

Draft 1

AD HOC JOINT COMMITTEE TO CONSIDER MATTERS IN TERMS OF SECTION 12 OF THE NATIONAL PROSECUTING AUTHORITY ACT, 1998 (ACT 32 OF 1998)

Report of the Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), dated ??? February 2009

The Ad Hoc Joint Committee to Consider Matters in terms of Section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998) reports as follows:

1. Introduction

- 1.1. Advocate Vusi Pikoli was suspended from office as the National Director of Public Prosecutions (NDPP) by former President Thabo Mbeki on 23rd September 2007. Following this, on 28 September 2007, an enquiry, chaired by Dr F Ginwala was established in terms of section 12(6)(a) of the National Prosecuting Authority Act No 32 of 1998 (the Act), with terms of reference (dated 3 October 2007) to determine:

"2.1. The fitness of Advocate V Pikoli, to hold the office of National Director. In particular:

2.1.1. Whether he, in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organized crime to the national security of the Republic.

2.1.2. Whether he, in taking decisions to grant immunity from prosecution to or enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the Act, took due regard to the public interest and the national security interests of the Republic, as contemplated in section 198 of the Constitution, as well as the Prosecution Policy.

2.2. Whether the relationship between the National Director and the Minister has irretrievably broken down. In particular,

2.2.1. Whether he failed to appreciate the nature and extent of the Constitutional and legal oversight powers of the Minister over the prosecuting authority;

and such other matters as may relate to the fitness and propriety of the National Director to hold office."

- 1.2. After completing its work, the Ginwala Enquiry produced a written report on 4 November 2008. On 8 December 2008 having regard for the work of the enquiry, and after receiving further representations from Adv Pikoli in respect of the report, the President Kgalema Motlanthe, decided to remove Adv Pikoli from office in terms of section 12 (6)(a) of the Act.

- 1.3. The aforementioned decision was communicated to Parliament on December 2008, as provided for by section 12(6)(b) of the Act.

2. Composition of Committee

- 2.1. The following members of the Assembly were appointed to serve on the Committee:

Burgess, CV (ANC); Carrim, YI (ANC); De Lille, P (ID); Delport, JT (DA); Khompela, B (ANC); Joubert, LK (DA); Maake, JJ (Alt) (ANC); Magwanishe, GB (ANC); Moloi-Moropa, JC (ANC); Monareng, OE (ANC); Nyambi, AJ (ANC); Sibhidla, NN (ANC); Swart, SN (ACDP); and Van der Merwe, JH (IFP).

- 2.2. The following members of the Council were appointed to serve on the Committee:

Dlulane, BN; Douglas, WM; le Roux, WJ; Mazibuko, NF; Mokoena; Kgoshi ML; Moseki, AL; Ntuli, ZC; Tau, RT; and van Heerden, FJ.

- 2.3. Mr OE Monareng and Kgoshi ML Mokoena were elected co-chairpersons.

3. Legal Framework

- 3.1. On 12 January 2009, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces established an Ad Hoc Joint Committee in terms of the Joint Rule 138 to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998). The Committee's task was to consider the correctness of President's decision to remove the National Director of Public Prosecutions, Adv Vusi Pikoli.
- 3.2. The grounds for and process by which the NDPP may be dismissed are provided for in section 12(5), (6) and (7) of the National Prosecuting Authority Act, 1998.¹ Parliament's role in this process is to either endorse or

¹ Sections 12(5), (6) & (7) of the National Prosecuting Authority Act, 1998:

(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

(6) (a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the

reject the President's decision after it has considered the President's reasons for the dismissal and the NDPP's representations.

- 3.3. In terms of section 12(6) of the National Prosecuting Authority Act, 1998, there are four permissible grounds for dismissing the NDPP from office.
- 3.4. Section 9 of the National Prosecuting Authority Act provides for the qualifications for appointment as the NDPP. In addition to possessing the requisite legal qualification and being a South African citizen, an NDPP must be a 'fit and proper person, with due regard to his or her experience, conscientiousness and integrity to be entrusted with the responsibilities of the office concerned'.

