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MEMORANDUM
[Confidential]

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

COPY: **Acting Secretary to Parliament [Mr M B Coetzee]**

FROM: **Constitutional and Legal Services Office**
[Adv C R van der Merwe –Parliamentary Legal Adviser]

DATE: **29 August 2012**

SUBJECT: **Annual Submission to the Joint Constitutional Review Committee: IFAISA submission on Anti-Corruption Commission; Representation in Parliament and the JSC**

CR COMMITTEE REFERENCE: **CR12-11**

REF: **193/2012**

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MEMORANDUM

TO:	**Honourable Adv. SP Holomisa. MP and Honourable Mr. BA Mnguni, MP Co-Chairpersons: Constitutional Review Committee**
COPY:	**Acting Secretary to Parliament [Mr M B Coetzee]**
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INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Joint Constitutional Review Committee ('Committee') to advise on the submission received from the Institute for Accountability in Southern Africa ('IFAISA').

SUBMISSION BY IFAISA

2. IFAISA makes three proposals in its submission. Firstly, the establishment of an anti-corruption unit, "the Eagles" as a new Chapter 9 institution is proposed. Secondly a request is made for proportional representation to be

reconsidered and thirdly the membership of the Judicial Service Commission (JSC) is requested to be changed.

NEW CHAPTER 9 ANTI-CORRUPTION COMMISSION

3. In the matter of *Glenister v President of the RSA and Others*[1] the Constitutional Court declared Chapter 6A of the South African Police Service Act 68 of 1995 inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') in that it failed to establish an adequate degree of independence for the Directorate for Priority Crime Investigation (DPCI).

4. IFAISA bases its submission on the *Glenister*-judgement and argues for the creation of a new chapter 9 institution as it is of the opinion that creating an independent anti-corruption body by way of national legislation is not the best solution in practice. The new chapter 9 anti-corruption commission is proposed to be referred to as "the Eagles" and will focus on "corruption of a serious nature". "The Eagles" is proposed to operate in addition to the Hawks, who will investigate, prevent and combat other priority crimes.

5. IFAISA is further of the opinion that the South African Police Service Amendment Bill,[2] currently referred to the National Council of Provinces, will also not pass constitutional muster as it yet again fails to provide sufficient independence to the anti-corruption body that it is proposing.

6. The court in *Glenister* held that although the Constitution does not require the establishment of a corruption fighting unit, nor prescribes operational attributes, the court does not doubt that the Constitution as a whole "*imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.*"[3]

7. Three international agreements to which South Africa is a signatory[4] require such a mechanism to be created and specifically require the mechanism to be

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[1] 2011 (7) BCLR 651 (CC).

[2] South African Police Service Amendment Bill, Bill 7 – 2012.

[3] *Glenister*, par 175.

[4] Article 6(2) of the UN Convention; Article 8(1) of the Southern African Development Community Protocol on Combating Illicit Drugs; and Article 5(3) of the AU Convention.

independent.[5] In establishing the meaning of "independence" the court referred to the Organisation for Economic Co-operation and Development's definition:

> *"Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."* [6]

8. Having held that the Constitution and international obligations require that a mechanism be established to fight corruption, which mechanism must be independent, the court emphasised that "*the form and structure of the entity in question lie within the reasonable power of the state, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence.*"[7]

9. The minority judgment in *Glenister* puts it more succinctly:

> *"It is therefore within the power of Parliament to establish an anti-corruption unit and to locate it within the SAPS. The Constitution does not prescribe to Parliament where to locate the anti-corruption unit. It leaves it up to the Executive, which initiates legislation under section 85(2)(d), and ultimately to Parliament to make a policy choice."*[8]

Legal Advice

10. The question whether an anti-corruption mechanism is better suited as a new chapter 9 body, or as a unit created by national legislation separately from, or within the SAPS, is not a legal question. The Constitutional Court made it quite clear in the *Glenister* matter that the form and structure of an anti-corruption

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[5] *Glenister,* par 183 – 186.
[6] *Glenister,* par 188.
[7] *Glenister,* par 196.
[8] *Glenister,* par 65.

mechanism lie within the reasonable power of the state. The proposal for a new chapter 9 body "the Eagles" to be formed is thus a policy decision.

PROPORTIONAL REPRESENTATION

11. IFAISA refers the Committee to the "Van Zyl Slabbert Commission of Inquiry" or Electoral Task Team's 2003 report. IFAISA argues for a different electroral system in Parliament, requesting improved accountability mechanisms and responsiveness as well as creating more transparency in the relationship between the elected and the electorate.

