SUBMISSIONS BY THE ASSOCIATION OF REGIONAL MAGISTRATES OF SOUTHERN AFRICA (ARMSA)

REGARDING THE JOINT REPORT ON THE REMUNERATION OF MAGISTRATES OF THE PARLIAMENTARY PORTFOLIO AND SELECT COMMITTEES

INTRODUCTION

[1] The Association of Regional Magistrates of Southern Africa (ARMSA) represents 272 of the nearly 300 sitting regional magistrates in the Republic.

[2] In October 2005 the Portfolio Committee on Justice and Constitutional Affairs ("the Portfolio Committee") together with the Select Committee on Security and Security Affairs ("the Select Committee") (collectively referred to as the "Joint Committee") convened hearings "to discuss and consider the implications of the proposed new salary scales for magistrates, as recommended by the Commission [on the Remuneration of Public Office Bearers]".

[3] After these hearings the Joint Committee drafted a report (the "Draft Report"), which was adopted by the Joint Committee on 21 June 2006 and referred to the plenary session of Parliament for discussion and adoption.

[4] Although representatives of the Department of Justice and Constitutional Development ("the Department"), the National Treasury ("the Treasury") and the National Prosecuting Authority ("the NPA") were invited to these hearings no member of the magistracy nor any representative from any organization representing magistrates was invited to these hearing to make any submissions or comment on the submissions of any of the other representatives.

[5] One of the consequences of this failure is that the Draft Report is in part based on certain misunderstandings and misconceptions of the correct position regarding magistrates. In some respects incorrect or incomplete information was also provided.

[6] We believe that it is very unfortunate that those organizations representing magistrates were not given an opportunitytoappear before the Joint Committee and/or at the very least to comment on information that was placed before the Committee.

[7] This is particularly the case since much of the information placed before the Joint Committee (some of it inaccurate or incomplete) placed magistrates in a negative light and was therefore detrimental to the interests of magistrates.

[8] We would have expected that since issues affecting the interests of magistrates were under discussion and the other role-players/representatives would naturally advance their own interests, the Joint Committee would have given effect to the maxim "audi alteram partem" and also have invited representatives of magistrates to the hearings.

[9] It is against this background that ARMSA decided to formulate these submissions in an effort to correct some of the inaccurate information placed before the Joint Committee and to place the whole issue of the remuneration of magistrates in its proper perspective.

[10] At the outset we wish to reiterate our complete acceptance of Parliament's role and authority in our constitutional democracy. We also recognise Parliament's role in ensuring that public monies are expended in a way that best advances the public interest.

[11] We hope that any criticism levelled at the Draft Report in these submissions is viewed in the spirit in which it is intended: a sincere effort to contribute to a meaningful debate on this important issue and to advance our constitutional democracy.

THE FACTORS MENTIONED IN THE INDEPENDENT COMMISSION FOR THE REMUNERATION OF PUBLIC OFFICE BEARERS ACT, (ACT 92/1997)

[12] Section 8(6) of Act 92 of 1997 provides as follows

"When making recommendations referred to in subsection (4) the Commission must take the following factors into account:

(i) The role, status, duties, functions and responsibilities of the office-bearers concerned;
(ii) the affordability of different levels of remuneration of public office bearers;
(iii) current principles and levels of remuneration, particularly in respect of organs of state, and in society generally;
(iv) inflationary increases;
(v) the available resources of the state; and
(vi) any other factor which, in the opinion of the said Commission, is relevant."

[13] The Independent Commission for the Remuneration of Public Office Bearers ("ICRPOB") must take into account these enumerated factors in arriving at its recommendations for the remuneration of any office

bearer (including magistrates) that are then submitted to the President for his determination and (in the case of judicial officers) for approval by Parliament.

[14] We submit that section 8(6)(i) to (v) must be read conjunctively (that is reading those factors in addition to one another) and not disjunctively (that is, in the alternative). When there is any other factor not specified in section 8(6)(i) to (v) which "in the opinion of the said Commission [ICRPOB], is relevant" then such factor must also be taken into account.

[15] We submit that although the ICRPOB is obliged to take into account all the factors mentioned in section 8(6) the weight to be attached to each factor that is taken into account is for the Commission to decide.

