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**SUBMISSIONS BY THE DEPARTMENT OF ARTS AND CULTURE TO THE  
PARLIAMENTARY PORTFOLIO COMMITTEE ON ARTS AND CULTURE ON THE SOUTH  
AFRICAN LANGUAGES BILL, 2011**

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**1 Introduction**

- 1.1 The Parliamentary Portfolio Committee ("the Committee") on Arts and Culture is in the process of considering the South African Languages Bill, 2011 ("the Bill").
- 1.2 The Department of Arts and Culture ("the Department") thanks the Committee for the opportunity to present its submissions of the Bill. The purpose of this Memorandum is to provide the Department's responses to the public submissions to the Committee on the Bill and in particular to:
  - 1.2.1 to discuss the constitutional mandate and context within which the Bill is drafted; and
  - 1.2.2 to provide a brief overview of the purpose and content of the Bill.

**2 The constitutional mandate on languages**

2.1 Section 6 of the Constitution provides as follows:

**6 Languages**

- (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- (3)
  - (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
  - (b) Municipalities must take into account the language usage and preferences of their residents.
- (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
- (5) A Pan South African Language Board established by national legislation must:
  - (a) promote, and create conditions for, the development and use of-
    - (i) all official languages;
    - (ii) the Khoi, Nama and San languages; and
    - (iii) sign language; and
  - (b) promote and ensure respect for-

- (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
- (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa."

- 2.2 Section 6(1) identifies eleven official languages of the Republic, as listed above.
- 2.3 Section 6(2) obliges the state to take practical and positive measures to elevate the status and advance the use of indigenous languages, in recognition of the historically diminished use and status of these languages.
- 2.4 Section 6(3) provides that the national government and provincial governments may use any particular official languages for the purposes of government. Examples of purposes of government may include:
- 2.4.1 the use of a language in a court of law;
  - 2.4.2 the use of a language when communicating with government (filling in forms, dealing with officials and the like);
  - 2.4.3 the use of a language in public notices (such as street signs, public information and the like);
  - 2.4.4 the use of a language in government reports, documents, hearings, transcripts and other official publications intended for public distribution;
  - 2.4.5 the use of a language in legislation, and in the proceedings and records of the legislature.
- 2.5 In order to determine which particular official languages to use for the purposes of government, section 6(3)(a) stipulates the following factors that government must take into account:
- 2.5.1 usage;
  - 2.5.2 practicality;
  - 2.5.3 expense;
  - 2.5.4 regional circumstances; and
  - 2.5.5 the balance of the needs and preferences of the population as a whole or in the province concerned.
- 2.6 Section 6(3)(2) further provides that national government and each provincial governments must use at least two official languages.
- 2.7 Section 6(4) obliges national government and provincial governments to regulate and monitor their use of official languages by legislative and other measures. It is clear from this section that:

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<sup>1</sup> I Currie 'Official Languages and Language Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, December 2005) Chapter 65 at p 65-5

- 2.7.1 it is government's use of official languages that must be regulated and monitored, as opposed to use of official languages by the public in general or the private sector; and
- 2.7.2 legislative and other measures must be used by government to regulate and monitor its use of official languages.
- 2.8 Section 6(4) goes on to provide that, without detracting from the provisions of section 6(2), all official languages must enjoy parity of esteem and must be treated equitably. As discussed by Currie<sup>2</sup> 'equitable' treatment is not the same as 'equal' treatment:
- "Equitable treatment is treatment that is just and fair in the circumstances. Those circumstances include a history of official denigration and neglect of indigenous languages. Equity may therefore require that the languages that FC s6 (2) terms 'historically diminished' in use and status receive particular attention from and support from the state. It might mean that historically undiminished languages (ie, English and Afrikaans) are treated with relative inattention."
- 2.9 The term 'parity of esteem' can be understood to require that all official languages are treated with similar respect and regard:
- "In short, while parity of esteem does not ensure the equal treatment of all eleven official languages, it does oblige the state to take all eleven languages seriously."<sup>3</sup>
- 2.10 Section 6(5) requires the establishment of a Pan South African Language Board through national legislation to promote and create conditions for the development and use of national languages and promote and ensure respect for defined languages:
- 2.11 In addition to the provisions of section 6 on languages, the Constitution<sup>4</sup> prohibits discrimination on the basis of language,<sup>5</sup> gives individuals the right to use a language of their choice<sup>6</sup> and protects the rights of linguistic communities to use their language.<sup>7</sup>

