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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

**THE JUDICIARY AND
LEGAL SYSTEMS**

PUBLIC HEARING

5TH JUNE 1995

PRESENTATIONS BY
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GENERAL COUNCIL OF THE BAR: ADV AP BLIGNAULT
UWC: PROF L FERNANDEZ
ATTORNEYS GENERAL: ADVS F KAHN, JA D'OLIVEIRA
KPCO VON LIERES UND WILKAU & G BIZOS

CONSTITUTIONAL COURTTHEME COMMITTEE 5

DATE: 5 JUNE 1995

CHAIRPERSON: Good morning, I would like to welcome all of you here and just apologise for the delay, we have had a slight problem because apparently our parliamentary order paper says this meeting starts at nine o'clock rather than 8.30 so there seems to have been some confusion about it. 10
But we believe that we should start and just carry on in the meantime. I want to thank everybody for taking the time and effort to come here. What I would propose that we do is that we have the various presentations, maybe just with very short questions of clarity if there are and that we then have a fairly lengthy session afterwards where members of the committee can ask questions and we can then entertain some discussion from all the people present. The order that we propose to take people in, if that is okay with everybody, would be to start with the Black Lawyers 20
Association, then the General Council of the Bar, then the Attorneys General and then the Judicial Service Commission. Now I believe we may have Professor Fernandez here also later but he is not here at the moment. So could I ask Mr Hansjee from the Black Lawyers Association to start the proceedings for us.

MR HANSJEE: Good morning ladies and gentlemen. Basically our submission is very short and brief. We suggest that the appointment of attorneys general should come under the aegis of the Judicial Service Commission but that this be done in 30
conjunction with the Public Service Commission, reason being that the position of the attorney general is a senior
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position in the system, the criminal justice system and as you all probably know the attorney general has to deal with criminal prosecution. He represents the State and in this context we would like to place an emphasis on the people the State is representing. The Judicial Service Commission as it is presently composed is not a desirable one, the reason being that the composition is not sufficiently representative of the people that it is serving. The proposal has not been put in here but we would like to suggest that all members of the historically disadvantaged people be represented on the Judicial Service Commission as well as another proposal that should the appointment of the attorney general come under the consideration of the Judicial Service Commission that there would be some sort of rotation on the basis that members of the legal profession, advocates or attorneys or any other legal person be called upon to sit on the commission that is somewhere along the lines of the Legal Aid Boards rotation basis. In that way you would have a much more independent composition and a better input, to move away from certain stand points of the various organisations, including ours. The structure as it is is really composed of organisations with particular stand points and that we feel that if they have independent people from the profession, legal profession in general that this will give it a better image and as well that individual members could be able to give a valuable input. There are a lot of people that have been sidelined simply because they do not belong to certain organisations or established structures. As far as the position itself is concerned we are not happy with the position that it is - the attorney general's position, the way their promotion and appointment

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is concerned. We feel that it should be advertised in the same manner as the positions on the Public Service commissions, for example the director generals. We are trying to move away from closed shop sort of appointments and interviews. We are quite happy with the present position of the appointment of judges except that, as we mentioned before, there should be more transparency, more input from the public, advertisements made in the newspaper along the lines as the Constitutional Assembly is doing in the drafting of the final constitution where members of the public are called upon to make inputs, written recommendations, telephone calls, whatever. As far as the - and the same process should be used in the appointment of the attorney general. 10

This will go a long way in promoting the image of the attorney general. At the moment if you ask a person in the street who is an attorney general or what is an attorney general they will probably tell you it is some sort of an attorney, does not realise - he or she does not realise what the position of the attorney general really is and that in fact the attorney general is a representative of the people. And that is why we are saying that it will eventually become we the people rather than the present state and move away from the historical situation that we presently find ourself in. 20

As regards the second question, the function of the attorney general, we feel that it should be shown purely prosecutorial. As we stated earlier the position of the attorney general is that he represents the people in the prosecution of crime and that is really the context in which the duties of the attorney general should be seen. And this 30

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does not mean, however, that the attorney general should be (indistinct) police. By that we are saying that coming from the background that we are coming from the State has a reputation of (indistinct) police and we have faith in the integrity of the attorney general to move in the direction of the national culture.

The third question as to whether there should be a super AG, we are saying that the attorney general should be answerable to the parliament through the office of the Minister of Justice and that there should be an attorney general at each division of the Supreme Court. At the moment there is a commission sitting discussing the restructuring of the Supreme Court and the BLA will shortly be making a submission. Whatever the position might end up at a later stage we maintain that there should be an attorney general at each division of the Supreme Court. The reason that we are saying that it should fall and they be answerable to the Minister of Justice is that to prevent a conflict with individual attorney generals and a Minister of Justice who articulates justice policy on a national level. The Minister of Justice, sitting as he does in parliament, has a better (indistinct) so to speak, on the national policy and that whatever the personal view points of the individual attorney generals may be, that this should be in line with the policy as announced by the Minister of Justice. The individual attorney general should ensure that he or she does not enter the political arena in the national and public interests and there should be consultation between the AG and the Minister of Justice to avoid conflicting positions on fundamental legal issues and justice policy.

The fourth question is what provisions relating to the independence of attorneys general should be in the constitution or in the legislation. We realise again the independence question is quite a sensitive one. We understand the independence of the attorney general asking for the independence as the attorney general is presently doing but we are saying that the independence is really a relative term. By the nature of her or his office the attorney general is not independent from the community that he or she represents. But the attorneys general is independent in the sense that he or she has a discretion in the exercise of his or her duties. This does not mean to say that the attorneys general should become mere puppets of the Minister of Justice. On the other hand, however, we have faith in - and we seem to be missing this point in our discussions, in the professional integrity of persons. As a member of the BLA and situated in Johannesburg for the portfolio of the constitution litigation officer I am independent. I have my own professional integrity and I accepted that position that the director and indeed the BLA has in me, saying that I have professional integrity and that they believe in me or have confidence in me in doing my job. That does not mean to say that I should be completely independent from the constituency that I represent. I will be directed by the general membership of the BLA, so in that sense but if we had to draw an analogy the attorney general as well can be independent in that respect. If we are saying the attorney general is saying that he wants - he or she wants to be as independent as the judge that is not acceptable because we are after all in an accusatorial system. The attorney general represents the accused person

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- I beg your pardon, the community and the accused person is represented by an individual person who argues that the accused's position. So independence really should be seen in such a light. There have not been - there have been very little instances of political manipulations so we cannot see any reason why we should have a separate independent clause put into the constitution. There are other cheques and balances, for example private prosecution and reviews, although of course not much of this is used but once the general populace gets to understand exactly how our legal system operates and indeed these submissions that we are presently making might be a bit premature. We are not sufficiently or the general populace is not sufficiently engaged in the whole legal system so the general populace at this stage would not really be able to make a valuable input unless they become interactive and we are saying as far as the attorney general is concerned through the offices of the prosecutors that there should be greater interaction between the general populace and the attorney general as well as the prosecutors under his office and that once the general population gets a greater input, realises how the system operates that we would have greater co-operation, the image of the judicial system would be greatly enhanced.

Question five, to what extent should any of the issues dealt with above be in the constitution. The issues dealt above should not be in the constitution. We maintain the minimalist approach. We do not want an encyclopedia. Most of our members cannot even afford encyclopedias so we are not in favour of a series of volumes of a constitution. We have always maintained that the constitution should be succinct and simple and meaningful to the people. It should

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become a people's document. It must be a living document and the way that it becomes a living document is for the provisions of the constitution to become meaningful people should be able to talk about it and in the context of the attorney general should be able to talk to the prosecutor about matters that concern them.

Question six, should there be any further provisions dealing with the attorney general. No.

Question seven, should the appointment of any other officials in the judicial system be dealt with within the constitution. Except for the appointment of judges, no. 10

Block 7. Language and interpretation.

CHAIRPERSON: Mr Hansjee, I wonder if I can interrupt you there. I would suggest that perhaps we deal with the issue of the attorneys general and then we will give everybody an opportunity to come back to the other issues that were raised. If that is okay with you.

MR HANSJEE: Thanks.

CHAIRPERSON: Thank you very much. I think unless there is any pressing questions of clarity, that we will move on to the General Council of the Bar's presentation. Advocate Blignault. 20

ADV BLIGNAULT: Mr Chairman, the (indistinct) submitted this morning, which contains the submissions of the General Council of the Bar in regard to matters raised in what, 6 to 9, be considered by this committee. I shall then at this stage only deal with block six, the question of the attorney general and leave the other items for later. The document is fairly lengthy and with your leave I am not going to read out all of it but perhaps concentrate on what I think are the more important elements. 30

In the first few pages we just refer to some background and some of the history in the United Kingdom because there might be some confusion if one were to fully and wholly try to incorporate conventions or principles applicable in England. What is however, and that is all that needs to be emphasised in this regard, is that in England certainly there is an absolute constitutional convention that there can be no political interference with the decisions of the attorney general and his subordinates in regard to the conduct of criminal prosecutions. 10

Coming then to page 4, I will put forward what I think is our important principle stand point, that it should be a fundamental principle of a criminal justice system that there should be a separation from any vestige of political control of the decisions of the prosecuting authorities concerning the institution, conduct and, where appropriate, withdrawal of criminal prosecutions. The danger of political interference, Mr Chairman, cannot be overstressed. Where it is possible for politicians to influence the decision to prosecute it means that the full force of the resources of a state which ought to be deployed only in the public interest and for the public benefit can be used at the instance of politicians and may therefore be misused in order to harass opponents of the government of today. And obviously if I may add the converse would also apply that in certain situations such inference may lead to or may be seen to lead to a situation where politicians are not prosecuted in circumstances where they should be prosecuted. 20

We refer to one or two instances which reflect our perceptions of the history of this country. Mr Chairman, we need not dwell about that. May I move on to page 6. We 30

then put forward our two central recommendations which we believe should be embodied in a new constitution.

The first recommendation (a), that the process leading to the appointment of the attorney general or attorneys general in the present system of appointing an attorney general for each provincial division be continued. It must be an open and transparent process directed at securing of the personal presence demonstrated independence for this office. And secondly the constitution should contain provisions which safeguard the independence of the attorney general in performing - all attorneys general in performing their functions in regard to the institution, direction and conduct of criminal prosecutions. We believe thus that the question of appointment should be a public process and the obvious body for that, Mr Chairman, is the Judicial Service Commission, operating in the same manner as it does in respect of the appointment of judges. We just draw attention then to - there is a provision at the moment in section 5 of the Attorney Generals Act which reads: 10

"The Minister shall co-ordinate the functions of the attorneys general". 20

It is not entirely clear to us what this means in theory or in practice but it does seem to us to contain, Mr Chairman, the danger of control over the prosecutorial decisions and we believe that this is in conflict with what is our central recommendation, namely that there should be a constitutional guarantee of independence. The same applies to the provision in section 55(b) of the present Act where attorneys generals are required to give reasons for decisions taken. That, 30

too, seems together with the provision that the Minister shall co-ordinate his functions seems to create the

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possibility for political interference.

Mr Chairman we then on page 8 go on to consideration of a slightly separate question which is also of some importance, namely whether there should be a single attorney general or a number of attorneys general having responsibility for a particular division of the Supreme Court. In our understanding there are a number of arguments pro and contra and we list them briefly. The advantage firstly of a single attorney general is that there can be a greater degree of co-ordination, of harmonisation of the policies and approaches adopted in different parts of the country. It may also - this single attorney general may enhance the office. Against that we mention two, there are indeed three factors, firstly that this would place - to vest ultimate decisions of enormous public concern in the hands of a single individual and it is debatable whether it is advisable to vest so much power in the hands of one single individual.

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Secondly there are practical questions. Historically in this country each provincial division of the Supreme Court has operated separately and there may be strong practical reasons for retaining the existing system whereby each attorney general acts autonomously.

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And a third possible criticism of course to the concept of one super, as it has been called, attorney general is of course, and that reverts to the main theme of our submission, it may be easier to manipulate his appointment and thereafter the performance or the functions of a single individual, that may be easier than the position where there are a number of individuals.

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In short, Mr Chairman, on this issue the arguments on

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each side are cogent. Ultimately it is perhaps a question of policy and what we - and perhaps we do not have also sufficient knowledge as to the practical working of the office and on that you would have the information and input of the attorneys general themselves but the principle point that we wish to make is that whether the choice is on one single attorney general or on a number of attorney generals there should be a safeguard of independence, both in regard to the appointment and the functioning of the attorney general. 10

That then brings me to the five questions which have been - or the six questions that have been raised here and if we can deal briefly with them then. Page 10. How should the attorney generals be appointed. That should be, in our submission, after provision of consideration by and on the recommendation of the Judicial Service Commission. Further we submit that posts should be advertised and nominations should come from both within the existing structure and also from outside. That could only lead to the enhancement of the reputation and independence of the position. 20

Secondly what should the function of attorney generals be. The function, as it is to be described in a constitution, in our submission should simply be the institution, conduct, oversight and where appropriate withdrawal of criminal prosecutions in the name of the state. They should not be required to perform functions of a political nature nor should they be given powers to involve themselves in the administration of justice itself, for example to grant bail and the like. They may of course have input on - simply advice or input to other bodies such as the parole board. That would not be inconsistent with 30

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their principal function.

Who shall acquire responsibility for decisions concerning prosecutions. In our view it should be the attorney general or attorneys general and he should be entirely free from political inference.

Fourthly then what provisions relating to the independence of attorneys general should be in the constitution, for the reasons set out above we believe that there should be a constitutional guarantee for the independence of the attorney general from any form of political control or any obligation to report to any political office bearer concerning the decision to institute a prosecution as regards the conduct of a prosecution or the decision to withdraw a prosecution. 10

To what extent should these issues be dealt with in a constitution. We believe that only the fact that there shall be an attorney general, that a provision should be made for the appointment of that person and the guarantee of his or her independence and maybe if I could add, plus a general definition of his function. 20

Mr Chairman, may I just add that at a previous occasion submissions have already been put forward, as I understand, on behalf of the General Council of the Bar where the more general question was debated, namely as to what should go in a constitution and I think I am not going to repeat what is set out there. The point was made, I understand, that - clearly that the constitution should as far as possible only contain what are the necessary principles. Details should be left to subordinate and other ordinary legislation. So for that reason then on number six we say that there should not be any other provisions in the constitution dealing with the attorney/.... 30

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attorney general. Other detailed provisions could be left to ordinary legislation.

The final question, number seven, was not clearly understood by us. Should the appointment of any other officials of the judicial system be dealt with in the constitution. In short that clearly judges should be dealt with, judges of the superior court and their appointment, that is dealt with and has been dealt with in our previous submissions. As far as other officials are concerned such as magistrates, registrars, masters of the Supreme Court et cetera, we do not believe that a public process of appointment is either necessary nor practicable. There is one question, however, and that we wish to point out. There is one question whose position in his regard is exceptional, namely the registrar of papers. Under the (indistinct) he performs functions of a judicial nature and consideration should be given to the appointment process and reference in a constitution similar to that of judges. These are then our submissions on block 6. 10

CHAIRPERSON: Thank you very much, Advocate Blignault. Again unless there are any urgent questions I would propose that we continue. Our next input will be from the attorneys generals themselves. I believe that Advocate De Oliveira will be leading that presentation but I think it anybody would like to add something after that they should feel free to do so. 20

ADV DE OLIVEIRA: Thank you, Mr Chairman. Mr Chairman, ladies and gentlemen we wish to place on record our appreciation for giving us the opportunity to give an input in this process of creating an enduring instrument, the constitution which, as we all know, is not as transient as 30

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attorneys general, politicians or even at a lesser pace, governments.

