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LEGAL OPINION

TO: Honourable Adv. SP Holomisa and
Honourable Mr BA Mnguni
Co-Chairpersons: Constitutional Review Committee

COPY: Mr M. Coetzee
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Ms SS Isaac – Parliamentary Legal Adviser]

DATE: 17 October 2012

SUBJECT: Annual Submission to the Joint Constitutional Review Committee
Submission 9: Dina Bogatsu

LEGAL ADVISER: Ms SS Isaac

REFERENCE: 191/12

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MEMORANDUM

To: **Honourable Adv. SP Holomisa and**
Honourable Mr BA Mnguni
Co-Chairpersons: Constitutional Review Committee

COPY: **Mr M. Coetzee, the Acting Secretary to Parliament**

From: **Legal Services Office**

Date: **17 October 2012**

Subject: Annual Submission to the Constitutional Review Committee Submission 9: Dina Bogatsu

FACT

1. Our office was requested by the co-chairpersons of the Joint Constitutional Review Committee to advise on a submission received from Ms Dina Bogatsu.

2. Ms Bogatsu raises two issues. Firstly, she has a complaint regarding the leadership in the community as there is unfair treatment of people with disabilities. Children at the Keurhoff School at Matlosana are unable to complete school due to their learning disabilities. This prevents them from finding proper employment and as a result they have no choice but to take jobs such as gardening, making pottery, cleaning graveyards and municipalities. She states that people with disabilities wish to support themselves in proper jobs with salaries rather than receiving disability grants from the state. She requests that the Committee engage with the municipality, the hospitals, Eskom, Telkom, and the post offices to employ people with disabilities.

3. Secondly, she alleges that a company called Zimba Company hired and then fired him because he did not have a matric certificate.

Conclusion

4. The first submission deals with allegations of the unfair treatment of people with disabilities. The submission contains no request for the Committee to amend the Constitution. The Committee may consider referring the submission to the relevant committee on Women, Children and People with Disability or Basic Education.

5. The second part of the submission deals with an alleged labour dispute. The submission contains no request for the Committee to amend the Constitution. Current law provides sufficient mechanisms in terms of which the submitter may pursue the relief that she is seeking. We therefore advise that the submitter needs to seek the assistance of an attorney regarding the alleged labour dispute. If she is unable to afford legal services it is suggested that she approach Legal Aid South Africa, one of the University Campus Law Clinics or the nearest Legal Resources Centre for assistance.

Ms SS Isaac

Parliamentary Legal Adviser

CR12 – 9

X30 Pheletso Street
Ext 2
Jouberton location
Matlosana
2574

Attention: Mrs Pat Jayiya

Dear Madam

We have complaints concerning the leadership of our committee and we are saddened about the unfair treatment towards people with disabilities. Children at our Keurhoff School at Matlosana are unable to complete matric because they have learning disabilities. We have tried our best to ensure that our children complete matric but our attempts have failed due to their learning disabilities. These children attend school until Grade 9 but are unable to progress further because it becomes difficult for them to continue with their schooling.

The other problems experienced in this respect are that people do not understand their situation and they cannot get proper employment because of underperformance shown in their school results. The municipality have many jobs that can be offered to these children with disabilities. These children are only given jobs such as gardening, pottery making, and cleaning the dirty graveyards and drains in our municipality. They are given these jobs because they do not possess a matric qualification.

The problem is that only able-bodied people get proper jobs. Our question is: what about people with disabilities? They do not want disability grants but want to have a normal life like able-bodied people. My request is that you engage with the municipality, the hospitals, Eskom, Telkom, and the post offices so that they can employ people with disabilities, even if they are paid a salary of R4000 just like everyone else. They want to have families, so how are they supposed to pay lobola if they receive R1, 200 from a disability grant? How are they going to support their families with R1, 200? They need to enjoy freedom just like everybody else.

I would also like to express my unhappiness about Zimba Company's treatment towards my son, Thapelo Mathews Bogatsu, who also has learning disabilities. They hired him but he was fired because he did not have a matric qualification. They should understand that he did his best by obtaining a driver's licence. How will he cope in life after what they did to him; why did they do that to him and where should he work now?

I would like to see him return to his job because he loved working at the warehouse. Could you please contact the company and get clarity on this matter. His situation caused a lot of pain to me and I nearly died of a heart attack. I was sick for about 6 months because I kept on thinking about what my son had gone through and the questions he kept asking me regarding his situation. It causes him stress and I don't know what to do.

Could you please assist people with disabilities and meet with the Zimba Company and ask them to employ our children. I hope you understand all the stress we go through as parents and the abuse our children experience, unlike the human resources management

of the municipality and the hospitals who don't know how to treat them and they don't care about them.

I hope my application will be taken into consideration.

Yours Sincerely
Dina Bogatsu: Committee member
Cell Number: 079 165 8352

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MEMORANDUM

[Confidential]

TO: Adv SP Holomisa, MP
Mr BA Mnguni, MP
Co-Chairpersons of the Joint Constitutional Review Committee

COPY: Acting Secretary to Parliament
[Mr M Coetzee]

FROM: Constitutional and Legal Services Office
[Dr BE Loots – Parliamentary Legal Adviser]

DATE: 17 October 2012

CRC REF: CR12-10

REF: 192/2012

SUBJECT: OPINION ON THE CONSTITUTIONAL REVIEW SUBMISSION BY JOHN PRICE RELATED TO THE APPOINTMENT AND TERM OF THE PRESIDENT

PARLIAMENT
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LEGAL SERVICES
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MEMORANDUM

TO: **Adv Hon SP Holomisa, MP**
Mr BA Mnguni, MP
Co-Chairpersons of the Joint Constitutional Review Committee

COPY: **Acting Secretary to Parliament**
[Mr M Coetzee]

FROM: **Constitutional and Legal Services Office**
[Dr BE Loots – Parliamentary Legal Adviser]

DATE: **17 October 2012**

CRC REF: **CR12-10**

REF: **192/2012**

SUBJECT: **OPINION ON THE CONSTITUTIONAL REVIEW SUBMISSION BY JOHN PRICE RELATED TO THE APPOINTMENT AND TERM OF THE PRESIDENT**

INTRODUCTION

1. Our Office was requested to advise on the submission by Mr John Price for the annual constitutional review by the Joint Constitutional Review Committee ('the Committee').

OVERVIEW OF SUBMISSION

2. In his submission, Mr Price opines that the Constitution of the RSA, 1996 ('the Constitution') has fatal flaws –
    a. "[in] our constitution has a fatal flaw ... [in] that it gives too much power and influence to the president, the head of the government"[1] and
    b. "that proportional representation puts excessive power in the hands of the leader of the governing political party".[2]

[1] Paragraph 3 of the submission.
[2] Paragraph 9 of the submission.