4. Procedure

- 4.1. The Committee in proceeding with its work had regard to the following:
 - The letter and the supporting documentation from the President explaining the reasons for the removal of Adv Pikoli.
 - The Ginwala Enquiry Report and the addendums to the report.
 - The oral presentations to the Committee from Adv Pikoli.
 - The oral presentations from the Minister of Justice and Constitutional Development, Enver Surty, and the Director General in the Presidency, Reverend Frank Chikane.
 - The Joint Standing Committee on Intelligence Report on the Special 'Browse' Mole Consolidated Report (adopted by Parliament in November 2007).
 - Deliberations from the Committee.

5. Overview of presentation by Advocate V Pikoli

- 5.1. Adv Pikoli remarked as follows:
 - The Commission of Enquiry conducted by Dr Ginwala had exonerated him, recommending that he be restored to Office. In his view, this vindicated not only his integrity but also that of the NPA as a whole.
 - Adv Pikoli was taken aback when he learnt that President Motlanthe had decided to remove him on the basis that he was not sensitive enough to matters of national security. Although he conceded that he is not an expert in this field, he believes that he has had the necessary exposure to

restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

(7) The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6)(a), is presented to the President.

and experience in such matters. He provided the Committee with details of this experience. Instead, he maintains, that had he not refused an unlawful instruction from Minister Mabandla (contained in her letter to him dated 18 September 2007) to halt the investigation of Mr Selebi, he would not have been suspended.

- He also told the Committee that everything he did was not out of personal interest but out of loyalty to his oath of Office.

5.2. Adv Pikoli listed five adverse findings made by the Ginwala Enquiry. In each case he provided the Committee with an explanation:

- 5.2.1. *Listing of the Directorate of Special Operations (DSO):* The Enquiry had criticised him for not informing the Minister before notifying the National Treasury that the DSO was not listed as a public entity. Adv Pikoli replied that he had a legal obligation to inform the National Treasury. Although he did not inform the Minister before writing the letter to National Treasury, he had communicated with her several times previously on this matter.
- 5.2.2. *Search of the Union Buildings:* This had never been raised with him as being an issue until he was suspended. Adv Pikoli told the Committee that he had informed the President, Deputy President, the Minister and the DG: Presidency after he had obtained the warrants to search the Union Buildings and Tuynhuys as he wanted to ensure that a properly conducive environment was in place for the warrants to be executed. It was arranged that the DSO's Adv Nel and Rev Chikane would meet to make the necessary practical arrangements and this meeting took place. A mechanism was also put in place to deal with any documents in dispute. As far as he was aware, there were no security breaches.
- 5.2.3. *Request for mutual legal assistance in matter of plot to assassinate the Malawian President:* Adv Pikoli told the Committee that this was not an intelligence matter but a simple legal request. He had complied with the requirements of the legislation by relaying the request for mutual legal assistance to the Director General of Justice.
- 5.2.4. *Browse Mole Report:* While the Enquiry found that Adv Pikoli had not authorised the Browse Mole Report, he was criticised for not stopping the investigation when he received the preliminary report in March 2007 and for not taking action against Adv McCarthy, DSO Head. He told the Committee that when Adv McCarthy gave him the preliminary report in March 2007, the investigation had already been completed. The report, however, needed finalisation. When he received the final report in June 2007, Adv Pikoli immediately realised that the DSO had exceeded its mandate. He instructed Adv McCarthy that the report had no legal status, expressing his disapproval in the strongest terms. He then met with the Directors General of SASS and NIA, providing them with copies of the report. As for disciplining Adv McCarthy, although he expressed his disapproval at the time, he is of the view that it was for the President to institute disciplinary proceedings against Adv McCarthy.
- 5.2.5. *Investigation of Mr Selebi:* There were two complaints about Adv Pikoli's handling of the investigation of the National Commissioner. He failed to

inform the Minister of the intention to obtain warrants of search and seizure and for the arrest of the National Commissioner; he also failed to exhaust a process initiated by the President to facilitate the NPA's access to sensitive documents in possession of SAPS. A related issue is Adv Pikoli's contention that the real reason for his suspension was to prevent the National Commissioner from being arrested and prosecuted. From the outset, Advocate Pikoli has maintained that this was the reason for his suspension.

