

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

18 FEBRUARY 2021

DAY 345



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 18 FEBRUARY 2021

CHAIRPERSON: Good morning Mr Freund, good morning everybody.

ADV FREUND SC: Good morning Chair.

CHAIRPERSON: Are you ready?

ADV FREUND SC: We are indeed.

CHAIRPERSON: Okay. Let us start.

ADV FREUND SC: Thank you Chair. Chair as I – as I believe you know we propose to lead today four witnesses.

10 We are going to be departing a little from the – the nature of the evidence heard thus far by this stream.

Thus far we have really been hearing from people in and around Parliament about what did and did not happen at certain time.

The – the focus today will be slightly different. The focus will be from what one might call observers who as it were wish to contribute to the work of the commission by giving their analysis as to what they believe went wrong if anything went wrong and what they believe perhaps could
20 be suggested as potential measures to help to address the problem from occurring in future.

We will be starting with the evidence of Mr Lawson Naidoo from CASAC. We will then hear the evidence of Professor of Corder. We will then hear the evidence of a representative of the Parliamentary Monitoring Group Ms

Jennifer Rault-Smith and then finally this afternoon the evidence of Mr Lewis from Corruption Watch.

Chair with your leave I wish to call the first witness Mr Lawson Naidoo?

CHAIRPERSON: Yes thank you.

ADV FREUND SC: His – his documents are to be found in Volume 3 from page 204 and following it is Exhibit ZZ10.

CHAIRPERSON: Thank you I have got it. Thank you. Mr Naidoo are you there?

10 **MR NAIDOO:** Good morning Chair yes I am thank you.

CHAIRPERSON: Good morning how are you this morning?

MR NAIDOO: Very well Deputy Chief Justice.

CHAIRPERSON: Thank you very much and thank you for availing yourself to try and help the commission. I know that you and your organisation are big supporters of the commission and its work and we appreciate that very much so I am very grateful that you have availed yourself to try and assist the commission.

MR NAIDOO: Thank you Chair.

20 **CHAIRPERSON:** Thank you.

ADV FREUND SC: Chair.

CHAIRPERSON: Yes. Yes Mr Freund.

ADV FREUND SC: Sorry Chair I was just going to say I suggest that maybe we should ask for Mr Naidoo to be sworn in.

CHAIRPERSON: Yes. The Registrar will now either administer the oath or the affirmation. Mr Naidoo if you speak then you will come back onto the screen.

MR NAIDOO: Yes Chair.

CHAIRPERSON: Okay alright.

MR NAIDOO: I am here.

CHAIRPERSON: Ja the – the Registrar will administer either the oath or affirmation depending which one you prefer.

10 **MR NAIDOO:** The affirmation Chair.

CHAIRPERSON: Thank you.

REGISTRAR: Please state your full names for the record.

MR NAIDOO: Parmananda Lawson Naidoo.

REGISTRAR: Do you have any objection to making the prescribed affirmation?

MR NAIDOO: No.

20 **REGISTRAR:** Do you affirm that the evidence you will give will give will be the truth; the whole truth and nothing but the truth; if so please raise your right hand and say, I truly affirm.

MR NAIDOO: I truly affirm.

CHAIRPERSON: Thank you very much – thank you very much. Mr Freund you may proceed.

ADV FREUND SC: Thank you Chair. Mr Naidoo is it correct that under your direction; your organisation the

Council for the Advancement of the South African Constitution commonly known as CASAC prepared and submitted a report to the commission?

MR NAIDOO: That is – that is correct Mr Freund.

ADV FREUND SC: And is that the report we find in Bundle 3 at page 206 and following?

MR NAIDOO: That is – that is correct.

ADV FREUND SC: It is a report entitled Why the National Assembly failed to exercise effective oversight in respect
10 of state capture, is that correct?

MR NAIDOO: That is correct.

ADV FREUND SC: And is it correct if you go to Bundle 3 page 205.1 and following that you signed a brief confirmatory affidavit in relation to that report?

MR NAIDOO: I did indeed.

ADV FREUND SC: Chair on that basis may I move that Exhibit ZZ10 be admitted as – formally as an exhibit before this commission?

CHAIRPERSON: The affidavit of Mr Parmananda Lawson
20 Naidoo together with its annexures and the affidavit appears at page 205.1 is admitted and will be marked as Exhibit ZZ10.

ADV FREUND SC: Thank you Chair may I proceed?

CHAIRPERSON: Yes you may proceed.

ADV FREUND SC: Mr Naidoo I just want to take you

briefly through one – aspects in the confirmatory affidavit itself. It is correct is it not that you are the Executive Secretary of CASAC?

MR NAIDOO: That is correct Mr Freund.

ADV FREUND SC: Perhaps if you describe very briefly what that job entails and the nature and duration of your experience in CASAC and I emphasise very briefly?

MR NAIDOO: Indeed. CASAC was established in September 2010 I have been the Executive Secretary of
10 the organisation since its inception for over ten years now. And CASAC's main focus is to promote the basis of our constitutional democracy in South Africa focusing primarily on issues of public accountability, constitutional awareness and – and broadly holding public officials to account and seeking to strengthen the work of institutions of governments.

ADV FREUND SC: And in that – for that purpose and in that capacity you together with colleagues were instrumental in preparing the report that we are going to be
20 discussing this morning?

MR NAIDOO: That is correct.

ADV FREUND SC: And the ultimate objective as I understand it at the report you tried to analyse as it were – try to understand if something went wrong why that happened from the perspective of effective Parliamentary

oversight and then drawing on that you make suggestions as to what issues should be considered to try to address the problem. Would that be a fair summary?

MR NAIDOO: That would be a fair summary yes.

ADV FREUND SC: Just for the purposes of the record if I could take you to page 205.2 and to paragraph 5 of your confirmatory affidavit? The report we are going to come to shortly we have already referred to I just draw attention to the fact that you indicate in your confirmatory affidavit that
10 there are annexures to your report.

The first of which is the report by Professor Huge Corder and others and that is not annexed to your affidavit because it is appears elsewhere in the bundle. Chair that is in the Reference Bundle from pages 49 and following.

And then secondly you annex as annexure 2 a document that discusses the dedicate – a dedicated anti-corruption agency that is annexed to your report and that Chair is at pages 257 to 267. Is that correct Mr Naidoo?

MR NAIDOO: That is indeed correct Chair – Mr Freund.

20 **ADV FREUND SC:** Thank you. Now I would like to turn now to the substance of your report and if I may say so it starts with the very helpful set of references both to the statutory underpinning and constitutional underpinning of oversight and some of the principles that emerged from the leading case law particularly case law of the constitutional

court on Parliamentary oversight.

And you have endeavoured to sketch the legal background. Is that correct?

MR NAIDOO: That is correct yes we have put into context the issues of Parliamentary responsibilities with regards to executive oversight.

ADV FREUND SC: Now in the interest of time and bearing in mind that the Chair as the Deputy Chief Justice is reasonably familiar with the provisions of the constitution
10 and of the case law to which you refer I am not going to be taking you in detail through that material although we are grateful because it does assist to kind of focus the mind.

But if I can just ask you generally if one – if one looks at the question of the adequacy of the powers and the adequacy of the legal instruments – well let us stop – let me rephrase this.

Whether the existing legislation in your opinion confers sufficiently clearly adequate powers on the legislature to exercise oversight, what in broad view is
20 your view?

MR NAIDOO: I would agree with that the – about the constitution and legislation as well as the rules of Parliament – the rules of the National Assembly with the
00:10:38 that provide a clear guidance on what is required of Parliament; what its responsibilities are in respect of

oversight of the executive and organs of state and I think the law and the rules are clear in that regard and so we – our view that the constitution, the law and the rules are not an impediment in themselves to effective oversight.

ADV FREUND SC: Alright. And in addition to focussing on the constitution its statutory provisions and rules of the National Assembly. You have also drawn attention to Parliament’s own governing policy document the oversight and accountability model and you deal with that from
10 paragraph 47 and following of your report, is that correct?

MR NAIDOO: That is correct.

ADV FREUND SC: And again Chair just for your convenience the – that is to be found in the Reference Bundle pages 1 to 48. And what you do in the next few pages of your – of your report is to highlight some of the core views and commitments that one finds in what has become known as the OVAC Report adopted by Parliament in 2004, is that correct?

MR NAIDOO: That is correct.

20 **ADV FREUND SC:** So I want to pick up the threads from that point onwards in your affidavit. In other words I am going from page 223 and following in Bundle 3 and what you do over the few pages that follow is to draw attention to certain of the key decisions of the Constitutional Court on the question of – of Parliamentary Oversight.

Perhaps you might like to just summarise what you see to be the very gist of the – the right or the duty of Parliament to exercise oversight over the executive as it emerges from that case law in your understanding.

MR NAIDOO: Well I think what the jurisprudence tells us and I think it is quite instructive for Parliament is that there are matters that have come before the courts particularly matters that have come before the courts in recent years have clarified what the constitutional provisions regarding
10 Parliament's responsibilities are. How members of Parliaments are expected to exercise those powers of oversight and scrutinising executive action and giving meaning and content to those rights and responsibilities and those matters have on occasion come before the courts because there were disputes in Parliament as between political parties as to what the nature of those responsibilities were and how Parliament should in a constitutionally compliant manner execute its mandates. So I think the jurisprudence from the courts is very
20 instructive in elaborating on what the responsibilities of members of Parliament are.

ADV FREUND SC: And it seems from a reading of your report that you seem to be of the view that the very fact that a number of these cases were considered to be necessary demonstrates that there had been some

measure of failure of – of oversight which is what prompted the very decisions that you sight.

MR NAIDOO: Indeed that is true and we make the point I think that it is the very failure of Parliament to resolve many of these issues which concerns the workings and the function being of Parliament which Parliament is given the discretion in terms of the constitution to develop its own rules and orders to ensure smooth functioning. But where there are disputes and they have not been capable of
10 being resolved within the political structures of Parliament they have landed up before the courts.

Some of those issues are perhaps issues that are not appropriate for judicial judgment insofar as issues such as the use of un-parliamentary language and the like which are matters we do not necessarily sight in this report but which are matters that have come before the courts.

Others have been more fundamental issues about – about oversight about what the powers of the Speaker are in relation to certain matters that come before Parliament
20 when motions of no confidence and 00:15:20 motions need to be discussed and what the powers of Parliament are in relation to reports from Chapter Nine Institutions and specifically reports from the Office of Public Protector.

ADV FREUND SC: Yes and I think one of the most famous cases to which you refer is the case that arose out of the

Public Protector's Report on Nkandla and the manner in which Parliament through various structures dealt with that resulting in a finding by the Constitutional Court that Parliament had failed in its constitutional obligations of oversight. Do you want to just touch on that very, very briefly?

MR NAIDOO: Again yes I mean this was a seminal case in any respects and it was the failure of Parliament to properly deal with the report of the Public Protector type of
10 securing comforts relating to former President Zuma's residence and Parliament's failure to properly process that report and instead seeking to substitute its own findings of that of the Public Protector as found by the Constitutional Court to be unconstitutional and a dereliction of the constitution responsibility of Parliament to hold the President to account.

So I think again coming back to what I said earlier it is a judgment that was instructive to Parliament in how it needs to go about in exercising its oversight mandates.
20 And I think the issue that arises is – is what has Parliament done in relation to many of these judgments to absorb them – the advice and judgments of the Constitutional Court in many respects and adapt its workings to conform with – with those complications of the law.

ADV FREUND SC: Right. Now I would like to take you to page 228 of your – of your report where you commenced dealing with something that becomes a theme that runs through this report which is to focus on the role of the Speaker of the National Assembly.

Now I do not wish and I do not believe the commission wishes to get amerced into controversy about a whole number of issues of detail here of the Speaker's role in any particular incident.

10 But you have some views on the general principle of Speaker impartiality and I would be interested if you could just elaborate on that please.

MR NAIDOO: Yes I mean this is drawn in part from a previous report that was commission by CASAC in 2015 which looked at the state of Parliament at that time and I think in – in contextualising how Parliament has responded to many of these issues in the period that we are referring to which is largely the tenure of the Fifth Parliament from 2014 to 2019.

20 I think it is important to place it in the context of the disruptions that occurred in Parliament following the 2014 national elections and Parliament's difficulty in dealing with those issues as they arose.

And many of those brought into sharp focus questions around the impartiality of the Speaker in dealing

with those protests within Parliament; within dealing with requests for Parliament to properly exercise its oversight in particular over the President.

And so I think those respects and you know this is – it is common knowledge being reported you know extensively by the media the role of the Speaker was called into question. The impartiality of the Speaker was called into question. Suggestions that the Speaker was using or – her power to protect the President and you know
10 it – it resulted in – I think in the first time in certainly the history of the democratic Parliaments in South Africa of a motion of no confidence being brought against the Speaker.

So I think that – that sets the context and the concerns that were being raised by members of Parliament; opposition party 00:19:41 borders of the South African public because the role of the Speaker as an impartial Chair of the most important plenary forum of our elected representatives needs to be a position that is beyond
20 approach that needs to exercise functions independently and impartially.

And in the South African context one accepts the fact that the Speaker is drawn from a political party and is a politician and a member of Parliament in his or her own right.

But how the exercise the power as the Speaker should be in a manner that commands the respect from across all of the parties that are represented in that assembly.

ADV FREUND SC: And is it your assessment that – that this issue is – is relevant when one considers the extent to which Parliament succeeded or failed in the Fifth Parliament in holding the executive to account in relation to allegations of alleged state capture; alleged corruption.

10 **MR NAIDOO:** It did and I think you know we made the point in the report that it was the conduct of the state that contributed towards the dis-functioning of Parliament that created the grounds for this – the breakdown of trust between political parties in the National Assembly.

You know Parliament is – is a political forum there is always going to be contestation, robust debate, disagreements and it is the role of the Speaker to mediate those in the interests of finding a resolution and Parliament coming to a decision on matters.

20 But when the Speaker acts in a manner that is partisan and it seen to be favouring one political party or members of the executive then it undermines not just the confidence of other political parties but of the public at large in the constitutional ability of that institution to do what it is constitutionally mandated to do.

And I think that has brought Parliament into a – Parliament's reputation into question and it is something that cannot be healthy for a democracy in which Parliament is the primary mechanism or institution that holds executive power to account.

ADV FREUND SC: Now I want to change focus. This commission has already heard evidence and you also deal in your report with the – with the central feature of our constitutional order which is our closed list proportional
10 representation system and the impact that that has on – on the exercise as it were of conscience by members of Parliament when voting on issues of high national concern.

And you focus if I can refer you to paragraph 69 or your report? You draw attention to two similar and related provisions in the constitution. They are Section 47(3)C and I believe you deal elsewhere with it is 100 and – 106 ...

CHAIRPERSON: What page did you say Mr Freund I am sorry. What page of the report?

20 **ADV FREUND SC:** 200 – 232 in Volume 3.

CHAIRPERSON: Okay.

ADV FREUND SC: Which is...

CHAIRPERSON: Thank you.

ADV FREUND SC: Which is page 27 of the report itself and I am at paragraph 69. And that is one of the places in

which you – you deal with this issue. There you refer to Section 47(3)C of the Constitution and that is the provision that provides that a person loses membership of the National Assembly if that person (and then I leave out some words and come to sub-paragraph C) ceases to be a member of the party that nominated that person as a member of the assembly and it continues.

And there is a – there is a similar provisions in Section 106(3)C of the Constitution. Let me just read that.

10 It provides likewise a person loses membership of a Provincial Legislature on terms really substantially the same as what I have just read to you.

Now would you like to comment on this issue generally the problem of – of party discipline in a PR system and then move on and – and the submissions you wish to make on the advisability and relevance of those particular provisions of the constitution?

MR NAIDOO: Well these two sections you know Section 47(3)C deals with the membership of the National

20 Assembly and 106(3)C deals with it in a context of Provincial Legislatures the same provision.

But what it really recognises is that in the place closed list – closed party list system that we currently have the seat in Parliament or in the Provincial Legislature belongs to the political or party and not to the NP that is

allocated that seats and therefore should a representative
cease to be a member of the political party 00:25:13 list
they were nominated to the Legislature in question
probably lose that seat for whatever reason whether they
resign from the party or are expelled from the party and
this seems to place significant power in the hands of party
bosses in that they can use that as a mechanism to get
members of Parliament to tow the line as it were and to
follow the party line on various issues.

10 Now in many respects that is not an issue because
in any electoral system political parties put forward a
manifesto and the electorate votes on the basis of that
manifesto and if it is an issue of policy and a party uses its
power to do that it is commonly called using the whip to
get party numbers to support a party position on a policy
matter.

 Now in that context it is not a – it is certainly not
problematic that is the very essence of a democracy that
the party winning an election has the right to implement its
20 policy proposals in its manifesto. But where that power is
used in Parliament not on issues of substantive questions
but to abuse procedural rules and to use the majority of a
political party to stifle or shut down debate and not allow a
debate to even happen that certainly undermines the role
of Parliament and Parliament's ability to execute its

constitutional mandates.

If a debate were on a particular issue were to happen – if the – an enquiry into corruption or alleged corruption in state owned companies it is conducted by Parliament and this disputes about whether there was corruption or not and so on the substantive decision taken after an investigation can certainly be along party lines but that – the issue would have been heard in public and the public would be able to make a – to make a finding on – of
10 their own on the outcome of that process.

So a distinction between the procedural rules and the substantive issue is one I wish to highlight.

But I think the electoral system as we currently have it chose – had that as being manipulated to undermine the role of Parliament and inhibit Parliament from truly exercising its oversight mandate.

Now you know almost simultaneously with making the submission to the commission which I think we did in July last year just a few weeks before that we have – had
20 an important judgment from the Constitutional Court in the New Nation Movement Matter which declared certain sections of electoral acts inconsistent with the constitution and it has given Parliament 24 months in which to amend those sections of the electoral act which is likely to see us move away from a closed party list system because the

amendments of the electoral act will have to make provision for independent candidates to contest national and provincial elections in the – in a manner that perhaps will be the same as in which they contest elections at local government level at the moment.

But it does mean that Parliament is now ceased with the issue of considering how to amend the electoral act and whether a new electoral model needs to be implemented in South Africa.

10 The New Nation Movement Judgment comes on the back of significant pressure in recent years for at least a discussion of – around electoral reform and the need to change its current system because it places too much power in the hands of party officials over the conduct of NP's.

 It was an issue that was raised in the task team that was chaired by Dr Van Zyl Slabbert in the early 2000's. it was an issue that was reflected upon in the independent panel report in Parliament in 2008 or 2009 and again in the
20 high level panel report that was chaired by former President Kgalema Motlanthe in 2018. So the time is certainly ripe for electoral reform.

ADV FREUND SC: If I could just stop you there because I think the report of the high level panel of 2018/19 probably has not received a great deal of attention at least in these

hearings but there once again a – a structure – a committee appointed by Parliament to review Parliament's own success in the democratic era once again proposed that serious consideration should be given to elect ...[indistinct – cut off] along the lines first proposed in the Van Zyl Slabbert Report. Would that be correct?

MR NAIDOO: That is indeed correct, yes.

ADV FREUND SC: And the nub of the argument, as I understand it, is that some type – there is no attack on the principle of proportional representation but what some
10 proponents are arguing is that it needs to be married somehow with some form of constituency system so that the MP has a relationship with the constituency and therefore has sort of powerbase independent from that purely of party bosses.

Would that be a fair summary of the gist of your argument?

MR NAIDOO: It would be. I think the issue – you know, the issue that have arisen here is firstly is that the
20 Constitution requires that the results of the election must in general resulting in proportionality to give effect to the wishes of the electorate.

So a simple constituency model where they first ask post-system. The rest meets the model, if you like, would fall foul of that constitutional requirement of

proportionality.

But within that, there are various other options available including the one that was recommended by the Van Zyl Slabbert Task Team in 2002 which was multi-member constituencies using a closed party yes-system but a multi-member constituency in which proportional representation is applied rather than closed past-post.

And the view of the Van Zyl Slabbert's majority report was that in time one should look towards to an open
10 yes-system where voters get to ranked the kind of – that is individually and therefore are able to make a closer preference for the people that you would like to see in Parliament.

Having said that, I think experience from elsewhere in the world tell us that simply changing the electoral system does not deliver accountability and it does not in any sense necessarily reduce the power of political parties over their MP's whether they are in a defined single-member constituency or a multi-member
20 constituency.

Because the reality that political parties are a central feature of our democracy and many other democracies around the world and the...

You know, so it is a mechanism to enhance accountability but it needs – it is – what I would say is a

necessary step to take but in itself it is not sufficient to necessarily enhance accountability.

ADV FREUND SC: Well, that is just the point I wanted to come to because what I think your reports says and to mean in the past is, that it is necessary albeit not sufficient but you think it is something whose time has come albeit it is not a panacea.

And I do not think anybody is arguing with the proposition that it is not a panacea. It is not going to sort
10 out all the problems but what I would like to focus on is why you think it is a necessary reform if we are going to enhance accountability?

MR NAIDOO: Well, you know, and this is an area where CASAC has done some work and we published a paper also in 2015 I think. It was prepared and written by Professor Steven Friedman that looked at the issue of alternative electorate models and lead back to accountability.

And the view is that whatever the electorate system we choose that there needs to be a change in
20 political culture of holding political parties and individual representatives to account.

And experience in South African tells us, and I have made reference to the electorate model that operates at a local government level, where we have constituencies, where we have single-member or with a single council

allocated to that.

And it is clear that at the local government level that has not have an impact in terms of enhancing accountability which is why that we say that it is a not a sufficient mechanism on its own.

But I think the broader issue but why it is necessary to revisit the electoral system and CASAC does not have a particular preference for a particular model that we need to adopt, we believe that a national debate on the
10 issue is necessary to identify the model most appropriate for a democracy as it now exists in the 27-years after freedom.

We understand the necessity at the time of having a simple close-party PR system in 1994 but we think that – the experience has told us that this electorate model, and I think it is demonstrated by the issue we discussed with the vote of Parliament.

And it is said as an inhibitor towards the execution of responsibilities by members of Parliament or to behold
20 them to the party that they – that has nominated them to Parliament. In many cases it did not gel.

What means from a member of Parliament who chooses to step out line, be disciplined by that political party, firstly expulsion from the party and therefore a loss of income and livelihood.

So these are serious issues that inhibits members of Parliament using their own discretion to decide what is in the best interest of the country, how to executive their constitutional and legal mandates to the electorate and to serve the interest of the electorate rather than of the party officials that have placed them in those positions.

ADV FREUND SC: Now in the course of your diversions over the last few minutes, you have said that electorate reform would be advisable but I think you have said that
10 political culture is at the heart of the problem.

And perhaps if you could just elaborate on what concerns about political culture insofar as it is relevant to this issue that the Commission is seized with which is oversight in relation to allegations of State Capture and corruption.

MR NAIDOO: Well, the – you know, in our Constitution, you know, we speak of an inclusive anticipatory democracy. The Constitution makes adequate provision for that
20 anticipatory democracy in terms of Parliament that its processes that must be open to the public and to the media.

There must be public consultation on legislation and other policy development issues. And so the democracy we have is not simply one where a voter goes to a polling booth once every year five years and make a

cross on a ballot paper.

But is being more engaged in the politics and what is happening and ensuring, ultimately, that those members who are elected to legislatures do what they promised in their manifestos which is to increase the level of service delivery to people, to ensure that more services are available, to ensure that we have a thriving and prosperous economy in which people have jobs, do not suffer any poverty and so on.

10 And people have a right to that expectation but people have a responsibility that when political parties and individual representatives are seemed to be acting against that interest, they raise their voices and do so.

So it then becomes a two-way street but political parties will only become responsive when we demand that of them.

