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Date: 26 April 2012

### PRESENTATION TO THE JOINT STANDING COMMITTEE ON DEFENCE

Honourable, JJ Maake and Honourable SD Montsisi, the Co-Chairs of the Joint Standing Committee on Defence have requested me to provide it with advice on its constitutional responsibility with respect to the Defence Review Committee.

#### DEFENCE REVIEW COMMITTEE<sup>1</sup>

The Minister has appointed the Defence Review Committee. Its mandate is to both prepare a consultative document and engage in a comprehensive public consultation process with key stakeholders, interested parties and civil society.

Regulation 20 of the Amended Treasury Regulations made in terms of Section 76 of the Public Finance Management Act, 1999 (Act No. 1 of 1999),<sup>2</sup> makes provision for the appointment of Committees of Inquiry. It defines a committee as follows:

*“committee” means a committee of inquiry appointed by the executive authority and includes an interdepartmental committee of inquiry, but does not include any permanent commission, board, council, committee or similar body, whether appointed pursuant to any law or otherwise;*

Committees such as the Defence Review Committee are appointed for specific purposes and to help the executive to formulate policy.

In terms of section 85 of the Constitution of the Republic of South Africa 1996, the executive authority of the Republic is vested in the President who exercises the executive authority, together with the other members of the Cabinet, by—

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

<sup>1</sup> See pages 33 -35 of the South African Defence Review 2012.

<sup>2</sup> GNR. 225 of 15 March 2005

- (b) **developing and implementing national policy;**
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.

In respect of defence policy the following, contained in section 2(a) of the Defence Act 2002 (Act No. 42 of 2002), should be noted:

*"The Minister and any organ of state defined in section 239 of the Constitution, as well as all members of the Defence Force and any auxiliary service and employees, must, in exercising any power or performing any duty in terms of this Act, have regard to the following principles:*

- (a) *The formulation and execution of defence policy is subject to the authority of Parliament and the national executive.*
- ...".

The Defence Review Committee met for the first time at the Castle of Good Hope on 14 July 2011. There the Minister provided the Committee with its Mandate and Terms of Reference. The Minister of Defence stated that the compiled Defence Review is required to provide:

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

The Minister of Defence further required the Defence Review to address the following key considerations:

- a. The primary objective of the National Defence Force arising from Constitutional imperatives and the defence statutory framework.
- b. Government priorities, including the Medium Term Strategic Framework and the developmental agenda.
- c. The strategic security environment, trends and predictions, and emerging sources of insecurity.
- d. The defence contribution to national security and an expression of South Africa's national interests.
- e. The defence contribution to South Africa's international relations policy, international relations strategy and international obligations.

- f. Recent international experiences in defence policy making and the lessons that can be extracted from these.
- g. Defence expenditure within the context of South Africa's fiscal policy and framework.
- h. The nature and scope of the South African defence industry, its products and its strategic domestic and international partners.
- i. The manufacture, marketing, sale, export and transit of South African armament and related goods and services.

The Minister of Defence tasked the Defence Review Committee to reflect on the following critical questions in its deliberations:

- a. What place does South Africa occupy in the world, on the African continent and in the Southern African region?
- b. What does the Southern African region and the African continent expect of South Africa?
- c. What is the nature of the Defence Force that South Africans want?
- d. What should Government's defence commitment be?
- e. What should South Africa's future defence posture be?
- f. What state of readiness, and what capabilities and force levels, are required to meet present and future defence commitments?
- g. What should be the high-level defence doctrine and on what should it be based?
- h. What is the ideal relative size of Regulars and Reserves in the Defence Force?
- i. What is the required Defence Force culture?
- j. What is the nature of the Defence Industry required to support the future Defence Force?

While this committee has been tasked with developing various policies, its report is not binding on the executive until such time as the policies formulated by it have been approved and adopted by the national executive.

Having mentioned the terms of reference of the Defence Review Committee, we now need to consider the powers and functions of the Joint Standing Committee on Defence.

#### **JOINT STANDING COMMITTEE ON DEFENCE**

This is a very important committee as it exists by virtue of the Interim Constitution.<sup>3</sup>

Although the Interim Constitution was largely repealed by the Constitution of the Republic of South Africa, 1996, the provisions of the Interim Constitution pertaining to the Joint

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<sup>3</sup> The Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993)

Standing Committee on Defence remain in force.

