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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE

SUBMISSIONS

RECEIVED AS AT
7TH FEBRUARY 1996

VOLUME 12 (ADDENDUM)

PART 1

ORGANISATIONS

CONSTITUTIONAL ASSEMBLY

SUMMARY OF SUBMISSIONS RECEIVED AS AT 7TH FEBRUARY 1996 (ADDENDUM)

VOL 12 ADDENDUM	ORGANISATION	SUBJECT	SUMMARY
1	Community Law Centre: Prof N Steytler Prof J de Ville	Attorney General	**Accountability of Attorney-General/Prosecuting Authority:** Propose the following formulation: (a) The authority to institute criminal prosecution on behalf of the State vests in the National Director Public Prosecutions who must exercise his or her function without fear, favour or prejudice. (b) The National Director of Public Prosecutions is appointed by the President acting on the advice of the Judicial Service Commission. (c) The Minister of Justice has final responsibility for the office of the National Director of Public Prosecutions and may issue directives for the performance of the prosecutorial authority, but may not interfere in decisions taken in individual matters.

1 (cont.)			(d) Where the Minister issues directives it must be in writing and published in the Government Gazette as soon as the interests of justice permits. (e) The jurisdiction, powers and functions, including the appointment of provincial directors of public prosecutions is to be regulated by legislation.

2	Community Law Centre Prof N Steytler	Privacy; Arrested and Detained	The word "unreasonable" should be included in s13: "Everyone has the right to privacy, including the right not to **unreasonably** have - (a) their person or home searched .... The right to privacy, as presently formulated, contains no internal qualifier whatsoever. Thus every limitation of the right must be justified in terms of the limitation clause. This will lead to the following unsatisfactory result. All searches must be justified by the state as being reasonable and/or necessary. This is done in terms of the two principal rules: (a) there must be a reasonable belief that an article which affords evidence of the commission of an offence, may be found in a person's sphere of privacy; and (b) absent exigent circumstances, that there must be prior judicial authorization in the form of a search warrant. As the privacy provision now reads, instead of reserving the limitation clause for exceptional cases, it is used to justify

2 (cont.)			the ordinary and totally acceptable police powers of search and seizure. **s34(1)(d): Bail - Detained & arrested.** Option 2 is referred. Option 1 is subject to the following critique: The wording of option 1 suggests a very elusive right. First, the provision refers to the right to be released without bail, that is to say, with no limitations on the accused's freedom of movement or property. Second, an accused has a right to be released with bail, that is, with limitations of varying degrees (and often very severe) on the accused's rights to movement and property. When is the accused the holder of the unconditional right to be released and when not? Third, when the interests of justice so requires, there is no right to be released at all. The wording of the provisions does not accurately reflect the nature of the right. Submits that the interests of justice are not limited to the question whether the accused should be detained, but are relevant to bail decisions in all its aspects.

2 (cont.)			Option 2 is thus preferred because it more accurately describes the bail process. **s34(3)(1) - To be sentenced within a reasonable time after being convicted. This provision should be deleted** The Draft contains two provisions pertaining to a speedy trial. s35(3)(c) provides in general that a trial should be held within a reasonable time while s35(3)(1) has a more specific focus - after conviction a person has a right to be sentenced within a reasonable time. The interpretation of these two sections, particularly in conjunction with one another, may lead to a different conclusion on the question when the clock stops running in calculating whether there was unreasonable delay, more particularly, whether appellate delay should be included in the period of review. The word "trial" in s35(3)(c) could be given a broad meaning to include the appellate or review proceedings. First, s35(3)(c) contains three distinct rights; public trial, in an ordinary court, and a speedy trial. The rights to a public trial

2 (cont.)			and an indepemdent and impartial court are clearly applicable to appellate or review proceedings. Consistent interpretation of the word "trial" would thus refer to the whole of the proceedings until finality is reached on appeal or review. Second, this interpretation is also consistent with the way in which "trial" is used in the opening line of s35(3). The right to a "fair trial" includes the right "of appeal to, or review by, a higher court" (art 35(3)(n)). A trial is thus not restricted to the proceedings in the trial court, but encompass the whole of the proceedings including appellate or review proceedings. It is submitted that s35(3)(1) should be deleted as it adds nothing to the right to a speedy trial. To the contrary it limits the right by excluding by necessary implication the right to speedy appellate proceedings, a right which has been recognized by the European Court of Human Rights and the Zimbabwean Supreme Court. **S35(4) : Exclusionary rule** Evidence obtained in a manner which violates any right in the Bill of Rights <u>may</u>

2 (cont.)			be excluded if the admission of that evidence would render the rial unfair. The exclusion of evidence obtained in violation of any constitutional right on the basis that it "would bring the administration of justice in disrepute", is borrowed from s24(2) of the Canadian Charter of Rights and Freedoms. From the Canadian jurisprudence it appears that the concept of "disrepute" has not been very useful. First, it is incorrect to talk about the admission of evidence bringing the administration of justice in disrepute. Second, implicit in the criterium is a proportionality test. The classical example is that where the violation is trivial and the offence is serious, then the exclusion of the evidence would bring the administration of justice in disrepute. Third, it is conceptually difficult to determine in whose eyes the administration of justice is being brought in disrepute. In grappling with the concept the Canadian

2 (cont.)			Supreme Court developed two basic tests which determine the exclusion of evidence. First, would the evidence obtained in violation of the Charter lead to an unfair trial? Second, has the violation of a Charter right been serious, deliberate or flagrant? A third test, which the courts refer to but is never determinative, is whether the exclusion of evidence would bring the administration in disrepute. It is submitted the exclusionary rule which the Supreme Court of Canada has developed is more concerned with the fairness of the trial than with the repute of the administration of justice in general. The aim of the exclusionary rule is thus to protect and promote the integrity of the criminal trial now based on constitutional principles. The exclusionary rule thus reinforces the constitutional values of the trial process. The use of a fair trial criterium is precise and clear and should thus be substituted for the vague and imprecise term of "bringing the administration of justice in disrepute".

2 (cont.)			Finally, it should be stressed that the exclusion of evidence must fall within the discretion of the trial court. A mandatory duty to exclude evidence (as is proposed in the Draft) would lead to unacceptable results and would indeed undermine the fairness of the trial from a societal point of view. It is thus submitted that the word "must" should be replaced by "may".

3	Auditor-General	Auditor General	The Auditor General's (AG) submission in the form of a legal opinion raises the following concerns with respect to the working draft:- • The independence and impartiality of the AG; • The need to separate the AG from other institutions promoting Constitutional Democracy; • Comparison of s192(4) of the Interim Constitution and s106(3) of the Working Draft; • The "disappearance" of s193(4) of the Interim Constitution from the working draft; • The AG's support staff and the manner of conducting audits; and • Appointment of the AG 1. **The independence and impartiality of the office of the Auditor General** The question arising for consideration under this rubric is whether the independence of the AG and his office is sufficiently guaranteed in the working draft of the final constitution, especially when compared with ss191-4, s244 and schedule 4 of the Interim Constitution.

3 (cont.)			The AG's legal opinion suggests that there are many political interests which are uncomfortable with the AG's independence and who would prefer to have the AG under direct Parliamentary or Executive control. This, it is argued, would undermine the very function of the AG. The importance of constitutionalising the AG's independence along the lines provided for in the Interim Constitution, subject to Parliamentary control, is emphasised. The provisions in the working draft dealing with the independence and impartiality of the AG, when compared with similar provisions in the Interim Constitution, are according to the AG a cause for grave concern. **2. The need to separate the AG from other institutions promoting Constitutional Democracy** The AG's legal opinion raises concerns that the AG is, in the working draft, not treated as a separate institution, but together with other state institutions in Chapter 7. The lumping together of the AG with the Public Protector, Human Rights

3 (cont.)			Commission, the Commission for Gender Equality and the Electoral Commission, it is argued, tends to lower both the esteem and function of the AG's office. For this reason, it is submitted that the AG should be separated from other state institutions. 3. **Comparison of s192(4) of the Interim Constitution and s106(3) of the Working Draft.** According to the AG's legal opinion, s106(3) of the working draft, as opposed to s192(4) of the Interim Constitution, appears to take away the AG's right to request assistance directly and on own initiative from all organs of state. The AG submits that a constitutional provision empowering the AG to request for such assistance from organs of state should be retained in the final constitution. 4. **The disappearance of s193(4) of the Interim Constitution.** The AG is concerned about the

3 (cont.)			Interim Constitution's s193(4) from the working draft, notwithstanding the fact a similar provision can be provided for in national legislation. The AG realises that his concerns about the disappearance of s193(4) will be met with an answer that a similar provision can be contained in ordinary legislation. The AG's concern, though, is that there is no constitutional guarantee that such a provision will be so legislated. The AG accordingly submit that ss193(4) and (6) of the Interim Constitution be retained in the final constitution as this will ensure full accountability by everyone who controls public funds. **5. The AG's support staff and manner of conducting audits.** Support staff for the AG's office should be constitutionalised to enable the AG to perform his functions effectively. The constitution should also empower the AG to determine the manner in

3 (cont.)			which an audit should be conducted, subject to governmental auditing standards. **6. Appointment of AG** The AG is concerned that s191(2)(a) which required that the AG be nominated by a joint committee of Parliament consisting of one member from each party has been dropped in the working draft and replaced by s115(4). The concern of the AG is that if the AG is appointed by an ordinary committee of parliament, he would effectively be an appointee of the majority party. This can affect the apolitical nature of the AG's office and may lead to political interference and manipulation, thereby undermining the AG's independence. The AG submits that a procedure for the appointment of the AG that will ensure his independence and impartiality should be constitutionalised.

4	Public Protector		The Interim Constitution constitutes the framework and parameters within which the National Public Protector and Provincial Public Protectors operates or should be operating. Unfortunately, the appointment of Provincial Public Protectors has not been without problems. On 28 November 1995, a bill seeking to ensure the appointment of a Provincial Public Protector in Gauteng was withdrawn by the MEC for Finance, Mr Jabu Moleketi. Mr Moleketi stated, as his reason for withdrawing the bill, the fact that the recently published working draft of the Constitution contains no provision on the establishment of Provincial Public Protectors. The fear of the Honourable MEC is that should the final Constitution be passed without a provision on Public Protectors, any appointment of a Provincial Protector in terms of the Interim Constitution would be unconstitutional under the final constitution and the termination of contracts of Provincial Protectors, so appointed, would be financially devastating.

