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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 5

THE JUDICIARY AND LEGAL SYSTEMS

PUBLIC HEARING

29TH MAY 1995

PRESENTATIONS BY
ASSOCIATION OF LAW SOCITIES: MT STEYN
NADEL: M NORTON & V SALDANHA
ADVOCATES AP DE VRIES SC, JSM HENNING SC,
ZH DE BEER & PP STANDER

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE V

PUBLIC HEARING - ATTORNEY GENERAL DEBATE

DATE: 29.05.95

CHAIRPERSON: We are today here essentially to hear evidence from a number of people on the question of the Attorney General and how the office of the Attorney General should be structured. The visitors we have with us today are firstly from the Association of Law Societies, Mr Theuns Steyn, whose over there. From Nadel we have Mr Vincent Saldanha and Michelle Norton. Then we have a number of senior State advocates, Advocates de Vries, Henning, de Beer and Stander at the end of the table.

We are going to start with the Association of Law Societies and we normally try to keep our presentations to about 10 or 15 minutes. I think most of you have been here before, and then allow some time for questions afterwards. It's over to you.

MR T STEYN: Thank you Mr Chairman. I am Theuns Steyn, here on behalf of the Association of Law Societies of the Republic of South Africa.

Mr Chairman I trust that members of your Committee and all those others present here have in front of them copies of our submissions. If not I hope that Noel will have some additional copies.

Let me take you through the submissions, because unfortunately I have been quite late in submitting them to Mr Taft, that's because I've been placed on the spot quite late, and I had to do some burning of midnight oil.

Mr Chairman I will run through the submissions then. First of all we would like to refer you to section 108 of

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the Interim Constitution, I will refer to that as the Constitution from now on. The first subsection vests the Attorney General with the authority to institute criminal prosecutions on behalf of the State, in the Republic of South Africa. The second subsection states that the area of jurisdiction, powers and functions of an Attorney General shall be as prescribed by or under law. Then the last subsection no.3, states that,

> "No person shall be appointed as an Attorney General unless he or she is appropriately qualified in terms of the law regulating the appointment of Attorneys General in the Republic".

Quite short and sweet.

The Constitution recognises the Attorney General as an organ of the State, it's important to note this. Section 233(ix) of the Constitution defines an organ of the State, " As including any statutory body or functionary". The word "functionary" in our submission covers the description of the Attorney General as contained in section 108(1) of the Constitution.

The recognition granted to the Attorney General in the Constitution is distinct from the recognition granted to the executive authority. The Attorney General is accordingly seen as an organ of the State, separate from the government, which of course is also an organ of the State.

The Association of Law Societies, to which I shall hereafter refer as the ALS, submits that this distinction should be preserved in the final Constitution. An Attorney General prosecutes on behalf of the State and does so accordingly to the law as interpreted by the courts of the

State. This in our submission, ensures uniformity of action and application in a manner that cannot be achieved through executive control.

Theme Committee V is presently engaged in considering whether the final Constitution should provide for the restructuring of the office of the Attorney General, and if so how it should be restructured. The ALS is of the view that any process of reform or transformation must have a clear purpose. It must in this instance, have the effect either of curing an ill or remedying an unacceptable status quo, or on the second instance it must bring about an improvement of the status quo.

The ALS is further of the view that the structure of the office of the Attorney General, as provided for in Act no.92 of 1992, and the Constitution has functioned satisfactorily in practice. We believe that it suffers no structural ill that needs to be cured. I will address this aspect later on in my submissions.

As far as the possible improvement of the structure of the office of the Attorney General is concerned, we are of the view that the following requirements should be borne in mind, and I list them from item 7 to 15 in our submissions.

First of all, an Attorney General should have a status independent of executive or political control. As such the Attorney General should be appointed by the State President on recommendation in our view of the Judicial Services Commission.

Secondly, the Attorneys General should have representation on the Judicial Services Commission by way of one of their members elected by them to represent their interests on that body.

In the third instance, the Attorneys General should remain accountable to the Minister of Justice and Parliament, as is presently the case in terms of Act 92 of 1992.

Fourthly, an Attorney General should further remain subject to the powers of suspension and/or discharge from office by the State President in conjunction with Parliament as provided in section 4 of Act 92 of 1992.

Then in the fifth instance, section 108(2) of the Constitution recognises that an Attorney General is appointed for a specific area of jurisdiction. It is the ALS' view that each province of the Republic of South Africa should have its own Attorney General, who will exercise the autonomous authority provided for in section 108(1) of the Constitution in that province.

Uniformity and approach: Uniformity of approach and application would be ensured by law and the interpretation thereof by the courts. We respectfully submit that this control has proved eminently adequate in the past. It is accordingly tried and proven and should not be interfered with.

The ALS respectfully submits that there should be an autonomous Attorney General for each of the provinces of the Republic of South Africa due to the fact that the needs of each province, as far as the maintenance of justice is concerned, are different. An Attorney General should accordingly be attuned to the needs of the province which he or she serves, and that can only be so if he or she works in close contact, on a daily basis with the problems of that province.

In the sixth instance, should a prosecution be in bad

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faith, that fact would be pointed out by the court, and the State President would be entitled to proceed with his disciplinary powers contained in Act 92 of 1992. Should an Attorney General refuse to prosecute under circumstances where a prosecution is called for, provision is made in the Criminal Procedure Act for a private prosecution. In both of these instances of course, bad faith prosecution and the refusal to prosecute, the Minister of Justice is entitled to call for an explanation. These checks and balances have had the practical effect of ensuring a balanced approach by Attorneys General in respect of the discharge of their prosecutorial duties.

In the seventh place, executive or political control over the Attorneys General would pave the way for improper political pressure on the person exercising political control over the Attorneys General. A person holding high political office should not have the ability to influence or manipulate the decision of an Attorney General whether to prosecute in respect of a criminal offence, because that person may, him or herself be subject to political manipulation or pressure.

The ALS submits in the final instance, that the powers of the executive arm of the State with regard to the office of the Attorney General should go no further than is provided for in section 5(5) of Act 92 of 1992. This section limits the Minister of Justice's powers to the coordination of the functions of the Attorneys General and to the right to request information or reports and reasons for decisions taken by the Attorney General. This covers policy.

Then we come from paragraph 16 and following to certain criticisms that have been levelled against the structure of

the present system.

The first instance it has been stated that the present dispensation does not contain adequate provision for the accountability of Attorneys General. The ALS disagrees, with respect, with this statement. It does so for the following reasons.

Firstly, an Attorney General is bound to act according to the strictures of the law as interpreted by the courts. Should the Attorney General fail to do so, he or she would be called to account by the court.

In the second instance, the Minister of Justice is entitled, in terms of the provisions of section 5(5) of the Attorney General's Act, to call for information or a report or reasons from an Attorney General. The Attorney General is accordingly accountable to the Minister of Justice.

In the third instance, the Attorney General has to report on an annual basis to the Minister of Justice on all his activities during the previous year. This is a further instance of the Attorney General's accountability to the Minister.

And then in the fourth instance, the Minister has table the Attorney General's report to Parliament within 14 days of the receipt thereof. The Attorney General is accordingly accountable to Parliament in the final instance. Parliament is the representative of the people of the Republic and by accounting to Parliament the Attorney General is accordingly accounting to the people.

Secondly as far as the criticisms are concerned, it has been said that the incumbent Attorney Generals are all appointees of an unacceptable regime. That does not, in the

view of the ALS, constitute a valid criticism against the structure of the office. It may, in any event, not even be a valid criticism against any of the Attorney Generals concerned as far as their persons are concerned. Their performance should be valued objectively and not by reference to who appointed them to their office. It should not be forgotten that they are professionals who have risen through professional ranks and not through political office.

The third point of criticism that we wish to address is that it has been levelled against the present structure of the Attorney General's office that there is no adequate provision for the formulation of prosecutorial policy. The ALS does not view this as being a valid criticism and does so for the following reasons.

1. The Attorney General enforces the law as contained in the common law, as laid down by Parliament and as interpreted by the courts. It is not for the Attorney General to formulate policy on a political basis. He has to do so on a legal basis. His is a legal decision Mr Chairman, not a judicial or a political one.
2. The accountability of the Attorney General as referred to above, ensures that the necessary checks and balances exist for the proper discharge by the Attorney General of his or her functions and duties and the policy that he follows can be checked in that way.
3. The Minister of Justice coordinates the functions of the Attorney's General and as such is entitled to consult with them and to formulate with them any specific approach that needs to be taken with

regard to any problem that exists either regionally or nationally.

