JUDICIAL COMMISSION OF INQUIRY INTO CRIMINALITY, POLITICAL INTERFERENCE AND CORRUPTION IN THE CRIMINAL JUSTICE SYSTEM

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CHAIRPERSON: Good morning, Mr Chaskalson. Good morning, Doctor Fikeni.

PROFESSOR FIKENI: Good morning.

CHAIRPERSON: Before we start, I just want to clear up something. It has been brought to my attention that there is speculation out there about something I did yesterday. Yesterday I joked with Doctor Mpahlwa and I said I wanted to tell him a story about legal practitioners who are also doctors.

Now the unfortunate speculation is that the story I wanted to tell him was about Doctor Lebeya, which is completely untrue. My co-commissioners were there when I told the story to Doctor Mpahlwa, who loved the story by the way. So the speculation is totally, totally untrue. That is all I wanted to say. Yes, Mr Chaskalson.

ADV CHASKALSON SC: Thank you, Chair. Moving away from doctors, it is Professor Fikeni.

CHAIRPERSON: Apologies, Professor. Thank you. Also, maybe before we start, I think I owe it to the public to disclose that I know Professor Fikeni quite well, let me say so, and for a number of years. I have known him since the early or mid-1980s. We were at the then University of Transkei together and we have kept contact since. So I think I should – but of course, we will assess the

Professor's evidence in accordance with its content and weight. Thank you.

ADV CHASKALSON SC: Thank you, Chair, and Professor Fikeni is the Chairperson of the Public Service Commission and he will be testifying today about issues relating to the criminal justice system from the perspective of his position as Chairperson of the Public Service Commission and possible reforms that may be desirable in that regard. Chair, I wonder if we could swear Professor Fikeni in.

CHAIRPERSON: Professor, will you be swearing or affirming?

PROFESSOR FIKENI: I will be swearing, Chairperson.

CHAIRPERSON: Do you swear that the evidence you are going to give is the truth, the whole truth, nothing but the truth? If so, please raise your right hand and say, so help me God.

PROFESSOR FIKENI: So help me God.

CHAIRPERSON: And please state your full name for the record.

PROFESSOR FIKENI: Somadoda Fikeni.

CHAIRPERSON: Thank you, Professor. Thank you, Professor.

SOMADODA FIKENI: (duly sworn states)

EXAMINATION BY ADV CHASKALSON SC: Professor Fikeni, maybe if we can just start by confirming the

correctness of your statement? And if you can go to page 70 of – sorry, there will be two files. The one will be the statement, the one will be the annexures. If you can go to page 70 of the statement file, and I am hoping you have an unredacted copy there so that you can confirm that the signature at page 70 is indeed your signature.

PROFESSOR FIKENI: Here I do not see the signature. In fact, I see a blackened-out section. I am not sure whether it is the same thing as you see.

CHAIRPERSON: That is what has been shared with us as well.

ADV CHASKALSON SC: We will find the unredacted copy, but maybe for now, Professor Fikeni, if you could confirm that you did indeed sign this statement at the point where we see the sort of blacked-out box on page 70.

PROFESSOR FIKENI: Yes, I did.

ADV CHASKALSON SC: And that the contents of the statement and the opinions you expressed therein are, to the best of your belief, true and correct.

PROFESSOR FIKENI: It is true.

ADV CHASKALSON SC: Thank you. Now, the statement is very lengthy and very detailed, so I am not going to ask you to read it all out. I think rather it will be more effective if we focus on certain themes and certain aspects of the statements. But maybe if we can start with your

introduction at page 5 of the statement bundle? And there in paragraphs 5 and 6 you set out a framework for the statement as a whole. And maybe if you can read those paragraphs to begin with?

PROFESSOR FIKENI: Paragraph 5 was saying that:

> "The PSC's central proposition is that criminal justice systems should be examined as an interconnected public administration system. A failure at recruitment can later become a command accountability failure. A poor appointment can become an integrity risk. Weak performance management can allow incapacity to persist. Political intrusion into administration can weaken professional judgment. Fragmented information systems can conceal risk. Weak consequence management can normalise misconduct. Inadequate parliamentary follow-up can allow these failures to recur."

In paragraph 6:

> "The PSC therefore presents its evidence

through three themes. Theme 1 addresses the PSC's systemic assessment of the criminal justice system, beginning with the personnel practices and extending through professionalisation, performance, ethics, integrity, financial disclosure, governance, role-based compliance cultures as opposed to value and outcome-based cultures, coordination and consequence management. Theme 2 addresses the political administrative interface and the need to preserve both democratic executive authority and a professional continuous administration. Theme 3 addresses parliamentary oversight and the need for an accountability chain that does not end when oversight body issues a report or recommendation."

ADV CHASKALSON SC: And we will get to those three themes almost immediately, but before we do so, I would like you to turn to page 14 where you, in paragraph 24A onwards, 24A through to 24D, you emphasise issues of ethics in relation to this investigation. And maybe if you

could address those paragraphs, if you want to read them, please do. If you want to just elaborate on them, feel free to do so.

PROFESSOR FIKENI: Well, in page 14 I am there, but I want to pre-empt it by simply saying in terms of our mandate, the very first of those is for us to promote and make sure that the implementation of values and principles as outlined in section 195 of Chapter 10 of the Constitution is at the heart of almost everything that we speak to.

The very first one is the promotion of professional ethics in the public administration, and that public administration refers to your national, provincial departments, your local government, and all other institutions in the public sector. So that is the essence of what we are speaking to.

And our observation has been that over time, the issue of conformance, where people simply master the art of reporting the templates, has become key instead of a value-based approach of saying, what is the mandate of my institution? So that is the essence of what we are trying to capture there.

ADV CHASKALSON SC: Thank you. With that introduction, let us then get to the first theme, which is your systemic assessment of the criminal justice system, and that starts on page 15 of the statement. And in paragraphs

25 to 27, you speak of what I might call an integrity change. Could you maybe elaborate on that? I mean, again, at any stage, if you want to read the provisions of the statement or simply elaborate on them, it is your choice. You must feel free.

PROFESSOR FIKENI: Maybe let me speak to it without necessarily reading it. One of the things that we do as the PSC is to assess the disclosures right across departments, even amongst the police and the different entities. What we have realised is that when people say we are doing financial disclosures, to start with, we have been raising this issue of a financial disclosure as a misnomer.

Many other countries talk of asset disclosures. Because that misnomer creates a particular mindset where you are looking for money when, in fact, you end up reporting on assets. So we have raised it with the Department of Justice and Constitutional Development, with the Department of Public Service and Administration to say many other countries speak to assets.

These disclosures are often more performative where people simply say, I disclose. Then PSC takes it further and verifies and that verification process, we then write to the executive authority, in the case of the National Department, to the Minister and say this is the red flag, but very often nothing happens because there is no probity.

The key thing is that people want to tick the box that I have complied, I have complied, I have complied.

I will give you a simple example. One of the verifications that we have been doing of the Police Commissioner, of General Khan and several other people, we realise as we follow the Commission, as we also watch the news and so forth, that the disclosure that is there when we tried to do the verification, there were variances, because when you go to NATIS, you will see one car, but what is declared is many.

But what is troubling is the fact that most of the ethics officers you will find will just accept this disclosure. There is no coordination with your risk officers and others to say this is actually worrisome. And also there is no system of saying in that integrity chain. How can a person working in your high-level organised crime space also be working in the car, you know, the body shop? Because you know that very often the stolen vehicles and many others and so forth, that ought to have been a discussion within the department itself.

But what has been disturbing, not just with the department, the SAPS, but across, is once people disclose, that is it. So that is why we talk of this conformance, compliance culture instead of the outcomes-based culture, where you begin to analyse what the problem could possibly

be in terms of the conflict of interest.

Even when we raise some of these issues with the executive authorities or the Ministers, very often compliance or follow-ups are very little, and that is where the problem is.

COURT: Do you ever get feedback as to why what you get from the Ministers is very little? Are there any explanations for that?

PROFESSOR FIKENI: Well, we often get the response which says, we are going to look into it, thank you very much, this is a very important and worrisome matter, that is where it ends. Later I will speak to what I call the political economy of inefficiency, where inefficiency in our public administration is by design, not by default, where most of the things are presented just for optical illusion, not because people believe in them.

