PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 20 SEPTEMBER 1995 (CP020095.MEM)

RE: ATTORNEY-GENERAL/PROSECUTORIAL AUTHORITY

SUMMARY

1. On the premise that the prosecutorial authority shall be constitutionalized and that agreement has been reached on the requirement that such authority shall be independent and impartial, the Panel took account of and analyzed *inter alia* the history of the office of the Attorney General (AG) in South Africa, the situation in some other legal systems, submissions made to the CA (also with regard to practical considerations about crime control and effectiveness) and the relevant Constitutional Principles (CPs).

2. The aim was to determine the nature of the prosecutorial authority in order to reach conclusions on issues such as the meaning and scope of its independence, as well as how to ensure such independence, the burden of political responsibility and accountability and the question whether this authority should be exercised by a national functionary, or by independent provincial prosecutorial heads.

3. Comparative research indicates that a variety of models are followed in the world, that prosecutorial authorities are seldom totally independent of all branches of government and that different degrees and methods of political responsibility, accountability and independence exist. In no legal system known to the Panel is the prosecutorial power exercised only on a provincial level by functionaries who are totally independent from any national control or direction.

4. In a recent Namibian judgment it was found on an interpretation of the Namibian Constitution, *inter alia*, that direct ministerial control and intervention (as was the case in South Africa before 1992) is not in accordance with the imperatives of the constitutional state, but that the minister (or AG as a Cabinet member) must be informed and bears "final responsibility" for the office of the prosecutorial authority.

5. Historical and comparative evidence and an analysis of the duties of a prosecutorial authority suggest that the nature of this office is neither of a purely executive nor a purely judicial nature, but rather quasi-judicial or *sui generis*.

6. Against this background, and in view of the relevant CPs, it is recommended that:
6.1 the prosecutorial authority should be structured nationally, with provincial or regional offices responsible to a national AG, rather than having an independent AG for each province;

6.2 the prosecutorial authority should be independent, impartial and immune from political manipulation, but also fully accountable;

6.3 the political responsibility of the government for crime control and related matters should be taken into account in formulating models regarding the prosecutorial authority;

6.4 effective mechanisms regarding appointment, tenure and reporting should be designed to ensure the aforementioned;

6.5 new titles or terminology deserve consideration.

7. Three draft texts are put forward for the purposes of discussion.
## CONTENTS

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Introduction</td>
</tr>
<tr>
<td>2.</td>
<td>History and duties of the AG in South Africa</td>
</tr>
<tr>
<td>3.</td>
<td>Comparative perspective</td>
</tr>
<tr>
<td>4.</td>
<td>Submissions received</td>
</tr>
<tr>
<td>5.</td>
<td>A suggested approach; a definition of prosecutorial power in relation to functional areas; the relevant questions</td>
</tr>
<tr>
<td>6.</td>
<td>The relevant Constitutional Principles</td>
</tr>
<tr>
<td>7.</td>
<td>Practicality and local and regional needs</td>
</tr>
<tr>
<td>8.</td>
<td>Political responsibility, accountability, independence and abuse of power</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8.1 General</td>
</tr>
<tr>
<td></td>
<td>8.2 Political responsibility and accountability</td>
</tr>
<tr>
<td></td>
<td>8.3 Independence</td>
</tr>
<tr>
<td></td>
<td>8.4 Prevention of abuse of power</td>
</tr>
<tr>
<td>9.</td>
<td>Recommendations</td>
</tr>
<tr>
<td>10.</td>
<td>Nomenclature</td>
</tr>
<tr>
<td>11.</td>
<td>Tentative Drafts</td>
</tr>
<tr>
<td>12.</td>
<td>Literature consulted</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

1.1 During a debate in the Sub-Committee of the Constitutional Committee on Friday 8 September 1995, the Chairperson of the CA requested the Panel to formulate an opinion on the "Attorney-General" (AG).

The Panel based the interpretation of its mandate on the draft text (with footnotes) of 25 August 1995, included on pages 14-15 of the relevant documentation, as well as the debate around this draft text in the Sub-Committee.

1.2 The Panel's recommendations and other remarks are thus based on the assumption that a draft constitutional text on the AG is to be discussed by the CC. The Panel was not requested to express an opinion as to whether or not the office of the AG or prosecutorial authority ought to be constitutionalized.

1.3 It was accepted that agreement had been reached on the independence (and presumably impartiality) of the AG. (See 1(2) of the draft text, with footnote 4, on page 14 of the Sub-Committee documentation.)

1.4 The Panel was specifically requested to do comparative research regarding the position of the prosecutorial authority in other countries. It was regarded as useful to include a brief summary of the history of this office in South Africa.

1.5 Against this background, the Panel reflected on the nature and functions of the office, its relationship with the executive and with Parliament (and thus the possible meanings of "independence" and "accountability") and desirable degrees of "centralisation" and "devolution", including the question as to whether or not the prosecutorial authority in South Africa should be exercised by a National Attorney General (NAG), or separately and independently in each of the provinces. These questions were examined in the light of the submissions received from political parties, AGs, judges, lawyers' organisations and other role players. The relevant Constitutional Principles and practical considerations which govern effective enforcement of the law, crime control and prevention and prosecution of criminals were taken into account, as well the sensitivities which surround this issue because of the existing situation in South Africa.

