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GENERAL NOTICE

NOTICE 613 OF 2013

NOTICE OF INTENTION TO INTRODUCE PRIVATE MEMBER'S BILL AND INVITATION FOR PUBLIC COMMENT ON DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL

In accordance with Rule 241(1)(b) of the Rules of the National Assembly, notice is hereby given that Mudene Smuts MP, intends to introduce a private member's bill entitled the Constitution Eighteenth Amendment Bill to make provision for a variety of matters pertaining to the office of the National Director of Public Prosecutions.

A copy of the draft Constitution Eighteenth Amendment Bill and a memorandum setting out its objectives are included in the Schedule to this Notice in fulfilment of the requirements of Rule 241(1)(c) of the Rules of the National Assembly.

Interested parties and institutions are invited to submit written representations on the draft bill to the Secretary to Parliament within 40 days of the publication of this notice. Representations can be delivered to the Secretary to Parliament, Old Assembly Building, Parliament Street, Cape Town; or mailed to the Secretary to Parliament, P O Box 15, Cape Town, 8000; or emailed to mcoetzee@parliament.gov.za and copied to dene@iafrica.co.za.

6 June 2013
M Smuts MP

Schedule

REPUBLIC OF SOUTH AFRICA

**CONSTITUTION EIGHTEENTH
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 74 Bill); Bill and prior notice of its introduction
published in Government Gazette 36566 of 14 June 2013)*

(The English text is the official text of the bill)

(Ms M Smuts MP)

[PMB6 – 2013]

GENERAL EXPLANATORY NOTE:

[] **Words in bold type in square brackets indicate omissions from existing enactments.**

_____ **Words underlined with a solid line indicate insertions in existing enactments.**

BILL

To amend the Constitution of the Republic of South Africa, 1996; to provide that the President appoints the National Director of Public Prosecutions on the recommendation of the National Assembly; to provide for the involvement of civil society in the nomination of persons for the position of National Director of Public Prosecutions; to provide that the National Director of Public Prosecutions may only be removed from office following a finding of misconduct, incapacity or incompetence and the adoption of a resolution by the National Assembly; to delete the final responsibility of the Cabinet member responsible for the administration of justice over the prosecuting authority; to provide that the National Prosecuting Authority is accountable to the National Assembly; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Amendment of section 179 of the Constitution of the Republic of South Africa, 1996

1. Section 179 of the Constitution of the Republic of South Africa, 1996, is hereby amended by:

(a) the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President [as head of the executive; and] on the recommendation of a committee of the National Assembly proportionally composed of members of all parties represented in the National Assembly and approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly; and”;

(b) the insertion after subsection (1) of the following subsection:

“(1A) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).”; and

(c) the substitution for subsection (6) of the following subsection:

“(6) [The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.]

(a) The National Director of Public Prosecutions may be removed from office only on –

- (i) the ground of misconduct, incapacity or incompetence;
- (ii) a finding to that effect by a committee of the National Assembly; and
- (iii) the adoption by the Assembly of a resolution calling for that person’s removal from office.

(b) A resolution of the National Assembly concerning the removal from office of the National Director of Public Prosecutions must be adopted with a supporting vote of at least two thirds of the members of the Assembly.

(c) The President must remove a person from office upon adoption by the Assembly of the resolution calling for that person’s removal.

(d) The National Prosecuting Authority is accountable to the National Assembly and must report to the Assembly at least once a year.”.

Short title and commencement

2. This Act is called the Constitution Eighteenth Amendment Act, 2013, and takes effect on a date determined by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION EIGHTEENTH
AMENDMENT BILL, 2013**

1. SUMMARY

- 1.1. The Bills aims to create a new appointment mechanism for the National Director of Public Prosecutions (NDPP) and, in addition, to make constitutional provision for the removal of an NDPP.
- 1.2. The Bill also aims to remove the ambiguity found in section 179 as between the independence guaranteed in subsection (4) and the Justice Minister's "final responsibility" in subsection (6) by removing subsection (6).

2. PROVISIONS OF THE BILL

- 2.1.1 In 2008, then Justice Minister Enver Surty observed that security of tenure is important to prosecutorial independence. Over and above the removal of the NDPP by Parliament, Parliament should also reconsider its role in the appointment of the NDPP in terms of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (paragraph 6.7 of the Ad Hoc Committee's Report, published in Announcements, Tablings and Committee Reports, 11 February 2009, hereafter referred to as "the Report").
- 2.1.2. A review of the legislation (the NPA Act 32 of 1998) does not address the problem, because the Constitution in section 179 (1) gives the power of appointment to the President as head of the national executive.
- 2.1.3. The Bill proposes that the constitutional section 193 appointment mechanism for the Chapter Nine Institutions Supporting Democracy should be used. The mechanism has been tried and tested, and encourages selection on objective grounds during a transparent, multi-party process. The 60 per cent threshold which the Constitutional Court required in the certification judgment for the Public Protector and Auditor-General is proposed for the NDPP. The National Assembly is the appropriate House because Justice and Constitutional Development is an exclusive national competence.

2.2 Clause 1 (b):

2.2.1. The clause proposes the involvement of civil society in the nomination of a person to fill the position of the National Director of Public Prosecutions.

2.3. Clause 1 (c)

2.3.1. Former Justice Minister Surty in reference to “the two constitutional imperatives that exist side by side (i.e. the imperative to collaborate and co-operate and the principle of prosecutorial independence), suggested that “as the Minister’s final responsibility is not defined in the legislation...the Committee may want to look more closely at this when making its report”.

2.3.2. It is submitted that the two “imperatives” are in conflict, and that the Constitution has simultaneously adopted the example of jurisdictions where independence is the first consideration and jurisdictions which favour political control.

2.3.3. Parliament’s role in the removal of the NDPP under the NPA Act does not provide the NDPP with sufficient security of tenure. This is demonstrated by the fact that first the former President and then Parliament removed Adv Vusi Pikoli from office despite the fact that the Ginwala Enquiry had found him fit and proper for the post of NDPP.

2.3.4. The Bill proposes that the removal process should be based on section 194 of the Constitution, which requires an enquiry and finding by a committee of the National Assembly, followed by a resolution supported by two thirds of the members of the Assembly as for the Public Protector or Auditor General.

2.3.5. The Bill further proposes that the National Prosecuting Authority must be accountable to Parliament.

2.3.6. Consequential amendments to the NPA Act would include the repeal of section 12(4) to (7).

3. FINANCIAL IMPLICATIONS

None.

4. PARLIAMENTARY PROCEDURE

4.1 The Legal Advisers of Parliament are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 74(3)(a) of the Constitution, since—

- (a) it amends provisions of the Constitution other than section 1, section 74(1) or Chapter 2; and

- (b) the amendments do not—
 - (i) relate to a matter that affects the National Council of Provinces;
 - (ii) alter provincial boundaries, powers, functions or institutions; or
 - (iii) amend a provision that deals specifically with a provincial matter.

4.2 The Legal Advisers of Parliament are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No.41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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