### 3 Application of section 6 of the Constitution

- 3.1 Various obligations arise from an application of section 6 of the Constitution *inter alia* that:
- 3.1.1 the state must take practical and positive measures to elevate the status and advance the use of indigenous languages;<sup>8</sup>
- 3.1.2 the national government and provincial governments, on consideration of various factors, may use any official languages for the purposes of government, but must use at least two official languages;<sup>9</sup>

<sup>2</sup> Currie, *ibid* at page 65-6

<sup>3</sup> Currie *ibid* at page 65-7

<sup>4</sup> Constitution of the Republic of South Africa, 1996

<sup>5</sup> Section 9(3) and (4) Constitution, 1996

<sup>6</sup> Section 30 Constitution, 1996

<sup>7</sup> Section 31 Constitution, 1996

<sup>8</sup> Section 6(2) Constitution, 1996

<sup>9</sup> Section 6(3) Constitution, 1996

- 3.1.3 the national government and provincial governments must by legislative and other measures regulate and monitor their use of official languages;<sup>10</sup>
- 3.1.4 all official languages must enjoy parity of esteem and must be treated equitably;<sup>11</sup> and
- 3.1.5 a Pan South African Language Board must be established through national legislation.<sup>12</sup>
- 3.2 It is evident that the provisions of section 6 gives effect to Constitutional Principle CP XI that "the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged."<sup>13</sup>
- 3.3 It is however important to note that in giving effect to section 6, government is only required to promulgate legislation in two circumstances namely:
  - 3.3.1 to regulate and monitor their use of official languages;<sup>14</sup> and
  - 3.3.2 to establish a Pan South African Language Board.<sup>15</sup>

#### 4 Brief background to Bill

- 4.1 It is in the context of the constitutional obligation to use legislative measures to regulate and monitor use of official languages, discussed above that the South African Languages Bill, 2011 has been drafted.
- 4.2 In 2003 the Department drafted the National Language Policy Framework, 2003; the Implementation Plan: National Language Policy Framework, 2003 and a South African Languages Bill, 2003.
- 4.3 The South African Languages Bill, 2003 was presented to Cabinet. Cabinet did not approve the South African Languages Bill, 2003 and requested the then Minister of Arts and Culture in consultation with the Minister of Justice and Constitutional Development to investigate other non-legislative ways to regulate language use.
- 4.4 In 2010 Mr CJA Lourens brought an application to the North Gauteng High Court<sup>16</sup> to determine whether, amongst other things, national government complied with its obligations in terms of section 6 of the Constitution and specifically whether it has complied with section 6(4).
- 4.5 In terms of the judgment in *Lourens* the Court found that national government is failing to regulate and monitor through legislative and other measures the

<sup>10</sup> Section 6(4) Constitution, 1996

<sup>11</sup> Section 6(4) Constitution, 1996

<sup>12</sup> Section 6(5) Constitution, 1996

<sup>13</sup> Schedule 4 of the Interim Constitution, 1993

<sup>14</sup> Section 6(4) Constitution, 1996

<sup>15</sup> Section 6(5) Constitution, 1996

<sup>16</sup> *Cornelius Johannes Alexander Lourens and the President of the Republic of South Africa, the Minister of Arts, Culture, Science and Technology, the Minister of Justice and Constitutional Development and the Pan South African Language Board, High Court of South Africa (North Gauteng, Pretoria) Case number 49807/09, date of judgment 16 March 2010 [unreported and translated from Afrikaans to English]*

national government's use of official languages in terms of section 6(4) of the Constitution.