4 (cont.)			There is merit in the Honourable MEC's argument, albeit, not without problems. The prevailing law relating to the appointment of the National Public Protector and Provincial Public Protectors is the Interim Constitution and the Public Protector Act. For this reason it is improper to resist the establishment of any office in terms of the Interim Constitution purely because such establishment might be eclipsed under the final constitution. Furthermore, even if consensus about all clauses of the new Constitution is reached by May 1996, it does not mean that the final constitution will come into operation then. The President would have to promulgate the date on which the Constitution will take effect. Such date will have to be fixed after auditing all Structures of Government as established under the Interim Constitution. Provincial Public Protectors, as envisaged in the Interim Constitution, were not established as an academic exercise, but as a consequence of a need for Public Protector services to be brought closer to the people. The vastness of the country, geographically speaking, makes it impossible for the National Public Protector to function, without regional

4 (cont.)			offices, effectively in the provinces. If it is envisaged that the Public Protector will, in future, be supported by regional offices - the final constitution must contain a provision in this regard, alternatively, the matter must be dealt with in transitional arrangements. The CA is enjoined to consider the future role of Provincial Public Protectors or alternatively similar mechanisms , such as the Public Protector's Regional Offices.

CONSTITUTIONAL ASSEMBLY

SUMMARY OF SUBMISSIONS RECEIVED AS AT 7TH FEBRUARY 1996 (ADDENDUM)

Memorandum to the Constitutional Assembly

THE ACCOUNTABILITY OF THE PROSECUTING AUTHORITY IN THE FINAL CONSTITUTION

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1 February 1996

EXECUTIVE SUMMARY

1. It is of importance to determine in the final Constitution the position of the prosecutorial authority. At present the prosecutorial authority has been established as a fourth branch of government because it is accountable neither to Parliament in any meaningful way nor to the executive in any way. It is not accountable to Parliament because Parliament can neither prescribe policy to the Attorneys-General, nor, should it attempt to do so, enforce the execution of such policy. The Attorneys-General's accountability to the executive has been explicitly excluded by legislation.

2. Attorneys-General routinely make different types of decisions which call for different modes of accountability. Four types of decisions can be distinguished: first, quasi-judicial decisions which are the application of the facts in individual cases to the law; second, the formulation of general prosecutorial policy of how and in which cases prosecutions should be instituted; third, devising crime combatting policies, and fourth, office management decisions, including appointment policies. The first type of decision should be taken by an independent professional person and should, where appropriate, be subject to judicial scrutiny. The other decisions involve matters of public policy and must be subjected to public accountability and formulation. The best method of accountability is through the executive (via the Minister of Justice); the executive should have a final say on matters of policy for which it is accountable to Parliament.

3. In order to counter the possibility that the prosecutorial authority may be manipulated by the executive, the following safeguards should be adopted: first, the executive should have no control over decisions in individual cases; second, all instructions of the Minister of Justice on policy matters should be in writing and made public. This would foster transparent executive supervision.

4. With executive accountability in place, it is not critical whether there is a national attorney-general responsible to the

Minister of Justice or nine attorneys-general responsible to the Minister. For organisational considerations and to promote equality before the law, it is obviously preferable that there is a national attorney general (better called a director of public prosecutions) who would supervise and co-ordinate the work of provincial attorneys-general (or provincial directors of public prosecutions.

5. Proposed formulation:

(a) The authority to institute criminal prosecution on behalf of the State vests in the National Director of Public Prosecutions who must exercise his or her function without fear, favour or prejudice.

(b) The National Director of Public Prosecutions is appointed by the President acting on the advice of the Judicial Service Commission.

(c) The Minister of Justice has final responsibility for the office of the National Director of Public Prosecutions and may issue directives for the performance of the prosecutorial authority, but may not interfere in decisions taken in individual matters.

(d) Where the Minister issues directives it must be in writing and published in the Government Gazette as soon as the interests of justice permits.

(d) The jurisdiction, powers and functions, including the appointment of provincial directors of public prosecutions is to be regulated by legislation.

THE ACCOUNTABILITY OF THE ATTORNEYS-GENERAL IN THE FINAL CONSTITUTION

1. INTRODUCTION

This memorandum seeks to address the central issue of establishing the accountability of the attorneys-general in the final Constitution. This is done by enquiring into their present from of accountability of the attorneys-general, inquiring into the positive features as well as deficiencies.

Accountability as a concept naturally requires definition. On a general level it means to be answerable for one's conduct. But answerable in what sense? The Canadian Royal Commission on Financial Management and Accountability[1] has given the following comprehensive definition of accountability which is linked to the purpose thereof:

> `Accountability is the fundamental prerequisite for preventing the abuse of delegated power and for ensuring instead that power is directed toward the achievement of broadly accepted national goals with the greatest possible degree of efficiency, effectiveness, probity, and prudence.'

To ensure this accountability, control must be exercised over public officials. This can be done by private as well as public institutions, which include the three spheres of state authority, the judiciary, the legislature and the executive.

2. DEVELOPMENT OF THE OFFICE OF THE ATTORNEY-GENERAL

The status of the attorneys-general in South Africa has undergone various changes during this century. Before Union, the attorneys-general of the four provinces were members of the cabinet who held full ministerial authority. The legislation regulating the powers of the attorneys-general to prosecute all provided that the right and power of prosecution in the Attorney-General `is absolutely under his own management and control'. At the National Convention, it was decided to separate the prosecution of crimes from the government and to appoint attorneys-general for each of the provinces and to give them full power to prosecute. The position of the attorneys-general was regulated by ordinary statute in 1917, in terms of section 7(2) of the Criminal

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1. As quoted by Jabbra JG & Dwivedi OP `Introduction: Public service Responsibility and Accountability' in Jabbra JG & Dwivedi OP *Public Service Accountability* (1989) 8.

Procedure and Evidence Act.

In 1926 (under the Hertzog cabinet), in terms of the Criminal and Magistrates' Courts Procedure (Amendment Act) all powers of prosecution were vested in the Minister of Justice who was permitted to assign to the attorneys-general (and the Solicitor-General in the Eastern Districts Local Division), as his deputies, the exercise `of such powers, authorities and functions' in the areas for which such officers had been appointed. The main arguments advanced by the Minister of Justice when introducing the Bill was that the fact that there was no accountability to parliament was unsatisfactory and that it was necessary to make the attorneys-general, through the Minister, answerable to parliament and furthermore that in some `big cases of public importance' it was necessary for the government to intervene.

In 1935 (Act 46 of 1935 s 1) the power of prosecution was again vested in the attorneys-general but they were to -

> `exercise their authority and perform their functions under this Act and under any other law subject to the control and directions of the Minister who may, if he thinks fit, reverse any decision arrived at by an Attorney-General or the Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function'.

This position was retained until 1992 when the position of the attorneys-general in relation to that of the Minister of Justice was again drastically altered by the Attorney-General Act 92 of 1992. In terms of the Act the Minister now has the power only `to co-ordinate the functions of the attorneys-general'. The ultimate control over prosecutions thus no longer rests with the Minister of Justice but, as was the case from 1910-1926, with the various attorneys-general. The Act was clearly aimed at the new constitutional dispensation where it was thought better not to subject the attorneys-general to political control. This position is seemingly confirmed in the interim Constitution.

3. NATURE OF AN ATTORNEY-GENERAL'S ACTIVITIES

An A-G performs a variety of functions and make many different types of decisions. It is therefore impossible to categorise all decisions under one heading. It is also not helpful to label all actions as sui generis as it merely obscures the vast array of decisions. Different types of decisions may be discerned.

First, and foremost, statutory authorized discretionary decisions entail the power to prosecute, withdraw cases, stop proceedings, appeal against adverse decisions, etc. These decisions come the closest to a judicial decision but can at best be classified as

quasi-judicial decisions.[2] Judicial decisionmaking is characterized by the making of reasoned decisions in terms of pre-ordained rules after an adversary contest in open court. In contrast, when A-Gs decide whether or not to institute a prosecution, the decisions are not always made in terms of legal rules; other non-legal factors play an important role. Moreover, it is not done after adversary proceedings in open court accompanied by a reasoned judgment. The routine institution of prosecutions on the basis of prima facie evidence, however, could be regarded as a quasi-judicial function; legal rules are applied to a set of facts without reference to other factors. These decisions do not fall within the domain of public debate but are best taken in terms of professional criteria.

Second, linked to the decision whether to institute a prosecution in a particular case is the formulation of prosecution policy, that is, whether a prosecution should be instituted at all in a type of case in the presence of prima facie evidence. A non-prosecution policy, for example, of certain categories of juvenile accused, is done in pursuance of non-legal considerations. The non-prosecution of public morality crimes would be another example. These policies have profound public impact and belong properly in the public domain.

Third, A-Gs engage in a number of activities aimed at the better control of crime. These activities are administrative of nature but have important consequences for the public. The A-G of the Cape of Good Hope established a special court for sexual offences and child abuse cases in order to protect the victims of those offences. The same A-G participated in community crime forums in an effort to combat gang related crimes. These decision are based on policy consideration of how best to combat crime and make the prosecution service more effective and efficient. These decisions, taken for the benefit of the public, are clearly of public concern.

Finally, there are policy decisions which do not relate to the combatting of crime at all but are integral to the office of an A-G. One such policy decision is a staff appointment policy. Currently representativeness of personnel is an important issue which also falls within the public domain.

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[2] Traditionally defined as a decision in the exercise of a discretion affecting the rights, liberty or property of a person. Although the distinction between pure administrative action and quasi-judicial administrative action has been discarded for purposes of ascertaining the application of the audi alteram partem rule (see Administrator, Transvaal v Traub 1989 (4) SA 731 (A) 759A-B) it is submitted that it can fulfil an important function in the present context.

Because the nature of these decisions vary considerably, different methods of accountability will be more appropriate than others for specific categories.

3. PRESENT FORMS OF ACCOUNTABILITY

Regardless of the formal independence of the attorneys-general as set out above, they still remain subject to the ordinary forms of control of the actions of executive authorities.[3] Their actions are namely subject to judicial control, parliamentary and executive control. The nature of the first two forms of control are described by Baxter[4] as follows:

> `The former provides a monitor of the legality of administrative action while the latter assesses the wisdom or merits of the activities and policies of the Cabinet and public administration. Together they are meant to provide the balances - legal and political - necessary for constitutional government.'

