



LEGAL RESOURCES CENTRE

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25 June 2009

Minister of Justice and Constitutional Development
c/o Mr JJ Labuschagne
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Pretoria, 001

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Dear Sir

Re: Proposed Constitution 18th Amendment and State Liability Bills, 2009

1. We refer to the Department of Justice and Constitutional Development's call for public comments following the publication of the proposed Constitution Eighteenth Amendment and State Liability Bills, 2009 ("the bills").
2. In this letter, we set out the joint concerns of all the organisations and individuals mentioned below ("the signatories"). This is not a petition: the views contained in this letter are fully subscribed to by each of the signatories.
3. At the outset we wish to state that the period of one month during which the public has been afforded the opportunity to comment on the bills is unreasonably short. The subject-matter of the proposed legislation is of a technical nature and the actual meaning and import of the bills may not be of immediate significance to readers without legal training. Furthermore, the bills have been introduced at the same time as an

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S Sephton (Director), K Govender

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application by the Department to extend the period of suspension of the Constitutional Court's order in the *Nyathi* matter. This has occupied the time and focus of the legal advisers of many of the signatories, who have consequently been unable to consult fully regarding the impact that the bills may have on their activities.

4. It would appear that the short time period that has been provided for public commentary on the bill is in part the result of the fact that the deadline set by the Constitutional Court in the *Nyathi* case has not been met and in preparation for their application to the Court for an extension. Despite this, the Department has seen fit to publish "omnibus" legislation whose scope extends far beyond the narrow issues that were at stake in that case and which are the subject of the Constitutional Court's order. In particular, we note that the draft State Liability Bill not only covers terrain that is already covered by the existing Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, but that it also seeks to introduce for the first time a range of provisions relating to the power of state officials to institute litigation (see part 4 of the proposed State Liability bill). These provisions are undoubtedly important and will certainly be controversial. We are strongly of the opinion that consideration and public debate of these issues should not be curtailed or subjected to the time pressures that have arisen as a result of the failure to meet the *Nyathi* deadline.
5. In the circumstances, and unless the bills are withdrawn for the reasons set out in this letter, we request that the time period for submission of comments be extended by at least another month, so that detailed comments can be prepared and submitted by each of the signatories.
6. The purpose of this letter is to bring the Department's attention the fact that we believe that the bills are fatally flawed in a number of important

respects, which are set out briefly below. We submit that these flaws are of such a fundamental nature that the bills cannot be submitted to parliament for consideration in their current form, let alone passed and promulgated. It is our considered view that the manner in which the bills have been structured as a package including a constitutional amendment means that it would be fruitless to seek to make piecemeal changes to the current drafts. Nothing short of a complete re-thinking of the structure of the proposed “package” is required.

7. Most importantly, we regard it as axiomatic and a matter of high constitutional principle, in a democratic society based on the supremacy of a written constitution and the rule of law, that the founding document underpinning our democracy should not be amended unless absolutely necessary.
8. We are of the view that a constitutional amendment is entirely inappropriate to achieve the stated object of the proposed State Liability Bill. To the extent that impediments might exist, we submit that it is incumbent on the government and legislature to seek a solution that avoids any constitutional conflict and only to seek to amend the Constitution as a matter of last resort, in the event that avoidance of constitutional conflict is impossible.
9. We submit that it would be entirely possible to ensure speedy and effective satisfaction of judgment debts against the state while at the same time maintaining appropriate accounting controls between organs of state without any amendment to the Constitution. In particular, we submit that this can be done without falling foul of any constitutional provision (including section 226(2)(b) thereof). As an example (and we submit that a range of alternative possibilities exist in this regard), we are

of the view that there would be no constitutional impediment to a State Liability Bill which provides, *inter alia*, for:

