

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE CONSTITUTION EIGHTEENTH AMENDMENT BILL

1. INTRODUCTION

The Law Society of South Africa (LSSA) welcomes the opportunity to comment on the Constitution Eighteenth Amendment Bill, together with the Memorandum on the Objects of the Bill, published in the Government Gazette of 21 September 2015 and wish to comment as follows:

2. CLAUSE 1(a)

Clause 1(a) seeks to remove the requirement of South African citizenry for appointment to the Constitutional Court, the reason being to align the provision with the appointment of all other judicial officers.

We are of the view that that it should be a requirement for a person appointed as a judge in the highest court in the country to be a South Africa citizen. Furthermore, we believe that the requirement of South African citizenry should cut across all higher courts and that Section 174 should be amended accordingly.

It is of fundamental importance that a judge understands the ethos of the legal system in South Africa and what issues this system needs to address in order to create a just society, particularly in view of the history of the country. A judge should have an understanding of the socio-economic conditions in his or her country and a profound knowledge of the most fundamental principles of the Constitution, which is the highest legal expression in South Africa.

Judicial officers are required to embrace the Constitution and take an oath that they will protect and uphold it. However, it is questionable whether a person can own allegiance to a country of which he or she is not a citizen.

This is in no way suggesting that non-South African judges are not fit to be appointed. However, the fitness of judicial officers in our high courts must comply with the sentiments expressed in the previous paragraph.

3. CLAUSE 2(c)

The LSSA has no objection to the reduction of the presidential appointees from four to two. We, however, do not agree with the view expressed in the Memorandum that, in cases where the President is given a discretion, the presidential appointees are superfluous. We have absolute confidence that the presidential appointees are playing a pivotal and independent role, which enhances the process leading to recommendations for appointments.

Their involvement in the decision making process augments the appropriate checks and balances to ensure accountability, responsiveness and openness in the exercise of powers by the head of the National Executive, a constitutional principle underscored in *Ex parte*

Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC).

Furthermore, the LSSA believes that it is unwise for the presidential appointees to contribute to advising the government on other matters relating to justice, as proposed. They may be compromised, and by extension the entire Judicial Service Commission, should they be considered playing a role in advising government.

4. REMAINDER OF THE BILL

The LSSA has no objection to the remaining provisions of the Bill.