And therefore I place the responsibility on the electorate as well as on political parties which need to change the culture in which they operate in institutions of
20 Parliament to see it as a deliberative forum where, you know, you just do not just trap down debate but you engage in debate and reach a decision after debate and be open to persuasion to compromise and the like, which is a feature of a robust democracy.

ADV FREUND SC: Now I take your point about the

important role of the electorate and the electorate being, as it were, demanding and vigilant, but if we focus for the moment on political parties themselves and in the nature of democracy in whichever party wins a majority it has great power over the actual decisions of the Parliament.

Do you wish to comment at all on the question of political culture wherein political parties, in particular the majority political parties, as a fact of relevance to the issues that we are debating?

10 **MR NAIDOO**: Well, you know, I think we have seen an entrenchment of a culture of following the party line and I do not think this is an issue that is unique to the majority of the ruling party.

I think we see it a number of the larger parties that there is a consensus of opinion and an opinion that deviates from that, it is marginalised and it is not given proper consideration.

20 So you know this speaks to an issue of internal party democracy and internal party tolerance of differences of opinion and when those differences are being raised in order to enhance the ability of the party to discharge its manifestos, mandates as well as it is constitutional mandate in terms of, for example, issues in the bill of rights have been enhancing and the delivery of rights and the bill of rights to the people of South Africa.

Then that is something that ought to be welcomed but we see, as I say, across political parties where a party line is taken and no deviation from that and no debate on that is permitted.

And I think that is the culture that is stifling to the developments of our democracy and to the development of policies that can really begin to address the fundamental challenges that we face.

ADV FREUND SC: Now can I refer you to paragraph 62 of
10 your report, please? That is at page 227.

MR NAIDOO: Did you say 62?

ADV FREUND SC: Paragraph 62 at page 227. Now this is an extract from a judgment by Justice Jaftha in the Constitutional Court and one of them, various decisions that you referred to but it is an extract that you used through your report to highlight a theme.

And you quote Justice Jaftha's as having held the following:

20 "The fact that members of the Assembly assume through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly.

Where the interest of the political party was inconsistent with the Assembly's objectives,

members must exercise the Assembly's power for the achievements of the Assembly's objectives.

For example, members may not frustrate the realisation of ensuring a government by the people if its attainment would harm their political party.

10 If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred.

This would be inconsistent with the Constitution.”

Now it seems to me that that bears directly to what you have been just talking about a moment ago. The problem of the situation which there can emerge a conflict or at least a perceived conflict being in the interest in relation to a particular issue of a political party and the constitutional duties of members of Parliament.

20 Do you agree and would you elaborate?

MR NAIDOO: Indeed. I think this excerpt from Justice Jaftha has said more eloquently of what I was trying to explain a moment ago.

And I think it deals with that very issue of what is the ultimate responsibility of the member of Parliament.

Yes, they are – they hung their seats by virtue of political party putting them on the list and having them nominated and then homely elected but once they are nominated to Parliament, they take an oath of office which is again prescribed in the Constitution and it is an oath of office to uphold the law to do what is in the interest of the country and not the political party.

They do not have a take an oath of office, a political party. They may do that within their own political party but once you become a member of Parliament that constitutional oath of office is what ought to guide and direct a member's behaviour within that institution.

And I think this excerpt from the judgment from Justice Jaftha encapsulates what that actually means, that where there is a conflict between what a political party asks you to do and what the Constitution asks you to do, then the Constitution – your constitutional responsibility overwrites that of the political party.

And that is why I say earlier that the current electorate system is a great inhibitor on members of Parliament demonstrating that we have a law of independence.

CHAIRPERSON: Well... I am sorry Mr Freund.

ADV FREUND SC: Now you ...[intervenes]

CHAIRPERSON: I am sorry Mr Freund. Well, Mr Naidoo,

the point of the conflict between what the party may view as in its interest which its members of – which it may expect its members of Parliament to protect and advance and what may be in the interest of the republic is quite an important issue.

And there may be cases where – maybe it is quite clear where the interest of the republic lays and if the party has a different view, it is a situation that could be seen as protecting people that may be involved in
10 wrongdoing and so on.

But I would imagine – I imagine that within the context of South Africa because while at a certain level we can talk in general principles, we have also to talk in terms of the specific context of South Africa where there has been one majority party in Parliament, in the National Parliament from 1994.

It may be quite difficult for a member of the ruling party who wants to do the right thing if he or she is told if you do this - what he or she regards as the right thing -
20 you are going to cause disunity in the party.

Or, he or she is being accused of being factional or he or she is being accused or will be accused of not showing loyalty to the party or he or she will be accused of forgetting that it is the party that brought her or him to Parliament.

Or, he or she will be accused of wanting to do things that will decrease the number of voters for the party in the next election. You want this party not to be the majority party after the next elections. That kind of talk.

You must tell me if my understanding of your evidence is correct. It seems that where you referred to the need for the change of culture, that maybe what you are talking about to say we may change a lot of things but if we do not...

10 If there is no change of the culture, and in this context one can talk about the culture in a political party, there would still be serious difficulties in having proper oversight and accountability, the Executive being held accountable by Parliament including the majority party.

Is my understanding of your evidence correct?

MR NAIDOO: Perhaps let me clarify Deputy Chief Justice.

CHAIRPERSON: Yes and put it in your own words.

MR NAIDOO: I think when it comes to issues ...[intervenes]

20 **CHAIRPERSON:** And put it in your own words.

MR NAIDOO: Thank you.

CHAIRPERSON: If you want to.

MR NAIDOO: I think when it comes to issues of policies. So your political parties get elected on the basis of a manifesto that they offer to the electorate.

And so I am not suggesting that we should do away with internal party discipline, far from it. And it would be legitimate for a political party to say: Well, this is the manifesto we put to the electorate and this is the manifesto we are going to implement as the majority party.

And if a member then disagrees with that manifesto position, then the party has every right to discipline that member to say: Well, this is the basis on which we were elected.

10 But when it comes to issues of unconstitutional conduct of allegations of illegality, of corruption, of misuse of public funds, of maladministration then surely the member of Parliament has the right to speak out and not be constrained.

In those circumstances, by party disciplined and being told that you have to do this regardless of the consequences of what that might be that we are ignoring issues of corruption, we ignoring issues of the misuse of public funds.

20 After all, Parliament is the primary organ that is entrusted with oversight over the expenditure of public funds. Parliament, after all, is an institution that allocates to those funds to the Executive and has a responsibility of oversight over this stuff.

So I think I would draw that kind of distinction

Chair in looking at that issue. And one does not want to undermine or you know the role of political parties and their abilities to be able to discipline their members and to call them into line and to impose a particular consistent with democracy, with the manifesto and so on.

CHAIRPERSON: Well, what you say is important and I think it is in line with what some of the witnesses have said for example Professor Calland, I think.

So it seems to me that what you say and part of
10 what Professor Calland said includes this that it may be necessary that we try and find a way that accommodates legitimate party discipline within the context of members of Parliament of a particular political party.

And the need for members of Parliament to be able to deal effectively with certain specific and identifiable issues such as corruption.

Now obviously, no party is going to come before the Commission and say: We want to be able to tell our members in Parliament not to raise issues of corruption.
20 Nobody is going to do that.

But what people may do in public and what they may do in private sometimes are different things. So the question that arise for me is whether we might – it is possible to identify a list of matters where maybe there could be consensus among all right thinking people in

South Africa, all political parties to say.

If members of Parliament, if it comes to these matters, 1, 2, 3, 4, 5. Members of Parliament must be able to really do their job the way they believe the interest of South Africa dictates.

Or, whether that is going to be too difficult to draw the line because a member of Parliament might be saying: I am raising issues of corruption against, for example or argument sake, the President.

10 And then maybe the party says: No, you are joining the opposition to try and unseat the ruling the party, the ANC for example, for argument sake. They are starting with the President. It is just a start.

So in brief my question is whether it is possible to identify issues where we could all try and get consensus to say members of Parliament, if it is these types of matters they should be able to deal with them and no party should be trying to force them to draw a particular line.

20 Or, is it just wishful thinking to think that is possible?

MR NAIDOO: Chair, I think it is a difficult question but my response to that would be. I think we would be able to identify certain issues that fall into that category.

I think trying to produce an exhausted list might be near impossible and perhaps not necessary but you know I

tried in my earlier response to say: Well, where it involves allegations of service misconduct, of criminal conduct and corruption, abuse of public resources. Those are the kinds of issues.

And I think, you know, to take your example. If there is an allegation of corruption against the President, then surely it is in the interest of the party for that matter to be aired and resolved.

And if the President is innocent, it will be find to
10 be so and then you move on and you know rather than having you know those allegations hanging over the – against the person to whom they are made.

So that is the response – that I would argue is the responsibility of Parliament. Once it becomes aware, either from members of Parliament, from members of the public, civil society or the media, that there is a responsibility to take those allegations seriously.

And you know, on some occasions it may be quite clear that the allegation is simply being made for political
20 motive and there is really no substance behind it and then you dispose of it quickly but you have got to deal with the issue so that you restore public confidence that the matter has been attended to.

And if there is no evidence, it gets dismissed and if there is evidence then there must be consequences. But

that I think is the responsibility of Parliament.

CHAIRPERSON: Of course, in the current electorate systems that we have and that – maybe that is partly why the suggestion about some combination of the current system and electorate and the constituency system is being suggested.

In the current system. If I am a member of the ANC and there is this issue about corruption, about the President of the country who is the president of the party.

10 If I speak too much and too harshly in Parliament about this, I may be thinking: You know, the leadership of the party is – they are the ones who have a say on who gets promoted in terms of career, who finally gets into you know the list of Parliament next time after elections.

And I am not going to be enduring myself to them very much if I speak too much. So that too is an inhibiting factor. But I think the point you are making is and I think Professor Calland may have made the same point too, is you know the constituency system is not a panacea.

20 It might make a contribution to the problems that we have but there may be a way of trying to marry the two systems and see how that can work but nobody should expect that anything that we come up with will solve all challenges that we have.

And maybe that is where the issue of the change

of culture becomes important and maybe on the part of a particular political party to say we do not want to be associated with corruption, for example.

We do not want to be associated with covering up corruption and any member of Parliament who is part of our party should not do anything that the public will perceive as covering corruption. In our deeds and what we say, we must be seen to be anticorruption.

10 So maybe until you have that kind of situation of culture there will be challenges but if we were to have that culture, things would be much more easier. But that might take quite some time.

MR NAIDOO: Indeed Chair it would take some time. You know, and that is why I said earlier that the you know any change of the electorate system would be necessary but not a sufficient change to try and develop that kind of culture.

20 In the context, you know, a member of Parliament who goes against the party leadership will find that to be a very career limiting move and will soon find themselves removed.

So you know, to come back to the proposal that we consider Section 47(3)(c) that you know within a new electoral system, you know, one consideration could be that once a member is elected to a legislature, the state

belongs to that member to the next election rather [indistinct – word cut off] that would give that member the freedom to do what they believe is right without the threat of expulsion and losing their livelihoods.

CHAIRPERSON: Thank you, Mr Freund.

MR FREUND SC: Thank you, Chair. Chair, I am conscious of time, so I am just going to try and take Mr Naidoo very briefly through a few discreet separate points.

CHAIRPERSON: That is fine.

10 **MR FREUND SC:** Firstly, Mr Naidoo, you deal from page 240 through to 245 with the Corder report and as you are aware Professor Corder will be the next witness and no doubt he can talk to his own report in some detail but if you could just summarise your stance and the stance of your organisation to the core arguments made in that report and in particular the desirability of legislative reform on the question of parliamentary oversight.

MR NAIDOO: Thank you, Mr Freund, indeed I would refer to the expertise of Professor Corder to come but perhaps
20 the reason we have raised this in our report is to go back to what we said at the bottom of our report which that there was no hindrance in the current roles of the National Assembly and the current constitutional and legislative environments for parliament to do what is necessary but there is a failure to do so, whether it is a failure of political

will, commitments a product of the electoral system that we have as we have just discussed but it seems to us that something more is needed in order to ensure in the short term at least until this new culture is hopefully developed that there is a compulsion on members of parliament to exercise this oversight, responsibility and for that to have consequences and it therefore is our view that some of the recommendations in the Corder report include an Accountability Standards Act may be necessary in order to

10 ensure that parliament does what the constitution mandates would do and which the rules of the National Assembly allow it to do but is not always done. So we would certainly support the recommendations of the accountability Standards Act and, in particular, I think recommendations that Professor Corder and his team would take with regards to the role of Chapter 9 institutions. This again is a subject of some discussion over a long period of time and in a similar manner the Van Zyl Slabbert report that we have just discussed there was a

20 report commissioned by parliament itself, an *ad hoc* committee and the Chairmanship of the late Professor Kader Asmal produced a report in 2007 on Chapter 9 institutions and how they can – their efficiency and effectiveness can be enhanced and I think that is an issue that is again a debate, it has a matter that has been sitting

with parliament for some years now but now progress has been made and I am thinking of a piece of legislation and the establishment of dedicated committee to receive and deal with reports of Chapter 9 institutions is necessary.

We use the example of SCOPA, the Standing Committee of Public Accounts from whom you have heard already that we have a dedicated committee to deal with reports from the Auditor-General but we do not have dedicated committees, you know, they go to the justice
10 committee or whatever, but the proposal that there would be a Chapter 9 committee, as it were, in parliament to process these reports from the Human Rights Commission, the Gender Commission, Public Protector, etcetera, would be of great assistance to parliament because what they provide is a level of oversight and scrutiny of executive action at a level of detail and specificity, that is not always available to parliament, parliament does not have the resources to go into the kind of detail that these Chapter 9
20 institutions do and often times complaint from these Chapter 9 institutions, they produce reports, they submit them to parliament and that is the last anyone ever hears of them, they never get discussed, debated, the recommendations are not considered or even implemented. So I think in those regards Professor Corder's report, despite being over 20 years old, I think it still has

relevance today and the proposals are worthy of further consideration.

MR FREUND SC: And then I would like to move forward to page 247 of your report where you have a section of appointments to key institutions.

Now again, there will be later evidence from Mr Lewis of Corruption Watch on this issue, so I do not want to steal all his thunder but just in broad overview what is your organisation's position on the importance of improving
10 the manner in which appointments to key institutions are effected and the manner of improving parliamentary oversight in that regard?

MR NAIDOO: I think one of the things we have learnt from the knowledge that we now have about state capture, the evidence that has been led before this commission, is how key institutions have got task with fighting corruption, were weakened during the state capture years with individuals being appointed to head those institutions particularly those in the law enforcement sector in order to
20 deliberately weaken them and undermine the capacity to execute their mandates.

So we support the proposals that are made by Corruption Watch and the Institute for Security Studies that there should be greater transparency and openness in these processes of appointment to key institutions such as

the NPA, SAPS, the Hawks, IPID and others and that it should be parliamentary process rather than within the [indistinct] 06.24 of the executives because we have seen as a result of the ability of the executives to make those appointments without reference to parliament, people are appointed who ultimately end up serving the interests of the executive rather than the interests of the legislative mandate.

So we propose that a more open, competitive and
10 transparent process be conducted by parliament in full view of the public so that if it is properly open and transparent process the public would have greater confidence in those individuals who are appointed to lead these institutions and know exactly that their capabilities, skills and expertise are in relation to those issues. So we used the example, I think, of the process that was followed late in 2018, with the appointment of National Director of Public Prosecutions which deviated from the past where although that power in terms of the constitution and the
20 law rests with the President to make an appointment, a President established a panel to advise him on that appointment and that process was conducted and I think that has enhanced the credibility of the appointee and the institution that she now leads.

MR FREUND SC: Alright. A point of relatively small detail

you touch on in paragraph 119 of your report, page 249 of bundle 3. There have been a number of persons who have expressed the opinion in this stream of evidence before the Commission that having regard to the importance of the roles played by chairpersons of portfolio committees consideration should be given leaving aside the current exception of SCOPA to providing for a more proportionate distribution of chairs. I see from your report that that is a view that CASAC supports, is that correct?

- 10 **MR NAIDOO:** Well, it is a view that we believe needs to be considered by parliament. You know, this is our - you know, venture to say a highly controversial issue of – it is a [indistinct] 08.44 but I think if we look at the context of the particular circumstances in which we find ourselves within a multi-party democracy but with a dominant party and to give – or to instil greater public confidence in parliament’s ability to executive its mandate and to be seen as a properly multi-party body in which all voices are accommodated, parliament perhaps should give
- 20 consideration to this issue. It is not a point that, you know, I think we are making particularly strongly but we are saying it is a matter of consideration.

But on that point there is an associated point that I would like to make and this is about the presidium of Presiding Officers in parliament. From the early days of

this parliament, of the democratic parliament, there was always a member of the opposition, one of the opposition parties to serve as part of that presidium. In the days of government of national unity it was the role of the deputy speaker that came from an opposition party.

Subsequent to that, other member of opposition parties were appointed as house chairs or chairs of committees or some such position and in recent times we see that all of the members of the presidium are drawn
10 from the majority party and once again this gives this perception to the public that it is the majority party that is controlling everything in parliament and I think if there were to be somewhere a presentation from opposition parties amongst that presidium it would give the semblance of a multiparty democracy in which the voices of the opposition members are equally respects. So I think that is a proposal that we will make strongly than that of committee chairs, *per se*.

MR FREUND SC: Then I would just like to deal because
20 you stress it so much in your report the issue of a dedicated anticorruption agency. Now it seems to me this strays perhaps slightly from the current focus on parliamentary oversight but you have prepared and submitted an updated detailed report, and I am not going to take you into the detail, on the need for a single

dedicated anticorruption agency. If you would just talk to that extremely briefly and in summary?

MR NAIDOO: Certainly. I think this follows on from the question we just dealt with a few moments ago about the appointment of heads of key institutions, particularly institutions in the law enforcement arena and this I think flows from that, is that what we have learnt from recent experience with regards to state capture and corruption is that the institutions of state were evenly captured and
10 therefore prevented from carrying out their responsibilities and we have argued for a very long time that what South Africa needs is a truly independent anticorruption agency that is insulated from undue political influence, that is insulated from executive influence, does not report directly to the executive and whose members have security of tenure, who have adequate resources to execute their mandate and report to parliament.

Now these proposals, I am very pleased to say, finally been received some consideration by our
20 government as it in the process of developing its national anticorruption strategy and also the President mentioned in his State of the Nation address last week, a national anticorruption advisory council soon to be established which will be a traditional structure to see us towards some sort of independent anticorruption agency. So I think

progress has been made in that regard but I think the important point to stress is that we cannot expect the institutions at that have failed us in the recent past to succeed simply because there are new personnel at the head of those institutions for the moment.

Those personnel could change in future and the effectiveness of those institutions would be then be similarly weakened so we need to take this opportunity to strengthen the institutional capacity of anticorruption agencies to execute their mandate without political interference and in the interests of the country at large and we believe that the time for a dedicated anticorruption agency has come and we are certainly very pleased that it is something that government is now seriously considering.

MR FREUND SC: And I think a point you made in passing was that ultimately it would be accountable to parliament rather than to the executive.

MR NAIDOO: That is correct, it is a proposal that has been made in the national anticorruption strategy and for this body that it should not report directly to the executive, that it is reporting to parliament with the enhanced transparency of that organisation, would enhance its levels on accountability to the institution of parliament and that it can then be held to account by parliament in an open and transparent manner.

MR FREUND SC: And finally, Mr Naidoo, your report is fairly lengthy, I have cherry picked what seemed to me to be some core points to highlight, but I want to give you a final opportunity to consider whether there is anything material that you would have wished to have had a chance to mention but you have not had a chance to mention.

MR NAIDOO: Well, firstly, thank you, Mr Freund, for the opportunity to share our views on these matters, I think we have traversed the main recommendations that we have
10 made in our reports to say – the lengthy reports, as you say, but I think the recommendations are succinctly put towards the end of that report and I think we have adequately covered that so unless, you know, there is anything you wish to probe further, I think I am happy that we have covered the substance of the CASAC submission.

MR FREUND SC: Well, thank you, Mr Naidoo, I have no further questions, Chair.

CHAIRPERSON: Thank you. Well, one or two questions, Mr Naidoo, with special reference to the notion of a
20 dedicated anticorruption agency. One of the matters that has been in my mind since I was appointed to chair this Commission with regard to corruption has been whether after we have made whatever findings we will make at the end of the work of the Commission whether we should look at certain things being changed with regard to how existing

bodies that are meant to fight corruption operate. In other words, look at where the weaknesses are and recommend that it is strengthened so that they operate in a manner that will ensure effective – an effective fight against corruption on their part or whether one should look at making a recommendation about a new structure or a new body and one of my concerns has been that coming up with another body that will be an anticorruption body might be criticised on the basis that one is multiplying anticorruption

10 bodies when there are various bodies that are there to fight corruption and one should be strengthening them rather. So there has been that issue that one has been thinking about.

So the question that arises in relation to your proposal about a dedicated anticorruption agency is whether the proposal envisages that some of the existing bodies that fight corruption in our country would be abolished or they would all continue and this would be an additional body.

20 **MR NAIDOO:** Thank you, Chair. I think that is an issue we discuss in the broader paper that we have submitted as an annexure and it has also formed part of discussions towards the development of this national anticorruption strategy. I think in brief, if I may respond, that the idea that we have a plethora agencies at the moment that deal

with – or have either a constitutional or legal mandate to fight corruption and that is perhaps one of the problems that we have is that we have too many of those institutions so I think the proposal in terms of a dedicated anticorruption agency but it becomes – that a multi-agency approach is replaced with a multi-disciplinary approach with an umbrella structure. So the existing capacity that we have and we have significant capacity to combat corruption. There is capacity within the Special
10 Investigation Unit, there is capacity that is being established at the moment within the investigating directorate at the NPA, there is capacity within the Hawks, the Financial Intelligence Centre and a range of other bodies and it is how (indistinct – recording distorted) harnessed those could be more effective, so – but it is about using the capacity that already exists, bringing it under the umbrella of an independent agency that is able to fight corruption more fearlessly and more effectively.

CHAIRPERSON: I take that answer to be saying yes,
20 some of the existing bodies that fight corruption would have to go but the personnel in them or at least some of them that might be seem to be suitable to serve in this new body would need to be taken over because the new body would need the experience and capacity that might come from those bodies. So is my interpretation correct of your

evidence?

MR NAIDOO: It is indeed, Chair, and if had to use an example to demonstrate that, so I think in this new body would not require the dissolution as a whole of the Hawks, as an example, because the Hawks have a broad mandate, that includes corruption but is about priority crimes including organised and a range of other things. So I think in that context one would remove the anticorruption mandate or leave the Hawks to deal with other issues and
10 move that anticorruption mandate into the new body.

With regards to an institution like the Special Investigating Unit, the sole focus is corruption but the constraints on the SIU is that they can only act on the [indistinct] 21.18 eventual proclamation, so if the person did not issue a proclamation they are unable to act and so you move that capacity and disband the SIU effectively because they had no other role to play and move that in.

So I think it depends on the institution that were are talking about and if I can just perhaps add one further
20 point, Chair, it is envisaged that a – this new agency will not only be responsible for investigating corruption but also a broader mandate which we had seen from comparative studies in other countries where issues of the preventative role that a body needs to play as well as the very important public education role and then they could

fall within the ambit if this structure.

Currently, public education, it is largely left to civil society to deal with – to tell the public about corruption and I am sure Mr Lewis will talk about that later on today. So it is giving that mandate, broader mandate, because we need to have a much broader strategy of fighting corruption simply than rather just investigating and prosecuting, which has been the focus to date.

CHAIRPERSON: So part of this body would do in
10 CASAC's view would be to investigate corruption and once
it has investigated corruption to then hand over the docket
of the file, so to speak, to the NPA or – so it would not
have to go to SAPS. I would imagine the docket – if they
had investigated they should just hand over to the NPA and
the NPA does what it is supposed to do.

