential to enrich debate and strengthen outcomes:

¹⁴ Green Paper at page 9

¹⁵ *Ibid* at page 18

¹⁶ *Ibid* at page 10

¹⁷ *Ibid* at page 17

¹⁸ [2006] ZACC 11; 2006 (6) SA 416 (CC)

¹⁹ *Ibid* at paragraph 116

In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. ... The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.²⁰

One final point on the need for consensus on a commonly agreed set of long-term goals as a “key aspect of a successful development state”: the Constitution itself provides the basis for fleshing out the necessary areas of consensus. Properly understood, it not only identifies priority areas for state intervention and service delivery, but also puts to rest many of the unhelpful ideological debates and discussions that often plague national dialogues. In our view, the Green Paper should have stressed the centrality of the Constitution in relation to the forging of a national consensus rather than implicitly suggest that such a consensus is simply the product of hard politics and negotiations.

Health planning

While the Green Paper makes many references to the provision of and access to health care services,²¹ it is largely silent on the role of health planning in social and economic development. This silence also extends to the composition of the NPC, whose commissioners “should collectively have expertise and practical experience in areas such as business, finance, labour, politics, sociology (including matters related to poverty eradication), economics, science, technology, demographics, and development.”²² While the list is clearly not exhaustive, the omission of any express reference to expertise in the broad field of health is to be regretted. In our view, health planning is central to the development agenda and thus should expressly be recognised as an integral part of national strategic planning.

Structure of the NPC

In our introduction to this submission we asserted that the proposed structure of the NPC would only provide the semblance of an independent commission, with the body in fact serving as nothing more than an advisory panel to the Minister. We make these serious allegations on the basis of the following proposals contained in

²⁰ Ibid at paragraph 115

²¹ See, in particular, the Green Paper at pages 5, 7, 10, 12 and 17

²² Ibid at page 23

the Green Paper:

- The NPC is to be lead by the Minister who will chair over a group of part-time commissioners;
- Commissioners will be appointed by the President seemingly in the absence of any public appointment process;
- Public consultation processes will not be conducted by commissioners but rather by the Minister himself or herself;
- Parliament’s limited role is to be mediated by the Minister;²³ and
- The NPC’s secretariat will be located within the Presidency, with employees accountable to the Minister and not the NPC or its commissioners.

In our view, the NPC should be established by legislation as an independent public entity with the ability to employ its own staff and hold them to account. While we support the appointment of commissioners by the President, we recommend that this be done on the recommendation of the Ad Hoc Committee in Parliament following an open interview process of publicly nominated candidates. In recognising the Executive’s constitutional role in the development of policy, we should not be understood to suggest that the NPC be empowered to make binding policy decisions. Instead, we are simply recommending that it be able to play its role in a manner that accords better with the stated purpose of the Green Paper: “to prevent government from being trapped in its own institutional preconceptions.”²⁴ This will not be feasible if the proposed structure is adopted.

Allocation of powers and functions

Our final concern relates to the Green Paper’s failure adequately to address the relationship between the Ministry on the one hand and other national government departments on the other. It ordinarily describes the relationship as one based on complementarity and synergy, mindful of the “Constitution’s allocation of roles and responsibilities.”²⁵ Thus the outcomes of planning within each department, sphere of government and state agencies are intended to “feed into the national strategic plan”. In turn, this plan would “define high level outcomes and impacts.”²⁶

Yet at times the Green Paper appears to envisage the Ministry playing an oversight and/or veto role in respect of the core competencies of other parts of government. Thus, for example, the Green Paper proposes the following functions for the Minister in facilitating strategic alignment and consolidating partnerships:

²³ Ibid at pages 20 and 28

²⁴ Ibid at page 1

²⁵ Ibid at page 13

²⁶ Ibid at page 11

- The Minister “will attend strategic joint meetings through which the Minister of Public Enterprises interacts with state-owned enterprises”; and
- The Minister “would also attend strategic joint meetings of development finance institutions in the proposed DFI Council, through which the Minister of Finance is expected to interact with them.”²⁷

A related concern is the Green Paper’s failure to deal expressly with the elephant in the room: the nature of the relationship between the Ministry on the one hand and the Economic Development Department (EDD) on the other. During the Presidency Budget Vote on 24 June 2009, President Zuma – in explaining why government has both the dti and the EDD – stated as follows:

The Economic Development portfolio will have a strong domestic focus and will address, amongst others, matters of macro and micro-economic development planning. We say this very much aware that in term of legislation, the National Treasury co-ordinates macro-economic policy. ... The affected Ministries are working together to align work and detailed responsibilities.²⁸

Yet the Green Paper mentions the EDD only once in passing – as one of a number of national government departments in an example focusing on strategic planning and energy security.²⁹ In so doing, it does not appear to recognise the particular role ascribed to the EDD by the President. In particular, it does not consider the mandate described by the Minister of Economic Development in his speech on the debate on the Trade and Industry Vote 32 on 30 June 2009:

The mandate is clear: the department will be responsible to develop economic policy with a broad, cross-cutting focus so that macro and micro-economic policy reinforce each other and are both aligned to the election mandate. The department will also be responsible for economic development planning and will work collegially within Cabinet to ensure co-ordination around a programme that places decent work at the centre of our economic policies in order to secure better employment outcomes.³⁰

Our concern has nothing to do with the actual allocation of powers and functions to Ministers – that is a power to be exercised by the President in terms of section 91(2) of the Constitution. Instead, we are concerned about the potential for conflict that arises as a result of the failure of the Green Paper expressly to deal with this relationship in an appropriate manner. Silence on the issue will do nothing more than give rise to further unhelpful speculation on internal conflicts within government.

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²⁷ Ibid at page 27

²⁸ See <http://www.info.gov.za/speeches/2009/09062414351004.htm>

²⁹ Green Paper at page 11

³⁰ See <http://www.info.gov.za/speeches/2009/09070109451001.htm>