PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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MEMORANDUM

To: **Chairperson: Joint Constitutional Review Committee [Mr D S Montsitsi]**

Copy: **Secretary to Parliament**

From: **Legal Services Office**

Date: **13 August 2008**

Subject: **Submission CR08 N by the Institute for Labour and Constitutional Law Studies to the Joint Constitutional Review Committee**

1. On 12 August 2008, I was requested to assist the Joint Constitutional Review Committee (the Committee) to evaluate the feasibility of submissions received from members of the public which propose amendments to the Constitution.

2. In terms of submission CR08N the Institute for Labour and Constitutional Law Studies (the Institute) is of the view that "it could never have been the intention of our democratic society as a whole and/or the aforementioned constitutional principles, properly interpreted and applied, that *ad infinitum* continuation of a new, fresh, constitutionally allowable, oppressive and racial discriminatory system of disenfranchisation (read: affirmative action) should ever be allowed to continually exist". The Institute thus proposes that section 9 of the Constitution be amended as it is discriminatory to allow affirmative action to continue to be implemented.

2. The Institute is also of the view that section 23(5) of the Constitution must be amended as it allows a registered trade union whose members constitute a majority of the employees employed by a specific employer in a workplace to establish a threshold of representativeness regarding trade union access to a workplace, the deduction of trade union subscriptions or levies and leave for trade union activities and that this is to the detriment of an employer as well as employees not belonging to such trade union.

Proposed amendment to section 9 (affirmative action)

3. In Brink v Kitshoff NO 1996(6) BCLR 752 (CC), the first Constitutional Court case that dealt with the right to equality, O' Reagan J differentiated between formal equality and substantive equality. She expressed the view that the equality clause in the Constitution was adopted in the recognition that past discrimination led to patterns of group disadvantage and harm. She held that "[t]he need to prohibit such patterns of discrimination and remedy their results are the primary purpose of [the equality clause]" (paragraph 42).

4. Since Brink v Kitshoff, the Constitution Court has reiterated and re-emphasised that the Constitution prescribes that remedial action must be taken to achieve substantive equality. Thus where such measures were taken to achieve substantive equality in accordance with section 9, the discrimination is regarded as fair (see for example President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC) and National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC).

5. More recently, in Minister of Finance and Another v Van Heerden 2004 (11) BCLR 1125 (CC), Moseneke J (as he was then) held that the "Constitution enjoins us to dismantle [past forms of discrimination] ... Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality".

6. Moseneke J thus concluded that our constitutional understanding of substantive equality includes remedial or restitutionary equality and as such fair discrimination measures are not in themselves "a deviation from, or invasive of, the right to equality. They are not 'reverse discrimination' or 'positive discrimination' ... They are integral to the reach of our equality protection... Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow" (paragraph 31).

7. While the question is a matter of policy, it is clear that the inequalties of the past continue to exist and that substantive equality has not been achieved. To amend the Constitution in the manner suggested would prevent remedial or restitutionary measures taken to address past patterns of discrimination.

Proposed amendment to section 23(5) (the regulation of collective bargaining)

8. The Institute is of the view that section 23(5) of the Constitution must be amended as it allows a registered trade union "whose members constitute a majority of the employees employed by a specific employer in a

workplace" to establish a threshold of representativeness regarding trade union access to a workplace, the deduction of trade union subscriptions or levies and leave for trade union activities and that this is to the detriment of an employer as well as employees not belonging to such trade union.

9. Section 23(5) of the Constitution provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining. It also provides that "national legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)".

10. The Labour Relations Act of 1995 (the LRA) gives effect to section 23(5) of the Constitution. It is however Chapter 3 of the LRA that establishes a threshold of representativeness and not the Constitution itself. As such the submission relates to provisions of the Labour Relations Act and not the Constitution.

11. In light of the above I am of the view that it is not appropriate for the Joint Constitutional Review Committee to consider the submission by the Institute. However, should the Committee deem it feasible, the submission by the Instituted may be referred to the appropriate Portfolio or Select Committee.