Mr Chairman we have in our presentation set out at some length a short history of the office of the attorney general. We believe it is instructive to remind ourselves that emanating from the English institution all power to prosecute was vested absolutely in the attorney general by the South Africa Act and then by the first Criminal Procedure Act of 1917. The sole right and duty of prosecuting in respect of any crime in the name of and on behalf of the sovereign, or the king at that time, was absolutely under the attorneys general control. This matter has been exhaustively investigated and commented upon by the Honourable Mr Justice Hoexter in the Hoexter Commission of the earlier eighties. His report was published in 1984. In his summary of the history, and I am looking at page 4 of our presentation now, he pointed out that up to 1926 there was absolutely no provision for ministerial control or intervention. However, in 1926 the government of the day thought fit to divest the attorneys general of the powers, authorities and functions relating to prosecutions and to assign them to the Minister of Justice. However, very quickly the government of the day realised that this was impractical, impossible and not fair to the people, that they introduced in 1925 an attenuated form of ministerial control. I may interpose to say that the reason officially given in 1926 for taking over the prosecution was that there could not be a public official, an attorney general, without accountability or responsibility to parliament. The control of the Minister, as you know, was retained in section 3(5) of the Criminal Procedure Act, which section 3(5) has now
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been overridden.

However, the independent nature of the attorneys general and the of the control and directions of the Minister was stressed in the 1961 constitution. According to Judge Hoexter it was clear that prosecutions are instituted in the name of the state on behalf of the Republic. The Hoexter Commission held further despite the involvement of the Minister of Justice prosecutions do not take place on behalf of the government of the Republic, as is the case in civil actions instituted in the name of the minister of state as representative of the government of the Republic. In this regard we whole-heartedly concur with the submission of the Black Lawyers Association that the attorney general represents the people, that prosecutions are instituted in the name of the Republic as pointed out in section 2 of the Criminal Procedure Act. The attorneys general do not form part of the executive or the government. 10

The Hoexter Commission proceeded further, and I am reading from page 6 of our presentation: 20

"... that the fact that the State President appointed the attorney general is indicative of the intention to emphasise the independence of the office of the attorney general. The role of the attorney general and the representatives as dominus litis in prosecutions in both the Supreme Court and in the lower courts is likewise indicative of an autonomous position in the administration of justice vis-a-vis the Bench. The institution of the prosecution on behalf of the Republic is not an executive act of the State but an act sui generis and performed independently 30

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of the executive. The maintenance of law through the enforcement of the criminal law largely depends on the discretion of the attorney general. In exercising this discretion the attorney general has to have regard not only to purely legal principles but also other and imponderable factors such as humaneness and the wider national interest".

The Hoexter Commission proceeds to find that the office of the attorney general is the most important office of the prosecuting authority and cannot be estimated highly and he proceeds to make recommendations pertinent to the status and prestige and the recognition of the importance of the office. 10

Mr Chairman, I pass to the brief conclusions made by the Hoexter Commission at page 13 and 14 of our submission. And the submissions were that the attorneys general of the various divisions be appointed by the State President, that an attorney general be relieved of his office only by the State President on recommendation of the Council of Justice to the Minister of Justice, that such a recommendation not be made on grounds other than a finding of misconduct on the part of an attorney general, physical or mental incapacity of an attorney general to carry out his official duties or any other reason which in the opinion of the Council of Justice justifies his discharge. It is obvious that the Hoexter Commission recommended the appointment of a Council of Justice at that time. Most of the recommendations, except for the question of adequacy of remuneration, are in fact incorporated in the Attorney General Act No.92 of 1992. And I may mention at this (indistinct) references have been 20 30

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made already to the appointment of the attorney general, that it should not be a closed shop appointment. I wish to point out that in terms of the Attorney General Act section 2(1) thereof, it is quite plain that anyone who qualifies in terms of this Act, not necessarily a civil servant, is a potential candidate for appointment. The section in question requires - and I read from the Afrikaans:

"Die Staat President stel ten opsigte van die regsgebied van elke provinsiale afdeling en van die Witwatersrand se plaaslike afdeling van die Hooggeregshof van Suid Afrika 'n persoon wat
 (a) ingevolge die wet op die toelating van advokate toegelaat is om as advokaat te praktiseer,
 (b) na sy toelating om as sodanige advokaat te praktiseer vir 'n ongebroke tydperk van minstens 10 jaar by die toepassing van die reg betrokke was, en (c) oor die ervaring beskik wat hom na die oordeel van die Staat President geskik maak om as prokureur generaal aangestel te word as 'n prokureur generaal aan".

The adoption of the Attorney General Act in 1992 signalled a return to the original situation as reflected in section 139 of the South Africa Act of 1909. This, Mr Chairman, was the culmination of efforts over the years by the attorneys general themselves, and by the Society of State Advocates of South Africa. It was also development in accordance with academic, and I may add, political pronouncements and with the views of practitioners. We point out at pages 15 and 16 further the two elements in the previous dispensation which caused unhappiness which caused or created room for

potential interference. That was that the attorney general was appointed subject to the laws of the public service, that was removed, and secondly that the attorney general exercised his powers under the control and directions of the Minister of Justice. That was section 3(5) of the 1977 Criminal Procedure Act.

As to the matter of independence is very germane to this meeting I wish to refer to commentators on section 3(5) of the Act and I deal with that at pages 16 and 17 of our presentation. Concerning section 3(5), the control provision, Professors Matthews and Van Niekerk have made the point that in the face of the provisions such as section 3(5) there is no formal or substantive separation of powers between an attorney general and the executive and that direct or indirect influences are possible. The professors proceed to say: 10

"Once again we are not suggesting that the attorneys general do submit to these influences but we are certainly of the opinion that there is no institutional guarantee which would prevent such influence from being exerted and perhaps even heeded". 20

The provision therefore represented the core of the objections both academic, political and from a practice point of view, to the position of the attorney general under the old Criminal Procedure Act. I beg your pardon, under the present Criminal Procedure Act, the old provision pertaining to attorney generals.

My colleague points out that on top of page 17, that is a typographical error, the very top line, exerted and perhaps even needed should read "heeded". 30

I proceed from page 19, Mr Chairman, ladies and gentlemen. It is a matter of public record that the restoration of the institutional or de jure independence of the attorney general was widely welcomed. We refer only to one example and my colleague Dr Fernandez is here, at a conference in Natal in 1993 he stated the following in a written lecture. I quote:

"Happily in June 1992 the legislature went a long way to remove public distrust of the prosecution by making the attorney general no longer responsible to the Minister of Justice but to parliament alone. This is a very welcome change". 10

In the course of his address further he proceeded to amplify the above, saying that although there was now in place a new Act cutting out political interference he felt that the changes of the standing rules of parliament was needed.

In our view, Mr Chairman, there can be little doubt that the present dispensation of institutional or de jura independence is both most salutary and necessary. An attorney general is the most senior law officer of the Supreme Court division to which he is attached. The judiciary places the greatest confidence and trust in his or her integrity and independence. It is well known that the respect for the independence and the discretion of the attorney general has been observed by writers. 20

A second point as interim comment. The attorney general's responsibility towards the public entails that he or she be accessible to everyone of whatever shade of opinion, belief, gender or social standing. The public must know that they are free to approach and even confide in him or her. The independence of the attorney general is vital 30

for the promotion of confidence and accessibility. The public must know that the attorney general is not subject to the influence of any political, economic or power grouping. And if I may again in passing comment on this recommendation made our colleagues, the Black Lawyers Association, that the constitution should be kept simple and should not be cluttered with unnecessary provisions, we say it would not be making the constitution complicated if there be a simple approach, a simple statement of approach to the attorney general embodied in the constitution, namely that the attorney general is independent and therefore accessible to everyone and that the public at whatever rank or status will know that that is the accessible officer. 10

Constitution legislative or other provision for potential control of the exercise of an attorney general's discretion or powers will undermine the trust and confidence of both the Courts the public. It is further our view that any interference or room for potential interference would undermine the fearlessness with which we are expected to fulfill our role and functions and would in fact render our position intolerable. 20

Our interim constitution, Mr Chairman, clearly upholds the doctrine of the separation of powers. We quote at page 22 and 23 various provisions relating thereto. Chapter 7 of the interim constitution deals with the judicial arm of the State and is entitled "The judicial authority and the administration of justice". In the scheme of the constitution the attorney general, and therefore the prosecutors acting qua prosecutors under their delegation, rightly fall under chapter 7. This accords with the independence of the attorney general vis-a-vis the executive 30

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as already referred to in conjunction with the 1992 Act. It is also in accordance with the position of the attorney general as officer of the court and with the fundamental nature of his powers and duties. We mention in passing that section 108 refers to the appointment of the attorney general. In our view there can be little doubt that the interim constitution subscribes to the principle of independence as contained in the 1992 Act, that being in existence when the constitution was passed and there have 10 been no indications to the contrary.

Mr Chairman, granted that an attorney general is head of an office and responsible for the management and administration thereof also performs non judicial functions. This administrative function is a sequela of his position vis-a-vis his staff and may in no way be taken to derogate from his essential position as officer of the Court within the judicial arm. In respect of managerial and administrative matters, the attorney general is (indistinct) accountable to the department which happens to supply the 20 infrastructure for the exercise of his functions. Where there has been reference in the presentation of our colleagues at the Bar that we function within the Department of Justice that is incorrect, we do not function within the Department of Justice except for the infrastructural requirements.

Mr Chairman, ladies and gentlemen, there seems to be a perception that the notion of independence of an attorney general connotes an unaccountability. That is definitely and decidedly not the case. We proceed from page 35 in our 30 presentation to set out various elements or aspects of accountability. In the first place there is accountability 2. to the/....

to the Courts. And here the (indistinct) of works such as that by Lansdown & Campbell will make it quite clear that the prosecutor's function is to present the matter to the Court fully and fairly and to conduct the case with judicial discretion and a sense of responsibility, not merely a (indistinct) conviction as an officer of the Court charged with the serious duty of assisting the Court to arrive at the truth. That is our first, our primary and our overriding duty to the Courts of this land. Accountability 10 to those Courts includes our exposure to reviews or to civil actions. In both cases we will be required, by the Courts, to explain or justify our actions and in civil cases even being liable to be mulcted in damages where a prosecution may be malicious.

In the second case we have accountability to the law, which of course includes the constitution. It is related to the aforementioned and I need not belabour the point. I wish, however, to stress that today of course we are also in duty bound to uphold and protect the constitution and the 20 fundamental rights therein. That, too, is our oath of office.

In the third place related to accountability there is a further measure. In terms of section 7 of the Criminal Procedure Act a private prosecution may be instituted which, if successful, will result in the attorney general being mulcted in costs.

The question of accountability, fourthly, is very topical and that is particularly so where the political dimension of accountability is concerned. It is to be 30 pointed out that the attorney general is accountable to parliament, too. Whether this accountability, which at

present takes the form of a submission of annual reports submitted to parliament through the Minister of Justice, should be expanded beyond reporting merely in writing to include an appearance before some standing committee is surely not open to objection in principle. In fact that recorded the suggestion made by our colleague Dr Fernandez.

In the fifth place you are well aware that in terms of the section 4 of our Act that the attorney general is subject to the powers of suspension or discharge by the president acting in conjunction with parliament. We say that the controls applying to an attorney general are there for extensive. 10

A further issue, Mr Chairman, ladies and gentlemen, which has been raised in all discussions pertaining to the attorney general is the question of policy or policy considerations. From page 28 on of our submission we deal with aspects thereof. The multiplicity of factors taken into account by an attorney general in the exercise of his powers precludes an enumeration thereof within the space of our memorandum or even of this presentation. Certainly the fundamental principle is that an attorney general acts within the constitution and the law and have regard to the policy legislatively embodied in those instruments as adumbrated by the common law and jurisprudence. Each individual matter involves circumstances peculiar to it and a principled approach to the exercise of discretion is called for. The governing ethos we describe as equality before the law and objectivity. We quote writers on this point, inter alia Professor Devenish who says that: 20 30

"In deciding whether or not to prosecute the attorney general must regard equality before the

law as a fundamental consideration".

And he proceeds to state:

"The attorney general takes into account all other relevant factors".

He concludes:

"In exercising his discretion the attorney general must weigh up various factors and it is possible that some other consideration of paramount importance in a particular case may outweigh the requirement of the even application of the law". 10

It is common cause, Mr Chairman, that we apply the Anglo American discretion model and not the German principle of compulsive prosecution. Professor Nairn points that out in his work in the South African Criminal Journal. We also refer to quotations pertaining to the exercise of discretion and the taking into account of a multiplicity of considerations as contained in writings such as that of Lord Surecross(?) whose quotation appears at page 31:

"That an attorney general must have regard to the public interest is no novel notion. After all prosecutions have their impetus at the public instance. Judges in determining unlawfulness have regard to the bone mores, the term sometimes rendered as policy considerations. Hence it is within the parameters of his public function, the law and the constitution that cognisance is taken of policy considerations. That requires an objective and informed approach to matters affecting the community at large and not just one sector thereof nor anything partisan. Within the abovementioned parameters cognisance is taken of

state policy and it is weighed in the equation. We wish to cite but one example, our Minister of Justice intimated to us in consultation that the President had a particular policy and concern about children in detention and steps were immediately taken, within the framework of the law, to respond to the concern of the President".

That communication to us, Mr Chairman, through the Minister of Justice, of concerns indicates that section 5(5) of the Act does work. We differ here from our colleagues at the Bar. We have been in the process of consultation and dialogue with ministers, both of this government and of the previous government and we are of the view that in practice section 5(5) of the Act provides more than sufficient scope for a reliable communication of state policy. After all we agree with our colleagues of the Black Lawyers Association, the Minister of Justice is a cabinet minister and has first hand knowledge of State concerns. There is no need whatsoever for a middleman. Call the middleman or middle person a national or a super attorney general. If the minister meets regularly with his attorneys general to discuss mutual concerns that is more than enough to obtain an informed view of broader policy considerations. The Minister of Justice firmly believes in upholding the independence of the attorneys general and in any event there has existed a convention of non interference. The communication of policy and the discussion of a particular decision are quite sufficient to ensure a mutual awareness of each other's concerns.

Our view then on the present dispensation as follows. Act 92 of 1992, that is the Attorney General Act, contains 2. within/....

within itself all the ingredients clambered for by those who have perceived themselves to be sidelined by the office of the attorney general. There is accountability to the people through parliament which we say can be expanded to provide for appearance before a standing committee. There is scope for a reliable communication of broader policy concerns. All this is consistent with the restoration of the original independence of the attorney general.