Hence, we were talking about a shift from just a compliance-based culture into a value-based and outcomes-based culture, where you begin to say, yes, we comply, yes, we have done what the template needed, but is it a right thing or a wrong thing? And that, to me, is at the heart of many challenges that we see across departments. It is that they look at this one thing, the annual report, they look at this one thing, the audit outcomes, and they do not look at what was this department created to do, what was this unit

created to do.

Are we doing that? Hence, some will lower your targets so that they overachieve. And it is the question that the Public Service Commissioner has been asking, why are our self-reporting looking so good when the lived experience of people who are supposed to be serviced look so miserable? That is one of the things. Hence, I then will come back to this issue of the political economy of inefficiency. As you will see, it is a thread that runs through.

ADV CHASKALSON SC: I have two thoughts, and again, you must determine when we address them. It seemed to me it may be useful to address the political economy of inefficiency up front because it does frame a great deal of what you say in your statement. If you would rather deal with it in the sequence of the statement, we can wait until it comes.

The second issue is when you were talking about the absence of action in the specific context of disclosure forms, it also occurred to me that we might want to discuss how things may change with the new Public Service Commission Act because there are very significant new features of the Act that are, I think, designed to address that sort of problem, not just in terms of disclosures but across the board.

I am in your hands on this one because I do not want to take you out of the sequence of your statement, but would you like to address either of those issues now, or should we wait until we get to them?

PROFESSOR FIKENI: Maybe let me start with what was signed by the President only two days ago, wherein the Public Service Commission Act is in place, and it will also tell you about this political economy of inefficiency. As early as 2007, the ...[indistinct] report indicates that Public Service Commission should be separated from government departments because we had our secretariat as a government department headed by a Director General, and as such it was reporting to the Chairperson of the Public Service Commission but also to the Minister of Public Service and Administration.

CHAIRPERSON: What was the mandate of Professor Asmal's committee?

PROFESSOR FIKENI: It was to look at the constitutional bodies and how they should actually be reorganised but also their independence and autonomy be affirmed.

CHAIRPERSON: All right, thank you. Please continue where you were.

PROFESSOR FIKENI: So that is when he indicated that PSC should be removed from a government department. And in 2011, again this matter is raised in the Cabinet, in

2012 it is restated in Chapter 13 of the National Development Plan to say this is urgent. 19 years later, that is when it is taking place.

What happened when the secretariat was not outside like all other Chapter 9 or constitutional bodies is that when you appoint a Director General, because it is a Director General, that Director General is the Minister of Public Service and Administration who had to lead that process. And he had to invite another Minister and invite another DG and only invite Chairperson of the PSC as this one single panel member.

So effectively, this constitutional body, the leader of the secretariat was appointed by the Minister of a department that we also have to oversee. Not only that, therefore whatever vote you had as the Chair of the PSC out of the entire panel, you were always a minority. The rest of the 14 Commissioners would only hear that this is the person we are presenting to you.

The President has to appoint this Director General and the President is the one who can remove this Director General even if you, as the constitutional body said, were not happy with the person. Not only that, most of the things that we were doing in assessing departments, we also assessed this department, we realised that now there is contestation between the Department of Public Service and

Administration because we are assessing them but we depend on them. Even if you want to appoint a Secretary, it has to be the Department. So that is what this bill is trying to resolve to make us separate and be independent.

Number two, this new Act now expands our role to include the local government which was not there before, to include state entities, to also include your state-owned enterprises. So it is going back to simply clarifying the role of the Public Service Commission as was envisaged in the Constitution, but it has taken 19 years.

Everybody never said no, we are not going to do it. They simply hurried slowly. So that is the key element of the political economy of inefficiency. Professionalisation framework of 2022 again, the implementation is still an issue. So the new Act is affirming our independence but it is also making sure that our findings are more binding.

Courts can review them if anyone wants to challenge, because I can share with this Commission the implementation rate across constitutional bodies because we have a forum. It is very low because this ecosystem of accountability and oversight is misaligned or, at best, it is simply ignored. So that is what in essence this new Act is speaking to.

ADV CHASKALSON SC: Maybe if we can, just that last point that you made, maybe if we can go to the annexure

bundle where the new Act sits, and at page 120, section 13, deals with the new regime for implementation of decisions of the Commission.

PROFESSOR FIKENI: Can you come again? Annexure?

ADV CHASKALSON SC: So it will be Annexure D, page 120 of that file.

PROFESSOR FIKENI: Okay.

ADV CHASKALSON SC: And it seems to me that the critical elements of section 13 are at least twofold. The first is that there is now an obligation when the PSC takes a decision, whoever the subject of that, whoever that decision is directed to, must now report on how that decision gets implemented within 60 days. Is that something that has existed previously?

PROFESSOR FIKENI: It was not in this particular form. We would issue recommendations and generally they would be ignored, but this now together with some of the case laws that have come up are giving us a bit of a muscle.

ADV CHASKALSON SC: The second provision again is subsection 3 of that section which says:

> "A person to whom a direction is issued must implement such direction within a period determined in terms of the relevant law or such period as may be determined by the commission in the

direction and in sub (4)..."

Which you have alluded to:

"...if that person believes that he or she has a valid reason not to implement the direction, the matter must be taken on review to a court of law."

Was there any enforceability mechanism of this sort under the previous regime?

PROFESSOR FIKENI: No, it was not there.

ADV CHASKALSON SC: Then you have also mentioned the general pattern of just ignoring public PSC reports in the past. In your statement you deal with that specific issue in relation to the criminal justice system. If you go to page 17 of your statement, you have some statistics there. Maybe if you could take the Commission through those statistics?

PROFESSOR FIKENI: That is the implementation record?

ADV CHASKALSON SC: Indeed, the foot of page 17, paragraph 34A.

PROFESSOR FIKENI: Yes:

"The PSC has now supplemented that earlier aggregate picture with the CJS specific implementation analysis drawn from the PSC data warehouse and implementation information captured by

> its branches. The underlying metrics records 381 recommendations across eight justice, crime prevention and security related departments. Of these, 68 are recorded as implemented, 46 as partially implemented, 130 as not yet implemented, 113 as having no feedback recorded, and 24 are not to be implemented. The significance is not the production of a departmental ranking. It is that 243 recommendations are either still recorded as not implemented or have no feedback, leaving the corrective cycle open or incapable of verified as complete."

ADV CHASKALSON SC: In your next paragraph you drill down to the five core criminal justice sector departments. I do not need you to repeat those statistics, but 34C and 34D seem to be crucial points that you make. Maybe, again, if you could elaborate on them or read them, whichever you prefer.

PROFESSOR FIKENI: I will just read and then reflect on them:

> "The implementation record identifies recurring weaknesses in follow-through

> evidence of closure, consequence management, appointment and suitability controls, interdepartmental dependencies, capacity and infrastructure, ICT and information management, and continuity of corrective action. It also shows why recommendation cannot be treated as complete merely because an internal process has commenced. A credible implementation system must identify the responsible authority, the action required, the timeframe, the evidence of completion, any institutional dependency and the escalation route if action does not occur."

ADV CHASKALSON SC: Okay, can I just – before we get to the next paragraph, are you confident that the new section 13 will enable you to achieve this?

PROFESSOR FIKENI: To a large extent, it will be an improvement, but it will not be sufficient. I will tell you why. Here it is not just the systems or the policies that change. It is the leadership in a given institution and their orientation. And the third one is the resources. Since 2014, PSC has suffered the deduction of its funding. No

explanation. The core business. To a point where now it is been reduced to bare minimum. You meet with Treasury. You explain yourself. They are very polite. They thank you for coming. You never even get an explanation of why this is cut.

Again, coming back to the political economy of inefficiency. You could have the law today. It has a business case, Chairperson and Commissioners. If it is not funded for implementation, it comes to naught, and that is generally the case. Hence, I come back to the point where I say, even when on paper you have certain policies in place, their implementation are not guaranteed.

In October 2022, we presented before Cabinet the framework for professionalisation of public service. Certain decisions were taken. To date, the implementation, the coordination is a problem. And that, to me, is exactly the point to say, we may come with certain policy recommendations. South Africa has become a symmetry of policies, some of the best policies, but when it comes to implementation, they fail flat.