12. It should also be noted that in the Certification judgment (In re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC)) the Constitutional Court held that Constitutional Principle 23 did not protect the right of individual workers to bargain as "individual workers cannot bargain collectively except in concert".

Adv M R Vassen
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MEMORANDUM

To: **Chairperson: Joint Constitutional Review Committee [Mr D S Montsitsi]**

Copy: **Secretary to Parliament**

From: **Legal Services Office**

Date: **13 August 2008**

Subject: **Submission CR08 O by Mr M Mnisi to the Joint Constitutional Review Committee**

1. On 12 August 2008, I was requested to assist the Joint Constitutional Review Committee (the Committee) to evaluate the feasibility of submissions received from members of the public which propose amendments to the Constitution.

2. In terms of submission CR08M, Mr Mnisi, on behalf of the African Christian Democratic Party in Mpumulanga proposes that the Preamble to the Constitution be amended to begin as follows, "South Africa is a Nation In Humble Submission to Almighty God".

3. While the Preamble to the interim Constitution (Act 200 of 1993) began with "In Humble Submission to Almighty God", the Preamble to the Constitution begins with the words "We, the people of South Africa". The current Preamble also contains a further inclusionary statement that "South Africa belongs to all who live in it, united in our diversity".

4. While the exclusion of the words "In Humble Submission to Almighty God" was vigorously debated in the Constituent Assembly, it was agreed to omit it as South Africa was to be a secular state.[1] It was also argued that in light of past discrimination, such a statement would continue to exclude non-theists.

[1] In this regard, at the time Archbishop Desmond Tutu said that "a secular ... is one in which the state does not owe allegiance to any particular religion and no religion has an unfair advantage, or has privileges denied to others . . . We do not want to impose Christian laws on those who are not Christian, even if we are in the majority." See 9 June 1995 Constitutional Talk No 8 6.

5. Prior to the advent of democracy and constitutionalism in 1994, a preamble was recognised as a statement setting out the objects of a statute. In this era preambles were not used frequently and when used as an interpretive aid, it was only used where the wording of a statute was unclear, ambiguous or overbroad (see Law Union and Rock Ins Co Ltd v Carmichael's Exor 1917 AD 597; S v Koch 1975 3 SA 332 (O); Ex parte Johannesburg City Council 1975 1 SA 816 (W)).

6. Du Plessis (Re-Interpretation of Statutes (2002, Butterworths, p 189) however points out that the "[o]ne issue in respect of which the law of statutory interpretation as it stands today differs most markedly from the law as it stood prior to 27 April 1994 is the admissibility and manner of invoking preambles as interpretive aids". This is particularly so in respect of constitutional interpretation.

7. In S v Mhlungu 1995 7 BCLR 793(CC) at para 112 for example, Sachs J held that "The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes".

8. Du Plessis points out that since Mhlungu, the Constitutional Court has shown a readiness to rely on constitutional preambles for interpretive purposes without imposing the qualification that such reliance is warranted only where constitutional language lacks clarity and unambiguity (Re-Interpretation of Statutes, p 241). As such any amendment to the Preamble must be carefully considered.

9. In terms of section 9(1) of the Bill of Rights, "[e]veryone is equal before the law and has the right to equal protection and benefit of the law. In my view the suggested amendment would be a departure from the principle of equality as set out in section 9 of the Bill of Rights.

10. Furthermore in light of the dicta by Sachs J in Mhlungu that the Preamble connects up, reinforces and underlies all of the text that follows and helps to establish the basic design of the Constitution and indicate its fundamental purposes, the proposed amendment might impact significantly on a number of other rights contained in the Bill of Rights. This includes the right to freedom of conscience, religion, thought, belief and opinion (as contained in section 15) as well as the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction (as contained in section 12(2)(a)).

11. In my view the feasibility of the proposed amendment should be considered in light of the above implications.

Adv M R Vassen
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MEMORANDUM

To: **Chairperson: Joint Constitutional Review Committee [Mr D S Montsitsi]**

Copy: **Secretary to Parliament**

From: **Legal Services Office**

Date: **13 August 2008**

Subject: **Submission CR08 M by Mr Faasen to the Joint Constitutional Review Committee**

1. On 12 August 2008, I was requested to assist the Joint Constitutional Review Committee (the Committee) to evaluate the feasibility of submissions received from members of the public which propose amendments to the Constitution.

