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MEMORANDUM

[Confidential]

TO:	**Mr DL Ximbi, MP** **Chairperson of the Select Committee on Security and Justice**
COPY:	**Mr Gengezi Mgidlana** **Secretary to Parliament**
FROM:	**Constitutional and Legal Services Office** **[Ms SS Isaac – Parliamentary Legal Adviser]**
DATE:	**25 January 2016**
SUBJECT:	**Appointment of the National Council for Correctional Services in terms of section 83(2)(h) of the Correctional Services Act, (Act No. 111 of 1998)**
REFERENCE:	**104b/15**

MESSAGE: Please find attached the above Memorandum for your attention

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MEMORANDUM

To: **Mr DL Ximbi, MP**
Chairperson of the Select Committee on Security and Justice

Copy: **Mr Gengezi Mgidlana**
Secretary to Parliament

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

Date: **25 January 2016**

Ref: **104 b/15**

RE: Appointment of the National Council for Correctional Services in terms of section 83(2)(h) of the Correctional Services Act, (Act No. 111 of 1998)

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1. Our Office was requested by Mr DL Ximbi, MP; the Chairperson of the Select Committee on Security and Justice ('the Chairperson') to advise on the appointments made by the Minister of Justice and Correctional Services ('the Minister') to the National Council for Correctional Services ('National Council') in terms of section 83(2)(h) of the Correctional Services Act, 1998 (Act No. 111 of 1998) ('the Act').

2. We were specifically requested to provide a legal opinion on:

   a. What is the meaning of the term 'in consultation with' and Parliament's role in terms of section 83(2)(h) of the Act?
   b. Whether the Minister can consult after the fact to rectify the previous omission?

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c. The legal implications of the work done by the persons appointed by the Minister should their appointments be found to be in contravention of the Act?
d. The way forward in terms of the appointment made?

3. The above questions are answered under the following headings?

   a. the implication of the appointments that were made by the Minister in June 2015, particularly in relation to the validity of the appointments;
   b. the status of decisions taken and recommendations made by the National Commission since 1 June 2015 especially in relation to parole matters; and
   c. the recourse available to Parliament and its committees to remedy the shortcomings in the appointment process.

BACKGROUND

4. In a letter dated 3 November 2015, the Minister informed the Chairperson that he had appointed members to the National Council in terms of section 83 of the Act. The appointment process began on 1 February 2015 and the new members commenced their duties at the National Council on 1 June 2015.

5. The Minister further indicated that due to an oversight on his part, he did not consultant with the relevant Parliamentary Committees in appointing members to the National Council in terms of section 83(2)(h).

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LAW

a. The validity of the appointments

6. In terms of the Act, the Minister must appoint a National Council.[1] The function of the National Council is to advise the Minister on policy development. The National Council is required to appoint some of its members to act as the Correctional Supervision and Parole Review Board to decide parole matters submitted for review. The National Council also makes recommendations regarding parole applications of persons serving life sentences. The National Council is made of members including persons appointed from the judiciary, public entities, and listed government departments. These appointments are made by the Minister after consulting with relevant heads of those bodies.

7. Further, section 83(2)(h) of the Act provides that:

The National Council consists of–

(h) four or more persons, not in the full-time service of the State, appointed as representatives of the public **in consultation** with the relevant Parliamentary Committees. (My emphasis)

The meaning of 'in consultation'

8. 'In consultation' is not defined in the Act but the ordinary meaning of this phrase has been considered by our courts.[2]

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[1] Section 83(1), Correctional Services Act, 1998 (Act No. 111 of 1998).

[2]The Constitution of the Republic of South Africa, 1993 (the Interim Constitution) also provides guidance as to the meaning of 'in consultation'. Section 233(3) and (4) provides that:

3. Where in this Constitution any functionary is required to take a decision in consultation with another functionary, such decision shall require the concurrence of such other functionary: Provided that if such other functionary is a body of persons it shall express its concurrence in accordance with its own decision-making procedures.

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9. In *National Director of Public Prosecutions and Others v Freedom Under Law*, the Court stated:[3]

> As to the legal principles involved, it has by now become well established that when a statutory provision requires a decision-maker to act 'in consultation with' another functionary, it means that there must be concurrence between the two. This is to be distinguished from the requirement of 'after consultation with', which demands no more than that the decision must be taken after consultation with and giving serious consideration to the views of the other functionary, which may be at variance with those of the decision-maker.

10. Similarly, in *McDonald and Others v Minister of Minerals and Energy and Others*, the Court stated that where a functionary is required to act in consultation with another functionary, there must be concurrence between the functionaries.[4]

11. From the above, it is clear that where a statute requires parties to act 'in consultation' with each other, there must be concurrence between those parties.[5] Further, the term 'in consultation' in comparison to 'after consultation' is a more exacting standard and requires that each party gives consideration to the views of the other before a final decision is reached. There must be agreement or in simple terms, a meeting of the minds where each party confers with the other and applies their mind in considering the pros and cons of the matter by discussion or debate.[6]

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4. Where in this Constitution any functionary is required to take a decision after consultation with another functionary, such decision shall be taken in good faith after consulting and giving serious consideration to the views of such other functionary.