1.6 One aspect which could cause some confusion is the different meanings
attached to terms such as "attorney-general", "solicitor-general", "director of public prosecutions" and "prosecutor-general" in various jurisdictions. Some of these will be clarified below, e.g. in the comparative section. In South Africa some lack of understanding on the side of the public also occurs, because of the use of the term "attorneys-general" for people, who are not actually attorneys, but state advocates and other prosecutors in criminal proceedings. The designation "state attorney", for those acting as attorneys for the state in civil cases increases the confusion. The present terminology is the result of historical developments. New terminology deserves consideration.

2. HISTORY AND DUTIES OF THE AG IN SOUTH AFRICA

2.1 The office of the public prosecutor in South Africa dates back to the Dutch colonial era. Soon after 1652 a 'Fiscal' was appointed, to investigate crimes and to prosecute offenders. His authority was later widened to include the duty to report even the Governor to the authorities in the Netherlands. Later the office was made subordinate to the local Government. During the Batavian period (1803-1806) the title 'Fiscal' was changed to 'Attorney-General'. The AG was appointed by the Dutch Government and his authority to prosecute was subject to approval of the court.

2.2 When the British occupied the Cape in 1806, they reintroduced the title of Fiscal. The Fiscal was also vice-president and acting president of the Court of Justice, as well as chief of the police. The Fiscal was theoretically independent, but in political cases the colonial government communicated with him. The office of AG was instituted only in 1828, to act *inter alia* as public prosecutor. The AG was also a political office. In 1874 it was recommended by a Commission that the AG should cease being a member of the government and rather be a permanent member of the crown, independent from the ministry.

2.3 AGs in the old republics of the Transvaal and Orange Free State and in Natal were responsible for public prosecutions, held several other senior executive posts (including chief of police and prisons) and were even allowed to practice privately.

2.4 When the Union of South Africa was formed, the power to prosecute was entrusted to four AGs, one for each province. All other functions of the previous AGs were taken over by the Minister of Justice. No provision for ministerial control over the AG or for accountability to Parliament existed.

2.5 In 1926 - apparently after an AG declined to prosecute a man called Jollie who tried to derail a train carrying Justice Minister Jan Smuts - the final control over prosecutions was removed from the AGs and vested in the
Minister of Justice. This was done both because public servants were not responsible to Parliament, and for reasons of policy.

2.6 Because of the intolerable burden of accountability which this arrangement placed on the Minister, the AGs were in 1935 again vested with the power of prosecution, subject to the direction and ultimate control of the Minister of Justice, who was a member of the Cabinet.

2.7 In terms of the General Law Amendment Act of 1957 and Section 3(5) of the Criminal Procedure Act 51 of 1977, the AG exercised his authority subject to the control and direction of the Minister of Justice "who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions". (Former Ministers of Justice often stated that interference would seldom take place, and only when national interests were involved. Allegations and suspicions of political interference, or of AGs vigorously and keenly pursuing the policies of the government, often came to the fore.)

2.8 The Attorney-General Act 92 of 1992 changed the position. The President appoints an AG for the area of jurisdiction of each provincial division (and the WLD) of the Supreme Court. The Minister of Justice appoints deputy AGs. However AGs are no longer subject to the control and directions of the Minister. The Minister coordinates the functions of AGs and can at most request an AG to furnish information or a report and to provide reasons regarding matters handled by the AG. An AG must submit a report to the Minister annually, and such report must be tabled in Parliament where the Minister can be questioned on it. The President can remove an AG from office only when requested to do so by both of the houses of Parliament. Thus AGs are independent from the government to the extent of being free to argue before the Constitutional Court that legislation is constitutional, although the government may believe that it is not. (In such cases the government may appoint lawyers to argue against an AG, as happened in the recent capital punishment case.)

2.9 Section 108 of the interim Constitution of 1993 vests the authority to institute criminal prosecutions on behalf of the state in the "attorneys-general" of the Republic. The area of jurisdiction, qualifications, powers and functions of AGs are left to be prescribed by law. Section 241(4) reflects the position of AGs holding office immediately before the commencement of the Constitution.

2.10 Several other laws also contain references to the office of the AG. The most important duties of the AG are to: decide whether or not to institute criminal proceedings (including the weighing of evidence, consultation with witnesses, instructions to the police and prosecutors and advice and
guidance to prosecutors); conduct prosecutions in the Supreme Court; consider representations from the public; provide opinions in review cases at the request of judges; comment on proposed legislation.

2.11 The office of the AG has been a powerful one. The courts not only showed considerable respect for decisions of AGs and were not inclined to interfere in, control, or even comment on the exercise of their discretion, but even accorded high praise to this office. An AG has the right to prevent the granting of bail in certain circumstances, without the court being able to question this decision. An AG furthermore has the power to order the detention of a witness under certain circumstances.

3. COMPARATIVE PERSPECTIVE

3.1 A variety of models and possibilities exist in the world. Many of these are obviously linked to the history and constitutional arrangements in different countries, as well as to specific characteristics of different systems of law and legal administration. With regard to the Commonwealth, for example, it has been stated that "(a) review of the existing systems operating at present ... produces a somewhat bewildering series of alternate arrangements, the nature of which cannot be fully understood without reference to the prevailing political context of each individual country."

