PMG PARLIAMENTARY MONITORING GROUP

Khulumani Support Group on TRC concerns, State Attorney Amendment Bill: further amendments; Draft notices and schedules in relation to Judges & Magistrates salaries: Department of Justice & Constitutional Development briefings

Justice and Constitutional Development

29 January 2014

Chairperson: Mr L Landers (ANC)

Meeting Summary

The Department of Justice and Constitutional Development (the Department) presented its latest amendments to the State Attorney Amendment Bill, following instructions given by the Committee on the previous day, but noted that it had not been able to address all issues. The Committee dealt at length with the wording of the new section 2. The new section 2(1) now contained an explanation of a "fit and proper" person for appointment as Solicitor-General (SG). The words "with due regard to his or her experience, conscientiousness and integrity", similar to wording in the National Prosecuting Authority (NPA) Act, had been inserted. Secondly, although the initial formulation had suggested that only an admitted attorney may be eligible for appointment, there was now an option by insertion of a new paragraph 2(1)(b) that a person eligible to be admitted as an attorney could be appointed. Members discussed whether such a person would have to remove his/her name from the roll of advocates before making application, and Members agreed, after discussion, that this would seem unnecessarily cumbersome although they noted that the Court might refuse an application for re-admission as an attorney. Members were dismayed to realise that a struck-off attorney could still be admitted as advocate, although that person would not be able to be a member of the General Council of the Bar, and suggested that this anomaly be addressed during the Legal Practice Bill considerations in the NCOP. Members felt that it was only a small number of people who would be affected, and noted that if the court refused to admit a person, such a person could well not be "fit and proper" to be appointed as SG in any event. Members agreed that it was necessary to ensure that a person with the necessary experience in an attorneys practice be considered. The drafters were asked to look at this again, in conjunction with the provisions around removal in clause 2(4) and to clarify the distinction between voluntary removal and striking or suspension. The expression "control" had been deleted from clause 2(1) as it was accepted that the SG would be a professional person, and the DA suggested that the phrase "with due regard to the ethical norms and standards of the profession, shall be subject to the direction and supervision of the Minister" should be used instead. This would emphasise the points made in the existing section 4 of the Act.

The Department explained the thinking behind the provision in clause 2(2), and said that it was Cabinet who had asked that the time period for the renewal of a second term be removed. Members differed whether this was necessary or desirable; some felt that it was necessary to avoid the risk of appointments in perpetuity, some felt that there should be some limitation and others felt that only one term should be allowed. The point was made that security of tenure was likely to attract more candidates, but another Member indicated that this really applied to those who had to apply their minds independently and the SG would fall under the Department. The changes to 2(4) were pointed out, namely the addition of a new paragraph (c). Technical changes were made to clause 3 and 3A(4), as well as clauses 4 and 5. The Minister, in clause 3(4) was now required to make policy "after (not "in) consultation, as this was a Ministerial prerogative but the SG must consult with State Attorneys to determine policy. The Department noted that there had been concerns that the attorney/client relationship should not be impacted upon in the implementation of any policy, but made the point that transformation imperatives still must be pursued so an appropriate balance was needed. The Committee would discuss the principles further. Members then discussed whether the Office of the State Attorney should be acting for the Road Accident Fund and agreed to raise the points with the Portfolio Committee on Transport, and whether the Office of the State Attorney was acting for foreign governments. The drafters were asked to propose some options for the possible inclusion of a requirement, at least of notification, to provincial legislatures and executive councils.

The Committee was briefed on the two draft notices relating to the determination of remuneration of Constitutional Court Judges and judges, and of magistrates. It was explained that the recommendations were largely the same as in previous years, except that there was a proposal for a 5% increase across the board, and that there was now an attempt to bring magistrates in line with the Senior Management Service by allowing that 70% of the package be a pensionable salary. Members noted that this was not the recommendation made by the Independent Remuneration Committee, and was essentially a compromise reached between the Office of the Chief Justice and Office of the Presidency after some judges had threatened to take legal action on what they perceived as an effective reduction of their salaries, contrary to the Constitution. DA Members asked for the opportunity to put the matter to their

party caucus, and it was noted that in any event this could not be approved by the House prior to the week commencing 17 February.

Khulumani Victim Support Group had requested, and been granted the opportunity to appear before this Committee but from a rash of documentation submitted shortly prior to the meeting, it became apparent that its request related to a petition that was apparently handed to a Department of Justice official during a march to Parliament during the Parliamentary recess in November 2013. The Chairperson was at pains to explain the parliamentary procedure and felt that the full presentation should not be given, also noting that this Committee and the NA had taken decisions on the TRC Act and government policy and all that this Committee could now really do was ensure that it was implemented, which was being done. Members felt that it was attempting to present to the wrong forum when it became apparent that the concerns related firstly to pending regulations, for which the closing date for comment was 31 January, whether the Department was following a fair consultation process, and whether the TRC Act and policy were correct in principle. They urged Khulumani to purse the right channels, including court action if necessary and reiterated that because this Committee did not make regulations, it could neither prescribe to nor interfere in Departmental processes, but could only exercise oversight and apply the law. Although Khulumani representatives expressed their displeasure, and took issue with some of the points made, the presentation did not proceed.

Meeting report

State Attorney Amendment Bill further proposed amendments
Ms Ina Botha, State Law Adviser, Department of Justice and Constitutional Development, noted that the drafters had not been able to address every concern raised by the Committee on the previous day, but welcomed the opportunity for the Department to get further guidance from the Committee. She would explain why certain suggestions had been made in the new version of the Bill (see attached document).

Clause 1
Ms Botha noted that there were no changes to clause 1.

Clause 2
Ms Botha took the Committee through the changes.

The new section 2(1) now contained an explanation of what a “fit and proper” person would be for appointment as Solicitor-General (SG). The words “with due regard to his or her experience, conscientiousness and integrity”, similar to wording in the National Prosecuting Authority (NPA) Act, had been inserted. The second change related to the requirement of admission as an attorney. Initially, the drafters had come up with a formulation that referred to a person who had been admitted and had practised as an attorney, and who was eligible to be admitted. However, it had been pointed out, during internal discussions in the Department that a person on the roll of advocates who wished to apply for the post of SG would be reluctant to remove his/her name from the roll before knowing that the job application had been successful. For that reason, the drafters had put in an alternative. The new 2(1)(a) referred to a person admitted and entitled to practice as an attorney, or (b) who was eligible to be admitted as an attorney.

