

## PRELIMINARY NATIONAL PARTY SUBMISSION

### THEME COMMITTEE 5

#### BLOCK 6: ATTORNEYS-GENERAL AND JUDICIAL APPOINTMENT

1. Section 108 of the Constitution of the Republic of South Africa, Act 200 of 1993 ('the Constitution') provides that the authority to institute criminal prosecutions on behalf of the state is vested in the attorneys-general. The Attorney-General Act 92 of 1992 provides for the area of jurisdiction, powers and functions of the attorney-general and acknowledges the independence of the attorney-general. In addition, it provides for the accountability of the attorney-general to Parliament.
2. In spite of the attorney-general exercising wider responsibilities than the prosecution of alleged criminals, the latter remains the main function of the attorney-general. Under his or her delegation, public prosecutors institute criminal proceedings against alleged contraventions of the law. The exercise of the discretion to institute proceedings, is not done in vacuo, but against a set of principles governing this matter. The standing of the attorney-general's office is recognized in law and in practice, as the attorney-general is an advocate of the Supreme Court and therefore an officer of the Court. It is consequently imperative that one attorney-general should be appointed for every Division of the Supreme Court. This will ensure the smooth operation of the attorney-general's office and contribute to the professional management of prosecution services in the area of jurisdiction of every particular Division.
3. The independence of the attorney-general should in no way be compromised by the process of appointment. The process of appointment (and dismissal) of an attorney-general should be transparent and accountable. In order to achieve this, the composition of the Judicial Services Commission ('JSC') should be amended to include two attorneys-general. The JSC would then have the duty to make recommendations to the President on suitable candidates for appointment. Every attorney-general would therefore be appointed by the President on the advice of the JSC. Procedures similar to those providing for the removal of a judge should be included in the Constitution in respect of the dismissal of an attorney-general.
4. The independence of the attorney-general should be entrenched in the Constitution. A statement on the independence and impartiality of the attorney-general is therefore an absolute necessity. The clauses pertaining to the Public Protector (section 111 of the Constitution) and the Auditor-General (section 192) are examples in this regard. In addition, the functions and powers of the attorney-general need to be set out.

5. The Constitution should make it clear that the responsibility for deciding on prosecutions should in the final instance only rest with the attorney-general, who remains accountable to Parliament.

6. In respect of public prosecutors, a statement dealing with their independence vis-d-vis the State should be introduced in Constitution, without derogating from the powers of the attorney-general under whose delegation they institute criminal proceedings. The detail of their appointment etc. should however be dealt with in separate legislation.

## **BLOCK 7: GENERAL**

### **1. SECTIONS 33 AND 35 OF THE CONSTITUTION**

The interpretation clause of the charter of fundamental rights (section 35) should not be amended. The limitation clause (section 33), which influences the interpretation clause, should be retained subject to the National Party's Preliminary Submission on this matter in Theme Committee 4.

### **2. SECTION 107 OF THE CONSTITUTION**

The provision for the use of languages in court should not be amended. Section 107 was included in pursuance of sections 3 and 31 in respect of language rights and gives further expression to those rights.

### **3. SECTION 231 OF THE CONSTITUTION**

3.1 The retention of this measure in the new Constitution is of vital importance. The increasing role that bi- and multi-lateral relations play in the South African agenda, the global nature of many problems and the need for South Africa to deal with other nations underlines the necessity for a measure dealing with international agreements. It is also important that the Legislature have a say in something which directly affects the progress of the country and its people. In support of the concepts of openness and accountability which permeates the Constitution, it is important that the power to enter into or accede to international agreements be balanced by empowering Parliament to ensure that checks and balances are placed on the exercise of the Executive (and the President in particular) of its powers in this regard.

3.2 Certain changes to section 231 are however proposed.

3.2.1 Subsection (1) can remain as it is except for the deletion of the words 'within the meaning of the previous Constitution'. These words no longer have any significance in view of the changed position in respect of the territory of the Republic.

3.2.2 Subsection (2) can remain as it is except for the deletion of the words "negotiated and signed in terms of section 82(1)(i)". Many (multi-lateral) international agreements are no longer

open to negotiation and signature, but only to accession. Furthermore, a number of international agreements are in their particular nature not law-making, but create a platform for good relations between countries and therefore do not need ratification. The retention of the above-mentioned phrase in those circumstances creates a contradiction. Furthermore, Parliament need not be occupied with non-law-making agreements, or pro forma agreements establishing diplomatic and consular relations. Parliament would therefore be competent to ratify agreements where a particular agreement requires accession or ratification to bring it into force on an international plane.

3.2.3 Subsection (3) can largely be retained. It might, however, be useful to qualify the word 'expressly' by adding the phrase 'by Act of Parliament', thereby removing any doubt which may exist.

3.2.4 Subsection (4) can be retained without amendment.

#### 4. SECTION 232 OF THE CONSTITUTION

The interpretation clause of the Constitution can only be dealt with once the substantive provisions of the new Constitution have been agreed upon. This is a technical matter which is not of importance at the moment.

#### **BLOCK 8: Legal Education and Legal Professions**

1. There is no need to deal with legal education in the Constitution.
2. There is no need to deal with private legal professions in the Constitution. The position in respect of judges, magistrates, attorneys-general and public prosecutors is dealt with elsewhere in the Constitution.

#### **BLOCK 9: Transitional arrangements**

1. Transitional arrangements should be dealt with when the substantive measures have been agreed upon.