4. Parliament furthermore can legislate to remove any unacceptable prosecutorial practice. It is interesting to note the substantial degree of past absence of a need in this respect.

5. The law and the courts ensure that justice is administered equally in every part of the country. The creation of the office of a National Attorney General would, in our respectful submission, not bring about any improvement in this regard.

6. The Minister of Justice is the best placed functionary of the State to coordinate the functions of all the Attorneys General. He is able to formulate and initiate whether in consultation with the Attorneys General or on it's own the legislation that is required to improve the functioning of the prosecutorial system of this country.

Then in the fourth instance the fact that the functioning, that is now as far as the criticisms are concerned, the fact that the functioning of the office of the Attorney General as presently structured has in the past produced results that may have proved politically unacceptable should not be confused with the adequacy of that structure. The results flowed not from the structure, but from the laws which that office had to enforce. Those laws emanated from Parliament, and not from the office of the Attorney General.

In the final instance, the ALS is of the view that the

South African situation is unique and as such requires unique treatment. Any attempts to impose foreign solutions such as for example following the United States or the United Kingdom models should not be embarked upon unless there is good reason to do so. The ALS respectfully submits that such reason does not exist.

To conclude the ALS supports the notion as expressed by the Minister of Justice during his budget vote in Parliament this year of a prosecutorial authority with assured independence to prosecute without fear or favour, and I may add according to the general policy, which were the words that were used, but in our view as laid down by law and not by a political office holder. I thank you Mr Chairman.

CHAIRPERSON: Thank you very much Mr Steyn. The floor is now open for discussions or questions. Mr Steyn are you able to stay for a while?

MR T STEYN: I can stay Mr Chairman.

CHAIRPERSON: Because it may make to some extent more sense for us to hear as much as possible the views before we start engaging in discussion. Could we then move on without too much further ado to Nadel's presentation.

MR SALDANHA: Thank you Mr Chairperson. On behalf of Nadel it's once again an absolute privilege to be before your committee to make these submissions. To us it is certainly gratifying to be part of the process of constitution making.

Mr Chair just to preface Dr Vella Sibisi of our office has joined us. Miss Michelle Norton will be leading the substantive part of our submission to yourselves, and I will just merely make some introductory remarks.

Mr Chair it's important that when dealing with the

office of the Attorney General that we are able to quite clearly put it into the correct context in which the office is operated and more particularly to put into correct context the legislation which governs the office of the Attorney General. You will note Mr Chair that it was almost during the dying days of the apartheid regime that the office of the Attorney General was so fundamentally restructured. In that time many lawyer's organisations, including Nadel and other NGO's had called for the halting of, what we regarded as being the unilateral restructuring of the profession of the administration of justice. Notwithstanding that demand the old government proceeded to restructure the office of the Attorney General. The serious concern about that was that there was not adequate and certainly not proper consultation with the role players and certainly with the broader public when restructuring that office. It would certainly not be good enough for the Department of Justice to say that organisations were invited to make comment on the bill. We think that process was fundamentally flawed and that process lacked fundamental credibility inasmuch as that Act was passed by an act of the old government.

Mr Chair it's also important to put into context some of the comments of the recent debate around what is referred to as the creation of a Super Attorney General. I think it's a misnomer to call it a Super Attorney General. All we are saying is that there should be a national office of a National Attorney General. That arose by and large at the legal forum which was convened by the Minister of Justice and the Press and I think to a large extent the offices of the various Attorney Generals contributed to some of the

confusion around what was notionally called the Super Attorney General. It was almost as if there were particular organisations which were propagating that there should be a Super Attorney General/Political Attorney General, and we hope this afternoon to persuade your Committee that's not what we intend in our submissions to see. Certainly not a political Attorney General, certainly not a super Attorney General.

Mr Chair the positions of Nadel arises from a process of broad consultation within the organisation. We are able to say that our branches nationally have been consulted and have thought very hard on these issues with regard to the office of the Attorney General. That's how we arrive at our positions. Unlike some of the other lawyer's organisations which assumes to talk on behalf of their membership.

Mr Chair I would now hand over to Miss Norton. I must at this stage apologise for having to leave this meeting at 15:20 as a result of a prior engagement. I know Miss Norton herself has to leave at 4 o'clock. Thank you Mr Chair.

MISS M NORTON: Mr Chairperson it's the essence of Nadel's submissions that the current constitutional and legislative dispensation relating to Attorneys General is unsatisfactory and that what is required is the establishment of an office of a National Attorney General.

One of the key problems that we want to address in the current dispensation is the absence of meaningful accountability by Attorneys General. Nadel is concerned that inadequate provision has been made for accountability of Attorneys General in the Attorney General Act no.92 of 1992.

In this Act the accountability of Attorneys General was

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shifted from the Minister of Justice to Parliament. Their accountability to Parliament however, is outlined in extremely broad terms. The requirement that Attorneys General submit reports on their activities during the year to the Minister of Justice and that these reports be tabled in Parliament contain no criteria for the form and content of these reports and no indication, no outline is given of the type of mechanism which could be used to ensure that Attorneys General are properly called to account for decisions to prosecute, decisions not to prosecute or for their formulation of general policy. As such we believe that the accountability currently operating is superficial and meaningless.

We believe that this absence of proper structured accountability would be unsatisfactory and problematic in any situation but is of particular concern in the context of post apartheid South Africa. We do believe it important that the incumbent Attorneys General are appointees of the previous National Party government who systematically applied the laws of the apartheid state. And we are concerned that Attorneys General with this background are to exercise the considerable powers of Attorneys General in a new democratic legal order without proper structured accountability.

While we are aware that it is possible and it would be possible to structure the accountability of Attorneys General to Parliament more substantially so as to make it more effective and meaningful, it is nevertheless our submission that the very principle of accountability only to Parliament is an unacceptable one. This principle basically undermines the notion that the execution of the

criminal law and the prosecution of crime is a function and responsibility of the executive branch of government.

This principle also limits the executive branch of government from controlling the development of prosecutorial policy and this brings us to the second problem which we wish to highlight which is the location of responsibility for prosecutorial policy.

The situation created by the Act of 1992 results in the effective autonomy of Attorneys General in respect of formulating prosecutorial policy. Because Parliamentary accountability operates reactively and because Parliament by its very nature is not in a position to formulate prosecutorial policy on an ad hoc basis Attorneys General have somewhat exclusive power and autonomy in respect of prosecution policy.

The powers of the Minister of Justice have been severely limited in the Act of 1992. The Minister of Justice is constrained to coordinate the functions of the Attorneys General and request information reports or reasons concerning cases, matters or decisions of the Attorneys General.

What this means is that there is no way of ensuring that prosecution policy is actively developed which reflects the values and pursues the objectives of the democratic legal order,and once again we refer to the background of the incumbent Attorneys General as exacerbating this problem.

It is Nadel's submission that the formulation of general prosecutorial policy, even in the absence of the circumstances applying in South Africa is an executive function and an executive prerogative and as such it should be under the ultimate control of the Minister of Justice.

Another problem we would like to point to in relation to policy formulation lies in the devolution of prosecuting power on a regional basis. We do believe that this is problematic, while we regard it as extremely important that the needs of specific areas be reflected in local prosecution policy, it is also essential that justice be administered equally in every part of the country.

Furthermore it has been established in the Interim Constitution, and we expect that it will be established in the final Constitution that justice is a national and not a regional competency and it is essential, accordingly, that direction in prosecuting policy be given at a national level.

Against the background of these problems, of accountability and policy formulation, Nadel proposes that the final Constitution makes provision for a National Attorney General, who would be appointed by the President and be accountable directly to the Minister of Justice and indirectly, through the Minister of Justice, to Parliament.

We should mention that there is some measure of support within Nadel for a National Attorney General being a member of the Cabinet and we would be prepared to discuss that idea further.

We propose that the National Attorney General would make recommendations to the President for the appointment of Provincial Attorneys General. Once again we leave this open-ended because we have in fact not made specific proposals regarding the mechanisms for appointment of Attorneys General.

The National Attorney General would control and coordinate the activities and functions of Provincial

Attorneys General; would formulate prosecutorial policy on a national basis and account to the Minister of Justice and through the Minister to Parliament, for all decisions taken by Attorneys General in performing their duties and exercising their functions.

Nadel regards it as extremely important nonetheless, to ensure that the discretion of Attorneys General in relation to the prosecution of individual cases cannot be subjected and should not be subjected to political interference or manipulation, particularly of a party political nature. To this end Nadel would support a requirement that all directions issued by the Minister of Justice in respect of prosecutions be in a written form and be published in the Government Gazette. This it is submitted, will accord with the modern international conception of the office of Attorney General which is that he or she enjoys a measure of independence from political control by the Cabinet in respect of individual criminal prosecutions.