But, as I understand it, that would not prevent the
police from still investigating corruption, they could still
investigate corruption but this will just be a dedicated body
that focuses on corruption without taking away any power
20 from the police to investigate corruption, is that correct?

MR NAIDOO: That is indeed correct, Chair. And, you
know, there would need to be a working relationship
developed between structures like that, like the SAPS to
be able to at some point refer matters to this body, if a
complaint is laid with SAPs, to say this body is better

equipped to investigate and deal with that.

Similarly, for example, with the office of the Public Protector, if a matter of corruption is – a complaint is laid with the Public Protector that office will be able to investigate that but in certain circumstances and, you know, a memorandum of agreement and so on would need to be established to be able to refer back to this agency and say you have more specialised knowledge and capacity to be able to deal with something like this.

10 So I think, you know, those sorts of relationships would need to be developed over time to be able to create an umbrella of bodies that can actually tackle the challenges that we face better than we have done in the past.

CHAIRPERSON: And I think you are also saying, which I think you said earlier on, in respect of some bodies – and you mentioned the SIU in terms of this proposal, that body would need to come to an end but its personnel, with the expertise that they have, could go to the new agency.

20 **MR NAIDOO:** Ja.

CHAIRPERSON: But when it comes to certain bodies such as the Hawks, this proposal does not entail that the Hawks be abolished because the Hawks do not just investigate corruption, they have other things that – other crimes that they investigate, so they would continue. In that case the

body will not be abolished but the – its mandate that relates to corruption might be taken away but you say in terms of the general SAPS, that there will be no interference with their power to investigate corruption.

In terms of the Public Protector to the extent that the Public Protector also investigates corruption, that would not be interfered with. So is my understanding correct?

MR NAIDOO: That is indeed correct, Chair.

10 **CHAIRPERSON:** Yes. No, thank you very much, Mr Naidoo, we appreciate that you availed yourself to assist us, we really appreciate it. Thank you very much, you are now excused.

MR NAIDOO: Thank you.

CHAIRPERSON: Thank you.

MR NAIDOO: Thank you very much, Chair.

CHAIRPERSON: Thank you. Mr Freund?

MR FREUND SC: Chair, Professor Corder is ready, willing and able but I see it is now almost 11.30, I would imagine
20 you may wish to take the tea break and we can resume as soon as you are ready to do so.

CHAIRPERSON: Yes, let us take the tea break and return at quarter to twelve.

MR FREUND SC: as you please.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes Mr Freund.

ADV FREUND SC: Thank you Chair, Chair the next witness is Professor Hugh Corder who is with us, his evidence that is intended to be admitted is Exhibit ZZ11 in bundle 3 from page 270 and following.

CHAIRPERSON: Yes, Professor Corder are you there?

PROF CORDER: Yes, Chairperson I am here.

10 **CHAIRPERSON:** Good morning Professor Corder, thank you very much for availing yourself to come and assist the Commission, we appreciate that very much.

PROF CORDER: Thank you, it is an honour to be here.

CHAIRPERSON: Thank you, the registrar will administer an oath or affirmation to you depending which one you prefer, she will administer the oath or affirmation right now.

PROF CORDER: Thank you.

REGISTRAR: Please state your full names for the record?

PROF CORDER: Hugh Michael Corder.

20 **REGISTRAR:** Do you have any objection to taking the prescribed oath?

PROF CORDER: No.

REGISTRAR: Do you consider the oath to be binding on your conscience?

PROF CORDER: I do.

REGISTRAR: Do you solemnly swear that the evidence you will give will be the truth, the whole truth and nothing but the truth, if so please raise your right hand and say so help me God.

PROF CORDER: So help me God.

HUGH MICHAEL CORDER: [duly sworn, states]

CHAIRPERSON: Thank you very much, Mr Freund you may proceed.

ADV FREUND SC: Thank you, Chair, Professor Corder is
10 that correct that you have prepared and submitted to the Commission an affidavit which is to be found in bundle 3 commencing at page 270?

PROF CORDER: That is correct.

ADV FREUND SC: And is that your signature that appears on page 295, confirming that that is your affidavit?

PROF CORDER: Yes, it is correct.

ADV FREUND SC: And what you deal with in your affidavit is fundamentally a report that you had previously prepared at the request of the original Speaker of the
20 Democratic Parliament, Ms Frene Ginwala, is that correct?

PROF CORDER: That is right Dr Ginwala was the Speaker.

ADV FREUND SC: And in paragraph 6.2, point 3 of your affidavit, which is page 273 you refer to your report but you make the point that because that report had already been

submitted to the Commission you are not annexing it again as an annexure to your affidavit.

PROF CORDER: That is correct.

ADV FREUND SC: And your reports are just for reference purposes as in the reference bundle, at pages 49 to 84 and I think you have access to that if need be, is that correct?

PROF CORDER: That is correct.

ADV FREUND SC: Chair, in the light of that evidence may I move formerly to the affidavit of Professor Corder with
10 annexures be introduced as Exhibit ZZ11.

CHAIRPERSON: The affidavit of Mr Hugh Michael Corder starting at page 270 is together with its annexures admitted AS Exhibit ZZ11.

ADV FREUND SC: Thank you Chair. Professor Corder if I could take you to paragraph 4 of your affidavit. You deal there with the fact that you are an Emeritus Professor of Public Law and you attach your curriculum vitae that is actually at page 296. I do not think there is any need for you to turn to that but perhaps what you could do is just to
20 give the Chair a very brief thumbnail sketch of your expertise and qualifications because you do testify as it were in the capacity as an expert in this field.

PROF CORDER: Thank you, Mr Freund. I will keep it brief Chair and happily answer any additional questions you may have. I studied my LLB degree at the University

of Cape Town. I did what is effectively a master's degree at Cambridge and then my doctoral thesis at Oxford in the year 1979 to 1982; looked at the role of the appellate division as it then was from 1910 to 1950 in South Africa, looking at the role of the judiciary in imposing unjust laws. I returned to South Africa and commenced my academic career at the University of Stellenbosch, but was appointed to the Chair of Public Law at the University of Cape Town in mid-1987.

10 I think that the most important point to stress from the balance of my CV is not what I have done at the University of Cape Town but my membership of the Technical Committee, which drafted the first bill of rights for South Africa, at the Kempton Park negotiations in 1993, which has informed some of my views in the so called Corder Report.

And I need to acknowledge the assistance 22 years ago of Ms Sarah Jaqwance[?] and Mr Fred Sorta[?] but that also led to Dr Ginwala requesting me to do the three-year
20 research projects. The third one of which resulted in the Corder Report, which are on page 2 paragraph 3, sorry, paragraph 5 of my affidavit, which I believe is on page 271 of the bundle.

ADV FREUND SC: That is correct and as you explained in that portion of your affidavit, you were actually asked to do

three separate tasks, three separate investigations and reports, only one of them have direct relevance for present purposes.

PROF CORDER: That is correct.

ADV FREUND SC: And that is the one in relation to parliamentary oversight.

PROF CORDER: That is correct.

ADV FREUND SC: So if you could perhaps, it is actually in paragraph 6.2, that you deal with that and if you could, 10 perhaps, if I take you to page 273, numbered page 4 of the original affidavit, you indicate, as it were the terms of reference of relevance.

If I take you to paragraph 7.1, I am just going to highlight a couple that seemed to me to be of most direct relevance, that you were asked by the Speaker on behalf of Parliament to outline and explain the nature of the obligation that Section 55.2 of the Constitution places on the National Assembly, that is the oversight provision.

And in point 5, what mechanisms and procedures 20 should be put in place to achieve the fulfilment of the constitutional obligation of parliamentary oversight of the executive. Those are the core, presently relevant parts of the mandate that led to you and your team producing the report, which we have come to know as the Corder Report, is that correct?

PROF CORDER: That is correct.

ADV FREUND SC: And you have told the Chair in paragraph 7.2 of your affidavit, that after a process of an interim report and engagement, you ultimately submitted a final report to the then Speak by July of 1999, is that correct?

PROF CORDER: That is correct.

ADV FREUND SC: Now in your affidavit, you have extracted for convenience the executive summary of the
10 report and even that executive summary, I do not propose for present purposes to read into the record, it speaks for itself.

But it seems to me that if we go to the foot of page 274, you dive in, straight into the difficult issue and that is accountability and oversight and what they mean. And perhaps if you would like to either read into the record or talk to, as it were, your then executive summary of your views on the essence of the meaning of accountability and the duty of oversight in the context that we are presently
20 interested in.

PROF CORDER: Thank you Mr Freund. I think I would like to sketch a very briefly some context to this report. We all know, and the Constitutional Court through Justice Mohamad said it very clearly and indeed the - what is known as the postamble to the interim Constitution made

the point that the current constitutional dispensation number 1, is a rigging and decisive break from the past.

We all know the extent to which the apartheid executive could have had come to dominate Parliament, and effectively to create it really as a lap dog to question the executive, that is the first point I want to make. So there was a determination in the Constitution making process to ensure that the new constitutional dispensation would not fall foul or not run the risk of becoming a lap dog
10 Parliament.

The second broad point is the values, which are contained in Section 1 of the Constitution. If we have any Section of the Constitution that is more special than any other it is Section 1, because only a 75% majority of the National Assembly can change any aspect of that section, and I want to refer particularly to the values in 1C of the rule of law and the supremacy of the Constitution and the values in 1D, which essentially constitutionalises the notion of participative democracy and within that, the last
20 three words are particularly important to me and I have stressed them throughout my teaching in the area of administrative law, this is about accountability, responsiveness, and openness. And at that point, I think it will be appropriate to talk about the definition of accountability.

Section 55.2 requires, there is the word must there. Parliament cannot get away from it. It has got to oversee the actions of the executive and I would say that there are three elements to accountability and oversight.

Number 1, the executive has to explain what if Parliament asks you to do so the executive has to explain to clarify its actions and its decisions.

Secondly, and the understanding of the doctrine of the separation of powers as being mutual respect between
10 the three branches of government, the legislature, the executive, and the judiciary, and it is mutual respect. So I mean, it is not only one respecting the other, it is each must respect each other's proper domain, secondly, the executive must justify its actions to a certain extent.

Thirdly, and this is the most I would suggest, controversial and difficult to demarcate. I would argue that there is an aspect of accountability, and I am relying on some of the literature that was around already in the 1990's in this respect, the executive should amend is what
20 is referred to as a mandatory accountability.

So the executive must explain, must justify and I suppose one could say in a mutually respectful relationship, and negotiate with Parliament, or at least the majority in Parliament as far as it is necessary the amending of any action or policy action taken or policy

decided upon. That is, it, so I will stop at that point so I do not go too long.

ADV FREUND SC: That is a convenient point because now if we can focus on the actual wording of what you said at the time, which is the point I have taken you to at the foot of page 27 before. You say in your report in your executive summary of your report in 1999:

10 “Basically, accountability means to give a given account of actions or policies, or to account for spending and so forth.”

And then you have emphasised:

“Accountability can be said to require a person to explain and justify against criteria of some kind of their decisions or actions. It also requires the person goes on to make amends for any fault or error and take steps to prevent its recounts in the future.”

20 And as you have already said, it is really that particular sentence that last feature, which causes the greatest difficulty, am I understanding you correctly?

PROF CORDER: Yes, you are.

ADV FREUND SC: But notwithstanding its difficulty, you stand by the notion this has been referred to as an amendatory accountability. You stand by the notion that the accountability which is owed by the executive to the

legislature includes obviously not limited to, but includes an obligation to make amends for fault or error, and to take steps to prevent and it empowers Parliament to take steps to prevent recurrences in the future, is that correct?

PROF CORDER: That is correct and I think I would emphasise those two words thought or error. It is not necessarily that one policy is preferred above another or that one decision was made, where a contrary decision could have been taken is that the policy itself, the
10 determination of the policy, or the decision itself, is shown in the process of explanation and justification could have been based on fault or error.

So it is quite a high standard that is set there and the reason for that is because it is not the proper domain of Parliament to determine under separation of powers, to determine policy or to make executive decision on a day to day basis.

ADV FREUND SC: Now, you make the point that I am reading at the foot of page 275:

20 “We are of the view that Section 35.2(a) sets the obligatory minimum standards of accountability for executive organs of State in the national sphere of government, the National Assembly must set up mechanisms to hold them accountable.”

And then you go on in your report to recommend three

types of legislative intervention and you start to address that at the foot of page 276 of your affidavit under the heading revising present arrangements and you say this:

“In the light of Parliament's constitutional obligations in present practices the legislation we propose would provide for a mandatory accountability, (which requires that where deficiencies have been uncovered, they be corrected and wrongs be addressed), and prescribed standards content and format for reporting.”

And then you go onto to deal in some detail on the procedure on these reports and so forth. So perhaps the starting point, for an understanding of your report, is an understanding of your core recommendation is to legislative reform, and why at that time, you thought legislative reform was appropriate?

PROF CORDER: Chair yes, Mr Freund, the Deputy Chief Justice would know that at the time we were working on the report 1999, late 1980's and early 1999 two other statutes were in the process of being drafted. Already on the statute books was the prevention, The Promotion of Equality in the Prevention of unfair Discrimination Act, PEPUDA as it is commonly known, which gave greater flesh to the skeleton of the right to equality in Section 9 of the

Bill of Rights.

But in '98,'99 the immediate context and I was involved in one of those two legislative reform or law reform processes saw the drafting of two acts of Parliament the promotion of Access to Information Act, in support of the right of access to information in Section 32 of the Constitution, and the promotion of Administrative Justice Act departure, which was in support of Section 33 in the Constitution, the rights to administrative justice.

10 Now, the idea behind that is that the Constitution provides a skeletal right so to speak but that further flesh needed to be added to the skeleton and although there was a direct constitutional injunction in the final Constitution of 1996, to draft the PEPUDA, the PAJA and the PAIA and although there was none in relation to Section 55, to oversight responsibilities.

It seemed to me, to us wise and appropriate that we should propose the drafting and adoption of legislation in the form of two acts of Parliament, which we are included,
20 both in the Corder Report and in my affidavit. Firstly, the Accountability Standards Act and secondly the Accountability and Independence of Constitutional Institutions Act.

I will not on this point expand on the necessity for either, but I think that there – ja, will not say more about

that at this point unless it is necessary.

ADV FREUND SC: We can come back to that, in a nutshell, you proposed the adoption of legislation for reasons that are set out both in the report and in the affidavit. You furnished your report and before we come back to your report and to its current relevance if any it is just helpful if we can just put it in its proper historical context.

You furnished your report and so far as you are
10 aware, what came of your report. To what extent was it taken up, to what extent were you engaged on the point, and what has been your subsequent involvement if any?

PROF CORDER: Thank you, Mr Freund, I would refer to paragraph 8 on page 278 of the bundle and I set out there the detail of what happened. One of the critical elements is that the second democratic election took place, just before the submission of the report and whereas the Joint Rules Committee, as far as I can recall, under the first Parliament was our interlocutor, so to speak, because we
20 did not – we reported to the Speaker but we then engaged or I then engaged with the Joint Rules Committee.

The membership of that committee, and the core of MP's in Parliament had changed substantially between the first and the second Parliament and one of the when I appeared before the committee, one of the complaints, so

to speak, was that there had been insufficient consultation with the members. And that was clearly so because many of the members within consultation had taken place because an interim report had been submitted in March of 1999. Many of those MP's were no longer in Parliament.

As far as - that really was the end of my direct engagement with Parliament, but I followed it really at a distance. And as I say, paragraph 8.1.2 to my knowledge, a sub-committee of the Rules Committee, or indeed,
 10 perhaps of the Justice Committee, Chaired by Ms Fatima Chohan-Kota, MP considered the report and then reported further to the, either the Joint Rules Committee or the Justice Committee. I was no longer from that moment onwards, no longer directly involved at any stage in the intervening 20 years, Chair.

ADV FREUND SC: And you have made the point to me Professor Corder that as regards to the – there were developments on the ground, in Parliament, in the succeeding period, you defer to the greater personal
 20 knowledge, for example of Richard Calland and even our last witness Lawson Naidoo, you think that really, the Chair should look to them to consider as a well, what happened subsequent to your report. Is that a fair summary?

PROF CORDER: Yes, thank you Mr Freund for bringing up that point that is exactly so, indeed Chair I might say that,

when I first approach to give evidence to submit an affidavit, I had no typed copy of the Coder Report and the only way that I could get hold of it was provided by Mr Freund who in turn, I think, got it from the Parliamentary Monitoring Group or some other group.

I had not, in any way abandoned a general observation of this notion because it is integral to administrative law as well and administrative justice, which is my staple diet. But I have not had any further direct
10 engagement nor had I made a direct study or research of what had happened on oversight and accountability.

ADV FREUND SC: And you are not particularly – you have had looks for purposes of this evidence, the rules of the National Assembly, but you are not particularly conversant or an expert in those rules.

PROF CORDER: No.

ADV FREUND SC: But what you can say, I think with some competence is that the recommended legislation that you proposed was not adopted.

20 **PROF CORDER:** That is correct.

ADV FREUND SC: And in preparation for giving your evidence today, you have been asked to consider to what extent if any, you stand by the view that legislation of the type that you propose now more than 20 years ago, would not be of value and I think it is fair to say that your core

view is, you still think it would be of value. Is that correct?

PROF CORDER: Absolutely, sir.

ADV FREUND SC: So really, I think what we want to focus on now for the duration of the rest of your evidence is really to substantiate that, to look at why you thought legislation was a good idea and why, notwithstanding everything that has happened since then, you remain of the view that Parliament should be encouraged to relook at the question of whether it supports and would be minded to
10 adopt legislation of the type that you recommended some 20 years ago.

PROF CORDER: Yes.

ADV FREUND SC: So why do I not leave it to you, as it were, talk to that in overview and then we can go into some more detail position issues in due course.

PROF CORDER: Thank you. I think in the overview as a matter of constitutional doctrine and as a matter of principle, I would refer again to the word must in Section 55.2, that is an imperative that is a command, if you like,
20 to Parliament, to provide for mechanisms for oversight. Broad...[intervene]

ADV FREUND SC: I am just going to interrupt you their Professor Corder just to read it into the record because not everybody would be familiar with the wording. What Section 55.2 of the Constitution says is the following:

“The National Assembly must provide four mechanisms A, to ensure that all executive organs of State and the National sphere of government are accountable to it.”

That is really the clause to what you are talking, am I correct?

PROF CORDER: That is correct. Now, the broader overview of the manner in which Parliament has carried out its oversight role, would disclose the following, I believe, and I believe this would withstand any form of analysis, or research or interrogation. Chair, one of the roles that I played very early on in our democratic era was to be an advisor to the Theme Committee, sorry, the Portfolio Committee on Health in Parliament. It was Chaired at that point by Dr Tshabalala-Msimang and the Chair may well recall the Serafina 2 incident early on, where the then Minister of Health Dr Nkosazana Dlamini-Zuma asked Mbongeni Ngema to produce the Serafina 2 as an AIDS awareness tool and that was done at considerable cost to the Viscus and it was done apparently, or at least there were questions about the irregularity on the tender process there.

I only mentioned this, because it is an incident - the Health Committee then summoned the Minister, please to come and explain why she had done so. So that was

explain it and to certain extent to justify. In the end, the summons was withdrawn for reasons that I do not know but I would guess that it could be fairly said that the first Parliament exercised its oversight role vigorously, in the true spirit in which Section 55.2 had been adopted.

Things went a bit quiet after 2009, after 1999 pardon me, after 1999 after the first Parliament, there was quite a revival in 2008/2009 under the presidency of President Motlanthe Parliament crept back in ...[indistinct
10 – word cut off] from the time of Mr Zuma's descendance to the presidency. I think there have been very few. In this respect, the oversight role – very few people who would question the broad analyses that I have given. Secondly ...[intervenes]

CHAIRPERSON: Hang on just one second Prof Corder. I might have missed this.

PROF CORDER: Yes?

CHAIRPERSON: I heard clearly that you made the point that during the term of the first democratic Parliament
20 there was vigorous performance by Parliament of its role, oversight role.

That, of course, would have been from 1994 to 1999. I thought you were going to talk about the Second Parliament but I seem to have understood you to jump to 2007 and so on.

Did I hear it correctly? Were you suggesting that until around 2007, Parliament had performed its oversight role vigorously?

PROF CORDER: Chair, I apologise for that, for the confusion I have created. I would argue that in – in fact, Parliament crept back inside its show from about 2000 onwards during the first and incomplete second terms as president of President Mbeki.

That it found its voice again during the presidency
10 of President Motlanthe but then it went quiet again from President Zuma's accession to power onwards. And I think that the way that I have explained it to myself and heard others explain it relates to the point that has been made by both Prof Calland and Mr Naidoo and others.

It comes back to the electorate system, the predominance of one majority party throughout the life of democratic constitutional South Africa and it goes to the political culture which has dominated within – I would...

I do not know, I am not a party politician Chair but
20 I would say in both of the majority party and frankly perhaps some of the opposition parties as well. So I am not only party in one direction but that is speculation.

And it seems to me and to come back to answer the question that Mr Freund asked me: Why is it relevant now again 20-years on to have those two statutes at least

or something like it – like them?

And I think you could, through a process of research and negotiation with Parliament, draft statutes which encourage members of Parliament to fulfil their constitutional duties, to fulfil the duties imposed on them by their oaths of office.

And to exercise the kind of oversight role by the legislature, which incidentally is created by almost every legislature in other constitutions in the world.

10 I did a quick survey again in the previous week or so Chair. There is almost no constitution which does not require the legislature to oversee and to hold accountable the Executive.

And it is – so and I would just add one more thing Chair. That if the Parliament as one of the advantages of government does not create its assigned constitutional role according to the Constitution, then there is a vacuum and another body of government has to step into the breach.

20 And I would argue, and I am working on this, that in the last nine to ten years in particular the courts and led by the Constitutional Court had been placed in some ways unfairly in the firing line, politically and in public discourse because Parliament failed.

So for me the failure of Parliament is shown by the extent to which political, broadly political questions, not

necessarily party political questions but broadly political and constitutional questions have been thrown to the judiciary.

And the judiciary, in my own view, has stepped up to the plate magnificently but there is a danger because the judiciary is exposed to party political attack and the - that leads to – and it may lead and it sometimes does, to an inclination on behalf of the Executive to want to undermine the judiciary.

10 I will stop at that point – on that point because I do not want to go onto a long discussion about law unless the Chair wants me to or unless Mr Freund wants me to.

But I think it is a direct consequence of the failure of Parliament to do its job of oversight and that in turn, as my colleagues, Calland and Mr Naidoo have explained, relates to the electorate system, the party whip political culture.

20 So whatever legislation we have, will have to address to some extent without undermining the party whip, will have to address the political culture and persuade MP's of every political party to do their – to do what is required of them under the Constitution.

Perhaps I should stop here. I have been going on too long already.

ADV FREUND SC: Prof Corder, you correctly draw

attention to the three arms, the legislature, the executive and the judiciary and you touched on the implication for the judiciary when the legislature fails to do what it should do.

But I do not know whether you heard the evidence or saw reports on the evidence of the very first witness to testify in this stream of evidence Mr Themba Godi.

He had a slightly different view on the root of the problem. His view would focus on the reports received by
10 SCOPA from the Auditor-General, the reports issued by SCOPA endorsed by the National Assembly.

His view was that the fundamental problem is a failure of the Executive to respond appropriately to the reports and recommendations of the legislature.

Now I wonder if you would like to comment on that because I think it connects with this issue that you have touched on already but which we are going to need to deal with in further detail on the issue of the mandatory feature of accountability of the Executive to the legislature.

20 **PROF CORDER:** Thank you Mr Freund. There are several questions in that one question. Firstly, I am afraid that I – only read the reports of Mr Godi's evidence but it is significant.

He chairs SCOPA and SCOPA is the only Parliamentary committee which has a chair who is not

drawn from the majority party.