- 9.1 An initial obligation on the relevant judgment debtor to pay the debt within 30 days as envisaged in the current clause 7(3)(a) and (b) of the proposed State Liability Bill;
 - 9.2 Failing compliance with this obligation, payment of judgment debts out of the National Revenue Fund within 30 days of such payment; and
 - 9.3 A consequent and proportionate reduction in the funds of the relevant Revenue Fund, or reduction of the next transfer of funds payable to the relevant judgment debtor.
10. We wish to point out in this regard that it is not necessary for the Constitution specifically to provide for the passing of legislation in respect of which there is no constitutional impediment, even when such legislation has been held by the Constitutional Court to be constitutionally required, as is the case with the State Liability Bill. We note that those instances in which legislation is mandated by the Constitutional text (see for example, section 33 thereof) are the result of the specific circumstances of the adoption of the Constitution, and are not comparable to the current situation.
11. Furthermore, given that a constitutional amendment is unnecessary for the purposes of legislating for appropriate accounting controls between organs of state, it suggests to us that a possible reason for the proposed constitutional amendment instead is to immunise the content of the proposed State Liability Bill from constitutional challenge on a basis similar to that advanced by the aggrieved creditor in the *Nyathi* case. The

language of the proposed amendment is broad-ranging and it is by no means clear that it is limited to addressing the (perceived) impediment of section 226(2)(b) of the Constitution.

12. Our concern is magnified by the fact that clause 7(1) of the proposed State Liability Bill contains language which is identical in its scope and effect to the provisions of section 3 of the current State Liability Act which were declared to be unconstitutional by the Constitutional Court in *Nyathi*. This is despite the fact that the proposed State Liability Bill does not appear to guarantee any relief to a judgment creditor should the State, for whatever reason, not comply with its provisions regarding payment.
13. The explanation that presents itself in the light of the above is that the proposed bills do not constitute an attempt to give effect to the Constitutional Court's judgment, but rather an attempt simply to overrule it. This would constitute an unacceptable breach of the separation of powers and an attempt to undermine the basic checks and balances that have been created in the Constitution.
14. In addition, we submit that the procedure and time periods envisaged for the finalisation of the bills is flawed. It is our view that the immunisation of legislation from constitutional scrutiny would constitute nothing less than an amendment to the founding principles set out in section 1 of the Constitution, which requires that the process set out in section 74(1) of the Constitution be followed. We note that this is not the procedure proposed in the explanatory memorandum published with the bills. Furthermore, the fact that such an amendment would require a 75% majority in Parliament would suggest that the time periods for the passing of the legislation envisaged by the Department in its founding papers in the *Nyathi* extension application are unrealistically short.

15. As noted above, these are issues of fundamental concern to us, and we believe that detailed discussion of the proposed State Liability Bill would be pointless. We are, however, concerned about the following issues which are raised following an initial reading of the draft bill:
- 15.1 The definition of “State”, read with the definition of “organ of state” would appear to exclude from the purview of the bill many of the very institutions which it purports to regulate;
- 15.2 The definition of “final court order” is unduly narrow and does not provide for sufficient flexibility in order to meet the specific needs of cases in which a court, applying ordinary principles of law, might require the payment of funds by a state defendant;
- 15.3 In the light of their proposed re-promulgation, is it intended that the provisions currently contained in sections 3, 4 and 5 of Act 40 of 2002 will be the subject of possible amendments at any stage of the consultation and legislative process?
- 15.4 The procedures proposed for the recovery of judgment debts against the state are extensive, probably time consuming and possibly very expensive. It is not possible, for example, to know the precise period within which a judgment debt will be paid once the National Treasury becomes involved in the process, as envisaged in clause 7(4) thereof. This is particularly worrying for the people whose interests are represented by the signatories. We submit that it would be possible to legislate for procedures that more readily guarantee the speedy, effective and administratively efficient payment of judgment debts against the State.

16. In the circumstances, we request that the bills be withdrawn and, if necessary, re-drafted in a form that addresses these fundamental concerns before we can meaningfully comment on the detailed provisions of the proposed State Liability Bill.

Yours sincerely,



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