LRC
LEGAL RESOURCES CENTRE

+SECTION27 incorporating the AIDS Law Project
catalysts for social justice

15 July 2010

SUBMISSION ON THE DRAFT CONSTITUTION NINETEENTH AMENDMENT BILL, 2010 AND THE DRAFT SUPERIOR COURTS BILL, 2010

Introduction

1. SECTION27, incorporating the AIDS Law Project ("SECTION27") and the Legal Resources Centre ("LRC") welcome the opportunity to make this submission to the Department of Justice and Constitutional Development ("the Department)" on the draft Constitution Nineteenth Amendment Bill, 2010 ("the CAB"), as read together with the draft Superior Courts Bill, 2010 ("the SCB").

2. As a public interest law centre and a registered law clinic, SECTION27 seeks to influence, develop and use the law to protect, promote and advance human rights, with a particular focus on the rights to have access to health care services, sufficient food and water, and basic education. SECTION27 builds on and expands the work of the AIDS Law Project, which was established at Wits University's Centre for Applied Legal Studies in 1993. SECTION27 combines research, advocacy and litigation. It recognises that the realisation of such rights ordinarily depends upon ensuring access to a fully-functional and independent judicial system based on the rule of law and the supremacy of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

3. The LRC is also a public interest law centre which uses the law as an instrument of justice for the vulnerable and the marginalised, including poor, homeless and landless people and communities who suffer discrimination. The LRC was formed in 1979 and has offices in Johannesburg, Durban, Grahamstown and Cape Town. It believes that the Constitution is a transformative instrument which should become a living document for all in South Africa. The LRC seeks creative and effective solutions to social problems using a range of strategies which include litigation and law

reform. Ensuring access to courts and an effective judiciary equipped to realise the transformative vision of the Constitution are key concerns of the LRC.

Purpose and structure of this submission

4. SECTION27 and the LRC make this submission to advance the interests above particularly in light of our shared concerns about effective access by litigants to judicial processes and the sound and effective functioning of the judiciary as a whole.

5. We have largely restricted our comments to three provisions of the CAB:

    a. **Clause 3**: the proposed amendment to section 167 of the Constitution that seeks to establish the Constitutional Court as the apex court of the judiciary.
    b. **Clause 10**: the proposed amendment to section 176 of the Constitution that seeks to align the terms of office of judges of the Constitutional Court with judges of other superior courts.
    c. **Clause 11**: the proposed amendment to section 178 of the Constitution that seeks to provide the constitutional basis for national legislation that will make provision for the Judicial Service Commission ("JSC") to be involved in the appointment, promotion and transfer of judicial officers of the Lower Courts.

6. For present purposes we have, in the main, limited our submissions to issues of principle arising from the CAB rather than the detailed provisions of the SCB. This is not because we do not wish to comment on the SCB, but because we wish first to address the key issues of principle that arise from the CAB which – if accepted – may have implications for the SCB. It is also apparent to us that it will still be necessary at the appropriate time to comment on the whole package of imminent bills and their cumulative effect including proposed amendments to legislation governing the Lower Courts and the JSC.

7. It should be noted at the outset that SECTION27 and the LRC support the stated goal of the proposed constitutional amendments, which is to facilitate the integration of the judiciary and to create a single judiciary. The creation of a single apex court is, in our view, an important step to take in attaining a single judiciary. The concerns that we raise in these submissions should be understood in this context. It is hoped that these submissions will assist the Department in arriving at the best practical ways to achieve the important objectives of the CAB.

Jurisdiction of the Constitutional Court (clause 3)

8. According to the explanatory memorandum to the Bill, the purpose of the proposed amendment in clause 3 of the Bill is to facilitate the creation of a single judiciary by confirming the status of the Constitutional Court as the apex court, being the highest court on all matters (constitutional and non-constitutional), with the Supreme Court of Appeal ("SCA") as an intermediate court of appeal. According to the CAB, this is to be achieved by conferring on the Constitutional Court jurisdiction to consider not only all constitutional matters, but also any other matter in respect of which it may grant leave to appeal.

9. In terms of section 167(3) of the Constitution, the Constitutional Court's jurisdiction is currently limited to "constitutional matters" and "issues connected with decisions on constitutional matters". The Constitutional Court also has exclusive jurisdiction over certain matters as set out in section 167(4) of the Constitution. The proposed amendment to section 167(3) would make the Constitutional Court the highest court of the Republic for all matters by way of appeal.