Mr Chairman, I have at length set out our presentation to you and to the persons present because within that presentation one finds the answers to the questions posed by your committee. Therefore apropos block 6 as to question two, we are able to state here in our presentation what is the function of attorney general. The fundamental duty of an attorney general is to uphold the constitution and apply the laws of the land as the most senior officer of the Court, entrusted with all criminal justice and related legal and management functions. We set out at some length some of the functions, for example the authority to prosecute and functions germane thereto, on page 35 of our presentation and we cited relevant statutory provisions. 10 20

Secondly, page 36, the delegation and control of prosecutions, also with reference to particular legislative provisions. Page 37 the appearances before the Constitutional Court. And on the same page the approach of the Courts for declaratory orders and similar orders where necessary. Page 38 initiating review and/or appeal proceedings where the interests of justice so demand. The function of official curator ad litem of mental patients as set out in the Mental Health Act. 30

7, the directional supervision of special
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investigations of particular public importance, whether assigned to the attorney general under statute, for example the office of serious economic offences or directly by the President, for example the Third Force investigation.

Eighthly the duties contemplated by legislation pertaining to the exhibition of persons, functions pertaining to the request for or rendering of international mutual legal assistance and international communication and co-operation ancillary thereto. On page 39 we continue to provide you with some other examples of our work. We render assistance to the judiciary by way of objective legal opinions or comments on request. We supply opinion comment or we make recommendations on contemplated legislation or we assist the law commission. We serve on commissions either as commissioners or as officers investigating and/or presenting evidence. We serve on the various departmental committees which range for matters such as personnel to even budgetary matters. We manage and control human resources which are allocated to us. We serve on disciplinary bodies enquiring into the misconduct of public officials. By statute we are assigned positions on such boards as the National Advisory Council on Correctional Services. I wish to mention on page 40 element 16, the receipt of all manner of complaints and representations from the public and any sector of society and we attend to such complaints and representations. Mr Chairman, this is an unbelievably important component of the function of attorney general, to be accessible to absolutely all and any sector and any person in the community which it represents. And we have found, just by way of passing, that often a representor always wants to go to the highest person, the highest office. It will go through the

prosecutor and come to the attorney general. The Minister of Justice will, I am sure, be able to advise you that he is bothered by many, many complaints and he would prefer his attorneys general to deal with them. There is an increasing participation in public interest forums and there are public relations exercises in support of our justice system both for the national and international level. We point out that many of these functions have developed through custom and usage, not all are directly found on statutory provisions yet. Our independence and our accessibility we there state, make it possible for us to serve our broader community in these legally related matters. And we conclude therefore that the attorney general performs both de facto and de jure, both judicial and administrative functions to such an degree that the nature of his or her decision-making could, on the whole, be characterised as sui generis. Thank you. This experience of us accords with the finding of the Hoexter Commission. 10

Then as to question one, how should the attorney general be appointed, the need for transparency and accountability in the appointment and dismissal of attorney general has been recognised for some time. That is clear from the Hoexter Commission. Section 105 of our constitution has already provided for the establishment of an advisory body to the Judicial Services Commission. If the provisions of section 105 are suitably amended to provide for representation of the division attorneys general by attorneys general on it then we are unanimous that it is eminently proper and necessary that because of the autonomous nature of their functions attorneys general should be appointed by the President on the advice of the 20 30

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Judicial Service Commission.

As to question three, who should have final responsibility for decisions concerning prosecution and other functions of attorneys general, in our view a clear distinction is to be drawn between responsibility and accountability. Apart from being in the final instance responsible for his decisions the attorney general also remains accountable, as we have set out in some detail above.

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Then as to what provisions relating to the independence of attorneys general should be in the constitution or in legislation, at page 44 we set out our reply to this. The provisions of section 108 of the interim constitution should, in our view, be expanded to include a statement on the independence and impartiality of the attorney general in a similar vein to that set out in respect of the public protector. Furthermore we believe that express provisions should be made in the constitution for the dismissal procedure of an attorney general similar to that applicable to a judge. The independence of the attorneys general must, in our view, be entrenched in the constitution.

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As to question seven, should the appointment of any other officials in the judicial system be dealt with in the constitution, our answer is no because we do not include judges under our answer. We believe they should of course be in the constitution.

And then in conclusion that the necessary transitional provisions, the deeming clauses, to ensure continuity of office and continuity of prosecutorial authority should be provided for in the final constitution.

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I am reminded that it may not be clear that the

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attorneys general at present are not members of the Judicial Service Commission and we are saying we submit that we should be members, if one considers the large volume of judicial and forensic work entailed by the criminal law and in which we directly participate. We believe that we have much to contribute to the oversight of the - to the overseeing, I beg your pardon, of the administration of justice through the Judicial Services Commission. I thank you, Mr Chairman.

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CHAIRPERSON: Thank you very much, Mr De Oliveira, for I think what was a very comprehensive presentation, perhaps slightly longer than we usually allow but I think you do have a direct interest in the matter so we were a bit more lenient than usual. I would suggest that we have a - I see our tea and coffee has arrived and before it gets too cold maybe we should have a quick break for that. Can I suggest that we try and finish by ten o'clock and resume at that time.

THE MEETING ADJOURNS.

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ON RESUMPTION:

MR Allow me to refer you to one or two extracts from various Sheshabas that appeared in July 1985 and in January 1986 and I just use this to illustrate the damage that can be done to a criminal justice system if short term views predominate and long term views don't carry the day. I quote from page 27 of the July 1985 Sheshaba.

"The legal system, whose unjust and repressive character has been increasingly recognised, is used to give a false stamp of legality to violence against protestors, to detention without trial, to torture, imprisonment and executions".

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And in the second column on page 27 mention is made of - and I quote - "the repressive character of apartheid's judicial system". In the Sheshaba of January 1986 I quote from page 22:

"The myth of the independence and impartiality of the Courts needs to be dispelled once and for all and the role of the red robed judges in the crime of apartheid exposed but even more so because the day of real judgment is fast approaching and the guilty must be sorted out from the innocent. All laws start off with a constitution of their makers. In South Africa today a parliament makes the laws of the land". 10

And then further in the second column on page 22 I quote:

"The judges and magistrates implement the laws of this parliament which, for all intents and purposes, is white. The judiciary especially in its most important areas is completely white whilst the law enforcement agencies are white controlled and led. The result is that blacks get white justice or to be more precise become victims of white injustice in both its legal and social forms". 20

And so it goes on. The point I am trying to illustrate, Mr Chairman, and ladies and gentlemen of the Committee, is this. If the criminal justice system does not enjoy the credibility that it should, if it does not enjoy popular support it will fail in being able to do what it must do and in this respect the belief that your chief prosecuting officer, whether you call him an attorney general or whatever you want to call him is a person sitting in a 30
2. cabinet/....

cabinet has such dramatic political overtones that the conception, the notion of independent decision-taking by such an official, by such an appointee is simply not going to realise, it is not going to be a reality and immediately the whole criminal justice system lays itself open to this type of devastating propaganda which can be used, the criminal justice system can be exploited as a result of the fact that the perception exists that it is not truly independent. And I want to urge the committee to distinguish between independent and accountability. This are two totally different concepts and they are not to be confused, the one with the other. That is why, Mr Chairman, I would urge the committee to seriously consider a permanent and enduring long term strategic approach rather than a short term tactical approach. Obviously it is convenient if I can have an attorney general in my cabinet, the man will know what is going on but is that in the interests of South Africa? Is that in the interests of the wide community in this country? Is it in the interests of an enduring permanent and long lasting constitution which can provide us with what we require to settle democracy properly in this country? I would argue no.

Secondly, Mr Chairman, I would like to draw the Committee's attention to the fact that the interim constitution is one that leans towards the devolution of power and not towards the centralisation of power. Having the concept of a single attorney general concretised really sounds anachronistic today because it leads to a centralisation of power whilst the whole idea of democracy is a devolution of power so that in the furthest outreaches of the country one can participate in the democratic process

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in the governing of this country. I would argue, Mr Chairman and ladies and gentlemen of the Committee, that the advantages of a single attorney general are far inferior to the disadvantages of a single attorney general. It is quite obvious to us that at present the geographical dispensation of the criminal justice system in South Africa is based on the white South Africa concept and not on the total South Africa concept and if we want to achieve the criminal justice system's availability to the whole of South Africa centralisation actually removes the access of the people to the justice system rather than to promote it. 10

Mr Chairman, I agree with the Black Lawyers Association that the Justice Services Commission should in fact play an important role in identifying suitable attorney general material. There is no reason why the attorney-general mustn't be subjected to the processes of transparency in his election as anybody else. I think it is common sense and I don't think any attorney general or any budding attorney general would be shy to subject himself to a certain scrutiny such as he should be subjected to for the important post that he has to occupy. But I don't think it must be done in conjunction with the public service commission because that would undermine the principle of independence of the attorney general which is and can and must be a corner stone of a proper criminal justice system in this country. 20

I also associate myself with the remarks made by the representative of the General Bar Council. There shouldn't be any political interference. Although the General Bar Council's submission is somewhat equivocal in their response to the questions they seemed to come out positively against 30

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the concept of a super attorney general. The problem with a super attorney general, Mr Chairman, is that it will do exactly that which is inevitable, namely he will be influenced by the political agenda of the cabinet of the day and not by the facts of the particular case that has to be tried. Consequently I would submit to you gentlemen and ladies to seriously consider the question whether one or more than one attorneys general shouldn't be decided on the basis of the devolution of power, the provincialisation process and one should possibly have regard to what the Hoexter Commission's findings are going to be in connection with the new jurisdictions before one finally takes a decision. Thank you. 10

CHAIRPERSON: Thank you very much. If there are no further questions then I would urge us to leave our questions over to the end. Could we then ask Professor Fernandez to do his presentation please.

PROF FERNANDEZ: What I will do is that I will try and give us an historical overview of the office of the attorney general and then I will discuss the arrangement as we have it now and then perhaps present one or two other possible models from which the Committee could try and devise some arrangement. Now let me start off 20

CHAIRPERSON: Sorry, can I just suggest that maybe you move to the front to the microphone.

PROF FERNANDEZ: Now at the time of Union in 1910 the attorney general used to be the political head of the Department of Justice and then in 1926 the powers of prosecution were vested in the Minister of Justice. Now why did this happen? The rumour is that at that time General Smuts was the Minister of Justice and that a certain fellow 30

by the name of Jolly had tried to derail the train on which General Smuts was travelling from Johannesburg to Cape Town and that the attorney general in the Cape had refused to prosecute so General Smuts then had the law changed to provide for the prosecutorial authority being vested in the attorney general and then in 1935, because the situation was becoming intolerable or the burden was intolerable, it was reversed again. So the Minister of Justice had only sort of a tenuated authority over the attorney general. And then in 1957 the law was changed again and this time it said that the Minister of Justice can reverse any decision that is taken by the attorney general and can himself institute any action which the attorney general himself can institute. So what this in fact meant was that the Minister of Justice became the super attorney general because he had the powers also to prosecute, not only to be accounted to but to reverse the decision and himself to prosecute. Now this was the situation until 1982. 10

Now there were some problems with that arrangement because it was raised in parliament several times that look this thing, this arrangement reeks of political interference and successive Ministers of Justice, successive attorney generals said that there has never been political interference. In fact I think it was Mr Kruger who said that, it is the highest traditions of the attorney general's office that there be no interference. And nobody criticises the situation. I have scoured through the legal literature and I found no article in which this was criticised except an article by Professor Matthews and Barend van Niekerk in which they felt that or that they alleged that sometimes interference does take place. Nonetheless in 1992 the law 20 30

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was changed making the attorney general no longer accountable to the Minister but to parliament itself. Now the question of course that the sceptic asks is this, if it worked so well all the time why do you change it now just before a new government comes into power. In fact this was raised by I think Mr Van der Merwe of the - I think it was AWB or Freedom Front who said that well this is a very interesting development. The Minister is saying that what we are doing now is that they are just codifying a convention, a convention of (indistinct) interference but we understand it as an amendment to the Criminal Procedure Act and he went out and I think he hit the nail on the head when he said well the government is just afraid that a new government will, you know, will take control of the attorney general's office and is now making provision for that kind of independence. So whatever the reason is I think it is important for us to try and analyse the situation as it is right now. What does this mean. It means that the attorney general now is no longer accountable to the Minister, he is accountable to parliament. Now what does it mean in practice. It means actually that at the end of the year the attorney general writes up a report and hands it to the Minister of Justice. Now I understand this co-ordinating function of the Minister to mean precisely that, to co-ordinate those reports and to present them in parliament but now what happens say for example a member of parliament gets up and says look I want to know why Mr Kahn did not prosecute that person. All the Minister can say is that look insofar as perhaps Mr Kahn has given him reasons he could say well Mr Kahn said these are the reasons for not prosecuting. But if the Minister says well I don't know why

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Mr Kahn/....

Mr Kahn did not prosecute them Mr Kahn is not there to answer for himself. In other words the standing rules of parliament have not been changed to provide for the presence of the attorney general in parliament. Okay, but that is not a problem because he can go back to Mr Kahn and say Mr Kahn please provide the answers and then he will have to perhaps provide them through the Minister. Or he will have to send the docket to parliament and who is going to read it. I find that arrangement a bit clumsy and untidy. I think it needs to be - it needs to be straightened out. Also because in practice although the attorney general is not accountable to the Minister you find the Department of Justice still has a say in the appointment of prosecutors. It is not the attorney general, it is the Department of Justice. So I would need some clarification on that. I find that - I find that also a bit untidy. I think because the attorney general is political head of the department, the attorney general should have a say in the appointment of the prosecutors because if somebody comes to the attorney general and say look Mr Attorney General your prosecutors are so weak, the advocates are running rings around them then he can turn round and say look I am not the person who appoints the prosecutors, they are appointed by the Department of Justice. So I find that a real weakness.