3. In light of this position, Mr Price recommends the amendment of section 42(3) of the Constitution to allow for a new system by which to appoint the President through the creation of an Executive Council.
4. In support of the proposed amendment, Mr Price makes reference to the "Switzerland model", which he explains as follows:

> *"Switzerland is run by a council of seven members. One of them acts as president for 12 months, and the job rotates every 12 months. Nobody may hold the position of president more than once during the life of a parliament."*[3]

LEGAL OPINION

5. In his submission Mr Price concedes that the presidential appointment and term system currently contained in the Constitution of the RSA is a generally accepted model.
6. Mr Price however submits the proportional representation system places excessive power in the hands of one individual. In our constitutional system the concept of proportional representation is closely related to the electoral system, the choice of which is a political matter.[4]
7. If the current system of proportional representation is amended, as per the submission, it will alter the nature of the model of electoral system South Africa currently has. Such an amendment will potentially call for additional amendments beyond the proposed amendment of section 42(3), as it potentially alters the democratic electoral system that underlies the Constitution.
8. As alternative models of government can be found in other jurisdictions, the proposed amendment is not a question of law, but rather one of policy. I am therefore of the view that the Committee is required to take a policy decision as to whether it wishes to recommend or opposed the proposed amendment in its constitutional review report.

Dr BE Loots
Parliamentary Legal Adviser

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[3] Paragraph 5 of the submission.

[4] Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 280 – 281. See also sections 46(1) and 105(1), read with section 19, of the Constitution. The link between proportional representation systems and electoral systems is also clear in *Louw v Matjila* 1995 (11) BCLR 1476 (W), where Van Schalkwyk J observed that there are more than one system of proportional representation, with the underlying purpose of proportional representation systems being equitable representation. See Devenish *The South African Constitution* (2005) 225.

1/6/12

CR12 – 10

SUBMISSION TO THE CONSTITUTIONAL REVIEW COMMITTEE OF PARLIAMENT

Members of the public have been invited to submit proposals for the review of particular sections of the constitution by 1st June 2012. I am grateful for the opportunity to address what is a serious shortcoming in many constitutions which are based on the generally accepted Western model, including our own constitution. My name and contact details are at the end of this document.

I respectfully request you to consider the following proposal.

South Africa is a present suffering from a plague of corruption that seems to be intensifying. A bold constitutional initiative will reverse the trend, and I submit the following analysis and proposal to you.

1. Winston Churchill said the following in the UK Parliament in 1947:

> Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

We all accept that when political trouble occurs, the remedy will be "democracy" but we don't question the form that it should take. We assume that the primary feature will be to give everyone a vote. We include in the proposals some checks and balances, and a declaration on human rights, and we assume that a popular person will emerge who has the support of most of the voters, and that he or she will proceed to preside over a democratic government.

2. This, more or less, is the form that attempts to create democratic countries in Africa (including our own) have taken. And almost everyone who speaks about the subject, will say that we have a very fine **constitution** and we must all respect it.

3. But **our constitution** has a **fatal flaw. That flaw,** which history will confirm, **is that it gives too much power and influence to the president, the head of the government.**

4. For confirmation, we need not look further than last century's dictators, like Hitler and Stalin, or people like Robert Mugabe, or Idi Amin and half a dozen other African dictators, to see how much damage to a country and its people, too much influence and power, in the hands of a single head of state, can do. I could go on, but we all know what I am talking about. **And it is significant that every would-be dictator sets out to attain four principal objectives. They are:**

- **To obtain control of the police and the army;**
- **To suppress the free media; and**
- **To appoint "puppy-dog" judges to carry out the dictator's instructions;**
- **To effectively control parliament, by gerrymandering elections, packing ballot boxes, terrorising the electorate, or other means;**

And thus to hold out to the world the pretence that the country is being democratically governed.

5. I recently mentioned to a small gathering the fatal flaw, that our constitution gives too much power to the president. They asked me how I could say so. I asked them, "Who is the president of Switzerland?" Silence. Nobody knew. Since I had asked the question, they asked me who it was. I didn't know either. And the reason why nobody knows, is that **Switzerland is run by a council of seven members. One of them acts as president for 12 months, and the job rotates every 12 months. Nobody may hold the position of president more than once during the life of a parliament.**

6. The seven members of the council are appointed by the general assembly, at its first sitting after a general election. They then choose one of their members to act as president for the first 12 month period, and thereafter the council appoints another member of the council to take over as president for the next 12 month period, and so forth. Each member's job is to oversee certain aspects of the country's affairs, just as a cabinet minister would. A new council member is elected by parliament to replace an incumbent who has resigned or died, or has become ineligible for any reason. The practical affairs of the country are run by the civil service, who are no doubt called to account for what they do, by the appropriate council member.

7. After Rome had been ruled by a succession of kings the Roman Republic came into being in 509BC, and the change for which the Republic became famous, is that Rome was thereafter ruled by two Consuls, who were appointed by the senate, and held office jointly, for one year at a time.

The point of the examples of modern day Switzerland, and ancient Rome, is that there is no need to place a lot of power in the hands of one person, and Switzerland and Rome found ways to avoid such a situation. Experience shows it can be extremely dangerous if one ruler has too much power.

8. The history of this aspect of English constitutional evolution is different. Growing conflict between the monarchy and parliament intensified during the 17th century, and culminated when King Charles I was captured by the parliamentary forces under Oliver Cromwell, and was executed in 1649. After that the monarchy was restored, as a constitutional monarchy, and was subject to the control of parliament.

9. This episode indicates another significant weakness in our constitution, **namely that proportional representation puts excessive power in the hands of the leader of the governing political party.** The president is able to ensure obedience by members of the party that put him in office by cancelling their party membership, and thereby securing their expulsion from parliament.

10. For this reason, the South African parliament can never be relied on to act as a brake on the president, in the way that the English parliament, under Oliver Cromwell, rebelled against King Charles I. For us to evolve into a mature society, effective alternatives to proportional representation have to be found.

11. It is also worth noting that for practical purposes almost all countries have a history of being ruled by a king or chieftain of some sort, and the "big man" syndrome of African societies is not unique. I have little doubt that King Henry VIII of England was as much a tyrant as King Chaka of the Zulus, or Robert Mugabe, who started his 30 year term as president with the massacre of thousands of Matabele. (And note also, that both Hitler and Mugabe came to power after what were taken as democratic elections.) If we want democratic government, we cannot tolerate the risk that any president could become all powerful. Action taken to avoid the danger of putting too much power in the hands of one person would establish us as a mature society.

12. It is not a coincidence that at this time of rampant corruption, inappropriate appointments to important policing positions, such as head of Crime Intelligence, and National Police Commissioner should be raised by concerned people, and that the president should suggest that the roles of the media and the courts of justice, need to be investigated. **It seems to me very appropriate, in such a context, that the role and the powers of the president, particularly his powers of appointment, and term of office, must also be reviewed.**

13. To return to the original motivation for this submission, namely the plague of corruption which we are enduring at present, it is necessary to note that **there is a very important difference between what are called the private sector, and the public sector.**

14. The **private sector** has no organization, and no head, or controlling body. It is simply large numbers of private citizens and business entities pursuing their various objectives. Some will be open to corruption, and if they can get away with it, they will be corrupt. Some will always be honest and law abiding, but they have no legal power to stop others from being corrupt.

15. In sharp contrast, the **public sector** is run by an organization with a head (the president) and bodies that are supposed to carry out what they are instructed to do (the civil service). One of the things they are supposed to do is to see that the laws are obeyed, and when they fail in this, lawlessness takes over, and corruption flourishes. That is why endemic corruption begins with a country's government, and also why **the only effective place to start eliminating corruption, is in the government, and at its head, the President. Corruption is a crime, but not only that; it is a disease that starts at the heart of government, and can turn a whole country into a "failed state".**

16. As things are, any president of South Africa who feels that his position as president is threatened, and who has aspirations to hold onto his office, will surround himself by appointing chosen acolytes, who can be relied on to protect him from criticism, and conceal what he is doing to cling to office, or to enrich himself. In the process they enrich themselves as well, all at the public expense of course. And since they are in the arrangement together, they stick together at all costs. The consequence is more rampant corruption, and Democracy fails, as it has failed in Zimbabwe.