10. The mechanism used to achieve this objective retains the controversial distinction between constitutional and non-constitutional matters, vesting jurisdiction in respect of the latter only where the Constitutional Court grants leave to appeal in the interests of justice. In addition, it seeks to remove any reference to the phrase "issues connected with decisions on constitutional matters" presumably because it is thought to be redundant given the general jurisdiction now conferred.

11. SECTION27 and the LRC support the objective of expanding the jurisdiction of the Constitutional Court so it becomes the apex court in all matters. In doing so, we recognise that the values of the Constitution inform all adjudication and infuse most, if not all, rules of law and their application. In our view, however, the mechanism adopted to move towards a single judiciary headed by the Constitutional Court as an apex court may frustrate the principle sought to be achieved and create unnecessary obstacles to access to justice. Below we explain why.

12. In sum, we make the following proposal:

    a. The principled distinction between constitutional and non-constitutional matters should be removed entirely, vesting the Constitutional Court with jurisdiction to hear any matter – directly or on appeal – if the interests of

justice so demand, in addition to its mandate in respect of matters where it has exclusive jurisdiction and in confirmation proceedings; and

b. In the alternative, should the distinction between constitutional and non-constitutional matters be retained, we submit that the Constitutional Court's power to hear "issues connected with decisions on constitutional matters" be retained.

The distinction between constitutional and non-constitutional matters

13. The distinction between constitutional and non-constitutional matters must be understood in light of the history of transition and more particularly the need in 1994, at the time of our democratic transition, to create an appropriately constituted Constitutional Court that would protect fundamental rights. We understand that it was largely for purposes of legal certainty and in the interests of a smooth legal transition that certain final appellate powers of the then Appellate Division of the Supreme Court were retained. These were important concerns at the time of the transition to democracy. Much has changed since that time and the legal principles developed by all of our courts – including the SCA – have become infused with the values of the Constitution.

14. In our view, what has become apparent during the past 16 years is that the distinction between constitutional and non-constitutional matters is difficult to sustain as a matter of principle. Indeed this has been recognised expressly by the Constitutional Court which is enjoined under the Constitution to be the arbiter of what is and what is not a constitutional matter. Thus Chaskalson et al in *Constitutional Law of South Africa* write:[1]

> The purpose of [the distinction] is to delineate the jurisdiction of the Constitutional Court as the highest court in constitutional matters and to distinguish that Court's specialised jurisdiction from the general jurisdiction of other courts. The Supreme Court of Appeal, for example, possesses general jurisdiction. The dividing line, however, between constitutional and non-constitutional matters is far from clear. As Ngcobo J observed in Van der Walt v Metcash Trading Limited:[2] "[W]hether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt."

[1] Second edition, Vol 1, at 3-2.
[2] 2002(4) SA 317 (CC) at para 32.

15. However, he pointed out that it must be accepted that such a distinction exists and that the judges must "try to make sense of that distinction". The "(in)coherence" or illusory nature of the distinction has often been commented on including in academic and extra-judicial writings. Thus, the jurisprudence that was developed by the Constitutional Court on what constituted a constitutional matter has sought to make sense of a distinction drawn by the Constitution that is difficult to sustain in principle, a point repeatedly made by the Court itself in its judgments on the subject.

16. A ready and commonly cited example in public debate revealing its illusory nature arose in the case of *S v Boesak*,[3] where the Constitutional Court held that its disagreement, or possible disagreement, with the SCA's assessment of the facts in a criminal trial, and thus whether a person's guilt has been proven beyond reasonable doubt (an incident of the right to a fair trial and more particularly the presumption of innocence) does not in itself constitute a breach of the right to a fair trial.

17. While it is obviously undesirable for an apex court to hear all criminal matters on an evaluation of evidence, this is arguably because it would be contrary to the interests of justice – and not because a constitutional issue is, in some measure, implicated. The considerations relating to the interests of justice, in this case, would relate to matters such as the need for finality in criminal matters and the undesirability of clogging the Constitutional Court roll in the ordinary course.[4]

18. Another example that shows the illusory nature of the distinction is the case of *K v Minister of Safety and Security*,[5] which reveals the extensive reach of the Constitution into all areas of our common law. In that case, the Constitutional Court developed the common law rules relating to vicarious liability of employers in light of the values of the Constitution.

