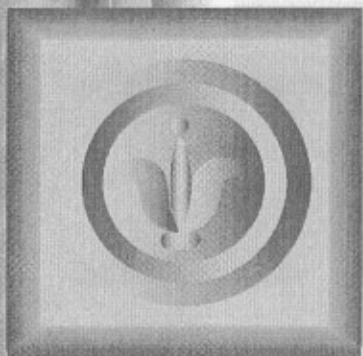


Additional Submission

9 September 2008



DSO Dissolution/DPCI Creation

[B23-2008];

[B30-2008];

“Overview”

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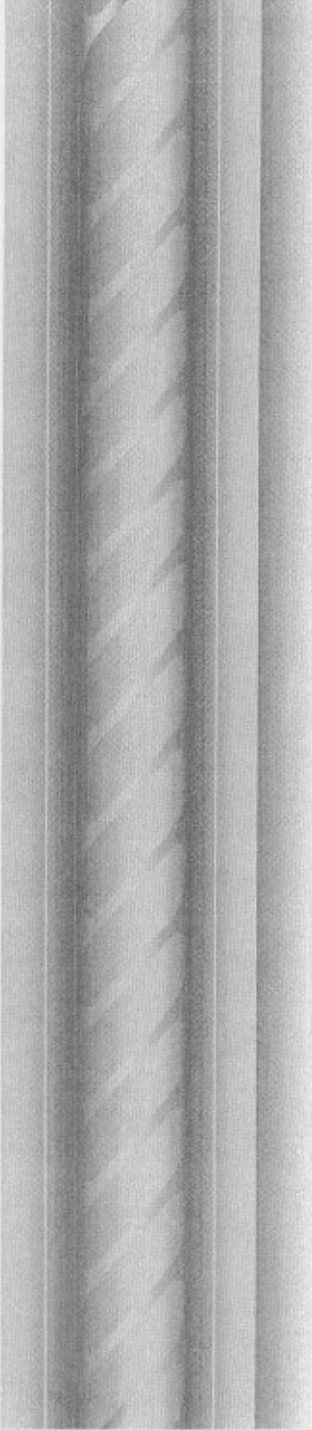
Public Participation Questions

- **Sunday Times (17 August 2008) -‘We may not listen, but still we’d like to hear from you’**
- **“Those who don’t agree with a majority party’s policies take part with the aim, at least, of restraining the majority party from having its way fully and influencing details within the policies.”**
- **“The challenge for ANC MPs is to manage – in a fair, democratic and constitutionally sound way – the relationship between the ANC’s policies on the Scorpions, and our parliamentary responsibilities to take into account the views of the electorate through public hearings”.**