- Adv Pikoli told the Committee that from early on he had informed the Minister and the President of the investigation. He referred to a long history of meetings and correspondence. He said that he had always made it clear that the end result would be the prosecution of Mr Selebi. Even after he obtained the warrants, their execution was always in his control. To this end, he had informed the Minister and the President to ensure that the necessary enabling environment to execute the warrants could be put in place.
- Government had initially disputed that there was ever a discussion between Adv Pikoli and President Mbeki about the amount of time needed for an enabling environment to be put in place. Adv Pikoli initially mentioned this under cross-examination. He told the Committee that the need for more time was not raised by the President as an issue at the relevant time. He said that when he parted with the President, it was on the note that Rev Chikane would convene a meeting of the National Security Council.
- Dr Ginwala dismissed the notion that the reason for Adv Pikoli's suspension was to stop the NPA from arresting and prosecuting Mr Selebi. Nevertheless, Adv Pikoli maintains that this is the real reason for his suspension.

6. Overview of discussions with the Minister Surty and DG Frank Chikane

- 6.1. Minister Enver Surty told the Committee that he was not representing the Presidency. The President had given his reasons for his recommendation in writing to the Committee, and it would be inappropriate for the Minister to add to the President's representations. Instead, he had made himself available to answer questions and clarify issues. He also offered to give his personal views on and legal interpretation of the relationship between the Minister and the NDPP. He had requested that Rev Chikane be present in his capacity as chairperson the National Security Council.
- 6.2. No presentations were made. Instead, questions were put to the Minister and Rev Chikane on a number of key issues:
 - The nature of the relationship between the Minister and the NDPP, given the potential for conflict between prosecutorial independence and Executive 'final responsibility'.
 - The Minister's views on the nature of the letter from Minister Mabandla to Adv Pikoli dated 18 September 2007.

- The disjuncture between the initial letter of suspension, the Enquiry's terms of reference and the reasons provided by President Motlanthe for removing Adv Pikoli.
 - The meaning of the term 'national security' in the context of fitness to hold the responsibilities of Office of NDPP.
 - The relevance of 'sensitivity to matters of national security' as a quality for fitness to hold the responsibilities of office of NDPP and the extent to which it is encompassed in the definition of fitness to hold office in section 9 of the National Prosecuting Authority Act?
 - The ways in which Adv Pikoli showed that he was insensitive to matters of national security.
- 6.3. Minister Surty expressed the view that the issue of fitness to hold office and, more specifically, the Enquiry's findings on this point should be considered as a whole and not selectively. The requisite attributes of an NDPP include a range of qualities. Minister Surty referred to Dr Ginwala's discussion of fitness to hold the responsibilities of office, in which she identifies sensitivity to matters of national security as a necessary attribute. While Adv Pikoli's integrity and honesty are unquestioned, he believes that matters of public interest, national security and collaboration are pertinent to the issue of fitness to hold the office of the NDPP.
- 6.4. In the Minister's view, the President is not bound by the Enquiry's terms of reference when making his decision. Nor is he bound to a particular finding of the Enquiry, but can look at the entire report when making a decision. The Minister also suggested that should there be a future Enquiry of this nature, it should make findings on the evidence presented to it but no recommendations. The recommendations should be made by the President, to Parliament after considering the Enquiry's findings in their totality.
- 6.5. On the relationship between the Minister and the NDPP, Minister Surty was of the view that it is important to carefully manage the two constitutional imperatives that exist side by side (i.e. the imperative to collaborate and co-operate and the principle of prosecutorial independence). Specifically, the relationship between the Minister and NDPP needs to be carefully managed to avoid unnecessary tensions. As the Minister's final responsibility' is not defined in the legislation, Minister Surty suggested that the Committee may want to look more closely at this when making its report.
- 6.6. Minister Surty described the letter from Minister Mabandla to Mr Pikoli as "unfortunate" but reminded the Committee that Dr Ginwala had found that neither President Mbeki nor the Minister had acted to interfere with Mr Selebi's arrest. He expressed the view that there was no resistance to Mr Selebi's prosecution but that the difficulty lay with how it was to be handled. While he could not speak for the former Minister, in general terms, he believed that there are lessons to be learnt about the importance of clarity when communicating.
- 6.7. Minister Surty agreed that security of tenure is important to prosecutorial independence. This is why Parliament makes the final decision about whether a NDPP can be removed from Office. He suggested that Parliament may also

want to look more carefully at its role in the appointment process for the NDPP.

