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**LEGAL OPINION**  
**[Confidential]**

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TO: Hon N Mapisa-Nqakula, MP  
Speaker of the National Assembly

COPY: Ms. P Tyawa  
Acting Secretary to Parliament

Mr. M Xaso  
Secretary to the National Assembly

FROM: Constitutional and Legal Services Office  
[Adv Z Adhikarie, Chief Parliamentary Legal Adviser]

DATE: 22 March 2022

REF. NO.: 31 / 2022

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**RE: Processing and way forward in respect of the Zondo Commission Report**

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**Introduction**

1. Our office was requested by the Speaker of the National Assembly (“the Speaker”) to advise on the options available to Parliament to process the Zondo Commission Report in as far as it relates to Parliament.

## Background

2. Section 84(2) (f) of the Constitution empowers the President to appoint commissions of enquiry. Acting in terms of this power, the former President of the Republic, Mr. Jacob Zuma, established the *Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* on 23 January 2018. The Commission is chaired by Judge Raymond Zondo the then deputy Chief Justice<sup>1</sup> and is referred to as the “Zondo Commission.”
3. The establishment of the Zondo Commission was pre-empted by the “*State of Capture Report*”<sup>2</sup> published by the former Public Protector, Dr Thuli Madonsela, on 14 October 2016. The report, which focussed on the alleged corrupt involvement of the Gupta family in state matters, implicated former President Zuma and other state officials (in varying capacities). The report contained several remedial actions including the establishment of a judicial commission of enquiry into state capture.
4. The Zondo Commission held its first hearing in August 2018 and has since then successfully applied for several extensions to its term on the basis, *inter alia*, of the volume of work. It held over 400 hearings and heard in excess of 300 witnesses. It has been granted an extension until end April 2022 to conclude its work.
5. Notwithstanding same, the Zondo Commission has to date released parts of its Report<sup>3</sup>. The President has published the parts of the Report as received but has only referred Part 3 to Parliament. All parts of the Report already released are available on the website of the Zondo Commission and can be accessed at <https://www.statecapture.org.za/>.
6. The portions of the Report, as released to date, identify several Members of Parliament, past and present, who are implicated in conduct that may constitute illegal, unlawful or unethical behaviour. In addition, there are certain aspects of the Report that have a bearing on Parliamentary business.

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<sup>1</sup> Mr. Zondo has since been appointed as the Chief Justice of the Republic and will assume office on 1 April 2022.

<sup>2</sup> Report No. 6 of 2016/17

<sup>3</sup> For purposes of this opinion the term “Report” will be used to denote the Zondo Commission Report in its entirety once completed and where necessary reference will be made to the specific parts as indicated in the table in Para 7 below.

7. The following tabulation summarises the release of reports and associated information:

<b>REPORTS OF THE ZONDO COMMISSION</b>			
<b>Report #</b>	<b>Focus Area</b>	<b>Release Date to President</b>	<b>Notes</b>
Part 1 (1 volume)	South African Airways and its associated companies	4 January 2022	Also deals with New Age Media, SARS and public procurement.
Part 2 ( 2 volumes)	Transnet and Denel	1 February 2022	–
Part 3 (4 volumes)	Bosasa	1 March 2022	Part 3 has been referred to Parliament by the President as it contains recommendations directly related to Parliament.
Balance of Report	According to papers filed in the Commission's request for an extension, the balance of the Report will contain information on the Estina Dairy Project, Parliamentary Oversight, SABC, ANN7, EOH, the City of Johannesburg and Gupta bank account closures.	Due on or before 29 April 2022 (the Commission has indicated that it will endeavour to release a portion by end of March 2022 and the final part by end of April 2022)	
Submission of the Zondo Commission Report (in its entirety) to Parliament by the President together with President's implementation plan			Must be submitted to Parliament on or before 31 August 2022

8. The question that now arises is when and how should Parliament process the Zondo Commission Report (or parts thereof) as it relates to the business of Parliament or Members of Parliament as the case may be. We will deal with each matter separately.