Section 228 of the Interim Constitution states:

### **Accountability**

**228.** (1) The Minister responsible for defence shall be accountable to Parliament for the South African National Defence Force.

(2) Parliament shall annually approve a budget for the defence of the Republic.

(3) (a) A joint standing committee of Parliament on defence shall be established, consisting of members of all political parties holding more than 10 seats in the National Assembly and willing to participate in the committee.

(b) The total membership of the committee shall be as determined by or under the rules and orders.

(c) Such a party shall be entitled to designate a member or members on the committee in accordance with the principle of proportional representation and as determined in accordance with the following formula:

- (i) A quota of seats per member of the committee shall be determined by dividing the total number of seats in the National Assembly held jointly by all the parties referred to in paragraph (a) by the total number of members of the committee plus one.
- (ii) The result, disregarding third and subsequent decimals, if any, shall be the quota of seats per member.
- (iii) The number of members that a participating party shall be entitled to designate on the committee, shall be determined by dividing the total number of seats held by such party in the National Assembly by the quota referred to in subparagraph (ii).
- (iv) The result shall, subject to subparagraph (v), indicate the number of members that such party is entitled to designate on the committee.
- (v) Where the application of the above formula yields a surplus not absorbed by the number of members allocated to a party, such surplus shall compete with other similar surpluses accruing to another party or parties, and any member or members which remain unallocated shall be allocated to the party or parties concerned in sequence of the highest surplus.

**(d) The committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, 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.**

(4) (a) The President shall, when the South African National Defence Force is employed for service referred to in section 227 (1) (a), (b) or (e), forthwith inform Parliament of the reasons for such employment.

(b) If, in the case of such an employment referred to in section 227 (1) (a) or (b), Parliament is not sitting, the President shall summon the joint standing committee referred to in subsection (3) to meet expeditiously, but not later than 14 days after the commencement of such employment, and shall inform the committee of the reasons for such employment.

(5) Parliament may by resolution terminate any employment referred to in section 227 (1) (a), (b) or (e), but such termination of employment shall not affect the validity of anything done in terms of such employment up to the date of such termination, or any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such employment."

Joint Rule 120A, 120B and 120 C of the Joint Rules of Parliament give effect to the

provisions of section 228(3).

However Joint Rule 117 establishes a Joint Committee on Oversight of Security Matter. This committee's functions are set out in Joint Rule 119(1) and are similar to those of the Joint Standing Committee on Defence.

The notes to these Joint Rules are somewhat confusing. Note 2 states that the main function of this committee is to do an annual overview of the SA National Defence Force and the SA Police Service.

Note 5 states that until section 228 of the Interim Constitution has been repealed the Joint Standing Committee on Defence must perform the oversight function concerning the SA National Defence Force.

The Joint Standing Committee on Defence has the power to deal with all of the matters listed in section 228(3). It does not have to do so.

## **CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.**

### **CHAPTER 11**

#### **SECURITY SERVICES**

Section 198 provides that: **Governing principles.**—The following principles govern national security in the Republic:

- (a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
- (b)\* The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
- (c) National security must be pursued in compliance with the law, including international law.
- (d) National security is subject to the authority of Parliament and the national executive.**

Section 199 states: **Establishment, structuring and conduct of security services.**—

- (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
- (2) The defence force is the only lawful military force in the Republic.
- (3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

- (4) The security services must be structured and regulated by national legislation.
- (5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
- (6) No member of any security service may obey a manifestly illegal order.
- (7) Neither the security services, nor any of their members, may, in the performance of their functions—
  - (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
  - (b) further, in a partisan manner, any interest of a political party.

**(8) To give effect to the principles of transparency and accountability, 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.**

Section 55 of the Constitution confers various powers on the National Assembly.

55. Powers of National Assembly.—

- (2) The National Assembly **must provide for mechanisms**—
  - (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
  - (b) to maintain oversight of—
    - (i) the exercise of national executive authority, including the implementation of legislation; and
    - (ii) any organ of state.