- 6.8. Rev Chikane stated that Mr Pikoli's suspension was necessary as he was insufficiently sensitive to matters of national security. He had attended the meetings of the President and Adv Pikoli in September 2007. At no point did President Mbeki say that Mr Selebi should not be arrested. When Adv Pikoli arrived at a meeting with the President, instead of giving a report on the investigation as expected, Adv Pikoli informed the President that he had obtained the warrants of arrest and search and seizure in connection with Mr Selebi. The discussion that ensued was about how to go about creating the necessary enabling environment to execute these warrants. The President requested a stay of 14 days so that he could apply his mind carefully to the matter, but Adv Pikoli was only prepared to concede to 7 days. Rev Chikane said that the President is privy to intelligence reports to which Adv Pikoli is not but it was clear that Adv Pikoli had made up his mind and was not prepared to concede any more time. Also, Rev Chikane told the Committee that if the President had argued about the time he needed, this could have been construed as interfering. The decision to suspend Adv Pikoli was made when it became clear that it was necessary to prevent a crisis that could have destabilised the country.

7. Overview of Positions of Different Political Parties in the Committee

Essentially, the views of ANC members in the Committee are:

- 7.1. *Government's Case Stronger than Appears:* ANC members are of the view that the Government's overall case against Adv Pikoli was not managed as best as it could have been during the Ginwala Enquiry, and that its case is stronger than that presented there, particularly in respect of Adv Pikoli's lack of sufficient sensitivity to national security issues (as also referred to further in section 6.3 below) . The inputs from Director General Chikane and Minister Surty to the Committee gave more significant substance to the government's case, even if members were not convinced by some of the things they said.
- 7.2. *Case as a Whole Must Be Considered:* ANC members expressed the view that while there may be differences of emphasis between President Mbeki's letter of suspension, the presentations at the Ginwala Enquiry and President Motlanthe's letter dismissing Adv Pikoli, the government's case must be considered as a whole – and, as such, there is much Adv Pikoli has to answer for.
- 7.3. *Lack of Sensitivity to National Security Issues:* ANC members are of the view that it is substantially clear that Adv Pikoli is not sufficiently sensitive to national security issues. Among other issues this was displayed in the way he had dealt with the Browse Mole Report, the search and seizure operation at the Union Buildings, the execution of the warrants in connection with the arrest and prosecution of Mr Selebi, and Adv Pikoli's unwillingness or refusal

to acknowledge in his reply to President Motlanthe that he had made any mistakes at all in respect of security issues..

- 7.3.1. *Browse Mole Report.* Given the politically explosive nature of the Browse Mole Report, ANC members feel that it is not credible that Adv Pikoli had filed the March 2006 preliminary report away on the advice of the Head of Directorate of Special Operations that it is work in progress, without carefully considering it. ANC members find it difficult to believe that Adv Pikoli did not appreciate the significance of the report or that it fell outside the legal mandate of the DSO. ANC members feel that he should have acted immediately to prevent the report from being finalised, and that his failure to do so amounted to a dereliction of duty. Had he done so then, he could have limited the damage caused by this intelligence gathering exercise. He should also have informed the Minister then and not when he received the final report. By allowing the DSO to finalise the report over 3 months instead of handing the draft over to NIA and SASS, he in effect commissioned the final Browse Mole Report. The Committee did not receive a clear answer as to how Adv Pikoli's copy of the preliminary report got lost and why another copy of it could not be reproduced from the computer on which it was typed and given to the Ginwala Inquiry as requested. Also, it suggests negligence on the part of Adv Pikoli that he could lose such a serious report without any credible explanation. ANC members also draw attention to the Special Report of the Joint Standing Committee on Intelligence on the Special 'Browse' Mole Consolidated Report.
- 7.3.2. *Vetting and search of the Union Buildings.* Given the security considerations associated with conducting a search of the Union Buildings, which is a "national key point", it was extremely insensitive of Adv Pikoli not to ensure that all persons involved in the search of the Union Buildings were properly vetted. That there are other state agencies that use private companies that are not properly vetted, as explained by Adv Pikoli is hardly a defence and reinforces the view that he is not sufficiently sensitive to national security issues. There must be few countries in the world where a similar raid of the President's Office by people without security clearance would be allowed.
- 7.3.3. *Arrest and prosecution of the National Commissioner of SAPS:* Adv Pikoli maintains that the real reason for his suspension was to stop Mr Selebi's arrest and prosecution. However, the Committee was given a different perspective from Rev Chikane, who told it that Adv Pikoli's suspension was prompted by his failure to appreciate that there were matters of state security at stake, and that the President needed sufficient time to create an enabling environment before the warrants were executed. By not appreciating this, more particularly by not agreeing to President's request for 14 days to put an enabling environment in place to execute the warrants, Adv Pikoli had showed considerable insensitivity to matters of national security. Rev Chikane suggested that there would have been a major security crisis had Adv Pikoli unilaterally acted on the warrant