### **The Zondo Commission Report in respect of Parliamentary Business**

9. Parts 1-3 of the Report do not deal directly with any issue relating to the business of Parliament.

10. However, we note that there are aspects of the Report that affect Parliament is as far as they relate to:

- 10.1. The proposed introduction of new laws or the amendment of existing laws;
- 10.2. Oversight over law enforcement agencies in respect of recommendations on criminal action they ought to take against specific individuals or entities;
- 10.3. Oversight over other public bodies in respect of recommendations relating to actions they ought to take to prevent corruption or to recover losses;
- 10.4. Circumstances in various public entities and departments which provided fertile ground for corrupt activities to take root.

11. As previously indicated by the Zondo Commission, the balance of the Report will deal, *inter alia*, with the issue of Parliamentary Oversight in general and the failure by Parliament to conduct its oversight mandate effectively thereby contributing to State Capture. The hearings and submissions related to this aspect have already been concluded and Judge Zondo has already remarked on ways in which the oversight function and capacity of Parliament could be strengthened.

12. The President's Implementation Plan which will be submitted together with the Report to Parliament in August 2022 may include specific implementation targets that relate to Parliament. In addition, the final part of the Report will likely contain recommendations related to the strengthening of Parliamentary Oversight.

13. Notwithstanding that there likely will be specific recommendations and implementation steps directed at Parliament, the points noted in paragraph 10 above (which are occasioned by recommendations not directed at Parliament) also bears consideration by Parliament.

14. Thus whilst it is likely that specific Members of the Executive will be instructed by the President to introduce legislation as envisaged in the Report and that the President will direct the relevant law enforcement authorities to action the recommendations in the Report, Parliament can and should play an oversight role in these matters as these unfold.
15. In addition, as noted in paragraph 10(d) above the Report highlights various inadequacies and financial management issues within public bodies, including matters related to public procurement, which may still be considered by Parliament as part of its normal oversight processes. By way of example: Part 1 of the Report alludes to the financial mismanagement of the State Security Agency (SSA) and the use of the SSA to channel public funds for private political party use. The Standing Committee on Public Accounts has already taken steps to consider these allegations in more detail in as far as they relate to its financial oversight functions.
16. Similarly, other Portfolio Committees may also proactively apply themselves to the information in the Report to determine if it warrants further engagement and interrogation of public bodies who fall under its portfolio. Respective content advisers to Committees are well positioned to consider these aspects.
17. In order for Parliament to effectively exercise its oversight functions that emanate from the Report, it is necessary that the Report be carefully scrutinised and that all matters which require further oversight by Parliament be extracted and referred to the relevant Portfolio Committees. In other words, Parliament should consider the Report beyond the explicit directives to it as contained in the recommendations and the President's implementation plan.

### **The Zondo Commission Report in respect of particular Members or former Members of Parliament**

18. The portions of the Report, as released, implicate various members and former members of Parliament.
19. Members of Parliament must conduct themselves in accordance with certain legal prescripts that apply to their office. Conduct is regulated in three main ways as follows:
  - 19.1. Members are bound by the internal Rules of Parliament which govern their conduct in their respective Houses and Committees (Rules of the National Assembly; Rules of the National Council of Provinces and the Joint Rules of Parliament);

19.2. Members must comply with the provisions of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (“Powers Act”); and

19.3. Members are bound by the provisions of the *Code of Ethical Conduct and Disclosure of Members’ Interests for Assembly and Permanent Council Members* (“Ethics Code”).

20. For purposes of the Report, it will be necessary for Parliament to determine whether Members implicated therein have breached or failed to comply in particular with any provisions of the Ethics Code or the Powers Act.

21. Below is a synopsis of each of these legal instruments and the manner in which breaches or non-compliance must be managed.

