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LEGAL OPINION

120624 SC DEFENCE

TO : Honourable SD Montsitsi
: Honourable JJ Maake ✓
: Co-Chairpersons: Joint Standing Committee on Defence

COPY : Acting Secretary to Parliament

DATE : 25 April 2012

SUBJECT : Legal Opinion on the constitutional responsibility of the Joint Standing Committee on Defence in respect of the Defence Review

LEGAL ADVISER : Mr N Vanara

REFERENCE NUMBER : 112 / 12



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SUBJECT : Legal Opinion on the constitutional
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on Defence in respect of the Defence Review

1. Our Office was requested to advise the Joint Standing Committee on Defence (JSCD) on its constitutional responsibility in respect of the Defence review.
2. My understanding of the request is to advise the JSCD of its constitutional role in the current policy review of the South African National Defence Force (SANDF) being conducted by the Defence Review Committee.
3. The legal question is about the constitutional role of the JSCD in the review of the current South African defence policy. In my view this question can be properly answered by understanding the constitutional role of Parliament, particularly the JSCD, and the national executive in respect of policy formulation.
4. The JSCD is a statutory Committee established in terms of section 228(3) (a) of the Constitution of the Republic of South Africa Act, 2003 (Act No. 200 of 1993) ("the interim Constitution") to "investigate and make recommendations regarding the budget, functioning, organization, armaments, policy, morale and state of preparedness of the South African National Defence Force and to perform such other functions relating to parliamentary supervision of the Force as may be prescribed by law".

5. Item 24(1) of Schedule 6 to the Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996) provides that the provisions of, amongst others, section 228 of the 1993 Constitution continue in force as if the latter had not been repealed, subject to –

“(a) the amendments to those sections as set out in Annexure D;
(b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the Constitution;

(c) consistency with the new Constitution.”

6. Section 228 of the interim Constitution has not been amended or repealed and is, in my view, not inconsistent with the provisions of the new Constitution. Therefore its provisions are still applicable.

7. Section 199(8) of the new Constitution provides that multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament. Parliament's Constitutional role is to maintain oversight of the national executive authority including the latter's implementation of legislation.

8. Joint rule 120A of the Joint Rules of Parliament establishes the Joint Standing Committee on Defence (“the Committee”) as required by section 228(3) of the interim Constitution. Joint rule 120B deals with membership of the Committee and joint rule 120C deals with the appointment of co-chairpersons of the Committee. However, the Joint Rules are silent on the functions of the Committee.

9. In terms of section 85(2) of the Constitution the President exercises the executive authority, together with other members of the Cabinet by, amongst others, developing and implementing national policy.

10. The Defence Review Committee was constituted by the Minister of Defence and Military Veterans (“the Minister”) during July 2011 to review the current defence policy which is premised on the 1996 White Paper on Defence. The Defence Review Committee was tasked with developing an independent report on the future long-term defence policy and to provide a:

- defence policy that is supportive of the Government's priorities and strategic intent;
- reviewed or confirmed defence mandate with associated defence functions, high level tasks, strategic concepts, doctrine, capabilities, level of effort and structure;
- sound policy for determining the blueprint Defence Force design and force structure, as well as the future defence fiscal and resource framework.

11. The Defence Review Committee is further required to address the following key considerations:

- The primary objective of the South African National Defence Force arising from Constitutional imperatives and the Defence Force's statutory framework as well as its contribution to South Africa's developmental priorities;
- Strategic security environment, trends and predictions and emerging sources of insecurity;
- Defence Force's contribution to national security and an expression of South Africa's national interest;
- South Africa's "strategic purpose" being that strategic role that South Africa must play on the Continent, the Southern Africa's Region in particular and an understanding of the Continent's expectations of South Africa;
- Defence Force's contribution to South Africa's international relations policy, international relations strategy and international obligations;
- Future Defence Force posture, future defence commitments, required levels of readiness and required defence capabilities to meet these commitments;
- Relative size of Regulars and Reserves in the Defence Force;
- Nature and scope of the South African defence industry, its products and its strategic domestic and international partners and the manufacturing, marketing, sale, export and transit of South African armament and related goods and services.

12. The current review of the defence policy by the Defence Review Committee concerns policy development, which in terms of the separation of powers principle is primarily an executive function. Section 228 of the interim Constitution only empowers the JSCD to investigate and make recommendations on, amongst others, the policies of the South African National Defence Force. As indicated above the developing of policy is an executive function. Therefore the JSCD recommendations will have to be submitted to the Minister or an entity or institution performing such a function on behalf of the Minister. In the instant case such an entity is the Defence Review Committee.

13. Consequently, the constitutional role of the JSCD in respect of the defence review is limited to making recommendations to the Minister or the Defence Review Committee on the development of defence policy.



Mr NJ Vanara

Senior Parliamentary Legal Adviser