

**AN ARGUMENT
FOR
CODIFICATION
OF
PROVINCIAL LEGISLATION
AND
THE ESTABLISHMENT
OF AN INDEPENDENT
LEGISLATIVE SERVICES AGENCY
FOR KWAZULU-NATAL**

A. Introduction and Index

This paper will investigate the feasibility of the codification of Provincial Legislation and the establishment of an independent Legislative Services Agency for KwaZulu-Natal. The paper has been organised into the following chapters –

A. Introduction and Index (pages 1 - 3)

B. The meaning of codification in our context (page 3)

This chapter seeks to define codification as entailing something more than rationalising or harmonising different pieces of legislation.

C. The main argument *for* codification (pages 3 - 4)

The main argument for codification is presented here.

D. The main argument *against* codification (page 4)

The main argument against codification is highlighted and qualified in this chapter.

E. Codification in different legal systems (pages 4 - 5)

This chapter looks at different approaches to codification in Civil Law Systems and Common Law Systems. The question of where South Africa fits in, is addressed.

F. The Role of the KwaZulu-Natal Provincial Legislature (pages 6 – 8)

This chapter discusses the legislative competence of Provincial Legislatures.

G. One civil code or a series of codes or Acts? (page 9)

Once the principle of codification has been accepted, a further question arises – *One (consolidated) civil code or a series of (separate) codes or Acts?*

H. The KwaZulu-Natal Code of Civil Law (page 9)

This chapter postulates that a single consolidated Code of Civil Law for KwaZulu-Natal is not only a distinct possibility, but should be a goal and priority for the Province.

I. Public Sector Lawyers as “Custodians of the Statute Book” (page 10)

This chapter discusses the role and responsibility of public sector lawyers/ legislative drafters as “Custodians of the Statute Book” or body of law in the Province.

J. An independent Legislative Services Agency for KwaZulu-Natal? (pages 10-16)

This chapter proposes that an independent Legislative Services Agency, serving both the executive and legislative branches of government, be established for the Province. The mechanisms for achieving this are also discussed.

K. The preferred mechanism to establish an independent Legislative Services Agency for KwaZulu-Natal (pages 16 – 18)

This chapter investigates the various options or mechanisms which could be used to reach the goal of establishing a LSA for KwaZulu-Natal: a provincial constitution, provincial legislation or national legislation.

L. The way forward – a proposed draft Bill? (page 18)

A proposed draft Bill, to form the basis for further discussion and negotiation, may be considered.

B. The meaning of *codification* in our context

Codification in a narrow sense would be limited to *consolidation* of laws. For our purposes, let us consider codification as meaning “*a more or less comprehensive, structured, legislative statement or restatement of the law in a particular area, whatever the nature of the existing law and whether or not it is changed in the process*”.¹

The main objective of codification in this sense is not substantive law reform but, rather, emphasises reorganisation, with tidying up, clarification and limited improvements where necessary, of the existing law. In this sense, codification could be seen as the final step in the process of rationalisation and harmonisation of laws in grouping together or organising the laws which belong together.

Would such a legislative reorganisation of the general laws currently applicable in the Province and which potentially affect all people in KwaZulu-Natal, not be desirable?

C. The main argument *for* codification

The main argument for codification is that an organised, well structured, accessible set of laws is better for all who have to use the law than a disorganised, badly structured, comparatively inaccessible set of laws.²

We may also ask how easy it is currently for lawyer and layman alike “to find the law” in the present South African context.

¹ **Current Codification Projects in Scotland:** A paper delivered by *Prof Eric Clive*, Edinburgh University on 15 May 2000.

² **Current Codification Projects in Scotland:** A paper delivered by *Prof Eric Clive*, Edinburgh University on 15 May 2000.

We are all aware of the practical effect of section 229 of the 1993 Constitution and Schedule 6 to the Constitution, 1996, in relation to the continuation of existing law (including what may be termed “old order legislation”).

As public sector lawyers we are regularly faced with finding what law currently regulates a specific subject area. At times, finding the law necessitates a great deal of research coupled with networking and even forensic skill!