3.1 JUDICIAL CONTROL

Under the previous constitutional dispensation the weight of authority indicated that the discretion of an attorney-general to initiate and prosecute proceedings was, although wide, subject to the normal grounds of review of administrative action. The attorney-general had no power to go beyond the provisions of the statute and should he have done so, acted *mala fide*, with an unlawful purpose, not applied his mind to the matter or not have exercised his discretion at all, the court would have had the power to interfere. The position was the same in respect of the exercise of other statutory powers.

In terms of the interim Constitution, the attorneys-general are clearly an `executive organs of state' and are therefore bound by

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3. In deciding whether to prosecute offences an attorney-general is clearly performing an executive function (once associated with the Royal prerogative of the Crown). The position is the same with regard to the performance of other duties and powers (see s 5 of the Act). Cf Commission of Inquiry into the Structure and Functioning of the Courts (1983) Final Report 534 where it is stated that `[t]he institution of a prosecution on behalf of the Republic is not an executive act of the State, but an act sui generis and performed independently of the Executive'.

4 Administrative Law (1984) 272.

the provisions of the Bill of Rights.[5] Especially the duty of equal treatment could place severe restrictions on the discretionary powers of an attorney-general. Decisions taken and acts performed by the attorneys-general will also qualify as `administrative action' which will therefore make them subject to the provisions of section 24. Under section 24(a) decisions of an attorney-general can be challenged for not complying with the mandatory provisions of the statute concerned, which would include the exercise of powers for an unlawful purpose, and under section 24(b) for failing to comply with the requirements of procedural fairness where s/he is required to do so.

Subsections (c) and (d) of section 24 introduce (at least) two additional grounds of review to those traditionally recognised, namely the non-furnishing of reasons in writing where a person's rights or interests are affected and the non-justifiability of administrative action in relation to the reasons given for it. It is submitted that reasons need only be furnished upon request and not as a matter of course, as this would place an unduly harsh burden upon the prosecuting service. A complainant would be entitled to reasons where a decision is made not to prosecute as his or her rights and interests would clearly be affected by such decision.[6]

In so far as section 24(d) is concerned, an attorney-general, in exercising his or her statutory functions would seemingly be required to act rationally, to consider relevant considerations (and to attach the correct weight thereto) to ignore irrelevant considerations and not to act with dishonest motives. His or her decisions should also be supportable on the basis of the available evidence. The requirement of proportionality can also in certain instances be said to find application.

A complainant now has a choice in appropriate cases whether to rely on section 24 of the interim Constitution or the ordinary administrative law grounds of review or both. In some instances where section 24 and the ordinary grounds of review overlap it might be more advantageous for a complainant to rely on section 24 in light of the requirements of *locus standi*.

3.2. PARLIAMENTARY CONTROL

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5. For the definition of an organ of state, see s 233(1) of the Constitution.

6. Namely, to have the state prosecute someone for an alleged infringement of, e g his/her right to human dignity, freedom and security of the person, privacy etc.

Accountability of the A-Gs to Parliament is sought through the submission of annual reports, questioning by Parliament, and in the final instance, by removal from office. In the first annual reports of 1993 two attorneys-general noted pertinently that they were independent of the control of the Minister of Justice and, as the attorney-general of the Eastern Cape put it, were "answerable solely to Parliament".[7] The A-G of the Witwatersrand (WLD) also noted that he was "now answerable only to Parliament, with the Minister of Justice acting as co-ordinator."[8] The efficacy of the present form of Parliamentary accountability needs to be assessed.

(a) Annual reports of the attorneys-general

In terms of section 5(6) of the Attorney-General Act every A-G has to submit an annual report to the Minister of Justice on his or her activities during the previous year. This report also has to be tabled in Parliament.

The annual reports for the first two years of reporting indicate at the same time both the limitations of this method of accountability and the need for other methods. The reports for 1993 and 1994 reveal directly or obliquely that A-Gs engage in policy decisions on a wide array of matters including prosecution policy, initiatives to combat crime, and staff appointments. At the same time the different approaches to these issues are as varied as the reports themselves. The reports varied considerably in length, depth and adequacy, with no uniform manner of reporting.[9]

(i) Prosecutorial policy

The A-G of the WLD rightly observed that the "Attorney-General has great powers which need to be exercised with care, objectivity and integrity".[10] The powers of the A-G lies in his or her ability to determine prosecutorial policy in general and to decide whether or not to prosecute in individual cases. In neither of these two areas did the reports reveal much.

Only the A-G of the Eastern Cape mentioned prosecutorial policy directly; he wrote that an important part of an A-G's

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[7] 1993 EC Report 2.

[8] 1993 WLD Report 1993 2.

[9] For 1994 the reports ranged from 7 1/2 pages for Natal to 60 pages for the Cape of Good Hope.

[10] 1993 WLD Report 1.

responsibility is the "formulation of prosecution policy".[11] He further revealed that "all existing circulars [pertaining to prosecutorial policy] were withdrawn and replaced by a single codified set of instructions".[12] The purpose of the new loose-leaf instructions manual was to simplify the "task of prosecutors in ascertaining and applying standing instructions".[13]

The variations in prosecutorial policy among A-Gs are only obliquely apparent from the reports. The A-G for the Free State stated a clear prosecutorial policy that no illegal gambling would be tolerated in his area of jurisdiction. In other jurisdictions a similar policy was not followed as appears from the constitutional challenge to selective policing in AK Entertainment CC v Minister of Safety and Security.[14]

(ii) Other policy matters

A few A-Gs initiated innovative projects. The A-G of the Cape of Good Hope established special courts for sexual offences and child abuse cases and a youth offenders' school.[15] In 1994 an assessment centre was introduced to assess at the earliest opportunity whether juveniles should be released into the custody of their parents. Attempts have also been made to get active community participation in dealing with gang activities.[16] In 1994 pilot projects were initiated in the Eastern Cape dealing with the treatment of rape victims and instituting juvenile offender diversionary programme.[17] The A-G of the WLD established a special fraud investigation unit to deal with economic crime as well as a unit for Special Investigation to deal with corruption in the public sector.[18] The A-G for the Eastern Cape also disclosed his policy pertaining to public relations. First, he introduced a policy of a more simplified correspondence style for "the message [to be] more easily understood",[19] and secondly,

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[11] 1993 WLD Report 2.

[12] 1993 WLD Report 10.

[13] Ibid.

[14] 1994 (2) SACR 718 (E).

[15] 1993 Cape Report. See also 1994 Cape Report 14-23, 26-7.

[16] 1994 Cape Report 23-4, 27-9.

[17] 1994 EC Report RP 110/1995, 11, 14.

[18] 1993 WLD Report.

[19] 1993 EC Report 4. See also 1994 EC Report 12.

that reasons for decisions are made known to the public.

(iii) Personnel policy

No uniformity of reporting was evident on personnel policy. On the critical issue of the appointment of black lawyers to the prosecutorial service, only three A-Gs[20] revealed in 1993 the racial composition of their staff. Only the Eastern Cape A-G noted any policy reasons for this statistic; he said that there were "considerable public interest in the progress made by members of hitherto disadvantaged groups in occupying posts in various professions."[21]

In the 1994 reports the picture changes dramatically. Most A-Gs now note the statistics[22] and some note the need to achieve a more representative composition of their personnel.[23] The policy of affirmative action was indirectly raised by the A-G of the Northern Cape who noted that the morale among white prosecutors were low because of their concern about their prospects of promotion.[24]

(iv) Performance

The reports contain a variety of statistics but those which deal with the effectiveness and efficacy of the prosecutions are not revealed in a consistent or comprehensive manner.

The Transvaal A-G omitted any reference to the number of prosecutions in the district courts. The Natal A-G did likewise and only noted activities of state advocates in the lower courts. These omissions could be the result of defining the scope of accountability as excluding lower court prosecutors (which is unacceptable) or that there was no sufficient information (which is equally inexcusable).

There is only limited and peculiar information about the success rate of prosecutions. With regard to Supreme Court cases, only

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[20] WLD, Natal and Eastern Cape.

[21] 1993 EC Report 12.

[22] 1994 Natal Report RP 108/1995, 2; 1994 NC Report RP 107/1995, 2; 1994 OFS Report RP 109/1995, 3; 1994 WLD Report RP 100/1995, 5; 1994 EC Report 4, 15. Only the 1994 Tvl Report RP 106/1995 contains no such statistics.

[23] 1994 OFS Report 2;

[24] 1994 NC Report 4. See also 1994 WLD Report 6, 17.

the number of death penalties `obtained' were noted.[25] No information was given about the outcome of appeals or prosecutions. With regard to regional court prosecutions, the majority of the A-G gave, however, the number of convictions obtained on murder charges.[26] These figures are essential for questions to be asked about the low conviction rates of 17% in the Transvaal;[27] 21% in the OFS[28] and 28% in the Cape.[29] Was it a question of poor investigation by the police, ineffective prosecution, or overcharging to start with?

In the regional courts the A-G for the Transvaal could report that the percentage of acquittals has decreased from 59,1% in 1993 to 31,8% in 1994.[30] With regard to the district court, the Northern Cape reported an 87% conviction rate for 1994.[31]

Little information is given about the length of court delays which is in part a function of efficient case management. A number of A-Gs alluded to this problem, but only the A-Gs of Natal,[32] the Northern Cape[33] and the Cape[34] reported the actual period of delay in Supreme Court trials.

Statistics on all these issues are seemingly available (or at least should be). Why are then, then, not provided? In the absence of adequate and comprehensive statistics Parliament will not be able to assess the performance of the prosecution service.

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[25] See, for example, 1994 OFS Report 13; 1994 NC Report Annexure A, 2; 1994 Tvl Report 11; 1994 WLD Report 21.

[26] See 1994 OFS Report 14;

[27] 1993 Tvl Report; 1994 Tvl Report 13.

[28] 1993 OFS Report. 1994 OFS Report 14.

[29] See also 1994 Cape Report Statistics 3-4.

[30] 1994 Report 13.

[31] 1994 Report RP 107/1995, 3.

[32] In the 1994 NC Report (2) reference is made only to the 12 month delay period from arrest to trial in the Pietermaritzburg Supreme Court.

[33] The average waiting period for both criminal cases and appeals is approximately three months (1994 NC Report 2).

[34] A 12 month delay in the Supreme Court between arrest and trial, 1994 Cape Report 41.