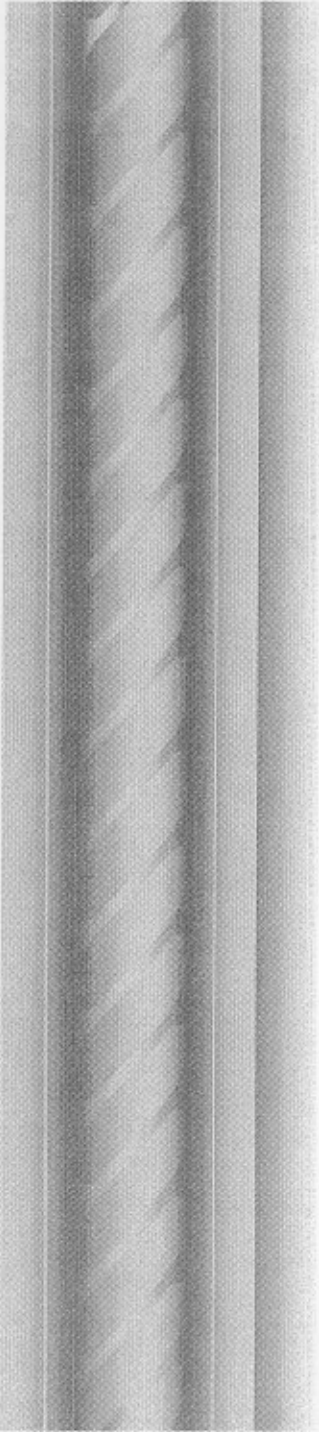
Public Participation Questions

- **Jurisprudence:** (CCT12-05) *Doctors for Life vs Speaker of the National Assembly and Others* as well as (CCT 73-05) *Matatiele Municipality and 10 others vs President of the RSA and Others*.
- These questions go to the very heart of how we balance representative and participatory democracy provisions of our constitutional democracy as the Constitutional Court has indeed already done in the *Doctors for Life* case.
- Whilst the article in question invites ongoing engagement and submission it does so on a very narrow basis – the improvement of existing policy suggestions that take as their point of departure the dissolution of the Directorate of Special Operations and the improvement of a new structure that is to be created (the DPCI).
- The HSF believes that such an approach, that only invites civil society to engage the detailed policy proposals as opposed to the policy decision in principle, may well fall short of the delicate balancing between representative and participatory democracy that the Constitutional Court has referred to so extensively in the ruling by Justices Ncgobo and Sachs in the *Doctors for Life* case.
- Question is – what is the scope and the nature of the duty imposed by Section 59, 72 and 118 of the Constitution to facilitate public involvement and is the right balance struck between participatory and representative tenets of our constitutional democracy.
- The duty to facilitate public involvement in the legislative process is an aspect of the right to political participation.



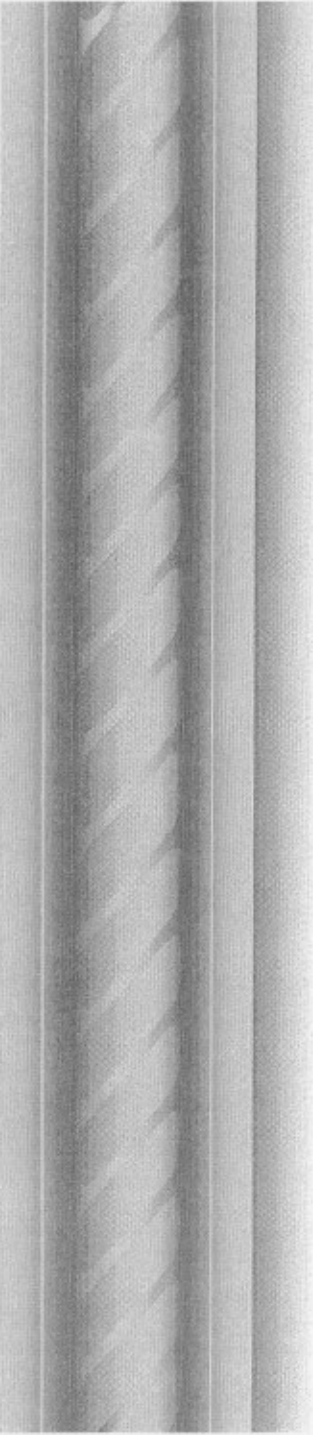
Dicta from Doctors for Life (Ngcobo, J.)

- [116] Therefore our democracy include one of its basic and fundamental principle the principle of participatory democracy. The democratic government that contemplated is partly representative partly participatory, is accountable and transparent and it provides for public participation in the decision-making processes. Parliament therefore function in accordance with the principles of our participatory democracy.



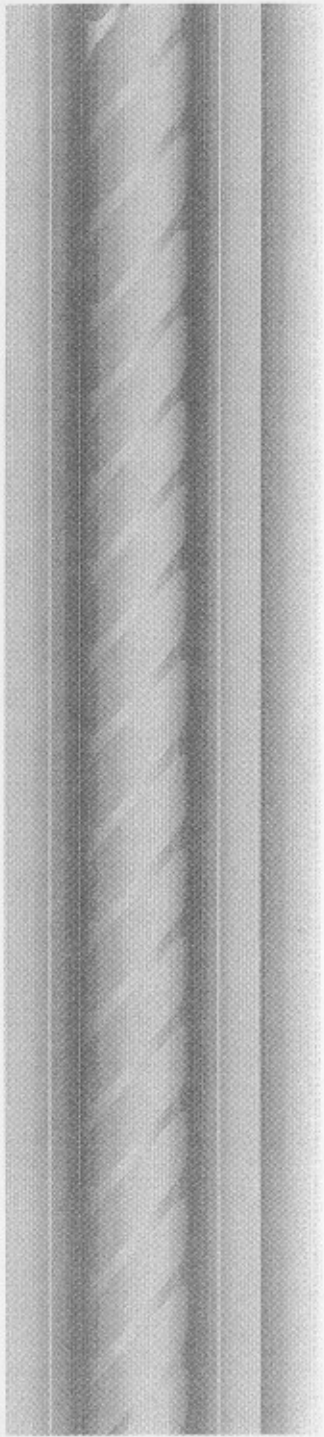
Dicta from Doctors for Life (Ngcobo, J.)