### 21.1. **The Powers Act**

a) The Powers Act prohibits certain conduct by Members of Parliament, which if committed may attract a sanction for contempt and may, in certain instances, further constitute a criminal offence making the member liable to a fine or imprisonment.

b) Briefly, a member is guilty of contempt of Parliament if the member -

- I. Improperly interferes with or impedes the exercise or performance by Parliament or a fellow member; threatens or obstructs a fellow member proceeding to a meeting or the House; assaults, threatens or deprives a member of any benefit on account of the member’s conduct in Parliament; creates or takes part in any disturbance<sup>4</sup>; or fails or refuses to comply with a lawful instruction by a duly authorised staff member (See section 7);
- II. Improperly influences another member in the performance of their duties, induces a member to be absent; attempts to compel a member to declare himself or herself in favour of or against matters pending or before Parliament; receives, asks or accepts for themselves or someone else any benefit for voting, promoting, opposing or making a representation to a House or Committee (See section 8);
- III. Fails to obtain leave to give evidence in proceedings outside Parliament (See section 10);

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<sup>4</sup> Means any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee but does not include an act committed by a member in the exercise of his or her privilege contemplated in sections 58 (1) and 71 (1) of the Constitution.

- IV. Publishes or broadcasts Parliamentary proceedings without authorisation (See section 19 and 21 (1));
  - V. Hinders or obstructs staff members (See section 26);
  - VI. Commits an offence related to witnesses (See section 17);
  - VII. Wilfully fails or refuses to obey any rule, order or resolution of a House or the Houses (See section 13(c)); or
    - I. Commits an act which in terms of the standing rules constitutes - contempt of Parliament; or a breach or abuse of parliamentary privilege (See section 13(d)).
- c) In terms of section 12(1) of the Powers Act, a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared under the Powers Act to be contempt of Parliament by a member, and taking the disciplinary action provided in respect thereof. Section 12(2) of the Act provides that a House must appoint a standing committee to deal with all such enquiries.
- d) Pursuant to the above, the National Assembly (“NA”) has established, in terms of Rule 191 of the NA Rules, a Powers and Privileges Committee to deal with the conduct of members of the NA. The National Council of Provinces has not, at present, established a permanent powers and privileges committee and deals with such matters via an ad hoc committee when necessary.
- e) The Powers and Privileges Committee is responsible for conducting enquiries into allegations of contempt of Parliament in accordance with a procedure that is reasonable and procedurally fair.
- f) When the Committee finds a member guilty of contempt, it may, in addition to any other penalty to which the member may be liable under the Powers Act or any other law, impose any one of a number of penalties including a formal warning; a reprimand; an order to apologise, the withholding, for a specified period, of certain members’ privileges; the removal, or the suspension for a specified period, of the member from any parliamentary position occupied by the member; a fine and/or suspension of the member, with or without remuneration, for a period not exceeding 30 days. It may, where appropriate, instead of or in addition to the imposition of a penalty also refer the matter to the National Director of Public Prosecutions.
- g) It is important to note that the disciplinary action and process envisaged by the Powers Act are not a pre-requisite for the laying of criminal charges in terms of

section 27 of the Powers Act. Such criminal charges against members and former members may be laid regardless of whether the member or former member has been subjected to a disciplinary process. Neither does the laying of charges preclude a committee of Parliament from conducting its internal processes.

## 21.2. The Ethics Code

- a) The Ethics Code, implemented 1 November 2014, outlines the minimum ethical standards of behaviour that Members of Parliament must adhere to. These include upholding propriety, integrity and ethical values in their conduct.
- b) The purpose of the Code is to create public trust and confidence in public representatives and to protect the integrity of Parliament.
- c) The Code sets out certain ethical and financial obligations, which Members must adhere to. In terms of the Code Members must:
  - I. conduct themselves in line with certain standards of ethical conduct. These include the duty to abide by the Code, uphold the law, act in accordance with the public trust placed in them, place the interests of the public above their own, act in a manner that maintains public confidence and trust in the integrity of Parliament and be committed to the eradication of all forms of discrimination;
  - II. resolve and declare any financial or business conflicts of interest;
  - III. refrain from conducting any prohibited business activities;
  - IV. only perform additional remunerated work if it does not pose a conflict of interest and is sanctioned by their political party;
  - V. avoid any abuse or improper use of Members Facilities; and
  - VI. disclose their registrable interests.
- d) In terms of Clause 16 of the Ethics Code, a breach occurs when a member contravenes or fails to comply with a provision of the Code or when disclosing registrable interests, a member wilfully provides the Registrar with incorrect or misleading details.
- e) Clause 17 (1) of the Ethics Code provides that the Joint Committee on Ethics and Members' Interests ("Ethics Committee") may, "acting on its own or on a complaint by any person through the Office of the Registrar, investigate any alleged breach" of the Ethics Code.