(iv) Evaluation

Annual reports are certainly a necessary requirement for any institution. To be of value they have to be comprehensive and deal with issues that matter. In this regard the annual reports of A-Gs fall short of the mark. They did not disclose their activities which would have called for answers: the effectiveness of their performance (conviction rate and the length of delays) or the policy decisions. There are extensive and comprehensive instructions issued every year by the various A-Gs. The appropriateness of the standing instructions and whether they should be made public, are certainly questions that Parliament should and could have debated. Instead of providing important information, the Reports became persuasive pleas for more staff, better pay and adequate accommodation.

On their own annual reports cannot be a sufficient form of accountability. The accountability to Parliament has to occur in a much more direct way - through the questioning of A-Gs by Parliament. There they could be probed for more information about how they executed their task, both with regard to questions of policy and practice.

(b) Questions and replies

The second method of control in this context is provided for in section 5(5) of the Attorney-General Act which provides for `the furnishing, on request, to the Minister of Justice, of information or a report on any case, matter or subject dealt with or handled by an attorney-general' and for the furnishing of reasons for any decision taken by an attorney-general `in the performance of his duties or the exercise of his functions'.[35] The aim of this provision must, inter alia, be to enable the Minister to answer questions posed to him by members of parliament relating to the exercise of powers by the attorneys-general.[36] To date no such questions has been put to the Minister.

(c) Committees

Parliamentary committees have, in terms of the Constitution, vast powers in order to enable it to fulfil its functions. Section 58(2) of the Constitution provides the following in this regard:

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[35] See Geldenhuys & Joubert (eds) Strafprosesreg Handboek (1994) 45.

[36] See also the speech of the Minister of Justice at the Second Reading Debate of the Attorney-General Bill, Hansard Friday 5 June 1992 col 10282-3.

> For the purposes of exercising its powers and performing its functions, any committee...shall have the power to summon persons to appear before it to give evidence on oath or affirmation and to produce any documents required by it, and to receive representations from interested persons.[37]

The standing committee(s) on Justice undoubtedly can exercise this power with regard to the attorneys-general.

In 1994 the A-Gs were not called by the Select Committee on Justice to give evidence before it. In 1995 the A-Gs "volunteered" to appear before the Committee in 1995 and in September / October 1995 the first hearings were held. Searching questions were put to some attorneys-general why no prosecution was instituted in a particular cases or cases.

Even if these avenues of parliamentary accountability are fully explored, Parliament performs only a monitoring function and cannot formulate prosecutorial policy. It can question a prosecutorial policy but it is doubtful whether it can formulate a policy which it then entrust to the A-Gs to execute. In essence parliamentary accountability is about calling the A-Gs to account for what they have done. It does not include instructions on how to executive their tasks. As Gladstone once put it,

> "Parliament's function is not to govern the country but to call into account those who do govern it."[38]

The A-Gs are not officers of Parliament taking instructions from Parliament and then account to it. The Committee could not instruct an A-G to institute a prosecution in a particular case. Equally it could not instruct the A-Gs that diversion programmes for juveniles must be introduced in each jurisdiction. If an intervention is to take place it is through legislation, providing legislative authority for, say, diversion programmes. Should Parliament attempt to give instructions, the refusal of an A-G to obey may well be without any consequences, unless, of course, such conduct falls within the parameters of impeachable conduct.

(d) Removal from office

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[37] See also Standing Rule no 53(a)-(c) for the National Assembly and for the Joint Business and Proceedings of the National Assembly and the Senate (February 1995).

[38] Quoted in Baxter supra 272.

Parliament has the ultimate power to dismiss an A-G.[39] The grounds of dismissal are the following: (a) misconduct; (b) continued ill-health; and (c) incapacity to carry out duties efficiently. The President may suspend an attorney-general in terms of section 4(3) of the Attorney-General Act pending the decision of Parliament. This suspension has to be communicated to Parliament within 14 days,[40] whereupon Parliament has the power to overturn the suspension by an ordinary majority. Parliament can also, on its own account, instruct the President to remove an A-G from office on one of the above grounds.[41]

The term `misconduct' and `incapacity' is not defined in the Attorney-General Act. The same terms were, however, used in the 1961 and 1983 constitutions with regard to the removal from office of the State President. These sections namely provided that the State President could be removed from office on the grounds of misconduct or incapacity. The terms `misconduct' and `incapacity' were not defined in either of the two constitutions either, but has been the subject of debate in academic circles. Wiechers,[42] relating to the removal from office of the State President (as head of state) under the 1961 Constitution holds the view that non-compliance of the State President with conventions would constitute misconduct. He also says the following with regard to the terms `misconduct' and `incapacity':

> Die begrippe "wangedrag" en "onvermoë" om sy ampspligte doeltreffend uit te voer" het 'n sterk politieke kleur en kan nie vooraf juridies vasgestel word nie. Dit is vir die volksraad self om die omstandighede te beoordeel en te besluit of die staatspresident se gedrag of vermoë tot sy ontheffing moet lei.

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[39] As is the case with the public protector (see new Act) and the Auditor-General (see s 191(9) of the Constitution).

[40] Section 4(3)(b) also refers to the position should Parliament not be in session at the time of the suspension. It is namely required that in such an instance the reason for the suspension shall be communicated to Parliament by message within 14 days after the next ensuing session. The interim Constitution provides, however, that Parliament is in continuous session during the five year interim period (See Rautenbach & Malherbe Staatsreg (1994) 106). The latter part of paragraph (b) can thus for all practical purposes be ignored.

[41] S 4(4).

[42] *Verloren van Themaat Staatsreg* 3d ed (1985) 231.

Basson and Viljoen[43] are of the view that the terms `misconduct' and `incapacity' in section 9(3) of the 1983 Constitution could be interpreted by having regard to the oath the state President had to take before taking office. They therefore conclude that

> (e)nigiets wat hy byvoorbeeld sou doen wat nie tot voordeel van die land is nie of wat die land kan skaad of wat 'n oortreding van die Grondwet sou wees, sou as wangedrag beskou kon word.

It is submitted that the oath the attorneys-general have to take in terms of schedule 3 of the interim Constitution also provides an invaluable guide as to the meaning of the term `misconduct' and `incapacity'. The oath they have to take is the following:

> I, A.B., do hereby swear/solemnly affirm that I will in my capacity as Attorney-General uphold and protect the Constitution of the Republic of South Africa and the fundamental rights entrenched therein and in so doing enforce the Law of the Republic without fear, favour or prejudice, in accordance with the Constitution and the Law of the Republic.[44]

A decision of the attorneys-general (or perhaps repeated occurrences thereof) not to prosecute for some or other reason (even though evidence of a serious crime having being committed exists) may affect the individual in his or her right to life (s 9), human dignity (s 10), privacy (s 13), religion, belief and opinion (s 14), et cetera, and might for that reason alone constitute `misconduct' or prove that the attorney-general is incapable of carrying out his or her duties of office efficiently.

Other actions of the attorneys-general which are clearly contrary to the provisions or the spirit of the constitution (even though the action does not constitute a criminal offence) can also constitute grounds for the removal from office.

The power of Parliament to remove an A-G is the same as its power to remove judges. The same grounds are listed and the same procedure must be followed. The prospect of removal is thus limited to extreme cases and cannot be as a result of differences over policy.

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[43] *Suid-Afrikaanse Staatsreg* (1988) 52.

[44] See also s 2(5) of the Attorney-General Act. Schedule 3 of the Constitution probably overrides this provision; see s 4(1) of the Constitution.

3.3. EXECUTIVE CONTROL

The Act limits the power of the Minister of Justice to "co-ordinate the functions of the attorneys-general" and to request information on specific decisions or in general.[45]

(a) Co-ordinate

The concept "co-ordinate" cannot be equated to "control or given direction to". The Shorter Oxford Dictionary defines "co-ordinate", inter alia, as "to act in combined order for the production of a particular result". The Concise Oxford Dictionary again defines the verb as follows: to "bring (various parts, movements, etc.) into a proper or required relation to ensure harmony or effective operation". The concept includes two important components. First, an active role for the co-ordinator to "bring various parts into a proper or required relation". Second, the proper relationship is one of achieving "a particular result, be it "harmony or effective operation".

The dictionary meaning of "co-ordinate" should, however, be seen in the context of the previous position which the Act sought to change. The intention of the legislature was precisely to remove the A-Gs from the control of the executive. The danger of seven free-ranging A-Gs was presumably foreseen and the duty of co-ordinating their functioning was thus entrusted to the Minister. It intention was not to give the Minister control over the prosecution service but to address the problem which may arose when more than one independent A-G are seized with the same case. In such a situation where there may be contesting interests, the Minister may presumably intervene to co-ordinate the activities of the A-Gs.

(b) Request information

The power to request information implies a reciprocal duty on an attorney-general to provide the requested information. This duty arises both from the logic of provision and the heading of the section. The heading of the section refers to the "duties and powers of attorney-general". The duties of the A-G can only refer to submitting a yearly report and information requested by the Minister. There is thus a clear legal duty on the A-Gs to furnish the Minister with any information.

Should an A-G refuse to provide information or furnish inadequate information, then it can be argued that he or she is guilty of a dereliction of duty which would constitute "misconduct" in terms of s 4. The President may then suspénd the A-G and Parliament can remove the person from office.

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[45] S 5(5).

While the Minister's power is limited to the request for information, it could play some role in influencing policy decisions. Moreover, if the information discloses non-compliance with the Constitution and the chapter on fundamental rights, then it may provide grounds for removal.

3.4. EVALUATION

The efficacy and the appropriateness of the various methods of accountability depend on the type of decision taken. The quasi-judicial decisions A-Gs take are best reviewed by the judiciary. The judicial control of an A-G's discretion, although now extended by the bill of rights, is limited to legal disputes which is by its very nature mostly retrospective in effect. Effective prospective accountability on policies has to be sought elsewhere.