And that is either the leadership is not there or the resources are not made available. This Act, for it to be implementable, it has specified the resources, human resources, finances and everything else, but it is an improvement from what PSC was before the Act was

implemented. But also, what we have done is to work with the other constitutional bodies in our forum, and the Chapter 9 institutions are there, Chapter 13 institutions are there.

Where we work together, we partner to try and see whether we can have greater influence. At times, where you find a Minister who is ready to cooperate, you suddenly have greater collaboration, but the problem is the turnover of Ministers. I have been at the PSC over five years and during that period, I think I have seen four Ministers.

So sometimes the delay, you find this Minister is enthusiastic about something, before you notice the Minister is gone. And then, at the level of administration, you find that you have a level of acting DG, acting DDG, acting DG, and I have even written to the President to say PSC is concerned about the rate of acting because the uncertainty in the acting space makes people not to take decisions. And at times, it could just be a play to say, if we keep this one off balance, hoping that something is going to happen. So it is that ecosystem that we should pay attention to.

CHAIRPERSON: I just want to add to the two reasons you gave for the non-implementation of what you describe as very good policies. I want to add that there may also be an unwillingness to implement. Would you agree?

PROFESSOR FIKENI: Thank you, Chairperson. In fact, when I talk of the political economy of inefficiency, the unwillingness to implement, but the presentation of a facade that we want to implement, is exactly at the core of that political economy of inefficiency. Where they say, okay, let them push, but we will make sure that it does not work. So that unwillingness is precisely the very essence of the challenges that we face.

You can count a number of laws in place. You can even take some examples, the Border Management Authority. There was a push, finally it was in place. It was given four drones, and sometimes these fly for 35 minutes. So ...[intervenes].

ADV CHASKALSON SC: Sorry, this is a leading question, because I know what the answer is and I know you know what the answer is. How many drones did the Border Management Authority indicate it needed for its job?

PROFESSOR FIKENI: They had wanted quite a massive number. When we met with the head of the Border Management Authority, they said initially they could do even with 80, but you realise that a department like Rural Development has many drones of the same features packed. That is the political economy of inefficiency.

It is not because they had wanted 4 000 000 000, they ended up with something slightly more than 400 000

000 to say let us establish some of these. And as PSC what pains us, we meet with departments like Land Reform, 5 000 000 000 was returned unused. What is an Employment Insurance Fund, close to 13 or 14 000 000 000 returned unused. You just find this recurring. It is not because there is no money, but in this country money is everywhere except where it is most needed.

ADV BALOYI SC: Professor, can I just ask this question? And it relates to your paragraph 34C where you identify the issues that result in noncompliance or failure to abide your recommendations. Does the work of the PSC go so far as to look into, and let me use the criminal justice sector as an example, does it go so far as you look at that sector and why they are not complying and then make recommendations about how they could comply?

I am looking, for example, at capacity and infrastructure, ICT, as reasons for noncompliance with what you recommend. And ICT at any given time is what it is in a department. Your report requires compliance within a certain period. Do you meet with them subsequently and do you have the capacity as in within your mandate where you say your ICT system is what it is today, here is what you could do with it to improve on compliance with our recommendations? I am asking that kind of question.

PROFESSOR FIKENI: Thank you very much, Chairperson

and Commissioners. Yes, we do because we investigate, we inspect. Just to give you a simple example, during COVID we realised that many people were working online, remotely, and every other department was complaining about the inadequacy of our ICT system. So we looked into the CETA.

We had our own accord investigation, which is the beauty with the PSC because we do not wait for a department or somebody to complain when we see a challenge, And we have done a thorough investigation into that. Here is the other challenge.

The CETA is the one that is the sole provider of IT services. So when it has weaknesses, it has that particular, you know, weakening factor across the entire public service. So we finished working with the Minister of Communication and Digital Technologies that review of the ICT system in government and we made recommendations, and those, we are hoping that the new board and the Minister will see them through.

The Forensic Laboratory of the SAPS, when there was a backlog where they said cases were not moving because forensic laboratories were not moving, so it impacted on your case flow management in the courts. It impacted on people identifying bodies in disasters and so forth. We again went through all the forensic laboratories,

investigated, came up with the findings, which were ultimately implemented and they reduced some of that.

But while still on that, if you may, Chair, we noticed that this inefficiency, there was a time when the forensic laboratory in Cape Town, there was absolutely no software to analyse videos and pictures, the enhancement which you use in actually solving some of these crimes and problems, and it was a small matter.

The licence had to expire because the request from Cape Town was not responded to in Pretoria. So during that period, the country was basically on a shutdown in as far as that analysis is concerned. That is part of this political economy of inefficiency.

Not only that, to just go off tangent, we realised that some forensic laboratories, which go to the major ones in Cape Town from Gqeberha, a person will travel there with a knife, the next one travels with an exhibit of Dagga or some drugs, the next one is carrying a firearm.

And we wondered, can you not have a courier service that takes all these things, because one person is out of work, one has to fly, one has to rent a car, one has to sleep, one has to get an S&T or an allowance for travelling. This one is happening. And these are subtle areas where people expand their income, just by making the system inefficient.

But now let me come back to the one which has the largest ballistic surveillance, and you will just bear with me that I go off tangent, having tried to answer your question. In Durban, Amanzimtoti, that is where your rifles, sometimes military calibre rifles and so forth were done. This place was in a shopping plaza. There was not even a gate.

The people who were security there only had a baton. They said there is some law which does not allow them to carry any rifle. And there was an interesting case we were told, I was personally there for that inspection. Outside this ballistic testing there was a three-metre square of tar compacting. It would be removed and put. They said there is something strange here. They said each time we are trying to do the ballistic testing, which is very sensitive to vibration, this person just starts moving the compactor, and then they never finish this road.

I mean, it is not even a road. It was a three-metre thing. You could see it was a dark spot. He said each time we are trying to test, then the person starts working. We are wondering what is happening. It is that web that was saying as much as you are looking at criminal justice, then we went back to ask why when the premises that were approved for you in Pinetown have you not moved? He said, you know, because we depend on the Department of

Public Works. So in essence that is the political economy of inefficiency.

ADV CHASKALSON SC: I mean, just to pick up on that, you do in your statement address several of the specific investigations that you have done in relation to SAPS, and just for the Commissioner's reference points, it is from page 16, paragraph 29, through to 33.

Moving to an entirely, well, not an entirely different topic, you address the issue of ethics in recruitment and selection within the criminal justice sector from page 19 of your statement. I wonder if you could elaborate on the points that you make there, because you are addressing the problem of not really addressing ethics right through the recruitment, appointment, and promotion process, and what that does to an institution. Is there anything you would want to elaborate there?

PROFESSOR FIKENI: Can you come again?

ADV CHASKALSON SC: Is there anything you would want to add to what is in your statement there, or just to highlight?

PROFESSOR FIKENI: Well, the recruitment processes at face value will look like they are fine. What I could add to what we have said, we have been wrestling with the question of, at times you see, as we have seen in the recent appointments of Commissioners for the provinces, systems

are in place, you do have psychometrists and so forth. We are asking, given the scale of the challenges that we see and people there, is it because the filter system is not working and people who are not supposed to be appointed get appointed, or is it because good people come in and once inside, they see a space where you can exploit things, and the organisational culture allows for these lapses in your integrity?

That broadly is the question that we have been raising, trying to look at some of the issues there. Of course, the dynamics within each department does affect the issues of appointment.

ADV CHASKALSON SC: Then the next topic that you deal with is security vetting and personal suitability checks ...[intervenes].

ADV BALOYI SC: Can I just ask a question? And what have you found, if at all, as an answer to your question, is it the filtering system that you find does not work, or good people come in, so the filtering system works perfectly, as perfect as possible in the circumstances, but good people get in and then they get corrupted? Have you made any findings to those two questions?

PROFESSOR FIKENI: Not yet, really. It is something that we are still very much preoccupied with, and we have raised it with the leadership of police. But at the same time, the

issue of either factions or groups or networks creating mechanisms for someone to go through is one of the plausible explanations in addition to all other things. Because what happens is that if right from the time you design questions, you design the structure, you know the person you want, and the people you invite to the panel are the people you know, even the ones you say are experts, you just collect the people you know, then you are going to have these kinds of problems.