The expression “control, direction and supervision” (of the Minister), cited at the end of clause 2(1) appeared in many other pieces of legislation. However, Ms Botha had heard the concerns of the Committee and suggested the deletion of “control” from this phrase, as it must be borne in mind also that the SG would be a professional person.

Ms M Smuts (DA) suggested “and who, with due regard to the ethical norms and standards of the profession, shall be subject to the direction and supervision of the Minister”. This would emphasise the points made in the existing section 4 of the Act.

Ms D Schäfer (DA) spoke to both the new sections 2(1) and (3), noting firstly that 2(1)(a) was tautologous: and only the word “admitted” was needed, as a person would only be admitted if entitled to practise. Under 2(1)(b) one of the conditions that would exclude a person from being eligible would be if the person was struck from the roll. She suggested that if the person was appointed, that person would later perhaps have to put his/her name on the roll.

Ms Botha said that the final decision whether a person could be admitted, although entitled in theory, was in the discretion of the Court.

Ms Schäfer pointed out that the Court would not refuse to admit without excellent reasons, and if it did refuse, then this raised the question whether the person was fit anyway to hold the post of SG. She suggested that perhaps a person applying for the post could remain on the roll while the application process was ongoing. If the application was successful, then perhaps the applicant must then, within a certain period, apply for removal for the roll of advocates, then for re-admission as an attorney.

The Chairperson noted that the whole application process was quite cumbersome.

Mr S Swart (ACDP) noted that there were probably only a small number of people who had formerly been attorneys and were now advocates. The only reason why they would be turned down would be for breaches of ethics, and then they should not be appointed anyway.

The Chairperson said that the difficulty was that a person could be appointed as SG, but the court later to refuse the application for re-admission.

Mr Swart also asked what "qualify as an attorney" meant – surely this must mean completion of the board exam, the articles and other requirements. He did not think that an advocate who had never been an attorney should be considered for the position.

Mr Holomisa confirmed that his question had related to an advocate who had previously practiced as attorney, and then moved to the Bar. That person had the qualifications and experience in an attorneys practice. He had not intended to refer to a person who had merely qualified for admission as an attorney, and had not been submitted to the rigours of practice and compliance with ethics.

Ms Kalay Pillay, Deputy Director General, Department of Justice and Constitutional Development, noted that after the previous day's discussions, the Department had discussed whether it was desirable to limit the eligible pool of people for appointment as SG. The second issue was what the SG was required to do, and she reminded the Committee that this person would essentially fulfil a managerial function, not attend court.

The Chairperson thought that Mr Holomisa's input actually amounted to increasing the pool, to include advocates who had practiced as attorneys previously.

Dr M Motshekga (ANC) cautioned against throwing the net too wide to cater for those without sufficient experience.

Ms Pillay confirmed that the SG should have experience working as an attorney and perhaps also be a manager of other large organisations. She cited the fact that some CEOs of hospitals may not be medical doctors. The SG would have to manage the offices in all provinces.

Dr Motshekga disagreed with this example. Doctors may separate the administration of the hospital from the doctors' medical work, but the same did not apply to the SG. That person would have to understand how the courts functioned and litigation unfolded, and be able to guide other staff.

Ms Schäfer agreed. People managing attorneys' offices did not always know how attorneys practices worked, and the whole reason for making these amendments was to try to improve the functioning of the offices, which was linked intrinsically to a full understanding of how legal processes worked. She summarised her understanding that a person must be admitted as an attorney again, before applying for the post.

Ms Pillay said that another possibility was that a person might be able to be appointed before being put back on the roll, but if this was not approved, the appointment could be terminated.

Dr Motshekga said that the point was eligibility to practise as an attorney.

Ms Schäfer said that perhaps the drafters may need to look again at the provisions of the new section 2(4)(a), referring to a person being struck off or suspended from practice.

Ms Botha said that this provision applied only to cases where the person had been struck off, but the term "eligible" for admission meant a person who had not been admitted and therefore had not been removed from the roll. Section 2(4)(c) referred to a sanction of dismissal imposed in terms of disciplinary proceedings governing the public service.

Dr Motshekga made the point that if the idea was to increase the pool, all those previously admitted as attorneys, but who were now practicing as advocates, should be eligible for appointment. In his view there was no need to include any further wording about being on the roll of attorneys.

Ms Schäfer suggested that perhaps section 2(1) should refer to a fit and proper person who was on the roll or who had previously been admitted.

Mr Holomisa said that there must be clarity that a person previously admitted, but removed voluntarily from the roll, would still qualify.

Dr Motshekga thought that “removal”, and the distinction between voluntary removal and striking or suspension must be clarified.

Ms Schäfer agreed that suggested that something to this effect could be inserted.

Ms Botha pointed out that a person struck off the roll would no longer be regarded as a “fit and proper person”.

Mr Mongemeli Kweta, State Law Adviser, Office of the Chief State Law Adviser, summarised the requirements. The clause must still refer to experience, conscientiousness and integrity. He agreed that a requirement to re-enrol as attorney would be unnecessarily cumbersome.

Ms Pillay explained, in answer to questions whether there were any instances of a person removed from the roll of attorneys but practising as an advocate, that indeed a person with an LLB, who had been struck off the roll of attorneys, could become a member of the independent Bar, but the General Council of the Bar (GCB) would not allow that person to be a member of the GCB.

Dr Motshekga wondered how such a person could claim to be a “fit and proper person” as an officer of the court. He pleaded that this absurdity must be addressed.

Ms Schäfer said that the problem was that the Legal Practice Bill, once passed, would allow such a person to be registered, and thus to apply for the job.

The Chairperson said that perhaps the Committee should raise this point to the NCOP, to consider when it was dealing with the Legal Practice Bill.

Ms Botha noted that the Committee had raised questions on the new section 2(2), as to whether the Minister should be able to extend the term of office for an undefined period. Initially, when this provision was drafted, the idea was to provide for fixed term. When the Bill was referred to Cabinet, it provided for a term of five years, renewable for one single term (in other words for 10 years). However, Cabinet had requested a change to allow for more flexibility, as it was felt that, depending on the profile of the SG, and if s/he was relatively young and the Minister wanted to create more stability, the Minister might wish to renew the appointment for longer than five years. The Department could not effect any changes to this at the moment, and she asked the Department’s Deputy Director General to expand further on this.