Parliamentary accountability is limited to providing information. Only in extreme cases of the dereliction of duty amounting to "misconduct" would the removal of an A-G be legally viable. For Parliamentary accountability to be efficacious it has to entail more than providing a report of activities or giving answers to questions. Effective executive accountability to Parliament is predicated on Parliament's power to remove the executive from office when there is disagreement on a point of policy. The same form of Parliamentary accountability is neither possible nor appropriate. Parliament cannot dismiss an A-G on a point of policy. Nor should Parliament be able to do so. A-Gs do not form a fourth branch of government. In terms of the trias politica[“] the proper structure of checks and balances would be for the executive to be accountable to Parliament for the policy decisions of the prosecutorial authority. Executive control over the A-Gs is, however, explicitly excluded by the Attorney-General Act. "Co-ordination" is no substitute for executive responsibility. The result is that the A-Gs are accountable in the final analysis only unto themselves. Independence from the executive thus translates into a lack of accountability.

The lack of accountability on matters of policy arises from the notion of prosecutorial independence. It does not fit into the underlying structure of the Constitution based on the doctrine of separation of powers between the legislature, the executive and judiciary and the concomitant need for checks and balances. Should be prosecutorial authority exercise a judicial function, then indeed should executive control be excluded. Parliamentary control should then be limited to the removal of an A-G in the extreme cases of misconduct in the same way Parliament exercises

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[“] Enshrined in Constitutional Principle VI of the Constitution.

control over the judiciary through the power of impeachment.[47] It is, however, accepted that an A-G does not perform a judicial function, but, at best, a quasi-judicial function in some of its duties.

The lack of accountability for policy decisions is compounded by the fractured nature of the prosecution service. There are currently 11 independent prosecution agencies; the seven A-Gs of the old South Africa and the four from the previous independent homelands. In all likelihood Supreme Court divisions will be established in each province and consequently an attorney-general's office for each of the nine jurisdictions. The fractured nature of the prosecution service has major implications for the principles of equality before the law. Although complete uniformity of policy is not necessary or even desirable in each jurisdiction, a uniform approach may well be constitutionally required. Furthermore, the exigencies of practice requires a national approach to the crime crisis. There are thus persuasive arguments why the prosecution authority should function as a unified service and the appointment of a national attorney-general is essential.

4. ESTABLISHING THE ACCOUNTABILITY OF THE PROSECUTORIAL AUTHORITY IN THE CONSTITUTION

It has been suggested above that the major shortcoming in the accountability of the prosecutorial authority is the lack of executive responsibility. Any improvement in the overall accountability will have to occur in this area. It is also the most contested area. A number of arguments have been put forward why executive responsibility is inappropriate. Two related reasons are given. First, the decision to prosecute is a quasi-judicial decision which is best exercised by a professional lawyer. Related to the first, and more importantly, there is a fear that the decision to prosecute may be manipulated for partisan political purposes. Both these reasons are legitimate and the exclusion of quasi-judicial decisions from executive responsibility is justified.

Who should, however, take final responsibility for the numerous "non-judicial" policy decisions which are of great public importance? Who should account for the policy decisions dealing with the formulation of appropriate crime strategies, selective prosecution policies, the relationship with the police service, the creation of special courts for particular types of offences, the institution of juvenile diversion programmes, employment policy, to name but a few?

Executive responsibility for these policy decisions is necessary

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[47] See s 104(4) of the Constitution, Act 200 of 1993.

and has traditionally been part and parcel of democratic governance. The danger of the executive abusing its power for narrow party political purposes cannot be excluded. The question is then how the relationship between the prosecutorial authority and the executive should be structured. From a range of models, two are pertinent to the concerns raised.

The Namibian Supreme Court has adopted an attenuated executive control model. As the name of the recent decision - ex parte: in re the Constitutional Relationship between the Attorney-General and the Prosecutor-General[48] - suggests, the Court had to determine the extent of the prosecutor-general's accountability to the executive. The prosecutor-general is appointed effectively by a judicial service commission which give the incumbent tenure subject only to impeachment and thus a large measure of independence. The Attorney-General, a political position in the Cabinet, is, however, required to take "final responsibility" for the office of the Prosecutor-General.[49] This excluded the power, the Court held, to instruct the prosecutor-general to institute a prosecution, to decline to prosecute, or to terminate a pending prosecution. Furthermore, the attorney-general may not direct the prosecutor-general to take or not to take any steps which the prosecutor-general may deem desirable in connection with the preparation, institution or conduct of prosecutions.[50] The Court thus defined this relationship as follows:

> "Thus interpreted, the office [of the Prosecutor-General], appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor. I accept that on this view of the respective Articles the 'final responsibility' may be more diluted and less direct but it is nevertheless still possible for such responsibility to be exercised provided that the Attorney-General is kept properly informed. On this view of the matter the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the

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[48] 1995 (8) BCLR 1070 (NmS).

[49] Art 87(a).

[50] 1074B-D, 1089G.

office of the Prosecutor-General."[51]

The principle that the attorney-general may not interfere in the prosecution of individual cases is supported. Why all other matters should also be excluded from the attorney-general's control, is difficult to understand in the light of the latter final responsibility for the office of the Prosecutor-General.[52] How can the Attorney-General bear final responsibility to the legislature when he or she has no power to determine policy but is limited to be kept informed about the actions of the Prosecutor-General. He or she is thus relegated to the press secretary of the Prosecutor-General. The Court, in answering this objection, suggested that there should, by convention, be regular consultations between the attorney-general and the prosecutor-general. It has been asked about what?[53] The suggestion may be a practical solution but it is hardly a constitutional one. As long as both parties are willing to consult (and negotiate in private?), a constitutional question about the distribution of power is avoided. This model of executive responsibility is not very helpful for South Africa because it interprets the specific provisions of the Namibian Constitution and, more importantly, fudges the central question of executive accountability.

A second model is the open and transparent executive model of executive responsibility. After a series of corruption scandals in Australia involving the prosecution authorities, legislative attempts have been made to safeguard against the political manipulation of the prosecutorial function.[54] No complete separation of powers was, however, sought. In the Australian state of Victoria which sought to give the Director of Public Prosecutions (DPP) the greatest independence, the DPP remains nevertheless "responsible to the Attorney-General [Minister of Justice] for the due performance of his functions".[55]

After legislative reforms at federal level, the Australian DPP still performs his or her powers "subject to such directions or

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[51] ???

[52] See Panel of Expert to the Constitutional Assembly, Memorandum to the Chairpersons and Executive Director of the Constitutional Assembly 29 September 1995.

[53] Ibid.

[54] See John L Edwards "The office of the attorney-general - new levels of public expectation and accountability" Unpublished discussion paper for meeting of Commonwealth Law Ministers, 15-19 November 1993, Mauritius.

[55] Act 9848 of 1982 s 9(2).

guidelines as the Attorney-General [Minister of Justice], after consultation with the Director, gives or furnishes to the Director in writing".[56] The principle of political control is maintained but it is made open and accountable. Any direction must be writing and be published in the Government Gazette at the time it is issued or after the completion of a particular case. The requirement of publicly committing instructions to writing has the potential of making a major contribution towards the twin goals of openness and accountability.

The latter model of executive responsibility is preferable. Rather than run away from the problem of political manipulation and create an unaccountable prosecutorial authority as in Namibia, the problem should be confronted head on. The strategy of openness and transparency appears an admirable solution. In the context of South African constitutionmaking it is also the appropriate response. Constitutional Principle VI requires that "[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." In addition Constitutional Principle IX demands that [p]rovision shall be made for freedom of information so that there can be open and accountable administration at all levels of government." It is thus submitted that adequate accountability can only be achieved by entrusting the policy making decisions to the executive which should be done in an open and transparent manner.

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[56] Act 113 of 1983 s 8(1).

MEMORANDUM TO THE CONSTITUTIONAL ASSEMBLY

COMMENTS ON THE CRIMINAL PROCEDURE PROVISIONS OF THE BILL OF RIGHTS

Professor Nico Steytler
Community Law Centre

2 February 1996

1. SECTION 13: PRIVACY

The word "unreasonable" should be included in s 13:

> "Everyone has the right to privacy, including the right not have **unreasonably**
>
> (a) their person or home searched ....

The right to privacy, as presently formulated, contains no internal qualifier whatsoever. Thus every limitation of the right must be justified in terms of the limitation clause. This will lead to the following unsatisfactory result. All searches must be justified by the state as being reasonable and/or necessary. This is done in terms of the two principal rules: (a) there must be a reasonable belief that an article which affords evidence of the commission of an offence, may be found in a person's sphere of privacy; and (b) absent exigent circumstances, that there must be prior judicial authorization in the form of a search warrant.[1]

In a number of well-recognized situations (accepted in the USA, Canada and other jurisdictions) the police may dispense with both these requirements by holding a roadblock for the purposes of road safety; no individualized reasonable belief or a search warrant is then required.

In order to justify a roadblock, the state must prove, in terms of the Draft Constitution, an exception of an exception, a task that could be very difficult if not impossible in terms of the limitation clause.

As the privacy provision now reads, instead of reserving the limitation clause for exceptional cases, it is used to justify the ordinary and totally acceptable police powers of search and seizure. The consequence of the proposed amendment would be that the usual rules of search and seizure would be developed in terms of what is reasonable or not, resorting only to the limitation clause in exceptional circumstances.

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[1] See Criminal Procedure Act 51 of 1977, s 20 and 21.

The prohibition against unreasonable searches and seizures is the standard way in which the right to privacy is expressed in both international instruments and national constitutions.

2. SECTION 34(1)(d): BAIL

Option 2 is preferred.

Option 1 is subject to the following critique:

The wording of option 1 suggests a very elusive right. First, the provision refers to the right to be released without bail, that is to say, with no limitations on the accused's freedom of movement or property. Second, an accused has a right to be released with bail, that is, with limitations of varying degrees (and often very severe) on the accused's rights to movement and property. When is the accused the holder of the unconditional right to be released and when not? Third, when the interests of justice so requires, there is no right to be released at all. What, then is the nature of the right?

The wording of the provisions does not accurately reflect the nature of the right. The core elements of the right are, first, that the infringement of an accused's right to freedom pending the outcome of the criminal proceedings should be decided by a court of law; second, the court of law should consider the accused's freedom at his or her first compulsory court appearance and until finality is reached in the case; and third, a court of law should decide the issue in accordance with the interests of justice. In short, an accused has a right to have his or her release considered by a court of law in accordance with the interests of justice. The interests of justice will be prejudiced if there is no trial (when the accused absconds), when the trial will not be fair both to the accused and the state (where an incarcerated accused will be hampered in his or her defence or where the accused destroys evidence or intimidate witnesses to the prejudice of the state), or where other purposes of criminal justice will be defeated (when the accused commits further offences).

