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MEMORANDUM

[Confidential]

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

COPY: Acting Secretary to Parliament
[Mr M Coetzee]

FROM: Constitutional and Legal Services Office
[Dr BE Loots – Parliamentary Legal Adviser]

DATE: 17 October 2012

CRC REF: CR12-10

REF: 192/2012

SUBJECT: OPINION ON THE CONSTITUTIONAL REVIEW SUBMISSION BY
JOHN PRICE RELATED TO THE APPOINTMENT AND TERM OF
THE PRESIDENT

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INTRODUCTION

1. Our Office was requested to advise on the submission by Mr John Price for the annual constitutional review by the Joint Constitutional Review Committee ('the Committee').

OVERVIEW OF SUBMISSION

2. In his submission, Mr Price opines that the Constitution of the RSA, 1996 ('the Constitution') has fatal flaws –
 - a. "[in] our constitution has a fatal flaw ... [in] that it gives too much power and influence to the president, the head of the government"¹ and
 - b. "that proportional representation puts excessive power in the hands of the leader of the governing political party".²

¹ Paragraph 3 of the submission.

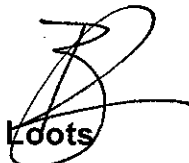
² Paragraph 9 of the submission.

3. In light of this position, Mr Price recommends the amendment of section 42(3) of the Constitution to allow for a new system by which to appoint the President through the creation of an Executive Council.
4. In support of the proposed amendment, Mr Price makes reference to the "Switzerland model", which he explains as follows:

*"Switzerland is run by a council of seven members. One of them acts as president for 12 months, and the job rotates every 12 months. Nobody may hold the position of president more than once during the life of a parliament."*³

LEGAL OPINION

5. In his submission Mr Price concedes that the presidential appointment and term system currently contained in the Constitution of the RSA is a generally accepted model.
6. Mr Price however submits the proportional representation system places excessive power in the hands of one individual. In our constitutional system the concept of proportional representation is closely related to the electoral system, the choice of which is a political matter.⁴
7. If the current system of proportional representation is amended, as per the submission, it will alter the nature of the model of electoral system South Africa currently has. Such an amendment will potentially call for additional amendments beyond the proposed amendment of section 42(3), as it potentially alters the democratic electoral system that underlies the Constitution.
8. As alternative models of government can be found in other jurisdictions, the proposed amendment is not a question of law, but rather one of policy. I am therefore of the view that the Committee is required to take a policy decision as to whether it wishes to recommend or opposed the proposed amendment in its constitutional review report.



Dr BE Loots
Parliamentary Legal Adviser

³ Paragraph 5 of the submission.

⁴ Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 280 – 281. See also sections 46(1) and 105(1), read with section 19, of the Constitution. The link between proportional representation systems and electoral systems is also clear in *Louw v Matjila* 1995 (11) BCLR 1476 (W), where Van Schalkwyk J observed that there are more than one system of proportional representation, with the underlying purpose of proportional representation systems being equitable representation. See Devenish *The South African Constitution* (2005) 225.

**SUBMISSION TO THE CONSTITUTIONAL REVIEW
COMMITTEE OF PARLIAMENT**

Members of the public have been invited to submit proposals for the review of particular sections of the constitution by 1st June 2012. I am grateful for the opportunity to address what is a serious shortcoming in many constitutions which are based on the generally accepted Western model, including our own constitution. My name and contact details are at the end of this document.

I respectfully request you to consider the following proposal.

South Africa is a present suffering from a plague of corruption that seems to be intensifying. A bold constitutional initiative will reverse the trend, and I submit the following analysis and proposal to you.

1. Winston Churchill said the following in the UK Parliament in 1947:

Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

We all accept that when political trouble occurs, the remedy will be "democracy" but we don't question the form that it should take.

We assume that the primary feature will be to give everyone a vote.

We include in the proposals some checks and balances, and a declaration on human rights, and we assume that a popular person will emerge who has the support of most of the voters, and that he or she will proceed to preside over a democratic government.