[16] The Joint Committee in its recommendations focuses only on one of these factors, namely, the "current principles and levels of remuneration, particularly in respect of organs of state, and in society generally". It does so in the context of the perceived disparity between the remuneration of magistrates and other lawyers employed by the State, in particular members of the NPA.

[17] In doing so, we respectfully submit, the Joint Committee has failed to attach the necessary weight to the other factors, particularly "the role, status, duties, functions and responsibilities of the office-bearers concerned [in this case, magistrates]" (section 8)(6)(i)).

[18] We submit that the Joint Committee misconceived in particular the status of magistrates and failed to take into account the very real differences in the role, status, duties, functions and responsibilities of magistrates as opposed to prosecutors.

[19] We submit that it is essential for any comparison between the remuneration of magistrates and that of prosecutors, state attorneys, public defenders in the employ of the Legal Aid Board ("LAB") and departmental lawyers to be valid, to take into account these differences.

[20] We will now proceed to analyse the role, status, duties, functions and responsibilities of magistrates.

The role, status, duties, functions and responsibilities of magistrates

[21] Section 165(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution, 1996") vests "[t]he judicial authority of the Republic.. in the courts. Section 8 of the Magistrates' Courts Act, 1944 ("MCA") provides that "[e]very court held under this Act [magistrates courts and regional courts] shall be presided over by a judicial officer appointed in the manner provided by this Act"

[22] In effect every magistrate exercises the judicial authority of the Republic when he or she presides in court. The magistrate is only limited in his/her authority by the jurisdiction of the court he/she presides in (whether in respect of offences that can be tried, penal powers, causes of action or other jurisdictional limitations).

[23] This is the case also in respect of the Labour Courts, the Supreme Court of Appeal and the Constitutional Court: all these courts are creatures of statute, although unlike the magistrates' courts they enjoy the status of a superior court.

[24] So too the case of political office bearers in the different spheres of government: the national, provincial and local spheres of government. While the national legislature has almost unlimited powers, the provincial and local legislative authorities have the powers conferred upon them by the Constitution, 1996. Likewise with regard to the executive authority at the three levels of government.

[25] It is important for purposes of the determination of a magistrate's remuneration to decide the nature of the relationshipbetween the person holding office as a magistrate and the State. Does the relationship of employer/employee exist between the State and the magistrate or does some other relationship exist?

[26] This question was directly considered in relation to superior court judges in Hannah V Government of the Republic of Namibia, 2000 (4) SA 940 (NmLC) ("Hannah") where Ngoepe AJ had to decide whether the Labour Relations Act in Namibia applied to judges of the High Court.

[27] In the course of his judgment he referred with approval to the decision of the Supreme Court of India in Union of I ndia v Pratibha Bonnerjea, [1996] AIR SC 690, where at 696 it is stated:

"Independence and impartiality are the two basic attributes essential for a proper discharge of judicial functions. A Judge of a High Court is, therefore, required to discharge his duties consistently with the conscience of the Constitution and the laws and according to the dictates of his own conscience and he is not expected to take orders from anyone. Since a substantial volume of litigation involves government interest, he is required to decide matters involving government interest day in and day out. He has to decide such cases independently and impartially without in any manner being influenced by the fact that the government is a litigant before him. ….. He, therefore, belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. It is, therefore, plain that a person belonging to the judicial wing of the State can never be subordinate to the other two wings of the State. A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill-will, unless he is totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone.

That is because the Constitution-makers were conscious that the notion of judicial independence must not be diluted. If the relationship between the government and the High Court Judge is of master and servant it would run counter to the constitutional creed of independence for the obvious reason that the servant would have to carry out the directives of the master. Since a High Court Judge has to decide cases brought by or against the government day in and day out, he would not be able to function without fear of favour if he has to carry out the instructions or directives of his master. The whole concept of judicial independence and separation of Judiciary from the Executive

would crumbel (sic) to the ground if such a relationship is conceded; High Court Judges would not be true to their oath if such a relationship is accepted.'

[28] In Van Rooyen and Others v. The State and Others, 2002 (5) SA 246 (CC) [2002 (8) BCLR 810 (CC)] ("Van Rooyen") the Constitutional Court remarked in relation to the remuneration of magistrates "magistrates are judicial officers, not employees".

