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**LEGAL OPINION**

**TO:** Honourable Adv. SP Holomisa and  
Honourable Mr BA Mnguni  
Co-Chairpersons: Constitutional Review Committee

**CC:** Secretary to Parliament

**DATE:** 4 August 2011

**SUBJECT:** Annual Submission to the Constitutional Review  
Committee  
Submission 5: House of Traditional Leaders

**LEGAL ADVISER:** Ms SS Isaac

**REFERENCE:** 129/11



## MEMORANDUM

# PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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**Copy:** Secretary to Parliament

**From:** Legal Services Office

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**Subject: Annual Submission to the Constitutional Review Committee-  
Submission 5: House of Traditional Leaders**

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1. Our office was requested by the co-chairpersons of the Constitutional Review Committee to advise on the submission received from the House of Traditional Leaders (the submitter). Some of the issues raised by the submitter overlaps with other submissions received by the Committee. They have therefore been consolidated in the opinion of my colleague Ms Ngema. This opinion is confined to the issue of sexual orientation under the equality clause.
2. The submitter proposes that 'sexual orientation' be removed as a listed category from section 9 (the Equality Clause) of the Constitution.

### Law

#### *The right to equality under the Constitution*

3. Currently section 9 of the Constitution provides that:
  1. *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
  2. *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
  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 of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*
4. The importance of the right to equality in the Constitution must be understood in South Africa's historical context.<sup>1</sup> Under apartheid the legal system was based on discrimination and inequality.<sup>2</sup> This was not limited to racial disparities but also had a direct impact on women and minorities such as homosexuals and the disabled. The impact of inequality resulted in great disadvantage, vulnerability and even stigmatisation of the affected groups.<sup>3</sup> It is in light of this background that the right to equality as assumed greater importance in society and is seen as a seminal goal in order for progress and transformation to be achieved in South Africa.
  5. Section 9 goes beyond merely requiring formal equality and envisages both substantive and remedial equality.<sup>4</sup> While formal equality requires all citizens to be treated equal under the law, substantive equality requires consideration be given to obstacles that prevent the achievement of equality and remedial equality requires positive step to overcome these obstacles.<sup>5</sup> Accordingly, section 9(2) places a duty on the State to promote the achievement of such equality by legislative and other measures designed to protect or advance persons, or categories of persons.
  6. South Africa's equality jurisprudence is underpinned by the value of dignity. Hence, any claim of discrimination is determined in reference to the infringement of a person's inherent dignity.<sup>6</sup> While defining what dignity is may be difficult, the Constitutional Court noted that 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.'<sup>7</sup>
  7. Further, underlying the entire Constitution is its founding values. These values are not just aspirational but 'they inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid.'<sup>8</sup> The founding values include: human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>9</sup>
  8. Section 9(3) prohibits the state from discriminating against a person on the basis of sexual orientation. Similarly, section 9(4) prevents a person from discriminating against another person on the basis of sexual orientation. The implication of the submitter's proposal is that 'sexual orientation' must no longer be a category protected from unfair discrimination by either the state or any person.

### *Sexual Orientation*

<sup>1</sup> Currie and de Waal. *The Bill of Rights Handbook*. p231

<sup>2</sup> Currie and de Waal. p231

<sup>3</sup> Cheadle, Davis and Haysom. *South African Constitutional Law: The Bill of Rights*. p55

<sup>4</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*. 1999 (1) SA 6. para 62

<sup>5</sup> Currie and de Waal. p231-4

<sup>6</sup> Albertyn and Goldblatt. Chapter 35: *Equality in Constitutional Law of South Africa*. p8.

<sup>7</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*. para 28

<sup>8</sup> *UDM v President of RSA 2003 (1) SA 495 (CC)*. para 19

<sup>9</sup> *Constitution of the Republic of South Africa, 1996*. Section 1(a)

9. The term sexual orientation applies to everyone including persons who are heterosexual, homosexual, bi-sexual, or transsexual.<sup>10</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Ackermann J endorsed a definition of sexual orientation first put forward by Edwin Cameron:<sup>11</sup>

*... sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.*

10. While the protections against unfair discrimination apply to all types of sexual orientation, historically there has been no notable discrimination against heterosexual people. It is therefore more likely that in light of both their vulnerable and minority status in society, homosexuals will seek protection of the equality clause. This is borne out by the fact that all the cases involving claims of discrimination based on sexual orientation have been made by homosexuals.

11. Therefore the removal of sexual orientation from section 9 will disproportionately affect homosexuals. In the *National Coalition for Gay and Lesbian Equality v the Minister of Justice* which dealt with the constitutionality of the criminalization of sodomy, the Court made the following remark:<sup>12</sup>

*The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.*

12. The Court, in *National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs*, recognised that both the vulnerability and past patterns of discrimination are important in determining unfair discrimination.<sup>13</sup>

*This Court has recognised that "[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair." Vulnerability in turn depends to a very significant extent on past patterns of disadvantage, stereotyping and the like. This is why an enquiry into past disadvantage is so important.*

13. The discrimination faced by homosexuals was widespread. The act of sodomy between men was criminalized, same-sex couples could not marry each other and there was a social stigma attached to homosexuality. Today while homosexuals may have formal equality, they are a minority that still faces great levels of discrimination and even abuse in society. As a result they remain a vulnerable group in need of protection under the Constitution. It is therefore important for sexual orientation to receive protection under section 9.

<sup>10</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, para 22

<sup>11</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, para 20

<sup>12</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, para 25

<sup>13</sup> *The National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs*, para 44

14. That said, in light of our current equality jurisprudence, the consequence of removing sexual orientation as a listed category under section 9(3) and (4) may not have the effect desired by the submitter. The doctrine of precedent especially decisions of the Constitutional Court binds all people and organs of state. The Courts existing decisions regarding sexual orientation and related matters as well as its numerous deliberations on the rights of equality and dignity will ensure that vulnerable groups such as homosexuals will continue to be protected.
15. From an interpretative perspective, the use of the word 'including' in section 9(3) indicates that the listed categories are not a closed list. Unlisted grounds that are characteristics or attributes that impact on a person's dignity may be regarded as analogous ground and be protected from unfair discrimination.<sup>14</sup>
16. This means that even if sexual orientation was removed as a listed category, the Court may find that it is an analogous ground protected under section 9 of the Constitution.

## Conclusion

17. The submission if allowed will fall foul of existing equality jurisprudence of the Constitutional Court. It is also not in keeping with the values of human dignity, the achievement of equality and the advancement of human rights and freedoms that is protected and promoted by the Constitution.
18. In concluding, the words of Cory J in the Canadian Supreme Court case of *Vriend v Alberta*, as noted by Ackermann J in the *National Coalition* case should be remembered.<sup>15</sup>

*It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.*

19. Whilst the decision to exclude sexual orientation from section 9 of the Constitution is a policy matter to be decided by the Committee, we are of the opinion, as reasoned above, that such an amendment is not desirable and would not be consistent with the existing constitutional jurisprudence and values of South African society.



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**Ms SS Isaac**  
**Parliamentary Legal Adviser**

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<sup>14</sup> De Waal and Currie, p257. Also see *Larbi-Odam v MEC for Education (North-West Province)* 1998(1) SA 745 (CC) and *Hoffman v South African Airways* 2001(1) SA 1 (CC)

<sup>15</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, para 22  
Per Cory J, delivering part of the joint judgment of the Canadian Supreme Court in *Vriend v Alberta*. Judgment of the Supreme Court of Canada, File No: 25285, delivered on 2 April 1998 at para 69.