Now one of the recommendations or at least suggestions I make in my affidavit and perhaps I can find it. It is in paragraph 9 onwards on page 279.

One of the recommendations I make there is that it is perfectly possible for Parliament to distribute the chairing role of the many portfolio and joint standing committees among different political parties.

Frankly, the role of a chair should be a neutral
10 arbitrator and manager of the proceedings of a committee and the – it is akin to the role of the Speaker in Parliament in the National Assembly.

And it – I would propose, as I have, that that is one reform that might come within the rules of Parliament. That does not require legislation. It occurs to me too that the notion of rotating chairpersonship of committees could be adopted in Parliament.

Parliament sits for five years. A term of Parliament is five years. And it could be every 18-months
20 or so the chairpersonship of a committee rotates.

Now the critical – the nub of the question that you asked me is to put to me the argument of Mr Godi that SCOPA did its work, that it asked the Executive to explain, to justify and perhaps even to amend from time to time and that the response came to none from the Executive.

It seems to me that the answer to that lies in... It seems to me that one could explore statutory meanings to bolster the obligation under Section 52 in the Constitution in a sense to force the Executive to do such, explain justification and where appropriate amending.

But there is a non-law and political explanation for the failure by the Executive and that could be, and I do not know, so I am speculating here.

That the vast majority of opinion among members
10 of Parliament of the dominant party or let us say the political culture which has recently been described in an opinion piece by the Deputy Secretary-General of the ANC of democratic centralism.

Led to those members of Parliament who wished for a delivery of accountability. Led to them being handicapped in pushing for that kind of response from the Executive. I do not know. I am not inside the caucus.

But from outside, it seems to me that that is the – and from other witnesses of which I have read reports, that
20 is the kind of atmosphere that might have prevailed within the caucus of the majority party.

ADV FREUND SC: Now Prof Corder, we clearly do not have time to deal in detail your proposed Accountability Standards Act but you deal with that at pages 281 through to 290 of your affidavit.

And perhaps you could just try to highlight for the Chair, as it were, the main two or three points, if it comes to that, which you think you have not as yet made but that you feel should be drawn out to emphasise the points you are trying to make there.

PROF CORDER: Thank you. So the detail there refers to – prescribed minimums and accountability of administrative accountability and that could be expanded to executive accountability.

10 That is one area which would need attention. I think the second area that might still need attention ...[intervenes]

CHAIRPERSON: I am sorry.

PROF CORDER: Sorry Chair.

CHAIRPERSON: I missed that first point. Would you please just repeat it?

PROF CORDER: Yes, certainly Chair. There is a reference on... Sorry, Chair. I just saw it a moment ago. On page... Pardon me. Page 283 of the bundle to
20 prescribed minimum standards of administrative accountability.

In other words, saying to the public service and public servants that this is what we expect of you in order to help hold the Executive accountable to standards and similar standards could be prescribed for the Executive as

well.

But the point that I was about to make also as an additional point is that enormous members of bodies must report to Parliament. This is the pattern all over the world. Administrative and executive bodies must report to the supreme legislature.

Parliament... What we proposed 20-years ago is that Parliament should develop sophisticated and a nuance system of receptacle port, tracking of reports because
10 typically the reports are directed to portfolio committees for consideration.

And then keeping track of what happens subsequently. So it is a matter of I suppose audits and record keeping.

And we propose part of the Accountability Standards Act that a central reporting office be established in Parliament for the receipt and the packing of reports to make sure that the portfolio committees did not just look at the report or even less than that, received the report and
20 not engage with it in any other way.

So we would propose a type of financial oversight as a compliment to the PFMA and the Public Finance Management Act but more from the PFMA.

And that might not be necessary at this point, given the fact that the PFMA, the Public Finance

Management Act, has been in place for so long and perhaps it is working well but with that – with part of what we propose.

One more point and I am referring now to page 286 of the bundle Chair and forgive me if I am going too quickly but we propose and this has been achieved to some extent but I believe not as sufficiently well yet.

That the existing parliamentary research capacity to assist portfolio committees in their accountability and oversight function ought to be expanded. I am afraid we used the word beefing up in those days.

And we also propose a specific standing committee in regard to the Auditor-General and that has, as we know, been established.

So I think, I have to say, because I have not said it expressly that Parliament has to some extent done, whether it is in response to these recommendations or not, has made changes.

I do not know whether Mr Freund wants me or like me or Chair you would like me to talk to the specific establishment of a portfolio committee or a standing committee to deal with the Chapter 9 Institutions and other constitutional institutions.

But that was very much part of our proposal at that point because the Chapter 9 Institutions which, I will just

make this point Chair, were foreseeing the necessity of a Chapter 9 Institutions, were foreseeing already in our work at the Technical Committee for Fundamental Human Rights in Kempton Park in 1993 because the Human Rights Commission and the Public Protector's office were established from the 27th of April 1994.

We had a massive democratic deficit at the end of apartheid and we recognised and the multi-party negotiating process recognised that we needed other
10 bodies in addition to Parliament to bolster the achievement or to facilitate the achievement of our constitutional democratic values.

And it is in terms of the relationship between those constitutional institutions and Parliament to render a report that we felt some kind of specific standing committee ought to be proposed.

So those were the kind of issues that we envisaged that stage would need to be contained in the Accountability Standards Act.

20 What would have to be done if such an act is contemplated today in 2021, would be a detailed order of what Parliament has done so far in the couple of decades and to identify the gaps.

And I would suggest that Parliamentarian should be able to make their inputs in this regard in order to take

their oversight role seriously. I will stop at that point
Chair.

ADV FREUND SC: Thank you professor. Professor, you
have run a little ahead of where I intended to be but since
you had let us focus on what you are dealing with and that
is the question of the institutions.

And I would have I mind, not only the Auditor-
General but in particular the Public Protector, amongst
others.

10 And a number of people, a number of politicians
have expressed the view to me and I think some of them
have testified before the Commission that it is really not
the job of Parliament to investigate allegations of
malfeasances. That is for the Chapter 9 Institution.

And as the Chapter 9 Institution has done their
job, it is really not for Parliament to do anything about it.

Now what we talked to here in the report is as it
were a partnership, a relationship between the Chapter 9
Institution and Parliament, each having their respective
20 roles but nonetheless being mutually reinforcing and you
are proposing in your proposed legislation that this sort of
be clarified and defined.

We can perhaps just talk to that and correct me if I
have put it incorrectly.

PROF CORDER: Chair, thank you. That is exactly

correct. So to ensure accountability and because the Chapter 9 Institutions like any other institution under the rule of law and our constitutional democracy need to be able to account for their activities. So and ...[intervenes]

ADV FREUND SC: To whom did they account?

PROF CORDER: They account to Parliament. So they report to Parliament annually, at least, they ought to. They get their budget through Parliament.

And if a Public Protector or members of the Human
10 Rights Commission or the Commission on Gender Equality
also on all of the Chapter 9 Institutions, if a member needs
to be appointed, Parliament does that work.

So it is quite correct. They were seeing in their
conception in 1993 as being complimentary, working
together with Parliament while retaining an independent
role.

And that is why we proposed the accountability
and independence. And you will note we did not refer to
the Chapter 9 Institutions and the counter of that chapter
20 is state institutions assisting constitutional democracy.

We referred to constitutional institutions because
there are some similar bodies which are not included in the
list of Chapter 9 Institutions which play important roles to
help in the constitutional – the realisation of the
constitutional dream, so to speak.

And so a strong and respectful working relationship between those bodies we saw and I would argue is part of the constitutional design even today.

ADV FREUND SC: So let me take you to a specific example because we have heard specific evidence and you may have heard evidence but there has been specific evidence in this work stream on the problems at PRASA.

And there has been specific evidence on the one hand of real concern and expressed by the Auditor-
10 General's office about serious and rapidly worsening irregular expenditure.

In relation to the same entity, there have been evidence about the report by the Public Protector derailed which focussed on alleged corruption and malfeasance and procurement issues.

There is no question that that material found its way before the relevant portfolio committee but the problem seems to be what to do with that.

What does one expect of the portfolio committee
20 and what does one expect of Parliament and how does one use that in order to bring about the necessary improvements because I think it is a matter of public notoriety and it is common cause that the problems at PRASA have not as yet been resolved.

So perhaps you can take that just as a case study

to illustrate the propositions that you would advance in relation to the proper position, the proper function of the Chapter 9 Institutions and of Parliament principle through a portfolio committee.

PROF CORDER: Thank you, Mr Freund. I attended Section 181 of the Constitution which is the first section under Chapter 9.

The Chapter 9 Institutions is a list of that. The Public Protector of the Human Rights Commission, the
10 commission for the promotion of protection of rights, cultural, religious and invested communities. They are seeking provision for gender equality, the AG, and the Auditor-General and the Electoral Commission, the IEC.

You will note what used to be called the Independent Broadcasters Authority, now ICASA, is not there. Now and those passed on. Neither nor are any of the – nor is any of the state-owned entities. Eskom is not there. PRASA is not there.

So the Constitution makes a distinction between
20 bodies which are, let u say, there work related to the achievement of the values of the Constitution on the one hand and other bodies.

Now there may be – I would argue and I have argued orally, not in writing – that a body like ICASA given the importance of the medium through which I am giving

evidence and we are holding this hearing today, given the importance of the electronic and other media.

A body like ICASA is closer and it is a regulatory body rather than an executive although that makes – it takes executive and administrative decisions. A body like ICASA is closer to a Chapter 9 Institution than is PRASA or ESKOM or as state would seem.

There maybe there will be – and ICASA is an example, there may be others which to a certain extent
10 stand closer to the Chapter 9 Institutions and therefore if there were to a setup standing committee, a joint standing committee on Chapter 9 Institutions, maybe ICASA could go that way rather than report to the Communications Portfolio which I assume it does at the moment in Parliament.

But it seems to me appropriate that PRASA should not report to the Transport Committee in Parliament. Perhaps Eskom should report to the Energy Committee in Parliament or to whomever it does and to the Minister of
20 Public Enterprises.

Sorry, the Public Enterprises Committee, not the Energy Committee. Maybe it will be better reporting to the Energy Committee, the Mines and Energy Committees.

But I think that having – let us say the difficulties that we have seen and which have been accounted before

this Commission in relation to many of the state-owned enterprises.

If the Parliamentary Portfolio Committee has had the first opportunity appropriately to engage with and seek accountability from the board, the board of those SOE's and has failed to follow up or has failed to hold them account – to account, then it may well be for a Chapter 9 Institution to take it on.

10 But I would argue the first obligation under the Constitution rests with Parliament and its portfolio committees.

ADV FREUND SC: Alright. Thank you. Can I now take you ...[intervenes]

CHAIRPERSON: Can I ...[intervenes]

ADV FREUND SC: Yes, Chair.

CHAIRPERSON: ...follow up on that Mr Freund before you proceed. Prof Corder, the point you make about Chapter 9 Institutions following up or taking up issues that primarily you believe Parliament should tackle.

20 Raises a matter that crossed my mind when Mr Lawson was giving evidence earlier on. So I am thinking aloud. This is not something I have had time to think about but I noted the one committee which is not chaired by ...[indistinct – word cut off] namely SCOPA seems generally to be taken as having done quite well in

terms of trying to - in terms of its performance of its oversight function and holding the executive accountable.

So one has that point and although I have heard some evidence to the effect that well, there are other parliamentary portfolio committees that have a fair amount of their job in terms of oversight that would be chaired by Chairpersons who come from the majority party, SCOPA seems to stand out as a committee that seems to have done quite well.

10 So if one looks at that, one asks the question is it the presence on the chair of the committee of somebody who does not come from the majority party that makes the difference in the context of – in SCOPA or is it the personality of the Chairperson or is it a combination of both? Probably a combination of both. So one looks at that.

 And then one looks at the position that where, for example, a committee has decided to conduct an inquiry such as the inquiry that we had into Eskom and so on in
20 parliament by the Public Enterprises committee where the evidence leader was Mr Vanara. Now I understand that Mr Vanara was not a member of parliament, I do not know whether he was nevertheless from within the staff of parliament or whether he was from outside but it seems to me that if you bring in somebody to lead evidence in the

context of such an inquiry who might not be a member of parliament and might not be a member of the majority party or might not be a member of any political party representative in parliament, it may well be that that person might ask all the right questions that maybe even some of the members of the majority party might have wished to ask but might fear that asking those questions might be career-limiting. So those are two instances where there might be a role to be played by somebody who is not
10 from the majority party or who is not a member of parliament at all.

So the question that I want to ask is whether there might be room for having somebody who comes into a committee when it appears that the particular committee has not performed its function properly in regard to a matter that is really of serious public interest who could then ask all kinds of questions to the executive that maybe the majority – members of the majority party do not feel comfortable to ask and maybe they are asked by the
20 opposition parties, they are just put by the majority. I do not know whether such a person could be the Chairperson but without necessarily being a member of parliament or could be somebody that could be brought in, somebody could make a decision to say, for example, on this issue of the proposal in 2016 that the DA made to say in the Public

Enterprises committee let us have an inquiry into allegations that involved the Guptas, that was not agreed to by the majority at that time and then if it is seen that that committee seems to have dropped the ball or the majority did not want to do its job maybe somebody could be brought in who would be able to ask the difficult questions without fear or favour or prejudice.

Obviously what I am saying is something that one has not thought out clearly but one just notes that here is a
 10 committee, SCOPA, which is chaired by somebody who is not from the majority party and it seems to do its oversight function reasonably well in circumstances where there are a number of portfolio committees chaired by people from the majority party that might not do so well. Of course there might be others that did well.

Do you have some thoughts, obviously- probably tentative thoughts about that and it is not something that is flat out because not something one thinks about, has thought about.

20 **PROF CORDER:** Thank you, Chair. I fact I would respectfully agree with your surmise earlier on that the fact that the Chairperson is drawn not from the dominant party combined with the personality of that Chair would provide the answer because you can get - you could get compliant non-questioning people in every - I would suggest in every

political party. So it is a combination of the two.

But in my very cursory research in preparation for this hearing, Chair, I noted that – it was in the American Congress and I hesitate to refer to the American Constitution or experience given the recent past but there is a government accountability office within congress, as I understand it. In other words, there is capacity which is specifically directed towards assisting parliament to exercise its accountability duties, to fulfil its accountability
10 duties and this would a statutory body, I suppose, or maybe a body within parliament and I would hope that it would be staffed by independent minded competent people who could fulfil the kind of role that you referred to in regard to the Public Enterprises portfolio committee and the evidence leader and so on.

The UK has a body within parliament called the National Audit Office. That may relate more closely to the work in our dispensation of the auditor general but in principle, if there is a National Audit Office within the UK,
20 parliament has no reason why there could not be a National Accountability Office within our own parliament as a practical suggestion.

One of the points that just occurs to me, which I intended in my affidavit which I would just mention at this point, Chair, is that I noted that the National Assembly

rules require a member of parliament who is not able to attend a portfolio committee meeting to seek leave for their absence from the Chief Whip of the party and it seems to be that that is odd. It is logical from one point of view because if the Chief Whip knows that MP X is going to be missing, they might want to supplement the membership with MP Y but it indicates a *locus* of power to a certain extent with the portfolio committee structure which does not lie with the Chair but which lies with the Chief Whip of the party.

CHAIRPERSON: Okay. Thank you very much. Mr Freund?

MR FREUND SC: Yes, thank you, Chair. Prof Corder, the witness to follow you is an experienced observer of portfolio committees in their day-to-day ordinary work and she will raise a number of very practical problems that inhibit effective oversight and it seems to me that a great deal of your Accountability Standards Act, as proposed, is actually addressed at trying to resolve some of those problems so I would like in the few minutes available to us just to focus on some sort of nuts and bolts issues which you propose in your Act should be addressed such as – and I am really looking from page 281 and following of your affidavit as it is bundled in the Commission’s bundling and you propose that this Accountability Standards Act:

- (ii) It would set the broad framework and minimum requirements for accountability.
- (iii) Provide an authoritative and mandatory framework within which committee members can perform their oversight past.

And then you go on elsewhere to talk about the questions of timing, when presentations should be submitted, that there should be standards against which accountability can be assessed.

10 One needs have standards in order to measure. And so if you could just talk briefly – obviously this is not a draft bill and we do not even have time comprehensively to deal with the issues but if you could get the Chair some sense of the flavour of what you think could be achieved by an Accountability Standards Act which attempts to address some of the logistical and practical problems because at the end of the day we have relatively small number of MPs faced with a large volume of work of which they do not necessarily have particular expertise and yet what we are
20 trying to achieve is effective oversight. So if you could just talk briefly to some of the sort of pragmatic level of the proposals you made which I would assume were informed by the observations you were making even then about the practical difficulties of exercising oversight.

PROF CORDER: Ja, thank you for that. I take as my –

well, really extremes at – in thinking about such legislation. On the one hand of the spectrum would be the Promotion of Access to Information Act which is a substantial Act going into enormous amount of detail, runs through many tens of pages.

On the other hand, the Promotion of Administrative Justice Act runs to less than ten pages and I so I would think that a statute that somehow that somehow managed to – I will not say straddle the divide but being closer to
 10 the middle of spectrum may be better. In other words, not so detailed and prescriptive because I think it would be inappropriate to prescribe to parliament too closely given that these are the elected representatives of the people, of the – ja, of the people.

But I would think that where one would have to start is precisely with the evidence that is going to be given next, which I have not seen, but engagement with parliamentarians, both currently and in the past to find out from them what are the stumbling blocks, what makes it so
 20 difficult? I, you know, I am aware that there are – there is a whole group of small minority parties in parliament and they are entitled to representation on all the portfolio committees and if you have got three MPs for your party, they have to make [indistinct] 14.21 on 20, 30 portfolio committees, they cannot possibly do their work much as

they insist on, physically impossible or intellectually possible.

So there needs to be the practical infrastructure within parliament and I would suggest the office of the Speaker would be the one who would not best and the committee of Chief Whips would help in identifying also where the shortcomings are and then it would be a matter of – either in the rules or including it in the statutes which I have proposed, the establishment of that kind of
10 infrastructure and of course then one have to find a budget for it but my understanding is that the research capacity, for example, of parliament has increased quite a lot over the past 20 years and that is a fairly good thing. I hope that those...

MR FREUND SC: Yes, thank you. And I would like to take up one particular detail which we find at the foot of page 286 where you propose prescribed reporting standards. Now just by way of background, such evidence, as I have seen and my investigation shows, that there is a profusion
20 of material that is produced and placed before portfolio committees very often in the form of PowerPoint presentations, very often at the eleventh hour and very often not in detail which enables, as it were, exposure of problematic aspects but a sort of broad overview generality. What you proposed – we read this at the page

of 286 is that you say:

“Accountability in its simplest form is linked to oral and written or electronic reports but this should remain one of the main conduits for feeding information to parliament but it is obvious that absence of requirements and guidelines with which written reports must imply results in ineffective accountability, reports may contain too much information overwhelming the accounting body with massive detail or may contain too little information to allow assessment of the body’s performance.”

And you continue. Now maybe with reference to that you could, as it were, elaborate on the point that you were making that if there is to be legislation, it needs, as it were, to be an appropriate level, it needs to impose some type of useful rigor but, on the other hand, obviously not be overly prescriptive.

PROF CORDER: Yes, I do not have an enormous amount to add to the sentences from that bottom of page 286 which you have read. There is a reference thereto, I am afraid, a Commission of Inquiry that was held in the apartheid days, 1989 it reported, but I believe that the recommendations made by the Brown Commission contained the seeds of what would be required here.

In other words, a broad brush strokes framework for

reporting which would assist because – assist the partners of state in their reporting function because I can imagine that if I am a – I would not be so, perhaps a DG or the DG says to somebody in the department please prepare a report for parliament, they are not going to necessarily know what model to use, how much to include, how little to include and so on and so on and so on. So some broad outline framework would be required, that is the nub of that recommendation.

10 **MR FREUND SC:** Alright. And finally, if I could you take you to page 290. This is, as it were, towards the end of an overview on your section on mandatory accountability and you deal in a series of bullet points with requiring certain information to be produced but then you continue:

20 “With the support of the majority of the members of the committee to put the minister to terms in respect of remedial action to satisfy executive accountability, to stipulate appropriately urgent and regular report-backs to the committee, to give appropriate publicity of these actions through the media to the broader electorate, to engage the speaker of parliament on her own or in consultation with the Chief Whips of the political parties represented in parliament, to exert her authority as head of the legislature and to intercede with the

President as head of the National Executive to ensure compliance by ministers with the obligation to amend.”

Now I take it that remains your view as contained in your report. Would you like to talk to that because this is an issue that has been canvassed with other witnesses but it seems to me it is an issue of some considerable importance.

PROF CORDER: Thank you. That in fact was not in the
10 Corder Report, that is, as indicated by the typeface, my current thinking in the preparation of this affidavit. But just the preceding paragraph, Chair, at the bottom of page 289, I would like to read it quickly so that one gets the context. So it is paragraph 9.7.1.3 at the bottom of page 289 and I quote:

20 “On the understanding that the primary focus for accountability would be through the committee system in parliament and in the knowledge that the committees are relatively well-supported by research and administrative capacity.”

I am hoping that that is the case. That may be wishful thinking, but I believe it to be the case.

“It could be provided, for example, that a significant number of the members of each committee say at least 30% so that frivolous or meddlesome inquiries

do not cause bottlenecks but not on majority so that the apparently errant minister cannot be shielded by the representatives of the majority party alone, should be authorised to take some or all of the following steps.”

So this is an attempt to avoid – and I am not saying it is applicable to us but there is well-known phrase called the tyranny of the majority and I am not saying that that applies in our country. I want to be very clear on that. But
10 I am saying that a significant level of support, if shown, within a portfolio committee for the steps that you read then which appear as bullet points on page 290 may be an example of a mechanism that could be introduced in an Accountability Standards Act or similar. But you started off with the bullet point which is halfway down which says:

“With the support of a majority of the members of the committee.”

So what I am suggesting there is that while 30% of the members of the committee may try to get some answers
20 and some accountability, some explanation out of the minister in bullets points, the first and second, it would need to majority of the committee to put the minister to terms and in doing so, I hope that I am being nuanced enough to recognise the balance of political party power within parliament. So that is the way that I would certainly

stand by, that set of proposals, but I recognise that it may not always be feasible. Thank you.

MR FREUND SC: Thank you, Chair. Chair, that is as far as I think I have time to take the matter and I have no further questions.

CHAIRPERSON: Thank you very much, Professor Corder, for your input, we appreciate it. If later other issues arise concerning these matters I am sure you will avail yourself to further assist. Thank you very much, you are now
10 excused.

PROF CORDER: Thank you, Chair, and I certainly will avail myself, if requested. Thank you very much and all good wishes to you and the Commission.

CHAIRPERSON: Thank you very much, thank you. Mr Freund?

MR FREUND SC: Chair, there are two further witnesses but I presume we take the lunch adjournment.

CHAIRPERSON: Yes, unless you think it would be a good idea for us to fast and skip lunch.

20 **MR FREUND SC:** No, I do not mind doing that but I think we should manage reasonably comfortably in the two hours between two and four to get to the two remaining witnesses.

CHAIRPERSON: Ja. Okay, not that is fine. Let us take the lunch adjournment, it is now nine minutes past one.

Let us resume at ten past two. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Freund are we ready?

ADV FREUND SC: Yes we are Chair.

CHAIRPERSON: Thank you.

ADV FREUND SC: Chair the next witness will be Ms Jennifer Rault-Smith. She is here to testify about three separate reports that she has prepared, they all form part
10 of Exhibit ZZ8 in Bundle 2, from page 754 and following.

CHAIRPERSON: Yes thank you. Ms Rault-Smith are you there?

MS RAULT-SMITH: Yes, good afternoon Chair.