Ms Pillay confirmed that this was to ensure continuity of leadership, whilst allowing for flexibility.

Mr S Swart (ACDP) asked if this meant one further period, but not necessarily more than one. If so, the “period” might be five years, but could equally be more.

Other Members pointed out that this period could be for extremely long periods, or “until death”.

The Chairperson asked if this implied that if there was dissatisfaction with the Solicitor-General, the Minister could terminate the appointment.

Dr M Motshekga (ANC) pointed out that not only was it necessary to have legal certainty, but to offer security of tenure to the incumbent. He had a problem with one individual deciding on the renewal term that was couched in such vague terms.

Ms D Schäfer (DA) agreed that this was too vague. She was not comfortable with any further period, since one five year term was in line with appointments of senior public servants.

Ms Smuts said that the idea of security of tenure applied to those who had to apply their minds independently – such as judges, National Director of Public Prosecutions (NDPP), but this was different, for the SG was subject to the control of the Minister. The DA believed strongly that considerations of ethics and professional standards must apply, and she herself believed that the current terminology was adequate, both in respect of the initial five-year term and a non-specific period of renewal. This would depend on the nature of the office. The one aspect of independence related to the quality of professionalism, which was different from what pertained to most other public service posts, but that was already set out in section 4 of the State Attorney Act (the Act). She did not think that there was a need to specify a time period for the further term.

The Chairperson asked her to think again about that. The Minister may appoint a person for one period, then another and another.

Ms Schäfer suggested that perhaps “for any further period or periods of five years at a time” might be considered.

The Chairperson agreed that this might provide sufficient checks and balances, and it would avoid appointment for life.

Mr Swart appreciated that the person would need to perform and the incentive to perform properly would be the possibility of renewal for five years.

Ms Botha also wanted to revert to comments on the deletion of the word “control” mentioned under the new section 2(1). There was a need to ensure not only that the salaries were attractive, but that sufficiently attractive and stable terms of office applied to persuade the right candidates to move across from private practice to the SG. The suggestions now made would enhance this.

The Chairperson asked if she was suggesting that only those working in larger firms attracting high salaries would apply. There were many attorneys who were not earning a great deal or dealing with major corporate work, but who were fine attorneys.

Ms Smuts reiterated that there was a need to make the post attractive to the whole pool, including those who worked in poor constituencies or attended to human rights work. The Bill should be phrased to allow the Department to attract the right candidates from across the whole spectrum, with a salary sufficiently attractive so as not to exclude those earning in the higher brackets in private practice.

Ms Botha outlined that the new section 2(4) now contained a new paragraph (c) to cover the sanction of dismissal imposed in terms of disciplinary processes governing the public service. Finally, she noted that other subclauses had been renumbered.

Clause 3
Ms Botha pointed out that the reference to Parliamentary agents had been deleted, as well as corrections made in respect of “Railways and Harbours” and a change of case for the word “administration”.

Ms Pillay explained the reasoning behind the changes to clause 3(4), which related to consultation. Previously this had read “the Minister shall, in consultation with the SG…” (draft policy). This had now been changed to “after consultation”. Dr Motshekga had made a valid point, on the previous day, that it was the Minister’s prerogative to make policy and any deadlock might affect that policy-making function.

It was now also clarified that the SG must consult with the State Attorneys to determine policy.

Ms Pillay noted the concerns on the previous day that the attorney/client relationship should not be impacted upon in the implementation of any policy. That relationship applied presently to the Office of the State Attorney (OSA). However, it was necessary to ensure that an appropriate balance was reached to ensure that the transformation imperatives in fact were implemented, and not to have so many qualifications that the policy could become meaningless. The client department would have the option finally to decide whether it wanted to initiate or defend litigation. However, the intention of the policy was to enable the OSAs to manage their caseload better. The clients’ right to take that decision would not be removed. However, in matters such as who would be briefed, there did need to be some control within recognised principles. No further changes had been effected on that point.

It would be necessary to manage the case load better and this was the intention of the policy. The policy would not take away the clients’ right. IN some matters, like briefing, there need to be control but some recognition of the principles. For that reason, no further changes had been effected to that.

Ms Smuts said that the only way to govern the briefing of advocates and transform the profession was by implementing numerical calculations. She asked if this would be set a target, quota, percentage or an aspirational percentage.

Ms Pillay said that the Department currently had a target that 75% of State work should be directed to previously disadvantaged individuals (PDIs) in the legal profession. A purely numerical target alone did not really assist, because it did not measure the kind and quality of work going to PDIs. Targets must also address the small percentage of work given to the few women at the Bar. There were too few women appearing in the Constitutional and High Courts. More thought had to be put into the policy, how to monitor, and training and sharing of experience and how to broaden the pool of qualified legal practitioners.

Dr Motshekga appreciated this explanation. Legislation could not be expected to deal with all the dynamics, but this approach would create the space for the Department to do its work.

Ms Smuts suggested that perhaps, in subclause (e), instead of using the phrase “which must be observed” it might be preferable to use “which must be taken into account”. This would ensure that there was no conflict with the ethics. One Court judgment had pointed out that policy could not be binding in the same sense as subordinate legislation.

The Chairperson said that the Committee would need to discuss that point. The transformation imperative was “an imperative”, which was necessary to implement, and he took the point of Dr Motshekga that it would not be possible to legislate for it which was why it was left to the policy. If a department wished to engage the most expensive senior advocate, then it would be able to do so, but the

point of the policy was to ensure that then the junior appointed must be, for instance, a black female. Whether that would fall foul of the judgment referred to would have to be considered. He felt it was not possible to compromise on imperatives. He thought it a disgrace that 20 years from democracy, there were only three black women senior counsel. Legislation could not fix that. It was possible to plead with the advocates to appoint black women juniors, but the most effective and fast route would be to use policy to enforce the principles.

Mr Kweta touched on the issue of policy not being equivalent to legislation, but clarified that the judgment had said that policy could not be binding on the public, confirmed also in another Supreme Court of Appeal case. The Constitutional Court had emphasised that a person entering into in the public service would, however, be obliged to comply with policies in the public service. That would include provincial departments, who were thus not in the same position as the public, and would not be able to deviate from the policy decided by the Minister.