[29] The question of the position and status of magistrates was finally decided in Khanyile v CCMA & others, [2004] JOL 13297 (LC) ("Khanyile") where Murphy AJ had to decide whether the Labour Relations Act applied to magistrates. The learned judge refers with approval to the judgments in both the Van Rooyen and Hannah matters.

[30] At paragraph [14] of the Khanyile judgment Murphy AJ states: "it is clear from various pronouncements throughout the [Van Rooyen] judgment that magistrates are to be seen as occupying a constitutional position similar in many respects to judges".

[31] Murphy AJ concludes at paragraph [27] that -
"Thus, the findings in paragraph [139] and [195] of the [Van Rooyen] judgment strongly suggest that by virtue of their office magistrates should not be seen as employees entitled to engage the processes of the Labour Relations Act for the purposes of protecting their rights. As judicial officers they hold constitutional and statutory office and the requirements of judicial independence render it inappropriate for commissioners of the CCMA, who are not judicial officers, to pronounce on their conduct or suitability for promotion".

[32] It should be noted that as far back as 1919 the then Appellate Division noted in Schierhout v Union Government (Minister of Justice), 1919 AD 30 at 42 ("Schierhout") that "In the exercise of such functions they [magistrates] do not act as the servants of the Crown within the meaning of the Crown Liabilities Act. They perform duties imposed upon them by law, and the responsibility for their decisions rests upon them alone. They are judges, entitled to certain protection even against the consequences of their own error; and any attempt to influence them in the discharge of their magisterial duties, by any form of administrative pressure, would be most reprehensible".
(Our underlining)

[33] It is important to note that the magistrate exercises the judicial authority of the State directly; limited only by the jurisdiction of the court he presides over. The magistrate exercises original authority, not delegated authority. This is an important distinction that must be taken into account in determining the remuneration of magistrates.

[34] In De Villiers v Minister of Justice, 1916 TPD 463 at 465 where De Villiers JP (as he then was) stated in relation to the liability of the State (Crown) for the actions of a magistrate exercising judicial functions that "It is quite clear that in this case he was not the servant of the Crown, because he was not acting by a delegated authority from the Crown. These are not functions or duties, which the Crown could have performed. Those were functions or duties imposed by law upon the magistrate himself, which he had to perform".

[35] Section 165(2) of the Constitution, 1996 provides that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". Section 165(3) provides that "[n]o person or organ of state may interfere with the functioning of the courts".

[36] In the Van Rooyen, supra, the Constitutional Court held in relation to the constitutionality of section 14 of the Magistrates Act, 1990 (Act 93 of 1990) ("the MA") concerning the powers and duties of magistrates (at paragraph 230) that "magistrates can have only those powers vested in them by law, and that it is not consistent with institutional independence to permit the Minister to assign judicial powers to magistrates in addition to those that are ordinarily vested in them".

[37] Similarly, in Van Rooyen, supra, the Constitutional Court held in relation to the constitutionality of section 12(2)(b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944) ("the MCA") concerning the powers and duties of magistrates (at paragraph 251) that "[a]ll magistrates whether appointed permanently or temporarily, must have the powers vested in them by law, and it is wholly inconsistent with judicial independence to vest in the Minister or any other person the authority to prohibit any magistrate from exercising or performing such powers".

[38] When presiding over a court (or exercising the judicial authority of the Republic within their jurisdiction) magistrates are "subject only to the Constitution and the law". We will assume that for the purposes of section 165(2) "law" would include the Common Law as well as statutory law (legislation). Magistrates, at least when they exercise the judicial authority cannot be subject to the direction of any other person, functionary or body. They can also not be subject to policy directives, as these would not constitute "law".

[39] Such distinction must also be borne in mind when making any comparison between the levels of remuneration of magistrates and other similarly qualified persons in the employ of the State.

[40] The primary function of the courts in any democratic state is to settle disputes (both private and public) and to enforcethe fundamental rights of subjects.

[41] Magistrates presiding in the lower courts settle civil disputes involving hundreds of thousands of Rand. Their decisions affect the property of subjects directly (either positively or negatively).

[42] They also decide certain disputes involving family law such as divorces under the Black Administration Act, maintenance matters, family violence disputes and the custody and welfare of children. In each case the parties involved in the dispute are directly and immediately affected by the decision.

