**Joint Committee on Constitutional Review**

**Consideration of Submissions for the 2020-Year**

**10 March 2023**

1. **Background**

The Committee tabled 58 submissions for the 2020-year proposing amendment to the Constitution, after eliminating duplicate submissions ultimately remained with 54 official submission for consideration in the 2020-year cycle. The Committee carried out its review mandate and processed these submissions by categorising them into three categories. The Committee agreed that Category 1 Submissions did not fall within its mandate, that Category 2 Submission required a legal opinion, and that Category 3 Submissions denoted those ready for consideration. To date the Committee has processed 44 submissions, namely 33 Category 1 Submissions and 11 Category 3 Submissions, which were ready for a decision without necessitating submitter, stakeholder or legal advisor consultation. The secretariat has written back to these submitters to inform them of the Committee’s decision in relation to their submissions.

On 26 November 2021, the Committee received legal opinion from the Parliamentary Legal Services, wherein Category 2 Submissions of the 2020-year were presented. The Committee resolved that it needs time to consider the legal opinions for its deliberations and decisions on the desirability of these submissions in possibly amending the Constitution. In April 2022, the committee received a briefing by Content Advisor on a summary of all the legal opinions. The Committee was of the view that they would like to call submitters to present these submissions to it prior to making a decision on the desirability of the submissions.

1. **Category 2 Submissions:-**

Herein below follows, a tabulated summary of the legal opinions for consideration together with the legal opinions:-