19. The distinction between constitutional and non-constitutional matters has also caused difficulties of a practical sort that implicate the ability of poor litigants to access justice. More particularly, it creates a jurisdictional "hurdle" which, in order to overcome, requires access to legal services, often specialised, in order to address both the confusing issues of principle as well as to deal with separate pleadings likely to be required for constitutional and other matters.

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[3] 2001(1) SA 912 (CC).

[4] See para 15 of the *Boesak* judgment where the Court reasoned that if the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt was a constitutional matter then "all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory."

[5] 2005 (6) SA 419 (CC).

20. This means that litigants with deeper pockets are more able to access the legal system than poorer litigants and are also able to block access by raising technical points in litigation, easily raised in circumstances where pleadings have to address distinctions in law that are difficult to sustain. It would be far more desirable for the system to encourage equal access to justice, to minimise any unnecessary procedural hurdles to the courts and to develop simpler legal processes.

21. It is in light of these concerns that we propose removing the distinction between constitutional and non-constitutional matters in section 167(3). The clause that we propose is as follows with underlined text indicating additions to the current text of the Constitution and bold text in square brackets indicating deletions.

> (3) The Constitutional Court—
> (a) is the highest court **[in all constitutional matters]** <u>of the Republic; and</u>
> (b) may decide **[only constitutional]** matters**[, and issues connected with decisions on constitutional matters;]**<u>—</u>
> <u>(i) on appeal, if the interests of justice require that it decide the matter**;**</u>
> <u>(ii) in respect of which it has exclusive jurisdiction in accordance with subsection (4);</u>
> <u>(iii) directly, in accordance with subsection (6)*(a)*; and</u>
> <u>(iv) referred to it in terms of legislation contemplated in section 172(2)*(c)*.</u> **[and]**
> (c) **[makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.]**

22. There are two principal differences between this approach and the mechanism adopted in the section proposed by the Department: first, a uniform test is set by the Constitution for whether any matter can be heard by the Court on appeal, this being if "the interests of justice" require this; and second, the Court would have jurisdiction to hear any matter – and not only "constitutional matters" – directly in accordance with subsection (6)(a). We address each in turn.

23. Under the current system, the Constitutional Court has developed its own test for whether leave to appeal in constitutional matters should be granted, the key element of which is whether it is in the interests of justice to do so. Accordingly, on the existing jurisprudence, the test for whether leave to appeal should be granted in a constitutional matter is the same as what is proposed in the CAB for appeals in "non-constitutional matters".

24. Accordingly, our proposal simply makes express what is already implied, but also creates a simple and more accessible mechanism for access to the Constitutional Court that removes unnecessarily practical obstacles as well as the controversial and illusory distinction between constitutional and non-constitutional matters. Any concern about the Constitutional Court being flooded with matters of a non-constitutional nature is easily addressed by the Court itself which, in giving content to the requirement of the interests of justice, will be in a position to emphasise its role as the final arbiter on matters of constitutional importance.

25. The second difference is that our proposal would vest in the Constitutional Court the power to hear "non-constitutional matters" not only on appeal, as the Department proposes, but also directly subject to section 167(6) which provides that national legislation or the rules of the Constitutional Court must determine when it is in the interests of justice to bring matters directly. The Constitutional Court has already developed a very strict test for when it is in the interests of justice to bring constitutional matters to it directly,[6] and it is unlikely that any difficulties will ensue in it preventing any abuse of this process when issues that don't raise matters of constitutional importance or which otherwise don't require immediate or direct adjudication are brought to it.

26. It is important to highlight the value of and the role played by the direct access provisions in a handful of Constitutional Court decisions. In *Fourie*,[7] for example, the Court granted direct access in respect of a case that in essence considered the same substantive concerns at the heart of another matter in respect of which it had already granted leave to appeal.[8] In granting direct access, it relied in large part on its earlier decision in *Bhe*.[9] That case also considered an application for direct access in respect of a case dealing with similar subject matter and constitutional concerns arising in another case in respect of which the Court had already granted leave to appeal. In both cases the Court was at pains to stress that direct access would ordinarily only be granted in exceptional circumstances.