Dr Motshekga said that the lawyers were" in the system" of the OSA, and thought that policy should bind them.

Ms Smuts confirmed that the point about the public service would apply to employees in the OSA.

Ms Botha continued by noting the new wording for clause 3A(4), which deleted the previous reference to "assigning" powers, in both paragraphs (a) and (b).

Clause 5
Ms Botha said that clause 5(2) and (3) had been amended, by deleting the references to stamp duty. There was still a reference to "fee of office", which apparently still applied in some instances.

Clause 7
Ms Botha noted that clause 7 amended section 8(3)(b), and confirmed that the State Attorney would not be divested, by the fact of delegation, of any powers.

Other queries
Mr S Swart (ACDP) asked whether the OSA was likely to do any work for foreign governments, and, if so, under what circumstances.

Ms Botha thought that this was covered in the State Attorneys Act. There were areas where it might assist, under mutual legal assistance treaties.

Mr Swart asked if mutual legal assistance was done via the OSA or Department.

Ms Botha said that she would check, and said that some other legislation, such as the Prevention of Corruption Act made reference to who would assist in joint operations or investigations. She was not sure whether, in practice, whether there was actually any work being done for foreign countries, but an enabling provision was in the existing Act.

Ms Pillay confirmed, in answer to a question raised by Mr Swart on the previous day, that the OSA did not do any work for the Road Accident Fund (RAF).

Mr Swart asked why not, particularly since the RAF costs for litigation, quite apart from settlement of claims, cost billions of rand. The RAF fell directly under the Department of Transport and in the long term he thought this litigation should be undertaken by the OSA, as it probably formed the major part of all State litigation. The RAF was not an independent body requiring its own lawyers. Having said this, however, he thought that perhaps the OSA would be reluctant to take on the work because it was so onerous. The RAF used in-house lawyers to deal with the claims, but it briefed private lawyers to handle the litigation, and they obviously would have an interest in pushing up the costs. He remained concerned that its litigation was not handled by the OSA, the costs were perhaps not being sufficiently curtailed.

The Chairperson suggested that this Committee should perhaps impress, to the Portfolio Committee on Transport, the need for the OSA to become involved in RAF litigation.

Mr Swart added that, on further thought, there was likely to be less litigation as the RAF moved to a no-fault system, following the Satchwell Commission of Inquiry. Perhaps this point may not need to be raised now, but it could be borne in mind for the future. He reiterated that OSA may be reluctant to accept this amount of work. The broader framework could consider whether the SG should look at that sector.

Dr Motshekga noted that he had been invited to a meeting with the Minister of Transport, during which frustration was raised on this very point, so he thought that there was merit in this Committee still speaking to its counterparts at the Portfolio Committee on Transport. If matters changed, it would always be possible to reconsider the involvement of the OSA. At this stage, however, there

were serious challenges and a need to find ways to assist RAF.

Mr Swart also said that in rare cases officials may be injured in the course of duty, such as police officers in a police vehicle, and the OSA would assist the injured plaintiffs (State employees). If the mandate of the OSA was extended, the possibility of a conflict of interest situation, and ways to handle it, must be borne in mind, although whether this was correct from a policy perspective was another issue. He would strongly support the saving of the massive amount of legal costs. The fiscal position must be taken strongly into consideration. The Committee could raise the issue with the Minister and discuss whether OSA's involvement could save legal costs.

Ms Smuts asked for inclusion of a reference to provincial cabinets and executive councils, alongside Cabinet, in the clause requiring policy to be tabled to Cabinet and Parliament, clause 3(5). She suggested that the policy should be approved by the national Cabinet, but, at the least, tabled to the provincial bodies (also called executive councils), as well as tabled in Parliament. If there was no such requirement she feared they would not be consulted and their own litigating interests might be ignored.

Ms Schäfer pointed out that the name "executive council" was used in the Constitution, although in the Western Cape it was given a different name; she thought that the use of the wording in the Constitution would probably suffice. She asked why the policy should be tabled to Cabinet and not just to the provincial legislatures and Parliament.

Ms Smuts explained that provincial legislatures litigated. She was hoping that MECs and the provincial executive should have a voice.

Dr Motshekga asked if the voice did not come via the legislature.

The Chairperson reminded him that this was a reference to the provincial legislature.

Ms Schäfer wondered if wording along the lines of after comment / consultation / notification / tabling to the Provincial Executive Council" should be used.

Dr Motshekga pointed out that there were various consultation mechanisms in government, such as MinMECs.

Ms Smuts agreed but added that there was not a MinMEC for justice.

Ms Botha agreed with the comment on other channels, saying that the national Minister of Cooperative Governance and Traditional Affairs took overall responsibility and should surely go through all channels to get comment. She could not understand how that Minister would not follow such a procedure in terms of the Constitutional mandate, so that there was probably no need to insert anything in the Bill. She would ponder on other ways to ensure that the process was followed, and perhaps wording referring to the Minister (of Justice), after consultation with the Minister for Cooperative Governance and Traditional Affairs, determining policy for the functioning of the State Attorney, might suffice.

The Chairperson asked the drafters to insert an option.

Determination of Remuneration of Constitutional Court judges and judges, Draft Notice in terms of section 2(1)(a), read with section 2(4) of the Judges' Remuneration and Conditions of Employment Act
Determination of Remuneration of Magistrates: Draft Notices in terms of section 12(1)(a), read with section 12(3) of the Magistrates Act: Office of the Minister briefing
Mr Blendynn Williams, Head of Office, Office of the Minister, Department of Justice and Constitutional Development, presented the draft notices, respectively, in respect of the determination of Constitutional Court judges and other judges, and in respect of magistrates. Each of these officers would be entitled to such salaries, allowances and benefits as determined by the President.

He summarised that the recommendations as set out in the draft notices were substantially the same as in the previous year, except that the increases amounted to essentially 5 % increase across the board. Nothing had been changed in respect of the cash allowance and non-cash portfolio.

Ms Smuts asked who made the recommendation, and if it emanated from the Independent Remuneration Commission (IRC).