[3] *National Director of Public Prosecutions* 2014 (4) SA 298 (SCA). para 38

[4] *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 (C). para 18 Likewise, where the law requires a functionary to act 'in consultation with' another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act 'after consultation with' another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.

[5] *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 (C). para 18.

[6] *Maqoma v Sebe NO and Another* 1987 (1) SA 483 (Ck). Pg. 490

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Failure of the Minister to consult

12. The Minister has on his own admission failed to consult with relevant Parliamentary committees. The question that arises is, what is the consequence of the Minister's failure to consult as required by the Act?

13. The case of *National Director of Public Prosecutions*[7] involved a challenge to the decision taken by the Special Director to withdraw various criminal charges against an accused person. Section 23(3) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998)[8] required that the Special Director take such a decision in consultation with the relevant Director of the area of jurisdiction concerned. The court found that the failure of the Special Director to take the decision in consultation with the relevant Director was not in accordance with the dictates of the empowering statute and for that reason alone the decision could not stand.[9]

14. In *McDonald* the court found that the Minister was, among other steps, required 'in consultation with the relevant municipalities to make regulations on the development surrounding any nuclear installation...'[10] The Minister had not followed this process. The court held that the process to make a decision in consultation with the relevant municipality was established by Parliament. The Minister could not bypass this process and create an alternative process.

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[7] *National Director of Public Prosecutions and Others v Freedom under Law* 2014 (4) SA 298 (SCA).

[8] National Prosecuting Authority Act, 1998 (Act No. 32 of 1998). Section 24(3):

A Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they shall be exercised, carried out and performed <u>in consultation</u> with the Director of the area of jurisdiction concerned. (my emphasis)

[9] *National Director of Public Prosecutions*. para 42.

[10] The National Nuclear Regulator Act 47 of 1999 (the Act) confers upon the Minister the power to make regulations in the following terms:

(4) The Minister may, on recommendation of the board [of the Regulator] and <u>in consultation</u> with the relevant municipalities, make regulations on the development surrounding any nuclear installation to ensure the effective implementation of any applicable emergency plan.

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15. Where the parties fail to consult when obliged to do so, they act outside the requirements of the empowering statute. It is clear from the above cases that a decision taken that does not comply with the provisions of the empowering legislation may be declared unlawful and invalid by a court. In this instance, the National Council was not properly constituted due to the Minister's failure to consult with the parliamentary committees prior to appointing the public representatives.

Can consultation take place retrospectively?

16. The Act does not set out the process by which the Minister is required to consult with the relevant Parliamentary Committees. However, it is inherent in the meaning of 'in consultation' that there must be meaningful consultation where parties to the decision are able to consider different views before reaching a final decision. Also implied is that for consultation to be meaningful it must take place prior to the decision being made.[11] Consultation that takes place after a decision is made does not allow for one party to convince the other party of their views or for a meeting of the minds to occur after consideration is given to the different views. Hence, consultation retrospectively contradicts the very essence of consultation.

17. In this matter, the Minister informed the Committee of his oversight in the appointment process (5) months after it had occurred. In that time the members of National Council had commenced duties and had made decisions in the course of their duties. Consultation after the appointments were made prevented the relevant Committees from applying their minds, from considering the pros and cons and from seeking to reach consensus with the Minister prior to the appointments being made.

18. Further, as the National Council has already commenced with its duties, their appointment is no longer subject to the outcome of the consultation as envisaged

[11] Gauntlett, J. Freedom Under Law: Proposed changes to the appointment of Chief Justice.

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by the Act. Hence, it is my view that consultation after the appointments were made is meaningless and would not meet the requirements of section 83(2)(h).

19. Also, in terms of section 83(2)(h) the relevant Parliamentary committees are only empowered to act prospectively. The Act does not empower the Committee to consult with the Minister retrospectively.

b. The status of decisions taken and recommendations made by the National Commission

20. The next question that arises is, what is the status of the National Council and the decisions that it has made?

Is the Minister's decision reviewable?

21. In answering the above question, the status of the Minister's decision must first be established. The Minister's action in appointing the National Council amounts to executive action in terms of section 85(2)(e) of the Constitution in that he was performing an executive function provided for in national legislation.[12] The grounds of review under the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) are not applicable in this instance as executive action is specially excluded from the application of PAJA.

22. However despite its exclusion from PAJA, executive action may still be subject to judicial review. It has been noted in various judgments that 'the legality principle has by now become well-established in our law as an alternative pathway to judicial review where PAJA finds no application.'[13]

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[12] *Minister of Defence and Military Veterans v Motau.* CCT 133/13
Promotion of Administrative Justice Act 3 of 2000. Section 1 , definition of 'administrative action' excludes *(aa)* the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) *(a)*, *(b)*, *(c)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85 (2) *(b)*, *(c)*,*(d)* and *(e)*, 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution.