- [127] Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. “In dealing with the issue of reasonableness,” this Court has explained, “context is all important.”
- [128] Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.



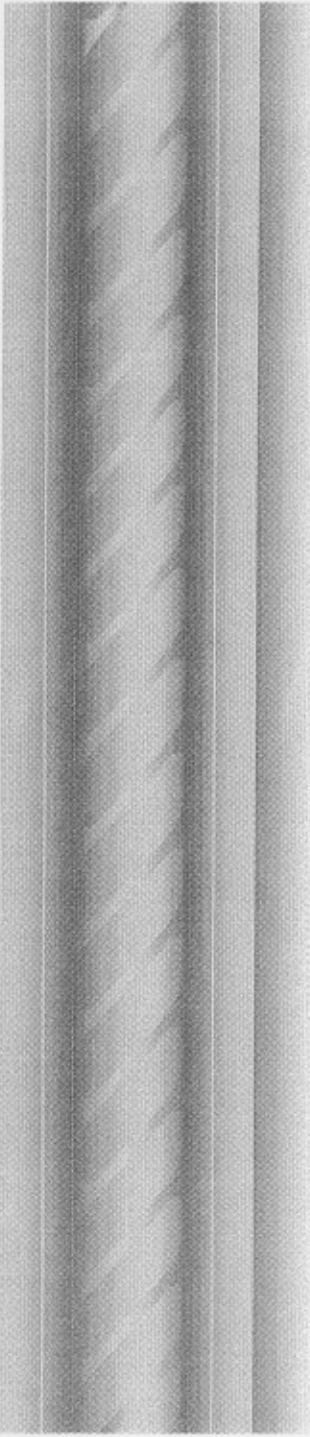
Dicta from Doctors for Life (Ngcobo, J.)

- [129] What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate.



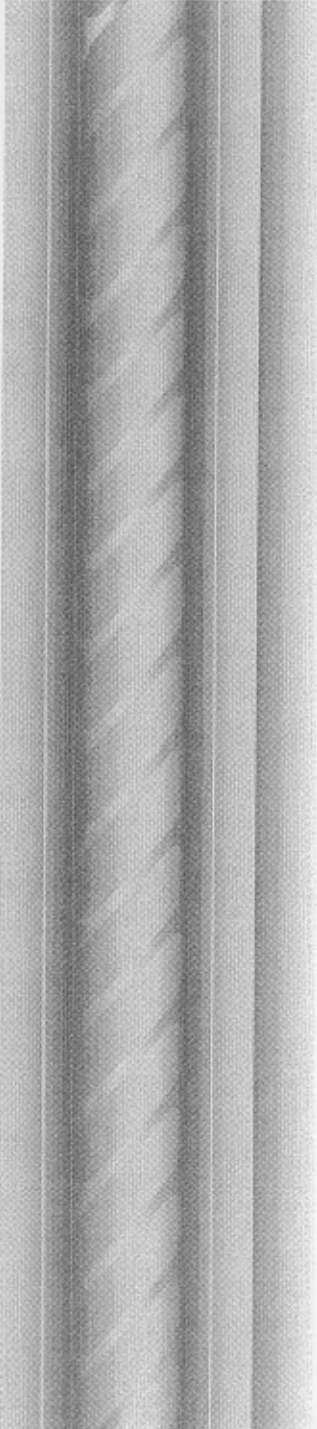
Dicta from Doctors for Life (Ngcobo, J.)

- [145] To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, so long as they do so reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. The Constitution demands no less.