Mr Williams said that initially the IRC had recommended a sliding scale of increases for all office bearers in these categories, which would change according to the total package. However, there had been some unhappiness with that. The sliding scale would have granted certain increases at the magisterial level. However the IRC's recommendation that applied to those receiving above R1 million, which was regional court presidents, Special Grade Chief Magistrate, and judges caused much unhappiness, as it was felt that in fact they would effectively receive no increase taking inflation into account. In terms of section 176(3) of the Constitution, salaries could not be reduced, but there were concerns that this was effectively being done. Given the concerns about the possibility of legal action, there had then been consultations between the Office of the Chief Justice and Office of the Presidency, which had result in a

compromise of a 5% increase across the board.

Ms Schäfer noted that the Western Cape Premier had refused to take this increase and the DA would prefer to accept the recommendation of the IRC, which it saw as an independent body whose decisions should not be interfered with. Given the sensitivities, she asked for the chance to discuss this matter with her party.

Ms Smuts said that whilst she would not automatically agree with all the recommendations made by the IRC in the past, it would make sense to take the matter to the party caucus.

The Chairperson asked Mr William to note the concerns and report back to the Deputy Minister that the Committee felt that the DA's request to refer to the party before taking a final concern was reasonable.

Mr S Holomisa (ANC) asked for, and received confirmation that, despite what may have initially been recommended by the IRC, the increases now being proposed for confirmation by Parliament would be 5% for all presiding officers. He asked if there had been any complaints submitted by judges or magistrates.

The Chairperson explained that this was perceived by some judges as being an effective decrease in salary, as the IRC's recommendation had proposed a sliding scale of increases for those earning less than R1 million, whilst those earning above the scale would not receive any increase. The 5% figure now tabled by the Presidency was an attempt to avoid further controversy.

Mr Holomisa said he understand that point, but was more concerned about the time frames. He wondered if the judges and magistrates had stated that they were in desperate need of having those increases implemented immediately and whether deferring the Committee's decision to a later date would be problematic.

The Chairperson confirmed that to date there had been no complaints.

Mr Williams noted that people would always want a larger percentage, but in terms of the process the Deputy Minister of Justice had informed the magistrates' bodies JOASA and others that the process was that this must be referred to the Portfolio Committee and the NA before it could be implemented. They seemed to have accepted the timeframe.

Mr Holomisa asked how long it would be before the Committee could take a final decision.

The Chairperson and Ms Schäfer indicated that hopefully this could be resolved by the following Tuesday. He added that in the previous week he had been approached by a magistrate who had asked when the increase would be effected, so there were concerns that it should not be unduly delayed.

Ms Smuts agreed, and pointed out that all MPs were in the same position, having only received their increases from April 2013 in January 2014. It was necessary to finalise this as soon as possible, although there was no DA caucus until 20 February, although the DA Members would raise the point with the necessary officials.

Ms Christine Silkstone, Content Advisor to the Committee, at the request of the Chairperson, confirmed that the procedure was that this Committee would furnish a report on the draft notices to the NA for its adoption.

The Chairperson noted that there would be no sittings of the House until the week commencing 17 February, and asked if Members wanted to give some "advance news" to magistrates now or wait until all formalities had been completed. He asked Ms Silkstone to prepare the Report as soon as possible.

Ms Schäfer said that she would try to have her instructions from her party by the following week, but might need more time, particularly given that it could not be adopted before February.

Mr Williams said that there had been concerns expressed every year as to why the increase process took so long, with increases having to be back-dated every year. He noted that one of the concerns of the magistrates in the past was that the basic pensionable salary component of the package had been limited, for magistrates, to 60% whereas for other public servants it was 70%. Now, however, this had been brought in line with Senior Managerial Sector employees, so that the 70% calculation also applied to magistrates. Judges did not pay into pension schemes. The magistrates had proposed this themselves and agreed with the change.

The Chairperson quipped that hopefully in this year no magistrates would threaten to go on strike. He added that despite the threats last year, none had actually been recorded as going on strike. Those who may have been absent from office had produced sick leave certificates and similar supporting documents.

Khulumani Victims Support Group: Submission to the Portfolio Committee on Truth and Reconciliation issues
The Chairperson noted that he been informed, in the last few minutes, that Khulumani Victims Support Group (Khulumani) was intending to make a Powerpoint presentation, and had also e-mailed additional documents to the Committee that morning. He explained that normally this Committee could not entertain documentation sent through at a late stage, in view of the voluminous correspondence already forwarded to the Committee, and noted the confirmation from other members that no purpose would be served in allowing the Powerpoint presentation. He welcomed the delegation and asked them to introduce themselves.

Ms Nomarussia Bonase said that she was the Khulumani National Coordinator, from Gauteng. Ms Judy Seidman was a member of the Khulumani Board. Adv Howard Varney had been instructed by the Legal Resources Centre to represent the Khulumani Victims Support Group.

The Chairperson asked who Marjorie Dobson was, who had sent an e-mail to him requesting the opportunity to address the Committee. He noted that she was described as “not with the group”. He then asked who Mr Mohamed, referred to in that memorandum, was.

Ms Bonase confirmed that this was Adv Hisham Mohamed.

The Chairperson noted that Ms Dobson claimed that Adv Mohamed had given certain undertakings to her. However, he was with the Department of Justice and Constitutional Development (the Department) and not with Parliament, and thus could not give any undertakings on behalf of Parliament.

Ms Bonase said that Adv Mohamed had said that he would hand the petition to “the Chief Justice, the Chief of the Portfolio Committee”.

The Chairperson said that it appeared from the email that he had received that Adv Mohamed had come from his offices to meet with those demonstrating at Parliament.

The Chairperson reiterated that this Committee had been receiving documentation from Khulumani, until twenty minutes ago, but explained that the Committee could not function in this way. It had a huge volume of work to get through and it could not simply sit around waiting for documents to be presented to it, so such late submissions were problematic. However, the last document contained ten arguments and he would come back to that point.

He wanted to relay to Khulumani some of the deliberations in this Committee when he informed the Committee of his decision to allow the presentation by Khulumani, as requested. The Committee Members had pointed out that whilst they fully respected the position of the Chairperson, this particular matter had been thoroughly dealt with both in the Portfolio Committee and the NA previously. All the arguments present in the “ten arguments” document - and in all other correspondence - had been considered and deliberated upon fully in the past. Both the Committee and the NA had taken firm decisions on this matter. The difficulty was therefore that this Portfolio Committee was not in any position to go back on those decisions and resolutions. For this reason, he was asking the presenters not to go through all the documentation again. He assured them that Members had read all the documentation thoroughly. However, he could afford them a chance to stress the most important points. However, in all honesty, he could not see this Portfolio Committee agreeing to a review of its previous resolution.