In terms of section 56 of the Constitution: Evidence or information before National Assembly.—The National Assembly or any of its committees may—

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
- (b) require any person or institution to report to it;
- (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
- (d) receive petitions, representations or submissions from any interested persons or institutions.

57. Internal arrangements, proceedings and procedures of National Assembly.—

- (1) The National Assembly may—
  - (a) determine and control its internal arrangements, proceedings and procedures; and
  - (b) make rules and orders concerning its business, with due regard to

representative and participatory democracy, accountability, transparency and public involvement.

Similar powers are given to the National Council of Provinces in sections 66 and 69.<sup>4</sup>

The provisions of section 8 of the DEFENCE ACT, 2002 (Act No. 42 of 2002) are also instructive. This section states:

8. Functions of Secretary for Defence.—The Secretary for Defence—

(a) is the Head of the Department as contemplated in the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the accounting officer for the Department as contemplated in section 36 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

(b) **is the principal departmental adviser to the Minister on defence policy matters;**

(c) must advise the Minister on any matter referred to him or her by the Minister;

(d) must perform such functions as may be entrusted to the Secretary for Defence by the Minister, in particular those necessary or expedient to enhance civil control by—

(i) **Parliament over the Department;**

(ii) **parliamentary committees having oversight over the Department;** and

(iii) the Minister over the Department;

(e) must provide the Chief of the Defence Force with comprehensive instructions requiring the Chief of the Defence Force to issue orders and directives and to give commands to any specified member regarding the exercise of any power delegated or the performance of any duty assigned to that member by the Secretary for Defence as head and accounting officer of the Department of Defence;

(f) must monitor compliance with policies and directions issued by the Minister to the Chief of the Defence Force and report thereon to the Minister; and

(g) is responsible for the discipline of, administrative control over and management of employees, including their effective utilisation and training.

In passing, I mention that Section 23 (1) of National Conventional Arms Control Act, 2002

<sup>4</sup> 66. Participation by members of national executive.—(1) Cabinet members and Deputy Ministers may attend, and may speak in, the National Council of Provinces, but may not vote.

(2) The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.

69. Evidence or information before National Council.—The National Council of Provinces or any of its committees may—

- (a) summon any person to appear before it to give evidence on oath or affirmation or to produce documents;
- (b) require any institution or person to report to it;
- (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
- (d) receive petitions, representations or submissions from any interested persons or institutions.

(Act No. 41 of 2002), also provides for reports to be submitted Parliament.<sup>5</sup>

This then brings me to the request to me to provide this with advice on its constitutional responsibility with respect to with respect to the Defence Review Committee.

The constitutional responsibility is clearly spelt out in section 228(3) (d) of the Interim Constitution:


(d) The committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, 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.

These responsibilities are also contained in the Joint Rules of Parliament.

These responsibilities include some of the issues contained in the terms of reference for the Defence Review Committee.

The Joint Standing Committee on Defence has, in my view, the constitutional responsibility to consider the report of the Defence Review Committee and to comment on it. It may also make recommendations based on that committee's report. This would be consistent, in any event, with the statement made by the Minister of Defence and Military Veterans, Dr Lindiwe Sisulu, MP, in her budget speech in Parliament on 13 April 2011 when she said that she would submit the final defence review to Parliament.<sup>6</sup>

This committee may also want to verify some or all of the information contained in the review and for that purpose may initiate its own investigation.

  
**ENVER DANIELS**  
**CHIEF STATE LAW ADVISER**  
**PARLIAMENT**  
**CAPE TOWN**  
**26 APRIL 2012.**

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<sup>5</sup> 23. Disclosure and non-disclosure of information.—(1) The Committee must—

(a) ensure compliance with the annual reporting requirements of the United Nations Register of Conventional Arms and simultaneously present to Parliament a copy of South Africa's annual report to the United Nations;

(b) make quarterly reports to the Cabinet and a committee of Parliament determined by Parliament on all conventional arms exports concluded during the preceding quarter; and

(c) at the end of the first quarter of each year, present to Parliament and release to the public an annual report on all conventional arms exports concluded during the preceding calendar year.

<sup>6</sup> See Page 33 of the South African Defence Review 2012.