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**LEGAL OPINION**

[REDACTED]

**TO** : Honourable SP Holomisa, MP  
: Honourable BA Mnguni, MP  
: Co-Chairpersons of the Joint Constitutional  
Review Committee

**COPY** : Secretary to Parliament

**DATE** : 15 August 2011

**SUBJECT** : Submission on the proposed amendment of  
section 9 of the Constitution

**LEGAL ADVISER** : Mr N Vanara

**COMMITTEE REFERENCE** : 2/11

**REFERENCE NUMBER** : 135 / 11



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**LEGAL OPINION**

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**DATE** : 15 August 2011

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section 9 of the Constitution

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1. Our Office was requested to advise the Constitutional Review Committee on the submission received from Mr Mbawula.
  2. Mr Mbawula is asking the Committee to "look at the law particularly regarding initiation issues." Mr Mbawula is of the view that the circumcision performed at hospitals cannot be called "initiation". We understand Mr Mbawula to be suggesting that circumcision as practised in hospitals cannot be equated with the one practised customarily and traditionally in African communities. It is his view that failure to distinguish between the two different practises has the effect of undermining his traditions.
  3. Our Constitution recognizes individual's rights to practise their different cultures. The Constitution expressly prohibits unfair discrimination against anyone on, amongst others, cultural ground. Section 9 of the Constitution provides that:

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

4. In *MEC for Education: KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC)* the court held that the importance of the relevant practice to the individual concerned was an important consideration in determining whether the discrimination was unfair. Our Constitution requires the community to affirm and reasonably accommodate difference, not to tolerate it as a last resort.

5. Section 12 of the Children's Act, 2005 (Act No. 38 of 2005) deals with social, cultural and religious practices and provides the following in respect of circumcision:

(1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

(2) ....

(3) Genital mutilation or the circumcision of female children is prohibited.

(4) ....

(5) ....

(6) ....

(7) ....

(8) Circumcision of male children under the age of 16 is prohibited, except when—

(a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or

(b) circumcision is performed for medical reasons on the recommendation of a medical practitioner.

(9) Circumcision of male children older than 16 may only be performed—

(a) if the child has given consent to the circumcision in the prescribed manner;

(b) after proper counselling of the child; and

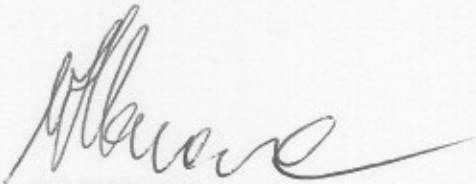
(c) in the manner prescribed.

(10) Taking into consideration the child's age, maturity and stage of development, every male child has the right to refuse circumcision.

6. The Children's Act, 2005 recognises circumcision irrespective of whom and how it is practised. This approach is consistent with the constitutionally entrenched right to equality provided in section 9 of the Constitution.

7. The Constitution does not provide for circumcision and only refer to the cultural practises. Circumcision is a type of a cultural practice. If the Committee were to decide to effect an amendment, section 9(3) of the Constitution would have to be amended by expressly excluding circumcision from the "culture". The Children's Act, 2005 specifically deals with circumcision.

8. In our view it is neither necessary nor desirable to amend the Constitution and the Children's Act, 2005.



**Mr N Vanara**

**Senior Parliamentary Legal Adviser**