12. IFAISA further proposes the deletion of section 47(3)(c) of the Constitution to allow members of parties to vote according to "their consciences on contentious legislation", without the fear of losing their seat in the House. Put conversely, the request is that seats be "secured" despite a Member of Parliament losing membership of the political party that nominated him/her.

13. Any change to the electoral system in the Houses of Parliament, as well as an amendment of section 47(3)(c), would constitute a policy decision. Paragraph (c) was inserted by the Constitution Tenth Amendment Act, 2003 to create "uniformity within the three spheres of government regarding loss or retention of membership of the National Assembly"[9] and an amendment of this paragraph will thus necessitate consideration of similar provisions that relate to the Provincial and Local spheres of Government.

14. The legal question that however arises from this request is whether a change in the electoral system of Parliament can be effected through an amendment of the Constitution.

15. The question whether proportional representation is such a part of the basic structure of the Constitution that it cannot be amended was considered by the Constitutional Court in *United Democratic Movement v President of the Republic of South Africa and Others ('UDM').*[10]

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[9] Preamble of the Constitution Tenth Amendment Act, 2003.

[10] (No 2) (CCT23/02) [2002] ZACC 21 (4 October 2002). *UDM* dealt with the so-called "floor-crossing" legislative amendments contained in four amendment acts: The Constitution of the Republic of South Africa Amendment Act 18 of 2002; The Constitution of the Republic of South Africa Second Amendment Act 21 of 2002; The Local Government: Municipal Structures Amendment Act 20 of 2002; and The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

16. The court in *UDM* was referred to *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*[11] ("*Premier of KZN*") where the Constitutional Court said that an amendment "*radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.*"[12]

17. The court in *UDM* said that there are many electoral systems which are consistent with democracy and accordingly that "*[i]t cannot be said that proportional representation ... [is] so fundamental to our constitutional order as to preclude any amendment of [its] provisions.*"[13]

18. The court in *UDM* further held that proportional representation cannot be considered a founding provision of the Constitution. A "multi-party system of democratic government"[14] does not preclude another electoral system, save for a one-party state, or a system of government in which only a limited number of parties may compete for office.

Legal Advice

19. The decision whether to change the electoral system of Parliament[15] is a policy decision. A decision to so change the electoral system, provided it does not affect the founding provision of a "multi-party system of democratic government", may be implemented by way of an amendment of the Constitution.

JUDICIAL SERVICE COMMISSION ('JSC')

20. The JSC is described by IFAISA as "one of the most dysfunctional bodies created by the founders of the Constitution." IFAISA is of the opinion that the reason for the dysfunction is an imbalance of "too many politicians and too many overtly political appointees on the JSC".

21. IFAISA requests that either the membership of the JSC be amended, or that the numbers of non-political appointees be increased to dilute the "pernicious

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[11] 1996 (1) SA 769 (CC)

[12] *Premier of KZN*, par 47.

[13] *UDM*, par 17.

[14] Section 1(d) of the Constitution, 1996

[15] This includes an amendment to section 46(1) (proportional representation) and section 47(3)(c) (losing membership).

influence of politicians of all kinds who at present bedevil the processes of the JSC."

22. Furthermore, IFAISA proposes that once the JSC is properly composed, the appointments of senior NPA officials should be conducted through the JSC so as to depoliticise these appointments as well.

23. In the *Certification of the Constitution of the Republic of South Africa, 1996* ('the *First Certification*-judgment') the Constitutional Court was faced with a similar objection to the constitution of the JSC. The composition of the JSC was very similar at that stage[16] and the court held that the composition of the JSC was a political choice made by the Constitutional Assembly within the framework of the constitutional principles against which the court must test it. Accordingly, the court could not interfere with that decision.

24. The court stressed that an essential part of separation of powers, is the requirement of an independent judiciary. The court pointed out that in countries such as United Kingdom, New Zealand, Canada, Australia, Germany and the USA judicial appointments are made by the executive and / or Parliament. According to the court it is "*crucial to separation of powers and the independence of the judiciary ... that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.*"[17]

Legal Advice

25. As stated by the court in the *First Certification*-judgment, the composition of the JSC is a political (policy) decision. It is not a new phenomenon to involve parliamentarians or the executive in the appointment process and the decision to amend the composition of the JSC is a policy decision to be taken by the Houses.