CHAIRPERSON: Good afternoon to you, thank you very much for availing yourself to assist the Commission, we appreciate that very much. The Registrar will administer the oath or affirmation, depending on which one you prefer, thank you.

MS RAULT-SMITH: Thank you.

20 **REGISTRAR:** Please state your full names for the record.

MS RAULT-SMITH: Jennifer Phyllis Rault-Smith.

REGISTRAR: Do you have any objection to make the prescribed affirmation?

MS RAULT-SMITH: No I don't.

REGISTRAR: Do you affirm that the evidence you will

give will be the truth, the whole truth and nothing but the truth, if so please raise your right hand and say I truly affirm.

MS RAULT-SMITH: I truly affirm.

CHAIRPERSON: Thank you very much. Mr Freund you may proceed.

ADV FREUND SC: Thank you Chair. Ms Rault-Smith is it correct that you have on behalf of the Parliamentary Monitoring Group prepared and submitted three separate reports, one dealing with oversight in respect of BOSASA, one dealing with oversight in respect of PRASA and one dealing generally with the question Parliamentary oversight?

MS RAULT-SMITH: That is correct.

ADV FREUND SC: And if you turn to page 755 ...[audio distorted]

CHAIRPERSON: Sorry Mr Freund you froze for a few seconds. Can you hear me? Can you hear me Mr Freund? I think he cannot hear me. Yes he cannot hear me. You need about ten minutes, okay, is – let me see if he is – is he going to appear maybe by any chance? He is not going to appear, okay I am going to adjourn for ten minutes.

We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let us hope the problem has been sorted out. You froze while you were asking your question Mr Freund and you couldn't hear me speaking to you but I understand the problem has been sorted out so you may proceed.

ADV FREUND SC: Thank you Chair yes, I hear you clearly [audio distorted]. Ms Rault-Smith is it correct that you deposed to a confirmatory affidavit at pages 755 to
10 762 in which you confirm your authorship of the report that's annexed in respect of BOSASA and which you confirm by way of an affidavit.

MS RAULT-SMITH: Quite correct.

ADV FREUND SC: I am going to come back to that, but I would like to take you now to page 825.

MS RAULT-SMITH: Right.

ADV FREUND SC: Is it correct that that is a further affidavit to which deposed, to which you annex your report on Parliamentary oversight over PRASA.

20 **MS RAULT-SMITH:** Yes.

ADV FREUND SC: And that confirmatory affidavit runs from pages 825 to 831.

MS RAULT-SMITH: Yes, that is correct.

ADV FREUND SC: And in that affidavit you explain that you are the author of the report and you explain the

background to that report, is that correct?

MS RAULT-SMITH: I do.

ADV FREUND SC: And then we have a difficulty, if I can take you to page 876.

CHAIRPERSON: I have got it Mr Freund, 876.

ADV FREUND SC: 876, do you have it Ms Rault-Smith, it is a further confirmatory affidavit. Now on the face of it this is a further confirmatory affidavit and if one turns to page 883 one finds what is annexed is the report that you
10 prepared for the Parliamentary Monitoring Group on Parliamentary oversight, but when one studies the actual text of the affidavit and in particular when one studies what appears in paragraph 3 which starts at page 876 and goes through to 877 you find that what has happened here is that the wrong – the affidavit refers to the wrong report here, or was intended to annexe your report on Parliamentary oversight erroneously says what is annexed is your report on PRASA, which is the same as what we referred to a moment ago, is that correct?

20 **MS RAULT-SMITH:** Correct.

ADV FREUND SC: Now notwithstanding that error, I understand that you have indicated that you would be perfectly willing in due course and as soon as possible to rectify this by means of a further brief supplementary affidavit correcting this and confirming that you are in fact

the author of the report on Parliamentary oversight and that that is what was intended to have been referred to in paragraph 3 ...[intervenes]

MS RAULT-SMITH: Yes I am happy to do that.

ADV FREUND SC: And you can confirm under oath today before the Chair that you are indeed the author of this report and that the balance of the content of your confirmatory affidavit is correct?

MS RAULT-SMITH: Yes I do.

10 **ADV FREUND SC:** Chair against that background ...[intervenes]

CHAIRPERSON: Ms Rault-Smith just wait until Mr Freund has finished his question ...[intervenes]

ADV FREUND SC: ...against the ...[intervenes]

CHAIRPERSON: So that you don't give an answer while he is still finishing his question so the two of you don't speak over each other, because that won't – the transcribers will have a problem with that. So just wait for him to complete his question and then you answer. Are
20 you able to see Mr Freund and are you able to see me?
Ms Rault-Smith?

MS RAULT-SMITH: Yes I am.

CHAIRPERSON: Okay, alright, is there some delay ...[intervenes]

MS RAULT-SMITH: Yes I can see you and hear you.

CHAIRPERSON: Oh, is there some delay when I speak before you hear what I am saying? She has – you had frozen Ms Rault-Smith, I don't know if you can hear me now. Hello Ms Rault-Smith? No, she cannot hear me.

Okay, we will adjourn for ten minutes. We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

ADV FREUND SC: Yes I can hear you.

10 **TECHNICIAN:** We apologise SC, we have got some network challenges which is beyond our control, we have just done a speed test from our network, it dips in and out, and it seems that we are going to be having that challenge, because when we test now it looks better, but it drops, it fluctuates in and out and it is something that is beyond our control, it is with the towers, I am not sure what is happening with Vodacom network and other networks that are currently giving us signal. I don't know what will be your proposal to the Chair but it is beyond our control.

20 **INQUIRY RESUMES**

CHAIRPERSON: Mr Freund?

ADV FREUND SC: Yes, thank you Chair.

CHAIRPERSON: The morning session was quite smooth. There were no technical duties but this afternoon it is different. But let us keep on trying.

ADV FREUND SC: Chair, with pleasure. I should just indicate to you. Although I hear you clearly, I do not see you at all.

CHAIRPERSON: Oh, that is strange. Let us see if the - because maybe the witness will not see me either.

ADV FREUND SC: We are both looking at a TV screen.

CHAIRPERSON: Ja. [laughs] Ms Rault-Smith, you also cannot see me?

MS RAULT-SMITH: Yes, I can hear you.

10 **CHAIRPERSON:** Can you see me now Mr Freund?

ADV FREUND SC: I can see you Chair.

CHAIRPERSON: Okay. Ms Rault-Smith, can you see me?

MS RAULT-SMITH: [Indistinct] *[distortion present – speaker inaudible]*

CHAIRPERSON: Just say something so you can appear on the screen because I cannot see you.

MS RAULT-SMITH: [No audible reply]

CHAIRPERSON: Yes. Can you hear me quite well and can you see me?

20 **MS RAULT-SMITH:** Yes, thank you. I can see you Chair. *[distortion present – speaker barely audible]*

CHAIRPERSON: Well, I cannot hear you. I can see you but I cannot hear you. Just speak again. Let us see if it is going to be better now.

MS RAULT-SMITH: *[distortion present – speaker*

inaudible]

CHAIRPERSON: That is not very good. Your voice is vibrating and as a result I cannot hear what you are saying. Let me ask you to say something again and see whether it is going to be better. Just say something.

MS RAULT-SMITH: *[distortion present – speaker inaudible]*

CHAIRPERSON: Ja, it is not better.

ADV FREUND SC: Yes. Chair, may I intervene and just
10 ask a question?

CHAIRPERSON: H'm, h'm.

ADV FREUND SC: We have Mr Lewis on standby and if his connection is strong which it may be, would you be willing to interpose Mr Lewis and bring Ms Smith back when the connection to her is stronger?

CHAIRPERSON: Yes, we can do that because we have already lost about an hour. So maybe let us do that and we will – and then once we are done with Mr Lewis we can take it from there.

20 **ADV FREUND SC:** Chair, can I just ask Mr Lewis? I am hoping he is listening to this. And if he can just come on screen and turn on so that we can see if he is visible.

MR LEWIS: [No audible reply]

ADV FREUND SC: There he is.

CHAIRPERSON: Mr Lewis, can you see me? Can you

hear me?

MR LEWIS: I can see you and ja, I can hear you.

CHAIRPERSON: Oh, thank you. Good afternoon to you.

MR LEWIS: Good afternoon to you as well.

CHAIRPERSON: Thank you for availing yourself to assist us. We appreciate it very much. Now the technicians are showing me Ms Smith... I do not know if you did hear Ms Rault-Smith? We are going to temporarily release you. Okay.

10 **MS RAULT-SMITH:** [No audible reply]

CHAIRPERSON: Okay. Ms Rault-Smith, we are going to listen to Mr Lewis' evidence because we are hoping he has got a better connection and when we are done with his evidence we will decide whether you – I hear your evidence after that or we make other arrangements for another time because we have lost about an hour. So but be ready to be connected with us as soon as we are done with Mr Lewis.

MS RAULT-SMITH: [No audible reply]

20 **CHAIRPERSON:** Okay alright. I was saying. Thank you very much Mr Lewis for availing yourself to come and assist the Commission. We appreciate it very much.

MR LEWIS: [No audible reply]

CHAIRPERSON: Oh, each time I thank Mr Lewis for availing himself, Ms Rault-Smith comes back on the

screen.

ADV FREUND SC: Mr Lewis, can I just check that you are not muted?

MR LEWIS: No, I am not muted.

CHAIRPERSON: Okay I am not going to repeat, thank you Mr Lewis because... [laughs] There might just be another problem. So I think the registrar will administer the oath or affirmation to you and then Mr Freund can proceed after that. Let us hope the connection will be smooth.

10 **ADV FREUND SC:** Sure.

CHAIRPERSON: Thank you.

REGISTRAR: Please state your full names for the record.

WITNESS: It is David Harris Lewis.

REGISTRAR: Do you any objection to making the prescribed affirmation?

WITNESS: No, I do not.

REGISTRAR: Do you affirm that the evidence you are about to give, will be the truth the whole truth and nothing else but the whole truth? If so, please raise up your right
20 hand and say, I truly affirm.

WITNESS: I truly affirm.

DAVID HARRIS LEWIS: (affirmed)

CHAIRPERSON: Thank you very much Mr Lewis.
Mr Freund.

EXAMINATION BY ADV FREUND SC: Thank you Chair.

Mr Lewis is it correct that you are the Executive Director of Corruption Watch?

MR LEWIS: Yes, that is correct.

ADV FREUND SC: And is it correct that under your leadership and guidance, Corruption Watch has prepared a submission to the Commission which is annexed to an affidavit that you have submitted.

MR LEWIS: Yes, that is correct.

ADV FREUND SC: Chair, the affidavit and the annexed
10 report are intended to be Exhibit ZZ-14 to be found in Bundle 5.

CHAIRPERSON: Thank you.

ADV FREUND SC: On page 966 onwards of Bundle 5.

CHAIRPERSON: Okay I have got it Mr Freund.

ADV FREUND SC: Thank you Chair. Mr Lewis, is it correct that your affidavit – that you deposed to the affidavit over pages 966 to 968 to which the report is annexed?

MR LEWIS: That is correct.

20 **ADV FREUND SC:** Chair, I move that Exhibit ZZ-14 be admitted into the evidence from pages 966 and following, Bundle 5.

CHAIRPERSON: Yes, you said it should be Exhibit ZZ.

ADV FREUND SC: 14.

CHAIRPERSON: Thank you. The affidavit of Mr David

Harris Lewis that starts at page 966 is admitted.

ADV FREUND SC: Thank you Chair.

CHAIRPERSON: Does it have annexures?

ADV FREUND SC: It has an annexure, the Corruption Watch Report.

CHAIRPERSON: Yes.

ADV FREUND SC: So the main bundle is the annexure.

CHAIRPERSON: Yes, together with its annexure as an exhibit and it will be marked as Exhibit ZZ-14. Okay

10 alright.

AFFIDAVIT WITH ANNEXURE OF DAVID HARRIS LEWIS IS ADMITTED AND MARKED AS EXHIBIT ZZ-14

CHAIRPERSON: Thank you. You may proceed.

ADV FREUND SC: Thank you Chair. Now Mr Lewis, could you just briefly describe the function of Corruption Watch, its mission and very broadly but briefly what it does?

MR LEWIS: Yes, Corruption Watched was established in January 2012 and its purpose is to encourage and enable public participation in combating corruption and to engage
20 in activities generally which combat corruption.

The primary manner in which we encourage public participation is to encourage the public to report experiences of corruption to us which they do in significant numbers.

We do this to, you know, basically for the worth of

the data that we gather, the intelligence it offers us, the legitimacy it offers us and because it underlines the importance of whistle-blowing in conducting corruption.

With these reports and you know with other information and intelligence we engage an investigation of a selected number of the reports. We can only investigate a tiny number of reports that we get.

But we also engage in strategic impact litigation and other forms of litigation, in research, in policy
10 formulation and in advocacy.

And all that goes into maintaining a constant communication through the media, both our own media platforms as well as commercial and community media platforms.

A constant engagement with the public and that has been our modus operandi since we started and the manner in which we have chosen to combat corruption.

ADV FREUND SC: Nor Mr Lewis, if we look at page 967 of Bundle 5, that is page 2 of your affidavit, in paragraph 5
20 on that page you explain, as it were, what is the primary purpose of the report that you had prepared for the Commission.

So by way of overview, could you just describe what is the task you set yourselves and what are the scope, broadly speaking, of the submission that you have

prepared for the Commission?

MR LEWIS: Yes, thank you. We – you know, we lay much store by the putative ability and power and resources of Parliament to hold the Executive to account that we have been somewhat disappointed back then and now.

As they say, it is neither here nor there. It is incumbent upon us to keep on trying and to keep on pushing the envelope because we do view it, as I say, putatively as the premier institution capable of holding the
10 Executive to account.

So we have a constant and extensive engagement with Parliament. And the two platforms, if you like, or the two parliamentary functions that we have engaged with but firstly in the formulation of policy and the preparation of legislation where we constantly making submissions to Parliament and engaging with them and that part of their work.

But we have made a particular, if you like, speciality of engaging with Parliament in the role that they
20 play in appointing the leadership of key institutions, where later on in the affidavit we list the number of institutions and the names of the institutions that Parliament is responsible for appointing the leadership of.

And we view this as particularly important for reasons that you know if you want, I am of course happy to

outline but this affidavit is confined to that activity, where we have, you know as I say, a considerable and fairly unique experience and some of the experience being quite sanitary and others being quite disappointing.

ADV FREUND SC: So you are focussing on Parliament's role in the appointment process of leaders of specific types of institutions. Is that a correct summary?

MR LEWIS: Yes, yes.

ADV FREUND SC: Now that report itself commences in
10 Bundle 5 at page 969 and after describing at that page briefly what is the mandate of Corruption Watch. Are you with me?

MR LEWIS: [No audible reply]

ADV FREUND SC: You refer at the foot of page 966 to an earlier joint submission made by Corruption Watch to this Commission, which as it were, is a precursor to this particular submission you are now making. Is that correct?

MR LEWIS: Yes, yes.

ADV FREUND SC: Against that background, what is the
20 previous submission about?

MR LEWIS: The previous submission was about the capture of the Criminal Justice System and we identify, as many others have, the critical role of the appointment of the leadership of those – of many of the institutions in the Criminal Justice System.

You know, we are able to identify quite clearly the decline of those institutions from the nature of the leadership that was appointed.

And that leadership was appointed, was able to be appointed because of the particular form that the process or lack of process governing the appointments of these critical leadership positions.

In fact, in several of the key leadership position, not least of all, the Head of the National Prosecuting
10 Authority and the Head of the South African Police Service, the President has an absolutely unvetted power to appoint those leaders. He need not even consult with anybody and I am not sure that in some cases you know presidents ever have.

And that was – I mean, the report is a very extensive report on the Criminal Justice System but as I say, it identifies the appointment of leadership as the key element enabling the capture of those critical agencies.

ADV FREUND SC: And then what you do in the present
20 report, building on that, is to address the question of the role that has been or should be played by Parliament in bringing about a better appointment process, both as a matter of procedure, as a matter of substance. Is that correct?

MR LEWIS: Yes, yes. And our remarks, you know, in

many instances may apply to the manner in which those leaders who are, whose appointment is the responsibility in Parliament as well as those leaders whose responsibility is not the appointment of Parliament.

ADV FREUND SC: Yes, indeed. And you referred a moment ago to the fact that in this report you list a number of appointments what Parliament does by existing statute play a role. That we find at the foot of page 970. Is that correct?

10 **MR LEWIS:** Yes, that is right.

ADV FREUND SC: And perhaps if you can just highlight the principle institutions because not everybody has access to your report.

MR LEWIS: They are mostly, not entirely, the Chapter 9 Institutions. So it is the:

- Public Protector
- The Auditor-General
- The South African Human Rights Commission
- 20 - The Commission on Gender Equality
- The Commission of the Promotion
- And the Protection of the Rights of Culture, Religious and Linguistic Communities
- The Independence Electoral Commission
- The Inspector-General of Intelligence

- The Independent Police Investigating Directorate.

And that is to approving the minister of...

[distortion in transmission – speaker unclear.]

ADV FREUND SC: In relation to those institutions or persons, existing legislation confers on Parliament a role. And you deal in this report on how that has been done and how it should be done.

But you have also just made the point that some of
10 the principles that you are now referring to ought to be extended beyond the appointments already – which Parliament has already mandated to make.

MR LEWIS: Yes, that is right.

ADV FREUND SC: And I am going to leave it to you, as it were, guide me in how you think better we should present this but it seems to be that a useful point of departure is your experience in respect of the 2016 appointment of the Public Protector. Would you agree that is a convenient way to illustrate?

20 **MR LEWIS:** Yes.

ADV FREUND SC: As it were, the positives and the negatives?

MR LEWIS: Yes, yes, yes.

ADV FREUND SC: So perhaps you should explain. What was the practise prior to 2016? And then, what happened

in 2016 in relation to the appointment of the Public Protector, the selection process in that particular year.

MR LEWIS: Yes, it may be – it may be an idea to tell you what our objective was in 2016 and that by way of contrast with the manner in which appointments were made or parliamentary appointments were made prior to this.

The appointment of the Public Protector was our first significant in this area of Parliament's duties and functions. It was the end of the Public Protector Thuli
10 Madonsela's terms of office, non-renewable term of office.

She or her office had for reasons that I guess are obvious been a tremendous support for organisations like ourselves during her tenure.

And we were concerned about who the next Public Protector was going to be. So we determined to engage with the process.

And there were three objectives in doing so. The first was to create public awareness around the appointment process through a mass media campaign
20 which we did.

We invested considerable resources in profiling, in raising the profile on the appointment of a new Public Protector.

And secondly, it is was our aim and our intention to create avenues for public participation in the

proceeding.

In the previous – in the appointment of Professor Madonsela, there was to our knowledge hardly any public involvement in the process.

The office at that stage was little know and it was obviously much a much higher profile now and for us to encourage public participation and it would have been seven years prior to that.

And thirdly, to ensure that the process was
10 transparent. You know, in a world of anticorruption NGO's the principle method of combating corruption if you like.

And the engaging public participation is to advocate for and secure the transparency of those processes. And those were our three objectives.

And in order to meet those objectives, we engaged extensively with the Ad-hoc Committee that was appointed and made responsible for this appointment.

And we secured the considerable names if you like. You know, I think somewhat lacking in the choice, in
20 Parliament's choice and the chair of that committee. It was an ANC MP who was, I think, appeared before you, Makhosi Khoza.

And this was, you know, an unusually confident and large personality who did not seem to take orders from anybody without evaluating the quality of the audience. So

she was open to our participation.

And so we secured a number of advances that have never been made before. They included the publication on Parliament's website on the CV's of the candidates who applied who were nominated to the position of Public Protector.

They allowed public comment on the – or objections to the candidate and these public comments were furnished to the committee when interviewing
10 candidates who were taken into consideration.

We made publicly available the questionnaires that were completed by shortlisted candidates.

The committee agreed to provide Corruption Watch with the identity numbers of candidates and the organisation could conduct financial and security vetting, the result of which were provided to the committee and used to scrutinise candidates in the interview process.

And we persuaded the committee to agree to ensure that the interview process was televised. So, you
20 know, we were – you know, we were very pleased that – at the willingness shown by the committee to – by the chair certainly to deal with this.

And these gains now reflected in future appointments, for example, in all future appointments of this sort without necessarily our intervention, the CV's of

candidates be put up on the parliamentary website and time has been set aside in the appointment process for public comment.

So you know this was – this represented a great and unusual gain for us in securing greater transparency and greater public participation. And you know, so it represented a significant gain.

Unfortunately, in this particular process, we – the gains ended at that point and particularly the short listing
10 process and the interviewing process, I think, were responsible for less than optimal outcome.

That they were conducted in a manner that would have been alien in both fairness, good order, transparency to the appointment of the loneliest employee in almost any private or public enterprise or institution.

The short listing process was an exercise in complete chaos. After all this vetting and questioning and questionnaires and the like, the short listing process was simply done by way of saying who do you – to the
20 committee – who – by the chair, who do you want from the shortlist.

And various parties would put their favourite candidates on the shortlist without ever providing any reasons why X or Mr X or Ms Y should go onto the shortlist.

It was just a matter of calling out names, so much so that, you know, certain names got onto the shortlist who did not even technically qualify according to the given criteria for being on the shortlist.

And the same lack of order and chaos followed in the interviewing process. For some reason or another it was decided that all interviews had to be conducted consecutively and that there could not be a break in the interview process.

10 And so the interview with started at eight on a given morning. They concluded at two the following morning where the last candidate was interviewed.

They know very well who would be the best candidate but by then, you know, nobody was in a position to judge. The candidate was certainly not in a position to give it. But the interview process, there was no right interview process.

 And candidates were asked – were not asked candid questions. Some were asked if they supported land
20 expropriation without compensation. Others were not asked this.

The whole process was highly, highly politicised. And so, you know, it produced the outcome it produced. I mean, under no circumstances could this produce best possible outcome except by sheer luck. And so I came

away from that process determined to think further about appointment processes both in parliament and those beyond parliament that would rectify this unfortunate situation because these were incredibly important decisions that were being made. And as, you know, you raised earlier in the questions that you proposed, you know, we were firmly convinced by that stage that the most important role that the President, in particularly the selections that he was responsible for, that an institution
10 like parliament played in the whole process of state capture was in the very identity of people who were appointed to lead critical institutions whether, you know, whether by direct will and purpose or by accident, many of these appointments were not qualified either by virtue of their technical competence or their record of integrity and honesty to lead the institutions that they were appointed to lead.

So we came, as I say, urgently wanting to think deeply about appointment processes and engage ourselves
20 in them and we have done that ever since. In the parliament sphere the most important that we have engaged with have been those of the independent police, investigating directorate and of the auditor general and those too were very distinct experiences.

MR FREUND SC: Well, before we deal with those factual experiences, I think it would be as well to focus on the assessment that you make. I am looking at page 972 of the bundle. Having described the gains as regards inclusivity and some measure of transparency you say in the middle of the page:

“However, the lack of a robust process to scrutinise candidates using merit based and objective criteria gave rise to certain consequences.”

10 So perhaps if you could just focus on this question of criteria and the need for criteria in appointment processes generally and these particular appointment processes in particular.

MR LEWIS: Yes, you know, that partly goes to an earlier remark I made about there being no consistent questions that were posed to the candidate and if you look at the – even just the candidates for parliament you see that there is a real, you know – forgive the analogy a real dog’s breakfast of criteria that are presented there. I mean, I
20 cannot remember exactly which these apply to but I know that in one case a qualifying criteria is employment experience in the public sector. In the case of another candidate a disqualifying criteria is employment in the public service, so there are no standardised criteria and I accept, you know, there would be different obviously

technical criteria from becoming the auditor general or the head of the IEC but particularly lacking or any indicators of, as I say, integrity and honesty and service, public and community service, so there is no criteria.