[43] Where a subject is charged with a criminal offence the subject has no choice as to the forum where the matter will be tried. The National Prosecuting Authority decides this, which is part of the executive branch of government.

[44] In many cases where a subject is charged with a criminal offence, in particular in the regional courts, his or her libertyis directly in issue. On a daily basis magistrates decide whether subjects should remain in custody (and be deprived of their liberty) or be released on bail pending trial (a restricted form of liberty)

[45] Magistrates presiding in the criminal courts, both at regional court and district court level enjoy considerable powers of punishment. In terms of the MCA a regional can impose imprisonment for up to fifteen (15) years and a district court for up to three (3) years.

[46] Section 151 of the Firearms Control Act, 60 of 2000 provides that "[d]espite any law to the contrary, any magistrates' court has jurisdiction to impose any penalty provided for in terms of this Act". Schedule 4 (Penalties) to the Act provides for maximum periods of imprisonment for certain offences of up to twenty five (25) years.

[47] In terms of section 51(2) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997) the regional court is obliged in respect of certain scheduled offences to impose minimum periods of imprisonment ranging from five (5) years to thirty (30) years unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence.

[48] When a regional magistrate convicts the subject of a serious criminal offence the magistrate will (except where a minimum sentence applies) have to decide whether the offence warrants imprisonment or at least correctional supervision, which amounts to a partial deprivation of liberty. At best a fine could be imposed, which directly impacts on the estate of a subject.

[49] The jurisdiction of the magistrates' courts has increased substantially over the past decade. In 1992 the jurisdiction to try murder cases was conferred on the regional courts. In 1998 the maximum period of imprisonment that could be imposed was increased from one to three years in the case of the district courts and from ten to fifteen years in the case of the regional courts.

[50] In each case the magistrate makes a decision, which has an immediate effect on the life of the subject, despite the fact that the decision could be subject to appeal or review.

[51] Since 1 January 2004 an accused wishing to appeal against his conviction or sentence in the magistrate's court (district or regional) must first obtain leave to appeal from the trial court (section 309B of the Criminal Procedure Act, 1977 (Act 51 of 1977).

[52] In considering any application for leave to appeal the magistrate must ensure that only appeals with a prospect of success reach the High Court. In this way magistrates are charged with the responsibility of ensuring that the limited resources of the State are properly utilised.

[53] In the magistrates' courts, except where assessors are involved, the magistrate is required to make his decision alone.

[54] Magistrates also enforce and protect the Constitution. They decide whether a subject's liberty should be violated when deciding whether to issue a warrant of arrest or whether his or her privacy should be violated when deciding whether to issue a search warrant. Magistrates must also decide whether unconstitutionally obtained evidence must be excluded or included.

[55] In the recent decision of Legal Aid Board (Ex Parte) v Pretorius and Another (unreported judgment of the Supreme Court of Appeal (Coram: Harms, Streicher, Navsa, Brand et Van Heerden JJA) in case number 332/2005 handed down on 31 May 2006) ("Pretorius") Navsa JA writing on behalf of the Court stated in clear terms that the presiding judicial officer was responsible for the integrity of any trial that takes place in his or her court.

[56] In dealing with the trial courts role in ensuring that an accused has effective legal representation the court states at paragraph [35] that "[t]his general power granted to courts [under s 38 of the Constitution, 1996] should be seen against the duty of judicial officers to ensure that criminal trials are conducted in accordance with notions of fairness and justice".

[57] All judicial officers are required to consistently do something that most people avoid doing: make decisions. Often these decisions have to be made rapidly while the decision will impact the interests of one or both parties to the dispute.

[58] All judicial officers enjoy the status of public office bearers; their constitutional position requires that they cannot be employees of the executive branch of government.

[59] Magistrates directly represent the State in exercising the judicial authority of the Republic (resolving disputes and enforcing the Constitution). They resolve disputes not by the agreement of the parties to the dispute but under the authority of law.

[60] Magistrates undoubtedly bear a heavy responsibility: each decision they make impacts directly and immediately on the parties to the dispute. They have authority to take away or restrict a subject's liberty, to affect their dignity or to deprive them of their property (in the case of a fine). A decision may also affect the rights and interests of the community where, for instance, a subject is released on bail or unconstitutionally obtained evidence is excluded in a criminal trial.