D. The main argument *against* codification

The main argument against codification, generally, is that a code would remove the flexibility presently enjoyed by the courts in common law jurisdictions. However, much depends on how the relevant parts of a code are drafted. A code can provide as much flexibility as the policy makers want, and that might vary with the subject matter. The experience of countries which have had civil codes for a long time (civil law jurisdictions) suggests that courts nonetheless retain a great deal of scope to develop the law, whatever the code may provide.³

E. Codification in different legal systems

Civil Law Jurisdictions or Systems have drawn their inspiration largely from the Roman law heritage and which, by giving precedence to *written* law, have resolutely opted for a systematic codification of their general law.

In Common Law Jurisdictions or Systems the law, for the most part, is technically based on English common law concepts and legal organisational methods which assign a pre-eminent position to case-law, as opposed to legislation, as the ordinary means of expression of general law.

South Africa has what may be termed a Mixed Jurisdiction or System. The term "mixed", which is arbitrarily chosen over other terms such as "hybrid" or "composite", should not

³ **Current Codification Projects in Scotland:** A paper delivered by *Prof Eric Clive*, Edinburgh University on 15 May 2000.

be construed restrictively, as certain authors have done. In any mixed system, two or more systems may apply cumulatively or interactively, but there may also be examples where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.⁴ There are also mixed jurisdictions and mixed legal systems which are legal systems in which the Roman-Dutch tradition has become strongly influenced by or even infused to some degree by Anglo-American law. Mixed jurisdictions are really political units (countries or their political subdivisions) which have mixed legal systems. Common law/ civil law mixed jurisdictions include Louisiana (in the USA), Québec (in Canada), Puerto Rico and, of course, South Africa.

The essence of the civil law is that every law is "codified," or written into the law. The judge's role is limited to the application of the law to the facts of a given case.

Although statutes enjoy similar importance and are paramount in both legal traditions, they differ in their functions. Civil law codes provide the core of the law – general principles are systematically and exhaustively exposed in codes and particular statutes complete them. Finally follows the jurisprudence. Common law statutes, on the other hand, complete the case law, which contains the core of the law expressed through specific rules applying to specific facts.

In our System, mixed as it is, we should be encouraged to draw from and develop the best elements of both traditions. With the adoption of our Constitution, 1996, the Bill of Rights it contains and the hierarchy of laws it establishes, we are moving increasingly further from certain traditional common law system elements in our legal system. A Constitution, such as ours, is rare in a common law system.

The concept of codification (the hallmark of civil law systems) would, therefore, not be foreign to the South African legal system and, indeed, one may argue that with the plethora of legislation enacted each year by Parliament in the national sphere and the Provincial Legislatures, whether the time has not come to consider the establishment of comprehensive, consolidated national and provincial codes of law.

Why not a KwaZulu-Natal Code of Civil Law for the Province of KwaZulu-Natal?

⁴ **Introduction to Legal Systems:** Law lecture notes (2003) by *William Tetley*.

F. The Role of the KwaZulu-Natal Provincial Legislature

The KwaZulu-Natal Provincial Government has wide powers to legislate and, it might be argued, a corresponding responsibility to use these powers wisely in the interests of the people of KwaZulu-Natal.

At this stage it may be as well to recap and confirm the full extent of the legislative powers of provinces in terms of the Constitution, 1996.

The provisions of Chapter 3 to the Constitution lay the basis for co-operative government which is expanded upon in other parts of the Constitution. No sphere of government derives its constitutional powers and functions from another sphere. The “spheres approach” does not envisage any hierarchy between the spheres other than in exceptional circumstances provided for in the Constitution. There is therefore no automatic national “override” or “precedence” of national over provincial, save in the circumstances provided for in the Constitution.

Contrary to popular opinion or assumption, provincial legislation which conflicts with national legislation is *never* invalid!

Section 104(1) of the Constitution vests the legislative authority of a province in its provincial legislature. A provincial legislature may, amongst others, pass legislation for its province with regard to –

- (a) any matter within a functional area listed in Schedule 4 (concurrent legislative competence with national);
- (b) any matter within a functional area listed in Schedule 5 (exclusive provincial legislative competence);
- (c) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and
- (d) any matter for which a provision of the Constitution envisages the enactment of provincial legislation (section 104(1)(b) of the Constitution).

Due to the *concurrent competence* of the national legislature in respect of functional areas listed in Schedule 4 to the Constitution (section 44(1)(a)(ii)), the Constitution foresees and

envisages that there will be conflicts between national and provincial legislation and sections 146 – 150 of the Constitution regulate the matter of conflicting national and provincial laws.