17. To achieve the objective described in 12 above, **I recommend the following:**

- Section 42(3) of the Constitution should be amended to provide that at its first sitting after a general election, the National Assembly elects an **Executive Council** consisting of not less than (say) nine members of the National Assembly, who must all then cease to be members of the National Assembly during their period of office as members of the Executive Council;
- At their first meeting after election, the executive council must appoint one of their number as president, who assumes the office of president, and presides as chairperson of executive council meetings for a period of 12 months from the opening of parliament;
- The executive council exercises all the powers and responsibilities of the president, including those in terms of section 84 of the constitution, and including the appointment of cabinet ministers to oversee and assume responsibility for all state departments, and any other office requiring presidential appointment. The executive council makes decisions by majority vote; provided that if there is an equal division of votes, the president has a casting vote. Executive council members may also be cabinet ministers.
- On expiry of the president's 12 month term of office another member of the executive council must be chosen by the votes of the council, who will then hold office as president for the following 12 months, and so forth, for

the duration of the general assembly, and until the next general election, after which a new executive council is elected, and the process is repeated;

- No member of the executive council may hold the office of president for more than one 12 month term during the term of an elected National Assembly;
- There may not be fewer than seven members of the Executive Council or more than nine, and if a vacancy occurs in the Executive Council for any reason, this must be filled by a member elected by majority vote at a special meeting of the National Assembly.

Further detail will need to be filled in to give effect to the idea, and the above is intended to present a realistic outline of the sort of provision that a sophisticated, and at the same time simple amendment to the constitution would involve.

18. The idea of a much shortened, single term of office (eg 1 year) plus the need to persuade a small committee to go along with the president's wishes, would reduce both the opportunity and the capacity, for any president to build himself into an impregnable position. If he finds it difficult to make suitable corrupt appointments in the time available to him, corruption will find it more difficult to get a foothold, and at the same time this will inculcate the respect for the constitution, among the public as a whole, that a democratic system requires.

19. **Such a system is at present in working in Switzerland, a civilised country, and it would not constitute a radical departure from what we have at present. We could also take account of the experience of that country for guidance.**

John Price
18 May 2012

If you would like to interview me to expand on the proposal I have put forward I can be contacted on telephone 082 888 2467. My postal address is PO Box 801, Pretoria, 0001. I will be glad to attend any interview in Cape Town or Pretoria.

I am a practising lawyer, with an LLB degree and qualifications as Conveyancer and Notary. I also hold an MA Degree in Sociology, specialising in Sociology of Law. (My MA dissertation dealt with the legitimation of lawful authority.) I will provide you with a fuller Curriculum Vitae on request.

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MEMORANDUM
[Confidential]

TO: Honourable Adv. SP Holomisa, MP and
Honourable Mr. BA Mnguni, MP
Co-Chairpersons: Constitutional Review Committee

COPY: Acting Secretary to Parliament [Mr M B Coetzee]

FROM: Constitutional and Legal Services Office
[Adv C R van der Merwe –Parliamentary Legal Adviser]

DATE: 29 August 2012

SUBJECT: Annual Submission to the Joint Constitutional Review Committee: IFAISA submission on Anti-Corruption Commission; Representation in Parliament and the JSC

CR COMMITTEE REFERENCE: CR12-11

REF: 193/2012

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OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES
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MEMORANDUM

TO:	**Honourable Adv. SP Holomisa. MP and Honourable Mr. BA Mnguni, MP Co-Chairpersons: Constitutional Review Committee**
COPY:	**Acting Secretary to Parliament [Mr M B Coetzee]**
FROM:	**Constitutional and Legal Services Office [Adv C van der Merwe – Parliamentary Legal Adviser]**
DATE:	**29 August 2012**
CR COMMITTEE REF:	**CR12-11**
REF:	**193/2012**
SUBJECT:	**Annual Submission to the Joint Constitutional Review Committee: IFAISA submission on Anti-Corruption Commission; Representation in Parliament and the JSC**

INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Joint Constitutional Review Committee ('Committee') to advise on the submission received from the Institute for Accountability in Southern Africa ('IFAISA').

SUBMISSION BY IFAISA

2. IFAISA makes three proposals in its submission. Firstly, the establishment of an anti-corruption unit, "the Eagles" as a new Chapter 9 institution is proposed. Secondly a request is made for proportional representation to be

reconsidered and thirdly the membership of the Judicial Service Commission (JSC) is requested to be changed.

NEW CHAPTER 9 ANTI-CORRUPTION COMMISSION

3. In the matter of *Glenister v President of the RSA and Others*[1] the Constitutional Court declared Chapter 6A of the South African Police Service Act 68 of 1995 inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') in that it failed to establish an adequate degree of independence for the Directorate for Priority Crime Investigation (DPCI).

4. IFAISA bases its submission on the *Glenister*-judgement and argues for the creation of a new chapter 9 institution as it is of the opinion that creating an independent anti-corruption body by way of national legislation is not the best solution in practice. The new chapter 9 anti-corruption commission is proposed to be referred to as "the Eagles" and will focus on "corruption of a serious nature". "The Eagles" is proposed to operate in addition to the Hawks, who will investigate, prevent and combat other priority crimes.

5. IFAISA is further of the opinion that the South African Police Service Amendment Bill,[2] currently referred to the National Council of Provinces, will also not pass constitutional muster as it yet again fails to provide sufficient independence to the anti-corruption body that it is proposing.

6. The court in *Glenister* held that although the Constitution does not require the establishment of a corruption fighting unit, nor prescribes operational attributes, the court does not doubt that the Constitution as a whole "*imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.*"[3]

7. Three international agreements to which South Africa is a signatory[4] require such a mechanism to be created and specifically require the mechanism to be

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[1] 2011 (7) BCLR 651 (CC).

[2] South African Police Service Amendment Bill, Bill 7 – 2012.

[3] *Glenister*, par 175.

[4] Article 6(2) of the UN Convention; Article 8(1) of the Southern African Development Community Protocol on Combating Illicit Drugs; and Article 5(3) of the AU Convention.

independent.[5] In establishing the meaning of "independence" the court referred to the Organisation for Economic Co-operation and Development's definition:

> *"Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."*[6]

8. Having held that the Constitution and international obligations require that a mechanism be established to fight corruption, which mechanism must be independent, the court emphasised that "*the form and structure of the entity in question lie within the reasonable power of the state, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence.*"[7]

9. The minority judgment in *Glenister* puts it more succinctly:

> *"It is therefore within the power of Parliament to establish an anti-corruption unit and to locate it within the SAPS. The Constitution does not prescribe to Parliament where to locate the anti-corruption unit. It leaves it up to the Executive, which initiates legislation under section 85(2)(d), and ultimately to Parliament to make a policy choice."*[8]

Legal Advice

10. The question whether an anti-corruption mechanism is better suited as a new chapter 9 body, or as a unit created by national legislation separately from, or within the SAPS, is not a legal question. The Constitutional Court made it quite clear in the *Glenister* matter that the form and structure of an anti-corruption

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[5] *Glenister,* par 183 – 186.
[6] *Glenister,* par 188.
[7] *Glenister,* par 196.
[8] *Glenister,* par 65.

mechanism lie within the reasonable power of the state. The proposal for a new chapter 9 body "the Eagles" to be formed is thus a policy decision.