[61] It is important that magistrates are remunerated taking proper account of what is discussed above.

CURRENT PRINCIPLES AND LEVELS OF REMUNERATION, PARTICULARLY IN RESPECT OF ORGANS OF STATE, AND IN SOCIETY GENERALLY

[62] The remuneration of any occupation is determined using various criteria including qualifications, experience, type of decision-making and level of responsibility.

[63] Care must be taken in comparing the remuneration of different occupations because the nature of particular occupations may on the surface appear similar but in fact may be very different.

[64] A simplistic comparison of the remuneration of different occupations that are inherently different will usually lead to a skewed result.

[65] Although the academic qualifications of an incumbent of an occupation must quite correctly have a bearing on the remuneration awarded to that incumbent it could never be the sole criteria: if this were the case it would yield ludicrous results. For example, an entry-level prosecutor and a superior court judge who both possess a master's degree could both demand the same remuneration despite the inherently different nature of the two occupations.

[66] While we agree that many prosecutors and other legal qualified personnel employed by the State possess the same academic qualifications we cannot agree that the occupations that they occupy are similar or that they are entitled to the same remuneration.

[67] Both prosecutors and other legal personnel enjoy a different status: they are employees. They exercise delegated authority and are part of a hierarchical structure. The only members of the prosecuting authority who are office bearers (as opposed to employees) of the State are the National Director, the Deputy National Directors, the provincial directors and the special directors. These persons exercise original authority that is laid down in law. All other prosecutors act on their behalf, are subject to their direction and are accountable to the particular office bearer.

[68] All other legal personnel, although they may be legally qualified, exercise the authority delegated to them by the headof the particular government department (ultimately the Director-General).

[69] Although a prosecutor makes some decisions that may affect the rights of subjects those decisions are not usually final and do not have the same impact as decisions made by a judicial officer.

[70] The role of the prosecutor in a courtroom is also inherently different to that of a judicial officer.

[71] Because of vastly less impact that the input of a prosecutor has on the rights of a subject and the different role that the prosecutor plays in society the responsibilities of a prosecutor are clearly not the same as those of a magistrate (judicial officer), even an entry-level magistrate.

[72] We submit, with respect, that it is incorrect to talk of disparity between the remuneration of magistrates on the one hand and other similarly qualified legal personnel in the service of State because the relevant occupations (as demonstrated above) are inherently dissimilar.

[73] We submit that the only occupations that can be meaningfully compared with that of magistrate for purposes of remuneration are those of superior court judges and the two levels of military court judges.

[74] In the case of superior court judges due account must be taken of the different duties and responsibilities of those judges.

[75] The Draft Report makes no reference to any comparison with superior court judges. With respect, this is a serious shortcoming in the report. The basic salary of a regional magistrate compared to that of a judge has decreased from± 80% in 1983 to the present ± 50%. In the same period ironically enough, the general penal jurisdiction of the regional court has increased from a maximum of 10 years imprisonment in 1983 to a maximum of 15 years imprisonment presently. The rest of the magistrates.position also worsened similar to that of the regional magistrates. It is very disappointing to note that no attention at all was given to the ever-widening gap between the remuneration of judges and magistrates.

[76] In addition regional courts have since 1992 been competent to try murder charges and almost the entire serious criminal matters previously tried in the High Court are now tried in the regional courts.

[77] Military court judges although they operate in the military context exercise similar functions and have similar responsibilities to civil judicial officers.

[78] There are two levels of military court judge created by the Military Discipline Supplementary Measures Act, 1999 (Act 16 of 1999) ("the Military Discipline Act") a senior military court judge and a military court judge.

[79] For appointment as a senior military judge the officer is required to have "not less than five years' experience as a practising advocate or attorney of the High Court of South Africa, or five years' experience in the administration of criminal justice or military justice"; for appointment as a military judge the officer must have not less than three years such experience.

[80] A court of a senior military judge may try any member of the SANDF for any offence, other than murder, treason, rape or culpable homicide committed within the Republic. Such a court, composed of three senior military court judges, may also try such a member for murder, treason, rape or culpable homicide committed beyond the borders of the Republic.