Hence, the framework for professionalisation becomes very much important to say, let the Public Service Commission work to establish a panel of experts who will sit alongside those, and that panel should be people who are knowledgeable about the sector and they can compile their separate report if they realise that some of the issues are not going well.

These are very complex networks where you find that at face value things look okay, but when you probe further, you realise that this one knows that one, that one knows that one, that one knows that one. And one of the red flags we are saying, once in any given organisation a network of friends who have not declared start congregating, bad things are going to happen.

ADV CHASKALSON SC: That is an issue I would imagine at higher level appointments. Is there anything in relation

to entry level appointments that you picked up on?

PROFESSOR FIKENI: Not that I am immediately aware of at this stage, except for the anecdotal ones where we receive, especially the civilian one, complaints or grievances of a person who says I was sidelined. So the tool we are trying to establish at the PSC is we should no longer just be resolving these cases one by one. We should be asking what is the trend? Is there pattern recognition which points to a weakness in the recruitment system? So that is the work that we are busy with and that is the work that we want to see across departments because it tends to replicate itself.

ADV BALOYI SC: Could a case be made for different treatment of departments? So, for example, the criminal justice sector in its recruitment processes, an argument be made to treat them differently and starting from the lowest level? Because one can imagine a situation where even at those lower levels people may be coming in that should not be coming in, so the focus is not just on the seniors. And yet in other departments you may not be making the same considerations or the same strictness. Can a case be made for that?

PROFESSOR FIKENI: I do think that you are correct, Commissioner. Given the resources that are limited, a targeted approach to say which departments are most

vulnerable, which units are most vulnerable becomes the issue. But what we have realised is that if your HR unit is weak, it has a cancerous spread across the body because it assists with the recruitment, performance management, consequence management, talent identification, succession planning and so forth.

You can imagine in a position where you do have this revolving door or the high turnover of Ministers, of Commissioners and so forth, what happens down there. And that HR unit, if it was intuitive, it would also be dealing with the issues of wellness, not just the recruitment. It would also be highlighting some of the risks in the recruitment processes.

So to us working with the National School of Government and other institutions, we are saying which units are most vulnerable that need intensive training or retraining or in-service training and also getting the best to be occupying that particular role? Because if HR unit is weak, it will be pliable to whichever leader says do A or B or C.

ADV BALOYI SC: Thank you, Mr Chaskalson.

ADV CHASKALSON SC: The next topic that you address is personal suitability checks and vetting. It is fairly self-evident, I think, what you are saying from paragraph 40E onwards. There are, I suppose, two points that leap out to

me. The first is the point that you make in 40G, that we have seen evidence in this Commission that some officials performing policing duties have not been vetted or have had their requisite vetting status denied and some were subsequently implicated in criminal conduct. From your perspective, how can that happen?

PROFESSOR FIKENI: Well, just the general statement would be to say the whole space of vetting needs a rethink and an overhaul. One, in terms of capacity, because when you have these backlogs. Two, in terms of modernisation of the processes and also to prevent vetting being weaponised, because there is a potential of that happening and there are instances where people have received their vetting results when they actually are finishing their term. Then you ask what is the point?

And we have been raising this particular issue and I do think that those who are specialists in the area, it needs a special attention. And also we have been asking another question, who vetted the vetters [sic]? Who will guard the guardians? Because given the scale of challenges that we have seen, it is clear now that we should trust but verify.

ADV CHASKALSON SC: Two points that you just raised. In relation to modernisation, what did you have in mind? Even if you do not have the specifics, what are your concerns there?

PROFESSOR FIKENI: Well, let me leap into that. The first thing, one of the reforms that you are seeing across the world, it is your digital transformation, wherein you have data of each and every individual as they move from this way to the other, and that is integrated because that is key. You could have that data, but if it is fragmented.

And these days you can even empower it with AI tools for pattern recognition. Therefore, if you are going for vetting, or you had gone somewhere, or you had done certain things, that digital footprint will make this process more efficient and swifter than people waiting for years to do that.

Many other countries are already doing that. Every instance or record that you have, your disclosures that were ever made, are integrated. Therefore, it makes it easier for the vetting person to take that information and simply look at some of the issues and make sure that the human errors at times are eliminated as much as possible and someone else can verify and arrive at the same results.

ADV CHASKALSON SC: I think we will get back to digital integration in more detail later because it is a topic that cuts across a range of the issues that you address. The second point that I was interested in is weaponization of vetting because that is certainly something that we have seen here. How does one address weaponization of

vetting?

PROFESSOR FIKENI: Well, once you start seeing inconsistent application, that is an early warning sign. Whether it is discipline management or vetting, this person goes through, their process is speeded up, others are speeded up, the other one is withheld, and once there is a major development, it is pulled that this one was not vetted. That is already a red flag to say, are these done consistently?

If you ended your submission in February, are you having a situation where you are not seeing results whilst others are coming back saying I am clean? That is a potential for weaponization. Unless there was a valid explanation.

ADV CHASKALSON SC: And in terms of who does the vetting, when we are talking about the criminal justice sector, do you have any thoughts?

PROFESSOR FIKENI: Well, at a high level, we know that your state security will do the vetting, and you also have military intelligence. Some from the police intelligence would be roped in to do the vetting, but it is a space, again, where we need to have more clarity than opaqueness, whilst still protecting the sensitivity of the space. But the role delineation as to who is deployed to do which role among those agencies and what are the capacities?

ADV BALOYI SC: Are there any thoughts about what should be the consequence of an outstanding vetting? Or alternatively where you, I do not know if the language is a failed vetting, I do not know if that is even language. And I ask because I think I have come upon something that allows the head of institution, where someone did not meet the requirements for security clearance, and the head of institution seemed to have the power written down to nonetheless allow the person access to information that otherwise they would not have by virtue of their position and it is a power that derives from a written instrument.

My question is, if a person, if it is outstanding, your vetting, what should be the consequence? Should you continue to be in the position? Has there been any thoughts about that? And if you have failed as well?

PROFESSOR FIKENI: Well, my initial thoughts are that you normally have just the security clearance as the first layer, just to see if just the basics are in place, then it gets into the top security vetting and that is commensurate to the role you are playing and the access of information you have.

If that vetting has not yet been confirmed, there ought to be some restraint as to what you could access and that is why then prioritising certain positions and certain roles becomes very much important rather than having a

generic approach if you had 70 people who need vetting because other roles and other positions have serious national security implications and they can impede somebody from performing their role and they can lay hands on documents they are not supposed to lay hands on and therefore threaten or expose national security by the time you say you have failed the vetting. So there ought to be certain limits up until that clearance and the vetting has taken place and that, in itself, I think is key.

ADV KHUMALO SC: Are you suggesting – good morning, Professor.

PROFESSOR FIKENI: Good morning.

ADV KHUMALO SC: Are you suggesting that for some positions, if somebody is awaiting vetting, they should not wait in the queue, their process should be fast-tracked?

PROFESSOR FIKENI: Yes.

ADV KHUMALO SC: Because that person, by virtue of the position they are being appointed to, will occupy a position that gives them access to classified state information and security, but also the nature of the work they perform is such that he should not be in that position if he is not vetted?

PROFESSOR FIKENI: Certainly, Commissioner Khumalo. That is exactly the point to say you cannot have the equal treatment for everybody and you say the reason we have

this backlog is because we have 300, but you know this particular person, the national security hinges on this person. Their exposure to information could compromise on a greater scale the very security of the nation. In such instances, there ought to be the jumping of the queue, if you will, precisely because of the situation that we are dealing with.

ADV KHUMALO SC: I want to ask you – sorry, Commissioner Baloyi – I have a serious issue with, and we have seen instances of that, where it is a requirement of a position that you must have security clearance or you must be vetted, but people are appointed and they are allowed to start in that position before the process is completed.

Should it not be the other way around to say your appointment will take effect only after you have been cleared or you have passed the vetting? Instead of saying you will start and then your vetting will wait, and if it does not happen either because of politics or because people are blocking it somewhere, then it creates a problem. Because as you say, you made an example of one instance where you only get the vetting result one month before your term ends or you are due to retire. Then it defeats the purpose of that requirement being there in the first place.