27. Save in the respects outlined above, there are no implications for removing the distinction between constitutional and non-constitutional matters. (The test for the

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[6] See, for example, *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) at para 18.
[7] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).
[8] Ibid at paras 34-36 and 39-44.
[9] *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) at paras 33-34.

grant of leave to appeal is, in any event, the same whether the matter is a constitutional or non-constitutional matter.) Section 167(4) of the Constitution deals comprehensively with exclusive jurisdiction without any reference to constitutional matters (albeit that all of these mandates concern "constitutional matters") and confirmation proceedings only apply to the three issues addressed in section 172(2)(c) of the Constitution.

Alternative argument

28. Although we consider it desirable that the distinction between constitutional and non-constitutional matters be removed from the text, we also wish to make an alternative submission in the event that this proposal is not accepted. This relates to the proposed deletion of the Constitutional Court's jurisdiction to decide "issues connected with decisions on constitutional matters".

29. The phrase "issues connected with decisions on constitutional matters" was interpreted by the Constitutional Court in *Alexkor Ltd and Another v The Richtersveld Community and Others* as being intended "(t)o extend the jurisdiction of this Court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the Court's jurisdiction."[10] The Court explained further:

> The underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of this Court's functioning when obliged to determine a constitutional matter. If any anterior matter, logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter, then it would be artificial and arbitrary to exclude such consideration from the Court's evaluation of the primary constitutional matter. To state it more formally, when any factum probandum of a disputed issue is a constitutional matter, then any factum probans, bearing logically on the existence or otherwise of such factum probandum, is itself an issue ''connected with a decision on a constitutional matter''.[11]

30. The effect of the proposed section 167(3) in the CAB is to remove this jurisdiction from the Constitutional Court, presumably because it is considered unnecessary to include it if the general jurisdiction of the Court is now extended to include jurisdiction in respect of "any other matter" in section 167(3)(b)(ii).

[10] 2004 (5) SA 460 (CC) at para 30.
[11] Ibid.

31. The difficulty with the proposed provision arises because this general jurisdiction is proposed to be limited to matters on appeal and thus would not arise in matters that are brought directly or on referral. This will both cause confusion to litigants, and unnecessarily limit an important aspect of the Constitutional Court's existing jurisdiction. Accordingly we propose that it must be retained in section 167(3)(b)(i) in the event that the distinction between constitutional and non-constitutional matters is indeed retained.

Appointment of judges of the Constitutional Court (clause 10)

32. In principle, SECTION27 and the LRC have no objection to the principle that the tenure of all judges, including Justices of the Constitutional Court, extends to a fixed retirement age. Our principled concern relates to the transitional process from one system of tenure to another. We wish to emphasise that this concern is not about the qualification of any incumbent but rather about the underlying principle of extending tenure and jurisdiction of judges who were appointed to a Court based on criteria that were presumably applied by the JSC to incumbents' appointments in light of both limited tenure (for a defined length of time) and jurisdiction limited to "*constitutional matters*".

33. The principle underlying the move to a system of uniform tenure is not without difficulties. Key benefits of the current system is that it encourages and enables the appointment of a diverse and dynamic Constitutional Court, something already addressed in its jurisprudence. In the context of judicial bias, the Constitutional Court has considered the value of a diverse bench in judicial decision-making, citing the following from a Canadian Supreme Court decision with approval:

> It is obvious that good Judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.[12] …
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> [Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As

[12] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at para 42, citing the majority decision by Cory J in *R v S (RD)* [1997] 3 SCR 484 at para 119.

> well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.
>
> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.[13]

34. Diversity in the composition of the bench can be enhanced by limited tenure because the opportunity arises more frequently to appoint judges with different experiences and backgrounds. Limited tenure also encourages dynamism by ensuring that new perspectives are brought to the bench on what are often contested debates about the values underpinning adjudication and especially constitutional adjudication.

35. However, important gains in achieving diversity can also be lost in a system of limited tenure. For example, the Constitutional Court recently lost two experienced female Justices – O'Regan and Mokgoro – with diverse experiences in circumstances where the Constitutional Court is seriously underrepresented by women in its gender composition. And the objective of achieving a diverse bench can still be achieved in a system of extended tenure. Indeed, (save in respect of gender) the diversity of the Constitutional Court is an achievement of which we can be proud.