In relation to legislation dealing with a functional area listed in Schedule 4, national legislation will only prevail if it applies uniformly across the country as a whole and if any of the following conditions are met –

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
- (c) The national legislation is necessary for –
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment (section 146(2)).

National legislation further prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –

- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy (section 146(3)).

In all other cases, provincial legislation prevails over national legislation (section 146(5)). In cases of conflicting legislation, it is for the *court* to decide which legislation *prevails*. A decision by a court that legislation prevails over other legislation, does **not** *invalidate* that other legislation, but that other legislation merely becomes *inoperative* as

long as the conflict remains (section 149 of the Constitution). In the unlikely event that a court cannot resolve an apparent conflict between national and provincial legislation in respect of a functional area listed in Schedule 4, the national legislation will prevail over the provincial legislation (section 148 of the Constitution).

The legislative authority of provinces is therefore wider than may, at first glance, appear. Conflicting provincial and national legislation should not be a common occurrence if co-operative governance is implemented as envisaged in the Constitution, and the respective spheres consult with one another and co-ordinate their actions and legislation with one another (section 41(1)(h)(iii) and (iv) of the Constitution). Provinces should make optimal use of the opportunities created for them in the Constitution without their vision being blurred by assumptions, perceptions and misconceptions which may be displayed to a greater or lesser degree by politicians and practitioners in the respective spheres of government.

In terms of the Constitution, consultation between spheres must be seen as co-operative, participative and engaging and not as prescriptive, “laying down the law”, giving instructions or issuing directives.

In relation to the national/ provincial relationship, provinces must take a pro-active approach to fulfill their true role and potential in terms of the Constitution. How many provinces are aware that section 104(5) of the Constitution empowers a provincial legislature to “*recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law*”? How many times have provincial legislatures made use of this power to recommend legislation to the national legislature?

The national legislative authority vested in Parliament confers on the National Assembly the power, amongst others, “*to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government*” (section 44(1)(a)(iii)). How many times has the provincial sphere requested the assignment of certain or any of these law-making powers of the National Assembly to a provincial legislature (or a municipal council, for that matter!)?

G. One civil code or a series of codes or Acts?

A key issue is whether any eventual legislation in the arena of civil law should take the form of *one comprehensive civil code* or *a series of codes or Acts* on specific subject areas.

We already have a plethora of Acts on specific subject areas and we, as public sector lawyers, have first-hand experience of the limitations and pitfalls of this approach.

The advantage of one comprehensive code is that coherence can be better assured and more visible.⁵ The law pertaining to any area or field or even specific and focussed subject areas would also be far easier to find, apply and maintain and there would be a consistency of terminology, approach, style and format.

Again, I pose the question: **Why not a KwaZulu-Natal Code of Civil Law for the Province of KwaZulu-Natal?**

H. The KwaZulu-Natal Code of Civil Law

A Code of Civil Law for KwaZulu-Natal is not only a distinct possibility but should, if submitted, be a goal and priority for the Province.

After the Rationalisation of Laws process has been completed in KwaZulu-Natal, the feasibility of codifying the laws applicable in the Province may be investigated and possible technical assistance may be sourced from the Indiana State Legislative Agency. I broached this matter with the CEO of the Indiana State Legislative Agency (*Mr Philip Sachtleben*) and he was amenable to the principle of the Legislative Services Agency participating in such an exercise.⁶

⁵ **Current Codification Projects in Scotland:** A paper delivered by *Prof Eric Clive*, Edinburgh University on 15 May 2000.

⁶ See <http://CDSLAS.bravepages.com/id8A.htm> for a short report on the **Fall 2003 Legislative Drafting Internship Programme** with the **Indiana University School of Law**.

I. Public Sector Lawyers as “Custodians of the Statute Book”

The legislative drafter/ public sector lawyer is not a mere secretary or scribe to the decision makers or the framers of policy. The dedicated legislative drafter, as “custodian and guardian of the Statute Book” has the duty to translate policy into practical and workable rules of law.

Objectivity, impartiality, independence and professionalism are qualities required of a dedicated legislative drafter. A delicate balance must be struck. Legislative drafting requires rare individuals who balance contributing to the development of policy without becoming too subjectively involved.