PROFESSOR FIKENI: If I go back to the concept of the political economy of inefficiency, it is when we lose the

logic of why certain things were done in the first place. We do them routinely because it is part of the requirement. Had we stepped back to say why was this a requirement in the first place, we would have laws or regulations in place to say your appointment will wait or your certain access to certain things until this particular matter is resolved.

In other countries, we have seen that even when you get appointed, you go to three months, six months of training, deep immersion, whilst all these other things are taking place. But in our case, we take this thing so casually. We are so nonchalant or blasé about it that even the induction process which we participate in, it is more like one of those things.

People come with their phones. They are checking emails. They are still trying to understand the role that they are in. By the time it is a one-day thing, it is compressed. In other countries, they take these roles seriously because they take statecraft seriously.

ADV BALOYI SC: What should happen where a candidate has failed? They are already in the position, as you say, that is how it happens. We recruit and you start while your vetting and clearance are underway. In a perfect system where it is not capacity constraints that delay the vetting processes but somebody fails, if that is the correct terminology, what is the thinking about what should happen

with that candidate? As matters stand, does our system provide for that, how you deal with those situations?

PROFESSOR FIKENI: It is fragmented because in an ideal situation, you ought to have a probationary period where you are employed on condition of fulfilling the following. You can be removed because it is stated up front that you will have to meet the following requirements, but in our case, we have been so casual in dealing with this. People come in, know we are under pressure and so forth.

The consequences of treating these safeguards so casually is exactly why we are seeing in this Commission darkness being made visible. Everything is casual, everything is semi-formal and yet the roles that you have are quite serious and formal.

ADV CHASKALSON SC: There are two issues that I would like to take forward from what you have just discussed because this conversation on vetting is really, has focused on entry level vetting, but there is also ongoing vetting because your profile or your position when you enter an organisation 20 years ago is not the same as it is when you are now in a position of seniority today.

So ongoing vetting is clearly crucial, but it introduces different issues because you have someone who, as things stand, has been vetted, has a security clearance, has passed their vetting. They now come to a new round of

vetting which needs to be done. But if your political economy of inefficiency means that that new round of vetting takes 10 years, there are two problems that arise. The one is that obviously you do not have any verification of the vettable [sic] status of that person, for want of a better adjective.

But the second is that if you put in place rigid rules that your old clearance expires after five years, your political economy of inefficiency can be weaponised to get rid of people by simply delaying their new vettings until their security clearances have expired and they are no longer able to be in the job. So how should one address those issues to ensure ongoing vetting, but at the same time to prevent ongoing vetting and delays in performing ongoing vetting being weaponised?

PROFESSOR FIKENI: Well, thank you very much for that question. Indeed, ongoing vetting in spaces of criminal justice, particularly police or security or military, is a key component. It can be weaponised if you still have the vetting system that is inefficient. Therefore it is very much important from the very planning within the department to say by year three we start this process of applying for vetting and that should be seen to be common across.

I come back to the issue of technology coming in. If these were in an integrated digital data, you would not

need even your supervisor to tell you. You would have an automatic reminder, but at the same time if the vetting agencies will have been professionalised, will be more efficient, will be more intuitive, they would be aligned to that particular planning.

So here a reduction of the human error factor becomes important and the modernisation of how we have done things, because we should not suffer from the South African exceptionalism because other countries are doing this thing, but we have just chosen the more inefficient approaches. And those who are supposed to oversee it either sometimes do not understand it because it is a technical operational matter, or they simply may not be interested. So the modernisation of the entire system would help with that and the reduction of human error would also help with that.

ADV BALOYI SC: Is this among recommendations that the PSC has made and they are simply not being implemented?

PROFESSOR FIKENI: We are at the very beginning of that digital transformation aspect, but on the vetting part we have raised the issue over the years where it is inconsistent, where there are delays. But we are moving on now to say with this window of new technologies and what other people are doing in their e-governance, should we not utilise that to make sure that the process is efficient, the

process can report where so-and-so is being left out whilst others are being attended? And it can be automated for that matter as a reminder.

But that point I raised earlier to say if these were people already in operations in crucial roles, again the prioritisation, the sequencing becomes key because this person is already operating and this is an ongoing vetting and this is building on the vetting that was already there to see what has changed.

ADV BALOYI SC: The recommendations or the thinking about your integration, your digital integration as you speak to it now, surely that is not a recommendation, I am assuming it is not a recommendation that you make or is implementable by a department in isolation of the rest of government if you like. So where do you make, where does the PSC make the recommendation? I assume to the Department of Technology, I think Information and Technologies, am I correct in that assumption that you make the suggestion at that level?

PROFESSOR FIKENI: It is actually interestingly inter-departmental because you will find that the department which issue norms and standards such as your Department of Public Service and Administration ought to be on board. Department of Planning, Monitoring and Evaluation ought to be on board and the Department of Communication and

Digital Technologies ought to be on board and the department, the Ministry and the Presidency that deals with security ought to be on board.

They could be using the cluster system to say we are pushing this, but what we have observed even where you have clusters, fragmentation still continue. They meet when they have to meet, but the seriousness of saying this is a single project, Sometimes you find that years pass whilst debating who should be leading this and so forth. It is mine, it is not yours, it is yours. If you do it, you take it and so forth. This is what is excruciatingly impacting on agility in addressing or effecting reforms.

ADV BALOYI SC: I am thinking, maybe let me say behind my question is that that cluster that you speak of, that of Ministers of departments, let us say, that they may well say, well, I have listened to Professor Fikeni at the Commission, saying this should be happening but the PSC has never suggested that we should embark on a project of integration and these clusters should come together and look at it. So I am asking with that kind of concern, when I say has the PSC made these proposals and at which level have these proposals been made?

PROFESSOR FIKENI: Yes, we have made such levels to the PSC. We have made such levels as we had a workshop for professionalisation where we had different departments

and we have made such proposals even to the Minister of Communication and Digital Technologies. Now the question is how government come together to make this happen. So we have specifically made the proposals.

ADV BALOYI SC: Thank you.

ADV CHASKALSON SC: Sorry, to go back a while. Ongoing vetting and as you say, prioritisation in relation to people whose positions depend, well, who really should not be in their position without ongoing vetting. Is there a system of consequence management for the people who do the vetting? I mean, if you have not vetted someone for five years, the problem should in the first instance rest with you as opposed to the person who has not been vetted. Is there that system to your knowledge and if there is not, do you agree that there should be one and do you have any ideas of how to structure it?

PROFESSOR FIKENI: The challenge here, once you get into the space of intelligence, things get opaque and sometimes for understandable reasons is shrouded in secrecy. Yes, we have met with the Inspector General of the Intelligence, raised these issues, and we have also met with the Human Resource Council of Intelligence, we raised these issues, but we do not have a sense as to where exactly is the locus of this function even in a collective manner, precisely because it is often presented, it is that

sacred space, it is secret, it is confidential and so forth.

So as PSC we do not venture into the space, but we simply raise the issues of inefficiency at a broad level. So the relevant Ministers, I would assume, or the heads of intelligence agencies or the Inspector General would have to be one of the persons of interest to say, what is in place? And when you do have this backlog, what is the performance assessment or agreement of the people doing the vetting?

That in itself I think it is a space that is generally opaque, not very clear, maybe for understandable reasons, because even as the PSC when we get into that space we stop at the human carrier incident issues. Once it gets to the operational or those issues that ought to be confidential, only the parliamentary committee that deals with those matters or the Ministers that deal with those matters ought to be pressed on these issues to say there is a problem. We need a clear reform or action to make sure that these backlogs are not there.

ADV CHASKALSON SC: Picking up from that, I understand, and correct me if I am wrong, that an expanded lifestyle audit system for the whole public service has now been allocated to the SSA, that the SSA are going to implement that function, lifestyle auditing. Am I correct on that?

PROFESSOR FIKENI: Not exactly. There are ethics officers who are trained in different departments. It is more decentralised, wherein they will deal with the issues of lifestyle audit. Then you will have the one that targets your security establishment. But where the problem is, it is how sometimes junior these people could be or how unsupported they can be. So even if they see certain things and at times they wait to be reported to, there is no proactive approach to some of these challenges.

Just like we said, if you see disclosures that present a potential conflict of interest or that is a red flag that warrants a lifestyle audit, you realise that the response is often reactive. Yes, we have ticked, we have done it and so forth. And the issue of probity is something that goes on to investigate, that goes on to analyse potential conflict of interest of people in their roles. We have not yet seen that.