Dr Motshekga hoped that this Committee was not expected to deal with submissions that may have been handed to Adv Mohamed, but which Members of this Committee had not seen, and requested the presenters to confine themselves to the points in the documents.

Mr Varney asked what decisions had been taken by Parliament.

The Chairperson referred him to the Parliamentary website but said that he would ask the Committee Secretary also to extract those and send them through. He noted that the Truth and Reconciliation Commission (TRC) recommendations dated back to around 1998, and Parliament had taken resolutions in the early 2000s. An ad Hoc Committee was constituted, the majority view prevailed, and essentially Parliament had approved the government’s reparations policy, as provided for in the law.

Ms Judy Siedman said that the question of the existing government reparation policy was the starting point. Khulumani was asking that this be re-examined. Proposals had been made by the Department on 21 November 2013 that would change the reparations policy and how money in the President’s Fund would be paid. There had not, however, been a full consultation process undertaken by the Department. Her request now, and the point of the petition handed to Adv Mohamed, was that Khulumani believed that there was a real danger that the process would go by default and without any public consultation and further discussion. This was not viable, not acceptable and may even be unconstitutional.

Ms Smuts said that this indicated the most recent concerns to the Committee. However, she wanted to stress that it was in fact this

Portfolio Committee who had insisted that something be done about the fact that so many years had elapsed without payment to so many victims, and this Committee had insisted that the Department must take stringent steps to find and ensure payment of the R30 000 to all victims named by the TRC. It was at the instance of this Committee (and she had been a prime mover) that the Department did move on the matter, and it had reached the point where only a few people were still listed as "untraceable". The law dictated who the "victims" were. She did not agree with the comments on the "closed list". This Committee received regular reports from Dr Khotso de Wee of the Department about the "heartbreakingly slow" process to get the regulations in place, which had to be done in conjunction with other departments, such as Education and Health. She knew that the Department had in fact consulted and had spoken to NGOs, including the Institute for Justice and Reconciliation (IJR), on the one suggestion that money in the President's Fund should be used for bursaries. The Department of Justice had been trying to get the regulations finalised in the other departments. She reiterated that if anyone had done something to ensure that effect was given to the TRC, then it was this Committee. She reminded the support group that a decision was taken at a certain point. The Department could advise the Committee on what had been published.

Ms Bonase said that Khulumani represented victims and its members were victims. This process had been started right after recommendations were sent to Parliament in 1998, when R30 000 was given to certain victims who were regarded as such, by the Department. However, not all of those attending the TRC had received that money. That was basically an unfinished process. The TRC had begun a good platform for reparations. However, the victims had asked for re-consideration when it became apparent that the process was not working. She took the point that the law had been passed, but said that " it is killing us". The medical and education regulations were passed even whilst individuals were pleading with those departments how the regulations should be drafted to actually help the victims. For the Department of Justice to say "take it or leave it" was problematic. The people were trying to get closer to government to work together for the betterment of the people. Democracy was not about dictating to the people. The issue of the community rehabilitation regulations was also not supported. Khulumani had made submissions on those regulations; they dealt with reconstruction and infrastructure, in a few areas, whilst others were not covered. She cited that in her own area, she was a victim, but did not see that government was doing anything. Khulumani was a multi-party organisation and pleaded for talks, to make this "our" government. It did not believe in taking destruction actions, but talking, but now there were many people who were very angry and disappointed with Parliament. She pleaded that Parliament should look at the issues and not simply be a "factory", but listen properly to issues and give a proper response. The memorandums were sent to the Department of Justice but it was not looking at issues of social cohesion. She noted that Khulumani "hated de Wee" and felt that nothing was being done to assist it.

She added that the TRC was not only about reconciliation but looking at the truth. She said that the DA failed to look at the issues, and was disappointed to hear these comments from Ms Smuts. She had thought that this was one avenue that Khulumani could follow to get results. She had a problem with the way in which this was pursued.

The Chairperson said that everyone was having a problem. Like Ms Bonase, many of those sitting in the Committee were also victims. Victims were victims, no matter by whom represented and whilst he heard her statement that "we" represented victims, not everyone might agree with that point. There were a few areas specified for community reparation. In KwaZulu Natal, his province, two areas would receive reparation but next year another two areas would be selected to receive reparations, and that applied throughout the country. He was not sure if Khulumani had read how this would be applied. There were other areas in the rest of the country to whom these provisions would apply.

Ms Smuts said that the reason why reparations were provided for in the TRC Act (which completed in 1995, and there would not be another Act) was that when indemnification against prosecution or amnesty was granted to gross human rights violators, the right of the victims to sue for damages was extinguished. That was why the Constitutional Court had made the ruling around reparations. Victims of gross violations fell into one category, but there were also victims of those granted amnesty for other lesser crimes, on certain conditions. There were 19 000 victims of gross HR violations found and declared and about 2 000 others – and they had been properly declared by the TRC. The TRC was not created to be the final word on apartheid. It was not in fact about apartheid, but about gross HR violations by all sides to the conflict in the past. The TRC had found it irresistible to become the platform on apartheid and it had used that platform to state that discrimination was a form of gross HR violations. Perhaps that was what was misleading some victims, but that was not what the TRC Act said. She herself had not agreed with the decision to award R30 000 to each victim, and disagreed with the TRC proposals also for a sliding scale. However, Parliament had adopted the government policy and that was now the law of the land that was being applied. The Committee had done everything it could to give effect to that law. Many MPs might have difficulties with what was in the policy. Victimhood had been defined, and now this Committee had to do everything by the book and in accordance with the law of the land.

Ms Smuts wondered if Khulumani was speaking of victims of other evils such as discrimination or injustice, but this was not what the TRC Act dealt with. Those who had not applied to the TRC and whose names were not published in Volume 7 were not covered under this law and regulations. Parliament could not deal with other victims.