Regarding the appointment of Attorneys General, Nadel's main proposal is that the procedure followed for appointment should be an open and transparent one. In this regard we submit that the qualifications and criteria to be used in selections be made public; that the names of candidates for appointment should be made public; that there should be an opportunity for objections to candidates and that the interviews of candidates should be open to the public.

Under the current dispensation appointment is formally by the President in terms of section 2(1) of the Attorney General Act. The process which is followed in practice, however, has been a difficult one for us to establish. It apparently involves the Director General of Justice,

consulting with Attorneys General, the Commission for Administration in order to obtain proposals of candidates. There is then submission of a name to the Minister of Justice after consultation and approval by the Cabinet.

Certain the process as it has operated until now has not been a transparent one and this is evidenced by the difficulty which we have had in establishing exactly what the nature of the process is.

Beyond the requirements for openness and transparency, Nadel has no specific proposal for the appropriate appointment mechanism, but we have given favourable consideration to appointment by the Judicial Service Commission or a similarly composed representative body.

The functions of the Attorney General which we propose follow those designated in the Attorney General Act of 1992 with the qualification that they be exercised subject to the control of the National Attorney General. Thank you Mr Chairperson.

CHAIRPERSON: Thank you very much to Nadel. I think unless there are specific questions of where people are not clear I would propose that we give Advocate de Vries, who I think is going to lead this next submission, an opportunity to do that.

ADV DE VRIES: Thank you Mr Chairman. May I just correct something. We are two Deputy Attorneys General here and two Senior State Advocates.

Mr Chairman we appear before you today in our personal capacities in order to argue from a practical point of view, a logical argument that is alternative to the official point of view of both the Department and the Attorneys General.

As a point of debate our main concern is that the main

argument revolves around the very responsible post of Attorney General, but once again the vague figure of the ordinary prosecutor is left out of the debate. We are very grateful for the invitation to address you.

The main thrust of our argument is firstly that there should be a national entity responsible for the prosecution services as a part of the executive, who should be outside the political arena and outside the government but responsible to government, through the President, and that using the holistic approach all prosecutors should be his responsibility in a properly structured pyramidical organisation, separate from the Department of Justice, but falling under the same Minister. For this purpose a separate Act should be promulgated which is not part of this Theme Committee, subject to the principles as set out in the Constitution.

Our chief concern with the official point of view is, in the old Latin maxim, <u>quis custodiet ipsos custodes</u>, who will guard the gods, and for that we are of the opinion that there should be a measure of accountability. We have submitted a lengthy memorandum, obviously I'm not going to read out the whole issue. I will try to summarise as far as I go.

Starting on page we make the point that the Constitution introduced a new culture of accountability, responsiveness and openness as well as well as the protection of fundamental rights, to which the executive, including the Attorneys General must adapt.

Secondly, it is in the interests of the administration of justice that the prosecutorial division be restructured. It follows as a necessity from such a restructuring that

overall management functions will have to be entrusted to a specific person.

These two grounds will be dealt with separately.

The Attorneys General exercise their powers as organs of the executive. In the historical development of the Criminal Law there is no doubt that the powers of the State to conduct criminal proceedings are viewed as executive duties of the State.

The fact that the Attorneys General are officers of the courts does not mean that they have judicial authority in the Republic, because that vests in the courts itself. They have no judicial powers as such.

The argument has been voiced that the position of the Attorneys General are sui generis, in our point of view the fact that they can institute a prosecution is sui generis and should not be tampered with at this stage, but that themselves and their functions are part of the executive.

Section 81 of the Constitution provides that the President shall be responsible for the observance of the provisions of the Constitution by the executive and that, as Head of State, he shall defend and uphold the Constitution as the supreme law of the land.

The Constitution therefore places a duty on the President to ensure that also the Attorneys General, as organs of the executive, shall adhere to the Constitution which we will assume will be continued in the next one.

The Attorneys General must annually submit a report which is tabled to Parliament, but Parliament is no longer the sovereign power of the land, the sovereign power of the land is in fact, the Constitution.

The Attorney General must also be accountable to the

Protector of the Constitution, namely the President.

When the independence of the Attorney General is taken into account this independence should be qualified and has been at some stage as qualified by the courts, as in Nhlabathi v Deputy Attorney General and Others. The Attorney General therefore, never was, and still isn't elevated above the powers of revue of the courts. In addition thereto, in terms of the Constitution the Attorney General is now, with regard to Constitutional affairs, also subject to the supervision of the President.

In our view the independence of the Attorney General means that an Attorney General may exercise his discretion to prosecute and perform related functions without interference, provided that his contract is intra vires and that his discretion is exercised in a justifiable manner.

The Constitution provides that every person has the right to equality before the law and for equal protection of the law.

This section leaves no room for contradictory approaches by the respective Attorneys General insofar as policy is concerned, and which may lead to unequal treatment.

It is obvious that absolute equality is impossible in practice. In the same manner that different courts will not give identical judgments and sentences based on similar facts, so Attorneys General cannot always take identical decisions. Besides, it must be taken into account that circumstances differ from one area of jurisdiction to another, and we adhere to the concept that there should be an individual Attorney General for each specific province because of the fact that each specific province has powers to make its own laws and therefore a totally equal national

policy is not possible. But at the moment the Hoexter Commission is sitting on the problem of that, so I won't go into that matter at this stage.

However, when essential difference in policy exists between the approaches of the Attorneys General it may lead to an infringement of the rights of subjects.

Differences of interpretation and of policy mutually between the Attorneys General, and also between the Attorneys General and the Government as the executive, must be expected. This has already been evident in practice.

The fundamental question is how the President will manage these difference, in order to ensure compliance with the Constitution.

On the one hand, in our opinion, no democratically elected government will allow its executive organs to follow a policy which is inconsistent with government policy. On the other hand the President, as head of the State and protector of the Constitution, can also not allow differences between the executive organs to lead to unequal treatment to the subjects of the State.

The obvious practical solution is to be found in the concept of a National Attorney General. This office bearer would be the person who determines policy in consultation with the President and would coordinate the functions of the Attorneys General in order to ensure uniform of the observance of the Constitution, as well as <u>intra vires</u> conduct on their part. Accountability to the President about the manner in which the prosecution conforms to the Constitution is then centralised in one office. Furthermore, this will obviate the danger of the President needing to enter into public debate with the individual

Attorneys General.

The situation may arise where a dispute may develop between an Attorney General and the premier in a particular province and/or area of jurisdiction. The National Attorney General will, in conjunction with other organs of the executive also take care of that problem.

The title "Attorney General" has a specific meaning in the Republic which does not necessarily correspond with the same official title in other democracies.

In South Africa the Attorney General is the functionary who, as indicated above, institutes and conducts prosecutions on behalf of the State.

If the terminology of "National Attorney General" is used, it evokes visions of a super prosecutor who will be able to interfere with the manner in which Attorneys General exercise their discretion in individual matters. Consequently opposition arises against the concept National Attorney General as this office is seen as a threat to the professional independence of the Attorneys General. In addition, the fear exists that it would be an office exposed to political manipulation. We have an article attached to our memorandum, but I think it is well know that this concept has created some furore in official circles.

To obviate these fears it is suggested that the title National Attorney General be avoided and that the office bearer rather be termed the Director of Public Prosecutions. In addition this office should be seated not in the political arena.

We have drawn up a new prosecutorial structure which is attached as annexure B which I will deal with at the end Mr Chairman. Just to give you what this would give you is it

represents a motivation for the office of Director from a point of view, other than constitutional considerations. If the prosecution is seen as an independent establishment, it is only logical that the single person should be the head of the establishment. It will be impractical and unwise to have the establishment run by a loose association such as a committee of Attorneys General or any other service committee.

As can be seen from this proposal the Director is not an Attorney General according to our traditional viewpoint of an Attorney General. The Director General in the past could not interfere with the decision-making of the Attorney General, the Director should also not be allowed to do so. The Director does, however, have the powers to issue instructions with regard to policy considerations.

We are of the opinion that the structure we envisage meets the following demands:-

1. It will provide a home for an independent, professional prosecution corner in a division outside the Public Service.
2. Thereby a career-orientated niche will be offered to Public Prosecutors in the lower courts who up to now have been neither fish, flesh nor fowl.
3. It provides a solution for the current problems experienced as a result of shortage of personnel.
4. It removes the prosecutors from the State bargaining mechanisms, where prosecutors are too few in number to enjoy separate representation. It is in any event undesirable for professionals to compete on a trade union basis for better salaries and better conditions.