PROPORTIONAL REPRESENTATION

11. IFAISA refers the Committee to the "Van Zyl Slabbert Commission of Inquiry" or Electoral Task Team's 2003 report. IFAISA argues for a different electroral system in Parliament, requesting improved accountability mechanisms and responsiveness as well as creating more transparency in the relationship between the elected and the electorate.

12. IFAISA further proposes the deletion of section 47(3)(c) of the Constitution to allow members of parties to vote according to "their consciences on contentious legislation", without the fear of losing their seat in the House. Put conversely, the request is that seats be "secured" despite a Member of Parliament losing membership of the political party that nominated him/her.

13. Any change to the electoral system in the Houses of Parliament, as well as an amendment of section 47(3)(c), would constitute a policy decision. Paragraph (c) was inserted by the Constitution Tenth Amendment Act, 2003 to create "uniformity within the three spheres of government regarding loss or retention of membership of the National Assembly"[9] and an amendment of this paragraph will thus necessitate consideration of similar provisions that relate to the Provincial and Local spheres of Government.

14. The legal question that however arises from this request is whether a change in the electoral system of Parliament can be effected through an amendment of the Constitution.

15. The question whether proportional representation is such a part of the basic structure of the Constitution that it cannot be amended was considered by the Constitutional Court in *United Democratic Movement v President of the Republic of South Africa and Others ('UDM').*[10]

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[9] Preamble of the Constitution Tenth Amendment Act, 2003.

[10] (No 2) (CCT23/02) [2002] ZACC 21 (4 October 2002). *UDM* dealt with the so-called "floor-crossing" legislative amendments contained in four amendment acts: The Constitution of the Republic of South Africa Amendment Act 18 of 2002; The Constitution of the Republic of South Africa Second Amendment Act 21 of 2002; The Local Government: Municipal Structures Amendment Act 20 of 2002; and The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

16. The court in *UDM* was referred to *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*[11] ("*Premier of KZN*") where the Constitutional Court said that an amendment "*radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.*"[12]

17. The court in *UDM* said that there are many electoral systems which are consistent with democracy and accordingly that "*[i]t cannot be said that proportional representation ... [is] so fundamental to our constitutional order as to preclude any amendment of [its] provisions.*"[13]

18. The court in *UDM* further held that proportional representation cannot be considered a founding provision of the Constitution. A "multi-party system of democratic government"[14] does not preclude another electoral system, save for a one-party state, or a system of government in which only a limited number of parties may compete for office.

Legal Advice

19. The decision whether to change the electoral system of Parliament[15] is a policy decision. A decision to so change the electoral system, provided it does not affect the founding provision of a "multi-party system of democratic government", may be implemented by way of an amendment of the Constitution.

JUDICIAL SERVICE COMMISSION ('JSC')

20. The JSC is described by IFAISA as "one of the most dysfunctional bodies created by the founders of the Constitution." IFAISA is of the opinion that the reason for the dysfunction is an imbalance of "too many politicians and too many overtly political appointees on the JSC".

21. IFAISA requests that either the membership of the JSC be amended, or that the numbers of non-political appointees be increased to dilute the "pernicious

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[11] 1996 (1) SA 769 (CC)

[12] *Premier of KZN*, par 47.

[13] *UDM*, par 17.

[14] Section 1(d) of the Constitution, 1996

[15] This includes an amendment to section 46(1) (proportional representation) and section 47(3)(c) (losing membership).

influence of politicians of all kinds who at present bedevil the processes of the JSC."

22. Furthermore, IFAISA proposes that once the JSC is properly composed, the appointments of senior NPA officials should be conducted through the JSC so as to depoliticise these appointments as well.

23. In the *Certification of the Constitution of the Republic of South Africa, 1996* ('the *First Certification*-judgment') the Constitutional Court was faced with a similar objection to the constitution of the JSC. The composition of the JSC was very similar at that stage[16] and the court held that the composition of the JSC was a political choice made by the Constitutional Assembly within the framework of the constitutional principles against which the court must test it. Accordingly, the court could not interfere with that decision.

24. The court stressed that an essential part of separation of powers, is the requirement of an independent judiciary. The court pointed out that in countries such as United Kingdom, New Zealand, Canada, Australia, Germany and the USA judicial appointments are made by the executive and / or Parliament. According to the court it is "*crucial to separation of powers and the independence of the judiciary ... that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.*"[17]

Legal Advice

25. As stated by the court in the *First Certification*-judgment, the composition of the JSC is a political (policy) decision. It is not a new phenomenon to involve parliamentarians or the executive in the appointment process and the decision to amend the composition of the JSC is a policy decision to be taken by the Houses.

Adv C R van der Merwe
Parliamentary Legal Adviser

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[16] The text considered during the first certification judgement provided for "the President of the Constitutional Court", while the final text provides for the "President of the Supreme Court of Appeal". Other than this the membership is exactly the same.

[17] *First Certification*-judgement, par 123

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IFAISA SUBMISSIONS TO THE CONSTITUTIONAL REVIEW COMMITTEE OF PARLIAMENT

Introduction

1. Ifaisa (the Institute for Accountability in Southern Africa) welcomes the opportunity to make submissions to the Constitutional Review Committee of Parliament as advertised in the Sunday Times on 29 April 2012.

2. In this submission three separate issues will be canvassed, the first relating to the establishment of an Anti-Corruption Commission as a new Chapter Nine Institution, the second concerning the superfluity of 100% proportional representation at this stage in the history of the democratic development of the nation and the third with regard to the dysfunctional nature of the Judicial Service Commission due to the abundance of political appointees in its ranks.

3. Should the Committee wish to hear oral submissions on any of the topics that Ifaisa raises in these submissions, we are willing to oblige at a mutually convenient time and place.

4. Ifaisa is a registered NPO and concentrates its energy on making accountability matter in the Southern African region. As regards political accountability, the aims of Ifaisa are to exact accountability and to promote responsiveness to the needs of ordinary people. There is more detail available regarding Ifaisa's activities on the website www.ifaisa.org which the Committee is encouraged to visit.

An Anti-Corruption Commission – the Eagles

1. The judgment of the Constitutional Court in the Glenister case will be well known to members of the Committee. A copy of the whole judgment is available on the Ifaisa website (www.ifaisa.org) on the Glenister case page. It is not intended to burden this submission with the judgment.

2. The effect of the judgment is to require of Parliament to create a sufficiently independent and effective anti corruption entity so as to achieve compliance with the international treaty obligations of the country and consistency with the values of the Constitution. This can be done without amending the Constitution. However, Ifaisa respectfully submits that this would not be the best practice solution.

3. A Bill, called the SAPS Amendment Bill 2012, is before Parliament and is under consideration by the select committee of the National Assembly concerned with policing at the time of preparation of this submission. The Bill is aimed at minimalistic changes to the current dispensation in which the Hawks (or Directorate of Priority Crime Investigation) are given the anti-corruption functions and responsibilities. It is likely to be found unconstitutional if enacted in anything approaching the form in which it was introduced by the Executive to Parliament.