[81] A court of a senior military judge may impose a variety of punishments, including imprisonment or a fine not exceeding R6 000 as set out in section 12 of the Military Discipline Act. According to section 92 of the Military Discipline Code ("the Code") only one sentence may be imposed irrespective of the number of charges preferred against the member.

[82] A court of a military judge may try any SANDF member, other than an officer of very senior rank, for any offence, other than murder, treason, rape or culpable homicide, or the offences under the Code involving treasonous, mutinous or cowardly conduct. Such a court can impose imprisonment of up to two years or a fine of R6 000 or the other punishments set out in section 12 of the Military Discipline Act.

[83] In the case of both levels of military court the court's decision is always subject to automatic review by a higher authority. A sentence of imprisonment, even where the operation thereof is suspended and certain other punishments are subject to review under section 34 of the Military Discipline Act before the sentence can be executed. Although certain sentences of magistrates are subject to automatic review the execution of the sentences concerned is not suspended pending review unless the accused is released on bail. Sentences imposed in the Regional Courts are not subject to automatic review at all.

[84] In making any comparison with the remuneration of a military court judge account must be taken of the fact that both levels of judges have lower penal jurisdiction to punish than magistrates, that they only operate within the military context and that their decisions are always subject to review by a higher authority.

[85] A person wanting to apply for appointment to the office of regional magistrate requires seven years relevant post-qualification legal experience. Appointment to the office of magistrate (entry level) requires five years relevant post-qualification legal experience. Therefore a higher level of experience is required for appointment to either level of magistrate than to appointment to either senior military judge or military judge.

[86] According to posts advertised on the website of the National Prosecuting Authority of South Africa ("NPA") a candidate for appointment to one of the various levels of prosecutor (ranging from district court prosecutor to senior public prosecutor) requires a recognised three year legal degree (with certain prescribed courses) and periods of relevant criminal court work experience of at least 4 years in the case of a Senior public Prosecutor, 3 years in the case of an advanced regional court prosecutor, regional court control prosecutor and junior state advocate, 2 years in the case of a regional court prosecutor, district court control prosecutor, head control prosecutor (Grade) 2 and relief prosecutor and 1 year in the case of the advanced district court prosecutor and head control prosecutor (Grade) 1. No period of relevant experience is specified for a district court prosecutor but a candidate with no relevant experience must successfully complete the Aspirant Prosecutor Programme.

[87] The periods of experience required for appointment to these levels of prosecutor are significantly less than that required for appointment as district magistrate, where five years relevant legal experience is required.

[88] In comparing the remuneration of judicial officers with that of other occupations it should be noted that unlike other occupations salary scales are not (and should not be) applicable to any judicial officer (magistrate). This is in accordance with the principle that judicial officers exercising equal authority (conferred by law) should receive equal remuneration.

[89] This means that once a magistrate occupies a certain office he or she is entitled to annual inflation- related adjustments and periodic reviews of his or her remuneration.

[90] The prospects of promotion within the magistracy are also limited. The numbers of senior judicial posts (heads of court) are limited. In order to progress to a "higher" judicial office a magistrate has to wait until an incumbent retires or the post falls vacant for some other reason or a new post is created.

[91] Whereas an employee is entitled to overtime remuneration the nature of judicial office requires that a magistrate often works beyond official hours without receiving any additional remuneration.

INSTITUTIONAL JUDICIAL INDEPENDENCE AND THE DOCTRINE OF THE SEPARATION OF POWERS

[92] The decision to include judicial officers (both judges and magistrates) within the ambit of the existing Independent Commission for the Remuneration of Public Office Bearers (ICRPOB) was no doubt taken to enhance the institutional independence of the judiciary.

[93] In the seminal decision on what is termed the institutional dimension of financial security for the judiciary, Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 ("the Provincial Judges Case"), supra at para. 125, Lamer CJC stated, "the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government".

[94] He went on to state that "although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applied against 'other potential intrusions, including any from the legislative branch' as a result of legislation".

[95] Professor Shetreet has written (in "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in S. Shetreet and J. Deschênes, eds., Judicial Independence: The Contemporary Debate (1985), 590, at p. 599):

"Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions."

[96] Lamer CJC proceeds, at paragraph 131 to deal with the institutional or collective dimension of financial security. He states that

"…. Financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticised. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic

manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse."