The decision whether or not to release an accused is made with reference to the following questions. The first question is whether the interests of justice will be prejudiced if the accused is released with only a warning to appear on the next court date. If the answer to this question is no, then the accused should be released. If the answer is yes, then the court has a further decision to make. Can the interests of justice be safeguarded through the impositions of conditions, such as the payment of a bail amount or the imposition of bail conditions. If the answer is yes, then the accused should be released on appropriate bail conditions. If the answer is no, then, the accused should remain in custody. Further rules may come into

play when it is not clear whether the interests of justice will be prejudiced. In a case of uncertainty the accused may receive the benefit of the doubt.

From this systematic analysis, it is submitted that the interests of justice are not limited to the question whether the accused should be detained, but are relevant to bail decisions in all its aspects.

Option 2 is thus preferred because it more accurately describes the bail process. First, the right to be released is subject to reasonable conditions. This means that bail conditions must be reasonable in terms of the principles of bail. This is another way of saying that the release must be in the interests of justice. Likewise, bail may be denied where the interest of justice so require.

In both options there is no location of an onus of proof on any party. The Court held in Ellish v Prokureur-Generaal, WPA[2] with regard to s 25(2)(d) of the interim Constitution (similar to the wording of option 1) that there is no question of any party having to shoulder a burden of proof because the court must hold an inquiry whether the accused should be released. The wording of option 2 does not change the structure of the bail decision in any way. There can be no onus of proof; the court must hold an inquiry in accordance with accepted bail principles.

3. SECTION 34(3)(1): TO BE SENTENCED WITHIN A REASONABLE TIME AFTER BEING CONVICTED

This provision should be deleted.

The Draft contains two provisions pertaining to a speedy trial. Section 35(3)(c) provides in general that a trial should be held within a reasonable time while s 35(3)(1) has a more specific focus - after conviction a person has a right to be sentenced within a reasonable time. The interpretation of these two section, particularly in conjunction with one another, may lead to different conclusion on the question when the clock stops running in calculating whether there was unreasonable delay, more particularly, whether appellate delay should be included in the period of review.

The word "trial" in s 35(3)(c) could be given a broad meaning to include the appellate or review proceedings. First, s 35(3)(c) contains three distinct rights; public trial, in an ordinary court, and a speedy trial. The rights to a public trial and an independent and impartial court are clearly applicable to appellate or review proceedings. A consistent interpretation of

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[2] 1994 (2) SACR 579 (W).

the word "trial" would thus refer to the whole of the proceedings until finality is reached on appeal or review. Second, this interpretation is also consistent with the way in which "trial" is used in the opening line of s 35(3). The right to a "fair trial" includes the right "of appeal to, or review by, a higher court" (art 35(3)(n)). A trial is thus not restricted to the proceedings in the trial court, but encompass the whole of the proceedings including appellate or review proceedings.

The idiosyncratic provision that an accused person has the right "to be sentenced within a reasonable time after being convicted", may suggest a different conclusion. A literal and plain reading of this provision leads one to the conclusion that an accused has two separate rights pertaining to the speedy completion of proceedings. The first right, contained in s 35(3)(c), is limited to a speedy trial up to conviction, whereafter a second right, s 35(3)(l), kicks in.

The necessity of the latter provision is hard to fathom as the evil which the right to a speedy trial seeks to eradicate is seldom tardiness on the part of the prosecution to proceed with mitigation of sentence. (I have yet to come across such a provision in another constitution or international instrument). The dominant players in the sentencing process are usually the accused (advancing mitigating factors) and the court (deciding upon a suitable sentence), and in practice they are seldom dilatory in the execution of these tasks. The only advantage of s 35(3)(l) may be that the right to a speedy pronouncement of sentence brings explicitly the conduct of the sentencing officer under review.

It is submitted that s 35(3)(l) should be deleted as it adds nothing to the right to a speedy trial. To the contrary, it limits the right by excluding by necessary implication the right to speedy appellate proceedings, a right which has been recognized by the European Court of Human Rights[3] and the Zimbabwean Supreme Court.[4]

4. SECTION 35(4): EXCLUSIONARY RULE

Evidence obtained in a manner which violates any right in the Bill of Rights may be excluded if the admission of that evidence would render the trial unfair.

The exclusion of evidence obtained in violation of any constitutional right on the basis that it "would bring the

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[3] Wemhoff v FRG 27 June 1968, Series A, no 7, § 18; Eckle v FRG 15 July 1982, Series A, no 51 § 77.

[4] Corbett v The State [1990] LRC (Crim) 30.

administration of justice in disrepute", is borrowed from s 24(2) of the Canadian Charter of Rights and Freedoms. In interpreting the interim Constitution, a South African Court has also borrowed the concept.[5]

There are a number of difficulties with the concept of bringing "the administration of justice in disrepute". From the Canadian jurisprudence it appears that the concept of "disrepute" has not be very useful.

First, it is incorrect to talk about the admission of evidence bringing the administration of justice in disrepute. In the leading Canadian decision of Collins v the Queen[6] Lamer J (later Chief Justice of Canada) opined that since the police conduct which violated the Charter, has already brought the administration of justice in disrepute, the purpose of s 24(2) of the Canadian Charter is "to prevent having the administration of justice brought into further disrepute by the admission of evidence into the proceedings". Thus, the phrase does not describe accurately the reason for the exclusion of evidence.

Second, implicit in the criterium is a proportionality test. The classical example is that where the violation is trivial and the offence is serious, then the exclusion of the evidence would bring the administration of justice in disrepute. In Canada this balancing test does not hold because the seriousness of a crime does not outweigh a violation that would lead to an unfair trial. In Canada the most important test whether evidence should be excluded, is whether it would render the trial unfair, irrespective of the seriousness of the crime.

Third, it is conceptually difficult to determine in whose eyes the administration of justice is being brought in disrepute. The Supreme Court of Canada has said that it is neither the judgment of the court nor the result of a popular opinion poll. It not very helpful to refer to the mythical a reasonable person "dispassionate and fully apprised of the facts".[7] As a yardstick, the test is thus not very useful, indeed it is misleading.

In grappling with the concept the Canadian Supreme Court has developed two basic tests which determine the exclusion of evidence.[8] First, would the evidence obtained in violation of the Charter lead to an unfair trial? A trial would be unfair where an

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[5] S v Melani 1995 (2) SACR 141 (E) 152h-j.

[6] (1987), 38 DLR (4th) 508 (SCC) at 523.

[7] Collins v the Queen supra 524.

[8] First formulated in Collins v the Queen supra.

accused is conscripted to provide self-incriminating evidence, such as a confession. This will be the case where an accused has been denied access to a lawyer before making the confession. Second, has the violation of a Charter right been serious, deliberate or flagrant? The admission of such evidence would amount to a condonation by the court of the unconstitutional police conduct. A third test, which the courts refer to but is never determinative, is whether the exclusion of evidence would bring the administration in disrepute. In terms of this test the court must apply a proportionality test; does the seriousness of the offence outweigh the violation. In practice, however serious the offence, if the admission of the evidence would lead to an unfair trial, the evidence is excluded.

It is submitted the exclusionary rule which the Supreme Court of Canada has developed is more concerned with the fairness of the trial than with the repute of the administration of justice in general. The exclusion of evidence is not to punish or deter police officers,[9] although it may be an additional advantage if it secures compliance.[10] The aim of the decision on exclusion is thus not to rectify the harm done by the police, but to prevent that the use of unconstitutionally obtained evidence results in an unfair trial. The aim is thus not to provide a remedy for past wrongs, but to ensure that the right of the accused to a fair trial is not jeopardized by the past wrongs of the police.

At the trial stage, when the issue of evidence is relevant, two constitutional rights in particular may be compromised by police or prosecutor's wrong doing: first, the right not to be compelled to be a witness against oneself (the right to remain silent, not to be compelled to make any confession or admission), and second, the right to an impartial court. In the latter case, a court which condones a blatant constitutional violation by the police, takes the side of the prosecution in its efforts of obtaining a conviction at any cost, thus compromising its impartiality.[11]

It is thus proposed that the exclusionary rule should reflect these concerns. The admission of any evidence which would compromise these rights, which stand central to a fair criminal trial, undermines the constitutional nature of the proceedings. The aim of the exclusionary rule is thus to protect and promote the integrity of the criminal trial now based on constitutional principles. The exclusionary rule thus reinforces the constitutional values of the trial process.

---

[9] S v Hammer 1994 (2) SACR 496 (C) 499f. See also Collins supra 519.

[10] Van der Merwe 1992 Stell Law Review 185.

[11] See Van der Merwe 1992 Stell Law Review 184.

What is required is a clear link between the violation and the trial because not all pre-trial violations have any significance for the trial or can be remedied by it. For example, an unconstitutional arrest has no effect on the court's jurisdiction. The question is thus narrow; will the pre-trial violation lead to an unfair trial? In short, the rationale for the exclusionary rule is the preservation of judicial integrity defined in terms of the principles of a fair trial.

The use of a fair trial criterium is precise and clear and should thus be substituted for the vague and imprecise term of "bringing the administration of justice in disrepute".

Finally, it should be stressed that the exclusion of evidence must fall within the discretion of the trial court. A mandatory duty to exclude evidence (as is proposed in the Draft) would lead to unacceptable results and would indeed undermine the fairness of the trial from a societal point of view. It is thus submitted that the word "must" should be replaced by "may".

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

OFFICE OF THE AUDITOR-GENERAL
KANTOOR VAN DIE OUDITEUR-GENERAAL

REFERENCE / VERWYSING
ENQUIRIES / NAVRAE
DATE / DATUM 29 January 1996

446 PRETORIA 0001
AUDITOR
FAX / FAKS

Dr R H Davies
Chairperson: Theme 6 Committee: Subtheme 2
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Dr Davies

PROVISIONS RELATING TO THE AUDITOR-GENERAL IN THE DRAFT FINAL CONSTITUTION

I enclose for your information and possible consideration, a legal opinion the Office has obtained regarding the above.

I shall be pleased to discuss the above with you, should you require this.

Yours sincerely

H E KLUEVER
AUDITOR-GENERAL

In the matter of:

THE AUDITOR-GENERAL **Consultant**

OPINION

1.

The Consultant has honoured me with a further instruction and has requested an opinion regarding the provisions relating to the office of the Auditor-General in the Draft Final Constitution.

2.