Now perhaps let's move on to examine some other models. Now I would like to think that the previous model that we had was a good one except for the fact that the Minister of Justice should not have the power to reverse a decision and should not have the power himself to prosecute. Because if you look around, if you look at Europe for example, Germany, France, Italy, modern democracies you find that in all those countries/....

countries the attorney general is accountable to the Minister of Justice. So in other words the Ministry of Justice is responsible for the staffing of the attorney general's office. Now in Eastern Europe just the opposite has happened, because of the socialist states that used to exist there and where a party affiliation was a qualification to become attorney general, they have moved away, they have moved towards an independent attorney general but I am asking myself now I mean we are a democracy. We did have it in the past, they said there was no interference so why can't we revert to the old situation where the Minister is the person to whom the attorneys general should account and apart from that I think that would give some uniformity in the prosecutorial policy. That is the one arrangement. 10

The other model that one could present is that of a super attorney general or national attorney general. Now this is not something new. This was raised for example by the Moltino reports in the 1960's. Now the Moltino committee was appointed by the then Progressive Party to look into the question of enfranchising Coloured people but amongst the recommendations that they brought out were the - referred to the reform of the administration of justice. Now they proceeded from the stand point that South Africa would become a federation which meant that - and then they suggested that there be a national attorney general or super attorney general who would a member of cabinet and who would also advise the government on treaties and things like that. Well that never came to pass. And then again when the Criminal Procedure Act was amended in 1992 to provide for the independence of the attorney general Minister Coetzee 20

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pointed out that - he was then Minister of Justice - he pointed out that he is considering introducing an attorney general who would not be linked to any geographic jurisdiction. In other words a roving attorney general. But now he was thinking more in terms of an attorney general who would deal mainly with questions of economic delinquency or fraud. And say for example like the director of the office of economic offences should be given the status of an attorney general. Now the notion itself is not an old 10 notion. It is not a new notion. It has been bandied around before. Now I know the National Association of Democratic Lawyers has presented the notion of a national attorney general more concretely and the argument there is that all the attorneys general in the country would then be accountable to the national attorney general, who in turn would be accountable to the Minister of Justice. Then there is another model or arrangement that was suggested by Advocate (indistinct) who said that there should be a national attorney general who should be appointed by the 20 President for a period of five years and whose continued tenure of the position should be dependent on approval by the two houses of parliament. So that is a notion that does exist and I think the committee should give serious attention to it. The only problem I have with - and what I am thinking of for example before I say this, let me look at the position in Germany. In Germany you have a (indistinct) who is the federal attorney general. Now you have the different "lande" and each "land" or each province has its own ministry of justice and its own attorney general and the 30 attorney general there is directly accountable to the local minister of justice. None of them are accountable to the

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federal minister of justice but the federal minister of justice can, in cases that have an overarching national interest, for example hijacking, piracy, treason, pollution, terrorism, he can take the matter out of the hands of say the Hamburg ministry of justice and prosecute it in the federal court. Now we in South Africa don't have a federal court so the question is in relation to the accountability of the attorneys general to a super attorney general, one which need to be clarified and of course if you are going to have a national attorney general what should his functions be. I see the functions of a national attorney general as being that of - being responsible for crimes that affect the country as a whole, also like for example cross border car theft or stock theft, illegal immigration, drug trafficking, gun running, pollution. In other words matters that affect the country as a whole, but I myself I am not really quite sure how - whether that attorney general should be one to whom the original attorney general should be accountable or what the position should be but I do feel that somehow that accounting must take place through the ministry of justice as a matter of general principle. And I don't think that that is something that needs to be written into the constitution. So basically what I am trying to say is that I have difficulty with the arrangement as it is, it can be fine tuned I know, but then also we must go the whole hog then and then make the attorneys general then responsible for also the staffing of their departments. And then of course the question remains what is then the function of the ministry of justice. If the magistrates for example are now accountable to the judiciary - I mean to parliament - the attorney general's office is accountable to parliament - the

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question is what becomes of the Department of Justice or the ministry of justice. So those are just the issues that I think needs to be looked at more critically.

CHAIRPERSON: Thank you Professor Fernandez. Unless there are any immediate questions I would propose that we deal with our last presentation which will be by Advocate Bizos on behalf of the Judicial Service Commission.

ADV BIZOS: Thank you Mr Chairman, members of the Constituent Assembly, colleagues. I am speaking on behalf of the Judicial Services Commission at the request of the Chief Justice who is its chairman and I am sure that we 18 members of the Judicial Commission will agree in thanking you for the lastly made submissions in expressing your confidence in our (indistinct) in relation to the appointment of any persons that may have to be appointed and whom you wish to be competent and independent. I am sure that you all know that the Judicial Services Commission consists of 18 people, all appointed by the senate, four by the legal profession and four by the President, the Judge President representing the various Judges Presidents and the Chief Justice, the President of the Constitutional Court and the Premier of the division in which appointments are to be made and the Judge President of the division. So it is a body that meets from time to time in order to do specific jobs and we have not debated or made decisions on any of the matters that are particularly pertinent to this discussion. I have, however, as a member of that Commission, been privy to informal discussions and I do not think that there can be anyone on the Judicial Services Commission who would not support the proposition that there should not be any political interference by anyone in relation to the

in relation to the specific constitutions or interfere with who should be prosecuted, who should not be prosecuted or how the case should be conducted.

I find it very difficult to stick very strictly to a representative brief, and insofar as I express any personal opinion, which I will try and avoid, I will say that it is my personal opinion and not that of the Commission, and if you have any doubt as to which hat I have on in relation to any specific matter that I speak of, please ask me to clarify if you think that I do not express the view of the Judicial Services Commission. 10

But I want to address firstly on the assumption that the Assembly decides that there should be a National Attorney General, and may "I" appeal that we drop the name Super Attorney General. We don't speak about Super Chief Justice, we don't speak about Super Presidents of the Constitutional Court, it has in my view a pejorative notion and I think that we should drop it and I would urge that we speak about the National Attorney General. 20

Much has been said about the history of the matter. What I would suggest is that the Constituent Assembly considers a fundamental fact which has intervened between that history and the adoption of the Interim Constitution and portions of which will no doubt find their way in our permanent Constitution, and that is this, that we expound the principle of equality in relation to every citizen and we have decided in common with the rest of the world that there are three arms of Government. Insofar as there is any suggestion in any of the memoranda presented to you this morning or on a previous occasion that Attorneys General, whether they be national or provincial are a different arm 30

of government. I would ask you to consider whether you want to adopt that and to enquire as to whether there is anywhere in the world where this fourth branch of government or fourth estate actually exists anywhere.

The position of the Procurator General in the European systems is equated to that of a judge. He actually sits up on the bench, or should I say sat, in most countries up to now. Complaints have been made, some with some success to the European Court of Justice that the Attorney General 10 doesn't belong up there, he is really down on the floor together with the other litigants. In fact one of our most eminent judges has put that on a basis that we must bear in mind that the Attorney General representing the State is a litigant, it is true a very important litigant because of the amount of work that he or she has to do in relation to the administration of criminal justice, but a litigant nevertheless.

The other is that those who appear for the State in prosecutions are members of the legal profession. They are 20 members of the Bar like the rest of us. They are appointed by the court and they owe a duty to the court as much as any member of the Bar or side Bar may owe.

Now because there are fundamental questions and because the Constitution generally speaking ought not to be amended from time to time as the exigencies of the situation may require, I am sure that there would be support on the Judicial Services Commission and the formulation or that there shall be, if that is the decision that there should be, a National Attorney General and Provincial Attorneys 30 General, who will be appointed by the body of persons or in the manner which the Constituent Assembly may decide to

incorporate into the Constitution. That the duties and functions should be provided for by law, save that in the Constitution it should be said - it should deal with the manner in which they are to be appointed, that they should be competent and independent, and no more than that.

Because experience will, I believe, make it necessary to have an Act, there is already an Act but having regard to the constitutionalism on which we have entered since its passed, that Act will require amendment from time to time. 10
We don't want to amend the Constitution it's quite easy to amend Acts of Parliament.

As to precisely what this Attorney General will be called upon to do; what the Provincial Attorneys General will have to do; how they are going to react with one another and I find myself in substantial agreement with Professor Fernandez, that in relation to the Constitutional matters, fundamental questions have got to be made which may only be in the opinion of the Constituent Assembly as matters of national policy. I want to give a number of 20
examples for your consideration.

It's true, as our colleague Mr de Oliveira mentioned that an expression of a view by the President in relation to the children provided an immediate response and children were released. Now everybody agreed about that and one is very grateful that there was this substantial agreement and that immediate relief was ...(indistinct. But there are other fundamental questions on which our society, our legislature and generally speaking the nation as a whole is going to be divided. We have already had an example of the 30
death penalty, I don't want to speak about that, but let me take the example of abortion.

What is the government going to do if a doctor is prosecuted and he takes the point that the Act under which he or she is being charged is unconstitutional? Is the Attorney General in Natal going to say I agree, and is the Attorney General of the Free State say that I disagree? Because any decision of the Constitutional Court is going to be binding on all in the country and there may be very fundamental differences of opinion. It will be a question of policy and not interfering in any particular prosecution. 10

Another example may be the following. That it may become necessary as a matter of national policy to offer an indemnity to the ...(indistinct), I've taken it as an example, possession of unlicensed firearms. Generally speaking this is not ...(indistinct) by legislation by the matter of administrative and directive ...(indistinct) the Attorneys General. Will it be open to the Attorney General of the Eastern Province to say this is very nice for the Minister of Justice to appoint this, but I am independent and in the Eastern Cape I am going to continue with the 20 prosecutions and I don't have to listen to him. Now I know that you may consider these things as far-fetched and that it may not happen. Of course one hopes that it will not happen, but once we are busy formulating a Constitution I think that in accordance with general principle we should draw the broad ...(indistinct) lines in the provision in relation to the various Attorneys General and leave it to legislation so that more time, thought and amendments having regard to experience may take place. Subject to any questions I think that that is all I wish to say. 30

MR ROUSSOUW: My name is Neil Roussouw and I'm an Attorney General. May I say Mr Chairman, before posing a question,

that I heard my friend Mr Bizos feel that we should drop the ... (indistinct) of Super Attorney General in favour of National Attorney General, and now I'm speaking for myself, the answer is a simple Afrikaans idiom, "Al dra 'n aap 'n goue ring, hy bly nog maar 'n lelike ding". May I ask whether the - what I deem to be, that's if I heard it correctly, support for the idea of a National Attorney General, whether that is the opinion of Mr Bizos himself, or whether that is an opinion by the Judicial Committee whom he says that he represents? 10

ADV BIZOS: I was very careful to say, if a decision is then to have a National Attorney General that's a clear indication that I was expressing what followed, a view on the assumption that there is a decision to have a National Attorney General. And now may I say in relation to a Super and a homely idiom in Afrikaans, yes I agree that it's a very nice idiom, but we shouldn't have to make it more lelike than it in fact is by using the word.

MR DE LANGE: I have many questions and I would imagine others have as well. If I have to go through all of them I would probably take up most of the time so what I will do is just try and raise some of them and then if there's time to ask others. Before we do that I have not heard from any of the inputs and I just want to know exactly where we stand on this before I ask my questions. In all the inputs, can we assume from them, that justice and the administration of justice are national competencies, or is there anyone here that is suggesting that there should be, as in Germany and other places, also some of those justice competences given to the provinces? I just need clarity on that to see who stands where on the issue before we tackle the thing further 20 30

Chairperson if I may.

MR: Clearly justice is a national function, there's one Constitution and one set of laws. Within the Constitution where it provides for local laws, for example provincial level, they will of course be applied with reference to the particular area and the profile of the area, but there is no doubt about it.

MR _____: Mr Chairperson surely it depends on the final Constitution content is it going to be a federated content, 10
a unionised type of content or what. I don't think we can commit ourselves one way or another.

CHAIRPERSON: I think Mr de Lange is asking a question really because I think in all the evidence that has been given to our committee in the previous block where we dealt with this issue nobody from the public has yet come forward with the view that we should have a parallel system of justice in the provinces. I think the views thus far has been unanimous that we should just have a single national system of justice. So I think he is asking if there are 20
people here who advocate a different position. It would be of interest to us to hear that.

MR _____: Mr Chairman I'm not, for that very reason, not sure of all the implications in the question, but by and large I agree with what my colleague has said, we would have one system of justice and administration and not nine separate systems.

MR DE LANGE: Chairperson can I just ask my questions. I must just say, and I must just preface it with two remarks. Firstly, whatever I do ask particularly of the previous 30
prosecuting authority in the country, under the old regime, that in no way is there reflection on any independent or any
3. individual/...

individual prosecutor or Attorney General within that system. When I do ask the question I ask it as the institution of the Attorney General. So I want to make that very clear so that there is no misunderstanding on the issue.

Secondly, I want to just say that on the input of Mr Klaus von Lieres Und Wilkau that I am going to treat his input in the spirit of what happened on the rugby field on the 25th of May just a little while back and therefore am not going to respond to many of the issues he's raised and perceptions that he's trying to raise. In particular because the document he quotes from, the Sichaba (?) without mentioning it, is of course a journal of the African National Congress, and therefore to the extent that he tried to impute or tried to not impute any suggestions to the ANC of opting for short term tactical approaches to this issue, I do not think, on this issue, that that merits a response. I do also not think that any other perceptions that he tried or tried not to create needs any response. And insofar as his views on democracy is concerned I would leave that to him, it's his good right to have those views. So in that spirit I am not going to respond to those issues, although there seems to be the possibility of a side-swipe to discredit certain views as coming from and emanating from our party. 10 20

I have many issues I want to ask but I am going to start off particularly with one set of issues, and that is the following. Many persons have made reference that the reason we want to have a certain kind of prosecuting authority is that we do not want political interference; we do not want political influence; we do not want a 30

manipulated appointments; we do not want people to report to political office bearers and so on. Now I want to deal with the past and ask some questions about the past because many of the gentlemen here from the prosecuting authority have held for a long time and are very senior on the prosecuting authority that emanates from that old regime.

When you deal with these matters gentlemen are there examples that you are aware of, where these things have happened? If so put them on the table for us so that we are aware of them and we know what we have to guard against. What manipulation and what interference were you subjected to under the apartheid regime, tell us what they are? Or are these all hypothetical issues we are raising? If they are hypothetical let's state them because that's equally important to deal with them obviously if they are hypothetical because the potential exists for that to happen. But I think we need to put the record very clear. Are there such instances and what is it that we have to guard against?

I also want to know just very clearly from themselves, the last sentence in the input suggests that we have to have a restoration of the independence of the prosecuting authority. Now in their view has that restoration of the independence taken place under the present dispensation that was created under 1992? Or will there be such a restoration of independence, as suggested by Mr Fernandez, to go back to the previous system, maybe with some fine-tuning? Where is that restoration? What is it exactly? It is a bit elusive to me. Or do they feel with the minor adjustments and suggestions they have made to the present Constitution and the present Attorney General's Act, that

3. that/...

that would restore this independence that they are talking about? These issues I just raised as the first ones to deal with where we are coming from and I would want to later raise many issues from where we should be going Chairperson. Thank you.

CHAIRPERSON: Mr ...(indistinct).

ADV ROUSSOUW: respond to the question, and unfortunately I must now leave and told you about that before we started and I apologise for not being able to stay. This is a very interesting debate. I was Attorney General of the Western Cape from 1980 to 1992 when I was appointed into one of the posts that Professor Fernandez(tape becomes inaudible), which is an Attorney General with a task specially given to him by the President. My task was the Goldstone Commission. There is one other such floating Attorney General as we call it and we can name it and that is Mr Swanepoel who is in the office of Serious Economic Crime. What I want to say in my tenure as Attorney General, for the 12 years that I was here, Kobie Coetzee never once phoned me to tell me you must do this, that or the other thing. My relationship with him was always professional and it was a very good relationship. 10 20

The other thing, I'm speaking for myself, and that is the ...(indistinct). We did prosecute people on occasion that I think Mr Coetzee would have liked to be differently. One of the instances that I well recall was when we had to decide whether, when those two ships collided in the southern ocean, Mr Kahn took that commission of inquiry, or that inquest, the question was prosecution or no prosecution. We eventually wound up in the Office of the Minister of Defence, who was then General Magnus Malan, and 30

Mr Coetzee asked me, "What is your decision? Are you going to prosecute or are you going to institute an inquest?". I said I am going to institute an inquest, that has been my response right from the beginning, I don't have enough evidence to warrant prosecution. That's one of the aspects. There was a certain gentleman, Mr Ackerman, who was a member of Parliament who one Sunday saw fit to assault somebody in front of a church. I prosecute Mr Ackerman without reference to anybody, no problem about that.

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With respect also Mr Chairman, on a conspectus of the information in the newspapers today, the Attorney General Gauteng will have to decide, of the Witwatersrand, that the division as it is now, will have to decide whether to prosecute the President or not. Therefore, he cannot be a person with one foot in a political camp and the other foot in a professional camp.

In South Africa we chose, deliberately, in this Chamber in the 1908 Convention that we were going to have an Attorney General and a Minister of Justice. We are going to separate the political from the professional and it has worked well for 90 years.