36. While dynamism in the composition of the Court has benefits, it also has drawbacks. In particular, it can and does create undesirable uncertainty in the law when the Court is regularly subjected to a loss of important experience and expertise developed by individual Justices and indeed the Constitutional Court as an institution over a period of time. And as a matter of principle, all justices who are appointed to the Constitutional Court understand that it is their duty to apply the law in light of changing social norms and the context in which adjudication takes place.

37. On balance, however, we are thus of the view that the proposal to create a uniform tenure for all justices until retirement, can enhance the administration of justice.

38. As indicated above, our principled concerns relate to the manner in which the transition to a system of uniform tenure takes place. While it may well be desirable that individual justices who have already been appointed to the Constitutional Court

[13] Concurring judgment of L'Heureux-Dube J and MacLachlin J at paras 38-39.

retain their tenure because of the value of their individual contribution, in our view this is an issue that ought to be approached not in light of any individual's contribution but from a position of principle.

39. The Constitutional Court in its current form was structured to hear cases of constitutional significance, and the judges were appointed on that basis. Judges are appointed to particular courts on the basis of their skills and experience. If the proposed changes in the judges' terms are enforced, judges who were appointed specifically to adjudicate only constitutional matters, ordinarily for a period of 12 years,[14] will now also preside over non-constitutional matters and – for some – for a period far exceeding their original period of appointment.

40. For example, one judge who was appointed in 2009 for a term of 12 years will be eligible to serve almost double that time under the proposed amendments. Another judge appointed in 2006 will retire from the court in 2018. However in terms of the proposed amendments, the same judge would be eligible for retirement in 2028. The judges will thus serve terms significantly longer than the period for which they were originally nominated and appointed and in respect of an expanded jurisdiction.

41. Given the constitutional context in which sitting judges were appointed, we think further thought needs to be given to the transition mechanism. It is the JSC that is vested with the power of appointing justices and needs to do so having regard to all relevant circumstances including the overall composition of the Constitutional Court which sits en banc. It would be thus undesirable if the composition of a particular bench for any period of time is determined not by the JSC, which is constitutionally vested with this power, but rather by an Act of Parliament that amends the Constitution.

42. In sum, we propose that a transitional mechanism be introduced whereby the incumbent justices serve the terms for which they were appointed, whereafter fresh appointments can be made by the JSC based on all relevant criteria having regard to the extended tenure and jurisdiction of the Court.

43. Any transitional mechanism will have its costs and benefits and we understand that what we propose will mean losing good people from the system earlier than otherwise. However, there are important principles at stake not least the need to ensure that it is the President, on the advice of the JSC which makes Constitutional

[14] A handful of sitting judges are currently eligible to serve more than 12 years on the Constitutional Court. The vast majority had already served three or more years as a judge of a High Court and/or the SCA at the time of their appointment to the Constitutional Court.

Court appointments. Moreover, in principle there is no reason why provision cannot be made for incumbent or already retired justices to be nominated and stand again if they so choose although we accept that in practice this is unlikely to occur.

Role of the JSC (clause 11)

44. The JSC is a body established by the Constitution to "advise the national government on any matter relating to the judiciary or the administration of justice". The Judicial Service Commission Act 9 of 1994 ("the JSC Act") expounds on the powers and functions of the JSC. It makes provision for the JSC's involvement in the appointment and discipline of judges of the Constitutional Court, the SCA and the High Courts (and courts of a similar status to a High Courts), but not the Lower Courts.

45. According to clause 11 of the CAB, responsibility for the appointment and discipline of judicial officers of the Lower Courts, currently the domain of the Magistrates Commission,[15] is to be transferred to the JSC by way of the establishment of a committee of the JSC responsible for dealing with judicial officers of the Lower Courts. There are three areas of concern here: first, the desirability of requiring the JSC to consider an expanded mandate that is proposed to include the appointment, promotion and transfer of judicial officers of the Lower Courts; second, the provisions relating to the appointment of the proposed new members of the JSC; and third, the nature of the relationship between the proposed new committee and the Magistrates Commission (if the latter is indeed to survive).