2. In terms of submission CR08M, Mr Faasen is of the view hate speech is not clearly defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) and that in his view, the Constitution must be amended as "there needs to be a clear guideline in the Bill of Rights what exactly would be regarded as hate speech and when it will be regarded as hate speech".

3. It is clear in terms of section 16(2) of the Constitution that hate speech is not a protected form of speech. In terms of section 16(2), freedom of expression does not extend to
   - propaganda for war;
   - incitement of imminent violence or;
   - advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

4. The Equality Act gives effect to the equality provisions and prevention of hate speech as contained in the Constitution. In terms of section 10 of the Equality Act, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to:

(a) be hurtful;
(b) be harmful or to incite harm;
(c) promote or propagate hatred.

5. In terms of section 1, "prohibited grounds" refers to:
   a. race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
   b. any other ground where discrimination based on that other ground:
      (i) causes or perpetuates systemic disadvantage;
      (ii) undermines human dignity; or
      (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)

6. It is trite that it is not appropriate for the Constitution to provide detailed remedies and sanctions for breaches of its provisions. (see Kentridge ("equality" in ***Constitutional Law of South Africa,*** p14-64).

7. In my view, should a lacunae exist in the current law, it should be addressed in legislation not via an amendment to the Constitution

8. In light of the above I am of the view that it is not appropriate for the Constitutional Review Committee to consider the submission by Mr Faasen. Should it be deemed feasible, his submission may be referred to the Portfolio on Justice and Constitutional Development to consider.

Adv M R Vassen
Parliamentary Legal Adviser

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Memorandum

To: Hon Mr S D Montsitsi
Chairperson Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Senior Legal Adviser

Subject: CRC: NK Govind

Date: 14 August 2008

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1. This submission raises 3 proposals. The first to provide for capital punishment, the second for reducing the number of provinces from nine to four, and lastly to change the electoral system and to eliminate floor crossing.

2. For ease of reference, I reiterate what this office has previously advised in respect of capital punishment.

3. In *S v Makwanyane and Another, 1995 (3) SA 391 (CC)*, the Constitutional Court declared the death penalty inconsistent with the most important of all human rights, and the source of all other personal rights in Chapter Three of the Constitution (at para 144).

4. Chaskalson, CJ as he then was stated that "[i]f public opinion were to be decisive.... [T]he protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. ..." (paragraph 88).

5. The court also pointed out that the reinstatement of the death penalty would conflict with South Africa's international law obligations as Parliament ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights which *inter alia* provides that that no one within the jurisdiction shall be executed and that the state is obliged to take all necessary measures to abolish the death penalty.

6. Should a policy decision be taken to reintroduce the death penalty, it would violate several provisions in the Bill of Rights (sections 9, 10 and 12) and conflict with South Africa's international law obligations.

7. The proposal of changing from the proportional list system to a constituency based system is purely a political one. The feasibility of changing the electoral system was

researched and discussed by the Van Zyl Slabbert Commission. As such if the Committee deems it desirable, it may wish to undertake further research to inform the political decision

8. In respect of floor crossing, the Constitution 14th, the Constitution 15th and the General laws Amendment Bills (62,63 and 64 respectively) are before the National Assembly and address these concerns.

Adv Z Adhikarie
Senior Legal Adviser

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Memorandum

To: Hon Mr S D Montsitsi, MP
Chairperson Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Senior Legal Adviser

Subject: CRC: Prof B Naude - Rights to victims of crime

Date: 13 August 2008

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1. Professor Naude requests that consideration be given to include the following additional rights to victims of crime in the Constitution:

   "a) the right to be treated with dignity and respect by the criminal justice system;

   b) the right to protection, assistance and treatment;

   c) the right to information with regard to the criminal proceedings;

   d) the right to restitution and compensation; and

   e) the right to bring to the court's attention the harm suffered as a result of the crime by means of a crime (victim) impact statement."