J. An independent Legislative Services Agency for KwaZulu-Natal?

Most Departments in the Province have progressed well with the establishment of legal administration components headed by public sector lawyers at the level of Manager/ Director. It can therefore not be said that the various Departments in the Province lack capacity in the area of legal services generally. The legal components of the respective Provincial Departments are what may be termed “the first port of call” in relation to “internal” legal services within the executive branch of government in the provincial sphere.

It is also not inconceivable that apart from considering the arguments for and against the “centralisation” and “decentralisation” of legal services within the Provincial Government, “outsourcing” certain legal services may be regarded as a viable option.

As private sector lawyers across the board are generally well-versed in legal matters pertaining to contract and litigation, it may be logical to consider the possible *outsourcing* certain public sector legal work such as *litigation* and *contracts*.

It would, in my view, be undesirable for the public sector to outsource the Legislative Drafting function. It is common knowledge that academics and legal practitioners in the private sector, even senior counsel, do not as a matter of course display the competence and skills required to draft legislation and legislation outsourced by Departments have, on many occasions, had to be totally redrafted before certification. There is a special relationship between policy and legislation as policy made by

government only binds individual citizens and society in general after the policy has been embodied in legislation.

As public sector lawyers in the service of the government of the day and as custodians of the Statute Book in our Province, State Law Advisors in the Office of the Premier are required to scrutinise all legislation presented for certification and legislation may only be certified if it complies with the standards, precepts and format generally accepted by, and reflected in, recent current laws enacted nationally and provincially. There is also an obligation to ensure that legislation certified for introduction in the Provincial Legislature, being the expression of government policy and the legal framework and basis for service delivery to the people, is complete, clear and free from possible problems in relation to interpretation and implementation.

In relation to “transversal” (as opposed to “internal”) legal services within the executive branch of government in the provincial sphere, the Chief Directorate: State Law Advisory Services is currently responsible for the certification of all legislation before introduction in the Provincial Legislature and also gives expert legal opinion which binds the respective Provincial Departments.

Co-ordination between the transversal legal services and the Departmental legal components takes place through the mechanism of the KZN Public Sector Lawyers’ Forum.

Every public sector lawyer in the employ, and on the establishment, of –

- (a) a Department;
- (b) *Ezemvelo* KZN Wildlife; and
- (c) the KwaZulu-Natal Provincial Legislature,

and every officer with the rank of Deputy Director or higher in the employ, and on the establishment, of the Central Policy Unit (CPU) and the Directorate: Inter-governmental Relations (IGR) in the Office of the Premier, is a member of the Forum. The Provincial Chief State Law Advisor is the Chairperson of the Forum.

The objects of the Forum are –

- (a) to promote co-ordination of transversal legal issues within the public sector in the Province of KwaZulu-Natal;
- (b) to promote uniformity of legal practice in Departments;

- (c) to promote increased co-operation between public sector lawyers, especially lawyers in the employ, and on the establishment, of Departments;
- (d) to facilitate networking amongst public sector lawyers;
- (e) to facilitate and promote training, formal and informal, for public sector lawyers in the employ, and on the establishment, of Departments;
- (f) to facilitate and promote skills development for public sector lawyers in KwaZulu-Natal;
- (g) to promote greater collaboration and co-operation between public and private sector lawyers and other bodies in respect of legal matters of mutual importance; and
- (h) to engage in such activities that are beneficial to –
 - (i) the Forum and its members; and
 - (ii) public sector law and lawyers.

This informal mechanism of co-operation works well within the executive branch of the government in the provincial sphere.

However, as is apparent from the difference not only in policy, but also in the quality of legal formulation, legal interpretation, content, style and format between legislation as certified and introduced and Acts ultimately passed by the Provincial Legislature, certain questions in respect of transversal legal services in the Province arise which must be addressed.

The Chief Directorate: State Law Advisory Services (currently structured within the Department of the Premier) is struggling to fulfill its mandate of being the “custodian of the Statute Book” in KZN and to exercise a strong influence over the legal quality of legislation ultimately enacted by the Provincial Legislature. This constraint emanates from the fact that the Chief Directorate: State Law Advisory Services (CD: SLAS) is structured within, and is perceived to serve only, the executive branch of government in the provincial sphere (the executive branch being the Premier, the MECs and the provincial Departments). The CD: SLAS is therefore perceived as having no formal role to play within the *legislative branch* of government, it is only consulted or heard by invitation and its legal opinions and preferences in relation to the legal interpretation and drafting or formulation of laws and proposed amendments debated by committees of the legislature may be easily ignored or swept aside by politicians brandishing legal opinions or drafts obtained from private sector lawyers.