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| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **1** | CRC ref:  2 of 2020  **Legal ref.:**  **133/2020** | Kgosiemang Moloko | Add a Chapter 9 Institution called The Commission for Internal Auditors  (AGSA) Auditor-General of South Africa. | **Committee briefed 26/11/2021**  Write to submitter and advise that the proposal can be addressed by existing legislation. Namely, the Public Audit Act which was recently amended to deal with material irregularities.  AGSA is also authorised to investigate and refer irregularities to relevant public bodies in terms of the named national legislation to take the appropriate legal action.  Parliamentary NA Rules also provide oversight mechanisms that also assist with this proposal without necessitating the establishment of a new Chapter 9 Institution.  The addition of Auditors Commission will duplicate functions and provisions of the Internal Audit Framework, the Public Finance Management Act and the Municipal Finance Management Act, which are set up as guiding mechanisms on internal auditing in the Public Service.  It will have financial implications of employing people to head the institution. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **2** | CRC ref:  6 of 2020  **Legal ref: 134/2020** | Andries Havenga | Review of all accountability provisions. namely section 19 in Chapter 2; section 89 (b) which provides for the removal of the President; Section 96, deals with the Conduct of Cabinet members | **Committee briefed 26/11/2021**  Advice pointed to a list of 15 pieces of National Legislation that contribute to enhancing integrity, transparency and accountability on page 7 paragraph 28.  Also advised that that the proposed provisions exist in the Constitution but are not exercised by those in power because it is discretionary.  Advice concluded that it is not necessary to review and amend the accountability provisions in the Constitution. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **3** | CRC ref: 32 of 2020  **Legal ref: 135/2020** | Khutso SK on behalf of Valodagoma | Review s6 to make Khilovedu an official language recognised under s6(1) | **Committee briefed 26/11/22**  Declaring a language official does not practically translate to more use by mere designation. The Bill of Rights deliberately refers to any language and not an official langue in particular. However, once made official the state has pressure to support its development.  The Language Board is mandate to promote other languages and this is a matter of respect rather than promotion and development. This has been important for identity recognition. Because a range of languages are used for broadcasting.  Education in mother tongue is done where it is reasonably practical to ensure sufficient teaching materials in that language.  Should Khilovedu be afforded the same status, as an official language consideration must be had for how this would affect the nation as whole.  Ref to par 25 on pg. 8 of the opinion which notes number of speakers, geographic location, extent of disadvantage, preference of the community, availability of resources to practically promote the language, distinction between it and other languages, and risk of it becoming obsolete.  Concluded by recommending that a Language Bill could be promulgated aimed at regulating and promoting the use of non-official languages within municipalities and national government.  In addition, the consideration of including Khelibedu to the s5a list of languages sighted for development in the Constitution. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **4** | CRC ref:  33 of 2020  **Legal ref:**  **136/2020** | South African Secular Society | Removal of reference to God in the Preamble | **Committee briefed 26/11/2021**  Provided legal framework in the Bill of Rights emphasized the Certification Judgment confirming that, what is in Preamble is not a problem and does not necessitate amendment, as it is fair.  The court unpacked the invocation of deity and said that it does not go against the Constitution, as it promotes national unity instead of limiting it.  Therefore, inclusion of God in the Preamble is not harmful and is declared to not be unconstitutional in terms of the case law.  Conclusion that invocation of a deity does not specify which deity. It is open to maintain all rights.  Advise against this proposed amendment. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **5** | CRC ref:  34 of 2020  **Legal ref:**  **137/2020** | Martin van Staden | Review of s1 and the s36 cross-referenced with s37. | **Committee to be briefed**  The Free Market Foundation (FMF), firstly, submits that section 1 of the Constitution has been neglected in public policy. It submitted that section 1 is the most entrenched provision in the Constitution and contains the values that must inform all law and government conduct.  Secondly, the FMF refers to the importance of impact assessments in public policy. The submission discusses impact assessment as a constitutional imperative that government has also neglected. Furthermore stating that without such assessments, public participation in government is undermined.  Thirdly, The FMF elaborate on the nature of constitutionalism that government must take into account when performing its functions. In this regards the FMF refers to the Constitution Eighteenth Amendment Bill, and, what it considers a threat, the potential nationalisation of the Reserve Bank. It is submitted that both these envisioned interventions would “undermine the fabric of constitutionalism within which the Constitution rests” and must be rejected.  Lastly, the FMF refers to the nature and operation of sections 36 (the general limita-tions provision) and 37 (the derogation provision) of the Constitution, and how these provisions ought to (have) operate(d) during the COVID-19 lockdown. The FMF is con-corned that government has acted unconstitutionally during “times of public crisis”, and encourages government to return to constitutional conformity.  Legal advised that the submission from the FMF does not call for an amendment or a review of the Con-situation. In fact, it argues against this in the case of the Constitution Eighteenth Amendment Bill, which has no impact assessment attached to it. Because impact assessment of policy and legislation is also not a constitutional review matter.  Legal further advised that the gist of the submission is that government is acting unconstitutionally with reference to section 1 of the Constitution. However, the FMF should make this submission to the relevant committee of the National Assembly as it does not pertain to a review of the Constitution. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **6** | CRC ref:  36 of 2020  **Legal ref:**  **138/2020** | Paul Hoffman | Insert a new Chapter 9 Institution aimed at eradicating corruption. | **Committee briefed**  **26/11/21**  The HAWKS are specialized body specifically created by statute to investigate “priority crimes”, and the definition of ‘priority crimes’ in the SAPS Act is broad enough to include corruption.  The HAWKS are performing this function in as far as the investigation of this category of crime is concerned. The National Prosecuting Authority is another statutory body established in terms of the NPA Act, responsible for the prosecution of crime.  To further strengthen and enhance the NPA’s work, the President has established the Investigating Directorate within the NPA on 4 April 2019. The NPA and HAWKS are legislatively designed independent bodies, having regard to the Constitution, NPA Act, SAPS Act and Investigating Directorate.  In light of the above the submitters have been overtaken by events and the concerns raised in their submission are adequately addressed and legislated for.  Conclusion is that it is policy decision and within the discretion of the Committee but caution that considering this will duplicate existing institutions and no need for addition of a Chapter 9 institution of this nature but a matter of strengthening of national legislation.  Where there is national legislation that covers proposals in a submission, the Constitution should not be amended but instead amendment should be made to national legislation and not the Constitution. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **7** | CRC ref:  52 of 2020  **Legal ref:**  **145/2017/NM** | Equal Education | Review and amend s100 on National Interventions in schooling matters, by strengthening & making it effective. | **Committee briefed 11/11/2020 and 26/11/2021**  The lack of clarity of roles and responsibilities, leads to confusion and diminished accountability amongst state organs during s100 interventions. This is detrimental to the vulnerable and affected parties.  Currently there are no guidelines more than the principals that are stipulated in s100 of the Constitution to implement interventions and this has caused much confusion with regard to roles and responsibilities of state actors.  The lack of clarity regarding the scope, powers and procedures of an intervention has lead to disputes of exercise of power of intervention in the Eastern Cape. Since national intervention as provided for in s100 is a crucial mechanism to ensure delivery of services and uniformity within the Republic.  It is recommended that there be enactment legislation to provide safeguards to prevent the possible abuse of s100 intervention on frivolous grounds. The opinion supports the amendment of s100 (3) of the constitution as this would be beneficial in making Government more efficient. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **8** | CRC ref:  53 of 2020  **Legal ref:**  **139/2020** | Justine Ballot | Review of sections: - 1; 2; 11; 12; 14; 27; 35; 38.  To provide for clearer constitutional limitations on government during a state of national disaster. | **Committee briefed**  **26/11/2020**  Submitter misunderstood the concept of sovereignty of the State because membership to United Nations does not force the state to comply. Section 231 of the Constitution requires parliamentary ratification of treaties for them to bind RSA. It was advised that this part of the submission had no standing in law.  Section 2 on the Supremacy of the Constitution was also found to not require strengthening through review and amendment because it cannot be limited by any action or legislation.  Section 11 on the right to life proposed to include the right to refuse forced euthanasia is recommended to not require a constitutional amendment. Due to euthanasia not being legalised in SA, if so considered and legislated, forced euthanasia would still amount to a crime because of the absolute right to life.  Section 12 to include the right to self-defence and right to bear arms the proposal was found to be unclear and presumably linked to the right to “freedom of security of the person”. It was recommended the SA legal system already regulates the rights proposed for review and does not necessitate a review and amendment of the Constitution.  On s14 right to privacy for murderers does not apply because the victim should have more rights than the criminal. It was advised that this proposal seemed misplaced and does not require the Committee’s consideration.  On s27 proposal for the government not forcing persons to be vaccinated, it was recommended that the default position is that the decision to accept or refuse medical treatment is always that of the patient. This section was found to not require review and amendment as the protection of individual rights in this context is provided for.  Section 35 to include the right of persons detained under quarantine. It was recommended that the right speaks rather to the application of rights and not the working of s35 specifically. Therefore, s35 does not need review or amendment.  Section 38 proposal to set up an organisation within the judiciary to report human rights violations especially during a state of disaster. It is advised that within the scope of s38, persons seeking redress for such violations but without means, could be represented by civil society organisations to access justice. This is further entrenched by s34 right to access to courts.  The Legal Aid South Africa Act is also enacted to ensure access to justice. Additionally s182 avails the services of the Public Protector in terms of the Public Protector Act to all persons and communities  In conclusion, the concerns raised in this submission are found to not necessitate amendment of the Constitution to provide the relief sought. It may however be an issue of implementation of existing national legislation. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **9** | CRC ref:  54 of 2020  **Legal ref:**  **140/2020** | Justine Ballot | Need for Constitutional provisions to protect officials against corrupt instructions and the need to review the Constitution to include the right against self-incrimination. | **Committee briefed**  **26/11/2021**  Section 195 of the Constitution sets out the “Basic values and principles governing public administration” and applies to all officials in the public administration.  Section 197 provides for the Public Service that must function in terms of national legislation that must execute the lawful policies of the government.  Section 3 of the Protected Disclosure Act also deals with protected disclosures and provides that “no employee or worker may be subjected to any occupational detriment by employer conduct after making a protected disclosure.”  The right to self-incrimination is also provided for in s35 on arrested, detained and accused persons in the Constitution. This right is protected at both the arrest and trial phases of the criminal justice process.  The constitution already provides for the proposals in this submission and does not require review and amendment.  State of Disaster Regulations proposal, does not speak to specific provisions in the Constitution relating to a state of disaster; it speaks to implementation of legislation and regulations.  In conclusion it was recommended that the concerns raised in this submission do not require a constitutional amendment, as the Constitution already includes the defence force within its mandate.  The framework of the Constitution and the legislation giving effect to it, sufficiently cover the concerns raised. |  |
| **No.** | **CATEGORY 2**  **SUBMISSION REFERENCE** | **NAME OF SUBMITTER** | **SUBJECT MATTER** | **LEGAL OPINION** | **DESIRABILITY TO AMEND THE CONSTITUTION**  **YES OR NO** |
| **10** | CRC ref:  58 of 2020  **Legal ref: 141/2020** | Romola Naido | Review of sections: 18; 22; 27(1) (b); 34; 37(1) (a) and (b); 171; 173; 174(5); 178(1) (e) & (j). | **Committee briefed 26/11/2021**  Matters proposed do not require a amendment of the Constitution as practitioners must first engage all that is available in law in terms of the legal framework set out in the legal opinion.  The National Environmental framework Act provides for the protections proposed. All tribunals are provided for under access to courts in s34 of the Constitution.  Legal Opinion recommended that none of the proposed amendments require amendment of the Constitution as all these matters are provided for e.g. proposal that parliament meet virtually is a moot point that is currently provided for.  The proposed amendment to section 27(1)(b) of the Constitution, to ensure the eradication of pit latrines is not properly substantiated. The matters raised by the submitter need to be referred to relevant committees. |  |

* Following considerations of the legal opinions, the Committee may elect to identify submissions that warrant a presentation by the submitter or any relevant stakeholders to enhance its deliberations and ultimate decisions where it deems it necessary.

1. **Conclusion**

It must emphasized that the Constitutional Review Committee reviews the Constitution by considering all submissions before it and makes a recommendation to Parliament to refer submissions it has identified as having grounds to possibly amend the Constitution to a relevant committee.

However, the decision to allocate identified submissions to the appropriate committees for processing is within the prerogative of the Parliamentary Table. The Committee can merely follow up on the referral of these submissions and advise submitters to monitor the scheduling of meetings considering their proposed matters in future.

The Committee’s Rules conclude in the adoption of a Committee Report on annual submissions considered with recommendations on submissions identified for referral to the appropriate committees. The Joint Rules applicable to this Committee do not extend to the promulgation of legislative amendments but rather conclude in the production of a Report recommending the appropriate action to give effect to the proposals contained in the submission.