- f) The Procedure for the investigation of complaints is set out in clause 10 of the Ethics Code and may, if facts are in dispute, lead to a hearing being held.
- g) At the conclusion of an investigation the Ethics Committee must make a finding supported by reasons. This finding must be made public and a summary of the facts must be disclosed.
- h) The Ethics Committee may, where a finding of breach is concerned, recommend a penalty which may include a reprimand in the House; a fine; a reduction of salary or allowance; suspension of the member's right to a seat in Parliamentary debates or committees and/or rectification of the breach and counselling on the requirements of the Ethics Code.
- i) The findings of the Ethics Committee must be forwarded to the appropriate House which may accept, reject or refer the recommendation back to the Ethics Committee.

22. It is clear from the above that the role of the Ethics Committee is to deal with issues relating to the ethical conduct of Members and matters relating to their financial activities. The Ethics Code clearly sets out these standards and it is only an alleged breach of such standards and obligations that would result in action taken against a member.

23. The Power and Privileges Committee on the other hand is only empowered to consider breaches relating specifically to contraventions of the Powers Act. These contraventions, whilst they may have ethical consequences, generally do not relate to the standards of conduct as laid down in the Code.

24. It is however not impossible that the actions of a member will invoke the provisions of the Ethics Code as well as the Powers Act. If such a matter arises, it will have to be dealt with, subject to paragraph 25 below, by the most appropriate committee as a Member cannot be tried twice by two different internal processes in respect of the same charge.

25. NA Rule 214 (1), which sets out the functions of the Powers and Privileges Committee, states that:

*“The Committee must consider any matter referred to it by the Speaker relating to contempt of Parliament or misconduct by a member or a request to have a response*

*recorded in terms of Section 25 of the Powers and Privileges Act, except a breach of the Code of Conduct contained in the Schedule to the Joint Rules.”*

26. Based on the above Rule, if the alleged conduct in question constitutes a breach of any provision of the Ethics Code it must be dealt with by the Ethics Committee.

27. Regardless of the structure ultimately used, it must be borne in mind that even a matter which is not dealt with by the Powers and Privileges Committee may still warrant a referral for criminal prosecution where there is evidence of a contravention of the Powers Act.

### **Application of Parliamentary processes in terms of the Powers Act or Ethics Code to members and former members implicated in the Report**

28. The 3<sup>rd</sup> part of the Report implicates several members and former members of Parliament. Whilst it is beyond the scope of this opinion to deliberate on the merit of the findings in detail we have considered these briefly, together with an indication of the way forward. The persons are as follows:

#### **28.1. *Gwede Mantashe, MP***

Part 3 of the Report dealt with allegations that Mr. Mantashe benefitted from private security upgrades arranged and paid for by Bosasa to 3 of his properties.<sup>5</sup> At the time Mr. Mantashe occupied the post of Secretary-General of the African National Congress and served as a member on its National Executive Committee. The Zondo Commission found that there is prima facie evidence of corruption relating to the security upgrades and that Mr. Mantashe be subjected to further investigation.

Neither the Powers Act nor the Ethics Code would apply to Mr. Mantashe and therefore Parliament has no *locus standi* to further consider this matter. In the event that Mr. Mantashe is successfully prosecuted for corruption he may stand to lose his membership of the NA in terms of section 47(1) (e) of the Constitution if he is sentenced to more than 12 months' imprisonment without the option of a fine. The mere commencement of criminal proceedings however does not affect membership.