4. From the public participation process it is apparent that all but one of the parties who so participated are critical of the Bill in the form in which it has been presented to Parliament by the Executive.

5. The ANC members of the select committee are seeking to find ways to keep the Hawks within the SAPS and yet also sufficiently independent and effective to pass constitutional muster. This is a well nigh impossible task. Section 207 of the Constitution prescribes that the National Commissioner of Police has control and management of SAPS. Under the Public Finance Management Act this official is also the accounting officer of SAPS. It can accordingly be seen that if the Hawks remain within SAPS they will be under the line function control and financial management of an accounting officer who is a political appointee (and indeed a politician too on the track record of recent appointments) and one in a position to influence or interfere with the investigations and functioning of the Hawks. This is unconstitutional.

6. It would appear that there is no political will to make the National Commissioner into a constitutionally independent functionary like the National Director of Public Prosecutions or the Commissioners or heads in the Chapter Nine Institutions.

7. It accordingly follows that it will be exceedingly difficult to keep the Hawks within the SAPS and still able to effectively and independently fight corruption.

8. The solution is to seek a new home for the anti-corruption entity which the state is obliged, both internationally and constitutionally, to maintain.

9. The suggestion of Ifaisa is that the appropriate home for such a body is a new Chapter Nine Institution, to be called the Eagles, in order to distinguish it from the Hawks.

10. The Hawks will continue to exist as they do as a unit in SAPS and will be required to investigate, prevent and combat priority crimes other than corruption of a serious nature, which will become the exclusive domain of the Eagles.

11. Ifaisa has made detailed submissions to the select committee on the notion of creating the Eagles. These are on its website www.ifaisa.org on the Glenister case page. They will not be repeated here so as not to unnecessarily burden this submission.

12. In addition to the submissions so made, a draft constitutional amendment and a draft bill for the Eagles have been placed before the select committee and are likewise available for perusal on the said website.

13. It is accordingly possible for this committee to have regard to the material placed before the select committee sitting on the SAPS Amendment Bill 2012 and to consider this submission in the context of the consideration of possible amendments to the Constitution.

14. There is a school of thought that suggests that the Eagles do not need to be a Chapter Nine Institution and could be a legislated anti-corruption entity of the "stand alone" kind.

15. Ifaisa concedes that the Glenister judgment does not require the creation of a new Chapter Nine Institution and that it would be possible to create a stand alone entity capable of being sufficiently independent and effective to satisfy the requirements of the judgment in Glenister's case.

16. It is however plain that this would not be the best practice solution to the problems posed by rampant corruption in society at this time. A legislated stand alone entity could be closed down just as easily as the Scorpions were closed down. This has the effect of retarding the fight against corruption. The Hawks have not caught any big fish, indeed they have been prevented from investigating some, like Richard Mdluli.

17. A Chapter Nine Institution, once created, can not be closed down except by a special majority of 66% of the vote in Parliament. This gives the Eagles far greater security of tenure than the Hawks, or even the Scorpions, in their day.

18. The rationale for making the Eagles a new Chapter Nine Institution is to demonstrate to the public the determination of Parliament to get to grips with the phenomenal growth of corrupt activities in our society at this time by establishing a best practice solution to the problem, rather than the minimalistic one proposed by the Executive branch of government. Chapter Nine Institutions are increasingly well known to the public and ever more respected by the people.

19. By creating the Eagles, Parliament can assert its willingness to hold the Executive to account, a task that is exceedingly difficult in our proportional representation system, in which the party bosses decide who to hire and fire on the party lists of representatives in Parliament and elsewhere.

20. The fundamental error in the way in which the Executive is approaching the task of implementing the Glenister judgment is that it is characterising corruption as simply another manifestation of crime. It is more than this in SA today, and it threatens to tear

apart all of the gains that have been made since the dawn of democracy and the establishment of a constitutional dispensation under the rule of law.

21. Members of the Committee are encouraged to read "Between a Rock and a Hard Place" on the Glenister case page of www.ifaisa.org in order to properly place corruption in its correct context in modern SA society. Corruption is a cancer which has the potential to turn the country into a failed state in short order. The prospects of peace, progress and prosperity in a failed state are not rosy; far better that early pro-active steps be taken to establish effective anti-corruption machinery sooner rather than later so that the scourge of corruption can be rooted out and we can realise the goals of the new Constitution: a society in which human dignity thrives, equality is achieved and the freedoms guaranteed in the Bill of Rights are enjoyed by all. This will elude us all if we take less than best practice measures to deal with corruption.

22. No self respecting Member of Parliament admits to being in favour of corruption, but too few are prepared to do what they know is the right thing in response to creeping corruption in high places. The right thing is to support the notion that a best practice solution to the problems of corruption must be put in place urgently.

23. Ifaisa submits that the Eagles is that best practice solution and that the drafts it has prepared to amend the Constitution and put in place an Anti-Corruption Commission called the Eagles, or refinements of them, are what is urgently needed to address the situation the nation faces at present.

24. Eagles see further, fly higher, go after bigger prey and are less susceptible to poisoning than other birds, particularly the scarce and shy Hawks.

Proportional representation

1. The question of proportional representation across the board in parliament was visited by the Van Zyl Slabbert Commission of Inquiry some years ago. The report of the commission is gathering dust is some parliamentary archive.

2. Ifaisa would like to propose that the report be dusted off and reconsidered in the interests of growing democracy, improving accountability mechanisms, promoting responsiveness to the need of ordinary people and enhancing transparency in the relationships between the elected and the electorate.

3. In recent elections more voters chose not to vote than voted for the governing tripartite alliance. This is a sad indictment of the state of democracy in SA. If so many people are so alienated from the system that they choose to forego their hard won right to vote, then it is time to do something pro-active about it.

4. Proportional representation was only meant to be part of the transition to democracy. The re-establishment of constituencies and the fostering of relationships

between the elected and electorate, instead of between the elected and their party bosses is overdue in SA.

5. The best form of accountability for an elected parliamentarian is the constituency meeting at which she or he reports back to the people represented. There is very little of this spirit in SA today and the country is the poorer for it.

6. Even if proportional representation is not adjusted in terms of the recommendations of the Commission's report, there is one issue that could still be considered by the Committee with a view to a constitutional amendment.

7. Ifaisa refers, of course, to the provisions of section 47(3) (c) of the Constitution. This pernicious provision prevents parliamentarians of the calibre of Prof Ben Turok from voting their consciences on contentious legislation without fear of fatal disciplinary measures on the part of the party bosses who control the party list and therefore the career of all of those on it and who want to be on it. As loss of membership of the party on whose list the parliamentarian belongs, entails loss of the seat she or he occupies in parliament, it can be seen that dire consequences flow from the powers that unelected party bosses are given by the provisions of the sub-section.

8. Ifaisa suggests that there is no longer any good reason for the provision and that it should be scrapped in the interests of a freer and more accountable corps of parliamentarians. Party membership ought not to be a pre-requisite of parliamentary membership – this interferes with freedom of association, a guaranteed right and is thus unconstitutional.