If you want to take that broader, you know, and old hoary war story of these is that to become – the criteria for becoming a constable in the South African Police Service are infinitely more extensive and more rigorous than becoming the Commissioner of the South African Police
10 Service.

So there are no standardised criteria and there are missing in many of the appointments a lack of pretty, you know, one would have thought self-evident criteria that the candidate needs to meet. I think in the case of the SAPS Commissioner, the only criteria to be 18 years of age and to be a South African citizen, I do not think that the SAPS Act specifies any other criteria at all and so this is what, you know, in the recommendations that we make, merit based and objective criteria are amongst the most
20 important and they apply – they are not, you know, rocket science, this would be pretty standard human resource practice but it does not seem to apply to – and that applies across a lot of the public service, it does not apply to these – seemingly to these high level appointments with any degree of consistency.

MR FREUND SC: Now I am going to come back to that because as you say, when you come to your recommendations that is pretty fundamental to it, but I just interrupted you when you were in transition between your experienced apropos of a particular appointment of a Public Protector and your experience in 2019 on the process to decide whether or not to renew the term of office of the Director of Independent Policing Investigative Directorate commonly referred to as IPID so perhaps you
10 would like to pick up the thread at that point.

MR LEWIS: Ja. You know, IPID again, an institution that is very important for the realisation of our mission. Obviously the police are incredibly important actors, potentially, at any rate, in combat and corruption and corruption within the ranks of the police is very extensive, certainly judging by the volume of reports that we receive in this regard. So we have engaged, you know, pretty extensively with the police portfolio committee both on policy matters and on matters of appointment and the
20 important appointment that came up arose when the term of office of the then head of IPID, Robert McBride, came to an end but unlike in the case of the Public Protector he was eligible, rightly or wrongly, from a – not sure what the term is, from the point of view of ensuring some integrity of a second term of office. He was – I am not sure that it

would necessarily pass constitutional muster but anyway, he came up – his term came up for renewal, we did not have a, you know, an overwhelmingly strong view on whether he should be renewed or not although we thought that he had done a job, a piece of work worth evaluating under any circumstances. The committee in this – this is an unusual appointment process in that the Minister of Police makes the appointment subject to the approval of the committee, the Minister of Police has to put his
10 selection to the committee both for appointment and for renewal of appointment to the portfolio committee and there we discovered that there had been no assessment made of the – I think seven, or was it five? Excuse me, I speak under correction here, whose five year term of office that McBride had already served. The committee had during that five years met with him 43 times so we thought that they were in a very privileged position, if you like, to be able to assess his character and his performance but the minister was having none of it. The minister and the
20 committee were having none of it.

The minister decided that he was not to be reappointed and the committee without really receiving reasons from the minister, without questioning the minister, simply accepted the minister's decision, you know, which goes to some of the earlier issues you were traversing today with

some of the other witnesses regarding the subservience of some committees and some committee chairs to their sort of executive counterparts and this to us seemed like a particularly blatant example of total subservience because, you know, here you have an important appointment, admittedly a controversial candidate, but you know, somebody who many thought had done a robust job and who, above all, had been independent in executing his job and who we felt at least should have had the courtesy of
10 being heard and being examined and being assessed in an objective manner.

In fact there was no assessment, there was no hearing, there was simply a ministerial decision made extremely late in the day and that was that. I contrasted markedly on the other hand with our more recent experience which is not in this affidavit and I do not know if that precludes me from referring ...[intervenes]

MR FREUND SC: Please go ahead.

MR LEWIS: The experience that we had with the
20 appointment of the new auditor general. You know, this is again an incredibly important experience from the point of view – appointment from the point of view of combating corruption and maladministration.

And there we found, you know, very active parliamentary – little team of parliament researchers for

the committee that did the appointment, a committee that took its task and the committee chairperson that took its task very seriously. We made a series of recommendations which we possibly should have annexed to this affidavit and I am happy to share with you. We, in correspondence with the committee, made a series of recommendations as to transparency, public participation. They received the recommendation.

They even called for a – they even commissioned or
10 briefed counsel on the quality, if you like of our submissions to them, but – and in fact, you know, we were delighted that the response that came back from the counsel, who was briefed, was that our advice and our proposals to the committee accorded perfectly with the constitutional requirements for fairness and transparency and these were the principles and the practices that the committee adopted in making its appointment and I have to say by luck or otherwise, but I prefer to think by virtue of the process that was followed, an excellent candidate was
20 appointed and this office is secure.

And so, you know, Deputy Chief Justice I think raised, you know, earlier in some of the submissions was this a function of personality or a process and it is a difficult thing to answer and I think the answer that you were given, I cannot remember by whom at the time, was I

think ...[intervenes]

CHAIRPERSON: It is a combination of both, I think.

MR LEWIS: Yes, I think it is a combination of two ...[intervenes]

CHAIRPERSON: A combination of both, ja.

MR LEWIS: You know and so, you know, you have just, I suppose, win some and lose some, but you could eradicate the uncertainty by, you know, providing for standardised processes and to some degree standardise criteria was
10 obviously – the smoke criteria built-in given the technical nature of the job that is on offer or is under consideration and that could eliminate some of the sort of lottery-like character of who you were going to get out of these processes, both the parliamentary processes and the external processes.

And then just to conclude this by saying that we were particularly cheered and encouraged by the manner in which the President chose to make the appointments of the heads of the NPA and the South African Police Service
20 because there, as I pointed earlier, he has an absolute unfettered discretion to do that on his own but he chose not to do that, he chose to appoint in each instances committees of people with expertise in policing and prosecuting and lawyering generally and these people constituted, you know, an advisory recommendation to him

but they did an interviewing process, they developed criteria for doing the interviewing and then made their recommendation to the President, so nobody challenged, you know, and whether it should be or should not be challenged is an interesting question, the President's sole rights to actually make the appointment but they did – but the process that he followed did provide him with the kind of necessary intelligence information and consideration to actually make a rational appointment, similarly, you know, 10 in the work that we have done with parliament, we are not necessarily saying that, you know, we may want to say that parliament's role should be removed in actually making in the National Assembly actually making the decision on the basis of the recommendation if you see it in the parliamentary committee but there has got to be a rational process to do so and I am pleased that we are able to say that in the process that has been decided on to – on whether or not to remove the current Public Protector from office, the Speaker has set up a similar process where 20 experts are – a small expert committee has been set up in order to determine in the first instance whether there are – whether the grounds for removal have been met and this committee will advise the parliamentary committee, this committee of experts will advise the parliamentary committee on whether the grounds exist and the parliament

committee will then be the decision-maker. But, as I say, again, as in the case of the President's decision regarding the appointment of the heads of the NPA and SAPS, some group of experts have been invited to consider the question and advise them that assist the committee in the incredibly important decision that it makes.

MR FREUND SC: Now, Mr Lewis, you also refer in your report to the recent inquiry headed by Judge Robert Nugent.

10 **MR LEWIS:** Yes.

MR FREUND SC: On the question of the appointment of the Commissioner of the South African Revenue Service and really it is to the same effect, is it not, as what you are now asserting.

MR LEWIS: In fact thank you for that because it was not the head of SAPS, it was head of SARS that the President appointed the other committee. Yes, you know, Judge Nugent's advice in his recommendation in his Commission report, you know, supports both, you know, what we would
20 like to see and it also, I should add, certainly in the case of the head of the NPA, who he was not dealing with here, supports the advice of the recommendation of the national development plan where, you know, it said you set up the panel of experts, a multi-stakeholder committee, so they are not only, you know, technical experts, but people with,

you know, expertise in policy-making in civil society arguably and these are the appropriate forms of making these appointments. I think there is a big question about, you know, whether – Judge Nugent advocates a very strong de-politicisation of the process.

There is a question over whether any form of politics should be able to intrude into the process. I mean, we have been – maybe because we do not have direct experience of this and we are not experts in this, we have
10 been struck by the Judicial Services Commission process of the appointment of judges. It seems to come closest to what we want because there is certainly more than a degree of politics in that process, I mean, I think that there is something like – I speak under correction but eight or ten members of parliament involved in that process.

CHAIRPERSON: I think the majority are politicians, if I am not mistaken.

MR LEWIS: Yes.

CHAIRPERSON: Ja.

20 **MR LEWIS:** And a minister involved in that process but there are also – you know, there is also the Chief Justice and her Judge President and some heavy hitting senior counsel involved in it and I would imagine that they get heard, if you like.

So, you know, that seems to us to be a role model

worthy of consideration but so do the remarks of Judge Nugent or his recommendations, so do the recommendations of the national development plan with respect to the NPA and so do I say, with respect, does our own experience bear consideration because the system or systems at the moment are not producing the desired results with catastrophic consequences in some instances.

MR FREUND SC: Mr Lewis, you have laid a strong foundation but I would like to take you to your
10 recommendations which we find at 976 and following in the bundle and if I could maybe make this observation that your evidence and experience suggests that sometimes things work reasonably well and sometimes they do not, without intervention, yet you are proposing here that this Commission should intervene in the sense of making certain recommendations and so the question remains why? Why should we not just be happy with things as they are?

MR LEWIS: Well, you know, firstly I do not think that one
20 should be happy with a sort of win some, lose some consideration when one can remove at least some of the uncertainty from that. I mean, selection processes and I am sure, you know, all of us have been involved in them are never perfect processes and they often do not produce perfect outcomes with the best processes in the world but I

think they should be given a chance and, you know, the recommendations here I think, again with respect, give them the best possible chance.

And then I think because, you know, this Commission dealing with how to ensure, best ensure that state capture does not happen again are I am sure bound to make recommendations as to how that can be prevented and because of the clear importance – and I am not only talking about the kind of institutions mentioned here, I am
10 talking of the heads of state owned enterprises, the boards of state owned enterprises, the heads of these institution and I cannot say this strongly enough, were absolutely instrumental in the capture of the state and I would go further and say that the most important – I think I have said this already – most important role that the President played in securing state capture lay in his powers of appointments and his influence over other appointments, people who were appointed manifestly to secure access to procurement budgets, people who were appointed
20 manifestly to secure access to the regulatory systems in the mining sector, people who were appointed manifestly to ensure a compliant law enforcement or criminal justice system rather than a robust and independent criminal justice system.

So that is why I think the Commission should

concern itself with this question.

MR FREUND SC: Well, against that background would you just take us through the five principle recommendations which you make at pages ...[intervenes]

CHAIRPERSON: Just one second, Mr Freund, just one second. I just want to say, Mr Lewis, those matters that you have just mentioned, the appointments of certain people to certain entities within the state are really very important matters when one considers what seems to have
10 happened in terms of the evidence that the Commission has heard and they are going to be very important in terms of the recommendations that the Commission should make in order to try and ensure that measures will be put in place to try and prevent a recurrence of what seems to have happened. So you are right to emphasise that the Commission should pay special attention to how certain appointments seem to have been made with a view to facilitating wrongdoing and how the appointment processes should be looked at in regard to SOEs and other entities,
20 maybe to try and make sure that prospects that something similar could happen in the future are minimised. So those are really important issues, we are keeping our focus on as well. So I just thought I would mention that I think you are spot on in saying they deserve special attention.

MR LEWIS: Thank you, Chair, that is very encouraging. Do you want me to go through these recommendations?

MR FREUND SC: I think you should not least because many people who will be listening or watching will not have an opportunity to have read this, so we need to just place on record the gist of what you are proposing.

MR LEWIS: Ja, we make five recommendations here. You know, the first is to review the legislation and it would be quite a lot of legislation, to review the legislation that provides guidance on fair and objective appointment processes. You know, at the moment there is no single piece of legislation that governs the appointment of senior officials, it is spread throughout the legislation. You know, I am not sure from a governance point of view whether there are good arguments to saying there should be single piece of legislation that governs all of this but - or whether this standardised thing should be repeated through – those requirements should be repeated through various statutes that provide for the appointment of particular posts, but requirements were impartial, effective and transparent processes that are set in law with prescribed criteria which candidates must adhere to can lead to fair appointments and appropriate and competent leaders, that can assist in protecting institutions from political interference without adequate laws such as in the

case of the IPID, appointments can legally happen, unilaterally with very few avenues for accountability. So, you know as we recounted in the Police Committee experience, the Minister made the decision and the – provided no reasons for it and the Committee simply rubber stamped it.

Secondly to develop a multi stakeholder structure to oversee the appointments, proceedings – I'm not sure that oversee is the right word there, to effectively, make the
10 appointments, to be the selection Committees in these instances and these – the models that we suggested there are the JSE, the selection committees established by the President to appoint the SARS – in a recent appointment, relatively recent appointment of the SARS Commissioner and the NDBP as well as the recent proposal by Parliament to institute an independent panel comprised of legal experts to consider whether there is a *prima facie* case to remove the current Public Protector. Those and our
20 experience of the Auditor General appointment, seemed to us to be the kind of role models that we should follow, each of which involve expert stakeholders appropriate to the appointment that is being made.

Secondly, where Parliament had, indeed – I don't - other processes are utilised to ensure that all Parliamentary succession selection processes are

transparent and open and in, you know, what we have said here is that transparency should involve widely publishing the advertisement for the available position. Publishing both the long lists and short lists of candidates as well as any supporting information provided by candidates. Sharing the budgets and expenditure related to appointments and ensuring that interviews and deliberation processes are open and accessible to the public. Again, it seems to me, that the JSE is a good role model in this regard. Fourthly the candidates must be tested for integrity and ethics as well as their skills and expertise using clear merit based and objective criteria. There are well tested HR methods for testing for things like integrity, elusive as these may seem but they are well tried and tested mechanisms for doing so and how one can appoint the head of some of these institutions without integrity testing really boggles the mind but there should be proper screening of candidates. Adequate vetting based on the objective criteria of which ethical conduct in the past is paramount. So, that's the fourth recommendation and then fifthly to ensure that the principle, the public participation is a virtual tenant in Parliamentary appointment processes. This would allow for the public as well as for employees in the various oversight institutions where the appointments are being made, to be appraised of the ability as in

characteristics that the new appointee should bring to the job.

In the Public Protector case, one of the things that we did, was to send around a questionnaire to every employee in the Public Protector Service to ask them, what they think should be the qualities that should be foregrounded in the selection of the Public Protector and it produced really interesting results, interesting outcomes, managerial skills and quality were favoured by some, integrity was favoured by others, some wanted only judges or former judges to qualify for – to be head of the Public Protector but they were informative and as I say, cost nothing, to ask of people who'd actually worked in the Public Protector's office, who were working in the Public Protector's office, what sort of head they would like to see. So, we would really like to, you know, as one of the recommendations that we make is to ensure that opportunities for public participation really be maximised because they do not always produce the results that you imagine that they might produce, and they do provide for much greater legitimacy at the end of the appointment processes. So those were the appointments that – those were the recommendations that we made. As I say, we have not made a recommendation as to whether we think Parliament should be a decision maker or the President

should make be a decision maker, you know, that maybe should be debated and considered, I'm not sure but to my mind what is paramount is that whoever the decision maker is, should be informed by a public participation process by expertise by integrity testing and that seems to me, whether it's Parliament of the President who makes the final decision, they should be informed by a process that allows for an informed, intelligent, rational decision to be made.

10 **ADV FREUND SC:** Thank you, Mr Lewis, I have no further questions.

CHAIRPERSON: Well, Mr Lewis, I think the recommendations that you make, that you have just dealt with now, seem to cover the important pillars as I would call them that need to be looked at, if one wishes to improve the quality of the candidates who get appointed to some of the institutions, I means, speaking within the context of SOE's, I certainly have been thinking that it's going to be important to look at the kind of criteria that
20 should be looked at in selecting people who will be considered as members of Boards of SOE's. So, one talks about the criteria, what criteria they must meet and then apart from that, you need to look at the process or appointment, what type of process should it be and what should it be, it's main features and transparency becomes

an important feature, should be an important feature of that process and then there's the question of, who should make the appointment within the context of the SOE's if one talks about the SOE's which have featured, prominently in the investigation of the Commission, one talks about appointments that have been made by politicians and if one looks at the SOE's that the Commission has been looking at. If that is anything to go by, the politicians have, to a very large extent, done a very

10 bad job in terms of appointments but maybe that is because the processes that were in place were not processes that enabled or promoted quality appointments. Obviously, at least in some case, one would imagine there would be politicians, or at least some of them wouldn't have, deliberately, wanted to appointment – make wrong appointments but there's a suggestion in the evidence – or the evidence does suggest that there may be case, and there may be a number of them where the appointments were made in order to facilitate wrongdoing. So your

20 recommendations seem to talk to all of those pillars that I'm talking about, the criteria that must be met by candidates, the processes that must be followed before those candidates are appointed and the question of who should make the appointments and you said that, in regard to who should make the appointments you have not put up

any strong recommendations but it may well be that if, for example, a politician is going to make the decision there should be a body prior to the politician making that decision, that appointment, which makes a recommendation and the politician is not, at large to go against that recommendation. So, one may have to look at matters such as that, I don't know whether you want to say anything about that kind of scenario, for example. Namely not just leaving it at saying it might not matter who makes
10 the appointment as long as – the appointments as long as they make informed decisions but saying well, maybe somebody must make a recommendation and somebody else must make a decision but the one who makes the decision should not, lightly, go against the recommendation. Have you got something to say about that Mr Lewis?

MR LEWIS: You know, my understanding, Chair, is that – it that in the case of the appointment of the Boards of SOE's, these are largely made by way of a Minister, the
20 Minister responsible for the SOE making recommendations to Cabinet which are rarely rejected although I think sometimes are really questioned although maybe sometimes are and I think, in the case of SOE's there is a very good argument with setting up a structure that filters candidates for Board membership and that makes

recommendations to the Minister. Whether the Minister should be given absolutely no discretion or not, I don't know, I think probably you'd prefer a situation like the JSE again where more recommendations are made than positions that are available to give the Minister some discretions but it's absolutely vital in the case of SOE's that this be done, you know, I'm not of the school that believes that you have to be an expert, sort of, Electrical Engineer to be on the Board of Eskom or a Transport
10 Economist to be on the Board of Transnet but you've got to have some people who know about how – about energy and you've got to know some people who you know about finance and then you've got to just have some people who are honest, smart, experienced people in governing huge and complex institutions, who maybe have no particular technical expertise to appoint.

So, you need to have an intelligent view of what mix of skills do you need on a Boards of these incredibly complex institutions and they are more complex institutions
20 than private sector Boards because you have the real difficulty of having to balance the public interest together with commercial and financial sustainability and this is a very, very complex, difficult mix to manage and so you need people with very special skills. You need people with skills in Development Economics or Development work but

there should be a Committee that is able to assess the suitability of candidates for this work and you could even work up a pool of suitable candidates from whom choices could be made when the need arises. They needn't only be – the suitable candidates need not only be identified when the time comes to appoint a Board.

So, I think this is a very important consideration because, definitely, in the case of some of the SOE's and the State Capture stories that have come out of it, there
10 was a mixture of, if you like, bad faith and incompetence. You know, people who just served on Boards that they had no particular competence to serve on, they may have been people, very competent in other spheres of life but to go onto the Boards of one of these massive organisations without some particular skill, and as I say, it needn't necessarily be a technical skill that you bring to the party, is a recipe for disaster.

CHAIRPERSON: Well, I heard evidence in regard to one of the SOE's that when a certain Board that was said to
20 have done extremely well during its term and the Minister had spoken in high praise of the Board but then – and there had been talk that it's term would be extended the way they were doing well but then, suddenly a decision was taken not to extend their term and they were all allowed to go except, I think I was told, to one member just

for continuity but the one member who – of the Board who was retained was said, in the evidence before me, to be a member who had been very quiet throughout the previous term so that's what was said. Okay, alright, thank you. Mr Freund did you say you are done, you have no further questions?

ADV FREUND SC: I have no further questions Chair.

CHAIRPERSON: Okay, alright, thank you very much Mr Lewis for coming to assist us, we appreciate it, and you
10 are now excused.

MR LEWIS: Thank you and thank you for the opportunity to make these submissions to you Mr Chair.

CHAIRPERSON: Thank you, Mr Freund?

ADV FREUND SC: Chair, I believe you're quite possibly under considerable time constraints, Ms Rault-Smith, I see is still with us, I would be only too happy to go back and try and lead her evidence, but I don't know if you have other commitments?

CHAIRPERSON: I don't see the next team for the evening
20 session as yet, so I think let's start with Ms Rault-Smith and see how we go, what's your estimate of how long she might be?

ADV FREUND SC: I would have thought an hour.

CHAIRPERSON: Ja, okay, alright. I think, let's just take five minutes adjournment, ten minutes adjournment – ten

minutes adjournment not five and then we'll resume and then let's continue with her, we adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Are you ready Mr Freund?

ADV FREUND SC: Yes, Chair. And it seems that we have good connection. Now Chair, you will recall that we interposed because of connection issues. We had
10 commenced the evidence under affirmation of Ms Rault-Smith. Her evidence is in Exhibit ZZ-8.

CHAIRPERSON: Yes.

ADV FREUND SC: Which is on pages 754 and following.

CHAIRPERSON: Can you just repeat the file? I just want to see whether it is the same one I have or is another bundle.

ADV FREUND SC: Bundle 2 which you would have had before but it would not been the same bundle as Mr Lewis.

CHAIRPERSON: Okay.

20 **ADV FREUND SC:** ZZ-8, it starts from page 754.

CHAIRPERSON: Okay I have got it.

ADV FREUND SC: Thank you Chair.

CHAIRPERSON: Miss ...[intervenes]

ADV FREUND SC: And Chair, you will recall that at the moment we were interrupted, I had taken the witness

through the existence of three reports that she had compiled.

I had taken her through two confirmatory that were in good order but I had taken her through a third confirmatory that had an error in it.

And the witness had said that she will attend with the assistance of the Commission, no doubt, to a short subsequent affidavit to rectify the error so as to make clear that was intended to be annexed was the parliamentary
10 oversight report and not the PRASA report as it is stated in error.

CHAIRPERSON: H'm.

ADV FREUND SC: It was in those circumstances that I was in the process of asking you Chair provisionally and subject to that further confirmatory being received ...[intervenes]

CHAIRPERSON: H'm.

ADV FREUND SC: ...to admit into the bundle as Exhibit ZZ-8 the three affidavits and their annexures.

20 **CHAIRPERSON:** Are they each standalone affidavits in the sense that they are not ...[intervenes]

ADV FREUND SC: They... So the first point starts at 755.

CHAIRPERSON: Ja?

ADV FREUND SC: And goes through to 825.

CHAIRPERSON: Yes.

ADV FREUND SC: And there are, as far as I am aware, no difficulties with that one.

CHAIRPERSON: Okay it goes to eight.. 762 and then their annexures, is that right?

ADV FREUND SC: With annexures it goes up to 825.

CHAIRPERSON: Ja.

ADV FREUND SC: 755 to 825 is the first one.

CHAIRPERSON: And this should be Exhibit ZZ?

ADV FREUND SC: ZZ-8.1.

10 **CHAIRPERSON:** 8.1. The affidavit of Ms Jennifer Phyllis Rault-Smith which starts at 875 is admitted together with its annexures and would be marked as Exhibit ZZ-8.1. Okay.

AFFIDAVIT WITH ANNEXURES OF JENNIFER PHYLLIS RAULT-SMITH STARTING AT PAGE 875 IS ADMITTED AND MARKED AS EXHIBIT ZZ-8.1

ADV FREUND SC: Thank you Chair. Then similarly, from page 825 through to page 875 to be admitted as Annexure ZZ-8.2.

20 **CHAIRPERSON:** The affidavit of Ms Jennifer Phyllis Rault-Smith starting at page 825 together with its annexures is admitted and will be marked as Exhibit ZZ-8.2.

