The State of South Carolina

Office of the Attorney General

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The Honorable Isadore E. Lourie
Senator, District No. 21
Gressette Senate Office Building
Suite 303
Columbia, South Carolina 29202

Dear Senator Lourie:

You have asked whether Senate Bill 82 is constitutional. Senate Bill 82 proposes an amendment to Section 15-78-60(a)(15) of the South Carolina Tort Claims Act [Section 15-78-10, et seq.] relative to the exemptions from suit under that Act. The proposed amendment reads:

> Governmental entities responsible for the removal of snow and ice from highways are not liable for loss arising out of the removal. Private entities working under contract with governmental entities to remove snow and ice must be considered governmental employees and are exempt from liability arising out of the removal of snow and ice from highways.

You particularly requested an opinion from this Office as to the constitutionality of the second sentence of the amendment, which attempts to accord sovereign immunity to certain private entities and their employees working pursuant to contract with governmental entities.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklin, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939); Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment

upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional or to make necessary findings of fact prior to finding a legislative enactment unconstitutional. Op. Atty. Gen. No. 87-62 (June 15, 1987). These same principles are applicable when this Office reviews proposed legislation. Our analysis of this proposed legislation is, therefore, necessarily limited to identify characteristics of the act which may render it susceptible to a court challenge on constitutional grounds.

A state, by reason of its sovereign immunity, is immune from suit and cannot be sued without its consent. 21A C.J.S. States § 298 (1977). Generally, the sovereign immunity of a state may only be waived by the State Legislature by legislative action. Id. § 299.[1] The South Carolina Tort Claims Act constitutes a partial waiver of the State's common law and constitutional immunity from suit, subject to the conditions and limitations contained in the Act. However, a state's consent to be sued is not a contract, and it can be repealed or modified at any time at the discretion of the state. Id. § 300; Morris v. S. C. State Hwy. Dept., 264 S.C. 369, 215 S.E.2d 430 (1975); Bell v. S. C. State Hwy. Dept., 204 S.C. 462, 30 S.E.2d 65 (1944). Since there is no common law right to sue governmental entities, and because a waiver of sovereign immunity may be repealed or modified at any time, in our view it is not a constitutional violation to limit the liability of governmental entities for removing snow and ice from highways.

This analysis, however, does not apply to the language which attempts to limit the liability of private entities working under contract with governmental entities for the removal of snow and ice from public highways. The proposed exemption from liability accorded to private entities under contract to remove snow and ice from public highways is subject to challenge on grounds that it violates the equal protection clauses of the State (Article 1, Section 3) and Federal (Fourteenth Amendment) Constitutions.

The requirements of equal protection are satisfied if (1) the classification bears a reasonable relation to the legisla-

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1. South Carolina Constitutional Art. X, Section 10, provides:

> The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.

tive purpose sought to be effected, (2) the members of the class are treated alike under similar circumstances and conditions, and (3) the classification rests on some reasonable basis. Carll v. S. C. Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985). While the General Assembly has the power in passing legislation to make a classification of its citizens, the constitutional guaranty of equal protection requires that all members of a class be treated alike under similar circumstances and conditions and that any classification cannot be arbitrary but must bear a reasonable relation to the legislative purpose sought to be effected. Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978). In Broom, supra, the South Carolina Supreme Court struck down as unconstitutional a statute which applied only to building architects, engineers and contractors but not to owners or manufacturers of components that went into construction of buildings. The Court stated:

> [w]hile it is broadly stated that a vital distinction exits between architects, engineers and contractors on the one hand, and owners and manufacturers, on the other, such vital distinction is nowhere pointed out such as to justify granting immunity to one group and not the other. No rational basis appears for making such distinction.

270 S.C. at 231, 241 S.E.2d at 740.

Section 15-78-30(c) of the Tort Claims Act defines "employee" as follows:

> "Employee" means any officer, employee, or agent of the State or its political subdivisions ... but the term does not include an independent contractor doing business with the State or any political subdivision thereof [emphasis supplied].

The proposed legislation attempts to single out one particular type of contractor on which to confer the benefits of sovereign immunity. Any contractor that does business with the State faces potential liability for its torts arising out of the performance of its contract to the same extent that the contractor faces potential liability for its torts arising out of the performance of its contracts with private entities. To single out those contractors who remove ice and snow by providing them sovereign immunity may not be supported by any reasonable factual basis since other private contractors providing services to the government, regardless of their exposure to tort liability, are not shielded by sovereign immunity. This is not

to suggest that the General Assembly, by legislative enactment, could not grant immunity to a private contractor providing a particular hazardous service for the government and the grant of immunity was reasonably required in order to obtain the services from the private sector; nonetheless, the extension of immunity would have to be reasonable and consistent with the special liability concerns occasioned by the provision of the hazardous service.

In conclusion, based on the analysis of Broome v. Truluck and the absence of any facts that support the reasonableness of the classification proposed by the second sentence of Senate Bill 82, we believe this provision raises serious equal protection concerns.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

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