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**MEMORANDUM**

**[Confidential]**

**TO: Mr LP Nzimande  
Mr VG Smith  
Co-Chairpersons of the Joint Constitutional Review Committee**

**COPY: Ms P Tyawa  
Acting Secretary to Parliament**

**Adv ME Phindela  
Acting Deputy Secretary to Parliament: Core Business**

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**FROM: Adv Z Adhikarie  
Chief Legal Adviser: Constitutional and Legal Services Office**

**DATE: 19 October 2017**

**REF: 116/2017  
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**SUBJECT: OPINION ON THE CONSTITUTIONAL REVIEW SUBMISSION BY R  
MAHARAJ REGARDING THE ELECTORAL SYSTEM**

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## INTRODUCTION

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

## OVERVIEW OF SUBMISSION

2. In his submission, Mr Maharaj, calls on the Committee to revisit the 2003 recommendations made the Slabbart Commission ('the Commission') regarding the electoral system.
3. Mr Maharaj indirectly concedes that the proportional representation system that is currently supported by the Constitution is an acceptable democratic electoral system. He states that this choice of system "might have been necessary immediately after the first parliamentary elections". However, he argues that the system requires adjustment because of "an 'abuse' of this system by the majority party."

## ANALYSIS

4. The Commission's inquiry context was the following:

*"South Africa has been undergoing constitutional transformation since 1993, a process ushered in by the interim Constitution... This Constitution provided for the members of the National Assembly and the legislatures of the nine provinces to be elected in 1994 by universal adult franchise in accordance with a system of proportional representation. With minor modifications (details in Annexure A to Schedule 6 of the [Final] Constitution), the 1994 electoral system was carried over to the 1999 national and provincial elections...*

*The provisions of the final Constitution relating to an electoral system do not, however, extend beyond the 1999 elections. The Constitution requires that an electoral system be introduced through the enactment of national legislation.... This situation led Cabinet to established an*

*Electoral Task Team [the Commission] to draft legislation for an electoral system...”<sup>1</sup>*

5. The constitutional provision in question, prescribing legislation is section 46 of the Constitution, which reads as follows:

*“(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that –*

- a. is prescribed by national legislation;*
- b. is based on the national common voters roll;*
- c. provides for a minimum voting age of 18 years; and*
- d. results, in general, in proportional representation.*

*(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.”*

6. The legislation enacted in accordance of section 46 of the Constitution is the Electoral Act 73 of 1998.
7. The Commission recommended that 200 members of Parliament (half the current component) be elected directly by their constituents, and not deployed from a list, as is currently the practice associated with the proportional representation approach currently reflected in South Africa’s electoral system, which recommendation was said to speak to the enhancement of accountability.
8. Not all the recommendations initially reported is reflected in the Electoral Act. From a reading of Mr Maharaj’s submission, it is assumed that he is now requesting the Committee to reflect upon as he submitted that he implores the Committee to “ensure that the Slabbert Commission recommendations are implemented.”
9. Section 114 of the Electoral Act addresses the issue of “Composition of National Assembly and provincial legislatures” and stipulates that “[t]he formulas referred to in sections 46 (2) and 105 (2) of the Constitution are set out in Schedule 3”, which formula reads as follows:

*Formula for determining number of members of National Assembly*

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<sup>1</sup> Report of the Electoral Task Team (2003), page 1.

(1) *By taking into account available scientifically based data and representations by interested parties, the number of seats of the National Assembly must be determined by awarding one seat for every 100 000 of the population with a minimum of 350 and a maximum of 400 seats.*

(2) *If the total number of seats for all provincial legislatures determined in terms of item 2 exceeds 400, the number of seats for the National Assembly may not be less than 400.*

10. To provide further context, it must be noted that Constitutional Principle VIII, which informed the drafting of the Constitution, reads as follows:

*There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.*

11. Although the Constitutional Principles are not binding, these do have interpretative value, in providing insight and guidance as to the reason and structure of constitutional provisions.
12. In considering the general proportional representation informed electoral system provisions of the then 'new text' of the Constitution, the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*<sup>2</sup> declared that "[t]here is no suggestion that those provisions of the NT offend in any way"<sup>3</sup>

## CONCLUSION

13. In conclusion –

- a. it appears as if Mr Maharaj is actually requesting an amendment of the Electoral Act, rather than an amendment of section 46 of the Constitution, as section 46(1)(d) requires a proportional system *in general*, and nothing in the Electoral Act formula or in the Slabbert Commission's recommendation detracts from a proportional representation *in general* – thus amounting to a submission which calls for legislative amendment and falls outside the mandate of the

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<sup>2</sup> 1996 (4) SA 744 (CC).

<sup>3</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) at para 180.

Committee's current process, but can still be referred to the relevant Portfolio Committee for consideration;

- b. however, if the Committee wishes to interpret Mr Maharaj's submission as a call for the Slabbert Commission's recommendations to be reflected in section 46 of the Constitution, such will alter the nature of the section moving away from a general proportional representation guideline to a specific proportional formula provision, which would require the Committee to take a policy decision as to whether to support such an amendment proposal in its constitutional review report.



**Adv Z Adhikarie**  
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