[97] Lamer CJC also discusses with the link between the components of institutional financial security and the separation of powers. He states (at para. 138) that -

"The institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government".

[98] According to Lamer CJC the separation of powers requires both that some functions must be reserved exclusively to particular bodies and that the different branches of government only interact in particular ways.

[99] He states that "the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other" is at issue. These relationships should be depoliticised.

[100] He goes on to state (at para. 140) that

"the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice".

[101] Achieving depolitized relationships create difficult problems when it comes to judicial remuneration. This is because (at paras 142-3)

"[o]n the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. ….

On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive."

[102] Lamer CJC then proceeds to state (at para 145) that

"[w]ith respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. …. However, the threat to judicial independence would be as significant".

[103] Lamer CJC then arrives at the concept of a "judicial compensation commission". He states the rationale for such a commission as follows (at para. 147):

"However, the imperative of protecting the courts from political interference through economic manipulation requires that an independent body — a judicial compensation commission — be interposed between the judiciary and the

other branches of government. The constitutional function of this body would be to depoliticise the process of determining changes to or freezes in judicial remuneration".

THE PROHIBITION AGAINST JUDICIAL OFFICERS ENGAGING IN SALARY NEGOTIATIONS

[104] The second component of institutional financial security is stated thus (at para. 134):

"[U]nder no circumstances is it permissible for the judiciary — not only collectively through representative organizations, but also as individuals — to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence".

[105] Lamer CJC explains that

"…. salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations, which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, are a form of 'horse-trading'."

[106] Importantly for present purposes Lamer CJC then states that:

"[t]he prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

RECOMMENDATION 2 OF THE DRAFT REPORT

[107] Recommendation 2 of The Draft Report of the Portfolio Committee on Justice and Constitutional Development & Select Committee on Security and Constitutional Affairs (Recommendations: Legislative Compliance: The Independent Commission Bearers for the Remuneration of the Public Office Bearers) dated 08 June 2006 ("the Draft Report") states that the Commission (ICRPOB) "should not consult with or receive submissions from individual or groups of magistrates relating to the remuneration of magistrates, as seems to have become the practice; considering the injunction of the Van Rooyen case that collective bargaining practices should be discouraged at this level".

[108] This recommendation is, with respect, based on a complete misunderstanding of the "injunction" in Van Rooyen, which in turn was based on the Provincial Judges Case.

[109] Firstly, ARMSA fully subscribes to the prohibition on labour relations-type collective bargaining (referred to by Lamer CJC as "negotiations") for the reasons stated in the Provincial Judges Case.

[110] However, it should be noted that the prohibition relates to negotiations and not the making of representations or submissions.

[111] Negotiations involve an interactive process between the parties to the negotiations ("horse-trading"). The making of representations or submissions involves the person or body making the representations or submissions setting out that person's or body's concerns about the subject matter, setting out proposals or responding to proposals made by the authorities. There is NO horse-trading involved: the decision-maker (in this case the ICRPOB) merely considers the representations or submissions along with representations or submissions from other interested parties and any other relevant information it has received and makes a decision in accordance with the law.

[112] It is very important that this fundamental distinction be recognised. At NO stage did ARMSA (or to our knowledge any other magistrates' grouping or individual magistrate) engage in any negotiations with the ICRPOB.In fact the ICRPOB in Government Gazette No 28312 dated 8 December 2005 invited interested persons or organizations to submit proposals in writing on the remuneration of public office bearers.

[113] ARMSA has since 2004 from time to time made representations (or submissions) to the ICRPOB, usually responding to the proposals made by consultants engaged by the ICRPOB or setting out our proposals regarding certain issues.

[114] Where ARMSA has met with representatives of the ICRPOB these meetings have mainly been information sessions, where the ICRPOB has conveyed such information as the procedure to be followed, time schedules and consultants to be engaged. In many cases ARMSA (along with the other interested parties) were invited to give written input.

[115] We believe that there is nothing illegal or wrong with the engagement with the ICRPOB in the manner described above. In our view our engagement with the ICRPOB as set out above can in no way be described as "negotiations" or "collective bargaining" and is not prohibited by Van Rooyen.

[116] Secondly, the recommendations that the ICRPOB makes in regard to judicial remuneration directly affects the judicialofficers concerned. The ICRPOB is essentially a statutory body engaged in an administrative law process.