Dr Motshekga said that the Chairperson had indicated the difficulties facing the Committee. However, the Committee had agreed that Khulumani should be heard. The Committee took all organisations of civil society seriously, and all people. He wanted all to understand the nature of the meeting. He strongly believed that Khulumani was now attempting to present to the incorrect forum. It had submitted a memo to an official of the Department, which had not come before Parliament or this Committee. Ms Siedman said

that certain matters arose last year, and those recent issues were also not before this Committee. Logically, before this Committee could give the opportunity for a hearing, Khulumani should follow up with the Department, who had received the memorandum, and exhaust that process. He did not believe that the Portfolio Committee should be dealing with matters that were in the hands of a government department, and this Committee was not aware what was being done with the memorandum. With the greatest respect, he reiterated that Khulumani was attempting to use the wrong forum.

Ms Siedman was concerned on many of the issues raised. One of the main issues was that Khulumani had understood, when it presented the memorandum, that Adv Mohamed would give it to the Parliamentary Committee. Khulumani thus believed that this meeting was a follow up to that. It was concerned that the publication of the regulations was directly counter to what had been requested in the memorandum, despite the fact that no response had even been made to the petition. The regulations ignored what Khulumani was trying to emphasise as the problems. Clearly, there had been a breakdown in the process. Most documents sent to the Committee over the last few days were attachments to the petition. The presentation that Khulumani was intending to give today expounded more on its response to the process. The proposed list was one of the crucial issues informing the memorandum and this attendance. The issue on who could be defined as victims was part of that discussion. Khulumani could identify 85 000 people who had filled out computer statements that fitted in with the definitions of those in the “victims of gross human rights violations” category.

Dr Motshekga interjected to say that even this follow-up was taking place in the wrong forum. He reiterated that this presentation should be given to the Department.

Ms Siedman said that Khulumani did not know what had happened to the memorandum.

The Chairperson asked where the handover took place and whether Ms Siedman had been present.

She noted that she had not, but Ms Bonase explained that it was done during the march outside the Parliamentary gates.

The Chairperson noted that no Parliamentarians had been in the building at the time, because Parliament was in recess. He asked how the Khulumani had got in touch with Adv Mohamed, as there were officials in Parliament who should have received the petition. He reiterated that Adv Mohamed accounted to this Committee, but actually worked for the Department of Justice and Constitutional Development and was not responsible for receiving petitions on behalf of the Committee. He was not here to explain the issues, but he might be able to shed some more light on what happened.

Ms Bonase assumed that Adv Mohamed had probably been informed of this by Dr de Wee, who knew that Khulumani was going to present the petition to the Parliamentary Committee. She reiterated that Adv Mohamed had said that this would be given to the Parliamentary Committee. Khulumani told Dr de Wee that it did not want to see him there. She accepted that it was possible that the memorandum had not been received. The documents were the backbone of the organisation.

The Chairperson said that the Committee could not really give responses to the last request.

Mr Varney conceded that this sounded like an unfortunate misunderstanding that documents would be handed to the Portfolio Committee, and it was futile now to discuss why the memorandum had not reached the Committee. He suggested that Khulumani be allowed to give a short overview about the regulations on community rehabilitations, which were likely to be promulgated in the next few weeks. Comments had to be presented to the Department by Friday, and he would like to outline why Khulumani believed that the draft regulations were objectionable and should be held back.

Dr Motshekga said, with the greatest respect, that there were officials in the Department as well as political heads, and if a memorandum was meant for that Department, it should have gone to the political heads. This Committee did not know if the information reached the political heads, and, if so, what they thought about it. An overview given by Khulumani setting out an interpretation of the regulations, which this Committee had not seen, would cause confusion. He suggested that since its memorandum should be sent to the Department, any follow up should also follow that route. This Committee could not interfere with the Department’s work.

Ms Schäfer noted that if comments were to be submitted by Friday, it was also not appropriate for one group to be allowed to make presentations, when the same opportunity had not been given to other organisations.

The Chairperson agreed, noted the deadline for Friday and would like to explain how regulations were dealt with.

Ms Siedman said that Khulumani had attempted for years to engage with the TRC and Ministry of Justice. This was not a first effort. Part of the concerns related to the failure to have its concerns heard and to get an effective response. Khulumani had been given to understand that ultimately the Portfolio Committee had oversight over the legislation, and Khulumani believed that at the very least a full consultation process, which it seemed that the Department had not engaged in, must be followed. The recommendations was gazetted on 29 November, the deadline for submissions by fax was 31 January. The organisation and individuals had sent submissions,

but with no response. It had been present in meetings where officials had basically said that they were going ahead with the regulations. It seemed logical, therefore, that Khulumani approach this Committee.

The Chairperson explained how Parliament dealt with legislation. This Portfolio Committee was, firstly, completely snowed under – and he was stating this as a fact, not an excuse. Parliament could write into laws that a portfolio committee must have sight of the regulations, which would allow that committee to monitor how they were to be implemented and whether they met with the committee's requirements. Another route, seldom followed, was that a portfolio committee might prescribe that it had the power to approve or reject regulations, but in practice MPs simply did not have the time to follow this route. In this instance, Khulumani must persuade the Department on its views. He noted that representations had been made, but this did not mean that the Department had to accept them. Ms Schäfer was quite correct; this Committee had been placed in an awkward position in that it was now listening to Khulumani, but not to other bodies who had made representations, and this might lead to accusations of bias in the Committee by other organisations who had perhaps not been aware that they could appear before a Committee if their request was approved. This was not normal procedure that a civil society group appear now before a committee, but he also wanted to stress that when civil society did appear, perhaps to present views on proposed primary legislation, not all views would be accepted. He was not saying that Khulumani's views should be dismissed because that was for the Department, not this Committee, to decide.

The Chairperson questioned whether Members thought there was any point in proceeding. The deadline was 31 January. The point about other submissions was well taken.

Dr Motshekga noted that Mr Varney had suggested that there was no point in proceeding. Even other points that the organisation may have wished to present flowed from the memorandum. Oversight by this Committee over the Department did not mean that the Committee could interfere with work in progress. A deadline of 31 January had been given. Khulumani should make a submission to the Department to persuade it on its concerns. It was impossible for this Committee to deal with the issues, particularly since the matter was ongoing. This Committee had not relinquished its oversight role and there was a possibility that Khulumani may wish to come back and address it again, if the need arose, but it was certain premature for it to do so now. He agreed that there seemed to be no purpose in proceeding with the presentation.

Ms Schäfer said that the crucial point was that Parliament did not make regulations and unless there was power written into the legislation for Parliament to overturn or disagree with regulations, the only remedy was to challenge them in court.