<u>The desirability of expanding the JSC's mandate</u>

46. The JSC is vested with powers that are vital to the effective functioning of our constitutional democracy relating to the sound administration of justice, including the appointment and discipline of judicial officers. Our principal concern regarding the proposed changes to the JSC relates to the expansion of its traditional mandate, which has until now been limited to the Superior Courts.

47. Although in principle this is a step which might enhance the creation of a single judiciary, in our submission, the JSC is not institutionally designed or equipped with adequate resources to perform this function. It is composed of representatives of various sectors all of whose time is spent primarily on their sectoral responsibilities, be it members of Parliament, the Executive or the Judiciary, or professional

[15] Established in terms of section 2 of the Magistrates Act, 90 of 1993.

representatives. Given the high number of judicial officers in the Lower Courts, the expanded mandate contemplates a burden that the JSC is unlikely to be able to fulfil meaningfully, if at all.

48. In recent years the JSC's performance of its functions, particularly in the areas of judicial selection and discipline, has been surrounded by controversy and critical public debate. While there are many dimensions to this debate, one important lesson that we might learn is the importance of strengthening the capacity of the JSC to perform its crucial constitutional mandate.

49. Put differently, recent controversies have highlighted – at least in some instances – that the JSC still faces very real challenges in developing its own capacity to perform its constitutional mandate. That this is so is hardly surprising given that the JSC has only been operating as an institution for some 16 years. The recent disciplinary process relating to the Judge President of the Western Cape High Court has revealed that there remain many open questions about how disciplinary processes need to be conducted, issues that are still being tested in our courts. Moreover, the legislative and regulatory environment for resolving complaints against judges that do not result in impeachment proceedings are only now being developed.

50. Similarly, the appointment process of the JSC has been subject to critical scrutiny from many quarters. Without engaging with the merits of any particular case, it is uncontroversial to state that a lesson that can safely be learned is that the JSC needs to be adequately resourced so that it is better positioned to evaluate candidacies for judicial office in light of candidates' judicial and non-judicial track records. The challenges posed by that task alone require the dedication of substantial additional resources and development of its capacity. In their nature, these functions require the dedication of much time and careful deliberation.

51. Even if it is contemplated that the committee to be established will carry the bulk of the work, difficulties remain. Given its institutional design, it is difficult to see what meaningful role will be played by the JSC. Indeed, the JSC is likely to assume little more than a rubber-stamping role if the committee carries the bulk of the work, as it will not have evaluated any candidacy on the candidate's record or interview. This, in turn, can compromise the integrity of the judicial selection process.

52. In our view, the body that is entrusted with the evaluation of candidacy for judicial office in the Lower Courts should be vested with plenary powers to make appointments. This leads to a second difficulty, namely the desirability of vesting

primary responsibility for the selection of judicial officers of the Lower Courts in a committee whose composition and structure is not addressed in the CAB or the SCB.

53. Accordingly we are of the view that any extension to the mandate of the JSC needs to be considered with great caution and the need to take this step at this stage of the development of our constitutional democracy is far from clear. In our view, we should first consolidate and enhance the ability of the JSC to perform its existing mandate and that the time is not yet ripe for expanding its mandate to include powers in respect of judicial officers of the Lower Court. It is vital that the JSC performs its existing mandate well. If it fails, we place one of the cornerstones of our constitutional democracy – the judiciary – at risk.

54. In the event that it is considered important at this juncture to expand the mandate of the JSC in this way, it is vital that the passage of the CAB is accompanied by serious consideration about whether the JSC, as a distinct constitutional body, is currently adequately resourced to perform its functions, and if not, what resources need to be given to it in order for it to do so. There are various ways of achieving this which can be resolved through legislation contemplated by section 178(4)(a) of the Constitution, but we propose that consideration be given to the establishment of a separate JSC secretariat that is distinct from the Office of the Chief Justice and resides within the JSC itself.

55. We would also submit that the role of the JSC in relation to the committee to be established needs to be clarified in the Constitution as does the composition and structure of any committee to be established. Plenary powers of appointment in respect of specific candidates should not reside with the JSC, which might be able to perform a helpful albeit limited function in respect of issues such as designing judicial selection procedures and developing criteria for judicial appointment.

56. We now deal with our second and third concerns, which assume that the JSC's mandate will be expanded. As set out above, we do not support the expansion of the JSC's mandate.