without the President having prepared the ground with the SAPS and other security agencies for the warrant to be executed. Reference was also made to Adv Pikoli's answer to the Ginwala Enquiry that it is possible that had the President insisted on a longer period of the time before the warrants were executed, he might have defied him.

- 7.3.4. *Adv Pikoli's unwillingness or refusal to acknowledge his shortcomings:* It is clear from Adv Pikoli's reply to President Motlanthe's request that he respond to the Ginwala Enquiry's adverse findings on him, that he is not prepared to concede that he made any mistakes in managing national security issues. This serves to reinforce the view that he is not sufficiently sensitive to security issues. The President mentioned Adv Pikoli's inability or unwillingness to acknowledge his shortcomings as a factor in his decision to dismiss him.
- 7.4. *Relevance of Sensitivity to National Security to NDPP's Fitness to Hold Office:* Clearly, being sensitive to national security issues is an important consideration in the work of an NDPP and reflects on his or her fitness to hold office. The terms of reference of the Ginwala Enquiry refer to the fitness of Adv Pikoli to hold office, in particular, "whether he, in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic" and whether "he, in taking decisions to grant immunity from prosecution to or enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the Act, took due regard to the public interest and the national security interests of the Republic, as contemplated in section 198 of the Constitution, as well as the prosecution policy." The Enquiry was also mandated to look into "such other matters as may relate to the fitness and propriety of the National Director to hold office" The latter term would also cover national security issues. It is interesting that the Ginwala Enquiry Report notes that "...in the course of this Enquiry some deficiencies in the capacity and understanding of Adv Pikoli to fully execute the range of responsibilities attached to the office of the NDPP became apparent. I feel incumbent to draw attention to these. They centre in the main on the lack of understanding by Adv Pikoli of his responsibility to operate within a strict security environment and to ensure that the NPA, and the DSO, operate in a manner that takes into account the community interest and does not compromise national security" (at paragraph 350). Adv Pikoli also did "not fully appreciate the sensitivities of the political environment in which the NPA needs to operate, and his responsibility to manage this environment"(paragraph 351). In the Executive Summary of the Ginwala Enquiry Report it was noted: "My most serious concerns arise from the evidence of the discussions between the President and Adv Pikoli at their meetings just prior to Adv Pikoli's suspension. Adv Pikoli also did not give due consideration to the actions the President might need to take in order to defuse a potential security crisis and instability and to preserve the country's international reputation. He did not take seriously the President's concerns about the mood of the SAPS and their possible reaction to the arrest of the National Commissioner; and even challenged the President's assessment of the time he would require to manage the situation. Had this been presented as a reason for the

suspension, when his conduct would have held a real threat of undermining national security, I would not have hesitated to find the reason to be legitimate. However, these were not among the reasons put forward by the Government before this Enquiry' (paragraph 17). Reference was made to Adv Pikoli's failure to give due consideration to any actions the President may have needed to take before Mr Selebi was arrested. The Enquiry concludes that 'he did not take seriously the President's concerns about the mood of the SAPS and their possible reaction to the arrest if the National Commissioner; and even challenged the President's assessment of the time he would require to manage the situation' (paragraph 354).