3.2 It is clear that an ideal prosecutor's role that could serve as a model for all criminal justice systems does not exist. Existing differences relate to the method of appointment (or election), the political nature of the office and the relationship between the office and the government of the day, the way in which the discretion to prosecute is exercised, and the degree to which the prosecutor's office is centralized and hierarchically organized. With regard to the last issue, it can be noted that where a criminal justice system is dominated by a policy of uniform law enforcement, great emphasis will usually be placed on comprehensive and rigid central supervision. If, however, a criminal justice administration is governed by the idea that prosecution should conform with what is considered desirable on a local level, the individual prosecutor needs some degree of

---

3. S 185 of the Criminal Procedure Act 51 of 1977
4. Edwards, in a paper on 'Emerging Problems in Defining the Modern Role of the Office of the Attorney-General in Commonwealth Countries', quoted in the recent Namibian case (see below).
3.3 No example could be found of any federal or other system where a national competency such as justice is exercised only on a sub-national level, or where provincial prosecutorial authorities operate in the absence of or independently from a national or federal authority, as far as the enforcement of national or federal law is concerned.

3.4 Some examples which bear out the above conclusions can be briefly mentioned.

3.5 In Commonwealth countries several `models' seem to be followed. The summary of these (with reference to authors on the topic) taken with some amendments from the recent Namibian judgment referred to below, is useful to some degree:

3.5.1 Model 1

Prosecutions are directed by a public servant who is not subject to the direction or control of any other person or authority. This person may be referred to as an AG or Director of Public Prosecutions (DPP). In some jurisdictions the prosecuting authority (or AG) will have other functions as well (such as advising on legislation). Systems exemplifying this model include those in Kenya, Sierra Leone, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Bahamas, Trinidad and Tobago, Botswana and the Seychelles.

In other jurisdictions the DPP is responsible only for prosecutions. This model to some extent exemplifies the classic Commonwealth pattern which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many colonies. Following independence in many countries, this particular provision was changed to bring the DPP under the direct control of the AG or Minister, to secure Ministerial responsibility. Jamaica and Guyana, however, have retained the total independence of the office of DPP.

3.5.2 Model 2

The AG is a political appointment. He or she is a member of the Government but, although holding Ministerial office, does not sit regularly as a member of the Cabinet. The AG of England and Wales typifies this

---

5 Herrmann 535 - 538

6 E.g. Edwards; also see Rose and Paul 57-58.
particular model.

3.5.3 Model 3

The AG is a member of the Government and, as such, is normally included in the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the office of the AG is combined with the portfolio of Minister of Justice (or similar title). Most of the Canadian provinces and the Canadian Federal Government have adopted this model. Other countries that fall within this category include Australia (both the states and the Commonwealth Government), Nigeria and Ghana. Where, in these jurisdictions there exists a DPP (or its equivalent), the DPP is, in the ultimate analysis, subject to the direction and control of the AG.

3.5.4 Model 4

The DPP is a public servant. In the exercise of his or her powers he or she is subject to the directions of the President but to no other person. This is the situation in Tanzania and which prevailed in Ghana during the latter stage of the first Republic from 1962 to 1966.

3.5.5 Model 5

The DPP is a public servant. Generally the DPP is not subject to control by any other person but if, in his or her judgment, a case involves general considerations of public policy, the DPP must bring the case to the attention of the AG, who is empowered to give directions to the DPP. This model is applicable in Zambia alone at present. In Malawi, the DPP is subject to the directions of the AG. If, however, the AG is a public servant, the Minister responsible for the administration of justice may require any case, or class of cases, to be submitted to him or her for directions as to the institution or discontinuance of criminal proceedings.

3.5.6 In summary it could be said that the general power to prosecute in Commonwealth countries may vest either in an independent public servant or in a member of government. In the later case the term AG is normally used.

Issues regarding the separation of powers, independence and accountability are addressed differently and no conclusive solution is offered. However, even in federal systems within the Commonwealth justice as a national competency is never exercised on a provincial level only. In Canada, for example, where the administration of justice is a federal matter, the Minister of Justice who is a member of the Cabinet and of Parliament is the ex officio AG of Canada. The Deputy Minister of
Justice is the senior official in charge of the Department of Justice and also the ex officio Deputy AG. Provinces have AGs and deputy AGs. In Australia where justice is a state competency the federal AG is a member of the Cabinet under whose directions the federal DPP falls. After some reform to safeguard the prosecutorial office against political manipulation, the Australian DPP still performs his or her functions subject to directions or guidelines from the Minister or AG. Such guidelines are furnished in writing and published in the Government Gazette, after consultation with the DPP.

Ministerial responsibility regarding the prosecutorial function has been part of the Westminster tradition. The responsible Minister, often called the AG, is a member of the Cabinet and the legislature and is responsible to the executive and to Parliament and thus reflects the interests of the public. The actual prosecutorial power is then exercised by a DPP, who functions under the control and direction of the AG. Because of the danger that the prosecutorial power may be abused for party political purposes, the Commonwealth office sought to make the prosecutorial authority entirely independent of the executive and legislature when drafting constitutions for newly independent Commonwealth countries in Africa and the Caribbean. As indicated above, ministerial responsibility has been reintroduced in some of these systems.

3.6 In Germany the federal prosecutorial authority is headed by the Federal Prosecutor (`Generalbundesstaatsanwalt') who is appointed by the federal Minister of Justice. This office is an `independent organ of the administration of justice' but is accountable to the Minister of Justice.

Each of the `Länder' or provinces of the Federal Republic also has `Generalstaatsanwälte', who is accountable to the Minister of Justice of the "Land". In many `Länder' these are political officials, a fact which has been subjected to some criticism.

The federal Minister of Justice lays down policy guidelines. The `Bundesstaatsanwalt' does not lay down policy for the `Länder', but may intervene to take specific cases over from a `Land' in cases of national and federal interest, such as drug trafficking, hijacking, or terrorism.