2. This, more or less, is the form that attempts to create democratic countries in Africa (including our own) have taken. And almost everyone who speaks about the subject, will say that we have a very fine **constitution** and we must all respect it.

3. But **our constitution** has a **fatal flaw**. That **flaw**, which history will confirm, is that it gives **too much power and influence to the president, the head of the government**.

4. For confirmation, we need not look further than last century's dictators, like Hitler and Stalin, or people like Robert Mugabe, or Idi Amin and half a dozen other African dictators, to see how much damage to a country and its people, too much influence and power, in the hands of a single head of state, can do. I could go on, but we all know what I am talking about. **And it is significant that every would-be dictator sets out to attain four principal objectives. They are:**
 - **To obtain control of the police and the army;**
 - **To suppress the free media; and**
 - **To appoint "puppy-dog" judges to carry out the dictator's instructions;**
 - **To effectively control parliament, by gerrymandering elections, packing ballot boxes, terrorising the electorate, or other means;**

And thus to hold out to the world the pretence that the country is being democratically governed.

5. I recently mentioned to a small gathering the fatal flaw, that our constitution gives too much power to the president. They asked me how I could say so. I asked them, "Who is the president of Switzerland?" Silence. Nobody knew. Since I had asked the question, they asked me who it was. I didn't know either. And the reason why nobody knows, is that **Switzerland is run by a council of seven members. One of them acts as president for 12 months, and the job rotates every 12 months. Nobody may hold the position of president more than once during the life of a parliament.**

6. The seven members of the council are appointed by the general assembly, at its first sitting after a general election. They then choose one of their members to act as president for the first 12 month period, and thereafter the council appoints another member of the council to take over as president for the next 12 month period, and so forth. Each member's job is to oversee certain aspects of the country's affairs, just as a cabinet minister would. A new council member is elected by parliament to replace an incumbent who has resigned or died, or has become ineligible for any reason. The practical affairs of the country are run by the civil service, who are no doubt called to account for what they do, by the appropriate council member.

7. After Rome had been ruled by a succession of kings the Roman Republic came into being in 509BC, and the change for which the Republic became famous, is that Rome was thereafter ruled by two Consuls, who were appointed by the senate, and held office jointly, for one year at a time.

The point of the examples of modern day Switzerland, and ancient Rome, is that there is no need to place a lot of power in the hands of one person, and Switzerland and Rome found ways to avoid such a situation. Experience shows it can be extremely dangerous if one ruler has too much power.

8. The history of this aspect of English constitutional evolution is different. Growing conflict between the monarchy and parliament intensified during the 17th century, and culminated when King Charles I was captured by the parliamentary forces under Oliver Cromwell, and was executed in 1649. After that the monarchy was restored, as a constitutional monarchy, and was subject to the control of parliament.
9. This episode indicates another significant **weakness in our constitution, namely that proportional representation puts excessive power in the hands of the leader of the governing political party.** The president is able to ensure obedience by members of the party that put him in office by cancelling their party membership, and thereby securing their expulsion from parliament.
10. For this reason, the South African parliament can never be relied on to act as a brake on the president, in the way that the English parliament, under Oliver Cromwell, rebelled against King Charles I. For us to evolve into a mature society, effective alternatives to proportional representation have to be found.

11. It is also worth noting that for practical purposes almost all countries have a history of being ruled by a king or chieftain of some sort, and the "big man" syndrome of African societies is not unique. I have little doubt that King Henry VIII of England was as much a tyrant as King Chaka of the Zulus, or Robert Mugabe, who started his 30 year term as president with the massacre of thousands of Matabele. (And note also, that both Hitler and Mugabe came to power after what were taken as democratic elections.) If we want democratic government, we cannot tolerate the risk that any president could become all powerful. Action taken to avoid the danger of putting too much power in the hands of one person would establish us as a mature society.

12. It is not a coincidence that at this time of rampant corruption, inappropriate appointments to important policing positions, such as head of Crime Intelligence, and National Police Commissioner should be raised by concerned people, and that the president should suggest that the roles of the media and the courts of justice, need to be investigated. It seems to me very appropriate, in such a context, that the role and the powers of the president, particularly his powers of appointment, and term of office, must also be reviewed.