4.6 The Court found that while it could not prescribe to government how to comply with its constitutional obligation, a combination of legislative and other measures is required to meet its obligations in section 6(4) of the Constitution.

4.7 Important for this matter is the Court's interpretation of section 6(4) of the Constitution:

"The obligation which section 6(4) imposes on the national government is "[to] regulate and [to] monitor [its] use of official languages". Although legislative measures are therefore one of the methods which the government must use to regulate and monitor its use of official languages, the adoption of a national language act is not a constitutional obligation. Therefore the court is not in a position to order the national government, represented by the respondents concerned, to adopt a national language act."<sup>17</sup>

4.8 The Court ordered the national Minister of Arts, Culture, Science and Technology to comply with the obligation in terms of section 6(4) of the Constitution within two years from the date of the order.

## 5 Brief overview of the Bill

5.1 The Bill has been prepared in order to meet the obligation in section 6(4) of the Constitution to regulate and monitor national government's use of official languages.

5.2 The purpose of the Bill is:

5.2.1 to provide for the regulation and monitoring of use of official languages by national government for government purposes;

5.2.2 to provide for the establishment and functions of the national language unit; and

5.2.3 to provide for the establishment and functions of the language units.

5.3 Application of Bill

5.3.1 The Bill applies to national departments, national public entities and national public enterprises.

5.3.2 In this regard it is important to note the wording of section 6(4) of the Constitution which requires that both the national government and provincial governments, must regulate and monitor their use of official languages by legislative and other measures.

5.3.3 Schedule 4 of the Constitution is also instructive. It provides that language policy and the regulation of official languages is an area of concurrent national and provincial legislative competence to the extent that the provisions of section 6 of the Constitution expressly confer legislative competence upon provincial legislatures.

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<sup>17</sup> Lourens at page 5

5.3.4 It is therefore evident that:

- national government must regulate and monitor their use of official languages through legislative and other measures; and
- section 6(4) expressly confers legislative competence upon provincial legislatures to pass legislation to regulate and monitor their use of official languages.

#### 5.4 Language Policy

5.4.1 Section 4 of the Bill obliges national departments, national public entities and national public enterprises to adopt a language policy on their use of official languages for government purposes within 18 months of the commencement of the Act. The matters that must be addressed in the language policy include:

- identifying at least two official languages that the national department, national public entity or national public enterprise will use for the purposes of government;
- stipulating how official languages will be used, amongst other things, in communications with members of the public, official notices, government publications and inter and intra government communications;
- describing how the national department, national public entity or national public enterprise will communicate with members of the public where their language of choice is not an official language contemplated in the Bill;
- providing for a complaints mechanism by members of the public regarding the use of official languages by the national department, national public entity or national public enterprises.

#### 5.5 National Language Unit

5.5.1 Sections 5 and 6 of the Bill empower the Minister to establish a national language unit in the Department whose functions include advising the Minister on-

- policy and strategy to meet the constitutional obligation to regulate and monitor the use of official languages;
- the promotion of parity of esteem and equitable treatment of the official languages of the Republic and facilitating equitable access to the services and information of national department, national public entity or national public enterprise concerned;
- promoting good language management by the national department, national public entity or national public enterprise concerned; and
- the functions of language units.

5.5.2 The National Language Unit must also liaise with and promote the general co-ordination of other language units established by the Bill and must perform the language unit function for the Department.

**5.6 Language units in national departments, national public entities and national enterprises**

5.6.1 Sections 7 and 8 of the Bill obliges every national department, national public entity and national enterprise to establish a language unit whose functions include:

- advising the responsible accounting officer or accounting authority on the development, adoption and implementation of the language policy;
- monitoring and assessing the use of official languages;
- monitoring and assessing compliance with the language policy of the national department, national public entity or national public enterprise concerned;
- promoting parity of esteem and equitable treatment of the official languages of the Republic and facilitating equitable access to the services and information of national department, national public entity or national public enterprise concerned; and
- promoting good language management by the national department, national public entity or national public enterprise concerned.