In particular cases of national importance (e.g. involving foreign nationals or relations) the federal prosecutor may seek advice from the Minister, and the Minister can even instruct the prosecutorial authority not to prosecute in particular instances. Apparently this rarely if ever happens in practice and the possibility of such ministerial intervention has been criticised by some German commentators.

The situation in Continental Europe is generally not very different from the
above. In Eastern Europe there has been a recent trend towards a greater
degree of independence than before, away from party political control.7

3.7 In **the United States of America** the federal and state prosecuting
systems are entirely separate.

3.7.1 The federal AG in the US is the head of the Department of Justice,
akin to our Minister of Justice. As head of this department, he or
she has authority over all functions of the Department, including 93
US attorneys' offices around the country which are responsible for
federal prosecutions.

The office of the AG is not specified in the US Constitution.
Legislation stipulates that the US AG shall be appointed by the
President subject to Senate confirmation.

The US Attorneys for each of the 93 federal districts are also
appointed by the President, subject to Senate confirmation. These
US Attorneys run large offices that deal with the federal
government's civil and criminal litigation in their district.
Traditionally they have a great deal of autonomy but they are
subordinate to the AG and to the head of the Washington office's
criminal division. The AG does not supervise day-to-day running of
these offices.

In theory at least, the institution of the Grand Jury provides a check
on the political nature of the federal prosecuting authority. All
prosecutions for felonies must be initiated by a Grand Jury
indictment. In practice the Grand Jury generally confirms the
prosecutor's charging decisions.

The 'Solicitor General' (SG) is also appointed by the President, subject to
Senate confirmation. He or she is in charge of representing the
government before the Supreme Court. The SG functions as an advocate
and not, like the AG, as an executive policy-maker.

3.7.2 Each of the separate states in the US is free to organize its justice
functions as it wishes. In most, but not all, states, the AG is an
elected official with almost no authority over criminal prosecutions.
Instead, a state AG functions as the state's civil attorney (akin to
South Africa's 'state attorney').

---

7 Herrmann 533 and in general.
Prosecution in state matters (i.e. not federal offences) is usually a county level function. Each county typically elects its own "district attorney" (DA) who, once elected, has complete autonomy with respect to the organization of the office and its operations. (DAs hire staff, organize their offices into whatever departments they choose, promulgate prosecuting guidelines, exercise supervision etc.) In most states the only limit on a DA's autonomy is the Governor's power to remove him or her in cases of gross corruption.

Elections are usually five yearly. If a DA is defeated, the successor is free to reorganize the office entirely. However, now many staff positions within DA offices have civil service protection and therefore staff cannot be fired for political reasons.

3.8 In **Namibia** a recent judgment of the Supreme Court\(^8\) addressed, *inter alia*, the relationship between the government and the prosecution. The offices of the AG and "Prosecutor General" (PG) are constitutionally recognized. The office of the AG, who is (but need not be) a cabinet member, is recognized by the Court to be a political one, because the appointment of the AG by the President is political, just like the appointment of the Prime Minister and Ministers. In contrast, the appointment of the PG by the President on the recommendation of the Judicial Service Commission in accordance with Article 32(4)(a)(cc) of the Constitution suggests that the functions of the PG are quasi-judicial in nature. The court approached the issue of the relationship between the AG and the PG from the angle of constitutionalism and the constitutional state, and by looking at comparative material.

The Court held that the former Section 3(5) of the South African Criminal Procedure Act of 1977 (discussed earlier in paragraph 2.6) is not the product of a "Rechtsstaat" and is not compatible with the "Grundnorm" relating to the separation of powers. It paves the way for executive domination and state despotism and represents a denial of the cardinal values of the Constitution, the Court found.

The Court also held that although article 87 of the Constitution gives the AG the final responsibility for the office of the PG, the AG does not have the authority to instruct the PG to institute a prosecution, to decline to prosecute, or to terminate a pending prosecution in any matter. The AG

\(^8\) Ex Parte AG: in re the Constitutional Relationship between the AG and the Prosecutor-General Case No SA 7/93, 13.7.1995, per Mahomed CJ, Dumbutshena AJA and Leon AJA
also does not have the authority to instruct the PG to take or not to take any steps which the AG may deem desirable in connection with the preparation, institution or conduct of prosecutions. However, the AG does have the authority to require that the PG keeps him or her informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve aspects of legal or prosecutorial authority.

The Court concluded as follows:

"Thus interpreted, the office, (of the Prosecutor General) appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor. I accept that on this view of the respective Articles the "final responsibility" may be more diluted and less direct but it is nevertheless still possible for such responsibility to be exercised provided that the Attorney-General is kept properly informed. On this view of the matter the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the office of the Prosecutor-General. The notions are not incompatible. Indeed it is my strong view that this conclusion is the only one which reflects the spirit of the Constitution, its cardinal values, the ethos of the people, and articulates their values, their ideals and their aspirations. It also is entirely in accordance with the "uniquely caring and humanitarian quality of the Constitution...."

I would add only this. I would strongly recommend that, these issues having been settled, the Attorney-General and the Prosecutor-General adopt the English practice of ongoing consultations and discussions which would be in the best interests of the cause of justice and the well-being of all the citizens of Namibia."

Thus in Namibia the PG, who is the prosecuting authority, is recognized as independent. With regard to accountability, the "final responsibility" lies with the AG as a member of government. The meaning and content of "final responsibility" is not made very clear. The court's recommendation that the AG and PG should consult and discuss on an ongoing basis is presumably intended to fill this gap, although the court does not state what their consultation and discussions should cover.