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Can I just say one other thing and then I must go, and that is that Professor Fernandez talked about the 1992 Act and the way it came into operation, that is namely after the 2nd of February 1990. Ever since, and even before I became Attorney General, 1980, it was felt by the Attorneys General and it was shared by our staff, that the Attorney General should not only be seen to be independent, that is described in the Act as independent, but he should be seen to be independent in practice but it should also state that in an Act.

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The first draft of that Act was drawn in 1984. It was first drawn by the Society of State Advocates. It contained two important aspects, one that the Attorney General should be out of the Civil Service and the second that there should be an end to the ministerial supervision of section 35. ... (indistinct) main changes in the 1992 Act. The first time that I myself, led the campaign to have an enactment of the independence of the Attorney General and a cessation of ministerial supervision. I laid a draft before Mr Coetzee in 1987. So that Act has a long history. It came to fruition after the 2nd of February 1990. Admittedly probably because the political climate had changed, but the history was there already. Thank you. 10

AG VON LIERES UND WILKAU: Mr Chairman with regards to the remarks Mr de Lange addressed towards my person, may I just place formally on record, I used the quotations from Sishaba to illustrate how easy it is to attack a criminal justice system if the employment of that system does not enjoy the support of the majority of the people. The fact that it came from the ANC is very irrelevant. They were one of the parties in the set-up and that illustrates the whole point of our absolutely delicate it is for the imputations by Mr de Lange on my person and the intent which he saw my person to use that with, I reject that with the contempt it deserves. Thank you. 20

MR DE LANGE: that I have no imputation at any stage on his person, that's exactly what I indicated in that input and that I reject sir, that you are trying to create that impression. At no stage did I do that. I said I am not going to respond to what you said, exactly because you let all those things hang in the air. So I reject absolutely 30

what he is trying to establish here Chairperson.

CHAIRPERSON: Could we leave it at that. Are there any of the other Attorneys General who would like to respond to the issues raised?

AG KAHN: Many points but I will try and keep this pertinent. I think we should all realise a certain confusion is creeping in in the function of the Attorney General, and I think the word that is causing that confusion is the State. Crime is reflected on the people. The State is seen as the executive of. In our cases the Attorney General represents the people, not the ruling power in the executive or the ruling party at any single stage. 10

Now to make the Attorney General as part of the executive we place him in a very uncomfortable position. What is the executive? They are still the prime constitutional power overriding the Attorney General. How do they override an Attorney General? They create moratoriums; they create amnesties; they create indemnities; they can release a prisoner or prevent an accused from even spending one day in prison; they can expunge an accused's previous convictions. In other words on the one hand the Attorney General says please sentence this accused to 20 years. The State, despite what the court does, imprisons him for 20 years, the State comes along and says no not 20 years we say three days. So to put the Attorney General under the wide umbrella of the State or in the executive arm creates confusion. 20

The Attorney General represents the people. The people are in Parliament, the people are the victims, the complainants on the receiving end of a crime. The Attorney General is not part of that executive function. 30

I am rather interested in Mr Bizos' remark that we mustn't call this being a Super Attorney General, because of the obvious connotations. To me the evil connotation of the Super Attorney General is that I cannot honestly see a function for him. If we want to tool up the accountability of all the Attorney Generals on the ground, fine, but why do we put in this middle person, for what end is he there? Is he going to be in the Cabinet, or is he going to be out of the Cabinet? If he is out of the Cabinet he is unnecessary. 10
If he is not going to take any decisions on a day-to-day basis, what is he going to say? Is he going to knock on the door and say please Mr de Oliveira try Frank Kahn's ...(indistinct) court in Pretoria, what would his function be? I mean let's come to policy.

Everyone is trying to define the policy. We have the job, we have the person, we say he can't interfere with decisions, now we must give him a policy, and we deliberated carefully last night. I don't say this to be sarcastic, but we cannot find what is policy. 20
Certainly given the restrictions or the limitations of resources and the prevalence of an offence, in the Cape I can find by way of example rape takes up more of my time. My colleague in Kimberley can say no, stock theft, that's how he wants to use his resources. What we can do is tell the public this point onwards we will concentrate on this offence instead of that offence. To arrive at this decision we are, as I said, influenced by the prevalence of the offence.

We would also be influenced by the input of the political head, the Minister. If the Minister had to come 30
to us, say coordinate your approach to gambling, we would then do it, but we would see it for what it is. It's an
3. input/...

input from another source.

The death penalty. Let us discuss the death penalty, let's discuss it face-to-face this death penalty. Firstly the Minister never once came to the Attorneys General and said the death penalty will be abolished, the government of national unity is against that death penalty, do not ask for the death penalty. All we read, our perception was, one of the parties, the ANC was divided on it, the other party, the NP said we want the death sentence. The Constitutional Court, to my anger still hasn't given us a proper decision on where we stand with the death sentence. As we stand here today none of us know what to do. 10

The judges in the CPD are three species. I have one judge who doesn't want to impose the death sentence at all. I have the other judge who says please let me postpone it to a later date hoping he'll get a decision from the Constitutional Court and I have a third judge or class of judges who say we apply the letter of the law it's the only appropriate sentence, we will ask for the death sentence. Now if the Constitutional Court is still awaiting direction, what were the Attorneys General expected to do? What were we expected to do? The Act says coordinate - the Minister has coordinated with us on one specific occasion, that's to tell us about juvenile justice. 20

Prosecution on abortion. If you want to know what would happen on abortions - when I was asked to prosecute on juvenile justice to deal with the juvenile justice matter the Constitutional Court, I took the legal view that I did not have a case. So I then conceded as I would in other case, I conceded at the Constitutional Court. What happened is the chairman of the Court said please give us contrary argument/... 30

3.

argument, which was his right, so contrary argument was given to him and this would happen on abortions. If an Attorney General refused to go one way or the other there would be argument invited from any other quarter. The Attorney General is not the beginning and the end of everything, that is the executive.

Finally, I want to come back to the Super Attorney General. How Mr Chairman, do you think that a country which is becoming slowly riddled with corruption, corruption links to the executive, how could Super Attorney General enjoy any other image than the perception that he's been created there to protect his super friends. I will have, I'm not mentioning names, to take a decision ... (indistinct) a very influential person before the end of the year. I can do two things. I can prosecute or I can withdraw. If I was in the Cabinet would I ever have the authority, or respect or objectivity from the public to withdraw against a member of the ruling political party if I was a member of that party, or if I could get voted out by that party or I was nominated as a so-called independent who is basically a political lackey of that party. 10 20

Gentleman a final remark, and I would like to aim this remark at Nadel. I am tired, and I thank Mr de Lange for not raising it, I am tired of the odd spokesperson of Nadel standing up and saying "these Attorneys General emanate from the National Party past and they are not acceptable to us". Let's set the record straight once and for all. The Minister has said, (A) we are acceptable. And (B) if we are not acceptable then we do not have to, as they argue, restructure the position to accommodate seven maybe unacceptable whites. There are other ways to deal with that 30

3. question/...

question. This structure is unrelated to the present incumbents. That we should ignore.

Finally, if anyone, after debate, can just answer that simple question for me. If I was a Cabinet Minister, member of a party in the Cabinet, how on earth can I withdraw against members of the ruling party. That is my difficulty. A political AG would never have any credibility. Thank you.

CHAIRPERSON: Can I just ask that we actually heed Mr Bizos' call and try to keep the debate as calm and reasoned as we can. I think that it will help if we try to distinguish the two matters as the, I think the General Council of the Bar and others have done. I think on the one hand there is a proposal that there should be a National Attorney General as there are Provincial Attorneys General at the moment. Not that that person is a member of the Cabinet or otherwise. 10

I think on the other hand there is a second question and that is the question of what the relationship of political accountabilities should be between such a National Attorney General and the executive or the Cabinet. I don't think there is a proposal that the National Attorney General should serve in the Cabinet from any party in this House. 20

I think that it really would help if we try and keep the emotions down on this issue. I think in any number of overseas countries there are National Attorney Generals, some of them even do serve in the national cabinet, but I don't think that is what we are proposing here.

AG ROBERTS: Mr de Lange's questions have not been specifically answered completely to his satisfaction, if I may put words in his mouth, may I attempt to fill in there 30

a little bit.

My name is Roberts, I'm the Attorney General for the Eastern Cape Division of the Supreme Court. The second of his two questions as I understand it is has the restoration of independence come about, or is it still to come? My personal view is that it has basically come about with the one rider that the appointment procedure has not yet come into play that for example the Judicial Services Commission would do it. Because that is part of the independence that the appointment procedure is a proper one which is to everybody's satisfaction. So I would say basically it's there with the appointment procedure which still has to come. 10

To get to the first of these two questions, and obviously the more delicate one, whether there have been instances in the past? I would like to refer to two instances under the previous regime. They both took place while I was a deputy Attorney General in Natal. In one of them I was actually serving as an acting Attorney General by Ministerial appointment during the absence of the AG and the other one I was, to say de facto the acting AG because the Attorney General was in court. So there were these two instances and I want to make it quite clear at the beginning I'm not suggesting anything improper was being suggested of me, they did not relate to a decision whether somebody should or should not be prosecuted, but they were decisions which were very germane to the functioning of one's task. 20

In the first one it took place against the background of the revelations of hit squad activities, this was before the Harms Commission was appointed, and the Minister had an idea that all inquests which related to people who had been 30

killed and couldn't be found a solution for and there was a possibility that maybe some form of organised force was being used here, that there should be a general re-opening by the Attorney General exercising his powers, of all inquests so that the matter could be ventilated in this way. My professional view was that this is not the proper way to go about it. If there is anything like that, reopening of an inquest, there has to be a proper basis with an indication of specific evidence and a specific case then an Attorney General could do something about it. I differed from the Minister on that and I said I was not prepared to do it. He left it at that. 10

The second occasion, there was somebody also related to hit squads, where somebody had come forward claiming to be a member of a hit squad in Pietermaritzburg who had killed a very prominent political person, and the alleged member of the hit squad made certain revelations in the Press which were widely published obviously, and then he went into hiding claiming he was in fear for his life because of retaliation from his colleagues in this hit squad. The Minister wanted, or suggested it very strongly if I can put it that way that the Attorney General exercise his powers under section 185 of the Criminal Procedure Act to issue, or to apply for this person to be detained on the order of a judge so that he could be safeguarded pending a trial. Once again, in my professional view, I decided that this was not a correct way of exercising these powers because of various technical problems in connection with it and I said I'm not prepared to do it. He felt strongly about it, but he backed off and he went and used some other way of addressing the problem. 20 30

The point that I make is, I feel I acted correctly in standing up to the Minister, and that if he wanted to exercise his powers they were there for him to use if he felt so advised. He didn't. But the point is that as now an independent person who is appointed and is totally free, I think the chances of somebody making a wrong decision under that sort of pressure are less at the moment. I don't know what somebody else in my shoes might have done if these two questions had been put to him. He might have given into this power, I don't know. I just say I personally would have felt even stronger had I been in the position in which I am today. Thank you. 10

CHAIRPERSON: Thank you Mr Roberts. I am going to give Mr Gibson a chance now.

MR GIBSON: Thank you Chairperson. Advocate Bizos started off by thanking everybody for giving the Judicial Services Commission such a thumping motion of confidence. He obviously wasn't listening to Mr Hansjee or reading the representations from the Black Lawyers Association, because you know it's politically correct to rubbish every institution which existed prior to the new Constitution, now it's happening with the JSC as well because its composition doesn't reflect the demographics of South Africa. As a result of that we've got Mr Hansjee suggesting that another independent commission be appointed, this one for the appointment of Attorneys General and prosecutors. He uses the word 'it is legitimate'. Mr Hansjee do you mean that you do not regard the JSC as legitimate firstly? Secondly, if the Minister were to appoint another independent commission for this purpose would you say that it would have to be composed of 70% black people, 15% white people, 10% 3. coloured/...

coloured people and 5% asian people to reflect the demographics? Or, would you suggest that say 5% should have a university qualification and 95% should not? Or that say 40% should be from communities living below the breadline? Is that what you are suggesting as the body that should appoint the Attorneys General? I have got a couple of other questions that I would like to follow from that.

CHAIRPERSON: Mr Hansjee do you want to respond to that? 10

MR HANSJEE: Thank you. What we are saying is that as far as the JC is concerned, the transparency is a bit lacking in it and we feel that perhaps if it becomes, as I put it, more representative, that it could not have that legitimacy crisis that it seems to be acquiring, even though our members are sitting on the committee. Exactly how we are going to work the demographics has yet to be ironed out.

What I was suggesting and I think the point which was not included in the submission was that we should have it independent in the sense that members of the profession could be drawn in on a rotational basis so that it does not become too organisational based as it is presently composed of, that we have a lot of people from the establishment and if we look at the appointments there are a number of Presidential appointees, and this is not entirely a healthy situation. That's basically what I am saying. I don't mean legitimate in the context that you are putting it there. 20

MR GIBSON: I thought it meant 'met in public' nowadays as well so I thought transparency was ensured. But in any event. May I just to the question of what should be included in the Constitution and what should be excluded. Now it seemed to me that there's reasonably general 30

3. agreement/...

agreement throughout that we shouldn't go into a lot of unnecessary detail in the Constitution. But apart from Mr Hansjee, everybody else, I think, seemed to agree that we should at least provide for the appointment of the Attorney General in the Constitution and that we should refer to their independence and so on.

Now Mr Hansjee's organisation seems to differ from that. We have here, he says that

"There must be checks and balances to safeguard any manipulation by the Minister of Justice, foremost of which is the electorate". 10

I don't know what that means, perhaps you would care to elaborate there?

In the next paragraph he doesn't want this appointment to be referred to in the Constitution at all. And he does it on the basis that the Constitution should be

"... succinct and simple as possible to be meaningful to the people. It should be a people's document. It must be a living document. It must be readable by all". 20

What do you mean by all this spate of rhetoric, this lack of legal precision? Do you mean it should be silent on this and therefore everybody will understand it because it won't be there, or what do you mean?

MR HANSJEE: As far as the independence is concerned as I said this has to be seen in the context of the position that we are, the legal profession is skewered at the moment and we have never really participated in debates such as this. Our position as practitioners was always on the side of the accused person. So we are not having sufficient, 30

3. indeed/...

indeed the populus at large is not having sufficient knowledge of the workings of the system and at this point in time we should not be dealing with it. The fact that I say that is should be succinct it's so that it becomes, the Constitution should grow out of the people, that once people live through the document, that it can then - at present it seems to be top down. We are not having sufficient input from the general populace, that is what I mean by it, it's not rhetoric sir, with respect to you.

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MR GIBSON: Chairperson, I don't understand whether your organisation wants to include reference to the Attorney General in the Constitution and refer to the independence of the Attorney General, because that's the point we are discussing and it might well all grow out of the people, but the fact is the people have grown a Constitutional Assembly which they elected at an election last year, completely legitimate, it reflects presumably the demographics of the country and it's got the job of drawing a Constitution. Please tell us whether you want it in, or want it excluded. If you want it excluded, why do you think the public are going to - that it's going to be a people's document? Surely it's easier for the public if they can see there, we are going to appoint an Attorney General or 10 Attorneys General or whatever it is, and they are going to be independent.

