A156

4 October 1993

Head of the Administration
Multi-Party Negotiating Process
World Trade Centre

Dear Dr Eloff

SUBMISSION BY THE DEPARTMENT OF JUSTICE FOR THE ATTENTION OF THE NEGOTIATING ~~COUNCIL~~ Technical Committee.

1. Attached is a submission by the Department of Justice entitled ***VIEWPOINTS ON THE PROPOSED CHAPTER ON THE ADMINISTRATION OF JUSTICE AS CONTEMPLATED IN THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL AFFAIRS***.

2. Kindly transmit the document for immediate attention to the Negotiating Council.

Yours sincerely

DEPARTMENT OF JUSTICE

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VIEWPOINTS ON THE PROPOSED CHAPTER ON THE ADMINISTRATION OF JUSTICE AS CONTEMPLATED IN THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL AFFAIRS

A. FUNDAMENTAL PREMISES

1. The Government has repeatedly stated its commitment to the establishment of a strong Constitutional State ("Rechtstaat") in the new dispensation. This objective is not only an important element of modern democracies throughout the world, but is also paramount to the establishment of a fundamental rights culture in this country and the protection of such rights. The premises underlying such Law State-concept are the following:

* The separation of powers (the legislative, executive and judicial authority).
* The guarantee of personal human rights.
* The formal concept of law.
* Government by law.
* Predictability of government actions.
* Protection by the courts.
* The maxim "*nulla poena sine lege*".

(Van Wyk as quoted by Basson and Viljoen: South African Constitutional Law on 220/1).

2.1 We view the separation of powers an absolute prerequisite for the attainment of the above goal, which necessarily implies that the judiciary shall be completely independent from the executive

and legislative authorities. Such independence has two distinct meanings. The first one is that only the judicial branch of State authority should discharge judicial functions, free from interference by the other two branches. Secondly the individual members of the judiciary should be insulated from external factors which might influence them in deciding cases, and they should decide cases impartially without allowing their subjective prejudices to intrude. (See Boulle, Harris, Hoexter: Constitutional and Administrative Law on 200).

2.2 The first form of independence could be achieved, *inter alia*, by including specific provisions to that effect in the Constitution, as reflected in clause 86(2) and (3) of the Committee's Report. With regard to the second form of independence, the generally recognized means of promoting such independence are, *inter alia* -

- through non-political appointment of judicial office-bearers;
- the taking of an oath of office by judicial office-bearers;
- statutorily providing for security of tenure for judicial office-bearers; and
- providing for financial security of such office-bearers.

(See also Boulle *et al* on 202-6).

3.1 In order to enhance the independence of the South African judiciary and especially the magistracy, the Hoexter Commission recommended the institution of, *inter alia*, a Council of Justice to administer the internal affairs of the judiciary, as well as the separation of the magistracy from the civil service. The South African Law Commission, in its Report on Constitutional Models, has since recommended the institution of both a Judicial Services Commission and a Magisterial Services Commission. The primary purpose of both these Commissions would be to enhance the independence of the judiciary from the executive and to recommend persons for, or oversee, judicial appointments.

3.2 The Government supports these objectives in principle and in fact recently promoted the Magistrates Act, 1993 (Act 90 of 1993), which purports, *inter alia*, to afford magistrates the protection referred to in paragraph 2.2 *supra* and also established a Magistrates Commission. The objectives of the said Commission fall squarely within the ambit of the Committee's proposed clause 98.

4. The Republic is presently undergoing dramatic changes with regard to its legislative and executive authorities. Whilst the Government is firmly committed to the transition to a fully fledged democracy, it should be borne in mind that the transitional process will inevitably be accompanied by a considerable degree of tension and uncertainty among most, if not all, South African communities. The judicial function as such, however, is not amenable to change, and the courts will fulfil a vital role in ensuring that the administration of justice is not substantially hampered during the transitional process. Bearing in mind also

the vital role the courts would fulfil with regard to the protection of fundamental rights, we view it as of paramount importance that the security of office and tenure of the judiciary should be afforded the best possible protection. Notwithstanding some criticism as to the legitimacy and the composition of the present judiciary, it is an undeniable truth that the Republic has a comprehensive and thoroughly decentralized court structure that daily decides thousands of cases, and the general competence of our judiciary is widely recognized.