Mr Varney said that it would be in the interests of the Committee to hear the views of important stakeholders. He took exception to the view expressed by Ms Smuts suggesting that Khulumani had held itself out as only organisation representing victims...

Ms Smuts clarified that she had not said that and she had specifically referred to IJR and others.

Mr Varney said that Khulumani was one of the largest support groups, representing 85 000 victims. In regard to hearing this stakeholders he submitted that it was in the interests of this Committee to hear the views and the Committee could of course call upon other stakeholders to present their views too.

Dr Motshekga and Ms Schäfer reiterated that this would not serve a purpose as it was not the Committee who made regulations.

Mr Varney said that the recourse to court was possible but if this Committee could play a role in steering the process to avoid the necessity of approaching the court, then it would save costs and taxpayer money and perhaps this Committee could steer the path.

Dr Motshekga pointed out that the integrity of government processes and separation of powers must be respected. The Executive had a window and process for submissions. He did not think that any threat of court action should be made at this point. He said that it was premature for this Committee to consider any submissions.

Mr Varney said that what he wanted to mention did not deal with the regulations, which could be regarded as a separate issue. The policy of the majority party had become law, as noted earlier in the meeting. It had been said, here and other occasions, that the policy and the law of the country said that only those who had made statements before the TRC qualified for reparations. This was not even concerned with the community regulations, but if these community reparations regulations were passed, then the closed list was entirely irrelevant. The contemplated benefits, educational and medical, were another point. It would be interesting to heard from the Department what had happened to those regulations, which were published for public comment early 2011. They seemed to have died, but so too had many victims, most of whom were in the 60 to 80 age category. Every day that went by without benefits being afforded resulted in grave injustice and everyone should hang their heads in collective shame. Those who did not make statements to the TRC under its set procedures could not benefit under law, although there was actually nothing in the TRC Act to specify that. Many individuals were not able to see a statement taker. The TRC had limited resources. Individuals who were ignorant and could not access information did not even hear about the requirements. The law contained nothing about having to make the statement to the TRC's statement takers. Those who may have been in mental institutions were not able to qualify.

Ms C Pilane-Majake (ANC) raised a point of order. There had been agreement that this matter was being aired at the wrong forum, and she also said it was a valid point that the same opportunity was not being afforded to other organisations. She asked for a ruling.

Mr Varney answered her that his comments were not actually a presentation; they were merely responses to the Committee's comments.

The Chairperson said that the TRC was never meant to be a perfect process and everyone knew that the process would be fraught with risk. Mr Varney was essentially calling for a review of the entire process. If so, then he, as Chairperson, would have to put that request to the Portfolio Committee, and he believed that each Member would ask for the opportunity to raise it with their respective caucuses. He could not predict the responses, although he could guess the response from his own party.

Ms Smuts said that what seemed to be happening was essentially that Khulumani wanted to access money in the President's Fund to distribute to other 85 000 victims. That was not a matter that this Committee could debate or decide upon. She suggested that if Khulumani wanted to rewrite the law, it would have to approach the Court. She agreed that it was shocking that people were not paid the reparations. Parliament may not have liked the process, but was doing what the TRC Act required.

Dr Motshekga again reiterated that these issues were not properly before this Committee. This meeting was not about opening the TRC process and the Committee would not entertain the suggestions because they were being raised in the wrong forum.

Ms Siedman wanted to make a clear statement. From Khulumani's perspective, if it accepted that this was the wrong forum, it was disappointing, because surely the oversight committee must ultimately not accept what was being done by the Department. It believed that the dispersal of the President's Fund under the proposed new regulations was in fact instituting a different approach to what was in the TRC Act, and that the Department failed to meet the commitments. Those were the immediate issues. She pointed out that if the committee closed this door, Khulumani was left with few other options. The Department itself already had a "closed door" approach. Khulumani had been pleased to hear that this Committee was prepared to meet with it, and its immediate demand was that the process not be allowed to go through without public discussion. It wanted the Department to make this an open debate so that stakeholders whom Khulumani represented should have their say fully. If this Committee felt that it could not do that, then Khulumani would have to look at other approaches.

The Chairperson said that this was fine.

Ms Bonase said that her worry about Ms Smuts' response was that she was suggesting that she had helped victims to get responses.

Ms Smuts clarified that she had said "we", which meant the Committee. She had driven the argument to get the process working, but it was the Committee who pursued it.

Ms Bonase complained that Ms Smuts was interrupting her. She then said, in relation to the comment that Ms Smuts suspected that perhaps not all "victims" as defined by Khulumani fell into the categories set out in the TRC Act, that she had the feeling that Ms Smuts did not want to know. The 22 000 were victims who had been declared by the TRC as victims.

Ms Smuts clarified that the TRC had declared them as victims, in terms of Volume 7.

Ms Bonase said that Khulumani represented victims both within and outside the TRC process. She noted that the Committee had said it could not go back on regulations already dealt with. Khulumani had worked with the Department. Parliament did not seem to know what was going on and she commented that Ms Smuts had said that it seemed that Khulumani wanted the money in the President's Fund to be widely distributed.

Ms Bonase made some remarks to Dr Motshekga in isiXhosa. She added that Khulumani had made submissions to the Department and the Portfolio Committee.

Dr Motshekga summarised that the Committee indeed took Khulumani very seriously and there was no reason why it would say that it would not listen, because it would and did give full attention to public concerns. However, the right process must be followed until it had been exhausted, and if the need arose, then Khulumani might approach the Committee again. He asked that the views of Ms Smuts should not be attributed to the whole Committee, because the Committee had not discussed the issues and had not formulated a Committee approach. Lastly, he thanked Khulumani for their understanding.

Ms Siedman concluded that Khulumani was being told to wait until Friday, but if the regulations were being put through, then it could come back to the Committee.

Dr Motshekga said that the process must be allowed to end. The Committee could not know how this would end and therefore did not give any final word on the matter.

The Chairperson noted that Dr Motshekga could not give any undertakings. In the same way that Ms Smuts did not speak on behalf of the Portfolio Committee, neither could anything that Dr Motshekga said be regarded as binding on the Committee. Finally, he suggested to Mr Varney that if Khulumani wanted to persuade people, it should refrain from commenting that it “hated” people.

The meeting was adjourned.