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MR HANSJEE: What I am saying sir is that the Constitution should be a simple - in other words a person in the street should be able to read it. Maybe I have not made our viewpoint correctly. We are saying that legislation should be passed dealing with the appointment of the Attorney General, as it is presently you know the situation.

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MR GIBSON: Mr Chairperson assuming then that we don't have anything about the independence of the Attorney General in the Constitution or his appointment at all, then we are going back to relying on checks and balances which you referred to earlier and you say,

"Checks and balances to safeguard any manipulation by the Minister of Justice, foremost of which is the electorate".

Now how is the electorate going to apply those checks and balances in the absence of some provision in the Constitution? 10

MR HANSJEE: The checks and balances that I was referring to is already contained in the whole legislation for example private prosecution, ...(indistinct) indeed the office of the Public Protector, those are the checks and balances. I don't know whether any more would be coming up from the populace.

ADV BIZOS: Mr Chairman may I on a matter of clarification for 10 seconds respond to one that reference has been made to certain persons nominated on the Commission who are nominees of the President. There are four, there are two members, senior members of the Bar, one a member of the Black Lawyers Association and a prominent member and the other a Senator who is a member of the National Party. I don't want to make any further comment, I merely want to put those facts on record. 20

MR: I have ...(indistinct) entirely Chairperson.

CHAIRPERSON: One last question.

MR GIBSON: My last question. 30

CHAIRPERSON: And then we'll come back to you again later.

MR GIBSON: Which I would like to put to one of the

Attorneys General. We had a submission about a week ago, an extremely interesting submission by what we sort of referred to as a rebel band from the office of the Attorney General in Johannesburg I think it was, and they in fact proposed the appointment of a National Attorney General. But that was an issue that was really part of a whole submission where they suggested that the prosecutorial service should somehow be separated and form a continuous career path. They told us, for example, that it creates great problems in the magistrate's court where prosecutors are sort of under the jurisdiction and control of the chief magistrate, and at the same time under the control of the Attorney General. And they were suggesting some sort of a mechanism whereby they come out from the control of the magistrate and form part of some sort of separate service which was a prosecutorial service. Could we have some comment from the Attorneys General? 10

AG.....: Mr Chairman independence in the magistrate's court was a matter which severely exercised our minds for many years, because 20 years ago the prosecutor had to, in the magistrate's court, had to look to the magistrate for his promotion, his suitability and so forth. The Attorneys General initiated a professionalisation process to make the prosecutor in the magistrate's court an independent professional career option. In other words he wasn't, in the olden days he was compelled to accept promotion to the Bench whether he wanted to or not. That has changed in the meantime. He has got an option. He can choose to remain a prosecutor or he can choose to become a magistrate. 20 30

Similarly the prosecution is the major feeding source

for many other professional occupations in the Department of Justice such as State Attorney for example, law advisor, head office assistant and they are basically the feeding source to feed all other professions. That of course places a severe strain on the efficiency, experience levels and so forth, because the moment you expand and you create another magistracy or so inevitably a prosecutor is drawn in the point of - to become that particular magistrate.

So we have, over the years we have tried and to a certain extent succeeded in professionalising the prosecution in the magistrate's court, make him an independent body, make him an independent person. Now the relationship today between the prosecutor and the magistrate, at least in Johannesburg and in the Witwatersrand is the following. The magistrate technically has administrative responsibility for the prosecutor. Now that covers things like the prosecutor can't go on leave if a magistrate not also goes on leave because then there's an official or a judicial officer who is not properly occupied. So the coordination, for example, of the leave component is the final responsibility rests with the magistrate who is the head of the district, and who is responsible to see that the judicial service which he renders is an efficient one, both in the civil courts as well as the criminal courts as well as the administrative support services. So in that sense, yes, it coordinates.

As far as the professional exercise of the prosecutor's discretion is concerned that is something over which the magistrate has got absolutely no say. It falls under the senior prosecutor of the district who is the line functionary responsible directly to the Attorney General for

that professional exercise.

So the suggestion that the prosecutor in the lower court is bereft of a career because of the magistrate's position is not a correct reflection of the position as it is today. In fact 20 years ago you had one prosecutor for one magistrate. Today you have three prosecutors for every two courts, excluding your managerial staff required to run the show. So in fact Mr Chairman a separate career for prosecutors had developed over the last 15 to 20 years and it is in quite an advanced stage at this stage. And it is definitely an improvement in terms of what it was 20 years ago. 10

But where the prosecution suffers is the lack of experience. We don't have the experienced prosecutors in the lower courts where the vast majority of crime is tried, to do justice and to protect the community efficiently. Now there are various reasons for that, I don't need to go into that, but that is really the problem that we have so that we don't provide the service that the community is entitled to expect of us. But we have succeeded in getting the prosecutor and putting him up as an independent career not subject to the vicissitudes of a particular magistrate. 20

ADV BIZOS: May I correct one statement of fact, I am sorry. I stated one of the Senators was a member of the National Party, I am sorry, and it shows how little importance we attach to whence we come from on this Commission, he comes from the trade union circles and not the National Party. The member of the National Party is a Senator. I am sorry about that. I take it no further but I wanted to correct that, in fairness to both the Senator and the trade unionist. 30

DR YASAK: Thank you Mr Chairman. We would like to wish Advocate von Lieres everything of the best and happiness and contentment in his retirement. We will remember him for his firmness in maintaining and pursuing the laws of the past. Unfortunately many of us on this side of the house have been the victims of the justice that was meted out in the past where many of the Attorney Generals did not display any humaneness when it came to prosecuting people who were politically involved in, there was political ... (indistinct) 10
of the law. Following on this I agree with the proposition that there should be no political interference in the appointment of Attorney Generals, but my problem as a lay person is, how do we change the mindset of those who are there, who were prosecuting us in the past? Because I think the problem is not, you know of one where - at the moment I problem I think is this one of the mindset of the people who did prosecute us in the past and I was wondering if Advocate Bizos could assist us by informing us whether the Judicial Service Commission, when it's appointment will 20
take into consideration this problem that we face at the moment. Thank you.

ADV BIZOS: ... (tape cuts out) ... nor has any one from the Attorney General's staff made himself or herself available for judicial office. The Judicial Services Commission would take into consideration every possible factor that impinges upon the past conduct of a particular person. Our hearings are now completely open and you will have seen from the number of questions that various members of the Commission, from various social, political and other 30
perspectives ask candidates. Probably a person who has taken a particular stand in a particular case may or may not
4. come/...

come into issue. But you will permit we to place a fact which I know must be pressing very hard on you, you forgot to report to the police station and you had to serve 14 years imprisonment, the question is whether a doctor who looked after his patients had to go to prison for 14 days for having forgotten on a particular Monday morning to do something, those are fundamental questions. I am sure that no Minister told any Attorney General prosecute the doctor. But then of course what people will do when they are not told may be sufficient for injustices such as was done to you to occur. 10

AG VON LIERES: If I may just add doctor. There is perception and there is fact. It may interest you to know that in 1984 in Johannesburg we prosecuted the first security officer for shooting a detainee, and my experience of the prosecution has been that obviously we are dependent on the informations placed before us by the police although we have the moral power and suasion to order them to produce certain cases. Our experience has been that by and large in the cases we dealt with it was equivocal across the board whether it was a National Party MP who committed an election fraud or a security officer who killed a detainee, all these people were brought to justice irrespective of their political affiliations. 20

Naturally we had resource restrictions as well which meant we can't cope, as well all know we can't cope today. But by and large I don't think there was a deliberate policy, at least in the Witwatersrand to select the political opposition for special attention. Across the board we applied the law as the cases were placed before us. 30

DR VAN HEERDEN: Thank you Mr Chairman. Almost all the people/...

people who make representations mentioned the fact that we should just put in the broad principles in the Constitution, and then leave the detail to legislation. Now my personal opinion, and to a certain extent that also of the National Party that I represent here, is that we should go rather a little bit beyond that sir, because society is a very complex - we are living in a very complex society, and there is no way in which you can organise society in simple or in just broad terms. We should go beyond just mentioning the broad principles but you should also give some more detail. 10

The fact was also mentioned that the people should know exactly what stands in the Constitution. If you just mention the broad principles, the person from the Black Lawyers Association mentioned that - no, the people should understand and they should know more or less by reading from the Constitution exactly what it means. Now a question. Advocate von Lieres und Wilkau said, and I fully agree of course, there is a big difference between independence and accountability. Just looking at those two words and then Advocate Blignault said that the Constitution should just mention the appointment and the independence which I also agree. But now I think that in order, and then he further also elaborated that it must be free from any political control. I am just scared if we just say accountable, and do not spell it out a little bit further that people may think that he will be accountable, accountable maybe to the Minister of Justice or whatever the case will be. 20

Now the final question then, and then Advocate Bizos also mentioned the aspect of competency. I fully agree with that as well. Then the final question now is from anybody Mr Chairman, do they agree that we should just go a little 30

but further or shall we just mention the word competency, independence and accountability? Thank you Mr Chairman.

MR DE OLIVEIRA: ...Chairperson are set out that we feel - we are of the view that the office should be protected from all improper or potentially improper of removal from office, that therefore the removal from office or the termination thereof, should be in the Constitution as we have in the case of judges. That we have set out in our written submission.

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May I use the opportunity to respond a bit more broadly to the points raised. I feel Mr de Lange has touched on core questions. First of all, he asked concerning possible manipulation or interventions. Now myself personally acting as Attorney General from 1986 personally have not had any direct intervention or manipulation. However, in the course of my work of supervising the Transkei division, I had reported to me cases where the politician responsible for justice or for the government of the country dictated to the Attorney General that he prosecute or not prosecute a person. The Attorney General however, explained to him the exact position why he declined to prosecute in a given situation and then put it to the particular politician or Minister said, you have section 35 use it.

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Now what I am endeavouring to illustrate is that with section 35, with a controlled position, with the power of the Minister to reverse a decision and to prosecute himself it always lurks there in the background. Now I ask Mr de Lange what has changed, have we reached the ideal situation? I would say yes. Why? Because independence, meaning the independent discretion has been restored.

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If one looks at administrative law one knows that that

must be exercised in accordance with the principles of law which is often referred to as the principles of intra or ultra vires depending on how you look at it. There must be the legality of discretion.

Once you have a person, call it a National AG, call it a political AG, call it a Minister, who can prescribe to you policy which is an essential component of the exercise discretion, your discretion is not free. You are not independent, you cannot act according to law, that is established administrative law internationally. You ask what has been restored? I say that discretion. I know I can take a decision, I am fully responsible, I am prepared to take responsibility before the courts, before Parliament, before anybody. That feeling, if you like, freedom in the interests of the people. That has been a very material change brought about by the 1992 legislation. 10

Now Dr Fernandez mentioned the reference to some person, I think he mentioned the name of van der Merwe, I apologise I am not quite sure whom he was referring to, as being the person saying that, yes now the government wants to, or the passing government wants to make things independent just because they are leaving office or something to that effect. Now I wish to point out that criticism of the control dispensation began way back, at the time of the struggle but also in the time of the academics such as Professor van Niekerk and Professor Matthews and that is 1971, 1972. 20

Then in 1984, that is when I was in a more senior position in the Attorney General's office, I was aware then of efforts made to change that section 35 regime, the control regime. We have found and we have believed all 30

along that institutional independence is essential to give us that freedom to which I have averted.

Now there may be some areas in which because of a lack of exposure of our people to our office, the Attorney General's office there may be unclarity. The statement that not the Attorney General but the Department of Justice has a say in the appointment of prosecutors is not accurate. The Department of Justice must provide the manpower in terms of the staffing arrangements of the Public Service. They will therefore put a person, or elect a person to a position in a magistrate's court. It will depend on the Attorney General in terms of section 6 of his Act whether he will give a delegation to prosecute. If he does not do that that person is not a prosecutor. Granted the staffing comes from the Department of Justice, but the Attorney General decides who his prosecutor will be.

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Now if we avert to the point raised by Mr Gibson, yes we do have problems, we wish we were out of the Public Service and I mean by that the whole division. Our prosecutors, as my colleague has pointed out, become the source for any division in the Public Service. They are now keen to become magistrates, why, because the magistrates have a recognised dispensation. We are limited by what the Public Service Commission can feed us. That is bad for the administration of criminal justice in the country.

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My colleague Dr Fernandez in proposing one model mentioned section 35 and he thought first of all, that there should be accountability to the Minister of Justice as in section 35, but that the Minister of Justice should not have the power to reverse any decision or to exercise the prosecutorial authority himself. We ask then, what remains?

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Do we not have the present dispensation where we are accountable to Parliament through the Minister of Justice?

And then to come back to Mr de Lange's points again we find that is a most satisfactory arrangement and we have stated our preparedness, in the interests of transparency, to appear before any committee of Parliament, in other words the fine tuning of matters such as appointment as my colleague Roberts mentions and accountability.

My colleague Advocate Bizos mentioned at one stage that he found himself in substantial agreement with Professor Fernandez on certain matters of national policy. I would assume colleague Bizos that that was a case where you were perhaps indicating your personal view. 10

Now let us mention for example, the question of indemnities. It is a misunderstanding to say that the Attorney General can decide whether he grants indemnity or not. Let me explain to you a bit of history. At the time when reconciliation was being sought, when the old order had to change, the Minister of Justice called his Attorneys General together and said, there is a whole change happening in the country. If one does not prosecute for murder in certain cases that could assist the process. And we of the Attorneys General advised the Minister, that that in terms of the law was impossible. Why? If there is a murder, for political reasons or otherwise, it's irrelevant, of the spouse or of the children, of any particular party. And I say for political reasons, because the Minister wants it, I am not going to prosecute. What will happen? The relatives of the deceased are fully entitled to conduct a prosecution and no one can stop them. If they succeed the State must bear the cost thereof. So we advised the Minister, in law, 20

our duty which is to apply the existing law makes it impossible to meet you in your particular quest for political reconciliation. We suggest that if you wish to sideline us use Parliament to pass an indemnity act which was done. Indemnity Acts were used to effect the conciliation, in fact to lay the basis for the Amnesty Acts of the future.

Similarly with firearms. We will prosecute firearms, first of all given the fact that there is a case and there are no particular circumstances why they should not be prosecuted, unless the law gives accounts and says, here is an indemnity section which it has done recently, and the Minister is empowered now to state that for a month or so there's a moratorium on prosecutions, but that is because legislation is there. It's not because of the whims or vagaries of each of the seven Attorneys General. That's because the law said so. We are there to serve the law and the law only. 10

On the matter of abortion. Let us assume that comes up now. Let us assume the question arises should I prosecute Dr X or not. I will look at the law. What is the existing law? What is the Constitution? Is it sustainable that the law is in accordance with the Constitution? I say is it sustainable, therefore there is an argument for the validity thereof. 20

If, for example, the Minister were to say to me, we as a political party do not believe you should argue this matter further. He is saying to me I should decline to prosecute then the relatives of the person upon whom the abortion was performed, or a person having a substantial interest can demand a prosecution, the prior prosecution 30

under section 7. In other words we are back where we started.