Adv C R van der Merwe
Parliamentary Legal Adviser

[16] The text considered during the first certification judgement provided for "the President of the Constitutional Court", while the final text provides for the "President of the Supreme Court of Appeal". Other than this the membership is exactly the same.
[17] *First Certification*-judgement, par 123

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IFAISA SUBMISSIONS TO THE CONSTITUTIONAL REVIEW COMMITTEE OF PARLIAMENT

Introduction

1. Ifaisa (the Institute for Accountability in Southern Africa) welcomes the opportunity to make submissions to the Constitutional Review Committee of Parliament as advertised in the Sunday Times on 29 April 2012.

2. In this submission three separate issues will be canvassed, the first relating to the establishment of an Anti-Corruption Commission as a new Chapter Nine Institution, the second concerning the superfluity of 100% proportional representation at this stage in the history of the democratic development of the nation and the third with regard to the dysfunctional nature of the Judicial Service Commission due to the abundance of political appointees in its ranks.

3. Should the Committee wish to hear oral submissions on any of the topics that Ifaisa raises in these submissions, we are willing to oblige at a mutually convenient time and place.

4. Ifaisa is a registered NPO and concentrates its energy on making accountability matter in the Southern African region. As regards political accountability, the aims of Ifaisa are to exact accountability and to promote responsiveness to the needs of ordinary people. There is more detail available regarding Ifaisa's activities on the website www.ifaisa.org which the Committee is encouraged to visit.

An Anti-Corruption Commission – the Eagles

1. The judgment of the Constitutional Court in the Glenister case will be well known to members of the Committee. A copy of the whole judgment is available on the Ifaisa website (www.ifaisa.org) on the Glenister case page. It is not intended to burden this submission with the judgment.

2. The effect of the judgment is to require of Parliament to create a sufficiently independent and effective anti corruption entity so as to achieve compliance with the international treaty obligations of the country and consistency with the values of the Constitution. This can be done without amending the Constitution. However, Ifaisa respectfully submits that this would not be the best practice solution.

3. A Bill, called the SAPS Amendment Bill 2012, is before Parliament and is under consideration by the select committee of the National Assembly concerned with policing at the time of preparation of this submission. The Bill is aimed at minimalistic changes to the current dispensation in which the Hawks (or Directorate of Priority Crime Investigation) are given the anti-corruption functions and responsibilities. It is likely to be found unconstitutional if enacted in anything approaching the form in which it was introduced by the Executive to Parliament.

4. From the public participation process it is apparent that all but one of the parties who so participated are critical of the Bill in the form in which it has been presented to Parliament by the Executive.

5. The ANC members of the select committee are seeking to find ways to keep the Hawks within the SAPS and yet also sufficiently independent and effective to pass constitutional muster. This is a well nigh impossible task. Section 207 of the Constitution prescribes that the National Commissioner of Police has control and management of SAPS. Under the Public Finance Management Act this official is also the accounting officer of SAPS. It can accordingly be seen that if the Hawks remain within SAPS they will be under the line function control and financial management of an accounting officer who is a political appointee (and indeed a politician too on the track record of recent appointments) and one in a position to influence or interfere with the investigations and functioning of the Hawks. This is unconstitutional.

6. It would appear that there is no political will to make the National Commissioner into a constitutionally independent functionary like the National Director of Public Prosecutions or the Commissioners or heads in the Chapter Nine Institutions.

7. It accordingly follows that it will be exceedingly difficult to keep the Hawks within the SAPS and still able to effectively and independently fight corruption.

8. The solution is to seek a new home for the anti-corruption entity which the state is obliged, both internationally and constitutionally, to maintain.

9. The suggestion of Ifaisa is that the appropriate home for such a body is a new Chapter Nine Institution, to be called the Eagles, in order to distinguish it from the Hawks.

10. The Hawks will continue to exist as they do as a unit in SAPS and will be required to investigate, prevent and combat priority crimes other than corruption of a serious nature, which will become the exclusive domain of the Eagles.

11. Ifaisa has made detailed submissions to the select committee on the notion of creating the Eagles. These are on its website www.ifaisa.org on the Glenister case page. They will not be repeated here so as not to unnecessarily burden this submission.

12. In addition to the submissions so made, a draft constitutional amendment and a draft bill for the Eagles have been placed before the select committee and are likewise available for perusal on the said website.

13. It is accordingly possible for this committee to have regard to the material placed before the select committee sitting on the SAPS Amendment Bill 2012 and to consider this submission in the context of the consideration of possible amendments to the Constitution.