5. It obviates all intelligent objections that can be brought to bear against the concept of a National Attorney General.

6. It ensures the uniform execution of policy and proper coordination and planning between the Government and the prosecution.

7. It centralises accountability to the Government, and/or Parliament.

Our motivation for the restructuring of the prosecution is, that one must examine the true functions of the Attorney General in a de facto manner in which these functions are being executed. The importance of his duties should not be underestimated in any way; he is in the first instance in the final fighting line between the public and the criminal, the usurper, the robber and the murderer.

The Attorney General manages the fight against crime in his area of jurisdiction. The whole community would fall into decay and chaos if he does not have the necessary means to manage crime effectively. These criminals that are arrested must be brought to trial and be punished.

All attempts to prevent crime is to no avail and is a waste of manpower if the prosecution of criminals is not effective. Inefficient prosecutions serve only to make the general public dissatisfied with the government's incapacity to govern properly.

It is important to remember that the Attorney General is in the service of the community and that he has to act according to needs of the people and that there has to be a proper policy regarding prosecutions.

The Attorney General is not only responsible for prosecutions but partly also for the proper administration

of the criminal law. He has to keep the courts within his jurisdiction going, give instructions regarding investigation of crime, curator of mental patients in institutions and responsible for applications regarding the protection of the state witnesses as well as their maintenance. A legion of administrative tasks that he is responsible for, not only legal tasks.

He is also responsible for administering his own office within the rules and regulations of the Civil Service. He manages his own budget as well as administrative tasks with regard to his staff for example their meriting and applications for leave. This responsibility entails supervision ranging form the ordering of erasers to control over telephone accounts. He is both the administrative principal of his office, he is the head of an office and the instituting authority for all prosecutions in his area of jurisdiction.

In this onerous task he is assisted by various functionary, both administrative and professional, but his main task, as in any large organisation is administrative in nature and to a lesser degree professional, therefore delegates these powers to, in his own office, Deputy Attorneys General are responsible for instituting prosecutions and are the only ones with power to institute prosecutions, and in the lower courts to prosecutors. Advocates in the Attorney General office do not have the power to institute a prosecution, they can only act in the name of the Attorney General.

The Attorney General only deals with matters personally if they are important to his prosecution policy, politically sensitive, or for some reason of great public interest.

Ninety percent of all criminal prosecutions are conducted in the lower courts. The Attorney General delegates all his powers to a prosecutor subject to his directions and control. One must take into account that normally a prosecutor starts straight from university. The Attorney General delegates all those powers to that particular prosecutor subject to his powers of control.

Any prosecutor has the power to institute prosecutions. But they also have functions other than that of conducting prosecutions such as maintenance officer, clerk of the court, lead evidence in judicial inquests, write reports, participate in the control and merit system of the department.

To our point of view the position of the prosecutor in the lower courts create the biggest problem regarding the accountability of the Attorney General. Although they are technically on the Attorneys General's organisational chart they are at the same time performing their duties in the magistrate's court under the control of the magistrate. Professionally they resort under the Attorney General, but administratively they resort under the magistrate and thus the Department. There is even a Code: Public Prosecutors, the successor to the Code: Criminal and Civil Matters as well as other Departmental Codes to which they have to adhere in performing their professional duties.

The Attorney General has no say in the Departmental directives, never sees a prosecutor before his is appointed, and has no part in his/her destiny. The Attorney General has in particular no say in the Department's staffing policy.

This is an unhealthy situation already addressed by the

Hoexter Commission in 1984, but the Commission's recommendations were never fully implemented. The only other known investigation is that of Lovell Fernandez in the South African Law Journal, 1993 entitled "Profile of a vague figure : The South African Public Prosecutor", a copy of which is attached thereto.

It is necessary to quote some extracts from this article:

> "The large number of new appointments point to a disturbingly high turnover of personnel within the prosecution corps.....And in June 1989 the Directorate of Justice admitted this continuing shortage of experience.
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> The rapid staff fluctuation undermines the professionalisation of the office and militates against long-term organisation and allocations such as staff, space, finances, supporting investigative structures and technical equipment. In addition, it impedes the development of a coherent and continuous prosecution policy with regard to matters such as case intake, case screening, pretrial division, case review, evaluation, assignment, trial preparation, court appearances and sentence recommendation. In sum, it undermines the dignity of the office and erodes the quality of the prosecution.
>
> Whatever the reasons may be, it seems that they are indirectly related to a more fundamental aspect of the prosecution service in South Africa: The question of

> professional image and identity.
>
> The professional identity of prosecutors is also clouded by the fact that while professionally they are under the control of an Attorney General or a Senior Public Prosecutor, in practise magistrates have administrative control over them as regards promotions, leave and transfers.
>
> This state of affairs means that prosecutions are in fact serving two masters, the Hoexter Commission said. Indeed, a young prosecutor whose promotion depends to a large extent on the goodwill of the magistrate cannot be said to exercise his or her discretion freely".

Except for the salaries that are paid which at this stage is not part of the issue, although the factor is again reaching a critical stage, the primary cause of the status afforded to the prosecutor is the main reason why so many of them are leaving. The days when unqualified clerks conducted prosecutions have long gone. At present all public prosecutors are academically qualified, many having obtained LLB degrees and often also Honours and Masters degrees. Salaries of prosecutors, magistrates, state advocates and state attorneys are exactly the same to that it is possible to move from one niche in the department to another depending on practical experience and aptitude. Every prosecutor has the same academic qualifications as private practitioners, who are afforded professional status, but the prosecutor is afforded a lesser status, he is not regarded as a professional but rather as "just another civil servant".

This corps is then utilised as a source for all other posts in the Department - magistrates, advocates, state attorneys, legal advisors, masters etc. In the past they were promoted with an increase in salary to magistrates or advocates in the office of the Attorney General. At present they receive the same salary but undergo only a change of status within the hierarchy and in the eyes of the Department.

At present the prosecutor is considered to be on the same level with regard to status, as a candidate attorney and this endures for the rest of his career. A prosecutor is therefore considered to be only a pupil-magistrate, justified or not.

All present magistrates are ex-prosecutors and due to the personnel shortage some ex-prosecutors with as little as 9 months practical experience are appointed as magistrates.

There is for all practical purposes no career in existence for a prosecutor, and his/her professionality is negated.

.....(tape change) Attorney General has delegated all his authority the position of the Attorney General must be reconsidered.

It is clear that the Attorney General is responsible for the professional conduct of a number of persons with whose appointment he has no involvement, to whom he is obliged to transfer all his authority with regard to prosecutions and whose conduct he is expected to justify. To make the principles even worse the magistrates in the meanwhile undergone a change in status. The magistrate is independent of the Public Service similar to the Attorney General. The logical situation then is that the Department

of Justice at present appoints legally qualified persons as prosecutors in terms of the provisions of the Commission for Adminstration as State officials; that independent of the Public Service, magistrates exercise control over their daily comings and goings; that an independent Attorney General issues instructions to them with regard to their professional duties which is sometimes in conflict with their instructions from the Director General and/or their independent head of the office, the magistrate.

No professional, legally qualified person can endure this schizophrenic existence for any amount of time and the Attorney General cannot be expected to justify their conduct either.

The accountability of the Attorney General has to be separated in principle between policy and the exercising of his discretion in specific cases.

No modern country has a legal system where the person in control of prosecutions is not accountable to either the policy-making or legislative body. The Attorney General is part of the executive authority in the present political dispensation, part of the policy-making authority.

It is unacceptable that an Attorney General has to be accountable for the manner in which his policies are executed by people appointed by an organ other than the Attorney General under conditions he did not set.

It cannot be expected from any person to accept responsibility for the acts of an articled clerk not appointed or controlled by him. The Attorney General can only be held accountable for his policy if he is allowed to have a staff policy with regard to his delegatees selected by him and trained by him.

For this purpose it is proposed that a prosecution component, separate from the Department of Justice has to be created. Under the control of the Director of Prosecutions, this Director would then be responsible for the enforcement of a national prosecution policy as well as the general management of the component.

It is undesirable that the Director should have any political position and that he should be an experienced legal practitioner and known for his administrative capabilities.

If he is a politician it would be expected from him to take an active part in political debate which may comprise the position of the Attorneys General. He should not have the powers to institute a prosecution or to conduct it. He should not be allowed to join in a prosecution.

The institution of prosecutions should be left to the Attorney General and his delegates.

Instituting of a prosecution should, in particular, be outside the political arena, because the people must see that politicians are also subject to the sanction of the law and in no way above the law. The Attorney General must exercise his powers to prosecute independent from the Director but the Attorney General should be responsible and accountable to the Director with regard to the prosecution policy implemented.