Reforming the Judicial Service Commission

1. The JSC must be one of the most dysfunctional bodies created by the founders of the Constitution. Things have reached such a dire state that twice in succession insufficient candidates have put their names forward for appointment and for the honour of occupying the one vacant seat in the Constitutional Court, a crowning achievement in any successful legal career. This is lamentable.

2. The JSC is perpetually involved in ugly and destructive litigation. It has not protected the honour of the justices of the Constitutional Court in the Hlophe saga, it has fought with all and sundry over the extension of the term of office of the last Chief Justice, it has been taken to court by FUL and Premier Zille for its flaccid treatment of the disciplinary issues around Hlophe, it has, as usual, lost the case over its failure properly to appoint suitable candidates to vacancies in the Western Cape High Court. It has then, petulantly so, refused to fill these vacancies, thus requiring the second busiest division in the country to run with hordes of acting judges, only to have the JSC relent when all unsuccessful candidates withdrew their nominations. The process around the appointment of the present Chief Justice was a demeaning fiasco in which the JSC emerged as one of the worst offenders. One of its members even made it known that he would vote for the

President's candidate even though his personal choice was the Deputy Chief Justice. What is the point of such a person serving on the JSC? The President was asked by Ifaisa to dismiss the Commissioner in question but ignored the request for reasons that are obvious. This can not be allowed to continue.

3. According to section 165 of the Constitution, the JSC, as an organ of state, is supposed to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. It does none of these properly. Its interview process has deteriorated into an inquisition for some candidates and a five minute walk in the park for others. Public criticism of the JSC fills the columns of serious newspapers. It remains impervious to all criticism and is taken the judiciary to places it ought not to have to visit, through its ineptitude. The Committee is invited to google the term "Judicial Service Commission South Africa" and consider the extent of the bad press the JSC has earned for itself.

4. The question is: why is the dysfunctional state of JSC affairs so pronounced?

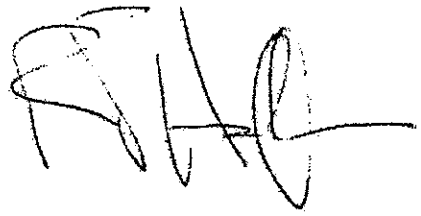
5. The answer, Ifaisa respectfully suggests, is that there are too many politicians and too many overtly political appointees on the JSC. It does not function as an independent body. Allegations that it has an ANC caucus in its midst are stoutly denied, yet seem to gain credence at every session as any intelligent and informed observer sees politics at play in a process that ought not to be political at all. The primary task of the JSC, as set out in the Constitution, is that of identifying appropriately qualified women and men who are fit and proper persons to be appointed to the judiciary. The need for the judiciary to reflect broadly the racial and gender composition of the country "must be considered" when judicial officers are appointed. Unfortunately, politics has been allowed to unduly intrude in this process, to the detriment of the administration of justice, the reputation of the Bench and the confidence of the public in the judiciary.

6. If the problem is too many politicians, the solution has to be the reduction of the number of politicians and political appointees and their replacement with nominees of the Bench (in the form of retired judges, who, of all people, have the most expertise in identifying appropriate candidates) of civil society (in the form of appropriately qualified commissioners who can constructively assist in so identifying), faith based organisations (ditto) and trade unions (ditto) in addition to the legal professionals and law teachers representatives who already serve on the JSC.

7. If this is too bitter a pill to swallow, then at least give consideration to increasing the numbers appropriately so as to dilute the pernicious influence of the politicians of all kinds who at present bedevil the processes of the JSC.

8. When the JSC is re-invented as a well functioning commission, consideration ought to be given to a suggestion made by the Deputy President, when he was President, that senior appointments in the NPA should also be the business of the JSC. Depoliticising the

office of the National Director of Public Prosecutions and her or his Deputies could go a long way toward restoring public faith in the independence of the NPA. This is an essential element of confidence in the criminal justice administration and a bulwark against vigilantism.



Paul Hoffman SC

Director

Ifaisa

30 April, 2012.

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LEGAL OPINION

[Confidential]

TO : **Mr BA Mnguni and Adv SP Holomisa**
Co-Chairpersons of the Constitutional Review Committee

COPY : **Acting Secretary to Parliament**

DATE : **17 October 2012**

SUBJECT : **Constitutional Review of sections 41(2), 166, 190(1)(a), 211, 212, of the Constitution**

LEGAL ADVISER : **P Ngema**

REFERENCE NUMBER : **194 / 2012** (CR 12/12)

CR12 – 12

"Democracy means freedom to choose"

INKATHA

Inkatha Freedom Party
IQembu leNkatha Yenkululeko

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Ref. C-con-120531

31 May 2012

Ms Pat Jayiya
Committee Secretary
Constitutional Review Committee
Parliament
via email pjayiya@parliament.gov.za

Dear Ms Jayiya,

SUBMISSION OF THE IFP TOWARDS ANNUAL CONSTITUTIONAL REVIEW

The Inkatha Freedom Party submits that the following sections of the Constitution require review –

1. **Chapter 3, Section 41(2)**
   Houses of Traditional Leaders and Traditional Councils should be included as intergovernmental structures, to facilitate intergovernmental relations.

2. **Chapter 7**
   Local Municipalities should be diséstablished and replaced by Traditional Councils as service providers within traditional communities. Sections 151 and 155 should be amended and municipalities be replaced by Traditional Councils. This will enable efficient service delivery in traditional communities.

3. **Chapter 8, Section 166**
   Traditional Courts should be included as one of the courts.

4. **Chapter 9, Section 190(1)(a)**
   This section should be amended to provide that the Independent Electoral Commission manage elections in traditional communities in consultation with Traditional Councils.

5. **Chapter 12**

It must be specified that Traditional Councils are the primary local government structure in rural areas. Section 211 must be amended to provide that the institution of Traditional Leadership is guaranteed and protected, and not only recognised. The recognition of Traditional Leadership should include all layers of Traditional Leadership, to prevent the introduction of other layers outside the Constitution. The Houses of Traditional Leaders should be regarded as Departments operating under Parliament and Provincial Legislatures.

Yours sincerely,

PRINCE MANGOSUTHU BUTHELEZI MP
PRESIDENT: INKATHA FREEDOM PARTY

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LEGAL OPINION
[Confidential]

TO : Adv. SP Holomisa, MP and Mr BA Mnguni, MP
Co-Chairpersons of the Constitutional Review Committee

COPY : Acting Secretary to Parliament

DATE : 17 October 2012

REFERENCE : 194 / 2012

COM REF : CR 12 / 12

SUBJECT : REQUEST TO REVIEW SECTIONS 211, 212 AND CHAPTERS 3 AND 7 OF THE CONSTITUTION

1. Our Office was requested to advise on the submission from the Office of the President: Inkatha Freedom Party to review sections 41(2), 166, 190(1)(a), 211, and chapter 7 of the Constitution.

2. Please be advised that some of the issues raised in the submission were raised during 2009, 2010 and 2011 constitutional review process wherein our Office provided three legal opinions referenced 146/ 09 (Committee Reference 7 and 13) and 94/10 (Committee Reference 7), and 130/11 (Committee Reference 6/11) respectively. These legal opinions are attached for ease of reference.