3.9 Finally, attention may be drawn to two different basic principles which
provide the basis for prosecutorial policies and are applicable in different legal systems, namely the legality principle and the opportunity principle. The primary premise of the first is mandatory prosecution, or that prosecution must take place in all cases in which sufficient evidence exists of the guilt of a suspect and in which no legal hindrances prohibit prosecution. The prosecution can thus exercise only limited discretion. The opportunity or expediency principle, on the other hand, does not demand compulsory prosecution and allows for discretion even when proof exists, e.g. not to prosecute children, old, or ill people. In South Africa the opportunity principle applies (as in Belgium, Denmark, France, Great Britain and the Netherlands). The legality principle applies in Australia, Germany, Italy, Portugal and Spain, amongst others. Both systems have advantages and disadvantages. The opportunity principle allows for unlimited discretion which contains the potential for corruption, discrimination, arbitrariness and political manipulation. The legality principle protects the prosecution against these, to some extent, but is rigid and sometimes even unworkable. Discretion also creeps in under the guise of unlikelihood of conviction. Prosecuting guidelines may to some extent capture the advantages of both these principles.

4. SUBMISSIONS RECEIVED

4.1 The first advances the notion that there ought to be nine independent AGs in the country, one for each province, and that there is no need for a NAG or coordinating officer. The second broad view is that national coordination and policy guideline determination are essential to a proper administration of criminal justice in South Africa, that a national office should be established and that provincial offices should be under its authority.

4.2 There is considerable agreement amongst the submissions that the AG (or AGs) ought to be independent and thus not susceptible to political control or manipulation, that no AG ought to be obliged to obey a political directive in relation to a specific case, and that no Minister ought to be able to give instructions to an AG on the withdrawal of a case.

4.3 On the other hand the need for political responsibility and accountability is also stressed. To be able to prevent and control crime, the government of the day must have a say in the formulation of prosecutorial policy. The prosecutorial authority furthermore needs to be accountable in a real way as far as its sensitivity towards constitutional values, the policy of the government and the needs of the community are concerned. A balance thus has to be found between independence and accountability.

4.4 Although those who have made submissions agree that the AG ought to be accountable, there are differences in regard to precisely how the
balance between independence and accountability should be attained. Those parties who advance the view that there ought not to be a national AG appear to link this position to the fear that a national AG would in some way render that office more susceptible to political manipulation and compromise the independence of the office of the AG. There are also differences in regard to the person or body to whom such an AG should be accountable.

4.5 In addition to their reliance on the concern for the independence of the office which is described above, the AGs (and in particular the Association of State Advocates of SA) rely in their submissions, on what they contend to be the practical ineffectiveness of a national AG. Indeed, they suggest that there may be no work for such an AG at all, or at the other extreme that such a national office may be overburdened with too many complaints and other such matters to handle.

4.6 None of the parties who made submissions to the CA directly indicated the relevance of the Constitutional Principles (CPs) contained in Schedule 4 of Interim Constitution in a determination of this issue. While it cannot be doubted that many of those who made submissions had the CPs within their focus when submissions were made, the submissions did not refer to the CPs.

4.7 Overall there seems to be considerable agreement amongst those who made submissions that a prosecutorial system for South Africa ought to be:

4.7.1 independent from political control, manipulation or intimidation

4.7.2 impartial

4.7.3 effective

4.7.4 sufficiently uniform to ensure equality before the law

4.7.5 sufficiently flexible to ensure that local and regional needs can be taken into account

4.7.6 accountable, in a way which is not superficial.

5. A SUGGESTED APPROACH; A DEFINITION OF PROSECUTORIAL POWER IN RELATION TO FUNCTIONAL AREAS; THE RELEVANT QUESTIONS

5.1 Questions such as whether there should be a NAG and how this NAG, or several AGs, should be appointed and be accountable but independent, have to be examined in relation to the broader theoretical background
defining the nature of prosecutorial power and placing this in its appropriate context. The debate is not assisted by reference to AGs as persons appointed to do certain work. The question is not whether there ought to be nine independent AGs or whether these nine persons should be controlled by and made accountable to one NAG. The question is rather whether the country requires a single prosecutorial authority sufficiently flexible to cater for provincial and local variation, or whether there is need for nine independent prosecutorial authorities in this country.

5.2 The precise extent and limits of prosecutorial power have undergone considerable change over the past centuries in relation to independence, accountability, responsiveness, and so on. It is not necessary to go into the details of these changes. Suffice it to say that the power to prosecute (which is a state power) has often been seen as a necessary extension of good government and therefore as the exercise of an executive power and function. On the other hand, theorists have tended to emphasize the discretionary and decision-making aspects of the AG and have tended to classify them more as judicial functions. The latter view has sought to draw sustenance from the important duty of the prosecutor and to place all material before a court, whether such material is favourable to the state case or to the accused. These view are relevant to the determination of the earlier mentioned balance between independence on the one hand and political responsibility and accountability on the other, as well as to the application of the Constitutional Principles.

5.3 It is now accepted that the function of a prosecutorial authority has both executive and judicial elements and that this function is more properly described as quasi-judicial or even sui generis.

5.4 Although there are difficulties in classifying the prosecuting power and function as purely executive or judicial, it is clear that it is aimed at crime prevention, crime control, the achievement of stability and the attainment of justice in SA. It can therefore not be doubted that it falls within the sphere of the administration of justice and therefore within the functional area of justice.