This organogram that we have attached Mr Chairman we set out, in annexure B, we set out fully the position and qualifications and duties of the Director and his accountability. He is responsible for the management of the prosecution, recruitment, screening, training, standards, transfers, promotions, evaluations, finance - he has his own

budget/...

budget, determination of national prosecution policy in conjunction with the Minister of Justice and other Attorneys General in order to ensure uniform interpretation and application of the Constitution. He is accountable for liaison and consultation with the Minister of Justice, receives annual reports from the Attorneys General, submits consolidated reports to the Minister of Justice in Parliament, requests reasons from Attorneys General as now in order to report to the Minister, Cabinet, Parliament. He is also responsible for external liaison, for extraditions, cooperation and investigations and conferences.

We also, apart from placing all the Attorneys General under his control, place the Office of Serious Economic Offences under his control and we suggest that the Act be amended so that OSEO reports to the Director, and receives delegations from Attorneys General to handle prosecution which has been an area of some debate within our own office and within the office of OSEO behind me. Thank you Mr Chairman.

CHAIRPERSON: Thank you very much. I think that was a very enlightening proposal. Can I suggest now that we ask questions of those who have made the inputs. Before we go over to that we've got another very important event and that's tea that is getting cold in the passage, but I would ask that we try and keep that as short as possible. I think we do have some time constraints on our discussion. So could I ask everybody please to get a cup of tea or juice and just to take their seats again please.

MS MATTHEE: Thank you Mr Chairperson. I would like anyone of the persons who have submissions, perhaps Mr Steyn or Miss Norton, to give us some examples of countries where the

department of the Attorneys General are not part of the executive, and where there are no National Attorney Generals.

MISS NORTON: As far as I am aware there are no examples where there has been an attempt to separate the office of Attorney General from the executive. What we do have is accountability, usually from Directors of Public Prosecutions to Minister of Justice or somebody in the Cabinet. What has arisen of late, in various jurisdictions, is an attempt to control the possibility for interference, political interference at the discretion of the Director of Public Prosecutions and the Attorneys General. Nobody has gone so far as to try to separate this function from the executive. What has been introduced, for instance in Australia, is the mechanism which we have referred to in our submissions, of requiring that any directions given by the Minister of Justice to Attorneys General be in written form and be published, so that there is a control over any attempts to influence this discretion, prosecuting discretion.

MR STEYN: Thank you Mr Chairperson. May I just say that I think it's important to consider the principle that we are looking at here. It's not so much a question of whether the Attorney General is separate from the executive or seen as the State Advocates say, standing as a fourth arm of the State set up, but as to how that organ of the State or the functionary functions within the set up. Now the message that's coming clear, coming through loudly and clearly here is that there has to be accountability, but there should not be political manipulation. As far as the other countries are concerned, I don't have anything further to add to what

Miss Norton has said here.

In many other countries there is political interference and control, the question is whether that leads to proper prosecution in that country. In our view there should be accountability, but there should be a free and unfettered discretion on the part of the Attorney General to decide whether to prosecute or not to prosecute. He or she has to stand by his or her decision and has to give account for that. If it's the wrong decision that Attorney General will have to pay the price for that.

But the big thing is not whether the Attorney General is seen as being under the direct control of the Minister of Justice, but the way in which the Attorney General functions. As the State Advocates have pointed out they want a Director of Public Prosecutions, to me it seems to be simply another step in the set up that we have at the moment, that's more an administrative officer than one that will be taking the decisions on prosecutions as we have it at the moment.

In the United States the Attorney General for example, is a political appointee and if my memory serves me correctly he controls, she at the moment I am sorry, you must excuse me I'm still in the mindset as far as that is concerned, she controls the prosecutions on a federal basis, but then once again one must consider that in the United States there is no uniformity of application. Each State has its own law and its own Attorney General and only for the federal contraventions do you have a National Attorney General. So there are two levels of law there that you operate on which we don't have in this country, we have one legal system for the whole country, that's what we would

like/...

like to see maintained.

If you want a National Attorney General to formulate policy, fine, I don't quite know what is meant by policy, I thought the policy was formulated by Parliament which enacts legislation expressing the views of the people of the country setting out when there should be prosecutions and how law should be applied.

CHAIRPERSON: Mr Henning?

MNR HENNING: Dit gaan oor die vraag: wat is beleid? Ons moet nie beleid hier met politiek verwar nie.

CHAIRPERSON: We have a bit of a problem - we'll have to interpret, so if you can manage in English, we'd prefer that, but else I'll summarise it at the end.

MNR HENNING: Ek sal maar liewers aangaan in Afrikaans. Kom ons neem die volgende scenario. In een spesifieke regsgebied volg 'n prokureur-generaal die beleid om die beskuldigde toegang tot sy dossier te gee. Met ander woorde, die beskuldigde kan vooraf insae kry in die getuieverklarings en die prokureur-generaal weerhou net die getuieverklarings indien die belange van geregtigheid en die regspleging dit inderdaad vereis.

In 'n ander afdeling volg 'n prokureur-generaal 'n ander beleid. Dit gebeur - dis wat tans in Suid-Afrika besig is om te gebeur in ons situasie - ons kan ook ander situasies kry. Die een prokureur-generaal mag byvoorbeeld van oordeel wees dat lyfstraf is onkonstitusioneel, dat hy nie voor die Konstitusionele Hof gaan pleit vir die behoud van lyfstraf nie.

'n Ander prokureur-generaal mag van oordeel wees dat lyfstraf behou behoort te word vir jeugdiges in uiterste gevalle, dat lyfstraf 'n gepaste vonnisopsie is eerder as

langtermyn gevangenisstraf.

So mag daar verskillende beleidsoorwegings wees. Die een prokureur-generaal mag byvoorbeeld van mening wees dat die Grondwet 'n groter vryheid toelaat wat die besit van pornografiese materiaal aanbetref, terwyl 'n ander prokureur-generaal 'n baie meer konserwatiewe beleid mag volg.

Ons hoor oor die televisie van 'n nuwe benadering wat gevolg gaan word om die jeugdige oortreder, sover dit prakties moontlik is, uit die strafstelsel te hou. Die vraag is: waar trek jy die lyn? Die een prokureur-generaal kan besluit, ek trek my lyn hier. Die ander prokureur-generaal kan besluit, ek trek my lyn daar.

Wanneer ons dus oor beleid praat, dan praat ons oor hierdie tipe aangeleenthede - aangeleenthede wat handel oor sake van nasionale belang, aangeleenthede waaroor daar eenvormige benadering moet wees, want anders gaan dit lei tot ongelyke behandeling van die onderdane wat nie deur die Grondwet geduld word nie. Dit is wat ons bedoel wanneer ons beleid praat.

Dit mag wees dat die een prokureur-generaal byvoorbeeld besluit, ek gaan in my gebied streng begin optree teenoor plakkers, terwyl die President van die land van oordeel kan wees dat daar landswyd 'n bietjie verdraagsaamheid in dié verband getoon moet word, sodat daar alternatiewe meganismes gevind kan word om die mense te akkommodeer. Daar kan beleidsverskille ontstaan. Dit ontstaan reeds, en dit sal ook nog in die toekoms al hoe meer ontstaan namate ons in die howe met ons nuwe Grondwet werk. Dankie.

CHAIRPERSON: Can I just summarise briefly? I think Mr Henning was saying that we must not equate policy matters

with politics and that there are differences at the moment for example in the way that the different Attorney Generals allow access to police dockets in their different jurisdictions, some allow it on a limited scale, others do not. In the way that sentence of corporal punishment is asked for and in the way that anti-pornography laws are enforced and so on. So that those are all matters in which policy, prosecutorial policy is made in a sense in different areas, and that there needs to be a level of uniformity else the citizens in different parts of the country are not being treated equally. I think the last example he gave was also perhaps something that is more political. I am not sure if I understood it correctly, but where the President of the country may feel that we should not treat squatters too harshly at the moment because the government feels that other alternatives need to be investigated, but that the Attorney Generals may choose to still go their own route on that matter. I think on all these things he's saying that there is a need to develop a national uniformity of approach. I hope I summarised you accurately.

MR SCHUTTE: I would just like to get some clarification from Miss Norton. Is the argument by Nadel that the Minister should actually be able to give directions regarding specific prosecutions or only with regard to policy, and how far do you interpret that? I would just like to get clarity on that.