AFFIDAVIT WITH ANNEXURES OF JENNIFER PHYLLIS RAULT-SMITH STARTING AT PAGE 825 IS ADMITTED

AND MARKED AS EXHIBIT ZZ-8.2

ADV FREUND SC: Thank you Chair. And then Chair the third one is from 876 through to 899. That is the one where I have indicated to you that there is a mistake in the confirmatory which needs to be sorted out.

It has been sorted out by the evidence under affirmation by the witness to you this afternoon. And really, what it does is that it points out that the annexure that was intended to be referred to in the affidavit or that
10 the affidavit refers to the wrong annexure.

CHAIRPERSON: Yes.

ADV FREUND SC: It says it is incorporating the PRASA Report when it is meant to be incorporating the report on parliamentary oversight.

CHAIRPERSON: H'm.

ADV FREUND SC: But notwithstanding that, my submission is that there is no reason why you should not admit as Exhibit ZZ-8.3 the affidavit at 876 through to 899 as an exhibit before the Commission.

20 **CHAIRPERSON:** I am just thinking whether it is enough to do it that way or whether it is better or her – simply give her oral evidence without referring to this confirmatory affidavit and dealing with the correct report.

And then afterwards, the correct confirmatory affidavit can be put in together with the correct report. And

in the confirmatory affidavit, what happened today can just be indicated that she gave evidence without referring to this affidavit.

This is what has happened but this is what should have been put in and it is now been put in.

ADV FREUND SC: Yes. Judge, that will certainly be in order from our perspective.

CHAIRPERSON: Yes.

ADV FREUND SC: But the implicating, if I understand you
10 correctly, is the actual report which is the report that starts at page 883.

CHAIRPERSON: Ja.

ADV FREUND SC: It runs through to 899, will be referred to by the witness.

CHAIRPERSON: Yes.

ADV FREUND SC: And therefore should be admitted as an exhibit.

CHAIRPERSON: Yes, yes, yes, yes.

ADV FREUND SC: So I will then ask you to admit by
20 whatever number you think appropriate but perhaps it would be 8.3(a), the exhibit that runs from pages 883 through to 899.

CHAIRPERSON: Yes. You say this will be exhibit...?

ADV FREUND SC: 8.3(a).

CHAIRPERSON: Starting with ZZ or not?

ADV FREUND SC: ZZ, yes. Sorry, ZZ.

CHAIRPERSON: Ja.

ADV FREUND SC: ZZ-8.3(a) and it is to be found in Bundle 2 from page 883 and following.

CHAIRPERSON: Yes. The report starting at page 883 is admitted as an exhibit and will be marked as Exhibit ZZ-8.3(a). Is that right?

ADV FREUND SC: As you please.

CHAIRPERSON: Ja.

10 **ADV FREUND SC:** Thank you Chair.

REPORT STARTING AT PAGE 883 AS PART OF THE WITNESS, JENNIFER PHYLLIS RAULT-SMITH'S AFFIDAVITS IS SUBMITTED AND MARKED AS EXHIBIT ZZ-8.3(A)

CHAIRPERSON: Okay alright.

ADV FREUND SC: Thank you Chair. Now Ms Rault-Smith, can I now take you back to the first of those affidavits, starting from page 755?

MS RAULT-SMITH: Yes.

20 **CHAIRPERSON:** Let us check that you can hear. The last time you – there was a problem. Can you see me and can you hear me well?

MS RAULT-SMITH: Yes, thank you Chair I can.

CHAIRPERSON: Ja, I can hear you quite well as well. So the oath or affirmation that took earlier on continues to

apply, okay?

MS RAULT-SMITH: Thank you.

JENNIFER PHYLLIS RAULT-SMITH: (still affirmed)

CHAIRPERSON: Alright. Mr Freund.

EXAMINATION BY ADV FREUND SC (CONTINUES):

Thank you Chair. If you go please to Bundle 2, page 755.

That is the first page of your first affidavit.

MS RAULT-SMITH: [No audible reply]

ADV FREUND SC: And you will recall that this is the
10 affidavit that annexes the report that you did on BOSASA.

MS RAULT-SMITH: Right.

ADV FREUND SC: Now what I would like you to do is just
with reference with what you say in paragraphs 4 through
to 10 of your affidavit. Just summarise very briefly. What
is the Parliamentary Monitoring Group and how does it go
about its business?

MS RAULT-SMITH: Thank you. The Parliamentary
Monitoring Group came into existence in about 1995 when
a number of Ngo's realised that the committee system of
20 the new Parliament is really important.

And it was important for them to observe what
decisions would be taken in the committees. They were
constructing a whole new democratic society but obviously,
with nearly 50 committees, one little NGO was not able to
monitor all of the committees.

And so it was decided by these NGO's, the three of them that got together and I know Prof Calland mentioned also last week.

And they decided to institute an organisation, exactly the same as about 220 others in the world and it is called the Parliamentary Monitoring Group.

So it is not a unique group but it is unique to South Africa. And this group got together, created a very small organisation, maybe half a dozen full time people.

10 In addition to that, the actual people who go and monitor are volunteers who get paid like a stipend and you can apply to go and monitor.

There are processes for and criteria for checking that you are able to do what you have to do. And PMG is very strongly supported by various faculties at the local universities.

And so a lot of our monitors are postgraduate students who are studying Law, International Relations, Political Science and so on.

20 And so by monitoring, not only do they contribute towards this democratic process but they are also extending their own understanding of their field.

So that is how it is set up. And what happens is, you go – you allocate to a committee. You go to the committee, you take an MP3 player, you take audio

recording of the entire meeting and that gets uploaded onto the website.

So at any time anybody can listen to the entire meeting of the audio. So if a recorded tenders to miss something it would still be there in the audio.

Then you take your copy of the recording home, you have made notes, especially who is speaking at you are listening to it, and you write out a slim a report as you possibly can.

10 It is very much like the Hansard but it is in reported speech. And then once you have done that it gets send back to the Parliamentary Monitoring Group.

They do an edit of it and they do a quality control of it and then that gets loaded up onto the website together with all the documentation that was presented at that particular meeting.

ADV FREUND SC: Well, in terms, would record it, report it and the also bring back and make available public to all documents tabled before that particular portfolio committee
20 and all of that in due course is processed on the PMG website.

MS RAULT-SMITH: Yes. The intention to get it all up within three days of a meeting. So the audio recording goes up immediately with all the other documentation.

And it also includes an attendance list of which

parliamentarians were there, who from that committee, maybe the Minister and other people.

So all of that goes up. And basically that is what – there must be about 50 monitors who do that and there are people who drawn from all walks of life.

As I said, there are a large of number of postgraduate students. And on the website, you can access all of this information but there is a subscription fee for business and government departments, simply to
10 help maintain the organisation.

So the subscriptions maintain about a quarter of the operating costs and then there are some who supports democracy that substitutes the rest of the costs.

I think I can say there are reports – I would not call them minutes because there is a special meaning to the word minutes and Parliament does have its own minutes.

But our reports are pretty accurate. They have been used by tens of thousands of people over the past
20 two decades. And we have got a very positive relationship with Parliament. Parliament helps us to access all of those documents if you have difficulty in the committee or something.

So we are actually quite grateful to Parliament for supporting us in a way we try and support Parliament and

democracy.

ADV FREUND SC: And the reason why the service is necessary because Hansard which covers debates on the floor of the National Assembly and presumably the NCOP, does not keep records of portfolio committee meetings and that was the gap that your organisation was essentially founded in order to address. Is that correct?

MS RAULT-SMITH: That is exactly it. Yes.

ADV FREUND SC: Now having regard to yourself
10 personally, if I can refer you to paragraph 15 of your confirmatory affidavit at page 759. You had a distinguished career before you became a monitor.

And really, if you can just explain to the Chair what your background is and that you have experience of dealing with the parliamentary committees, not only as a monitor but as a person reporting to parliamentary committees.

MS RAULT-SMITH: Yes. I started out as an educator in Bonteheuwel. And eventually ended up working for the
20 Department of Education. I worked with Western Cape Department of Education. I was head of matric exams and curriculum.

And obviously, we often got questions or there was a meeting in Parliament and our department had to present and if you were directed upwards then you could have been

chosen to go along to the parliamentary meeting. So I went a number of times.

And specifically when there were questions asked, Parliament... Well, provincial legislature questions, then they would be on exams or they have done incorrectly and then I would have to answer those questions and present them to the DG to the Minister to be able to answer.

And from there, I went up to Pretoria to the National Department of Education and I was a Chief
10 Director for curriculum and some of the assessments there as well.

And exactly the same thing there. I was actually asked to go to Parliament, present sometimes and definitely answer a lot of questions to Parliament.

So I had seen Parliament from the other side and I was very familiar with the workings of the departments. I know exactly how a department works.

So when the course of events left a huge gap in my life. I heard about the Parliamentary Monitoring Group
20 and I decided that – I studied Political Science in my degree. So similar background.

And so then I – it is now been four years that I have been doing it. And then because I was doing two sometimes even three meetings a week and really enjoying, I must say. I learnt a lot.

And then this issue came up. I was asked to write the report, basically, because I understood Parliament quite well. I understood departments and I knew my way around the PMG website which is quite an immense website.

ADV FREUND SC: Right. Now when you say when this issue came up, I think you must be alluding to the fact that I had some... with the senior people within the Parliamentary Monitoring Group and the PMG equipped to
10 assist the Commission and eventually decided, at least in the first instance, to commission two reports.

One on oversight on BOSASA by the Portfolio Committee on Correctional Services and one on oversight by the Portfolio Committee on Transport. And you were requested by the PMG to actually prepare those reports. Is that correct.

MS RAULT-SMITH: That is correct, yes.

ADV FREUND SC: And what you say in your affidavit is essentially this. You went through the massive material in
20 both issues – relevant to both issues and searched through the material of the PMG to find any instances that were relevant to the question of oversight, whether they were good oversight or bad oversight.

You then compiled long and detailed reports as to what actually happened in those portfolio committees we

described and also other portfolio committees and question in The House and so forth.

You trawled through the PMG records in order to prepare these two reports. Would that be correct?

MS RAULT-SMITH: That is correct, yes.

ADV FREUND SC: And let me focus firstly on the report that is annexed to the first affidavit. This is the report on BOSASA. If I can take you to paragraph 16 of your affidavit at page 759.

10 **MS RAULT-SMITH:** Yes.

ADV FREUND SC: You say the following in your affidavit as appear from the initial portion of the report annexed to this affidavit under the heading Scope of this Report:

20 “It is designed to follow the attempts of Parliament through its system of committees to have oversight over the Department of Correctional Services as regards to contract with the BOSA group of companies and the... to policy and acts of Parliament including the Public Finance Management Act”.

So that was really the purpose of the report.

MS RAULT-SMITH: That is correct.

ADV FREUND SC: And then you explained... You explain how the original Portfolio Committee evolved into a slightly different Portfolio Committee and how you followed its

work, how you followed SCOPA, how you looked at The House or questions in The House, how you looked at press reports, how you correlated the press reports with what appeared in these reports of portfolio committees, and that all appears from the text of your report itself. Am I right?

MS RAULT-SMITH: That is correct, yes.

ADV FREUND SC: And then I am not going to take you at all through the substantive content of your BOSASA report but you do make the observation that – this is what you say in paragraph 19 of your affidavit, page 751.

You say - you draw comfort from the fact that Mr James himself, an MP, who attended many of the meetings, has had regard to your report and attended most, if not all of those meetings, and confirmed that he thinks this is a good report that properly summarises the events.

MS RAULT-SMITH: Yes, that is correct.

ADV FREUND SC: I sit correct that you really did virtually the same type of exercise. I am now moving to page 785. Is it the same type of exercise in relation to parliamentary oversight over the Passenger Transport Agency of South Africa, generally known as PRASA?

MS RAULT-SMITH: Yes, that is correct.

ADV FREUND SC: And your report as you we have already mentioned on PRASA, starts at page 832. It is a

lengthy and detailed report but your methodology was precisely the same.

You were looking at the extent of parliamentary oversight in relation to PRASA. You focussed in part or largely on the Transport Portfolio Committee but if the issue came before SCOPA, if the issue gave rise to question in The House, you noted that.

And you deal from and extracted and put into your report the records of the PMG on those incidents and
10 issues. Is that correct?

MS RAULT-SMITH: That is correct. The PRASA report begin with the Fourth Parliament in 2009 because PRASA was only constituted just before that.

ADV FREUND SC: That is correct. And indeed, when it all came about the BOSASA report, it went back earlier than that because in fact the issues of alleged corruption involving the BOSASA group of companies went back earlier.

So you in fact, went right back to the beginning of
20 the essence of the relationship between that department and that portfolio committee and how its understanding of its function evolved.

How it took some time for it to come to the view that it actually was required to look at issues of alleged corruption. And it did address that and you followed the

whole history of that in your report.

MS RAULT-SMITH: Yes, I did. Yes.

ADV FREUND SC: So I do not propose to take you any further on either of those two reports today. I think the documents speaks for themselves.

It is safe perhaps to make the observation again that in paragraph 19 of your affidavit at page 830 you say you draw comfort from the fact that Mr Manny de Freitas, MP, who attended many of the meetings referred to in your report, has confirmed that in his view, the PMG reports are reasonable accurate.

10

And he is going to depose to an affidavit to that effect. He did depose to an affidavit to that effect. And he did testify before the Commission that he thought that the report was a reasonable reflection or to the best of his knowledge of what happened on those issues.

MS RAULT-SMITH: Thank you.

ADV FREUND SC: Now what I would like to take you to in a bit more detail is your third report. And that is the one where I am not going to take you through the affidavit that has the error.

20

But I would like to take you to your report that starts at page 883. And it runs through, so far as I am aware, including its appendixes 899. Is that correct?

MS RAULT-SMITH: Yes.

ADV FREUND SC: Now that report, as I understand it
...[intervenes]

CHAIRPERSON: I am sorry Mr Freund.

ADV FREUND SC: ...actually grew out of your earlier
...[intervenes]

CHAIRPERSON: I am sorry Mr Freund.

ADV FREUND SC: In the process of compiling your
PRASA report, in the process of compiling your BOSASA
report ...[intervenes]

10 **CHAIRPERSON:** I am sorry Mr Freund. I am sorry.
Ms Rault-Smith, was that answer a yes? I think there is
something that Mr Freund asked you about the last page of
your report and the answer was not audible, at least to me.

MS RAULT-SMITH: That is my last page, 900.

CHAIRPERSON: Okay.

MS RAULT-SMITH: But you know that I am a bit wary of
this ...[intervenes]

CHAIRPERSON: Well, my last page is 899 and I suspect
Mr Freund's one is 899. But Mr Freund, is the question
20 that you had asked her and I think it may have been to
confirm that that report goes up to page 899.

So I did not hear answer. That is what I wanted to
confirm but you might wish to ask that question again so
that we know whether we have the same number of pages
or not.

ADV FREUND SC: Well, let me do that a little bit more carefully. Am I correct Ms Rault-Smith that it starts at – the main body of the report starts at 883 and it goes through to 894 before we come to the first annexure?

MS RAULT-SMITH: Uhm ...[intervenes]

ADV FREUND SC: Sorry. Having said that ...[intervenes]

MS RAULT-SMITH: Yes.

ADV FREUND SC: May I was right. Yes, I think I was right because on my copy, the top of 895 is the beginning
10 of Appendix 1. Do you have the same?

MS RAULT-SMITH: Okay. [laughs] This is the one that I had to print out because it was not included. So on the page that says Annexure A, Report by the Parliamentary Monitoring Group on Parliamentary Oversight, for me that is page 884.

ADV FREUND SC: Alright. So I am one page out all the way through.

MS RAULT-SMITH: That is alright. I will follow.

ADV FREUND SC: Because that is your first page, 884
20 the end of Appendix 2, you say, comes to 900 whereas in the records of the Chair and myself it goes to 899.

MS RAULT-SMITH: [No audible reply]

ADV FREUND SC: And that is a consequence of the fact that you live in Cape Town and documents have had to be emailed to you and you have done some pagination

yourself. Is that correct?

MS RAULT-SMITH: Yes. Well, it is printed on here that page but then I did not get a hard copy of it but it is fine. Go with your page numbers. I will – I really have no problem at all.

ADV FREUND SC: Alright.

CHAIRPERSON: Ja, I think it should be possible because it looks like you are one page ahead of us. So Mr Freund, you just mentioned the page numbers are according to
10 what we have and you will know that you have to go one page further. Okay Mr Freund?

ADV FREUND SC: Yes, thank you. Now before I take you to any specific pages. I was asking you a general question and it relates to the original of this third report. And I was putting it to your comment. You can correct me or confirm.

That really what happened is that in the process of compiling your first two reports, the BOSASA report and the PRASA report.

You tend to some sort of more general
20 observations and you also sought a little bit about your experience on other committees beyond those committees.

And you started to think about incorporating into those reports some general observations. And then in discussion with me it was agreed that rather than doing that you would extract that.

And you would make that a separate self-standing report that deals generally with the question of parliamentary oversight and its effectiveness. Is that a fair summary?

MS RAULT-SMITH: That is exactly what happened. I was being very careful because PMG is neutral, none part of and does not take sides and I did not want to say PMG thinks this but it is inevitable that observations will come out. So what I really put in my observations and maybe a
10 comment on the observations.

ADV FREUND SC: Right. And really what I am interested in, placing as evidence before the Chair today, is really some of your observations.

So you deal in this report by way of background, with the material that the Commission is well-familiar with. The legislative background and the rules and so forth.

And what I would like to do is. I would like to take you really from page 885 on my pagination, that is typed page 3 at the foot of the page.

20 And you then start dealing with parliamentary committees and you explain how they are established under the rules and then from page – from the next page, page 886 you start to emerge yourself in the detail of your experience as an observer of portfolio committees. And that is really the meat of what I want to try and – and try to

give on the record this afternoon.

Now in the third paragraph of page 866 of my papers, you talk about the work of each committee in producing a budgetary review and recommendation report known as the ...[indistinct – word cut off]. If you could briefly describe what that is and what a big job that is and how much of the committee's time that takes.

MS RAULT-SMITH: Well, every committee has to produce this, BRRR, in order for the department to get its funding
10 and so what it requires is consideration of the annual plan of the medium term expenditure framework, they had to go through the budgets, they have to look a previous budgets, they have to see what they have spent and they have to draw up this plan and this one of the issues about the committee is when they draw up the BRRR it is their committee, their department. So I am transport and this is my department and I want to make sure they get the most money and so on.

But then, on the other hand, if they get that money
20 and they do not spend it properly then that same committee has got to censure them or at least do some sort of oversight. So really, that BRRR report is an enormous report, a lot of is done by the committee staff and the committee staff basically write most of the reports and then leave the recommendations and the findings to the

committee and the committee then puts that down and that is what goes through as the key part of their report.

MR FREUND SC: So this is intended to enable parliament to make an input on the whole process of budgeting which, of course, has to in due course go to finance and ultimately result in an approved national budget in which an allocation will be made by the department and the committee plays a role in that process through its annual BRRR report.

10 **MS RAULT-SMITH:** That is correct, yes.

MR FREUND SC: Now you make the point in the next paragraph that the most effective power the portfolio committee has, to enforce adherence to legislation and policy lies in not approving the budget of a department and that is a theoretical sanction but it is very drastic and you make the point that it is just – it has never been done although occasionally that [indistinct] 02.21 has been made.

MS RAULT-SMITH: That is correct, it is far too drastic
20 because it basically would close down a department and so at least one, if not more, committees has threatened to do it, but nobody has actually done it because it is really drastic, it means you will not have a Department of Transport or Home Affairs or whatever it happens to be and I think something would have to be very drastic to take that

kind of a step.

MR FREUND SC: Right. And then what you do is you move on, I am looking at the third last paragraph on the same page, you explain the nuts and bolts of monitoring and oversight. You say:

“Despite other mechanisms, committees rely largely on self-reporting by departments or entities as other methods can incur costs and be time-consuming.”

And you now – you deal in some detail with the inherent
10 limitations in oversight which takes place largely by listening to presentations presented by the overseen entity. Would you just like to talk to that briefly?

MS RAULT-SMITH: Well, the department has to come and present this is what we have done for the year, here is my quarterly report, here is my annual report, this is what we have achieved, these are the challenges we faced, but a department is not going to come and self-incriminate. They are not going to come and say oh, we misused some money, or whatever, they will present challenges which
20 would be along the line of we did not get enough budget to be able to meet these targets or we could not fill all of our posts because there was a limit on the number of posts that you are allowed to fill. So those challenges are presented and they are fair, they have got nothing to do with the department but a department will never say we are

in trouble because we did not have internal audit taking control of it and one cannot expect anybody to self-incriminate, I do not think, and that is where the problem comes.

And making it worse is that they tend to present these hugely elaborate reports, PowerPoint presentations, sometimes like over a hundred PowerPoint slides and it is just impossible to get through it and a [indistinct] 4.51 that says that well, this is our mandate and this is the
10 legislation, I mean, things that everybody knows.

So there is time spent on things that are no importance in terms of their achievements or their budget or whatever but they do not actually get to the nitty gritty of this is what is going wrong or this is what – well, I suppose they often say this is what has gone right.

MR FREUND SC: Alright.

CHAIRPERSON: Just let me ask some question about that. It may be that if one is looking at whatever may have gone wrong in a particular department being of a criminal
20 nature and involving the person who must report to a particular portfolio committee it may well be that they might not want to incriminate themselves but I do not see why you would not expect a department, because you seem not to expect them to say that, to say we have not done as well as we should have in the past financial year or in the past

12 months, we had aimed to – we had the following problems at the beginning of the past 12 months, a, b, c, d, we had identified them, these are the measures we put in place to try and get – to address those problems and we were sure that by the end of the 12 month period half of them would have been sorted out or all of them would have been sorted out but we have failed, we admit that we have failed. We have only solved two out of the six major problems we wanted to sort out but we know we have
10 failed. This is why we have failed and because we have identified precisely what it is that made us fail; we now know what to do in the next 12 months to make sure that we are sorted out. So there you have somebody or a department that owns up to its failures but puts in place measures to improve. So why do you not expect them to do that kind of thing?

MS RAULT-SMITH: Chair, you are exactly correct. If I may say, you could be a DG talking. That is exactly what they do do because they have got a number of targets and
20 they will come and say we have met five targets, five we were not able to meet but maybe I am focusing too much on this concept of corruption and things. That they cannot tell. They can say to you we did not have enough to meet this, we did not have enough staff, this did not work out, we – maybe it was a contract that did not work out and

there was an appeal and we had to re-advertise the tender. So there are reasons for that but, you know, to say I have done – this is not finished, that is not completed, I have not met these targets, that is what parliament can deal with perfectly. Parliament can deal with the things that are normal, above board and they do and they say to them well, what do have in place to fix this up? And that works very well but there is more wrong then it is below the table, so to speak.

- 10 **CHAIRPERSON:** Well, of course, I would imagine that what may encourage them not to give parliament full disclosure of what has gone wrong is if they know that chances that parliament is going to find out what they have not disclosed that has gone wrong are minimal then they may be encouraged not to tell parliament.

- 20 But if they knew that the particular portfolio committee exercises proper oversight and even if they do not tell the committee some of the wrong things that have happened, the committee will find out, then they may decide well, we rather be, you know, be candid with the committee because if it finds out on its own then they will say to us why did we not include this in the report and if you are the DG you are going to be in trouble because it would mean you were misleading parliament by hiding something that they should know that has gone wrong in

the department but if they know that it is unlikely that parliament will find out what we have not told them then they would feel quite comfortable not disclosing those things. Would you not agree?