[117] We submit that because of the importance of the recommendations that the ICRPOB makes to the President, ARMSA (and all other interested parties) have a right to be heard before any recommendation is made. The Constitution guarantees the right to be subjected to a fair administrative procedure.

[118] Such a fair procedure necessarily involves the right to a prior hearing (where appropriate written submissions will suffice) and the right to have those submissions properly considered. The decision-maker is in no way obliged to follow any particular submissions: provided the decision is justified the decision-maker is entitled to differ from any particular submissions.

[119] Thirdly, and with respect, the recommendation that the "Commission (ICRPOB) should receive a single submission on behalf of the magistracy from the Chief Justice or a person designated by the Chief Justice relating to recommendations in respect of the remuneration of magistrates" is completely unacceptable to ARMSA.

[120] Although the Chief Justice is the head of the Judiciary, he holds no mandate on behalf of any class of magistrates. It would be an almost impossible task for the Chief Justice to represent the interests of magistrates. We submit it would also be manifestly unfair to impose this duty upon the Chief Justice.

[121] With respect, the interpretation that the Draft Report seeks to give to section 12(1)(c)(i) of the Magistrates Act is neither in conformity with the concept of the institutional financial security of the magistracy (as described above) or with the constitutionally enshrined right to fair administrative action.

[122] The fact that the section requires that the ICRPOB consult with the Chief Justice, the Minister of Justice and Constitutional Development and the Minister of Finance does not preclude the ICRPOB from receiving submissions from the very persons who will be affected by the recommendations the ICRPOB ultimately makes, the judicial officers themselves.

[123] The matter of whether the ICRPOB should receive submissions from individual magistrates as well as organizations representing magistrates is in our view a matter that should be left to the discretion of the ICRPOB.

RECOMMENDATION 6 OF THE DRAFT REPORT

[124] The Joint Committee recommends that "the Magistrates Commission conduct an urgent and full investigation into any absenteeism from work without valid reason; or any type of protestation, including any "go-slow" action, on the part of any magistrate, since the 13th of September 2005, to which ostensibly relate to the process of final approval of the new salary regime by Parliament, including the reported absenteeism, due to alleged stress (particularly in the Eastern Cape)"

[125] ARMSA unreservedly deplores the conduct of any judicial officer or group of judicial officers which amounts to industrial action (as it is understood in the labour relations context) or which may be perceived as intending to pressurise Parliament into approving any increase in remuneration for magistrates. ARMSA is on record as having condemned such action as far back as June 2001.

[126] Such conduct, if the media reports were true, would undoubtedly bring the Judiciary into disrepute. Obviously if t the seallegations are proven against any particular judicial officer at an enquiry held under the auspices of the Magistrates Commission then such a judicial officer must be severely sanctioned for such behaviour.

[127] We are, however, somewhat perturbed by the statement in the Draft Report that "[t]he actions of some magistrates, in contravention of the principles in the Van Rooyen judgment, are unbecoming a judicial officer and have brought the Judiciary into disrepute".

[128] This statement in the Draft Report creates the unfortunate impression that the Joint Committee has presumed these allegations to be true and the magistrates concerned to be guilty of the conduct complained of.

[129] To our knowledge no disciplinary enquiries relating to the conduct complained of have to date been instituted against any magistrate. The magistrates concerned have the right, as deplorable as their conduct may allegedly have been, to both lawful and procedurally fair administrative action in accordance with the principles laid down in the Van Rooyen judgment.

[130] ARMSA would prefer to await the outcome of any enquiries to be held into the conduct of these magistrates before passing any final judgment on their behaviour.

CONCLUSION

[131] We trust that the above submissions will place the matter of the remuneration of magistrates into better perspective. In this way we hope to contribute to an objective and meaningful debate on the remuneration of magistrates as public office bearers.

[132] We respectfully request that in the light of what is set out above the National Assembly does not accept the current draft report of the joint committee but instead reject it or alternatively, refer the matter back to the joint committee for further investigations and discussion.

GRAHAM TRAVERS
CHAIR: JUDICIAL INDEPENDENCE COMMITTEE: ARMSA

ADRIAAN BEKKER
PRESIDENT: ARMSA
18 AUGUST 2006