MISS NORTON: Yes we do draw a distinction in the types of matters and the types of control which could be exercised by the Minister and by the National Attorney General over Attorneys General. It is our submission that the Minister should have total control over the formulation of policy,

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but should not be in a position to give directions in the exercise of discretion and individual cases. There is some scope, in some jurisdictions, distinctions are made between interventions for purposes of party political objectives and interventions on the basis of broader political objectives. For instance there might be an acceptance that a Minister of Justice could issue directives if he wished to ensure that certain broader political objectives were pursued in prosecution, if individual prosecution decisions were going to affect for instance international relations, labour disputes, ethnic racial disputes. But I think it is Nadel's position that there should be a strict distinction between these two areas and that there should be full accountability to the Minister by the Attorneys General through the National Attorney General for their decisions in individual cases ex post facto but that there should be in the area of policy full control and directions given by the Minister of Justice to the National Attorney General and thereby to the Attorneys General.

MR SCHUTTE: I've still got a problem with this word 'policy', because if one looks at the examples quoted by Mr Henning, sooner or later there will be guidelines on these matters by a court. Sooner or later the court will decide on in which cases police dockets should be made available or not, or which cases are regarded as pornographic content or not. It's still very vague to me to just talk about policy matters, what, I mean can you give us a few examples?

MISS NORTON: I think one of the examples which isn't covered by your concern is that of prosecution of squatters for instance. There's not going to be any clarity in the immediate future given by the Constitution Court for

instance on whether squatters should be prosecuted for something which there is always a measure of discretion to be exercised in the daily implementation of the law, and the daily execution of the law and it's important that Attorneys General be enabled to exercise that type of discretion in developing policy on a day to day basis.

MR SCHUTTE: But that's not ...(intervention)

CHAIRPERSON: Okay let's just give Mr de Beer a chance to respond.

MR DE BEER: If I may just indicate something. It seems that your problem is with that you feel there might be a situation where because of the policy, undefined situation there might be a case where this National Attorney General, whatever we call him, may interfere and say this is policy. I understand that's where you are leading with your problem regarding to the undefineability. I just want to say one thing that we differ, it seems, with Nadel when we deal with the policy situation. We draw the line, if I may just indicate on our - we draw the line here. In other words we say that the national policy, and if you look at page 34 of our memorandum, we indicate in there the powers and functions of this National Attorney General, and we say him, he's responsible under,

> "b to determine and coordinate in consultation with the Minister of Justice and the President the prosecuting policy that shall be followed by the Directorate of Public Prosecutions; and
>
> c. for the observance of the provisions ....."

There are situations and we deal with it on a daily basis where policy determines for instance, ...(indistinct)

people should not be prosecuted in the regional court but in the Supreme Court. That is what policy is for a prosecutor. If you take that and you read that together with the fact that as we proposed in our proposal that there is no ways that this National Attorney General can give direction in a specific case, that is part of the Constitution then you won't have the problem that a National Attorney General can direct prosecutions from where he sits under the heading of a policy decision. He cannot. The Attorney General for every province is the person that will have the right to institute a prosecution, and he has no right, this national person, except what we stipulate on page 34. Thank your Mr Chairman.

CHAIRPERSON: Let me just give Mr Matthee a chance and then Mr Gibson.

MR MATTHEE: Thank you Mr Chairman. My question would firstly be to Miss Norton. I would like to know how she sees the decision-making process that an Attorney General has to adopt. Is it not so that an Attorney General should take all his decisions on a judicial basis, as a judicial decision, the same way that a magistrate or a judge has to take his or her decision on the basis of the law as it stands at that point in time? The only difference being that the decision that the judge or the magistrate has to take is whether an accused is guilty or not guilty and of course the sentence. And the decision that an Attorney General has to take is whether to prosecute or not to prosecute. But is it not so that the process should be exactly the same, namely, a judicial decision based on the law as it stands and solely on the law as it stands regardless of any policy of the government of the day or

anybody else. Do you understand it the same way, or do you have a different understanding of it?

MISS NORTON: We certainly agree that the decision-making and the exercise of discretion by an Attorney General is a unique one, it's a quasi judicial role which the Attorney General performs and we certainly see the Attorney General as having, and exercising a greater measure of discretion than a judge in its determining whether or not to execute a particular law. And we refer once again to some of the examples which have been cited in the discussion thus far, as being instances where there might be pressing political socio-economic reasons why a certain law should not be implemented or executed at a particular point in time, and we regard therefore the Attorney General as having a different and a greater measure of discretion in the application of the law.

MR MATTHEE: Mr Chairman may I just have a follow-up question just so that I think we can all understand this. Do I understand you correctly then Miss Norton, that you say that the Attorney General's decision is not based solely on the law of the land as it stands at that point in time? Because that is the way I understand you. It is also, or it should, in your opinion, also be based on certain policy directives, or direction of policy of the government of the day because if it is on the law as it stands then certainly there is no room for that Attorney General to be influenced by any policy whatsoever by the government of the day. You see, can I just explain to you, the government of the day will have the majority in making legislation in the country also, and if it wants to change the law of the land it has to change it through Parliament, through the normal

legislative process. But what you are saying, as I understand you, is apart from the law as it stands of the country, the Attorney General also has to take into account the policy or policy directives coming from either the National Director of Prosecutions, and I think you also indicated that you would prefer him to be in Cabinet. So I would just like you to be clear as far as that is concerned. You say, do you want him to take his decisions also in line with policy directives or only a judicial decision in line and based on the law of the land as it stands on the day that he has to take his decision?

MISS NORTON: We believe that the decision-making by an Attorney General must take account of policy considerations. I think we are certainly aware in the Western Cape of media statements issued weekly by the current Attorney General as to whether anti-pornography laws should be implemented to the full extent of the law, certain innovative measures which the Attorney General of the Western Cape has taken in respect of diversion(?) programmes for juveniles. There are various areas in which the law as it stands, has to be examined and considered along with background policy considerations in exercising the discretion of an Attorney General.

MR MATTHEE: Thank your Mr Chairman. May I repeat the same question to the representatives from the Attorney Generals.

CHAIRPERSON: That's your last question.

MR DE VRIES: Thank you Mr Chairman. The Attorney General does institute on a prosecution based solely on the facts and solely on the law of the land, he also is vested with the discretion. There's a lengthy discussion or the prosecutor's discretion, a plea for circumspection published

in SA Tydskrif ...(indistinct) vol 1 1977, page 143. By discretion it is understood that the Attorney General can decide, for instance, if someone has been killed in a motor car accident and the driver is the guilty party in that motor car accident, but the person who has been killed was his three month old baby, he then has a discretion whether he will prosecute and further place a burden on this particular man, or whether he will not prosecute although there is quite clearly a criminal case to be answered by him. If I may quote an example from past history of how this policy matter works.

Many years ago there was a section in the Immorality Act, section 16, which caused some controversy in this country and although all prosecutors were authorised to institute prosecutions in terms of section 16, eventually the Attorneys General agreed that all these prosecutions would come to their offices and would be judged in their offices whether they would institute a prosecution or not institute a prosecution and eventually no prosecutions were instituted, although the law was still on the books. That is what I mean by policy.

MR GIBSON: Thank you Chairperson. It seems to me that there's quite a convergence in the views of Nadel and the Attorneys General. I'd like both sides to crystallise where their differences are, just so that we can understand it. To me the one major difference expressed by Miss Norton was the ability of the Minister of Justice to issue a directive. Now assume he were to do so in respect of a specific prosecution, do you think he should have the right to do that, firstly? Secondly, what happens if he doesn't issue a directive, he simply phones an Attorney General and says

I think it will be awful if you prosecuted and I really don't want you to, I'm not giving you an instruction, I'm just suggesting that you shouldn't? Say for example a very prominent politician was accused of being involved in an abduction and a murder, and the Minister of Justice didn't want that politician to be prosecuted, he could firstly suggest that no prosecution should be instituted and thereafter he could in fact issue a directive and published in the Government Gazette, you shall not prosecute Ms so and so for abduction and murder and simply justify it on the grounds that she/he, the politician, was very prominent and it wasn't in the public interest for a prominent politician to be prosecuted. Does your model lend itself to that?

MISS NORTON: With respect that any of the models proposed would lend themselves to that because what we are talking about is a situation in which the Minister of Justice abused his or her powers and what you are actually would want to know in that situation is what is the security of tenure of the Attorney General on the other side of the telephone line, whether that person feels secure enough to resist any attempt t interfere with his or her discretion. I think that is where the important checks and balances come in. And I think our answer would be, no that we would not want to see Ministers of Justice, and we would not regard it as their right, to interfere in specific prosecutions. We would certainly see it as their right to request reasons ex post facto once decisions had been made or once it was clear that a decision was not going to be made, to request reasons for those decisions. Yes we do, in that we see the ultimate responsibility for prosecution as lying with the Minister of Justice and we therefore feel it important that the Minister

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of Justice be able to exert a measure of control and demand a measure of accountability from Attorneys General.