In his written instruction to my attorneys, the question has been put as follows:

> **"The Auditor-General and his Office ... require an authoritative legal opinion and comment on the legal merits or otherwise and of the consequential positive and/or negative practical effects of the provisions pertaining to the Auditor-General in the final Draft Constitution when compared to the Interim Constitution (more specifically sections 191 to 194, section 244 and schedule 4 - Principles xi, ix and xxix thereof)".**

3.

In order to be able to answer this question properly, it is necessary to place the office of the Auditor-General in perspective.

4.

This office has its origin in English parliamentary practice, where the official is called the Comptroller and Auditor-General.

5.

It is an office of very great importance and high esteem, as is apparent from the following quotation from **Halsbury's Laws of England, 4th edition, Volume 8 (Constitutional) paragraph 1372 -**

> **"The Comptroller and Auditor General is the head of the Exchequer and Audit Department. He is appointed by Letters Patent under the Great Seal. He holds his office during good behaviour, subject to removal by the Crown on an address by both Houses of Parliament, and may not hold any other office under the Crown ... In the performance of his duties he is independent of the executive government. The function of the Exchequer and Audit Department is two-fold. It includes, first, the control of the issues of public**

money from the Consolidated Fund, and the National Loans Fund, and, secondly, the examination on behalf of Parliament of the public accounts, and especially the accounts of all supply services, for the purpose of reporting on them to the House of Commons .."

6.

Bearing in mind the importance of the office, it is surprising that there is so little legal authority on it. **Erskine May** in the **20th edition** of **Parliamentary Practice** states on **page 250** inter alia the following :

"His report regarding the applications and the appropriations of the grants form the basis of the work of the Committee of Public Accounts. Although an independent statutory officer, the Comptroller and Auditor General is traditionally accorded the privileges of an officer of the House of Commons and his statutory responsibilities are directly attached to the financial responsibilities of that House".

7.

The Committee of Public Accounts is responsible for controlling the spending of public monies by Parliament. The Auditor General normally, through his reports, provides

the basis for the work of this committee.

8.

The other authorities which I was able to consult,

Baxter, Administrative Law, page 278 and 279

Basson, South Africa's Interim Constitution, Text and Notes, page 241 and 242,

Garner's Administrative Law, 6th Edition, page 82

do not add much to what has been stated above already. The last-mentioned authority adds the following gloss :

> **"This servant of Parliament enjoys a prestigious position independent of, and immune from the influence of, the government of the day. His salary is charged direct on the Consolidated Fund and so is not subject in any way to annual approval. Further, he may only be removed from office by an address moved in both Houses of Parliament. In short, his salary and continuance in office are secure unless, inconceivably, a Government were willing very 'publicly' to use its parliamentary majorities against him".**

9.

To these considerations, Mathews, <u>The Darker Reaches of Government, page 234</u>

points out that the Auditor-General can, in the performance of his functions, severely embarrass the Government as was the case with the Information Scandal, while Wiechers adds laconically in the **Third Edition of Verloren van Themaat' Staatsreg** on **page 251** -

> **"Die Ouditeur-Generaal word ingevolge die bepalings van die Skatkis en Ouditwet 66 van 1975 aangestel en geniet groot beroepsekerheid."**

10.

Apart from the aforegoing, legal literature does not abound with references to the Auditor-General and his functions, and in those which do exist, for instance the **Third** Edition of **Ralph Kilpin's** Parliamentary Procedure in South Africa, **pages 53 and 120**, or a chance reference to the office in the decision of

Minister of Finance v Masembgwa 1969(3) SA 155 (R, AD)

there does not appear to be great of dispute or uncertainty about the Auditor-General's function.

11.

[redacted]

[redacted] executive [redacted] inspecting, auditing and [redacted] expenditure.

12.

[redacted] Compare in this connection

John Garrett: Westminster, Does Parliament Work?

and the very interesting comments which it contains about the watch-dog function which the Comptroller and Auditor General and the Public Accounts Committee fulfil in the present British system.

13.

That such a role may bring the office into conflict with politicians has been proven in our own jurisdiction quite strikingly, in which regard reference need only be made to the previous opinion which I was entrusted with by our consultant.

14.

[redacted]

15.

Sections 191 to and including Section 194 guarantee the powers, functions and independence of the office of the Auditor-General.

16.

Section 244 deals with the transitional arrangement which ensures that the incumbent of the office shall continue in employment, subject to the Constitution and, where applicable, the Audit Arrangements Act, whereas Schedule 4 of the Constitutional

Principles enshrine the separation of powers, freedom of information and provides that the independence and impartiality of the Auditor-General shall, together with the Public Service Commission, the Reserve Bank and the Public Protector -

> **"be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Public Service" (Principle xxix)**

17.

It is only natural to assume that there may be many political interests which are none too comfortable with our consultant's independence, and who would prefer to have the consultant under direct parliamentary control or under the control of the Executive.

18.

It is clear that this would undermine the very function of our consultant's office, and that consequently it is in everybody's interest that the office of the Auditor-General be factually completely independent of the Executive and of Parliament, although subject to the control by Parliament as provided for in the present Constitution.

19.

Our Consultant does have one advantage over his British counterpart, in that his position is enshrined in the Constitution, and that the constitutional principles upon which the Final Constitution must be based ensure that the Auditor-General's independence and impartiality form part and parcel of the constitutional democracy of the future.

20.

It is in this connection that the working draft of the new Constitution causes some concern when compared with the existing provisions in the Interim Constitution.

21.

[redacted]

22.

[redacted]

[redacted] regarded of sufficient [redacted] separate chapter devoted [redacted] Commission, does tend to lower both the esteem and [redacted] Consultant's Office.

23.

It must be underlined that the other public bodies which are mentioned in the draft for the Final Constitution together with our Consultant's office are public institutions which serve only segments of the community. Even the Human Rights Commission, in spite of its wide-ranging powers and functions, does after all only consider human rights' violations and the protection of human rights.

24.

Our Consultant's office is concerned with the whole gamut of public life and is in a very real sense placed in a position of authority over the other public institutions. After all, the Auditor-General must audit the accounts of the Public Protector, the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. This should be underlined, and emphasis should be given to the fact that the other public institutions and public commissions are accountable to our Consultant for their use of the public's funds which are entrusted to them.

28.

[redacted] the Auditor-General should be dealt with separately and in [redacted] position.

29.

[redacted] Section 192(4) of the Interim Constitution [redacted] all organs of State -

"[redacted] such assistance as may be reasonably required for the protection [redacted] impartiality, dignity and effectiveness of the Auditor-General in the exercise and performance of his or her powers and functions ...",

[redacted] provided that -

"[redacted] legislative and other measures, must assist and protect these institutions ...".

30.

[redacted] and [redacted] initiative from all organs of State as and when required.

31.

The ability to call upon the immediate and direct assistance of other organs of State may be of prime importance for the effective functioning of our consultant's office, particularly if occurrences such as the Information Scandal should be repeated under the new order.

32.

I would consequently recommend that this provision, namely that the Auditor-General may [redacted] other organs of State as and when the need [redacted] in the new Constitution.

33.

More worrisome is the disappearance of the provisions of Section 193(4) from the working draft of the new Constitution. To eliminate the Auditor-General's function to,

> **"whenever he or she considers it to be in the public interest, or upon receipt of a complaint, investigate, audit and report on the accounts and financial statements of any statutory body or any other institution in control of public funds"**

and to substitute therefor an audit which only be carried out -

"as may be regulated by legislation"

is open to sinister interpretations. Although it will obviously be argued that these powers will be contained in appropriate legislation, there is no constitutional guarantee that this will be done. Under these circumstances, the provisions of Sections 193(4) and (6) should not be removed from the working draft of the new Constitution. These clauses ensure full accountability by everybody who controls public funds.

34.

I would furthermore insist that the Constitution guarantee that the Auditor-General will have sufficient staff at his disposal to effectively perform his functions.

35.

In order to obviate any possible disputes, I would furthermore recommend that the Auditor-General be empowered expressly to determine the manner and function in which an audit should be conducted, subject only to a provision that his audit be conducted in accordance with generally accepted governmental auditing standards. Although this right is reflected in existing legislation, I believe that it should enjoy Constitutional protection.

36.

[redacted] is amended [redacted] This Section states that the Auditor-General is nominated by a joint committee of the [redacted] Parliament composed of one member [redacted] party represented in Parliament [redacted] to participate in the committee ..."

If the Auditor-General should be nominated by an ordinary committee of Parliament, it will in practice mean that the Auditor-General is then appointed by the majority political party in Parliament. This will affect the apolitical nature of the Office and might leave the Office of the Auditor-General open to political interference and manipulation, which will totally undermine the independence of the Office of the Auditor-General. It is therefore of the utmost importance that the Auditor-General should be nominated and appointed in a way that will ensure the total independence of the Office of the Auditor-General and that the procedure of his appointment should be entrenched in the Constitution.

This applies in equal measure to his discharge

37.

On reconsideration, I am satisfied that the provisions relating to the removal from office of the Auditor-General, as contained in the Draft Constitution, are in fact an

improvement upon the present formulation, namely that the Auditor-General may only be removed from office by two-thirds of the members of both Houses, excluding the provision **"present and voting"**.

38.

Together with provisions relating to the independence of the Auditor-General, I agree that proper provision must be made for the timeous appointment of an Auditor-General, and see to it that his remuneration cannot be reduced as a punitive measure by Parliament.

39.

I also agree that, if not necessarily in the Constitution, then certainly in the Auditor-General's Act, provision must be made for the possibility that the Auditor-General may retire from office.

40.

If the aforegoing is borne in mind, I trust that the independence and effective functioning as well as the impartiality of our consultant can be safeguarded.

41.

I trust that my consultant and his staff will have a blessed Christmas, and a prosperous, rewarding and successful 1996.

With kind regards

EBERHARD BERTELSMANN SC

CHAMBERS

22 DECEMBER 1995

REPUBLIC OF SOUTH AFRICA

PUBLIC PROTECTOR
MOSIRELETSI WA BATHO • MOŠIRELETŠI WA BATHO
MUSIRHELELI WA VANHU • MUTSIRELEDZI WA VHATHU
OPENBARE BESKERMER • UMKHUSELI WABANTU• UMVIKELI WABANTU

☎(012) 322 2916 • Fax (012) 322 5093 ✉ Private Bag X677 Pretoria 0001 228 Visagie Street Pretoria

Enquiries: Reference: 1/2/3/3

1996-01-23

Mr C Ramaphosa (Chairperson
Constitutional Assembly: Cape Town

Fax No: (021) 461 3679

Your ref: Adv P Ncholo

Dear Mr Ramaphosa

RE: PROVINCIAL PUBLIC PROTECTORS

Please find herein enclosed two memoranda from myself and from the Provincial Service Commission, Gauteng, which speak for themselves.