There is thus no final and binding authority in the public sector (the executive and legislative branches of the Provincial Government) in relation to legislative drafting and the furnishing of legal opinions to the ultimate detriment of legal certainty and governance.

This is seen as the most serious shortfall in the current process, and the main contributing factor to the current problem with regard to the quality of laws which are ultimately enacted by the Provincial Legislature. Legal personnel attached to the Provincial Legislature and the legal personnel attached to the Provincial Executive “serve different masters” and this current state of affairs has the potential to negate the non-partisanship required from legal practitioners in the public sector.

An appropriate solution may be the establishment of a separate new “Legislative Services Agency” (LSA) for the Province to serve both the executive and legislative branches of the Provincial Government. The new LSA should, ideally, not be structured within either the executive or legislative branches in order to emphasise its independence and impartiality in serving both branches of government in relation to legislative drafting and the furnishing of legal opinions.

The primary object of the LSA should be to enhance the quality and accessibility of the body of provincial law in KwaZulu-Natal.

The secondary objects of the LSA should be –

- (a) to scrutinise, legally edit and certify all provincial legislation;
- (b) to investigate and undertake the regular rationalisation, harmonisation and review of the body of law applicable in the Province of KwaZulu-Natal; and
- (c) to undertake legal research.

The LSA should be the highest transversal, professional and independent legislative drafting and legal services body in the public sector in the Province serving both the executive and legislative branches of the Provincial Government.

Legal opinion furnished by the LSA must be final and binding on the administration of the executive and legislative branches of the Provincial Government.

The LSA should be charged with the responsibility to –

- (a) legally edit and certify all legislation drafted, processed or considered by the executive and legislative branches of the Provincial Government before introduction in, and enactment by, the Provincial Legislature;
- (b) investigate and undertake the rationalisation, harmonisation and review of the body of law applicable in the Province of KwaZulu-Natal and, in relation thereto, may make recommendations to the executive or legislative branches of Government in the Province; and
- (c) when briefed in the prescribed manner, furnish legal opinion to the executive and legislative branches of the Provincial Government in relation to the interpretation of existing legislation administered, or draft legislation considered, by the Provincial Government.

This would promote legal certainty, quality of Provincial law ultimately enacted and consistency in relation to legal matters in the public sector in the Province. Only then would we be able to fulfill our mandate of being the custodian of the body of Provincial law and also ensure co-operative governance in respect of legal matters between the executive and legislative branches of the Provincial Government in the spirit of Chapter 3 of the Constitution. It is further submitted that the establishment of a body such as the proposed LSA would not be repugnant to the model of *separation of powers* as enunciated in our Constitution.

Internationally, the doctrine of separation of powers has not been an issue in establishing a central cadre of legislative drafters or a centralised legislative drafting service or office within government serving both the executive and the legislature. Many Commonwealth countries have what is known as an Office of Parliamentary Counsel which is, in effect, a centralised legislative drafting service. The situation in the USA is that 26 of the 50 states employ the mechanism of a central legislative drafting office (for example, the Indiana State Legislative Services Agency).

There is currently no central cadre of legislative drafters in South Africa, neither within the national sphere, nor the provincial sphere. The question is whether it is not high time to consider this option which is ostensibly being employed to good effect elsewhere.

The *advantages* of the option of a central legislative drafting office are the following –

- (a) best use is made of limited resources (human and financial);
- (b) collective experience, skills and know-how are pooled and shared;
- (c) procedures and style and format of legislation are easily standardised;
- (d) the resulting legislation is more consistent and uniform simplifying the task of interpreting the law.

The advantages are maximised when the central drafting office or service is tasked with drafting both *principal* (Bills) and *subordinate* (Regulations) legislation.

The only *disadvantage* of a central drafting office or service may be a perception that such a body may be too “elitist”, but this perception may be easily dispelled by the attitude and demeanor of those staffing such an office.

Another advantage of establishing a central drafting office or service is that *accessibility* to legislation would be enhanced if that office is also tasked with the publication, maintenance and updating of the Statute Book.