MR DE VRIES: Mr Chairman we think that it would be totally iniquitous if a politician can be allowed to direct an Attorney General in a specific matter. That would mean that certain members of the community, for example, was quoted as prominent politicians would be above the law, and that it would not be subject to the Constitution. There can be no interference in a specific prosecution.

As regards accountability, after the decision has been made, while the case is before court, obviously it is a sub judice matter, obviously Parliament can have no say in that. The court is there, actually, for the accountability of the Attorney General. If there is a conviction then the court has justified, or that the Attorney General is justified in instituting the conviction. If there is not a conviction the Press will in any event castigate. The media is there as a control for the Attorney General and the instituting of prosecutions for prominent people, that is why he normally takes this decision himself.

SEN MASHWANA: I notice that two things which I want to be clarified from the presenters. The first thing that I see we are trying to do here is to check how can we make the Attorney General more accountable, and to be free from improper political manipulation. When I read through these documents and listened to presentations, I don't find a clear exposition of how do we make this office more accountable to us, or to the public in general, because in one instance we are saying the Minister can call for an explanation, is that how he can be accountable? Then secondly we are saying there is still room for private

prosecution. Private prosecution we know what it is all about, how expensive it is and how inaccessible it is to most black or the poor in the rural areas, and we are saying these people, the AG, he makes reports to Parliament, can we be clarified which Parliament? When we say they will be appointed at the provincial level, provincial AGs, are we saying the provincial AGs will report to the provinces or in what manner? And also for the fact that these reports will be presented to Parliament are not subject to any debate. They are just reports which are tabled in Parliament. I just want you to clarify us so that we know what control measures will be in place.

For instance in the presentation by the independent advocates, they say the appointment of the Director of Judicial Services will be appointed by the President. Why is it not necessary that he be appointed by the Judicial Services Commission which is more representative of the people? I just want us to be clarified on these control measures. Thank you.

CHAIRPERSON: Let me just give Priscilla Jana a follow up to that.

MS JANA: We are talking about accountability and I want to follow up on my colleague to say we need to go beyond just tabling reports, what else can be done? Perhaps if anyone can tell us what happens in other parts of the world, in other countries, as far as accountability is concerned?

MR DE BEER: If I may just, we missed the point here, I just want to answer the previous question under Mr Gibson, he said the difference. I see three main differences in our proposal. One is we say there should be what we call a National Directorate of Public Prosecutions. The whole

institution, in other words from the National Attorney General, whatever he's called, to the lowest prosecutor, we say outside of the Department of Justice. That I have not heard from Nadel's proposal. And we say that is the way that the lowest prosecutor can also be accountable right through upwards. If you keep him in the Department of Justice like he is now there is a problem, he doesn't know where to account to because there's the magistrate looking after him, there's the Department looking after him and there's an Attorney General looking after him. That's the one main issue.

We are against any form of that person, the national person being in the Cabinet. That is the one main difference.

Then the third one is that we see the Minister, not as a person that can issue the directions. The policy directions is the job of the National Director of Public Prosecutions. Those are the main differences.

With regard to the questions from my right-hand side, we said on page 32 sir, that the Director of Public Prosecutions shall be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Services Commission. So we are bringing in the Judicial Services Commission in his appointment, if that's what I understand your question to be, and the process of the Judicial Services Commission as described in the Constitution at the moment is what we had in mind with that proposal. I, however, can't add to your position, I'd just like to add the following, it seems if you look at the international tendency, the gap between the person that institutes prosecutions, in other words your Attorney

General and the person at the top, that that gap has been governed, most of these other countries that we look at, Canada and all these places, by what is called a - may I put it in Afrikaans, 'ongeskrewe reëls' - conventions. It seems that it's virtually impossible and that's what everybody is battling with all over the world is to rule those forces that work with, but they are based on conventions and those conventions have been established over ages, and I think that convention is part of our system, the way our Ministers and Director Generals acted in the past and I think it should be brought forward. It is very difficult to legislate that. We think the furthest you can go, as what we have proposed the powers as we did on page 34 of our submission.

MR STANDER: I would just like to add to Mr de Beer in answer to the Senator's question. The reason why the President should appoint the Director of Public Prosecutions or the National Attorney General is because of section 81 of the Interim Constitution and I see no reason why the specific section should not be taken up in the final Constitution. Section 81(1) says,

> "The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall as head of the State defend and uphold the Constitution and the supreme law of the land".

The Director of Public Prosecutions will be a functionary within the executive and for that reason the President who is in charge of seeing to it that the executive acts in compliance with the Constitution, why he should appoint him

and not someone like the Judicial Services Commission. There is however, no reason why the Judicial Services Commission should not be involved and make recommendations.

You also mentioned the fact of the Attorney General's relation to the provinces. We are not saying that the Attorney General is appointed by the province or has only accountability to his region or to his regional head. 3.2 on page 32 of our proposal says,"An Attorney General for each province shall be appointed by the President", for the same reason as the National Director should be appointed by the President, "in consultation with the Cabinet and after consultation with the Director of Public Prosecutions".

Now it is so, Mr Henning made mention of the provinces earlier and the powers they have, it will necessarily be so that there will be certain legislation passed by the Provinces which might also create offences, the situations in the provinces differ. It might be whether you call them ordinances or Municipal Bye-Laws, whatever the situation will be, there will be different legislation in the different provinces. Now that legislation, obviously the Attorney General will have to apply that as well, but in that regard there will have to be some channel to the premier of the region for accountability. And in a matter of course the National Attorney General won't be involved there at all except as Mr Henning mentioned earlier, which is clear from our proposal, when there is some sort of conflict between the two then we see the National Attorney General as the person managing that conflict. Thank you.

MISS NORTON: I would just like to address the question of accountability to Parliament and how that could actually be fine-tuned and made more effective. In our vision of course

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the Attorneys General and the National Attorney General will be accountable to Parliament through the Minister of Justice who we believe will be in a far stronger position than Parliament to request reasons for decisions on a daily basis. We would, however, envisage ultimate accountability to Parliament. I think some of the methods which have been used to enhance that accountability in other jurisdictions have been, for instance, adjusting the standing rules of Parliament to ensure that individual Attorneys General for instance could appear in Parliament and answer questions. Another way might be to use to the full the powers of the Standing Committees. Parliament is a fairly unwieldy body to sort of address day-to-day questions and questions of policy and prosecutions. The Standing Committees would be a far more viable option for bringing Attorneys General to account and addressing particular questions. So those are two avenues which we would see as being likely ways of enhancing Parliament's ability to call Attorneys General to account.

SEN DE VILLE: Mr de Vries, Mr Human gave evidence here last week on behalf of the State Advocates and in his submission on page 10 he says the following:

> "This Association is of the firm view that the proposed service and our country will best be served by having the individual Attorney Generals retain their independence as at present".

He goes on to say that,

> "Our Society are of the considered opinion that the following disadvantages outweigh the possible advantages of having a National Attorney General".

Now your view today I think differs from that of Mr Human that he gave last week, can you perhaps just give us clarity on what the position of the State Advocates are on this please?

MR DE VRIES: The difference is mainly based thereon that we see the whole of the prosecution being under the control of one specific person who does not institute prosecutions as such. I think they have envisaged the fact that there would possibly be a National Attorney General who would be in a position to interfere with local Attorneys General in their decision-making, we take the whole structure instead of just the Attorney General itself. I think that is basically our degree of difference.

If I could remember correctly they started with the concept of an independent prosecutorial core and then switched tracks saying it would be too expensive. Our point of view is, for good criminal justice you need to pay, whatever the expenses may be.

CHAIRPERSON: Senator maybe just to make clear I think what we heard last week was the official view of the Society for State Advocates. I think the persons with us today have made it clear that they are here in their individual capacities.

SEN DE VILLE: Yes I just wanted to know what the status of this representation and that of Mr Human.