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<sup>5</sup> See from page 738 onwards in volume 4 of Part 3 of the Zondo Commission Report

## 28.2. **Winnie Ngwenya, MP (Permanent Council delegate)**

Part 3 of the Report deals with allegations that Ms. Ngwenya, during her term as a member of the Portfolio Committee on Correctional Services, executed her functions in a biased manner, to the benefit of Bosasa, in return for monthly cash payments.<sup>6</sup>

The Zondo Commission found that her conduct was in violation of the Ethics Code and the Prevention of and Combatting of Corrupt Activities Act, 2004 (“PRECCA”). We note that the alleged conduct violates several provisions of the Ethics Code including the duty not to accept any reward, benefit or gift that creates a direct conflict of interest for the member; the duty not to use one’s position to improperly advantage oneself or another and the failure to disclose the financial benefit received from Bosasa.

Notwithstanding that the Report only referred to the Ethics Code, the alleged conduct could also constitute a contravention of section 8(2) of the Powers Act which prohibits members from receiving compensation for voting or not voting in a particular manner, for promoting or opposing anything before or pending before a committee or making a representation in that committee. Such conduct constitutes contempt in terms of the Powers Act and is also a criminal offence in terms of the Powers Act and subject to a fine or imprisonment.

On the basis of NA Rule 214(1), the alleged conduct would have to be dealt with by the Ethics Committee but this does not preclude a referral for criminal prosecution in terms of the Powers Act if prima facie evidence warrants same.

## 28.3. **Cedrick Frolick, MP**

The 3<sup>rd</sup> Report contends that Mr. Frolick facilitated a meeting between former Member of Parliament and Chairperson of the Correctional Services Committee, Mr. Vincent Smith, and Bosasa.<sup>7</sup> The purpose of the meeting was allegedly to assist Bosasa to resolve its impasse with Mr. Smith and thereby improve its relations with the PC: Correctional Services, which was considering irregularities in the awarding of contracts to Bosasa. Thereafter, it is alleged that Mr. Frolick had further engagements (telephonic and in person with Bosasa) on matters related to Parliament.

In exchange, it is alleged that Mr. Frolick was paid cash (on more than on occasion) thereby contravening sections 3 and 7 of the PRECCA. The Report states that the Commission has referred

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<sup>6</sup> See from page 820 onwards in volume 4 of Part 3 of the Zondo Commission Report

<sup>7</sup> See from page 514 onwards in volume 4 of Part 3 of the Zondo Commission Report

Mr. Frolick's conduct to the investigative authorities for further investigation as the evidence establishes that there is a reasonable prospect that further investigation will uncover a prima facie case of money laundering, corruption and/or fraud.<sup>8</sup>

The alleged conduct violates several provisions of the Ethics Code including the duty not to accept any reward, benefit or gift that creates a direct conflict of interest for the member; the duty not to use one's position to improperly advantage oneself or another and the failure to disclose the financial benefit received from Bosasa. It must therefore, in terms of NA Rule 214(1), be referred to the Ethics Committee.

The alleged conduct may further amount to a contravention of the Powers Act and may also be referred for criminal prosecution.

#### 28.4. ***Vincent Smith***

The 3<sup>rd</sup> Report detailed various incidents in which it was alleged that Mr. Smith, a former member of the NA, had corruptly received cash or benefits from Bosasa for himself or his daughter during his time as a Member of Parliament.<sup>9</sup> At present there are several criminal charges that have already been brought against Mr. Smith.

In light of the fact that Mr. Smith is no longer a Member of Parliament, there is no legal basis upon which to initiate a breach process in terms of the Ethics Code. However, nothing prevents Parliament from laying criminal charges in respect of the contravention of section 8(2) of the Powers Act if it determines that there is prima facie evidence warranting same.

#### 28.5. ***Thabang Makwetla, MP***

The 3<sup>rd</sup> Report deals with allegations that Mr. Makwetla, during his tenure as Deputy Minister for Correctional Services, received security upgrades to his home as paid for by Bosasa.<sup>10</sup>

We note that these allegations have already been tested by the Ethics Committee following a complaint lodged with the Registrar by Mr. John Steenhuizen, MP in September 2018. Mr. Makwetla, MP was found to have breached certain provisions of the Ethics Code and the report

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<sup>8</sup> See page 784 onwards in volume 4 of Part 3 of the Zondo Commission Report

<sup>9</sup> See from page 821 onwards in volume 4 of Part 3 of the Zondo Commission Report

<sup>10</sup> See from page 853 onwards in volume 4 of Part 3 of the Zondo Commission Report

of the Ethics Committee, together with the recommended penalties, was ATC'd on 28 March 2019 (See ATC 40-2019).