13. To return to the original motivation for this submission, namely the plague of corruption which we are enduring at present; it is necessary to note that **there is a very important difference between what are called the private sector, and the public sector.**

14. The **private sector** has no organization, and no head, or controlling body. It is simply large numbers of private citizens and business entities pursuing their various objectives. Some will be open to corruption, and if they can get away with it, they will be corrupt. Some will always be honest and law abiding, but they have no legal power to stop others from being corrupt.

15. In sharp contrast, the **public sector** is run by an organization with a head (the president) and bodies that are supposed to carry out what they are instructed to do (the civil service). One of the things they are supposed to do is to see that the laws are obeyed, and when they fail in this, lawlessness takes over, and corruption flourishes. That is why endemic corruption begins with a country's government, and also why **the only effective place to start eliminating corruption, is in the government, and at its head, the President. Corruption is a crime, but not only that; it is a disease that starts at the heart of government, and can turn a whole country into a "failed state".**

16. As things are, any president of South Africa who feels that his position as president is threatened, and who has aspirations to hold onto his office, will surround himself by appointing chosen acolytes, who can be relied on to protect him from criticism, and conceal what he is doing to cling to office, or to enrich himself. In the process they enrich themselves as well, all at the public expense of course. And since they are in the arrangement together, they stick together at all costs. The consequence is more rampant corruption, and Democracy fails, as it has failed in Zimbabwe.

17. To achieve the objective described in 12 above, I recommend the following:

- Section 42(3) of the Constitution should be amended to provide that at its first sitting after a general election, the National Assembly elects an **Executive Council** consisting of not less than (say) nine members of the National Assembly, who must all then cease to be members of the National Assembly during their period of office as members of the Executive Council;
- At their first meeting after election, the executive council must appoint one of their number as president, who assumes the office of president, and presides as chairperson of executive council meetings for a period of 12 months from the opening of parliament;
- The executive council exercises all the powers and responsibilities of the president, including those in terms of section 84 of the constitution, and including the appointment of cabinet ministers to oversee and assume responsibility for all state departments, and any other office requiring presidential appointment. The executive council makes decisions by majority vote; provided that if there is an equal division of votes, the president has a casting vote. Executive council members may also be cabinet ministers.
- On expiry of the president's 12 month term of office another member of the executive council must be chosen by the votes of the council, who will then hold office as president for the following 12 months, and so forth, for

the duration of the general assembly, and until the next general election, after which a new executive council is elected, and the process is repeated;

- No member of the executive council may hold the office of president for more than one 12 month term during the term of an elected National Assembly;
- There may not be fewer than seven members of the Executive Council or more than nine, and if a vacancy occurs in the Executive Council for any reason, this must be filled by a member elected by majority vote at a special meeting of the National Assembly.

Further detail will need to be filled in to give effect to the idea, and the above is intended to present a realistic outline of the sort of provision that a sophisticated, and at the same time simple amendment to the constitution would involve.

18. The idea of a much shortened, single term of office (eg 1 year) plus the need to persuade a small committee to go along with the president's wishes, would reduce both the opportunity and the capacity, for any president to build himself into an impregnable position. If he finds it difficult to make suitable corrupt appointments in the time available to him, corruption will find it more difficult to get a foothold, and at the same time this will inculcate the respect for the constitution, among the public as a whole, that a democratic system requires.

19. Such a system is at present in working in Switzerland, a civilised country, and it would not constitute a radical departure from what we have at present. We could also take account of the experience of that country for guidance.


John Price

18 May 2012

If you would like to interview me to expand on the proposal I have put forward I can be contacted on telephone 082 888 2467. My postal address is PO Box 801, Pretoria, 0001. I will be glad to attend any interview in Cape Town or Pretoria.

I am a practising lawyer, with an LLB degree and qualifications as Conveyancer and Notary. I also hold an MA Degree in Sociology, specialising in Sociology of Law. (My MA dissertation dealt with the legitimisation of lawful authority.) I will provide you with a fuller Curriculum Vitae on request.

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