Dicta from Doctors for Life (Ngcobo, J.)

- [146] In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.

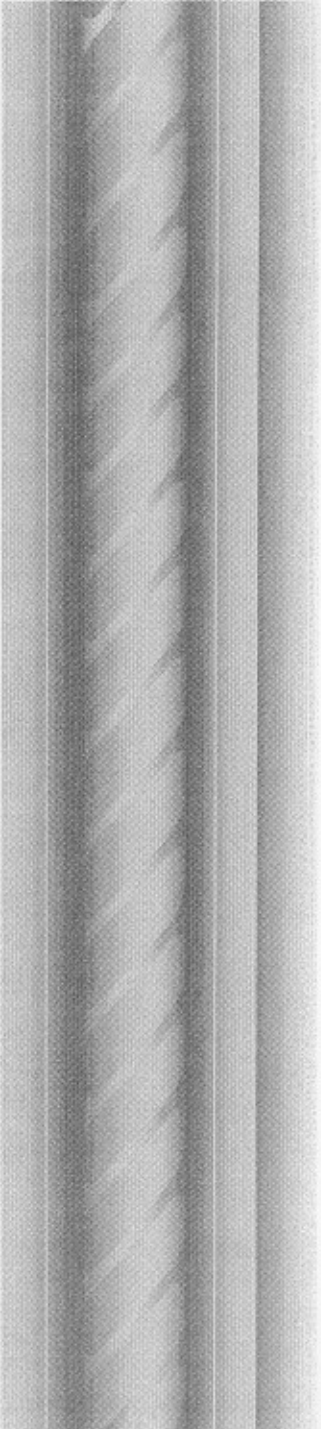


Dicta from Doctors for Life (Ngcobo, J.)

- [194] It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature's failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.

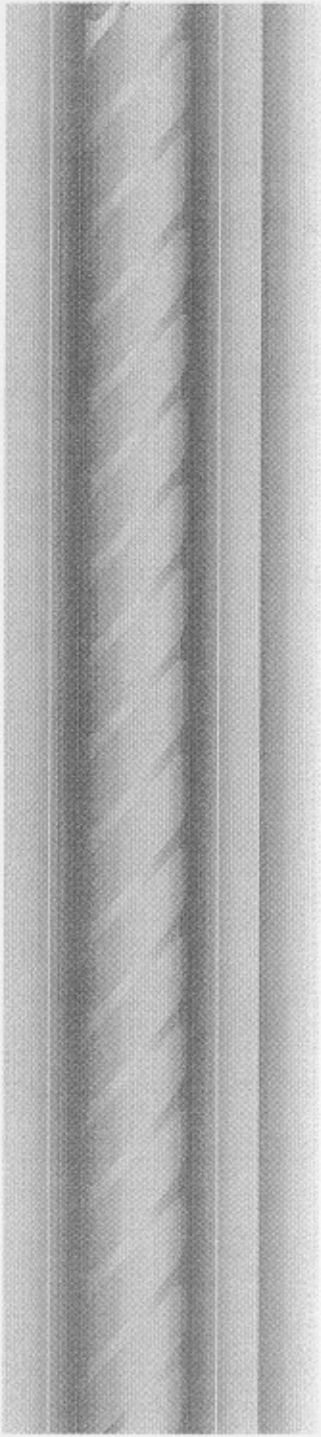
Dicta from Doctors for Life (Ngcobo, J.)

- [199] This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, “there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.” But at the same time, it has made it clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process.