I think there is a misconception on the role of the Attorney General before the courts and in particular the Constitutional Court. If an argument is sustainable, because we are there to apply the law, we must, we are duty bound to advise a court by way of argument, of all facets for example, for the validity of a particular section and the court wants that. Just as any counsel for the other side is entitled to ventilate all facets which are contrary to the legislation and let the court decide. And how many times, in our experience, hasn't it been that the Judge President says, Mr Attorney General you will argue for this point and so and so you will argue against this point. We are there to serve the process of justice, not to give our personal views. 10

Mr Chairman you yourself raised the question of the National Attorney General. You have clarified the areas saying we are not talking about a political Attorney General. Then we ask, in this non-political context then, what will the poor fellow do? Apart from the consideration, as my colleague Von Lieres has mentioned one is blowing against the normal process of decentralisation, which is in favour of justice at grassroots level. Apart from that it is our view that such a person would be far too remote from the people. If his office is in Cape Town, how on earth will the ordinary citizen of Messina get to him? Now the citizens of Messina knows there is someone in Pretoria. 20

This person would not, could not practically be involved in a case to case basis. He could not. If so how could he give accountability? How could he be accountable? 30

Such a person, I dare say, would not, could not know the practical problems at grassroots level. I dare say my colleague, formerly from the Witwatersrand, and I can talk to him about formerly, would not have had a full appreciation of the Eastern Cape areas pertaining to, for example, stock theft. But equally I, myself, sitting in Grahamstown, would have not had the full appreciation for the needs of the people in Johannesburg where you have high level economic crime and other violent crime. But each area has a profile. In each area your prosecutor, your chief prosecutor call him what you will, knows his people and must know his people. 10

Then thirdly, as my colleague from the General Bar Council has mentioned, it is dangerous to have too much power in one person. But apart from that, it is grossly unfair to saddle a person with that tremendous responsibility for all the prosecutions in the country.

And then as a small matter, it might sound light, last year my office handled 1,690, almost 1,700 representations from the public, multiply that by almost seven and you will know what correspondence the National Attorney General will be getting over his desk, and when representations are made to him a case has to be delayed until he gets through seven times 1,700 representations. How will justice proceed? 20

I think Chairperson I have addressed the main features mentioned, unless there is other further questions beyond this, I will take my seat at this stage. Thank you.

ADV BIZOS: Mr Chairman may I respond to Mr van Vuuren, because I think that he has raised the fundamentals. Mr van Heerden all those of us who believe in people having fundamental rights believe that there should be clearly and 30

4. expressly/...

expressly stated in the Constitution so that they are not illusionary and they are not easily defeated. But that does not mean that one has to have lengthy descriptions of those rights. And I just brought to your attention in relation to judges, both of the Constitutional Court and of the Provincial Divisions that with the most brevity of language in sections 99.5(D) in relation to the Constitutional Court judges, which merely says,

"In submitting its recommendations to the 10
 appointment authorities in terms of paragraph
 A and C the Judicial Services Commission
 shall have regard to the need to
 ...(indistinct) with the court which is
 independent and competent and representative
 in respect of race and gender".

Now that's just a few words but I believe that they serve their purpose.

Then in relation to judges, it's equally, with very few words, in section 104.1, 20

"Judges of the Supreme Court shall be fit and proper persons appointed by the President, acting on the advice of the Judicial Services Commission".

so that although there isn't a detailed description, it would appear to be serving its purpose and very often trying to enrich it by giving greater detail and by using by way of examples you run into the difficulty of some words limiting others, I don't want to go into the whole argument, but brevity does not necessarily mean that the right isn't 30 entrenched and truly entrenched. That's all I have to say. Thank you.

Then finally, of course I was speaking in a personal capacity about what the difficulties may be if we have a National and I did not, when I spoke of indemnity, I actually left myself open for misunderstanding, I didn't want to touch upon the broader question of indemnity, I merely referred to the moratoria that are from time to time given for grounds of public policy in the hope of solving the position of crime, and not exacerbate it, that's what I really referred to. I thank you for the opportunity. 10

MR: I think I should also respond to the question put I think by Dr van Heerden just briefly. On the question as to whether there should not be a more detailed description of the role and functions of the Attorney General. In our submission we indicated that there should be brevity of description, and after having listened to the various arguments, it still certainly is our submission. For example let's take the functions of the Attorney General.

We have seen from the submission by the Attorneys General that they perform today some 14, 15, 18 functions from time to time and even that is no exhaustive. We do not think that the Constitution should purport to contain an exhaustive list of such functions. It should, in very general terms, give a general definition of his function, and a specific function, for example, should be spelt out in separate legislation. 20

May I just, on one other point that was raised Mr Chairman, on the debate about what was the Super Attorney General and now is to be known as the National Attorney General, may I just say this. We have in our submission drawn attention to a number of pros and cons and advanced arguments/... 30

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arguments to and fro. However, I have listened and have picked up in the debate this morning, it seems to be another consideration the question of, that has been raised by some of the speakers, the question of policy. It seems to be a proposition that the National Attorney General is required, so that it will be easier for the government to convey its policy to such an Attorney General, and that would serve some purpose.

May I just say at this stage, listening to the arguments, we are not persuaded by that particular argument and it does, with respect, create the very problem against which we are warning in these submissions, namely that the Attorney General will, or the Attorneys General will become, not only if they specifically become pawns in the hands of the politicians, they can be seen or perceived to be pawns in the hands of the politicians. That point remains, it's an important point made at page 9 that it can be easier to manipulate the appointment and the performance of one single individual rather than a number of individuals and that remains an important consideration Mr Chairman. If it is necessary to convey policy on whatever subject, then surely such policy can be conveyed as easily to the nine 5 Attorney Generals as to what. These are the only points on which, unless there are other specific questions that I would like to respond at this stage.

CHAIRPERSON: I think that we have moved towards a greater clarity on some of the issues. I would like if I can perhaps ask one or two questions just from the Chair. I think it is a misrepresentation of the argument for a National Attorney General to say that the government can more easily, or the argument for it is that the government should/...

should more easily be able to convey its policies through that Attorney General. I think that if we, and the evidence that has been put before us thus far, I think indicates that in every single country of the world that has any similarity to our system, there is one National Attorney General that we do not seem to have a system where there are seven or potentially nine Attorney Generals that can all take different decisions within their different jurisdictions. I think related to that there is a persuasive argument that has been put forward that our citizens are entitled to an equality of treatment under the Constitution. So that if citizens in Natal are presently prosecuted when they have been entrapped with radar and they are not prosecuted in Gauteng for the same reason, that there is an inequality of treatment of our citizens. That similarly when it comes to the question of corporal punishment or many other issues, it seems that our Attorneys General in the different regions do not necessarily come to the same conclusions, and those have very real effects on the people who are prosecuted within their different jurisdictions. 10 20

Now surely if we are saying that justice is a national function that our citizens should expect treatment. Apart from the question now of the relationship between the executive and your National Attorney General, it just does not seem to one that there is any persuasive argument for saying that there should be nine people who can each follow nine different directions in the various parts of the country, when we have a Constitution that gives an equality of treatment to the citizens in different parts of the country, and one is saying that justice should be a national function. 30

I think the argument that was put to us by the minority grouping from the Society of State Advocates, I am not quite sure what to call them, but I think that was for us a persuasive argument. That in the same way as Attorneys General are performing their functions in the provinces at the moment, surely there should be, even if it is just at the very least that, a similar person ensuring that there is a uniformity of the application of law at a national level, and not different applications, that one does not have one Attorney General arguing before the Constitutional Court, or in their own jurisdiction that no corporal punishment should be enforced because it may be unconstitutional and in another jurisdiction corporal punishment is still sought by the State because the Attorney General there is of the view that it is constitutional. Now the Constitutional Court does need to clarify those matters, but in the meantime it affects many people, and there will be continually in a constitutional state matters of policy like that thrown up.

There are other policy decisions that are taken where, for example, that rape cases should all go to the Supreme Court or to a Regional Court rather than to a magistrate's court. I think the argument has been put to us on purely those technical grounds, is there a justification to say that different policies should be implemented in different parts of the country?

So I would just like to hear some counter arguments on that point in a sense and just to say where else in the world do we have a system like this, where you can have great disparities in prosecution policy in different parts of the country?

MR DE LANGE: No it seems to me that there are many

questions that need to be answered, and in fact everyone needs to get a chance to answer them. I want to propose to take your questions as a basis and ask any of the people here that want to ask questions, we put all those in the pool to all the representatives that are here, and we then ask them to respond in writing to those. Because I think some of them, I want to ask particular questions as well which are very vital for us to be able to hear what they say, to grasp those issues. I think one of the things, we 10 have spoken a lot of things today, but in the end I have a feeling we haven't grappled with all the problems. I would suggest whoever wants to ask questions, let's do that plus yours, and we give them an opportunity then to respond in writing. Otherwise we are going to get one or two people now, because some of us are going to leave and it's not going to be fair, it's just not going to give a right reflection.

CHAIRPERSON: Could I just, on that point, I know that there are a number of people here that have to leave right 20 now or quite soon. I think that most of us from the CA side are available to continue this discussion until 1 o'clock but I am not sure if what the position are of whether there are sufficient of the representatives here that are able to stay for another hour or so if we are able to continue. I think that it may be worthwhile to continue the discussion.

NR NGOUKA: Mr Chairman I just want to ask one simple question.

CHAIRPERSON: Sorry, could we just resolve the issue of the leaving or not leaving before we. 30

MR NGOUKA: I think Chairperson some of us will have to leave about 12:30 and therefore I would suggest that we try 5.
and/...

and be as short as possible and pose the questions and then our colleagues can then see if they can best respond. People are always free to submit further documents if necessary. So will you allow me to proceed and put my question?

CHAIRPERSON: Okay can I just ask, I think there are some people who have to leave now to catch their airplanes, so I think we are going to have to excuse them right now.

MR P MUJAPE: I am unfortunately one of those people who 10
have to leave right now and I should put an apology on record. The name is Phineas Mujape(?) and I am from the Judicial Services Commission. Unfortunately I arrived late due to the changes in the schedules of the connecting flights and I just want to put my apology on record.

CHAIRPERSON: We did get that message and I thank you for that.

ADV BIZOS: As it's going to be debate Mr Chairman the Judicial Services Commission should really not be partaking in the debate. I will be excused because we do have a 20
flight to catch at 1 o'clock, I hope that we are going to make it. We are going to have a meeting in the beginning of July, a scheduled meeting of the Judicial Services Commission, we intend reporting fully and if the Judicial Services Commission decides to express a corporate opinion, so to speak, we will transmit it's decisions to the Constituent Assembly and if we may be excused.

CHAIRPERSON: Could we perhaps just hear I think Advocate von Lieres and Ms Hoeveld(?) are the other people affected by having to leave now. Could I then excuse Adv Bizos and 30
Adv Motjipelo(?) and thank you very much for your attendance. I am going to follow the suggestion perhaps

that we then try and deal with a number of questions and then I will give each of the groupings here an opportunity to respond to that, Advocate Hansjee. Mr de Lange I think you were first with the question.

MR DE LANGE: I will have to make arrangements to leave by plane so I would like to just put these questions on record. The first one you have dealt with quite a bit and I think it's very important that this is dealt with because we are going to have to grapple with this. There are two issues. 10
The one is the issue of justice and the administration of justice being a national function. I think it's been agreed to and therefore the Constitution has to reflect that. Now the way the Bill stands now you actually have nine different prosecuting systems, because if I understand the Bill correctly, you can correct it if you want to, you appoint an Attorney General for each province. He or she has the exclusive jurisdiction within that province to decide on prosecutions. No one else can intervene into Mr Kahn's area of jurisdiction and visa versa. 20

If that is so then clearly the second issue we need to deal with is the equality clause in the Constitution and also in the Constitutional Principles. It says very clearly that all shall be equal before the law and as has been proved under the Gambling Act in some areas, prosecutions have taken place and others not and etc etc. You can't have nine sets of different rules and policies applying to citizens in the same country if there is one legal system.

Now if all those assumptions and facts are wrong then clearly we need to hear that from you, and in particular I 30
would ask also to respond in terms of the Attorney General's Act as I read it in terms of the appointments of the nine
5. people/...

people, I think it's section 3 or 4 I'm not too sure.

The second issue that flows from that, also which you need to address, is to tell us that it's very wrong to go and give the power to one person which will be a National Attorney General, well if I read the Act correctly then what you have done now is gone to give the exclusive power to nine men instead of one. So they are still, they decide what to do and therefore it's still the power to that extent may have been devolved in who is the dictator, but there is still nine of them and they would be absolute dictators if the law is correct or not and I'm using this in a jocular fashion. Mr Kahn I can see is smiling as well so that's how I mean it. 10

The second issue I think is vitally important is the issue that Mr Hansjee raised, should anything of the Attorney General be in the Constitution at all. Now I hear that Mr Gibson and Mr van Heerden had been very happy and they want to make a lot of detail in the Constitution, but the one thing that no one addressed here today and I haven't seen in your submissions, is no one has made reference to the Constitutional Principles. As you know as a CA, Constitutional Assembly, only the Constitution Principles bind us, and there is absolutely nothing in these Constitution Principles that says anything about the Attorney General. Why do we have to put anything in the Constitution? We would be completely within our rights to do so, so there is some persuading needed. I would suggest that the parties that were all part of negotiations, there were 26 of us, none of them saw fit to put that into these Constitution Principles. Now we have to deal with that issue. Why should we put it in here? 20 30

In particular I would ask you to respond then to clause 7 or Constitutional Principle 7 and Constitutional Principle 26 which clearly spell out certain independent structures that should be created, the Reserve Bank, the PSC and so on, but leaves out the Attorney General again. So those are very vital. I would like to hear people's responses to that.

The third area which Mr Hofmeyr has touched on and I just want to slightly touch on, and that's the issue of separation of powers. Our Constitution is clear on that and the Constitutional Principles are clear on that. And the classical separation is spelt out, legislature, executive and judiciary. Now particularly the Attorneys General are of the view that the Attorneys General should fall under the judicial arm of that and they say that the present Constitution does that. My question, and I need some answering is where else in the world are there examples where the prosecuting authority does not fall under the executive arm? If you could elaborate those to us and what they are.

Hand in hand to that is particularly what Mr de Oliveira said about independence, that as he sees the system now is that particularly certain international norms and standards have been brought into the issue. Now that's very debateable because I am told that the Americans have the greatest democracy in the world, now that's up for debate, but let's assume they do have. They are very clear, I mean their guy sits right in the Cabinet. Now in that land of the free, there for example you have it very clear that people sit in the Cabinet and elsewhere. So I would ask you to address that. It's no good just saying

5. that/...

that we can wish it away. There are so many examples in the world and we want to hear your responses to that. Why is it wrong? Why in those countries does it work or doesn't it work? One needs to know this. I think it is vitally important.

Hand in hand with that is in some countries they link up the AG with also the people that are responsible for civil matters, so that you have what was called earlier a Chief Legal Advisor to government and both the criminal and the civil arm runs from that. So you have one person then that represents the interests of government or the State. I would like to hear what response is there, what viability is there for that kind of structure. So instead of having a State attorneys and Attorney General or if you have both arms to have one person that's responsible for those, that you have one issue.

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The fourth area I would like to hear about is accountability.

MR.....: Just on that one thing of the American Attorney General, perhaps somebody will just comment on the fact whether that person isn't really the Minister of Justice. They simply call their Minister of Justice the Attorney General.