And by the way, the lifestyle audit is relatively new. I can understand it is still being rolled out, but my fear is that it could just be again the tick box of activities rather than a very intelligent approach in understanding and following up. And also all different agencies that ought to be working together, your SARS, your Deeds Office, your many other people and so forth, there is still a challenge there.

For example, as we do the verifications, when we

go to Deeds Office, we pay close to R400 000 just to get information. If you do not have that money, you cannot do your constitutional duty. And these are all government institutions. So the barriers create these inefficiencies.

CHAIRPERSON: Who gets subjected to lifestyle audits or what is the trigger?

PROFESSOR FIKENI: Generally it has been introduced to say when you have a report to say there is something we see or sometimes the disclosures could trigger and say there is something we need to look into this unexplained wealth. That generally is the trigger.

But the approach was to say let people who are in certain roles just be signed to lifestyle audit and agree up front so that there are no issues from time to time to verify and to go deeper in more intrusive manner. But for now, you will find that they will say we do not have resources. They will say so-and-so has reported, we will see what we do. And we had a discussion with the SAPS where they said some people seem not to have done well in the lifestyle audit, what do we do now?

So that in itself I think it is what ought to have been part of the training to say should you see these signals, it should immediately trigger those. As we said the inconsistencies in the disclosures where our verification came and raised issues which are not coherent with the

disclosures, that ought to automatically unleash the lifestyle audit. But it is a space that is relatively new. It is a space where we said let us meet, let us talk, let us coordinate on what happens once these red flags are there.

CHAIRPERSON: You have touched on what would have been a follow up question. You said people who occupy certain positions must agree up front to be subjected to lifestyle audits. I wonder if you wanted to know what norms, standards or legal prescripts exist for people to be subjected to lifestyle audits. Say, for example, there is no such up front agreement, on what basis could a person be subjected to a lifestyle audit? Do not say I am the lawyer and therefore I should know the answer.

PROFESSOR FIKENI: Well, I guess I would go back to section 195 of the Constitution because it outlines what public servants and public administration should do and all other legislations are born out of that. The promotion of professional ethics, transparency, efficient use of resources and accountability, that to us at the PSC ought to be a point of reference in any appointment as the originator of any regulations that could be there, to abide by that.

The same manner as your disclosures, for example, or vetting because you have moved into a particular role. Vetting is close to lifestyle audit, in essence, because you have chosen to work in this sensitive role of the police. By

implication, you have to be subjected to that. Of course there are various legislations such as your Public Service Act. They do speak to these issues. So that lifestyle audit is simply an expansion of what was there when you declare, when you disclose, when it says no conflict of interest.

ADV KHUMALO SC: Mr Chaskalson, I am looking at the time. I had a question for Prof and maybe he can answer it after tea. I wanted to take you back to paragraph 27, Prof, on page 15, where you deal with the recruitment process. And my question is really this. Has the PSC expressed a view on the entry requirements into the criminal justice system, focussing specifically on SAPS or IPID or even DPCI? Are we recruiting the right people and do we have the correct requirements in place to get the correct people into SAPS and DPCI and all of those institutions?

PROFESSOR FIKENI: In the process of developing professionalisation framework, we raise the issue of who should be appointed into the police service. Some of us even raise the issue that in the past you used to have a police college where you do have very practical training specific to that category rather than going to a police college in a university where you go to lecture hall and then you leave.

And also in the past we used to have a situation which I think has continued to some degree where a person

says, you know, if you have not done well in your matric, at least I would want you to be police, and yet crime has become a lot more sophisticated. You need data analysts. You need people who are knowledgeable about cybercrime, who are computer savvy, and you have these hundreds of thousands or millions of youth who are unemployed with degrees.

So a rethink in who gets recruited into police service, into the army, into the intelligence, within that broad statement we have been expressing that in different advisory documents or when we are called in into the workshops.

ADV KHUMALO SC: My follow-up question would have been, to what extent do you think the entry requirements contribute to issues such as criminality and interference and corruption?

PROFESSOR FIKENI: I would say to some degree we should not confine ourselves to just the entry requirements because you have a variety of people who have been caught in these criminal networks, some highly educated, some sophisticated having earned the ranks and so forth, but some at a lower rank.

But generally though, I want to make this broad statement. If you have a society which is the most unequal in the world, you are bound to have people who are at lower

levels a lot more vulnerable to be enticed. That is why conditions of service should be looked at. They will be a lot more vulnerable to be enticed with all these different things so that they just make a living. So the entry requirement is something that we should be looking at and it is something that we have said that right across the board we should be looking at that.

ADV KHUMALO SC: Thank you, Prof.

PROFESSOR FIKENI: Thank you.

ADV CHASKALSON SC: Chair, I have another question that can wait until after tea time.

CHAIRPERSON: Thank you. Let us adjourn and resume at 11:30.

HEARING ADJOURNS

HEARING RESUMES

CHAIRPERSON: Yes, Mr Chaskalson.

ADV CHASKALSON SC: Thank you, Chair. Professor, the one issue that I wanted to raise with you was the point that you made earlier about needing to differentiate in sequencing a vetting. And it seems to me that the underlying point about a failure to prioritise the use of certain stretched resources is one that we see in other places inside SAPS and there is a default position that everyone and every case must be treated in exactly the same way.

Even in circumstances where need and also likely outcomes would justify a system of prioritisation, not every case, be it a person's case or a criminal case, is identical for all purposes. Let me give you an example that we discussed here. There is a big problem with backlogs in ballistics. And part of it relates to resources, human and principally human. Part of it also relates to the levels of violent crime inside the country.

And part of it relates to a system that every single gun crime, from which guns or cartridges or bullets are recovered, is treated in an identical fashion with respect to the ballistics system. And there is an automated ballistics system that can match cartridges from one crime scene with cartridges from another. But to get into the queue, to get into that automated system, you wait your place in the queue along with every other gun crime.

Now, there are certain gun crimes that are much more likely to yield results in that automated system. Say, a professional hit in an organised crime context. That gun has probably been used more than once, as opposed to a gun used in a domestic violence situation, which may have been used more than once, but is much less likely to have been used more than once than the organised crime gun.

Now, the system up till now has not differentiated. And I am not suggesting that domestic violence should not

be investigated aggressively and efficiently. But when it comes to using the ballistics, the automated ballistics system, there should be certain criteria which say, is this gun likely to throw up results if we put it through the system or not.

And the organised crime gun should not wait in the queue with everybody else's gun because you then get the results a year later. In the meantime, when you find out that there are 30 other crime scenes that this gun has been used in for a whole year, 30 individual investigations have been working in parallel without knowing that they involve the same weapon.

Is there any system of, or are there any reports dealing with sensible management prioritisation practices within the criminal justice cluster that the PSC has been involved in? Is this a problem that you see across the public service?

PROFESSOR FIKENI: It is certainly the problem that we see across the public service. Perhaps I could just draw your attention to the inspection and the investigation we did with the forensic laboratories. That particular issue of how do you prioritise what comes before you. But they also raise another issue to say, if and only if we knew what the investigating officers or the Courts were dealing with, we could then begin to package and prioritise and sequence.

So the issue of fragmentation in the public service is quite endemic. And that lack of a very intuitive system that speaks to each other, that is integrated, never mind that you have intergovernmental framework, these things are pronounced but in practice they do not work. So that tells me that we do not have that sequencing and we have seen this with the departments, we have seen this with many others.

There was a case when I had just joined the Public Service Commission of a student who had not received a metric certificate. The approach was, let us investigate. It was February. I said, what if this person wants to get into school now? Why would we be sitting down, set up a team to investigate, instead of asking a DG to call a DG, then I will call the Minister and get this certificate. The letter that we are going to write to the Minister is how many other students have a similar problem.

So this issue of inefficiency, lack of sequencing has just become part of the fabric because there is a lack of an intelligent strategic thinking about the mandate of each place. It is more like, is it compliant? Do we tick the box? Do we tick the box? Will it work for my performance agreement? Many people have long forgotten what the department or the unit was created to do. Not to ask a question, will anybody miss your unit if it was disbanded?