5. The question of legitimacy is closely linked to the independence of the judiciary. Criticism is sometimes levelled at the legitimacy of our present judiciary on the basis that they are not representative of the composition of the whole of the South African community. This argument is not without merit and it is understandable that a large part of the community finds it difficult to identify with a legal environment that seems to be dominated by whites. A pragmatic approach should be adopted in redressing the situation through the encouragement of suitably qualified persons to accept judicial appointments and to provide suitable training for candidates for such appointment. The overriding concern should, however, be to provide the best possible service to the public. In this regard we would be well advised to bear in mind the following message of the American jurist Roscoe Pound to the American Bar Association in 1906:

> "Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities

and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong.".
(As quoted by James: Crisis in the Courts on 211).

B. **COMMENTS WITH REGARD TO THE TWELFTH REPORT**

6. **Ad clause 87**

We are firmly of the opinion that the Constitutional Court (CC), which is to be a court of final instance with regard to constitutional matters, and which would exceed the Appellate Division's jurisdiction in this respect, should be a chamber of the Appellate Division. The CC will be a (high) court of law and, because of its exclusive jurisdiction, would in all likelihood diminish the status of the Appellate Division. We are of the opinion that the legitimacy of the CC would not be determined by it being separate from the AD, but rather by the bench which will serve thereon and the quality of its judgements. Should the CC be a specialist court of the AD, the appointment of its bench may still be unique to that court, thus enhancing its legitimacy.

7. Ad clause 87(4)

If the CC (or a competent court) should hold that a particular law is unconstitutional, it is doubtful whether or not such law should be allowed to remain "valid". Such an anomylous situation would, after all, be completely in contrast to the spirit of the Constitution and would, in our opinion, undermine the Law State-principle.

8. Ad clause 88(2)(d)

We find it inconceivable that a member of the bench of the Constitutional Court, which, in the eyes of many, would be the highest court in the land, could be someone who does not qualify for an appointment as defined in subclause (c). This may seriously jeopardize the legitimacy and status of the CC.

9. Ad clause 88(3)

We foresee some practical difficulties with regard to the procedures envisaged by the above provision. The phrase "all candidates that it wishes to consider" is vague about how candidates are to be nominated, and by whom. In our opinion it may also reflect detrimentally on the integrity, competency and stature of candidates who, after what would probably be a grilling inquisitorial procedure, are turned down by the Standing Committee. We are firmly of the opinion that it would be much sounder in principle for the appointment of judges to be made by the Judicial Services Commission. See also paragraph 4 *supra* in this regard.

10. Ad clause 89

The Committee apparently prefers to leave the finer details of the procedural aspects of the Constitutional Court to the President thereof. The power so bestowed on the President is not uncommon and is similar to the powers currently enjoyed by the judges president. We nevertheless submit that, should direct accessibility to the Constitutional Court be decided on, it should not be left to the discretion of the President whether or not rules should be made to facilitate such procedures.

11. Ad clause 90(5)

The Bench of the Supreme Court previously commented on the impracticability of the referral of matters to the CC by way of a stated case. (See paragraph 4(b) of the memorandum submitted by the latter.) We are generally in agreement with their view on the matter.

12. Ad clause 92

The provisions of this clause are closely linked to securing the independence of the judiciary, as pointed out in paragraph 2.2 *supra*. It is therefore imperative, in our view, that similar provision should be made with regard to the magistracy, the Ombudsman and the attorneys-general.

13. **Ad clause 93(1)(g)**

We are of the opinion that the appointment of 5 Senators on the Judicial Services Commission (JSC) would be unsound in principle. Apart from the practical difficulty in that each SPR would not be represented on such JSC, such appointment would tend to derogate from the Law State-principle. (See paragraphs 1 and 2 *supra*.)