The Report does not appear to contain any evidence that Mr. Makwetla, in exchange for the benefits received by Bosasa, sought to improperly influence Parliament in contravention of section 8(2) of the Powers Act in order to advance the interests of Bosasa (for example during oversight processes conducted by the relevant portfolio committee). However, nothing prevents Parliament from revisiting representations by Mr. Makwetla to Parliament in his capacity as Deputy Minister to determine if he misled Parliament or otherwise contravened the Powers Act so as to determine whether it is necessary to lay criminal charges in terms of the Powers Act.

#### **28.6. Nomvula Mokonyane**

The 3<sup>rd</sup> Report recommends that Ms. Mokonyane be investigated and prosecuted for corruption in terms of PRECCA in relation to allegations that she received cash and benefits from Bosasa during her tenure as the Minister of Water and Sanitation from 26 May 2014 to 26 February 2018.<sup>11</sup>

Like Mr. Smith, Ms. Mokonyane is no longer a Member of Parliament. The Report does not contain any evidence that Ms. Mokonyane sought to improperly influence Parliament in contravention of section 8(2) of the Powers Act in order to advance the interests of Bosasa (for example during oversight processes conducted by the relevant portfolio committee). However, nothing prevents Parliament from revisiting representations by Ms. Mokonyane to Parliament in her capacity as Minister to determine if she misled Parliament or otherwise contravened the Powers Act so as to determine whether it is necessary to lay criminal charges in terms of the Powers Act.

#### **Way Forward**

29. Based on the above, we recommend the following:

- a) The Speaker, as soon as possible, refer Part 3 of the Report to the Ethics Committee to consider the alleged breach of the Ethics Code by Ms. Winnie Ngwenya, MP and Mr.

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<sup>11</sup> See from page 436 onwards in volume 3 of Part 3 of the Zondo Commission Report

Cedrick Frolick, MP. This referral is not dependant on the release of the final portion of the Report.

- b) That the Parliamentary Research Unit be consulted with a view to assisting Parliament to extract all parts of the Report that may have a bearing on Parliament's oversight mandate so that these matters can be referred to the appropriate content advisers to Portfolio Committees for advising the committees on matters that require their further consideration. We note further that the Report mentions other former members of Parliament as referred to by witnesses and consideration should be had as to whether the allegations trigger the provisions of the Powers Act and therefore requires consideration.<sup>12</sup> This process can be started prior to the release of the final portions of the Report and continued as need be.
  
- c) The Report and the President's Implementation Plan, when received, must be referred to the Rules Committee, together with the analysis conducted by the Research Unit, to determine whether it is necessary to refer specific matters to any Portfolio Committee for further consideration and for determination by the Rules Committee whether an ad hoc committee should be appointed, in terms of NA Rule 150(2), to engage with the Report to ensure that the recommendations and Implementation Plan of the President is coordinated and actioned.
  
- d) The referral in (c) above must further include a consideration by the Rules Committee on how alleged contraventions of the Powers Act will be dealt with where such contraventions constitute a criminal offence. In particular, if not specifically directed, a decision must be taken at the appropriate time on whether there is a basis to lay criminal charges against W Ngwenya, MP; C Frolick, MP; V Smith; T Makwetla, MP and N Mokonyane. CLSO is available to assist/advise at the appropriate time.

30. Should you require any further information please do not hesitate to contact the writer or our Ms. Fatima Ebrahim.



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**Adv Z Adhikarie**

<sup>12</sup> By way of example the testimony of Mr. Dennis Bloem, a former member of the NA, on 1 February 2019 made reference to several former members possibly having acted corruptly.

**Chief Parliamentary Legal Adviser**