14. There is a school of thought that suggests that the Eagles do not need to be a Chapter Nine Institution and could be a legislated anti-corruption entity of the "stand alone" kind.

15. Ifaisa concedes that the Glenister judgment does not require the creation of a new Chapter Nine Institution and that it would be possible to create a stand alone entity capable of being sufficiently independent and effective to satisfy the requirements of the judgment in Glenister's case.

16. It is however plain that this would not be the best practice solution to the problems posed by rampant corruption in society at this time. A legislated stand alone entity could be closed down just as easily as the Scorpions were closed down. This has the effect of retarding the fight against corruption. The Hawks have not caught any big fish, indeed they have been prevented from investigating some, like Richard Mdluli.

17. A Chapter Nine Institution, once created, can not be closed down except by a special majority of 66% of the vote in Parliament. This gives the Eagles far greater security of tenure than the Hawks, or even the Scorpions, in their day.

18. The rationale for making the Eagles a new Chapter Nine Institution is to demonstrate to the public the determination of Parliament to get to grips with the phenomenal growth of corrupt activities in our society at this time by establishing a best practice solution to the problem, rather than the minimalistic one proposed by the Executive branch of government. Chapter Nine Institutions are increasingly well known to the public and ever more respected by the people.

19. By creating the Eagles, Parliament can assert its willingness to hold the Executive to account, a task that is exceedingly difficult in our proportional representation system, in which the party bosses decide who to hire and fire on the party lists of representatives in Parliament and elsewhere.

20. The fundamental error in the way in which the Executive is approaching the task of implementing the Glenister judgment is that it is characterising corruption as simply another manifestation of crime. It is more than this in SA today, and it threatens to tear

apart all of the gains that have been made since the dawn of democracy and the establishment of a constitutional dispensation under the rule of law.

21. Members of the Committee are encouraged to read "Between a Rock and a Hard Place" on the Glenister case page of www.ifaisa.org in order to properly place corruption in its correct context in modern SA society. Corruption is a cancer which has the potential to turn the country into a failed state in short order. The prospects of peace, progress and prosperity in a failed state are not rosy; far better that early pro-active steps be taken to establish effective anti-corruption machinery sooner rather than later so that the scourge of corruption can be rooted out and we can realise the goals of the new Constitution: a society in which human dignity thrives, equality is achieved and the freedoms guaranteed in the Bill of Rights are enjoyed by all. This will elude us all if we take less than best practice measures to deal with corruption.

22. No self respecting Member of Parliament admits to being in favour of corruption, but too few are prepared to do what they know is the right thing in response to creeping corruption in high places. The right thing is to support the notion that a best practice solution to the problems of corruption must be put in place urgently.

23. Ifaisa submits that the Eagles is that best practice solution and that the drafts it has prepared to amend the Constitution and put in place an Anti-Corruption Commission called the Eagles, or refinements of them, are what is urgently needed to address the situation the nation faces at present.

24. Eagles see further, fly higher, go after bigger prey and are less susceptible to poisoning than other birds, particularly the scarce and shy Hawks.

Proportional representation

1. The question of proportional representation across the board in parliament was visited by the Van Zyl Slabbert Commission of Inquiry some years ago. The report of the commission is gathering dust is some parliamentary archive.

2. Ifaisa would like to propose that the report be dusted off and reconsidered in the interests of growing democracy, improving accountability mechanisms, promoting responsiveness to the need of ordinary people and enhancing transparency in the relationships between the elected and the electorate.

3. In recent elections more voters chose not to vote than voted for the governing tripartite alliance. This is a sad indictment of the state of democracy in SA. If so many people are so alienated from the system that they choose to forego their hard won right to vote, then it is time to do something pro-active about it.

4. Proportional representation was only meant to be part of the transition to democracy. The re-establishment of constituencies and the fostering of relationships

between the elected and electorate, instead of between the elected and their party bosses is overdue in SA.

5. The best form of accountability for an elected parliamentarian is the constituency meeting at which she or he reports back to the people represented. There is very little of this spirit in SA today and the country is the poorer for it.

6. Even if proportional representation is not adjusted in terms of the recommendations of the Commission's report, there is one issue that could still be considered by the Committee with a view to a constitutional amendment.

7. Ifaisa refers, of course, to the provisions of section 47(3) (c) of the Constitution. This pernicious provision prevents parliamentarians of the calibre of Prof Ben Turok from voting their consciences on contentious legislation without fear of fatal disciplinary measures on the part of the party bosses who control the party list and therefore the career of all of those on it and who want to be on it. As loss of membership of the party on whose list the parliamentarian belongs, entails loss of the seat she or he occupies in parliament, it can be seen that dire consequences flow from the powers that unelected party bosses are given by the provisions of the sub-section.