Kindly consider the matter and let me know the views of the Constitutional Assembly as a matter of urgency.

Yours faithfully

ADV S A M BAQWA
PUBLIC PROTECTOR

acs/a:/l/ramap

Copy to: Gauteng Provincial Service Commission - Barbara Adair

MEMORANDUM

RE: PROVINCIAL PUBLIC PROTECTORS

TO: THE CHAIRMAN, THE CONSTITUTIONAL ASSEMBLY, CAPE TOWN
AND TO: THE PREMIER, GAUTENG PROVINCE
AND TO: THE PROVINCIAL SERVICE COMMISSION, GAUTENG

The Office of the National Public Protector was established by Chapter 8 of the Constitution of South Africa Act No 200 of 1993. In tandem with its establishment Section 114 of the Constitution, also seeks to establish the offices of Provincial Public Protectors in all the nine Provinces. For completeness sake Section 114 of the Constitution is quoted herein:

"114. Provincial Public Protectors.-

(1) A provincial legislature may, subject to sub-sections (2) and (3), by law provide for the establishment, appointment, powers and functions of a provincial public protector and for matters in connection therewith.

(2) A provincial law referred to in sub-section (1) shall not in any way derogate from the powers and functions of the Public Protector.

(3) A provincial public protector shall be appointed by the Premier of a province in consultation with the Public Protector, provided that the appointment shall be confirmed by resolution of a majority of at least two-thirds of all the members of the provincial legislature.

(4) A provincial public protector shall exercise and perform his or her powers and functions in consultation with the Public Protector, who shall have concurrent jurisdiction in the provinces."

In pursuance of the provisions of Chapter 8 of the Constitution, national legislation in the form of the Public Protector Act No 23 of 1994 was promulgated. Section 12 of that Act

enjoins the Public Protector to formulate guide lines for Provincial Public Protectors. The Section is quoted hereunder:

"12(1) The Public Protector shall as soon as possible after a provincial public protector has been appointed under a law contemplated in section 114 (1) of the Constitution, and after consultation with the provincial public protectors, publish in the Gazette notice setting out general guidelines in accordance with which a provincial public protector shall exercise and perform his or her powers and functions as contemplated in section 114 (4) of the Constitution: Provided that this subsection shall not be construed as prohibiting a provincial public protector from departing from such guidelines in a particular case in consultation with the Public Protector.

(2) Unless provided otherwise in a law of a provincial legislature contemplated in section 114(1) of the Constitution, the provisions of section 5 up to and including section 11 shall mutatis mutandis apply to a provincial public protector in respect of an investigation into a matter by him or her: Provided that a reference to "Public Protector" shall be construed as a reference to a provincial public protector, a reference to "Parliament" shall be construed as a reference to a provincial legislature and a reference to "Minister of Finance" shall be construed as a reference to the member of the Executive Council responsible for finance."

The interim constitution and the Public Protector Act constitute the framework and parameters within which the Public Protector presently operates. Generally speaking it does not seem as if there is a problem in understanding both pieces of legislation in the country. In proof thereof, seven of the provinces have promulgated provincial legislation with a view to establishing the office of Provincial Public Protectors. They are currently engaged in preparations to facilitate the appointment of Provincial Public Protectors.

Unfortunately, however, the appointment of Provincial Public Protectors has not been completely without problems. On 28 November 1995 a Bill, seeking to ensure the appointment of a Provincial Public Protector, presented in the Gauteng Legislature was withdrawn by the MEC for Finance, Mr Jabu Moleketi prior to it being tabled. The main reason given by the MEC for the withdrawal was the fact that the recently released draft constitution makes no provision for the establishment of a Provincial Public Protector. He stated that his concern was, should this position be established and someone appointed into

the post, in May 1996 the office would become unconstitutional and the province would be compelled to pay out the newly appointed Public Public Protector for the contract period, this being seven years.

Whilst there may be logic in the honourable MEC's submission it cannot be said to be entirely without problems. The prevailing law at the moment is the interim Constitution and the Public Protector Act. Policies have been formulated in terms thereof and Offices and Structures have been established in accordance therewith. It is in my view not proper to resist the establishment of any office in terms of the interim Constitution purely because such establishment might be eclipsed by provisions of the proposed new Constitution. It is axiomatic that just like it happened in the case of the present interim Constitution, there will also be transitional arrangements provided for in the new or final Constitution. Further, even if consensus about all the clauses of the new Constitution is reached in May 1996, it does not mean that that is the time when the new Constitution will come in operation. The Office of the President would have to promulgate a date on which the Constitution will come into operation. Such date will have to be fixed after having taken into account all the structures that have been established in terms of the interim Constitution. Provision will have to be made to ensure that contractual arrangements which may have come into being in terms of the interim Constitution are not disrupted by provisions of the new Constitution. Accordingly it is inconceivable that a province would be put into a position where it would have to pay out a newly appointed public protector for a contract period of seven years, purely because of the coming into operation of the new Constitution.

It is correct that the recently released draft Constitution makes no provision for the establishment of a Public Protector at provincial level. The office of the Public Protector is dealt with in section 107 of chapter 7 of the working draft of the new constitution. It reads as follows:

"107.(1) The Public Protector has the following powers, as regulated by national legislation:

(a) to investigate any conduct in state affairs or the public administration at any level

of government that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public, unless exceptional circumstances to be prescribed by national legislation require that a report be kept confidential."

As can be seen, there is no mention of Provincial Public Protectors. The fact of the matter is that the Provincial Public Protectors as presently envisaged were not established as an academic exercise. There is a crying need for the delivery of Public Protector services closer to the people. The sheer vastness of the country, geographically speaking, is such that the National Public Protector cannot operate effectively in all the provinces without regional offices in the provinces. The amount of work and complaints already lodged at the National Public Protector's office is presently more than that office can cope with.

If it is envisaged that such regional offices will in future resort directly under the office of the National Public Protector, this matter ought to be dealt with directly either as a clause in the Constitution or in the transitional arrangements referred to above. If this supposition about provincial offices resorting under the National Public Protector is correct, the scenario as I foresee it would be as follows: The Provincial Public Protectors and whatever infrastructure they might have established at the time of the coming into operation of the new Constitution would remain in place. The contractual obligations would also remain in place. There would probably be a name change but the status would remain the same in respect of the office known as the Office of the Provincial Public Protector. There could be no downgrading of the status of the office because this is necessary for the effectiveness thereof. With regard to funding, the transitional arrangements would ensure that for the current financial year the provinces would provide for the provincial offices and provision could be made for a change over for financing at national level in the subsequent financial year if this is what is intended.

The working draft of the new Constitution is silent on these matters and the purpose of this memorandum is to make an urgent request to the Constitutional Assembly to state clearly how this matter of Provincial Public Protectors is to be dealt with in future. A copy of a memorandum received from the Provincial Service Commission, Gauteng in which they raise their concerns is annexed hereto for easy reference marked "A".

ADV S A M BAQWA
PUBLIC PROTECTOR

23 January 1996

a:/1/memo/acs

Office of Gauteng
Provincial Service
Commission

MEMORANDUM

TO : **TOKYO SEXWALE**
JABU MOLEKETI
MARK PHILLIPS
MOHAMMED DANGOR
cc. Adv. SELBY BAQWA

FROM : **THE PROVINCIAL SERVICE COMMISSION**

REF : **B. ADAIR**
P. FITZGERALD

DATE : **9 JANUARY 1996**

SUBJECT : **APPOINTMENT OF PROVINCIAL PUBLIC PROTECTOR**

1) S114 of the Interim Constitution makes provision for the establishment of a provincial public protector.

2) The provincial public protector must be appointed in terms of provincial legislation.

3) A draft bill setting out the above was scheduled to be tabled in the provincial legislature on 28 November 1995, however, prior to it being tabled it was withdrawn by the MEC for Finance, Mr Jabu Moleketi, as the recently released Draft Constitution makes no provision for the establishment of a provincial public protector.

4) We understand from Advocate Selby Baqwa that there is a need for the establishment of the provincial public protector as the national public protector, is unable to deal properly with problems that emanate from the provinces.

Our concern is that, should this position be established and someone appointed into the post, in May 1996 the office will become unconstitutional and the province shall be compelled to pay out the newly appointed public protector for the contract period, this being seven (7) years.

5) A solution, which we believe would be acceptable to all parties, would be for the national public protector to appoint deputy public protectors, in terms of S25 of the Public Protector Act, No 23 of 1994. The deputy public protectors could be situated in the provinces; effectively they would function as provincial public protectors, but established in terms of the national legislation.

In this way the national public protector would have the assistance that is required, this being public protectors situated in the provinces, and the province would have a public protector with specific knowledge of the province appointed by the national office whose position would not become unconstitutional in May 1996.

6) We hope that this suggestion in acceptable to all parties. If it is Advocate Baqwa approves, we shall facilitate the appointment of the deputy public protector, in the same way that we would have facilitated the appointment of the provincial public protector, on behalf of the national public protector.

We look forward to hearing what your views are regarding this suggestion.

TO THE CONSTITUTIONAL ASSEMBLY (ADV P NCHOLO)

ADDITIONAL MEMORANDUM

RE: PROVINCIAL PUBLIC PROTECTORS

In the Memorandum from the Gauteng Provincial commission (Paragraph 5) a solution is proposed. There is an erroneous reference to section 25 of the Public Protector Act. (The Act only has 15 sections).

This was probably meant to refer to section 3 of the Public Protector Act 23 of 1994. In my view section 3 does not provide a solution. The Deputy Public Protector referred to in that section is one to be appointed at National level. This becomes clear upon reading Section 3(2)(b) which refers at sub-paragraph (ii) thereof to the National Assembly and the Senate.

In my view a generous interpretation of Section 3 would conflict with the provisions of section 114 of the Constitution.

Accordingly, I re-iterate that in my view this matter can only be solved via the new constitution or through transitional arrangements.

ADV S A M BAQWA
PUBLIC PROTECTOR

24 JANUARY 1996