**5.7 Monitoring of and reporting on official language use**

5.7.1 Section 9 of the Bill provides that the Minister is responsible for monitoring the use of official languages. Measures provided for in the Bill to monitor the use of official languages by government include the following:

- every national department, national public entity and national public enterprise must submit reports to the Minister annually on the activities of its language unit, the implementation of its language policy, any complaints received regarding its use of official languages and how these complaints were dealt with;
- section 10 of the Bill provides that the Minister may intervene in instances where a national department, national public entity and national public enterprise does not comply with the Bill;
- section 11 requires the Minister to, on an annual basis, table in Parliament a report on the status of the use of official languages for government purposes by national government
- section 12 empowers the Minister to establish intergovernmental forums to promote general co-ordination, co-operation and consultation on the use of official languages for government

purposes and to co-ordinate, align and monitor the implementation of language policies.

- 5.7.2 The Minister may exempt a national public enterprise or national public entity listed in Schedule 3 Part B of the Public Finance Management Act, 1999 from the obligation to establish a language unit. However, if the Minister grants such exemption the public entity must assign a senior employee in the public entity to perform the functions of the language unit.

## 5.8 Regulations

- 5.8.1 Section 14 empowers the Minister, after consultation with the Pan South African Language Board, to make regulations regarding-

- the form and content of language policies;
- timeframes for establishing language units;
- the form and content of reports required from language units;
- the manner, form and timeframes for submitting applications for exemption.

## 6 Summary of the concerns arising from submissions made by the public to the Parliamentary Portfolio Committee for Arts and Culture and the Department's responses.

- 6.1 The Committee received approximately 34 written submissions from members of the public and held public hearings on the Bill on 17 and 18 January 2012. The comments received from members of the public on the Bill can be summarised as follows:

### Compliance with section 6(2) of the Constitution (promotion of multilingualism)

- 6.1.1 A concern was raised that the Bill does not meet the requirement of section 6(2) of the Constitution. In this regard, it was proposed that the Bill must include as its objective the promotion of multilingualism.
- 6.1.2 As discussed in paragraphs 2 and 3 above, section 6 requires government to promulgate legislation in two circumstances only:
- to regulate and monitor their use of official languages; and
  - to establish a Pan South African Language Board.
- 6.1.3 In the circumstances, there is no constitutional obligation on government to promulgate legislation to give effect to section 6(2) of the Constitution.

### Application of the Bill to provinces and municipalities

- 6.1.4 It was suggested that the Bill must apply to Provinces and municipalities. It was also proposed that the Bill must also apply to private organisations commissioned or mandated to act on behalf of government.



- 6.1.5 As discussed in paragraphs 2, 3 and 5 above, section 6(4) of the Constitution requires that both the national government and provincial governments must regulate and monitor their use of official languages by legislative and other measures.

#### Two official languages

- 6.1.6 Submission were made that the requirement in the Bill that national government must identify at least two official languages that it will use for government purposes is effectively promoting the use of English and Afrikaans to the exclusion of other official languages. Alternatively, only English will be used to the exclusion of indigenous languages. It was suggested that the Bill must require national government to identify at least three official languages that it will use for government purposes and at least one of the three languages must be a previously disadvantaged language or indigenous language. Alternatively, national government must identify six languages:

- one Nguni language;
- one Sesotho Language
- Afrikaans;
- English;
- Xitsonga; and
- Tshivenda.

- 6.1.7 The obligation in section 6(3)(a) of the Constitution, which is repeated in the Bill, is that national government uses a *minimum* of two official languages. National government may therefore choose more than two official languages. Section 6(3)(a) furthermore provides factors that national government must take into account when determining which official languages it will use. The Bill confirms the provisions of section 6(3)(a) of the Constitution.