5.5 In this regard, it may be significant to mention that only one of the parties required justice or the administration of justice to be within the competence of a province. Indeed, the submission from the Association of State Advocates of SA specifically disavows any contentions that justice ought to be a provincial competence.

---

9 See the definition by Leon AJA in the Namibian Attorney-General case (p. 11)
5.6 The rest of this memorandum will address two distinct but closely related questions, namely (1) whether the prosecutorial authority in South Africa should vest in independent and separate provincially based offices, or in a national office (possibly with its functionaries organized on a provincial basis) and (2) what methods could be used to best ensure the independence of the prosecutorial authority, as well as its accountability within the context of political responsibility.

These questions are approached by taking into account the relevant Constitutional Principles, the recent Namibian judgment and practical considerations put forward in the earlier mentioned submissions.

6. THE RELEVANT CONSTITUTIONAL PRINCIPLES

6.1 No Constitutional Principle (CP) directly refers to the AG or prosecutorial authority, but several CPs are relevant. It is necessary to determine the cumulative effect of the relevant principles. The existence of or need for separate and independent prosecutorial authorities on a provincial level is not indicated by the CPs. It would seem that a single prosecutorial authority is preferable, provided that questions regarding practicality, local and regional needs, independence, accountability and the abuse of power can be adequately resolved.

6.2 CPI provides for equality in a sovereign state. The concept of equality underlies the entire Constitution and may be regarded as fundamentally important moral imperative of the Constitution. Apart from being referred to in the Preamble, the importance of equality is implied by CPII and CPIII.

6.3 In particular CPV commands an equitable legal system in which there is equality before the law. This principle militates against the notion of prosecutorial systems in different provinces operating unevenly, subject to different policy guidelines, or differentiated by the application of discretion in accordance with widely varying considerations. We understand that the proposal of those parties which do not favour a NAG is that policy guidelines may well be laid down by the Minister or some national functionary charged with this responsibility. Full weight must of course be given to this, but it must be borne in mind that policy guidelines would, by their very nature, be broad and susceptible to varying interpretation by several separate and totally independent AGs.

6.4 CPVI requires a separation of powers amongst the judiciary, the legislature and the executive, while CPXVI requires government to be structured at national, provincial and local level. We have already pointed out that the powers and functions exercised by a prosecutorial authority
cannot be compartmentalized into one or other of the above categories. However, these two principles facilitate a consideration of this question by reference to the criteria in terms of which powers are to be allocated to the national and to the provincial respectively as contained in Principle XX and XXI.

6.5 CPXX juxtaposes the criteria of financial viability against administrative efficiency, and national unity against legitimate provincial autonomy and cultural diversity. We do not understand that those who favour nine independent AGs contend that this is necessary on account of legitimate provincial autonomy. The argument seems to touch on the cultural diversity element contained in the principle to the extent that emphasis is placed on different practical realities in certain of the provinces. The principle requires national unity to be balanced against cultural diversity and can be most adequately catered for in a judicial system which accommodates both.

6.6 CPXXI 1 appears to encapsulate the subsidiarity principle and requires a consideration of effectiveness. It has been contended that the appointment of a NAG would render the system ineffective in as much as all decisions in regard to whether or not a prosecution should be instituted, if required to be taken nationally, would cause a degree of malfunction (referred to as `chaos' in certain submissions). Careful consideration however reveals that there is already a great deal of delegation in the provincial functioning of the prosecutorial system. AGs are assisted by a number of deputies who, in turn, rely on a number of senior prosecutors stationed at various courts throughout the particular province. Each of these persons take appropriate decisions at the appropriate level in terms of appropriate authority. The principle of appropriate delegation - if reasonably applied - would not render the system ineffective merely by reason of the appointment of a national prosecutorial officer. (The federal prosecution system in USA, described in 3.7 above, provides a telling example.)

The prevention, control and prosecution of crime is a matter which has significant national implications. National standards of prosecution are necessary as is the need to determine minimum standards by which prosecutors would operate throughout the country. Serious economic crimes could well have implications for economic unity. The interrelationship between crime and national security is obvious. There is also the question of inter-provincial crime as well as the issue of a crime committed near a border between provinces A and B which the AG of province A is not prepared to prosecute because of the particular need of that province. This decision not to prosecute could well be to the prejudice of province B.
6.7 CPXXI 6 requires a power to be allocated to a province where the power concerns the specific socio-economic cultural needs of the community or the general well-being of the inhabitants of the province. The exercise of prosecutorial power does not usually concern itself with the specific socio-economic or cultural needs of the community, although it sometimes might. It is true that effective prosecutions do contribute to the general well-being of the inhabitants but it is difficult to see how this aspect of crime control would contribute to the well-being of the inhabitants of a province as distinct from the well-being of the inhabitants of the country as a whole.

6.8 Prosecutors would clearly be part of the Public Service which means that CPXXX which calls for an impartial, efficient and career-orientated public service is of some relevance.

6.9 Finally, account should be taken of CPIV which requires that the Constitution should be supreme and binding on all organs of state. At least some of the actions and decisions of organs of state or persons exercising prosecutorial authority would be justiciable, which could go a long way to address concerns in regard to the consequences of the improper exercise of power by any prosecutorial authority. Furthermore, this CP is a reminder of the general implications of constitutionalism, which was addressed inter alia in the Namibian judgment dealt with below in the context of independence and accountability.

7. PRACTICALITY AND LOCAL AND REGIONAL NEEDS

7.1 We have already referred to the argument that the appointment of a NAG would result in ineffectiveness, because decisions in regard to prosecutions, would need to be taken nationally.

