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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: 27 November 2020****REF. NO.: 138/2020** |
| **RE: ANNUAL REVIEW OF THE CONSTITUTION- THE NEED TO ESTABLISH A CHAPTER NINE INSTITUTION TO INVESTIGATE AND PROSECUTE “GRAND” CORRUPTION IN SA** |

**Introduction**

1. Our Office was requested to advise the Joint Committee on Constitutional Review (‘’the Committee’’) on the submission received from Adv Paul Hoffman, Director of Accountability Now, concerning the amendment to Chapter 9 of the Constitution to establish a special body to investigate and prosecute allegations of “grand” corruption. 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.

 **Background**

1. The Committee issued a public invitation to members of the public to make submissions regarding the review of the Constitution. As a consequence of this invitation on 06 January 2020, the Chairperson of the Joint Committee on Constitutional Review received a submission from Adv P Hoffman SC, on behalf of Accountability Now, proposing an amendment to Chapter 9 of the Constitution with the view to establish a special body to investigate and prosecute allegations of “grand” corruption. From the submission it would appear that Adv Hoffman had made similar submissions in the past (4th and 5th Parliament) to no avail.
2. In essence the submission states that “*the Hawks are not up to the task at hand when it comes to countering grand corruption. Their structural and operational lack of security of tenure of office is the underlying problem, which is exacerbated by executive instead of parliamentary control and oversight of their duties*.” This, in his view, therefore can be remedied by an establishment of a special Chapter 9 Institution to investigate and prosecute corruption.
3. The upshot of the submission is that a new institution must be established and added to the existing Chapter 9 Institutions.

**Regulatory framework**

1. Section 45(1)(c) of the Constitution enjoins Parliament to establish a joint committee to review the Constitution annually.
2. Section 59 (1) of the Constitution provides that the National Assembly must facilitate public involvement in the legislative and other business of the Assembly and its committees.
3. Joint Rule 6 provides that members of the public may participate in joint committees by responding to public or specific invitations on matters before joint committees.
4. Section 179(1) of the Constitution, establishes a single national prosecuting authority (NPA). Subsection (2) authorises the national prosecuting authority to institute criminal proceedings on behalf of the state and to carry out any function incidental to instituting criminal proceedings. The Constitution requires the prosecuting authority to perform its function without fear, favour or prejudice.
5. The National Prosecuting Authority Act (Act No 38 of 1998) regulates the functioning of the prosecuting authority and its structures. In particular section 7 of the Act empowers the President to establish Investigating Directorates within the NPA by proclamation in respect of any offence.
6. Section 17A of the South African Police Service Act (Act No 68 of 1995) establishes the Directorate for Priority Crimes Investigations (HAWKS) and defines priority crimes.

**Discussion**

1. Our understanding of the proposal submitted is that the HAWKS do not have the adequate level of independence to be able to investigate allegations of corruption hence the suggestion that an additional Chapter 9 Institution must be established by amending that Chapter of the Constitution.
2. It is now common cause that the HAWKS are a special body specifically created by statute to investigate “priority crimes”. The definition of “priority crime” in the SAPS Act is broad enough to include fraud and corruption. In practice it is common cause that the HAWKS are performing this function in as far as the investigation of this category of crime.
3. As it is evident from the regulatory framework referred to above, prosecution of crime is the primary responsibility of the NPA as directed by both the Constitution and NPA Act. It is now again common cause that in order to enhance the fight against corruption and other related crime, the President has since established an Investigating Directorate within the NPA. This Directorate was established on 04 April 2019, by Proclamation 20 GG 42383.
4. Both NPA and HAWKS are constitutionally and legislatively designed to be independent bodies. Having regard to the Constitution, NPA Act, SAPS Act and the recent development of an establishment of the Investigating Directorate, it would appear to us that the submission by Accountability Now has been overtaken by events.
5. This being the case, we are of the view that the concerns raised by Accountability Now are already addressed and legislated for. The creation of another separate body would be a duplication of functions with concomitant financial consequences. It is further our view that if there are gaps in the existing legislation regulating these institutions, such gaps must be remedied in that legislation not the Constitution.
6. Notwithstanding the above and in the interest of completeness we state that from a policy point of view it is always open to the Committee to consider the proposal if it so inclined.
7. As such, if the Committee is in agreement with our conclusion, we would recommend the Committee address correspondence to Adv Hoffman informing him that the Committee is satisfied that the existing regulatory framework adequately addresses his concerns.

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*SIGNED ELECTRONICALLY*

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**Adv Z Adhikarie**

**Chief Parliamentary Legal Adviser**