[13] *National Director of Public Prosecutions and Others v Freedom under Law* 2014 (4) SA 298 (SCA).para 28

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23. All public power must be exercised in compliance with the Constitution as the supreme law of the Republic. The doctrine of legality gives effect to this founding principle of constitutional supremacy by requiring that the legislature and the executive may only exercise public power of perform a function beyond that which is conferred upon them by law.[14] Hence, where public power is exercised beyond an empowering provision the decision may be reviewed on the grounds of legality and be set aside by a court.[15]

24. In the matter under consideration there are no pending court processes to review the Minister's decision. Here the Minister has on his accord informed Parliament of the error in the appointment process. However, even if both the Committee and the Minister are in agreement that the empowering Act was not complied with, there is no empowering statute or constitutional provision that gives them the legal authority to declare the decision to be invalid.[16] This power rests solely with the courts.

25. The Constitutional Court noted in *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* that invalid decisions by government whether falling

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[14] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC). para 49

> The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[14] In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

[15] *National Director of Public Prosecutions and Others v Freedom under Law* 2014 (4) SA 298 (SCA). *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC).

[16] *Oudekraal Estates (Pty) Ltd V City Of Cape Town and Others* 2004 (6) SA 222 (SCA). para 26

> '...But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

under the ambit of PAJA or outside it may only be set aside though proper review processes.[17] The Court stated that:[18]

> ...When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.

26. In the recent decision by the Supreme Court of Appeals in *SABC v Democratic Alliance*, the Court similarly noted that the principle that a decision has legal consequences until it is reviewed and set aside by a court has application beyond administrative functionaries to decisions by bodies such as the Public Protector.[19]

27. Therefore, the decision the Minister's decision may only be set aside if it is reviewed by a court and found to be invalid. Until such time the decision of the Minister to appoint the National Council stands and has legal consequences.

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[17] *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* (77/13) [2014] ZACC. para 82, the Constitutional Court noted that invalid decisions by government whether falling under the ambit of PAJA or outside may only be set aside though proper review processes.

'PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter application. They must do the same even if PAJA does not apply.'

[18] *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* (77/13) [2014] ZACC. para 65

[19] *SABC v DA* (393/2015) [2015] ZASCA 156. para 45. The Court stated:

> 'For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked (*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26). It was submitted, however, that that principle applies only to the decision of an administrative functionary or body, which the Public Protector is not. It suffices for present purposes to state that if such a principle finds application to the decisions of an administrative functionary then, given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution. After all, the rationale for the principle in the administrative law context (namely, that the proper functioning of a modern State would be considerably compromised if an administrative act could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question (*Oudekraal* para 26)), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports.'

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Status of decisions made by the National Council

28. The decision made by the Minister to appoint the National Council and the decisions taken by the National Council in carrying out its duties must be distinguished. As discussed above the Minister's decision as executive action may be reviewed on the basis of legality. The National Council, in taking decisions in terms of the Act, is exercising a public power in terms of legislation. Accordingly, its actions amounts to administrative actions as defined by PAJA[20] and its decision may be reviewed in terms of the grounds for judicial review set out in that Act.[21]

29. Our courts, as indicated above, have held that decisions made in the exercise of public power cannot merely be disregarded even if the decision was incorrectly made.[22] Hence, the decisions of the National Council may not be disregarded merely because the National Council was not appointed in terms of the proper process. The National Council made its decisions under the belief that it was a body properly appointed in terms of the Act. Further, the decisions may have wide reaching implications especially where it involves parole matters. Affect parties must be afforded the opportunity to participate in any review process.

30. Hence, until such time that a decision of the National Council is reviewed and set aside in terms of PAJA, its decision still has legal effect.

The recourse available to Parliament and its committees

31. There is little that may be done by the Committees to rectify the decision of the Minister in terms of its constitutional powers afforded to it as the legislature. For

[20] Section 1, Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

[21] Section 6, Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

[22] *Oudekraal Estates (Pty) Ltd V City Of Cape Town and Others and MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd.*

the Minister's decision to be declared invalid, it must be reviewed and set aside by a court.

CONCLUSION

32. It is my view that

32.1. The Minister's appointment of members of the National Council in terms of section 83(2)(h) did not comply with that provision of the Act. However, until such time that the appointment process is reviewed and set aside by a court, the legal consequence of the process remains in force.

32.2. The decisions of the National Council still has legal consequences until such time its establishment is reviewed and set aside and if the court makes a specific order regarding the status to the National Council's decisions.

32.3. Parliament and its committee have little recourse to remedy the shortcomings in the appointment process within its powers as the legislature. The decision of the Minister to appoint the National Council may only be reviewed by a court.

Ms SS Isaac
Parliamentary Legal Adviser

Quality Assurance:

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Date: 25/1/16