<u>Appointment of proposed new members of the JSC</u>

57. Clause 11(a)(cA) of the CAB provides that the chairperson and deputy chairperson of the proposed new committee will form part of the JSC but does not stipulate who is eligible to be appointed and by whom. In contrast, section 178 of the Constitution expressly provides for the representation of various government, judicial and

professional sectors and indicates expressly both the sector that is represented and who must designate the representatives from within that sector. For example, the judiciary is represented by the Chief Justice and a Judge President designated by the Judges President. Central to the scheme of section 178 and the composition of the JSC is the principle of self selection by the relevant sector. Thus the advocates' and attorneys' professions nominate their representatives as do teachers of law. The same principle applies to the parliamentary representatives whether from the National Assembly or the National Council of Provinces.

58. The proposed section 178(a)(cA) of the Constitution contemplated by clause 11 of the CAB effectively leaves the determination of who will represent the Lower Courts to national legislation and does not require that the JSC representatives of the Lower Courts be designated on the principle of self selection. Of course, national legislation may provide for the Chair and Deputy Chair of the committee contemplated by section 11(4)(b) to be drawn from the leadership of the Lower Courts but this is left to the discretion of Parliament. In our submission, section 178(1)(cA) must expressly provide for self selection by the leadership of the Lower Courts. For example, a provision akin to that applicable to the Judges President could be used referring to the designation by the leadership of the Lower Courts of two senior judicial officers of the Lower Courts. This concern might be addressed if the composition of the committee were dealt with expressly in the Constitution.

<u>Nature of relationship between proposed new committee and Magistrates Commission</u>

59. Furthermore, it is not clear from the CAB whether the committee proposed in section 11 will replace the Magistrates Commission, which is tasked, amongst other things, "to ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, judicial officers in the Lower Courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly".[16] If it is the intention of the Department to abolish the Magistrates Commission, it is unclear which body will take over the balance of its functions.

60. If this is not the Department's intention, it is not clear from the CAB whether the committee will take over part of the Magistrates Commission's functions and, if so, what the envisaged relationship between this committee and the Magistrates Commission will be. In our view, this lack of clarity shows why it is important that amendments to the Magistrates Act should be considered by the Department in

[16] Section 4 of the Magistrates Act, 90 of 1993.

order to effect the proposed amendments. We request clarity on these areas of concern in order to comment further on these proposals.

Role of Chief Justice and Judges President

61. The creation of a single judiciary has clear implications for the mandate of the Chief Justice and the Judges President. This in turn has resource implications for these offices.

62. Clause 11 of the SCB clarifies the Chief Justice's role as the head of the judiciary and provides that the Chief Justice is responsible for the development and implementation of the norms and standards for the exercise of judicial functions of all courts, including the Lower Courts. In line with clause 1, clause 12 of the SCB provides for a newly established Office of the Chief Justice to provide support for the Chief Justice's expanded mandate in respect of administering the entire judiciary. Although the explanatory memorandum indicates that there are no financial implications for the amendments, it is our view that the creation of an Office of the Chief Justice has clear implications for resource allocation. Adequate funding must be provided for this office in order to facilitate the administration of an integrated judiciary.

63. Clause 11(4)(b) proposes that Judges President, in addition to responsibilities in respect of their divisions, also be responsible for coordinating the judicial functions of all the Lower Courts that fall within their respective jurisdictions. But while the expanded mandate of the Chief Justice is supported by the creation of the Office of the Chief Justice, the expansion of the mandate of the Judges President is not similarly supported. In addition, it is unclear from the SCB what the co-ordinating function in respect of the Lower Courts will entail, and whether it will include the implementation of norms and standards set by the Chief Justice. In any event, it is likely that such a role will require the augmentation of resources in each Judge President's office to carry out the extended mandate in respect of the Lower Courts in that court's jurisdiction.

64. In this regard, SECTION27 and the LRC propose that the SCB expressly make provision for the establishment of an Office of the Judge President in each division of the High Court, which will itself give rise to the need for additional funding to support the creation of capacity to facilitate the expanded mandate of each Judge President.

Conclusion

SECTION27 and the LRC again thank the Department for the opportunity to make this submission. Should any further information be required, please feel free to contact Umunyana Rugege at 011 356 4120 or rugege@section27.org.za or Susannah Cowen at 011 836 9831 or susannah@lrc.org.za.