MNR HENNING: Kan ek net op die laaste vraag ook antwoord, die Vereniging vir Staatsadvokate het oor baie jare gepleit dat die hele vervolgingsafdeling onafhanklik van die Staatsdiens moet wees. Voor 1992 was daar toe nou optrede in dié verband, maar wat toe gebeur net die Prokureur-generaals is onafhanklik gemaak, is uit die Staatsdiens

uitgehaal. Ons sê dit behoort nie so te wees nie, dit was 'n fout, by daardie geleentheid moes die hele vervolging onafhanklik gemaak gewees het en ons standpunt is dat wanneer 'n mens dan die vervolging onafhanklik maak, dit logies is uit alle bestuursoogpunte om aan die hoof daarvan dat een sentrale persoon hê en daardie sentrale persoon voldoen dan meteens aan al die vereistes wat die Grondwet stel met betrekking tot die verantwoording doen aan die President, aan die Kabinet ... (onduidelik), maar daar is 'n wesenlike verskil tussen ons standpunt en die vereniging se ... (onduidelik) standpunt oor die bestaan van daardie sentrale persoon ... (onduidelik) Prokureur-generaal ...(onduidelik). Daaroor verskil ons soos die dag by nag. Ons verteenwoordig nie 'n amptelike .... (onduidelik)

CHAIRPERSON: Mr Henning was saying that they, the Society for State advocates have for many years asked for an independent office to be created. Essentially they believed that it was a logical point of departure from that to say that that office needs to be headed by a single person at the top and to that extent they differ from the ...(indistinct).

MR STEYN: Mr Chairperson may I just say that the Association of Law Societies' view is the present structures that are in place serve adequately as far as responsibility is concerned. In other countries the Attorney General is a political office holder, reports to Parliament or to Congress, on the same basis that he does here. He reports here to the Minister of Justice who tables the report in Parliament. If that should be viewed as not being adequate and that the rules of Parliament need to be changed to allow for the Attorney General to be placed on the red carpet to

answer questions, fine, but in our view that does not effect the process of constitution-making. It's something separate dealing there with rules and detail, the structure is in place.

Secondly we differ from the concept of having a dictator at the top, dictating policy for prosecutions. We believe in consensus politics. Not in having one person sitting at the top who decides when laws are going to applied and when not. As we see the present system, we have a Minister of Justice who has all the powers that a Director of Public Prosecutions will have. He can summon Attorneys General to a meeting with him, he can formulate policy with them, he can telephone them. Nothing's appeared in the Press, so far to my knowledge, where the Minister has complained about Attorneys General being obstructive, about not carrying out the wishes of the government, about not carrying out the laws. In our view it's all worked well. If we say that there are ills let's identify them before we start tinkering with the structure. Thank you.

MR SCHUTTE: I can only say "amen". Mr Chairman there are in my opinion three matters that have been raised before us today. The one is the question of accountability, the other one is the question of uniform policy and the third one is the independence of the structure.

Now as far as accountability is concerned I fail to see how centralisation is going to assist in that regard. Because on the argument proposed by Nadel that accountability, I mean the Attorney Generals will in any case still have the power to institute individual prosecutions. So in the final instance they will have to be accountable, and as matters are at this stage they have got

to report to Parliament, and we can actually ask them to come and give evidence before the Standing Committee on Justice. So I fail to see how, I would appreciate it if you could help us in that regard, to see how centralisation in one singular National Attorney General, how that is going to help as far as the accountability on the most basic issues, and that is on the question of individual prosecutions.

And then as far as the uniform policy is concerned, I still, after listening to the evidence, would like to hear whether there are at this stage, serious matters that need to be addressed in this regard, that really needs uniform policy. I mean we have been given the examples of, for instance, prosecutions for rape being in the Supreme Court or being in the regional court. There may be very, very good reasons why in certain regions rape cases should be prosecuted in the Supreme Court and other reasons in the magistrate's court or the regional court. So. - pardon

.....: ...(indistinct)

MR SCHUTTE: Well let's not refer to rape cases, but as far as faction fighting cases is concerned, I believe there is very good reason why in Natal it should only be prosecuted in the Supreme Court and nowhere else. Whereas faction fighting on the plains of the Cape may be not that serious. So I still would like to hear good reasons why there is now imperative to deal with uniform policy in this way.

MISS NORTON: To answer the first question regarding individual prosecutions and whether the system which is in place currently is not in fact adequate, I think our submission is that the process of accountability by a

Parliament remains, because of the nature of Parliament an unwieldy one. Centralisation of this function in the Minister of Justice would actually, and under the Minister of Justice or National Attorney General would allow for immediate accountability. If a decision had been made appeared to be problematic, if a decision had not been made and there was an outcry as to why a particular prosecution had not taken place, there would be a far more immediate accountability in the structure which we have proposed than perhaps awaiting the next session of Parliament and the standing committee finding time to address a particular issue and summons an Attorney General before it.

As regards uniform policy our submissions are based very firmly on the Constitution guarantee of equal application of the law, and we could certainly envisage a situation where somebody had been prosecuted in one province for a particular offence and somebody in another province was not prosecuted for a similar offence. It would be very important in that instance for example to ensure that the Minister and the National Attorney General have some measure, some way of finding out why there has not been, why there had not been an equal application of the law in both of those provinces.

MR DE BEER: Just one example. In certain of the areas of jurisdiction of the Attorneys General there is prosecution by camera for speeding, others not. The question is, in the system as it is how do you overcome that problem because it's not equality in terms of the Constitution, and the problem is there is no one.

MR.....: Mr Chairperson may I just say I beg to differ. I fail to see the point as far as principle is

concerned/...

concerned because that's a question of entrapment. The method employed to catch the offender and not the method employed to convict him, that's simply evidence and not a policy situation. If you have camera evidence you can use that, if you have a stop watch, if you have a radar, if you have a gasometer, I don't think that affects the principle or the policy, it is simply a way that is used by the law enforcement authorities to gain evidence, it doesn't go to the root of policy whether there should be a prosecution or not.

CHAIRPERSON: I thought Mr de Beer is saying that in certain jurisdictions at the moment the Attorney General will say I will not use camera evidence because I don't believe it's legally good. In other jurisdictions camera evidence is used because the Attorney General in the that jurisdiction believes that it is legally good. Is he not saying that one needs to have a measure of uniformity across the country about what evidence is used or not used in your courts.

MR.....: I suppose it depends on what works in the court Mr Chairperson. If the Attorney General who refuses to use that evidence has burnt his fingers with that he's not going to use it again. If the other Attorney General has had success he will use it. But my point really is that that is a matter that remains in the discretion of the Attorney General. The offence has been committed, it's not a question of him deciding that I'm not going to prosecute such a type of offence. I will prosecute such a type of offence if I'm brought the correct evidence.

MR.....: Mr Chairman may I ask a question of Nadel? If I understand them correctly, is it true that you want

accountability in the sense that there could be political interference with an individual decision by an AG, or by discretion in an individual case, by the exercise of his discretion in an individual case?

MISS NORTON: We would want to know that there was accountability after the event for the exercise of such discretion, but we would be very much opposed to the interference with that discretion while a decision was being made.

CHAIRPERSON: Are there any other questions?

SEN MUTI: Mr Chairperson it's not actually a question because most of the questions have been asked and less answers have been given. I just want to reflect that from the discussions here it is not clear as yet to me, whether there is a need for uniformity and coordination in the application of justice. If there is a need for that how do you then achieve it without centralising for instance? And if you centralise is the solution to the question of accountability, uniformity and coordination or something like that, there's apparently difference of opinion or something like that.

Furthermore I just want to comment that the more expensive justice becomes, the less available it becomes to the people or something like that. I heard one of the presenters saying that if we need to pay for good justice let's pay. I am not sure if he has taken that fact into consideration as well.

Further if for instance we have, in South Africa we have one ministry for justice, my ordinary interpretation would mean that we want to apply same justice to everybody in the country, and I am just not sure that it's possible

through decentralised prosecutions to achieve that, or something like that, I'm getting confused.

CHAIRPERSON: Is there anybody who would like to respond to Senator Muti(?)? I think he's making more of a comment perhaps than a question. If there are no further comments I think our Committee would like to thank all our presenters this afternoon very much. I think we have heard a range of views and they have been very informative for us. Clearly this is an issue that requires still considerable thought and discussion and we will still be hearing from a range of other people on the issue. I think for all of you if you have any further submissions or inputs that you would like to bring to our attention please do so. I am not sure if we will be able to hear you again, but certainly we will read whatever you may send us. On behalf of the Committee I wish to thank you very much.

OORSKRYFSTER SE SERTIFIKAAT

Ek, die ondergetekende, sertifiseer hiermee dat die voorafgaande, tot die beste van my vermoë en sover dit hoorbaar is, 'n ware en juiste afskrif is van die oorspronklike getuienis wat deur middel van 'n meganiese opvangtoestel opgeneem is in die saak van:

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The following problems were experienced in this matter:

IN SECTIONS OF TAPE 2 AND AT THE BEGINNING OF TAPE 3 FOR A FEW PAGES THE VOICES WERE ALMOST INAUDIBLE.

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