Does the State not have a responsibility to make its *Provincial Gazettes* and Legislation available to its citizens in updated form at no cost?

Then why is the State seemingly content to -

- (a) produce the information (*Provincial Gazettes* and Legislation); and then
- (b) allow companies in the private sector (eg. *Butterworths* and *Jutas*) to distribute this information back to itself and its citizens at substantial cost to the State and its citizens?

In a practical demonstration of commitment to –

- (a) the mainstreaming and institutionalising of ***Batho Pele*** (improved service delivery in a people-centric public service culture) and the **KZN Citizens' Charter**;
- (b) the concept of multilingualism espoused in section 6 of the Constitution, 1996; and
- (c) the concept of **e-Government**,

a central drafting office or service could publish (electronically and in printed format and make available online), provincial legislation and *Gazettes* in the three official languages of the Province (*isiZulu*, English and Afrikaans).

This will also effect *savings* for the Provincial Government –

- (a) by reducing the number of hard copies of *Provincial Gazettes* and legislation which will have to be printed and distributed; and
- (b) by reducing postage costs attendant to the mailing of hard copies to subscribers.

Ultimately, this will reinforce the ***Batho Pele*** "belief set": "***We Belong, We Care, We Serve***".

K. The preferred mechanism to establish an independent Legislative Services Agency for KwaZulu-Natal

Once the principle has been accepted that a body such as the proposed LSA would be desirable and, it is submitted that the argument for the establishment of a centralised legislative drafting office or legislative services agency especially in the provincial sphere in South Africa, is compelling, the preferred mechanism for establishing such a body would have to be identified.

Several options are available.

Possible mechanisms for establishing the envisaged LSA would be either a Chapter in a Provincial Constitution or an Act of the Provincial Legislature. Various questions and issues surrounding Provincial competence in respect of such a proposed legislative measure would also have to be investigated in detail after the principle of the establishment of a LSA is accepted.

A provincial legislature may pass a constitution for the province if at least two thirds of its members vote in favour of the Bill (section 142 of the Constitution). Section 143 of the Constitution deals with the contents of provincial constitutions. A provincial constitution

must not be inconsistent with the Constitution, but may provide for –

- (a) provincial *legislative or executive structures and procedures* that differ from those provided for in Chapter 6 of the Constitution dealing with Provinces; or
- (b) the institution, role, authority and status of a traditional monarch, where applicable.

Provisions included in a provincial constitution –

- (a) must comply with the values in section 1 and with Chapter 3 of the Constitution; and
- (b) may not confer on the province any power or function that falls –
 - (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
 - (ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Because a provincial constitution must be drafted within the narrow confines set by the Constitution, it must be certified by the Constitutional Court.

While the overall scope of a provincial constitution is limited, there are some possibilities that could be explored in devising different legislative and executive structures and procedures, and by developing innovative institutions and policies. It is submitted that the creation of a specialist institution or body such as the proposed Legislative Services Agency (LSA) would fall within the ambit of section 143(1)(a) of the Constitution for inclusion in a provincial constitution for KwaZulu-Natal.

It is also submitted that, in the event that a provincial constitution for KwaZulu-Natal is not proceeded with or, in the event that the provisions providing for a proposed LSA are not included in the provincial constitution, **the proposed LSA could be established by provincial legislation in terms of the legislative authority and competence of provinces as set out in section 104(1)(b) and (4) of the Constitution.**

Even if Provincial competence in respect of such a legislative measure proves to be dubious, section 104(5) of the Constitution, as we have noted above, empowers a provincial legislature to “*recommend to the National Assembly legislation concerning any matter outside the authority of that (provincial) legislature*”; alternatively, Parliament (the

National Assembly) could, in terms of section 44(1)(a)(iii) of the Constitution, be requested to assign its legislative powers in this respect to the Provincial Legislature.

L. The way forward – A proposed draft Bill?

It would seem that there should, ultimately, be no legal impediment to the enactment of such a proposed legislative measure by either Parliament or a Provincial Legislature. What remains is for the principle to be negotiated and accepted, firstly within the executive and legislative branches of the Provincial Government. Once this has been achieved, consultation with the national sphere of government could follow in the spirit of Chapter 3 of the Constitution.

Subject to the direction of the Director-General, a proposed draft Bill, to form the basis for further discussion and negotiation, may be prepared for consideration.

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