#### Period to adopt language policy

- 6.1.8 The period within which the language policy should be adopted is too long. National government must adopt language policies immediately.
- 6.1.9 The Department is of the view that 18 months is a reasonable period to adopt language policy given the various factors that must be considered as provided for in section 6(3)(a) of the Constitution. This is to ensure that any policy developed can be effectively implemented and will work towards achieving good language management within national government.

#### Pan South African Language Board

- 6.1.10 It was submitted that the Bill encroaches on the powers and functions of the Pan South African Language Board ("PANSALB").

- 6.1.11 The functions of the National Language Unit and the language units established by the Bill, as discussed in paragraphs 5.5 and 5.6 above, are to develop policy and monitor the use of official languages by the national department, national public entities and national public enterprises within which they are established. Language units are the structures within national government that will enable national government to meet its obligations in sections 6(3) and 6(4) of the Constitution.
- 6.1.12 The Bill does not purport to duplicate the functions of PANSALB as provided for in section 6(5) of the Constitution and the PANSALB Act, 1995. To the contrary, PANSALB's powers to investigate any violation of a language right, policy or practice may be used to enforce the provision of the Bill.

#### Compliance

- 6.1.13 It was submitted that the complaints procedure in the Bill is vague. It was proposed that the Bill must provide clear remedies and enforcement provisions. In particular, an Ombudsman and a Language Tribunal must be established. It was suggested that monitoring and regulation functions should not be performed by the Minister because he is too busy, instead the Minister must appoint a task team to perform these functions.
- 6.1.14 The Department is of the view that the framework created in sections 9, 10 and 11 of the Bill provides for appropriate monitoring and reporting on national government's use of official languages. In this regard it is envisaged that:
- Language units will monitor use of official languages within the departments, entities or enterprises within which they are established;
  - The National Language Unit must liaise with and promote the general co-ordination of other language units and advises the Minister on policy and strategy to monitor the use of official languages.
  - The Minister is responsible for monitoring the use of official languages. Language units must submit annual reports to the Minister and the Minister must table in Parliament an annual report on the status of the use of official languages by national government. Consequently, Parliament performs its oversight function to ensure that government complies with its legal and constitutional obligations.
  - Finally, any aggrieved party may apply the provisions of the PANSALB Act, 1995 discussed in paragraphs 6.1.11 and 6.1.12 above, and had access to courts and to resolve any disputes that may arise on the application of the Bill.

#### Exemptions

6.1.15 It was submitted that the Bill does not provide for the criteria for exemptions.

6.1.16 It is intended that the detail on the manner, form and timeframes for submitting applications for exemption will be provided for in Regulations to the Bill.

#### Sector specific provisions

6.1.17 It was suggested that the Bill must contain detailed and specific provisions on language policy for each of the government sectors that the Bill applies to for example education, health, justice etc.

6.1.18 The Department is of the view that it is not practical to regulate each sector individually. The Bill creates the framework within which national departments, for example, will develop language policy appropriate for that department.

### **7 Department's proposals to address some of the concerns arising from public submissions to the Committee**

7.1 The Department acknowledges the concerns relating to multilingualism and the application of section 6(2) of the Constitution. However, this Bill is not the appropriate mechanism to address these concerns. The National Languages Policy Framework: 2003 and Implementation Plan: 2003 are practical and positive measures that government is implementing. In addition, the Department intends to review the regulatory framework relating to PANSALB in order to ensure the effective promotion and development of languages.

7.2 The Department is of the view that some of the concerns arising from public submissions will be addressed through the promulgation of regulations as provided for in section 14 of the Bill.

7.3 The Department proposes that section 4 (2) (a) of the Bill be amended to make provision that one of the official languages must be an indigenous language with historically diminished use and status.

7.4 The Department proposes that section 4 of the Bill be amended to provide that a language policy must describe how a national department, national public entity and national public enterprise will communicate with the public where the language of choice is sign language.

7.5 The Department proposes that the Bill be amended to include that the National Language Unit also submits its annual report to PANSALB in order to promote co-ordination and co-operation between the National Language Unit and PANSALB.