7.2 In practice, decisions would be taken at the appropriate level depending on the policy guidelines and approach adopted by the authority concerned. The Constitution might deal with this by ensuring that the prosecutorial authority is obliged to put an effective system in place. Administrative restructuring might be necessary but our future constitutional dispensation should not be limited by difficulties which current practices or arrangements might create.

7.3 It is perhaps more practical and effective for one AG to account either to the Minister or to Parliament and to be questioned in regard to the functioning of that authority than for nine AGs to do so separately. (This aspect is dealt with under ‘Political Responsibility and Accountability’ in 8.2 below.)

7.4 The NAG would be responsible for the investigation and prosecution of
national crime.

7.5 The NAG would have the final authority to prosecute or not to prosecute. In practice, however, the NAG, like provincial AGs today, would rarely be called upon to make that decision personally. The right of every person to obtain a decision from a provincial AG is in practice satisfied by a decision of the provincial prosecutorial system taken at an appropriate level. So, for example, relatively junior prosecutors take decisions not to prosecute in cases of minor assault.

7.6 The NAG would have the ultimate responsibility to establish and maintain standards. Furthermore the national office would probably be responsible for a full investigation of and decision on cases concerning national economic unity and national security.

7.7 There is no indication that independent provincial AGs will be more suited to take legitimate local and regional needs and differences regarding e.g. cultural diversity and crime patterns into account than a national prosecutorial authority with regional deputies. Some cultural differences, e.g. related to concepts such as public morality, may be catered for by provincial legislation. Differences regarding crime patterns and geographical factors (such as proximity to national borders) could be taken into account in the formulation of a national policy regarding national crimes, or even in regional policies on matters not covered in national guidelines. Relevant differences could furthermore also exist on a local level. These should be taken care of by prosecutorial discretion within the context of a national policy and surely does not necessitate the independence of local prosecutors from provincial AGs. Again the federal prosecution system in the USA is instructive. Although all US Attorneys are under the authority of the US AG, they have considerable discretion over prosecuting decisions in their districts.

7.8 Of considerable interest in this regard is the submission of the Director of the Office of Serious Economic Offences which brings to light the contention that, that office too, should be upgraded to that of AG with the required independence and impartiality. A national prosecutorial officer is perhaps a more objective way of dealing with the difficulty concerning the status of the Director of this office.

8. POLITICAL RESPONSIBILITY, ACCOUNTABILITY, INDEPENDENCE AND ABUSE OF POWER

8.1 General

As indicated earlier, CPIV states that the Constitution shall be the supreme law of the land and thus - together with the other CPs - emphasizes the concept of
constitutionalism and the nature of the constitutional state. In the recent Namibian judgment discussed earlier the implications of constitutionalism for questions regarding political responsibility, accountability, independence and abuse of power were analyzed. The conclusions of the court need not be repeated here. Useful guidelines could be derived from this judgment (although the situation in a constitutional state such as Germany does seem to differ from the answers of the court to the specific questions dealt with in the case).

8.2 Political responsibility and accountability

8.2.1 The Minister bears the political responsibility for issues related to prosecutorial policies. Therefore the Minister should have the duty to determine and issue policy guidelines in respect of the prosecutorial authority in an open and transparent manner. However, the Minister cannot instruct the prosecution as to whether or not a particular prosecution should be instituted, because of the implications this would have for the independence of the prosecutorial authority. The Minister is accountable to Parliament.

8.2.2 It is clear that the AG must be fully accountable. One possibility for dealing with the needs of political responsibility and accountability, is to require the AG (or AGs) to submit regular reports to the Minister, who has to table such reports in Parliament. Both the Minister and the AG should then be required to appear before an appropriate Parliamentary Committee for questioning. Thus the Minister would be held accountable for policy issues and the AG for the practical implementation of policies, and the exercise of prosecutorial discretion.

8.2.3 Appropriate questioning, if sufficient evidence is available, could thus expose the AG, should he or she not exercise his or her powers in accordance with the Constitution, or if he or she unreasonably disregards the policy guidelines, or fails to duly take the interests of the community into account. Parliament could thus play an indirect role in the formulation and observance of policy. The consequent publicity would also operate as a measure of control over these functions.

8.2.4 In order not to leave the Minister unprotected, unreasonable disregard of policy guidelines should perhaps result in an investigation by the Judicial Service Commission or similarly independent body, or a Parliamentary committee, where appropriate.

8.2.5 As stated earlier, the issuing of guidelines could to some extent
capture the advantages of the legality principle, without doing away with the opportunity principle.

8.3 Independence

8.3.1 There seemed to be some suggestion during a debate in the CC Sub-Committee that something more than independence of the prosecutorial authority from political control was required. However, this position was not further explained. We are not able to conceive of the independence of a prosecutorial authority other than by reference to that authority not being subject to political manipulation or control. As the Namibian case indicates, the provision in the Constitution for the independence of this function ought adequately to guard against the possibility of political interference.

8.3.2 Independence can also be established by determining an appropriate appointment mechanism. If appointment by the President is not regarded as sufficient for independence, the Judicial Service Commission or another similarly independent body or an appropriate Parliamentary committee could be the appointment agency.

8.3.3 Security of tenure in respect of certain members of the prosecutorial authority is also relevant to the question of independence. We suggest that dismissal should be effected only by the Judicial Service Commission (or other such body) if there is proof of incapacity, incompetence or misconduct in relation to the performance of the function.