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MR DE LANGE: Well you are welcome to do so of course. There is a very strict separation in America where all the courts are completely separate from the executive. So in that sense it's very different from our country. There of course the Attorney General there are two of them, they actually handle more the prosecuting side and the civil things of government and in that sense they are the Minister of Justice. But the judiciary is completely separate they

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run themselves and the prosecuting authority is on the justice side and the courts are on the judiciary side. So that is why I have asked the question where else do you find that it's not part of the executive.

AG KAHN: Sorry Mr de Lange could we just insert another question. If we are to deal with where else in the world is there an Attorney General such as we have, shouldn't we deal with the question that where else in the world is there a Minister of Justice called such as we have in this country? 10

MR DE LANGE: Mr Kahn you are more than welcome in your representations to raise whatever you want to. I am just raising, not my positions, I want you to respond to certain, if you want to, and you can respond to those in whatever manner you like. I am sure other people would ask similar questions. I just think it's important we grapple with this thing. We have been very wishy-washy about the whole issue and I think we need to in that sense.

Accountability. I have heard no one in this country ever talk about meddling with the operational side of the AG. Who decides who to prosecute or not? The issue though that you have to grapple with is policy and not in the sense only that Mr Kahn has done it. For example the issue of the death penalty. The AG goes and argues that the death penalty is constitutional. You have to tell us on whose behalf you do that and who you are accountable to do so. You tell us you are accountable to Parliament, why don't you come to Parliament and ask them what their views are on it, so that you can represent the views of who you are accountable to? So I think that that's important that you deal with that. I mean the Attorney General can't just go and decide on policy things like whether they feel the death 30
5. penalty/...

penalty is constitutional or not, whether corporal punishment is not constitutional and they do it completely on their own. I mean they are not accountable to anyone. They do it whether they think it is right or wrong. And that needs to be grasped because that is when we talk about policy issues, that is policy, whether there should be the death penalty or not; whether there should be corporal punishment or not, and how are you going to be accountable in that way or are you going to be nine very wise men and women who are just going to do it completely on your own and in fact can take nine different positions on the issue? I would ask that that get answered. 10

Section 55(A) of the Bill, your Attorney General's Act. It seems to me to create a mechanism of accountability to the Minister. Everyone has told us that you are only accountable to Parliament, but 55 is very clear what the coordinating function of the Minister is. It spells out that he can go and ask for reasons and so on, and to that extent, I mean why isn't that put in your representations under accountability? Don't you see that as accountability? What is that mechanism in real terms? You dealt with it, I think, under policy formulation and not under accountability. What is that clause exactly? If the Minister can get all those things from you, and I can see it's a discretion, it's ... (indistinct) and I can see the word "request" is used, but what exactly and how does that fit into your whole system? 20

CHAIRPERSON: Mr de Lange could we try and summarise.

MR DE LANGE: Chair I am trying, but I think if they can't respond today they will have to do it in writing, then one needs to make the request relatively clear. 30

Then I would like to know that if you want to be this independent structure then I would imagine, and I am assuming this, that you too would like to transform the AG to be reflective of certain demographics in our country etc, etc, within the bounds of competency and so on. Now do the AG's who are independent and so on, do you have a plan on the table to show us how you want to bring about this transformation? What is it, etc, etc? Where is it that we see, because otherwise you are out there on a limb completely independent and you may be isolating yourself from the rest of society without having to deal with all the issues we have to deal with in terms of transformation. Where is that plan of the AG, is it in writing, is it not? And does such a plan exist? 10

Lastly the one thing I need some clarity on, because it's a more functional thing, is this the relationship between the AG and the Police, if you can spell that out a bit more. To what extent should there be a much stronger relationship like in some Attorneys General actually having the power to direct how the police operate and so on. So there's a much closer link and this police force doesn't just operate completely on their own on a limb somewhere and that the two, the prosecuting authority and the police work much closer. Are the laws adequate in this case? Do we need to look more clearly at it, and so forth? Because that could have certain constitutional ramifications in terms of the police force if we are dealing with it in the Constitution. So I would like to have your views. 20

I do have a few other issues, legitimacy of the AG but in the spirit of the 25th of May I am not going to raise those issues and so forth. And if I have, I have other 30

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questions here, I will try and put them in writing and submit them to you Chairperson. I really have to rush off so I do apologise.

CHAIRPERSON: Senator Ngquka? I hope you are going to be quicker.

SEN NGOUKA: Chairperson I must protest that I had raised my hand some time ago and now I find myself that most of the questions I wanted to ask have been asked but in a different form. I wouldn't have put them in maybe in that form. So 10
I have unfortunately to miss this golden opportunity of asking eminent Attorneys General questions. But maybe let me just say this seeing that Frank is here. You know there was a difference when you came into the office, it was easier to approach your office and you were able to solve quite a number of things relating to the province, but particularly the question you will recall, of protest marches. We had a situation developing in this province where there were no prosecutions for those who took part in protest marches, whereas in other provinces people were 20
being prosecuted. Now you see initially when I first came in here and I was hearing the debate going on I had a feeling and you will correct me if I am wrong, I really had the feeling that your proposals were more motivated by fear of the future. That there's more likely going to be an attempt by the democratic government whichever it may be, the ANC may not be in power next year, it may be some other government, but there will be an attempt by a democratic government to interfere with the work of the AG's. I have that feeling. Given my background, where I come from, where 30
I have been personally a victim of some of the decisions taken, decisions like where a political trial should be

held, the venues for political trials, some of those decisions, when there was in fact no interference as such by the Ministry, but a political decision was taken, that most of the cases should not be held where the accused came from. He should be taken away from them and all these issues.

Obviously there is also a fear on our side that we would not like to have the status quo continue. So there are those questions. Now my questions are more of perception Chairperson, a perception which is there on their part and a perception which is there on our side. And I really want to ask, I mean without just saying if a member of the Cabinet and National AG is a member of the Cabinet, therefore there is going to be political manipulation. We've got a lot of experience everywhere, in a number, not everywhere, in a number of countries where that is not the case. Closer home everyone talks about the Botswana as one of the democracies in Africa where you have an AG who is a member of the Cabinet. So to say that if one is a member of the Cabinet therefore there is going to be political manipulation is being simplistic. We really want to look at these questions. I am not advocating, and let me clear this matter, the position of the ANC is not that Attorneys General should be a member of the Cabinet, it is not. But the question that arises and I think we need to address this question very seriously, why should we not have a National AG if we remove that person from the Cabinet, why should we not have this person? That essentially is the issue and I think that taking into account your experiences and our experiences and our perceptions because it seems to me sitting here Chairperson, listening to the debate, there is not much which divides us. We are all agreed that the AG

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must be independent. We are all agreed that there must be no political interference, we are all agreed it must be impartial, all agreed that in terms of how they operate nobody must have any say, they must prosecute fearlessly, without fear, without favour, all those questions, we are all agreed about that. We are even agreed that even the method of selection of the Attorneys General must be such that you remove this question of illegitimacy and so forth. So we are agreed upon all those issues. It seems to me the matter centres around this question of the National AG. And I think that, is it not possible that we can't meet some.....(tape cuts off) 10

MR.....: Just follow that up with a very brief one. Assume for the moment that it's decided that you have got to have a National AG. Is there any reason why you shouldn't have a situation where you have somebody who is a working AG, who is running a division and as an adjunct to that simply performs the coordinating policy role which other people are talking about? Rather than sitting isolated in an office somewhere and not having anything to do as was suggested to us. 20

CHAIRPERSON: Miss Gandhi you had your hand up earlier, did you still want to ask a question.

MISS GANDI: Just to make one comment and ask one question. The comment is that it seems we are still in the old mode where we believe that Attorneys General are all males. I've also been referred to gentlemen in this forum and I just think we are now moving into a society where women are going to be included and not remain invisible. So with that comment I wanted to ask a question but Professor Fernandez is leaving, my question was directed to him. 30

CHAIRPERSON: Professor Fernandez there was a question specifically for you, if you could stay for a moment longer.

MISS GANDI: My question is that Professor Fernandez outlined a number of different models, but he left the presentation for us to decide which model would perhaps be the best. I would just like to ask Professor because of his experience and so on, maybe he could tell us which model would best enable us to have an Attorney General that would be impartial, that would actually service the people, that we wouldn't have the kind of problems that we have had in the past, and some of the problems have been, and I won't say that perhaps people can you know have been talking about political interference? I am saying that actually you know personal beliefs that have actually interfered with many cases because we find in my own experience and I'm not a lawyer, but as a lay person, I have found that you know often there have been cases where Attorneys General have prosecuted with so much of enthusiasm whereas there have been other cases where there has been a lax attitude presented and you know you could clearly see that there isn't that kind of interest in finding evidence and you know trying to actually prosecute in those cases. Now how can we in the future, what kind of system and what kind of provisions do we need in order to ensure that in the future we don't have that kind of impartiality and I mean that kind of partiality? 10 20

CHAIRPERSON: Professor Fernandez if we can just wait, I think there were a couple of questions asked earlier and perhaps we should deal with the responses to that if you have a moment longer. Is there anybody who wanted to get the ball rolling? 30

ADV BLIGNAULT: I will be very short. I am in a little difficult position here because he was my colleague Adv de Lange, posed some nine questions here and I just want to make it clear without any disrespect to him, we do not propose unless you rule otherwise, to put in further written submissions, because I do believe that on the principles involved our submissions are in the document that we put forward. Some of the points that he has raised were perhaps I think directed more specifically to the Attorneys General.

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Just on the question again and let me just make it very clear and I think that is clear from our submission but let me avoid any misunderstanding. On the question of a National Attorney General or nine Attorneys General, it is one on which we have not taken a final position. There are arguments for and against. However, we stress it's very important that whatever proposal be adopted in the end, the principle of independence should be safeguarded and that's an important point.

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Exactly as to how functionally, whether it's going to be functionally better to have one National Attorney General or perhaps a primus inter pares or nine of them, that is a matter which ultimately perhaps can best be answered by the Attorneys General and perhaps with international experience.

But at this stage, and I just want to clarify this, because the time is again running out and numbers of questions have been put, I would rather agree with what the honourable member has said here that there seems to be a broad consensus here amongst what I have heard of the debate and it seems to us that the difficulties or the problems that remain are questions of draughtmanship on the one hand

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and secondly questions of perhaps the internal reorganisation of the office.

So may I just, unless you direct that we should specifically again reply to specific questions Mr de Lange is not here, we do not intend disrespect to any questions but as presently advised, we do not intend to answer again what we think our answers are once members have had an opportunity to study these submissions, they will find the answers therein.

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CHAIRPERSON: Thank you. Is there anybody from the Attorneys General who would like to respond.

ADV DE OLIVEIRA: Chairperson thank you. We are of the view that the questions need consideration and we could not rattle off answers in the space of a couple of minutes. We would then prefer to answer them in writing as suggested by Mr de Lange, and I think if there are any further questions we will take them.

May I just comment on one question, how does one guarantee that anybody performs his work properly with enthusiasm or firmly or with vigour. That is a rather difficult question. If it were clearer to us what examples you were referring to where somebody did not do his or her job please we would like to have them to comment on those two.

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MR.....:just ask that (tape cuts out)made available to us.

CHAIRPERSON: I think we can try to do something like that, but I think perhaps in the couple of minutes that are available, I think Senator Ngquka was right in a sense that the key issue that still seems to be in contention is really the one about a National Attorney General in a sense. And

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I don't know if you have some response for us on the kind of models internationally, or otherwise, that you are looking towards and just maybe address some of the questions specifically on that issue.

MR.....: We have at this stage no comment. We prefer to comment fully. We see the dimension introduced by Senator Ngquka namely the question of the fears folk may have, that there may be a perpetuation of the system, and in that light we could supply you with what we see as the best situation, both to allay those fears and also to be constitutional and to guarantee an Attorney General necessary independence. But I prefer, because of the seriousness of the question that we consider it and give it to this committee in writing. 10

CHAIRPERSON: Could we just ask Professor Fernandez if he has a brief response to the question put by Miss Gandhi?

PROF FERNANDEZ: Thank you Mr Chairman. It's really not for me to say which model should be adopted but I for one personally favour the notion of a National Attorney General because experience teaches us that is the best model, be it in the United States, be it in Canada, be it in England, be it France, Germany, Botswana, New Zealand, wherever you look in the Commonwealth there is a National Attorney General, and this does not mean for example that there are no other Attorneys General. For example if you got to Nigeria, if you go to India, you are going to find there are regional Attorneys General, but they nevertheless they have a National Attorney General, and I think for very good reasons also. You find also that if you take Germany for example, you have a National Attorney General but you also have a Minister of Justice. 20 30

But the reasons are I think quite trite. These are that South Africa has now opened up its borders. It is now part and parcel of the international community. We are no longer an isolated country with a very parochial view and a very narrow minded perception of our existence. We have become part and parcel of the international community. Also we have become, shall I say, the destination of the international community of criminals. You have lots of economic delinquents, fraud, cross border car theft, cross border stock theft, things that really are placing a strain on the existing resources that we have within the administration of justice. Our prosecutorial service is about to collapse. We just don't have the people, the resources are strained. Attorneys General have to cope with lots of issues developing locally. 10

Now I see the role of an Attorney General being not only that of negotiating treaties and attending overseas meetings with other Attorneys General where issues of crime are being discussed, but also to advise the government to give government some advice on policy, policy both with regards to the environment, to immigration, to pollution and this..... 20

MR.....: They should all stand for Parliament and then ... (indistinct) .

PROF FERNANDEZ: Well you don't have to stand for Parliament, you don't have to become a member of the Cabinet, you can do so being in Parliament, because if you look around, all over the world, you find that the National Attorney General is either a member of the Cabinet, is a member of Parliament, without the right to vote, also in the Cabinet without the right to vote, or is a member of the

political party in charge. In some way or another the Attorney General is a political member and there is no way of trying to run away from it. You will not find a situation where you are going to find an attorney general who is going to be absolutely neutral. That is a myth. It's a legal fiction. So but you can build in inhibitions which could prevent the politicians from taking control of the decision making. You have a general stay there for example where you have guidelines or where for example, 10 where the Minister, when he interferes with a decision say for example it's a political case that's in front of the court and the Minister says well I don't think we should prosecute it then the Minister must issue a statement which is then gazetted. In other words it is there for the public to see that the Minister here has intervened and that it was a political decision. And it might be necessary for such things. Because even in Germany, if you look at Germany, you have what they call the principle of legality which means that if there is - a crime has been committed and 20 there is sufficient evidence, the prosecutor has to prosecute. So in such a system you say well you don't need a National Attorney General because you have the law which obliges him to prosecute. But they also have what they call the opportunity principle which we in South Africa subscribe to. And in spite of the fact that they have a legality principle, they have National Attorney General. So those are just my views on the issue. Thank you Mr Chairman.

CHAIRPERSON: Thank you very much. I think we are way over 30 our time at this stage. So I would like to call us to a halt. I would like to thank everybody for their attendance 5. this/...

this morning and I think that for us in the Constitutional Assembly it has certainly been a very exciting opportunity to have the Attorneys General and others here to speak to us, to hear your views directly and I think that we have taken the discussion, in a sense, a step forward. I hope that we will have further opportunities to explore the differences that there may still exist or to clarify those areas where there are perhaps more perceived and real differences. I would also like to thank everybody for I think a tremendous amount of work that was put into the presentations here today. In the way that we have conducted ourselves today, I certainly have a hope that we will be able to have a new Constitution that will reflect an almost total consensus in our society about what it is that we need. Thank you very much.

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