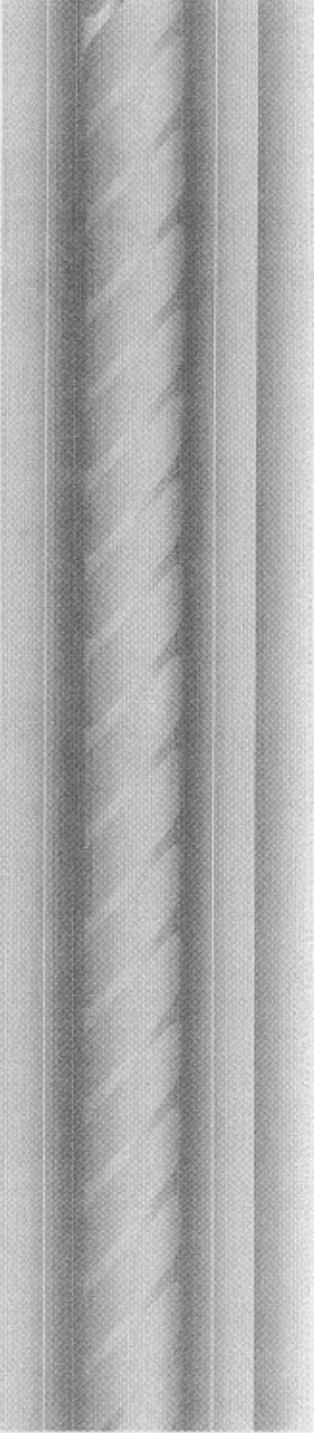
Dicta from Doctors for Life (Ngcobo, J.)

- [200] Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, "the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution." In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective.



Dicta from Doctors for Life (Ngcobo, J.)

- [201] The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; “[when deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid”. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the “Constitution is supreme . . . ; law or conduct inconsistent with it is invalid”. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid.
- [205] Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.



Dicta from Doctors for Life (Sachs, J.)

- **[227-240] Please refer to separate document containing exact extract from Doctors for Life ruling in support of Ngcobo, J. by Sachs, J in its entirety.**



The HSF reiterates that:

- the Directorate of Special Operations not be dissolved.
- that wide-ranging public hearings be held on the substantive and complete “Overview of the Criminal Justice System”, including the relevant documents that led to its creation, currently being undertaken by government to enable the public to play an informed role in the deliberations and refining of policies that take the “Overview” as its point of departure. The DSO can certainly not be dissolved until such time as comprehensive public hearings are held on the entire “Overview” and until a clear link is established between this process and the legislation currently before Parliament. Both the *Doctors for Life* and *Matatiele* cases emphasise the need for full access to all information as a core building block of the public participation process provisions of the constitution



The HSF reiterates that:

- that all the recommendations of the Kampepe Commission of Inquiry be implemented.
- that consideration is given to the re-establishment of key specialized units of the SAPS to improve its capacities and enhance its investigative capabilities in certain areas of criminality and that these units' activities are coordinated with the activities of the DSO by the necessary executive oversight structure proposed to be created by the recommendations of the Kampepe Commission. This will make a real substantive contribution to the overall fight against organized crime.
- that a clear policy of secondment be developed in government to allow members of staff of the SARS, Home Affairs, Intelligence and the FIC and others be allowed to work in either the DSO and/or the re-created specialized SAPS unit on an agreed basis to enhance the fight against organized crime within government. Where, and if necessary, the executive oversight structure can be expanded on an ad hoc basis to maximize overall co-ordination.



HSF maintains that the Bills:

- Are the result of a policy decision of the party not the state.
- Result in the undesirable dissolution of the DSO.
- Create a DPCI with an overbroad and unfocused mandate in contrast to the current mandate of the DSO.
- Concentrate power in the hands of the National Commissioner of Police.
- Eradicate the prosecution and intelligence-driven approach that hallmarked the DSO's operations.
- Further diminish co-operation and integration within the DPCI and among relevant departments/organs of state.
- Potentially carry adverse consequences for current terms and conditions of service of current DSO members.
- Fail to create any improvements in the security vetting procedures complained off in the Kampepe Commission's report.
- Contain a woefully inadequate cost estimation of their implications.
- Weaken existing powers of search and seizure dramatically.
- The Committee is urged to refer to the HSF's clause-by-clause analysis in a previous submission.



Conclusion:

- The legislative role of parliament is not only about policy or the 'improvement' of policy details on a narrow basis. It is about the contestation of a principle policy decision at heart and about the balancing of representative and participatory democracy provisions in our constitution in a reasonable manner.
- The HSF believes that there is a very clear potential case to be made that public participation has been wanting in this process despite the efforts of the relevant Committees to fan out across the provinces in order to meet some of the questions raised in the Doctors for life case.
- This considered view does not negate the HSF's grateful appreciation for this second opportunity to make an oral submission.
- Thank you.