8. Ifaisa suggests that there is no longer any good reason for the provision and that it should be scrapped in the interests of a freer and more accountable corps of parliamentarians. Party membership ought not to be a pre-requisite of parliamentary membership – this interferes with freedom of association, a guaranteed right and is thus unconstitutional.

Reforming the Judicial Service Commission

1. The JSC must be one of the most dysfunctional bodies created by the founders of the Constitution. Things have reached such a dire state that twice in succession insufficient candidates have put their names forward for appointment and for the honour of occupying the one vacant seat in the Constitutional Court, a crowning achievement in any successful legal career. This is lamentable.

2. The JSC is perpetually involved in ugly and destructive litigation. It has not protected the honour of the justices of the Constitutional Court in the Hlophe saga, it has fought with all and sundry over the extension of the term of office of the last Chief Justice, it has been taken to court by FUL and Premier Zille for its flaccid treatment of the disciplinary issues around Hlophe, it has, as usual, lost the case over its failure properly to appoint suitable candidates to vacancies in the Western Cape High Court. It has then, petulantly so, refused to fill these vacancies, thus requiring the second busiest division in the country to run with hordes of acting judges, only to have the JSC relent when all unsuccessful candidates withdrew their nominations. The process around the appointment of the present Chief Justice was a demeaning fiasco in which the JSC emerged as one of the worst offenders. One of its members even made it known that he would vote for the

President's candidate even though his personal choice was the Deputy Chief Justice. What is the point of such a person serving on the JSC? The President was asked by Ifaisa to dismiss the Commissioner in question but ignored the request for reasons that are obvious. This can not be allowed to continue.

3. According to section 165 of the Constitution, the JSC, as an organ of state, is supposed to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. It does none of these properly. Its interview process has deteriorated into an inquisition for some candidates and a five minute walk in the park for others. Public criticism of the JSC fills the columns of serious newspapers. It remains impervious to all criticism and is taken the judiciary to places it ought not to have to visit, through its ineptitude. The Committee is invited to google the term "Judicial Service Commission South Africa" and consider the extent of the bad press the JSC has earned for itself.

4. The question is: why is the dysfunctional state of JSC affairs so pronounced?

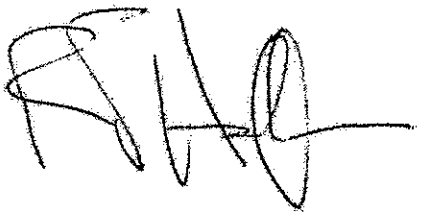
5. The answer, Ifaisa respectfully suggests, is that there are too many politicians and too many overtly political appointees on the JSC. It does not function as an independent body. Allegations that it has an ANC caucus in its midst are stoutly denied, yet seem to gain credence at every session as any intelligent and informed observer sees politics at play in a process that ought not to be political at all. The primary task of the JSC, as set out in the Constitution, is that of identifying appropriately qualified women and men who are fit and proper persons to be appointed to the judiciary. The need for the judiciary to reflect broadly the racial and gender composition of the country "must be considered" when judicial officers are appointed. Unfortunately, politics has been allowed to unduly intrude in this process, to the detriment of the administration of justice, the reputation of the Bench and the confidence of the public in the judiciary.

6. If the problem is too many politicians, the solution has to be the reduction of the number of politicians and political appointees and their replacement with nominees of the Bench (in the form of retired judges, who, of all people, have the most expertise in identifying appropriate candidates) of civil society (in the form of appropriately qualified commissioners who can constructively assist in so identifying), faith based organisations (ditto) and trade unions (ditto) in addition to the legal professionals and law teachers representatives who already serve on the JSC.

7. If this is too bitter a pill to swallow, then at least give consideration to increasing the numbers appropriately so as to dilute the pernicious influence of the politicians of all kinds who at present bedevil the processes of the JSC.

8. When the JSC is re-invented as a well functioning commission, consideration ought to be given to a suggestion made by the Deputy President, when he was President, that senior appointments in the NPA should also be the business of the JSC. Depoliticising the

office of the National Director of Public Prosecutions and her or his Deputies could go a long way toward restoring public faith in the independence of the NPA. This is an essential element of confidence in the criminal justice administration and a bulwark against vigilantism.



Paul Hoffman SC

Director

Ifaisa

30 April, 2012.