3. We will in turn deal with each submission proposal.

Intergovernmental structures: s 41(2) of the Constitution

4. The submission proposes that Houses of Traditional Leaders and Traditional Councils should be included as intergovernmental structures to facilitate intergovernmental relations. Section 41(2)(a) of the Constitution empowers Parliament, through legislation, to establish or provide structures and institutions that promote and facilitate intergovernmental relations.

5. Section 41(2) of the Constitution does not establish or determine structures and institutions to promote and facilitate intergovernmental relations. The section merely

obliges Parliament to enact legislation that establishes or provides for structures and institutions to promote and facilitate intergovernmental relations.

6. Parliament enacted the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) (IGR Act) to give effect to the provisions of section 41(2)(a) of the Constitution. Chapter 2 of the IGR Act sets out and establishes intergovernmental structures at national, provincial and municipal spheres of government. The established intergovernmental structures includes:

    - President's Co-ordinating Council (s 6 of IGR Act);
    - national intergovernmental forums (s 9 of IGR Act);
    - provincial and other intergovernmental forums (s 16 and 21 of IGR Act);
    - Premier's intergovernmental forums (s 18 of IGR Act);
    - Inter-provincial forums (s 22 of IGR Act);
    - Inter-municipality forums (s 28 of IGR Act); and
    - District intergovernmental forums (s 24 of IGR Act).

7. Indeed out of the above-mentioned intergovernmental structures established by the IGR Act, traditional leadership or traditional councils structures are not expressly incorporated. However, there are provisions which permit the chairperson of each structure to invite any person to the meeting of the forum. In my view the mentioned provisions could be used by chairpersons of the forums to extend invitations to traditional leadership. It can be contended that due to the many previous submissions alluding to a similar point, it is apparent that such a provision does not suffice as an expression for a mandatory inclusion or actual invite to traditional authority, but leaves it discretionary on the chairperson for each intergovernmental forum. Clearly that is unsatisfactory state of affairs for traditional leadership.

8. In addition, section 5 of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) permits the creation of partnerships between district and local municipalities and kingship and queenship councils, principal traditional councils and traditional councils within traditional communities. The national government and all provincial governments are enjoined to promote partnerships between local municipalities and traditional councils through legislative or other measures. Section 81 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), (Municipal Structures Act) also provides a manner under which traditional leaders should participate in local government structures and matters that affect traditional communities.

9. In my view, any change to the current state of affairs is a policy consideration and any amendment proposals should be directed to the IGR Act and not necessarily the Constitution.

Chapter 7: Disestablishment of local municipalities in traditional communities

10. The submission suggests that local municipalities within traditional communities should be disestablished and replaced by traditional councils. The submission suggests an alternative to the existing regime of government as stipulated in the Constitution.

11. Section 155(1) of the Constitution determines the categories of municipalities. In terms of section 155(1)(b) a local municipality is a category B municipality which shares municipal executive and legislative authority in its area with a district municipality within whose area the local municipality falls.

12. In terms of section 155(2), (3), (5), (6) and (6A) of the Constitution, national and provincial legislation is obliged to determine and establish different types of municipalities. However, with the constitutional mandate to review the Constitution conferred on the Committee by section 45(1)(c) of the Constitution, the Committee may decide on the appropriate manner to address the submission even if it is contrary to the existing structure of government.

13. Currently a municipality has both legislative and executive powers vested with the municipal council. Legislative bodies are democratically elected to represent the people and ensure government by the people under the Constitution[1] in terms of the legislated electoral system.

14. The traditional councils are not elected bodies but are bodies established in terms of section 3 of the Traditional Leadership and Governance Framework Act. Traditional leadership is according to customary law. Customary law, like the common law and any other law is now governed by the Constitution. The Constitutional Court in *Pharmaceutical Manufacturers' Association of South Africa: In re Ex parte President of the RSA 2000 (2) SA 674* explained that there is no law or public power that can exist separately from the Constitution because there is only one system of law.

15. In our previous opinion we dealt extensively with the proposal to disestablish local municipalities and their replacement by traditional councils within traditional communities. We refer the Committee to the view, which has been reduced to current policy argued by Christiaan Keulder[2], that traditional authorities should be fully incorporated into formal local government structures under the control of the elected structures in line with the Constitution. She argues that traditional leaders should not have legislative powers and should not be turned into a politically elected office. The White Paper on Traditional Leadership published in July 2003, is the current policy adopted by Cabinet, afforded traditional leadership and traditional councils an

[1] See section 42, 43, 61, 105 and 157 of the Constitution.
[2] See Traditional Leaders and Local Government in Africa, Lessons for South Africa, Christiaan Keulder.

advisory role in any of the government programmes which impact on traditional communities[3].

16. In summary the proposal suggests that traditional councils in traditional communities should have the local municipalities' competences. South Africa is a sovereign, democratic state founded on the constitutional values[4] inclusive of a multi-party system of democratic government. I am of the opinion that, it is a policy decision to decide whether the traditional councils are in a position to deliver municipal councils' constitutionally assigned obligations or if there should be a different governance structure applicable only to traditional communities. In line with the Constitution, a policy decision can be made either by Parliament or the executive.

17. The submission further proposes that the Houses of Traditional Leaders should be regarded as departments run by Parliament and Provincial Legislatures or that traditional community must be run by traditional councils instead of local municipal councils. Departments are established by the President in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994) and not in terms of the Constitution. If the traditional leadership or traditional councils prefer to be departments or part of the legislatures that is a policy consideration which requires an adopted policy.

18. The Committee or the executive may consider policy proposals in this regard which may alter the Constitution or proposal be accommodated through the Public Service Act.

Traditional courts as s 166(e) courts under Constitution

19. We now turn to deal with the submission which proposes that traditional courts must be included in section 166 of the Constitution. Section 166(e) provides that courts are any other court established by an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts. (Underline is my emphasis). We agree with the submitter that unless traditional courts are established by an Act of Parliament as such, traditional courts are not courts envisaged in section 166(e).

20. It is crucial to note that currently the traditional courts are not established in terms of an Act of the democratically elected Parliament but are in existence in terms of customary law and the Black Areas Administration Act, 1927 (Act No. 38 of 1927). A Traditional Courts Bill is currently considered under Parliament's legislative processes.

[3] On page 59 of the White Paper published in Gazette No. 25438 dated 10 September 2003, the conclusion on the role of traditional leaders.
[4] See section 1 of the Constitution of the Republic of South Africa.

21. In the *In Re: Certification of the Constitution of the RSA, 1996 1996 (10) BCLR 1253 (CC)* at paragraph 199, the Court said:

> Traditional Courts functioning according to indigenous law are not entrenched beyond the reach of legislation. NT 166 does not indeed provide for their recognition. Subsection (e) refers to "any other court established or recognised by an Act of Parliament". .. The qualification "which may include any court of a status similar to either the High Courts or the Magistrates' Courts" can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list.

22. Still in paragraph 199, the Court pronounced clearly that 'section 166 does not preclude the establishment or continuation of traditional courts.' In my view it follows that until an Act of Parliament is promulgated, giving effect to the structure, functioning and authority of traditional courts, as courts envisaged by section 166(e), traditional courts are not in the ambit of section 166(e).

23. In my view therefore, there is no need to amend section 166(e) of the Constitution as the provisions of section 166(e) are capable to accommodate traditional courts as courts envisaged in section 166(e) of the Constitution. It is my view that the proposed amendment to section 166 of the Constitution is not justifiable in order to recognise traditional courts as courts of law, but same could be achieved through an Act of Parliament.

