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**LEGAL OPINION**

**[Confidential]**

**MEMORANDUM**

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| **TO: Chairperson, Joint Committee on Constitutional Review****COPY: Acting Secretary to Parliament [Ms P N Tyawa]** **FROM: Constitutional and Legal Services Office** **[Adv Z Adhikarie, Chief Parliamentary Legal Adviser]****DATE: 2 December 2020****REF. NO.: 140/2020** |
| **RE: ANNUAL REVIEW OF THE CONSTITUTION-** 1. **PROTECTION FOR PUBLIC OFFICIALS AGAINST UNLAWFUL INSTRUCTIONS**
2. **RIGHT AGAINST SELF-INCRIMINATION**
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**Introduction**

1. Our Office was requested to advise the Joint Committee on Constitutional Review (‘’the Committee’’) on the submission received from Mr Justin Ballot, a member of the public, requesting that the Constitution be amended to include “some kind of protection for officials to refuse to follow instructions if they believe that those instructions are in violation of the Constitution”. He also requests that the Constitution be amended to include the right not to self incriminate.
2. No specific legal question was posed to us so we accept that the Committee is seeking a general legal advice on the relevant regulatory framework and how it should proceed on the matter.

**PROTECTION AGAINST UNLAWFUL INSTRUCTIONS**

**Legal framework**

1. Section 1(c) of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on various values including the “supremacy of the Constitution and the rule of law”.
2. Section 2 of the Constitution provides that “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.
3. Section 195 of the Constitution sets out the “Basic values and principles governing public administration” and applies to all officials in the public administration[[1]](#footnote-1).

 “(1) Public administration must be governed by the democratic values and

 principles enshrined in the Constitution, including the following principles:

1. A high standard of professional ethics must be promoted and maintained.
2. Efficient, economic and effective use of resources must be promoted.
3. Public administration must be development oriented.
4. Services must be provided impartially, fairly, equitably and without bias.
5. People’s needs must be responded to, and the public must be encouraged to participate in policymaking.
6. Public administration must be accountable.
7. Transparency must be fostered by providing the public with timely, accessible and accurate information.
8. Good human resource management and career development practices, to maximise human potential, must be cultivated.
9. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”
10. Section 197 of the Constitution provides for the Public Service. Section 197(1) provides that “Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.
11. Section 3 of the Protected Disclosures Act, 2000 (Act No. 26 of 2000) that deals with protected disclosures, provides that “No employee or worker may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.”

**Discussion**

1. The Constitution prescribes various obligations and principles that apply to everyone and to public officials specifically. In terms of section 1(c), one of the founding values is the supremacy of the Constitution and the rule of law. Section 2 of the Constitution provides that any law and conduct inconsistent with it are invalid. All public officials are therefore bound to act within the confines of the law and any action taken outside the law is invalid.
2. Further, section 197 of the Constitution directs that the public administration must be governed by the democratic values and principles enshrined in the Constitution. These values include, amongst others, a high standard of professional ethics, accountability and transparency. With regard to public officials in the public service, section 197(1) of the Constitution provides the “… public service … must loyally execute the lawful policies of the government of the day”.
3. There are also specific legislation that governs the public service “which place a positive duty on an employee to abide by the legislative framework and to report irregularities to a higher authority…”[[2]](#footnote-2). Section 16A of the Public Service Act, 1994 provides that disciplinary action must be taken against a public servant for failure to comply with the Act. Regulation 11 of the Public Service Regulations, 2016[[3]](#footnote-3) issued in terms of the Public Service Act requires, amongst others, that public servants “abide by and strive to be familiar with all legislation and other lawful instructions applicable to his or her conduct and official duties”. Regulation 13(e) requires public servants to report to the relevant authority “fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law” and other matter ”which is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service”.
4. The Protected Disclosures Act provides for procedures for employees and workers to disclose information regarding unlawful or irregular conduct by their employers or other employees or workers in the employ of their employers. It also provides for protection of employees or workers who make a disclosure which is protected in terms of this Act. An employee may make a protected disclosure on, amongst others, a criminal offence and a failure to comply with a legal obligation. Section 3 of the Act protects employees who have made a protected disclosure that they must not be subject to an occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure. An employee who is subject to an occupational detriment may approach the Labour Court or another court having jurisdiction for appropriate relief.
5. While the Constitution does not provide a specific protection for public officials who refuse to follow an unlawful instruction, it does place a positive duty on all public officials to act within the law. The Public Service Act and its Regulations also place an obligation for public servants to act within the law and to report unlawful action. The Protected Disclosures Act provides procedures for employees to make protected disclosures regarding criminal or unlawful acts in the workplace and protects the employee from occupational detriments.
6. The submitter does not indicate what further provisions are required to protect public officials. We are of the view that legislation does provide some protections and that any further protections for public officials are best provided for by amending the existing legislation. However, if the Committee is of the view that a specific provision must be included to protect public officials who refuse to follow unlawful instructions, the Committee may consider such a proposal as it is a policy decision within the ambit of the Committee.

**RIGHT AGAINST SELF-INCRIMINATION**

1. Mr Justin Ballot requested that the Committee include the right against self-incrimination in the Constitution. Mr Ballot does not provide further details as to what in particular about the right that he requests to be amended.
2. Self-incrimination is defined as “the act of incriminating oneself or exposing oneself to prosecution, especially by giving evidence or testimony.”[[4]](#footnote-4)

**Legal Framework**

1. Section 35 of the Constitution provides for the rights to remain silent and against self-incrimination.

“35. Arrested, detained and accused persons—

1. Everyone who is arrested for allegedly committing an offence has the

 right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

1. Every accused person has a right to a fair trial, which includes the right—

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(j) not to be compelled to give self-incriminating evidence;”

**Discussion**

1. Section 35 of the Constitution provides for various rights for arrested, detained and accused persons. The Constitution protects the right against self-incrimination at both the arrest and trial phases of the criminal justice process.
2. At the arrest stage, section 35(1)(c) of the Constitution provides that an arrested person has a right not to be “compelled to make any confession or admission that could be used in evidence against that person”. At the trial stage, section 35(3)(j) provides that an accused person has a right to a fair trial which includes the “right not to give self-incriminating evidence.”
3. Further, interrelated to the right against self-incrimination is the right to remain silent. Section 35(1)(a) provides that an arrested person has a right to remain silent. Section 35(3)(h) provides that an accused has a right to fair trial and a right to remain silent and not to testify during proceedings.
4. Therefore, it is our view that section 35 of the Constitution already protects the right against self-incrimination.
5. If the Committee is in agreement with the above conclusion, we recommend the Committee address correspondence to Mr Ballot informing him that the Committee is satisfied that the existing legal framework adequately addresses his concerns.

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| **RE: ANNUAL REVIEW OF THE CONSTITUTION- T** |

*SIGNED ELECTRONICALLY*

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**Adv Z Adhikarie**

**Chief Parliamentary Legal Adviser**

1. Section 195(2) The above principles apply to—

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises. [↑](#footnote-ref-1)
2. Public Service Commission Republic Of South Africa. PSC Circular 1 of 2020: Reference Number 7/3/P [↑](#footnote-ref-2)
3. GNR.877 of 29 July 2016: Public Service Regulations, 2016 (Government Gazette No. 40167). [↑](#footnote-ref-3)
4. https://www.dictionary.com/browse/self-incrimination [↑](#footnote-ref-4)