2. These rights are in my view guaranteed rights, albeit they are not expressly articulated in the Constitution as "victims' rights".

3. The Constitution accords the right to "Human Dignity" in section 10 to everyone. The right to "protection, assistance and treatment" is very broad and to some extent the provisions of section 34 (Access to courts) read together with section 9 (Equality) provides that victims are treated fairly. With regard to the right to information, it is trite that the Constitution expressly makes such provision in section 32, under the heading "Access to information" for everyone. The last two categories, the right to "restitution and compensation" and the right "to bring to the court's attention the harm suffered as a result of the crime by means of a crime (victim) impact statement", are not expressly provided for in the Constitution, but are implied and contained in legislation and policy (Probation Services Act 116 of 1991- which in the same section provides for rights of victims and offenders and the Victims Charter of 2004). Notably the Constitution makes specific provision for "arrested, detained and accused persons" and not for "victims".

4. On 1 December 2004 Cabinet approved the South African Service's Charter for Victims of Crime. The Charter contains the following seven victims' rights: **the right to information, the right to protection, the right to assistance, the right to be treated with fairness and with respect for your dignity and privacy, the right to compensation and the right to restitution**. Therefore most of the "rights" referred to By the Professor is contained in this Charter.

5. The Victims' Charter is an important instrument of promoting justice for all and is compliant with the Spirit of the South African Constitution, 1996, Act 108 of 1996, and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. However, in my reading of her submission, Professor Naude wishes to have this Charter incorporated into the Constitution.

6. The right to give input by victims at the sentencing stage - "crime (victim) impact statement" has been recognized by the *South African Law Commissions Report on Sentencing (A New Sentencing Framework) (Project 82).* The Report states that "... at the sentencing stage the rights of victims of crime requires that special attention be paid to the evidence from victims..." and that "...(c)learly a legislative duty may be placed on prosecutors to take this aspect of their role seriously." (SALC, Project 82, pp 86).

7. To give effect to the rights of victims as contained in the Victims' Charter, a document on the Minimum Standards on Service for Victims of Crime was also developed. The document not only outlines basic rights and principles, but also supplies detailed information to enable victims to exercise their rights and enable role-players to uphold those rights as contained in the Charter.

8. The Charter together with the Minimum Standards document is thus what is relied on to implement government's policy in respect of victims of crime. Whether it should be incorporated into the Constitution is thus a policy issue.

9. In my view it is appropriate for the Joint Constitutional Review Committee to consider this submission. However, the submission may also be referred to the appropriate Portfolio Committee for further consideration.

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Memorandum

To: Hon Mr S D Montsitsi
Chairperson Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Senior Legal Adviser

Subject: CRC: A Brown

Date: 14 August 2008

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1. Mr Brown raises two proposals in his submission. The first is for all to uphold the Equality clause (section 9 of the Constitution) and the second for the judiciary to be empowered to impose the death penalty in certain circumstances.

2. The first proposal is thus not a proposal for Constitutional review, but one of enforcing implementation. As such, this proposal falls outside the scope of the brief of this committee.

3. The second proposal is one that has been considered previously by this Committee and again arises in several of the submissions. I will deal with it briefly as we attach an earlier submission dealing with the question of the death penalty in more detail.

4. In *S v Makwanyane and Another, 1995 (3) SA 391 (CC)*, the Constitutional Court declared the death penalty inconsistent with the most important of all human rights, and the source of all other personal rights in Chapter Three of the Constitution (at para 144).

5. Chaskalson, CJ as he then was stated that "[i]f public opinion were to be decisive.... [T]he protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. ..." (paragraph 88).

6. The court also pointed out that the reinstatement of the death penalty would conflict with South Africa's international law obligations as Parliament ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights which *inter alia* provides that that no one within the jurisdiction shall be executed and that the state is obliged to take all necessary measures to abolish the death penalty.

7. Should a policy decision be taken to reintroduce the death penalty, it would violate several provisions in the Bill of Rights (sections 9, 10 and 12) and conflict with South Africa's international law obligations.

Adv Z Adhikarie
Senior Legal Adviser