So that is a long answer to a question to say, we have raised it in different reports. It may not have been the main focus, but we have raised the issue of sequencing, of a more intuitive planning.

ADV CHASKALSON SC: I am going to move off this this part ...[intervenes]

CHAIRPERSON: And would this be sequencing and prioritisation that would depend on whether those you are requesting to prioritise would be receptive to the approach, that is what you, you as PSC, have raised? Or would this be a prioritisation founded on some innovation in the system?

PROFESSOR FIKENI: It would be founded on innovation in the system. But let me just also, by the way of passing, say in this inefficiency of systems, when you go to licencing department, when you go to Home Affairs, when you go everywhere, the queue is long. It is meant to create a value chain, a demand outside. Somebody asked for a bribe, somebody asked to look for a car, rather than efficiency of service. Hence this modernisation and resistance to it. When I said there is this political economy of inefficiency, it is because it is a business model for other people for things not to work, for things to be inefficient until you say I will do something, can you do something? In that way we have democratised corruption.

CHAIRPERSON: I ask that question, I am not necessarily asking for a comment, I ask that question because there was evidence before us in the context of investigations by the PKTT where guns or firearms were used, and firearms likely to result in what Mr Chaskalson referred to, that is those firearms having been used multiple times. And the witnesses told us that they would request the ballistic section to prioritise the testing relating to those firearms and they said they were fortunate that those would indeed be prioritised. But as I said, as a preface to my question to you, that depended on those in the ballistic section being receptive to the requests, which should not be. Just a comment.

PROFESSOR FIKENI: Ja, maybe just to say that very issue of saying you have to have a personal connection inside. Call somebody, persuade. It is precisely the feeding of the system which says you will only get this if you have a network. Hence the modernisation you would have simply submitted and the analysis of what needs to be prioritised would not even matter. It is because this is a priority crime. It needs a certain turnaround.

But that maybe they knew somebody who knew somebody inside, it is a recurring story across all departments. Then what happens to people who know nobody but their work is urgent? It is the issue that is

always preoccupying our mind. Thank you, Chair.

CHAIRPERSON: Thank you.

ADV CHASKALSON SC: Can I raise another issue, because it seems to me that people with the best of intentions inside the system, it is much riskier to say let us not treat everything equal, I want a rational system of priorities. I want to go A, B, C. It is A can come first, B second, C third. You have to go out on a limb to take that decision. Whereas if you just fall back on we will first come first served irrespective of the rationality of that, you do not take any chances.

And one of the issues that, let me speak for myself, not for the Commission, that I have seen in this process is that there are a lot of people whose bona fides I do not doubt. But you do not want to go out on a limb and take a chance by doing something other than what the inefficient system is. How does one address that situation systemically?

PROFESSOR FIKENI: Well, the first thing is to address the underlying reasons. Of course, I started by saying your HR ought to be up to scratch. You need to have the right leadership. And I am happy you acknowledge that there are well-meaning people out there, public servants. Because the majority of them as we go from department to department are professionals who just want to do their

work. But they come across these particular challenges.

You have to address the organisational culture. You have to have the right leadership. In extreme situations where you see that there could be punitive measures, your whistle-blower protection system should be in place for a person to say the reason we cannot do A, B, C, D, E is the following. And therefore the overhauling of the whole unit to make sure that you have the right people, the right environment, is key.

In some instances, such fear will be struck because your political administrative interface comes into play. Where you have these patronage networks, if you touch this one, there will be repercussions. So I come back to my default position to say as we modernise, also let us automate, let us digitise, so that the recording of decision-making or non-decision-making is out there. The enforcement of failure to enforce policies is out there.

ADV CHASKALSON SC: That maybe should lead us into the next major theme of your paper, which is the political administrative interface. I am jumping over a topic which I'd like to get back to at the end, which is specific issues relating to financial disclosure and the responses to Professor Schoeman. But I do not see a huge difference between yourself and Professor Schoeman there and I do not want to get bogged down in detail there because there

are some more fundamental questions that you address elsewhere, but we will get back to it.

If you go to page 36 of your statement, or in fact 35 is where the second theme begins, you address issues relating to the political administrative interface, which are obviously issues across the whole of government. And you highlight a range of critical issues here. The first one that I see is the issue of uncertainty of relative responsibilities, which you flag in paragraph 70 at the top of page 36. Could you elaborate on that? What are you talking to there and what confusions have you witnessed?

PROFESSOR FIKENI: You do have a number of confusions. The first one, you will find that the Public Service Act assigned the accounting officer, your head of department, to be responsible for your procurement for administration operations and so forth. No, no, no, that one, it gave the power to the executive authority. But the PFMA specifically looks for the accounting officer whilst the Public Service Act seems to give to the political head certain responsibilities. So that tension has always been there as to who is in charge.

And that is now being clarified in the new Act to say ...[intervenes]

ADV CHASKALSON SC: Sorry, and when you say the new Act, you are talking about the amendments of the Public

Service Act.

PROFESSOR FIKENI: Yes.

ADV CHASKALSON SC: Not the Public Service Commission Act?

PROFESSOR FIKENI: Yes, not the Public Service Commission Act, because that created an inherent tension between the two. But that was not the only problem of the political administrative interface. You found that at times you do have even the head or the accounting officer or DDGs who are quite senior and involved in politics, more senior than the executive authority. Because very often we often frame this as the Minister or the MEC versus the HOD.

Some of the HODs are quite seasoned political players, and they play that space very well and you find that the Minister consent is paralysed. And they also play this space knowing that the Minister will not be around for too long. There was a time when we had almost nine Cabinet reshuffles in the space of nine years. So they know we will still be around. So that is the other side to it. But that contestation of the political administrative interface also expressed itself in terms of the political figures or your executive authorities giving unlawful instruction.

And we even produced an advisory to that effect, to say how public servants should resist this unlawful instruction, especially in the aftermath of Life Esidimeni,

because that had become a hot topic in the Zondo Commission. People said, no, my Minister said. So we gave guidelines to say how you actually resist or refuse to have that unlawful instruction. The third element ...[intervenes]

CHAIRPERSON: Before you, sorry, please do not forget your third element. The confusion insofar as it is related to the division of powers slash functions between the Minister and the administration, did that exist despite what you say in paragraph 80, capital letter A at page 39, which is that:

> "What the political leadership is entitled to do is to determine lawful policy and strategic direction, which then leaves the actual administration or even the enforcement of the policy with the administration or administrative head downwards."

Did the confusion in this regard exist despite this? Or are you suggesting that the delineation at that earlier stage was not as clear as what you state in paragraph 80, capital letter A?

PROFESSOR FIKENI: Yes, it existed even then. And there was quite a contestation at all times as to who is in charge. SPSC almost annually were invited to come and mediate between a Minister and the DG, between an MEC

and an HOD. One of the problems is that you will find that a DG or an HOD is appointed by the Premier in the province, but works under the MEC. They work very well. Once they start having tensions, they start saying, by the way, I was appointed by the Premier, I report to the Premier. We have dealt with cases of that nature.

Similarly, nationally, it is the President who delegates the Ministers. So when you have a fallout, then they will remind the Minister, by the way, my matter is to be handled by the President. I will not even go down to areas of the Minister and the Deputy and the DG, because with undefined roles for the Deputy Ministers, it is yet another challenge, but it is beyond the scope of what we are presenting.

Then the other area where you have had this expression of the political-administrative interface, it has come in the form of study groups and you may be aware that we issued an advisory. Where a political party invites public servants to come and brief it on the eve of presenting to the committee and these are generally not transparent, open, and so forth. In some instances, we have had where the accounting officer is the one that is more connected to those in the Portfolio Committee because of their network or because they are more senior than the Minister concerned.

And that in itself is a space where we have asked

in the advisory that the speaker in Parliament, as well as the government of the GNU, should deal with and start clarifying that in line with section 195 of Chapter 10, Values and Principles.

CHAIRPERSON: On study groups, I have two questions. The first one is, at a practical, or rather, let me say, yes, at a practical level, not at a theoretical level, do all political parties represented in Parliament have access to the administration for purposes of a study group? I do know that the ruling party does have ready access to the administration for purposes of study groups.