8.4 Prevention of abuse of power

8.4.1 Some of the submissions make the point that the disadvantage of having a central prosecutorial authority is that too much power will be concentrated in one person.

8.4.2 Part of the resolution of this perceived difficulty lies in the fact that the conduct of the prosecutorial authority is subject to the Constitution and that some prosecutorial conduct could thus be challenged in court.

8.4.3 A further fear that the head of the national prosecutorial authority (though appointed by the Judicial Service Commission or some such mechanism) might surround him or herself with provincial prosecutorial heads who would be answerable to him/her and would do his/her bidding to the disadvantage of the country as a
whole. This can be overcome by providing that all senior members of the prosecutorial authority, such as perhaps provincial heads, should be appointed by and subject to dismissal by the Judicial Service Commission.

8.4.4 This would mean that the provincial heads of the prosecutorial system would have a status and protection of their own despite the fact that they will be accountable to the national head in a manner appropriate to the relationship between the national head and the provincial head. Provincial heads of prosecution will also be protected from being isolated and singled out for criticism based on perceptions regarding their independence and even integrity, which could happen in a system with nine separately independent AGs.

9. RECOMMENDATION:

In summary it is recommended that

9.1 there should be a single independent, impartial and accountable prosecutorial authority for the Republic;

9.2 this prosecutorial authority could be structured at national and provincial level, but need not be (details of structures could be left to legislation);

9.3 the national and provincial heads of this prosecutorial authority should be appointed by the JSC (or other such body) and should have appropriate security of tenure;

9.4 the Minister of Justice could issue policy guidelines and should also be accountable for such guidelines and related policy decisions.

10. NOMENCLATURE

A difficulty which need to be resolved before a draft can be attempted is that relating to the names to be given to particular positions.

The problems connected to the term "Attorney-General" have been referred to in paragraph 1.6.

In the draft below the terms "Director of Public Prosecutions" and "Deputy Director of Public Prosecutions" are used merely for the sake of convenience. Another term which may be considered is "Prosecutor-General", which is used in Namibia.

11. TENTATIVE DRAFTS
The following drafts are put forward merely for the purposes of discussion. The main differences relate to the question as to how much detail is to be included, or left to the legislature. The order of presentation does not represent any preference on the part of the Panel.

DRAFT A

"Prosecutorial Authority"

1. The prosecutorial authority of the Republic shall be independent and impartial and shall function without fear, favour or prejudice.

2. The prosecutorial authority shall vest in the office of

   (a) a national Director of Public Prosecutions and

   (b) a Deputy Director of Public Prosecutions in respect of each of the provinces of the Republic.

3. The National Director and each of the Deputy Directors of Public Prosecutions shall be appointed by the President acting on the advice of the Judicial Service Commission, with due regard to appropriateness of qualification, representativity, impartiality and independence, and the need for accountability.

4. The Director and Deputy Director of Public Prosecutions may be dismissed only on a recommendation by the Judicial Service Commission based on a finding of incapacity, incompetence or misconduct of any of the offices concerned.

5. No person or authority shall interfere with the performance of the functions of the prosecutorial authority.

6. All organs of state shall provide the prosecutorial authority with all the assistance and protection necessary for the effective performance of its functions.

7. The Minister may make policy guidelines for the performance of functions of the prosecutorial authority. Such guidelines shall be published in the Government Gazette."

DRAFT B

"Prosecutorial Authority"
1. The authority to institute criminal prosecutions on behalf of the state shall vest in the Director of Public Prosecutions of the Republic.

2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions.

3. The prosecutorial authority/DPP (and Deputy DPPs?) shall be appointed by the President acting on the advice of the Judicial Service Commission with due regard to appropriate qualifications, independence and representativity.

4. After consultation with the DPP the Minister of Justice may issue guidelines for the prosecutorial policy in an open and transparent manner.

5. The prosecutorial authority/DPP shall submit regular reports to the Minister and be accountable to Parliament.

7. The jurisdiction, powers and functions of the prosecutorial authority/DPP shall be regulated by national law."

DRAFT C

"Prosecutorial Authority

1. The authority to institute criminal prosecution on behalf of the state shall vest in the Director of Public Prosecutions of the Republic.

2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions.

3. The jurisdiction, powers and functions, accountability, appointment and tenure of the DPP/prosecutorial authority shall be regulated by national law."

12. LITERATURE CONSULTED

(In addition to submissions made to the CA)

* Bekker PM "National or Super Attorney-General: Political Subjectivity or Judicial Objectivity?" Consultus April 1995 27

* Bloch SL "The Early Role of the Attorney General in our Constitutional
Scheme: In the Beginning there was Pragmatism" *Duke LJ 1989 561


* Edwards JLJ *The Attorney-General, Politics and Public Interest* 1984

* Felkennes GT *The Criminal Justice System. Its Functions and Personnel 162 - 182*


* Fernandez L "Profile of a Vague Figure: the South African Public Prosecutor" *SALJ*

* Frank H"Staatsanwälte als politische Beamten" *DRIZ* Nov 1987 449


* Martin L "Die Bundesanwaltschaft beim Bundesgerichtshof" in Glanzmann and Faller *Ehrengabe für Bruno Heusinger* 1968 85

* Rose & Paul

* Schaefer HC"Anspruch und Wirklichkeit - eine staatsanwaltliche Reflexion" *NJW* 1994 2876

* Tak PJP"The Legal Scope of Non-Prosecution in Europe" *HEUNIE Finland* 1986 26

* Yutar P "The Office of the Attorney-General in South Africa" *SACC* 1977 135