MS RAULT-SMITH: Parliament can find out quite a bit if they read the auditor's report because where parliament cannot go in and check ... [intervenes]

CHAIRPERSON: And what I have been told – and I am sorry, I am interrupting you - from what I have heard it
10 looks like very few members of parliament read the auditor's report or do anything about most of those reports. That is just what I have heard, you know, the auditor general has filed – the late auditor general had prepared an affidavit which he was not able to sign, which we have got here, which suggests that year in, year out the auditor general will send his reports to parliament and there will be no improvement on things that have been pointed out in the previous year's report should be fixed. I interrupted you, I am sorry, but I thought I could not resist when you
20 said they read the AG's reports I remembered that evidence seems to suggest that either not many enough members of parliament read those reports or, if they do read them, not much happens to fix problems that are pointed out in those reports.

MS RAULT-SMITH: Well, if I can say, they do not even

have to read the AG's report because the AG always sends somebody to present it. So the parliamentary committee actually gets a presentation on the AG's report, so they do get an insight into a lot. But, on the other hand, you have to accept that an AG's report, the one that gets published in their annual report, does not give the detail because is a public document.

The AG also gives a department what is called a management report and that is where he details exactly
10 what is wrong. But I have to agree that every year they will present and the committee might say I see you are in the red, you know, the colour, the achievement of the department, and you are not getting any better and so it happens the following year again.

So there is a lot of that and I think the problem is, is a lot of talk and what is wrong this and fix it up but there is not action, there is no consequence, it is talk and, you know, it comes back to the same thing time and time again and I also find that a lot of the reports are these fancy
20 reports and then if the committee gets now a chance to ask questions, then they start delving into things, if the Chairperson allows them to. And then what happens is the department has to say well, we do not have that information at our fingertips, we will send you a written report.

Now as the public we never get to see those written reports so we do not know if they are sent, if they are read by the committee or what happens to them and that is one of the things that we noted that it is a public document because it was raised in parliament and it was agreed and therefore it should be available to everybody. But, as I say, we do not see those, so we cannot follow that.

CHAIRPERSON: Okay, thank you. Mr Freund?

MR FREUND SC: Now I want to take you to page 887 on
10 our numbering, it is the section called 2.3:

“Effectiveness of South African Parliamentary Oversight.”

Because really, that is what we are interested in. And you pose a question in the first paragraph as to:

“In the light of the mechanisms of oversight, the questions are frequently asked, how could so much fraud and corruption have prevailed in government departments and state owned entities in the past decade? Did the parliamentary system of oversight
20 fail in the country?”

And then you say in the next paragraph that:

“It is like an aeroplane crash, very often it does not have a single cause, it is the combination of a series of problems”

Which in your analysis ultimately explains the

ineffectiveness of the systems. Am I fairly summarising your...?

MS RAULT-SMITH: Yes.

MR FREUND SC: So what I would like to [indistinct] 14.52 what those factors are and you deal right at the beginning with the question of accountability of members of parliament and I do not want to go through – back to the – or the debate about electoral systems, that has been canvassed by [indistinct] 15.06 but you say this at the end
10 of the paragraph and [indistinct] 15.15 flow chart, that:

“Parliamentarians on both sides of the house are generally very quick to hold department [indistinct] 15.19 accountable and to make demands on [indistinct] 15.22 but some [indistinct] 15.25 are certainly hesitant to hold the executive to account, are highly defensive of any criticism of the governing party or its policies.”

And you continue:

“The consequence that much of the oversight is
20 then [indistinct] 15.40.”

CHAIRPERSON: Hang on Mr Freund ...[intervenes]

MR FREUND SC: And I would just like you to elaborate on this question of the – your debate about the roles played by opposition MPs and the roles played by governing party MPs.

MS RAULT-SMITH: Right, the interesting part is once the presentation has been made and the questions begin. Usually opposition party asks questions first and they tend to have come with specific questions, they have usually read the presentation or whatever if they can actually manage their way through but then also, if they had read previous minutes and recalled what happened in the past they can then compare and say well, what happened here but the opposition party members tend to ask questions
10 very directly, but what happened here, why is this not here? They question them, question them quite severely in some cases. I mean, you have had the example of opposition MPs who really made life difficult in their committees because they always have questions to ask, where has the money gone, why is there no money to this, why has that not been done? That target was the target last year and still has not been achieved. Those kind of specific things.

They usually start by saying well, we appreciate it
20 and you have done some good work here and there but then once they have asked their questions then the ruling party gets a chance and it is inevitably, you have done so well and only the good side and I really have to praise you for this and if there is something that they are picking on then it is going to be something that is pre-decided and

they will have decided well, this is a problem. But on the whole they do not demand answers to difficult questions from the departments. Their role is more to say you guys have done a great job.

And remember, of course, whether it is a DG or a head of an SOE, they often just as much as the executive, people of the same ruling party, [indistinct] 18.07 they are there, so it is very difficult for somebody who is just a back bencher to say to a DG who, you know, has some clout in
10 the party, do not like what you are doing.

So it becomes a complex human scenario. So we can look at should you do this, should you do that, but on the other hand this is the livelihood, the job of those parliamentarians and some of them do not want to go without this particular job but I generally feel that if you look at PRASA, I have to say that it was one DA member that really plugged at it time after time after time and the same with BOSASA, I think it was one or two DA members.

The other opposition parties tend to be too small to
20 have enough research capacity or sometimes even the kind of speaking with authority that somebody in a bigger opposition party has and they may ask some questions and then it depends entirely on the individual.

For example, in one party that I sit in, the leader of the party is in that committee and he asks some very hard

questions but he has got the confidence personally and so, as an opposition member and as a confidant person and as one who does a lot of homework, he is able to ask the questions but if it has been decided in a study committee beforehand, do not question and [indistinct] 19.54 question that is negative.

MR FREUND SC: Now can I follow up on that by asking you this? You have explained and other witnesses have explained that there is certain opportunity which is taken
10 up by members of portfolio committees to ask ...[intervenes]

CHAIRPERSON: Mr Freund, just one second, there is some echo as you speak and I realise that when I speak too there is echo. There seems to be no echo when Ms Rault-Smith speaks. I want to check with the technicians whether that is going to place any problem in the preparation of the transcript because I can hear you, but there is echo, but I can hear you, if it is not going to create any problem in terms of the transcript, then we can
20 continue but if it is going to create a problem we might have to stop. We can continue. Okay, they say we can continue. Let us continue.

MR FREUND SC: I continue [inaudible – speaking simultaneously]

CHAIRPERSON: Repeat your question.

MR FREUND SC: Yes, the question was this. There is plenty of evidence to indicate that members of portfolio committees have an opportunity to ask questions and ask questions and you have described that they tend, when they come from opposition parties, to be probing, you have suggested that sometimes from a ruling party MPs, they are less probing. But what I am interested in is the process. Does every question get answered? Is question one answered before you get to question two? Are all the
10 questions answered and is this an effective probing process?

MS RAULT-SMITH: Alright, in SCOPA it is decided beforehand who is going to lead the questions and once that person has finished then the others get a chance to ask and the lead asks the question and gets an answer immediately thereafter or maybe they will decide to take three questions and get three answers whereas in most of the other committees it is a round robin and everybody goes – they go around to everyone and they all ask their
20 questions and then the department answers all the questions and it could be the DG or he could ask one of his DDGs or CFO or whoever has come along to assist him.

But it means that there could be dozens of questions and I know that because I write them down, there are many, many, many questions and it is a little bit

of a scattershot kind of approach, some deep probing, some fairly superficial, some detailed, it is just a complete range of questions and then the DG has to answer them. Now the Chairperson usually does not have a list of the questions because the Chairperson is paying attention to what is happened.

In a good committee a secretary will note all the questions and sit next to the Chairperson and say okay, we are going through, but on the whole it is a case of the DG, 10 if they DG is thorough, and some of them are very good, and they answer each question and they allocate questions but I have noticed in a number of them they pick and choose and they will spend ages on one question and run out of time to answer the other questions and say oh, we will send you a written report and I do not know if some of the questions ever get answered. You are on mute.

CHAIRPERSON: Mr Freund? Mr Freund probably cannot hear me or if he does hear me I cannot hear him.

MR FREUND SC: Sorry, it seems that I was on mute, I do 20 not know how I went on mute but it seems I went on mute, can you hear me now, Chair?

CHAIRPERSON: Okay, alright, you did hear her answer?

MR FREUND SC: I did hear her answer and I am mystified as to how my machine decided to mute but it did. Anyway, it resolved. The question of financial skills and skills

generally, would you comment on – if we could – if there was such thing as an average MP, whether – what your assessment is of the capacity of average MPs or many MPs to engage in some quite complex oversight functions.

MS RAULT-SMITH: Well, fortunately the average MP is just an average citizen, which is exactly what it is supposed to be, they are supposed to be people representing the people but oversight is being done over departments and SOEs that deal with billions of rand, absolutely billions. In fact I have said to a couple of DGs I
10 do not know how you keep track of everything that is going on in your department and so I am not too sure how the average citizen can deal with it. I know that one of the late MPs said to me once I wish they had given us more training in finance because I really have difficulty in reading these financial reports. Now I know they do get brief training but if you have got no background in finance it can be quite tricky.

SCOPA trains their people pretty well and I know
20 the particularly the opposition party tends to make so they have got somebody in SCOPA who knows how to read such reports and so on but unlike – I think it was previous witness who was talking about a board that needs a range of skills, there is no such range of skills on a committee, I am not too sure how people get chosen to be on the

committee.

I have got an idea that, you know, certain people are chair people, it is – they do their – you know, you have to have earned the right to be a Chairperson in whatever way you will earn the right, you have to have earned the right to be a whip but how other people are allocated to committees, I am not too sure but it can end up that a committee really is not able to grasp the detail of the finance even after the AG has presented the situation.

10 **MR FREUND SC:** Now related to that question is the question of support. I do not know if you have heard Professor Corder this morning but he made what struck me as a fairly optimistic assumption that the resources and support and advice available to committees has substantially improved and is generally adequate to the task. What is your sense?

MS RAULT-SMITH: Well, I can tell you if you ask those staff members they will tell you they are hopelessly understaffed, they are always complaining that they just
20 cannot get around everything that they have to do. I do know for a fact that there are more researchers than there were in the past, some committees even now have two secretaries because there are no many meetings that – three, four meetings in a week, but I do not think they have got – I really do not think they have got the capacity to do

the all the kind of research that they need and they do not have the expertise because they are generalists, they will research on a topic but they do not have the expertise and, if I may, I sat through the entire political party funding committee, it was an *ad hoc* committee and that committee actually called in Professor [indistinct] 28.29 and asked him for expert advice and input and also had a couple of sessions where people like even Lawson Naidoo and others were called to ask and come and give some input and that

10 to me was incredibly valuable because those people were specialists, they knew what they were talking about, they worked with the researcher in the committee and it was very powerful and so, I mean, it was simply a case of civil society working with parliament and producing really good results.

MR FREUND SC: I would like to take you to the top of the next page of your report, 889 in my pagination. You say something that strikes me, as a reader, as somewhat curious. You say:

20 “Portfolio committees generally see their primary task as being able to support and assist “their” departments. They often offer to help where a department or entity is experiencing difficulties.”

And you say later on:

“Generally, a committee in the department reporting

to meet frequently and become familiar with each other making it difficult for a committee to be both supportive and to censure a department.”

So you are focusing on this dual relationship where, on the one hand, probably quite legitimately, a focus is on trans ... [indistinct – word cut off] cooperation to procure improvement?

MS RAULT-SMITH: Yes.

ADV FREUND SC: But on the other hand there is an
10 oversight responsibility which actually requires sometimes confrontation, and do you stand by the general perspective that they see their core function more as supportive than oversight and criticism?

MS RAULT-SMITH: It would depend on the committee, but very much you are responsible for that committee, that departments and so it will reflect badly on my committee if my department is not doing well. So there is - and they often say, well, would you like us to speak to the Minister about that, could we change some legislation to make your
20 tasks easier and so on.

So they are, they are supportive and helpful and they do become pretty friendly with the DG's, DDG's, and so on, they meet them endlessly. Sometimes they are meeting twice a week for weeks and weeks on end. So it is quite difficult to build that collegial relationship and the

other hand just step back and to say, no, you are doing this incorrectly.

You know, because at the bottom of everything these are human beings, these are people and give the difficulties that people do have, and the politician really needs to get acceptance by people in order to keep their position. So they do not want to be totally antagonistic and I think that is something that an opposition party member can do, because they are there to fight for
10 whatever they see is missing but it is not that easy. I know one Chairperson, she is since retired and she was really quite strict, you know, and she had several of those Boards, SOE Boards over the coals, because they were not doing what they were supposed to but she was an exceptionally strong person and I think a lot has to do with who is the Chairperson.

Now, you were talking about criteria for somebody who is the head of an SOE. So what is the criteria for a Chairperson, a Chairperson who does not have good
20 leadership, good management, good administration, good timekeeping skills, is really going to battle to manage that committee, and allow that committee to do what it wants to?

In committees where the Chairperson does not have good timekeeping skills, and they do not get the Secretary

to assist them with that, they always run out of time, always and things are always incomplete or they go on for hours in the afternoon and eventually, the bells starts ringing and they have to pack and go.

So there is something about the criteria for a Chairperson that they need to be able to do the job that they have to do and it is not always the case, really, I have actually seen some excellent Chairpersons but I have seen some others, not so good.

10 **ADV FREUND SC:** Now, something that you have alluded to already but I want to take you back to, we find it in the second last paragraph of page 889, that is paginated page 7 at the foot.

CHAIRPERSON: I take it you are not far from finishing Mr Freund?

ADV FREUND SC: I am close to finished Chair.

CHAIRPERSON: Okay, alright.

ADV FREUND SC: You talk about the question of study groups and you say this:

20 “In some cases, members are given prepared questions during the study group meeting, which they themselves do not fully understand and so cannot determine whether a question has been satisfactorily answered or not.”

If you could talk to that and talk generally, to your

observations about the impact of what happens in study groups on what happens in committee meetings?

MS RAULT-SMITH: On - it bothered me a lot and maybe I should not be saying it, but it particularly bothered me because I found quite a number woman would give - and my next question is, and my question two is, and my question three is, and the answer came back and you could see that is there was no understanding of it and I thought that was unfair. The study group if they want somebody to
10 answer the question they actually need prepare them properly for that. It is simply throwing out the questions, you can have this one and you have the responsibility to everybody who is participating.

So the study group actually does determine what is going to happen, what is the outcome of that committee, but the ruling party has three ways of managing a committee, it has got the Chairperson who decides, I will come back to it on an agenda etcetera and he manages the meeting and says, okay, we - you can only have three
20 questions or no more questions or it is alright we will take your answers in writing.

Then you have also got the numbers, if the is a vote of obviously the ruling party is going to come in but the third thing is that there is a Management Committee known as MANCO and that committee is the Whip and the

Chairperson and the staff and they determine the program which is then approved by the committee, and they determine who will be coming to speak and how things are going to be arranged.

So that management of the committee is also in the hands of the ruling party and I have often thought, you know, the opposition members get very frustrated, because the only thing they can do is ask some questions, and hope they get answers. They have got no – they are very
10 frustrated that they do not have any engagement with the committee and how it does its work, etcetera. Some of them are more forceful, and really try and push their way and make things happen but it is not the case in all the committee's.

ADV FREUND SC: So in conclusion, can I take you back to where we started on this portion of your evidence. You asked the question, how much fraud and corruption have prevailed? Did the parliamentary system of oversight fail? What is your own perspective on if there was a failure,
20 what accounts for that failure?

MS RAULT-SMITH: I do think oversight failed in that sense, because everyone knew what was going on in PRASA, everyone knew that BOSASA had contracts of up to R6billion just from Correctional Services. So they did see it but what happened was, there was no action. You

know, they talked to DG's all the time, what consequent management have you enacted.

But I do not know they know or I know what a committee is supposed to do once they have uncovered something that is wrong. That is where it comes to an end. So they say, this is wrong, you spent too much money, you have done this, you have got too many irregularities, sorted out and so on but if it does not, where do they go then.

10 They went to SIU in one case, and SIU handed over there dockets, and the docket was then transferred to the HAWKS, and I think was it BOSASA - and the HAWKS appointed one officer to take the matter forward. So it gets passed down the line until it just evaporates. So that is really to me the bottom line. Whereas you can do a lot more to interrogate what comes through.

 You could ask questions beforehand, you can say to a committee, to a department when you come and tell us about your budget, I want to know about this, this and this
20 and give them five things to talk about that you have researched and say this is where the problems lie and I want to know how you are dealing with those. But then what if they do not improve? What if nothing happens? That is the big question. I know that one MP once said so what must we do when we find fraud, must we give it to

SCOPA or what? I also say or what? Sorry.

ADV FREUND SC: Thank you, Ms Rault-Smith there is a lot more detail in your report, but I am conscious of time considerations. We can read your report. Chair, I think I have no further questions unless there are issues you would want to raise.

CHAIRPERSON: That Thank you, Mr Freund. Thank you, Ms Rault-Smith, we appreciate that you came to assist the Commission and I will now excuse you, you are excused.

10 **MS RAULT-SMITH:** Thank you so much, thank you, Chair.

CHAIRPERSON: Mr Freund.

ADV FREUND SC: Chair that disposes of my available witnesses for today.

CHAIRPERSON: Yes and then next week, we will have what is it? Two or three during evening sessions?

ADV FREUND SC: Well, the current expectation is two evening sessions, quite possibly Monday and Wednesday, but to be confirmed tomorrow.

20 **CHAIRPERSON:** Ja, okay and then after those two, we would be - you would be left with one more plus one or two people from Parliament.

ADV FREUND SC: I would be left with one major witness and or Chair, you are aware that there is a potentially significant submission, which has not yet been received.

CHAIRPERSON: Yes, yes.

ADV FREUND SC: So yes, in order to just to decide what to do with it. I should also say Chair that even as I speak, I am receiving messages from people who want to place information before the Commission so I will have to investigate that and see about that.

CHAIRPERSON: Yes, no that that is fine but just in terms of planning I think, as we speak after next week your work stream would be having that one major witness plus one, maybe two major witnesses arising from connected with
10 this submission that you are still waiting for.

ADV FREUND SC: That is true, Chair.

CHAIRPERSON: Ja, and anything else might just arise from other things, but in terms of planning, that that would be it okay no that is fine.

ADV FREUND SC: Yes, Chair.

CHAIRPERSON: You were to mention something about some correspondence.

ADV FREUND SC: I can mention it now Chair if that is convenient to you. I have refrained from doing that only
20 because although I have a great deal of correspondence. There may be yet more, but I can certainly place on record what I have and then if there is more, we can place it on record in due course.

CHAIRPERSON: Maybe we could do it on Monday evening session, or what do you think.

ADV FREUND SC: We can do that.

CHAIRPERSON: Because of the constraints now, ja.

ADV FREUND SC: We can do that.

CHAIRPERSON: Okay, alright. I guess this is the time when I should excuse you to.

ADV FREUND SC: Yes indeed, Chair.

CHAIRPERSON: Unfortunately, I am going to be starting my evening shift but thank you very much, Mr Freund.

ADV FREUND SC: Thank you, Chair.

10 **CHAIRPERSON:** Thank you. I am going to take ten minutes' adjournment to enable the evening team to set up and then we will start after that, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: ...after lunch and after we came back from lunch with the previous witnesses but it looked like they were sorted out in some way from a certain time but I am told I adjourned at about six o'clock.

20 **ADV HULLEY SC:** It was five minutes to six when you adjourned Mr Chair.

CHAIRPERSON: Five minutes to six.

ADV HULLEY SC: Approximately.

CHAIRPERSON: Oh approximately, ja that means there's been a delay of about 30 minutes, I think that is too long, so I think we should just adjourn on the basis that these

problems, these technical problems seem to be too much for today, I don't know exactly what the problems are but I have been told of some technical, I have been given some technical language about what the problems are.

So I think that we will adjourn and arrange for another day, hopefully then there won't be problems, I don't want to wait 45 minutes when we are already at this time.

ADV HULLEY SC: Indeed.

10 **CHAIRPERSON:** Counsel for Mr Mhlongo are they listening, do you know?

ADV HULLEY SC: We were first checking Mr Joubert's bandwidth and his connectivity; I am not sure whether they have Mr Mhlongo's or Mr Mhlongo's counsel joined yet. I know that they were having problems about ten minutes ago, I am not sure if those problems have been sorted out yet.

CHAIRPERSON: Yes. Ja, well today seems to be quite problematic. I think what we should do is Mr Joubert and
20 Mr Mhlongo and his legal team, I hope they will understand, we will have to fix another date and hopefully on that date there won't be too many problems. I think we must look at the week after next week. Maybe it is easier if I provisionally fix the date and if we are looking at an evening session and then we can – I can be advised in the

next few days whether the date is fine for everybody. I am thinking of Tuesday of the week after next week, I don't know what the date is but we would do an evening session and I would say that if everybody would be available from four o'clock, we might end up starting at five but everybody would be available and then ...[intervenes]

ADV HULLEY SC: That would be March the 4th?

CHAIRPERSON: March the 4th.

ADV HULLEY SC: As I read it on my calendar. Pardon
10 me Chair, it is March the 2nd sorry.

CHAIRPERSON: March the 2nd, ja okay that is the Tuesday of the week after next week.

ADV HULLEY SC: Yes.

CHAIRPERSON: Has Mr Mhlongo filed his affidavit responding to the substance of the allegations in Mr Joubert's affidavit, first affidavit?

ADV HULLEY SC: As far as I am aware he has not filed it.

CHAIRPERSON: H'm, well I would say that he would need
20 to file next week ...[intervenes]

ADV HULLEY SC: You may recall that he has undertaken to file it by today.

CHAIRPERSON: He had undertaken to file by today, let's say he must file by end of the day on Tuesday next week, if he has not already filed, and I see Mr Joubert is now – Mr

Joubert are you able to hear me? Mr Joubert can you hear me? It looks like he cannot hear me. Can you hear me? No he cannot hear me. So I think we will need to do that, we are not going to proceed, we have lost too much time now, because he cannot hear me and I assume Mr Mhlongo's lawyers also cannot hear me. Counsel for Mr Mhlongo can you hear me?

ADV MANALA: We can hear you Chair.

CHAIRPERSON: Oh, okay thank you. The technology
10 has been giving us problems this afternoon, so it continues to give us problems, we have lost quite some time, so I am saying let us adjourn and come back on a date hopefully when the technology will be working well. Sometimes it works quite well and with just minor glitches but occasionally it gives us serious problems, so I have just said to Mr Hulley let us adjourn and adjourn until Tuesday of the week after next week in the evening, Mr Hulley tells me that will be the 2nd of March, we would be looking at an evening session just like today but if possible if everybody
20 would be available at four we might end up starting at five, if – depending on the day witnesses that I will be hearing. Would that be fine with everybody, and hopefully on that day the technology will not give us the kinds of problems it has been giving us today. Mr Manala can you hear me, is that fine with you?

ADV MANALA: Yes Chairperson the Tuesday afternoon as you suggest will work well for us. The commitment that we have is a commitment of early morning as you would know the court sessions would conclude at half past three and even then we would also ask that you afford us the same privilege to appear before you remotely.

CHAIRPERSON: No that is fine, you can appear remotely on that day as well.

ADV MANALA: Thank you Chairperson.

10 **CHAIRPERSON:** Ja, and Mr Joubert is that fine with you as well?

MR JOUBERT: That is fine with me Chair, I will avail myself.

CHAIRPERSON: Okay, alright, okay, thank you very much, we are then going to adjourn and for the benefit of the public tomorrow the Commission will start its session not at the usual time ten o'clock, but at two o'clock to hear the evidence of Ms Suzanne Daniels in regards to Eskom so that – so we will start at two o'clock tomorrow and that
20 is the Eskom work stream that I will be dealing with.

So the hearing of the evidence of Mr Joubert is adjourned to Tuesday the 2nd of March 2021, the idea is to start at four but there may be a delay and we will start at five and the legal team for Mr Mhlongo will be allowed to appear remotely.

ADV HULLEY SC: Thank you Mr Chair.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS TO 19 FEBRUARY 2021