Managing elections in traditional communities by traditional councils

24. We now deal with the submission that the Independent Electoral Commission must manage elections within traditional communities in consultation with traditional councils, thus a proposal to amend **section 190(1)(a)** of the Constitution.

25. The Chapter 9 institutions supporting constitutional democracy are listed in section 181 of the Constitution with their functions or powers constitutionally defined. Section 190(1)(a) provides that the Electoral Commission must manage elections of national, provincial and municipal legislative bodies in accordance with national legislation. It is a common factor that when the Electoral Commission conducts its constitutional obligation, to manage elections of national, provincial and municipal legislative bodies, the Constitution does not require the Electoral Commission to manage the elections in consultation with any of those government spheres elections are conducted for. (Underline is my emphasis)

26. According to section 5[5] of the Electoral Commission Act, (Act No. 51 of 1996), the Electoral Commission can perform certain functions consistent with consulting or

[5] **5. Powers, duties and functions of Commission**
(1) The functions of the Commission include to—

liaising with defined institutions in general terms. The relevant parts of section 5 of the Electoral Commission Act provides as follows:

- In terms of subsection 5(g) the Electoral Commission can establish and maintain liaison and cooperation with parties; and
- In terms of subsection 5(l) the Electoral Commission can promote cooperation with and between persons, institutions, governments and administrations for the achievement of its objects.

27. In my view the quoted provisions of the Electoral Commission Act are sufficiently wide to accommodate the consultation of traditional councils within traditional communities for purposes of the Electoral Commission's functions.

28. The submission suggests something contrary to the Constitution and the Electoral Commission Act for purposes of elections in traditional communities. Neither the Constitution nor the Electoral Commission Act provides in the peremptory expression that the Electoral Commission must consult with those whom it is managing elections for. However through the means established by the Electoral Commission the engagement and consultation occurs whenever necessary.

(a)manage any election;
(b)ensure that any election is free and fair;
(c)promote conditions conducive to free and fair elections;
(d)promote knowledge of sound and democratic electoral processes;
(e)compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters;
(f)compile and maintain a register of parties;
(g)establish and maintain liaison and cooperation with parties;
(h)undertake and promote research into electoral matters;
(i)develop and promote the development of electoral expertise and technology in all spheres of government;
(j)continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith;
(k)promote voter education;
(l)promote cooperation with and between persons, institutions, governments and administrations for the achievement of its objects;
(m). . . . .
(n)declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections;
(o)adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature; and
(p)appoint appropriate public administrations in any sphere of government to conduct elections when necessary.

29. The phrase "in consultation" has been accorded the meaning that the other stakeholder may not make the final decision without being in agreement with the other person who must be consulted[6]. In turn such a scenario creates a stalemate where the parties cannot have consensus. It is my view that such a consequence was never intended by the Constitution drafters. In line with the above views, the status of traditional councils including the role they may have during elections is a policy decision which the Committee may consider and decide whether the proposal is accepted or not. It is thus my view that there is no justified Constitution review in this regard, but after policy considerations by the Committee, amendments should focus on the Electoral Commission Act.

30. Other parts of the submission are advocating for policy reconsiderations to change some parts of the government structure. The policy considerations can be done either by the Committee or the executive.

31. In conclusion I am of the view that the proposed review of sections 41(2), 166, 190(1)(a), 211 Chapter 7 of the Constitution as proposed in the submission of the Inkatha Freedom Party is not necessary but perhaps consideration of legislative amendments to national and provincial legislation could be warranted.

Ms P. Ngema
Parliamentary Legal Adviser

[6] See MacDonald and Others v Minister of Minerals and Energy and Others 2007(5) SA 642(C) and the dictionary of legal words and phrases, Claasen Volume 2, D-I.

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LEGAL OPINION
[Confidential]

TO: Adv SP Holomisa, MP
Mr BA Mnguni, MP
Co-Chairperson of the Joint Constitutional Review Committee

COPY: Mr MB Coetzee
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv G Rhoda – Parliamentary Legal Adviser]

DATE: 30 August 2012

SUBJECT: Legal Opinion on the submission by the Commission for Gender Equality

REFERENCE: 195/2012

CRC Ref: CR12-13

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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MEMORANDUM

TO: **Adv SP Holomisa, MP**
Mr BA Mnguni, MP
Co-Chairperson of the Joint Constitutional Review Committee

COPY: **Mr MB Coetzee**
Acting Secretary to Parliament

FROM: **Constitutional and Legal Services Office**
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DATE: **30 August 2012**

REF NO: **195/2012**

CRC Ref: CR12-13

SUBJECT: **Legal Opinion on the submission by the Commission for Gender Equality to the Joint Constitutional Review Committee**

INTRODUCTION

1. Our Office was requested to advise on the submission by the Commission for Gender Equality for constitutional review by the Joint Constitutional Review Committee.

2. The Commission for Gender Equality (CGE) argues for various amendments to the Constitution of the Republic of South Africa, 1996. These will be discussed individually.

ANALYSIS

Section 9(3) of the Constitution, 1996

3. The CGE argues for the amendment of section 9(3) of the Constitution, 1996 by suggesting that 'disability' be included as one of the listed grounds on which the state may not discriminate.

4. The CGE asserts that it "observes that Section(3) does not include the disabled who are a vulnerable group and face considerable discrimination as well as marginalisation especially in the workplace."

5. Section 9(3) of the Constitution, 1996 reads:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

6. As can be read in section 9(3), disability is already expressly listed as one of the grounds on which the state may not discriminate.

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7. This submission therefore proposes an amendment to the Constitution that already exists. It is recommended that the Joint Constitutional Review Committee does not consider the submission for the purpose of an amendment to the Constitution.

Section 132 of the Constitution, 1996

8. The CGE proposes that section 132 of the Constitution, 1996 be reviewed in order to ensure compliance with gender equity targets when appointments are made by the Premier.

9. The CGE further submits that "such an approach is envisaged in terms of section 9 of the Constitution since no checks and balances are created in section 132".

10. From the submission provided, it is not clear which gender equity targets the CGE refers to and whether these targets are legally binding on Premiers.

11. Section 125 of the Constitution, 1996 provides that the executive authority of a province is vested in the Premier of that province. The Premier of a province exercises his/her executive authority when he/she appoints her cabinet.

12. Any executive action must be in line with the spirit and purport of the Constitution, 1996. In exercising his/her executive action, the Premier of a province is bound only by the Constitution, 1996.

13. Section 1 of the Constitution, 1996 furthermore provides that as a democratic state, South Africa is founded on principles of the supremacy of the Constitution and the rule of law. This is confirmed in section 2 of the Constitution. Therefore, any conduct, including the conduct of a Premier, has to be measured against these constitutional standards.

14. A Premier's action in appointing members of the executive council is therefore only fettered by the constitutional principles described above.

15. If any person, institution or body is of the opinion that these constitutional standards are not adhered to, it is open to said person, institution or body to follow the available legal avenues for challenge.

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16. It is recommended that the Joint Constitutional Review Committee does not consider the submission for the purpose of an amendment to the Constitution.

Adv G Rhoda
Parliamentary Legal Adviser