- 7.5. *Legal Framework Not Clear:* ANC members feel that it is unfortunate that matters have to come to where they have in the case of Adv Pikoli. A major context for this is the lack of sufficient clarity on aspects of the legal framework. They feel that all the stakeholders – the President, the Ginwala Inquiry, the NDPP and parliament – would have been better able to manage their respective roles if the legislation was clearer. The ANC members are of the view that the incoming executive and parliament need to review the Constitution and legislation to clarify the relationship between the NDPP, executive and parliament.

With some differences of emphasis and substance, the views expressed by Members of the Opposition parties in the Committee essentially are:

- 7.6. *Government failed to prove case:* The opposition parties are of the view that Government had failed to prove its case. It made a multitude of spurious accusations against Adv Pikoli, which were abandoned or dismissed as the process unfolded. The Ginwala Enquiry found him fit and proper to hold office. The Enquiry also found that the relationship between Adv Pikoli and Minister Mabandla had not broken down irretrievably. The quality or credibility of the testimony presented on behalf of government should also be taken into account. Dr Ginwala had found the evidence given by the Director General of Justice 'unacceptable', while Minister Mabandla had not given evidence at the Enquiry.
- 7.7. *Shifting of goalposts:* The opposition parties expressed the belief that it is unfair that Government has continually introduced new reasons for Adv Pikoli's suspension. The reasons provided for removing Adv Pikoli (that he lacks sensitivity to matters of national security) is an 'afterthought' that emerged only once the Enquiry had made its report.
- 7.8. *The arrest and prosecution of the National Commissioner:* The opposition parties support Adv Pikoli's interpretation of the events and reason for his suspension. They expressed the view that, in connection with the events relating to Mr Selebi's arrest and prosecution, Adv Pikoli had done nothing more than his duty. Nor should national security be used as a pretext to avoid a criminal investigation and prosecution. Attention was drawn to the following:
 - 7.8.1. The letter from Minister Mabandla to Adv Pikoli, dated 18 September 2007, asked for more information but made no mention of matters of

state security. Instead the Minister instructed him not to pursue Mr Selebi's arrest and prosecution until she was satisfied that sufficient information and evidence existed to justify the execution of the warrants. Nor was the issue of national security part of government's case against Adv Pikoli. The matter had had a long history, and Adv Pikoli had briefed the Minister and the President on many occasions. He had made it clear that the outcome of the investigation would be to arrest and charge Mr Selebi. The SAPS had frustrated, if not obstructed, the DSO's attempts to obtain vital documents. After he had obtained the warrants, Adv Pikoli had informed the Minister and the President.

7.8.2. The opposition parties argued that the question of the extended period of time needed by the President to create an enabling environment was not raised as an issue at the relevant time, but was first raised by Adv Pikoli himself during his evidence at the hearing. The impression that Adv Pikoli had was that although President Mbeki would have preferred 2 weeks, a week was enough time to make the necessary preparations.

7.8.3. Also, the Enquiry did not find that there had been actual breaches of national security; it only said that Adv Pikoli had not taken national security as a factor into consideration.

7.8.4. Reference was made to Adv Pikoli having told the Committee that after he had been suspended, the warrants relating to the arrest of Mr Selebi had been withdrawn. The implication was that there had been interference.

7.9. *Refusal or unwillingness to admit shortcomings:* The opposition parties are of the view that Adv Pikoli had acknowledged to the Committee that he is fallible. Also, that an inability or unwillingness to make such a concession does not mean that Adv Pikoli is unfit to hold office.

7.10. *Relevance of national security to fit and proper:* The opposition parties expressed the view that the definition of 'fit and proper' found in the National Prosecuting Authority Act does not mention sensitivity to matters of national security as a requirement. Further, the Enquiry had not found that there had been any breaches of national security. Its remarks on this issue were speculative and not based on the evidence it had before it.

7.11. *Issues of clarity surrounding the legal framework:* The opposition parties questioned the legality of the process. They do not believe it is fair to remove Adv Pikoli for reasons that did not appear in the Enquiry's terms of reference. Dr Ginwala had been faced with this problem when having to decide what to adjudicate on, and whether she could look at evidence that fell outside of the terms of reference. Also, certain aspects of the legal framework are not sufficiently clear, and the meaning of 'fit and proper', as well as the relationship between the Minister and NDPP would need to be debated at a later stage.

7.12. *Parliament's role is 'window dressing':* The opposition parties expressed the view that the Committee's role in this process is 'window dressing', and that the separation of powers between the Executive and Parliament will not be upheld. There is a perception of bias, that the outcome of the Committee's

deliberations is predetermined. In support of this, reference was made to a newspaper report that Adv Pikoli's successor had already been chosen.

8. Findings

- 8.1. The Committee submits that the President complied with the provisions of the National Prosecuting Authority Act, 1998. Based largely on the arguments presented in sections 7.1 to 7.5 above, the Committee finds that the President Motlanthe has exercised his mind and endorses the President's decision to remove Adv Pikoli from the office of the National Director of Public Prosecutions.

ANNEXURE 1

1. This is the first time that the Executive and Parliament have had to consider the removal of the NDPP from office. There are some lessons that can be drawn from the experience of attending to the removal of the current NDPP that are reflected in this annexure.
2. The Committee is of the view that the relevant legislative framework is not sufficiently clear. Although the Enquiry found that there had been no irretrievable breakdown in the relationship between the Minister and the NDPP, it is clear that this is an area where there is significant potential for tension, as the principles of prosecutorial independence and political accountability must be appropriately balanced. The Committee notes with approval the Enquiry's recommendations that there be a collegial discussions, as well as a structured engagement and interface between the Minister and the NDPP on an ongoing basis to clarify their respective functions and responsibilities and lines of communication'. The Committee recommends that the Ministry and the National Prosecuting Authority look into how to best manage this relationship, and that the incoming Parliament assists and oversees this. Consideration needs to be given whether there is need to provide greater clarity on what is meant in section 179 (6) of the Constitution that the Minister of Justice has "final responsibility" for the NPA.
3. The need for clarity on the relationship between the Minister of Justice and the NPA has also been raised by the 18 September 2007 letter sent by the Minister to the NDPP. The relevant part reads: "In order for me to exercise my responsibilities as required by the constitution, I require all of the information on which you relied to take the legal steps to effect the arrest of and the preference of charges against the national commissioner of the Police Service. This includes but is not limited to specific information or evidence indicating the direct involvement of the National Commissioner in any activity that constitutes a crime in terms of the laws of South Africa ... In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account, including the public interest. Therefore, I must be satisfied that indeed the public interest would be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the Police Service, you shall not pursue the route that you have taken steps to pursue'. The last sentence, in particular, has aroused controversy. The Ginwala Enquiry Report notes: "Adv Pikoli maintains that the letter constitutes an unlawful and unconstitutional instruction. Government has not put forward any cogent argument to dissuade me from a literal interpretation of the Minister's letter, which was an attempt to unlawfully interfere with Adv Pikoli's prosecutorial independence" (paragraph 289). The Committee is of the view that the Ginwala Enquiry Report conclusion in this regard is reasonable, and there is need to review the legislation and practice to better clarify the relationship between the Minister and NDPP.

4. The definition of 'fit and proper' contained in the National Prosecuting Authority Act may need to be expanded to take account of other relevant criteria in ensuring that the NDPP discharges his or her responsibilities adequately and effectively.
5. There may be a need to provide greater legal clarity on the relationship between the outcome of an enquiry into NDPP's fitness for office and the President's decision on whether to remove the NDPP or not.
6. The Committee notes that the Ginwala Enquiry reported that the statutory framework did not provide it with any guidance, and that it had to devise its own rules and procedures. The Committee believes that it would be useful for the executive and parliament to consider whether it is necessary to provide guidance on this process.
7. The Committee is of the view that it may be an anomaly that Parliament plays no role in appointing the NDPP, but has the final say in his or her removal. The review of the legislation should also consider whether parliament should play any role in the appointment of the NDPP.
8. The Committee notes that with disapproval the role that strained relations between the SAPS and the NPA has played in the events that unfolded. It recommends that the relevant incoming Parliament committees monitor this on a regular basis, as do the relevant co-ordinating structures within the Justice, Crime Prevention and Security (JCPS) cluster.