But what I am interested in is, at a practical level, do all political parties have that kind of access? That is the first question. The second one is, maybe you touched on it in your discussion on study groups, is the very idea of study groups a good practice at all? And as you respond, you would have seen from my questions that I do know what study groups are, but I think for the record, as you respond to my questions, can you just explain what study groups are?

PROFESSOR FIKENI: A study group is where a political party in its caucus invites an official in a department, very often a DG or an HOD, to come and get a briefing on the presentation that is to be made. And this particular practice has always been the one that worked with the ruling party.

In a situation now where you have a coalition, you have more dilemma. That is why you have had some of the officials coming to the PSC and we have had to intervene.

A Minister from party A sits down and prepares a document with a DG, and the DG has to take the same document, because they are invited by party B, to discuss and that discussion is not transparent, there is no request from the other Minister to come and present. And at times, with these virtual networks, you see the meeting is recorded, and you find people who do not even know the history and the evolution of this study group saying, hey, hey, hey, hey, if you put slide 7, hey, please remove that one.

Now that in itself militates against the very transparency, the very professional ethics and so forth. Even worse, at the time when you had factions now within the same party, you find that the appearance into the study groups gets weaponised. And again, our touchstone is your constitutional values and principles of the public administration. When such things happen, they impact on that professionalism, on that transparency, on that accountability.

And not only that, they will then expose this particular HOD or DG, because this Minister who was not told or requested to give permission, the moment the term

of office of this person comes to an end, they will want to terminate, because they are not comfortable with this kind of arrangement and they believe that this person was an deployee of that particular party. When in fact we are working towards having a professional administration, as the constitution had indicated, that supports any administration and that continues.

Then the other issue of the term of office of DGs, the five years, it also created an impression in other countries they have permanent secretaries. You are there for as long as you perform. But the moment you fail to perform, the system takes you out. And the moment you disobey, you are insubordinate, the system takes you out. And that continuity has created stability in many departments.

But because of these five years, the administration is five years, the DG's term is five years, so when that five years come, or a new person comes, they start coining in their mind that it is time to change. And it is for that simple reason that in the framework for professionalization, we opted for a longer term. We would have wanted a longer term, but we settled for ten years. But it has not yet been effected for the heads of administration.

CHAIRPERSON: I asked a question on study groups because you moved from the delineation of powers. I still

had one more question on the delineation of powers. In very broad terms, although there was some matter of detail, in so far as Minister Mchunu was concerned, but in very broad terms, there was agreement between him and the National Commissioner of Police that the Minister is responsible for exactly what you mentioned here, the determination of policy and the adoption of strategies, and that the National Commissioner is responsible for implementation and the actual administration of SAPS.

But, and here is my question, they would not agree on who, or rather on whom, the power to disband the PKTT resorted. So the Minister said, in terms of the power that I have, I do have the power to disband the PKTT. And the National Commissioner said, no, that falls within the purview of my functions. Are you able to, in very practical terms, tell us how one actually draws the line with regard to what you say in paragraph 80A, the determination of lawful policy and strategic direction, as opposed to what would lie within the administration? Where and how is the line supposed to be drawn?

PROFESSOR FIKENI: The lines are generally out there, but I will go further to say, even if you knew that this is my power, once there is no consultation, there is no transparency, it is indicative of other things. Because even if you were to determine the strategy, the direction,

because the person who is going to implement is technically at an operational level, you would say, if I were to do A, if I were to do B, what is feasible in terms of your operational experience? What will it take? What is the right timing? And so forth.

So the underlying factors, as we often deal with these disputes between this Minister and this HOD, it is already indicative of certain strained relationships, of certain contestations, of certain non-disclosure or non-consultation. So to me, the key thing would be what efforts were there, as they engage each other to say, I think this area, I am not so certain in any event it is a borderline case, it might be operational.

Because when you say, I disband, there are certain operations taking place on the ground, there are certain requirements on the ground, there are certain things you will ask and say, I do not want to disrupt only to find that you are about to corner a certain particular unit in a certain area. So in this particular case, that you do not have conversation, consultation, as well as a transparent approach to it. In fact, you may even call those heading that unit and other people and say, can we talk? Or you may even consult your colleagues in the Cabinet and say, can we reflect on this matter I was thinking, and so forth. That, to me, is key.

CHAIRPERSON: I have derailed you so much that you have probably forgotten your third point. You are coming to a third point.

PROFESSOR FIKENI: The third one is the issue of people in the private office of a Minister or an MEC. Because at times that advisory role sometimes turn out to be, you know, the people in the office taking charge, instructing this HOD, instructing that person sometimes by passing. That is where the lines get crossed. And again, who gets appointed into that office? Because some will be your operatives who are very much seasoned in a political space. Some may be technocrats who provide advices.

And as you have seen when we investigated the Department of Social Development, it could just be a random approach into who is appointed into the office. So that in itself, I think, needs some attention and some degree of control. Thank you, Chair.

ADV CHASKALSON SC: I want to jump backwards and forwards through a number of the topics you have touched on. On the issue of political interference, one of the points that you make is that in terms of the PFMA, if a directive from a Minister or an instruction from a Minister has financial consequences, it has to be in writing. Do you see any reason why that rule should not apply to all instructions of a Minister? So that what the Minister is pressurising the

head of department to do is always recorded. Or if it is not recorded, the head of department can say, please give me a written instruction because I cannot act, save on a written instruction.

PROFESSOR FIKENI: Well, I do think that one does not have to adopt a very rigid approach to it. Because you might have discussed in the strategy what has to be done. Now it is a matter of follow-up and reminder. Because there is the other extreme where you start saying, anything you say, write it down. But at the same time, where you feel that this is now encroaching into a space of unlawful instruction, that is when you say, write it down.

But I often say, sometimes people are aware, they say, I will not write it down. You send an email, and that email with the confirmation that a person has opened and read it, to say, I am so sorry, I might be missing other things from what you said, and you write it back to the person, so that you can confirm that you had spoken with the person and the person has received your message.

And then you will not move forward to take an action and say, I was still waiting for your response to the email I sent. So you throw the ball back to the person, or you say, I have brought a team that would be relevant to this implementation, and I would like us to have a follow-up meeting so that you repeat what you said.

ADV BALOYI SC: Is it not perhaps a safer option for an official in that position to rather be empowered to request an instruction in writing in those circumstances, the doubtful circumstances, or where they see this as an obviously unlawful instruction, that you have, whether by legislation or whatever form, the different forms that you have in government, that employees should be entitled to say, you give it to me in writing. And then they are not in breach of anything when they make that request.

That would require a hierarchy of decisions, and it may be that you say, if an employee is doubtful about the lawfulness of an instruction, they are entitled, and a Minister must provide that instruction. Is that not more, kind of safer and more empowering than confirmed by email, you have been given an instruction, you confirm. Yes, I see you saying that, make sure that they have read the email, but you get into an uncertain territory where a Minister says, well, it was opened by my PA, I never got to see it, that is why I did not respond.

Is the first option not the safest? Empower officials to request an instruction in writing if they are doubtful about the correctness of an instruction.

PROFESSOR FIKENI: You are certainly correct, Commissioner, that is exactly in an ideal situation, and as we move towards reforms, that is exactly what ought to

happen. In this case, it was stop-gapping for us to say when there was prevalence of this, these are the guides, because you know that whilst you are asking for legislation, it takes seven years, it takes 12 years, in the meantime we put as a stopgap a guide. But what you are saying is actually an ideal one.

CHAIRPERSON: How does the fear of career or professional victimisation, how should that be dealt with in practical terms? Because an official will bow to political pressure out of fear of losing their jobs, or their job.

PROFESSOR FIKENI: Well, I do think that if we were to strengthen legislation protecting employees who are facing the pressures and political interference, that would be key. And I do think that the legislation now that is trying to delineate these roles, the public vigilance over the implications on unlawful instruction, and ideally the fact that in the coalition arrangement now you have this Minister from this party who is watched by another Minister for another party, and the Portfolio Committees from another party and so forth, it has made accountability, you know, rather more robust. Because it is not people with a common cause now and they are all trying to demonstrate that they are doing something right.

Of course, in the whole basket, the protection of whistle-blowers, the protected disclosures, and all those

being affirmed, will give those particular assurances in terms of the unlawful instruction. But of course, nothing takes away the fact that you need intensive training of people to understand the unlawful instructions, in what form they come, what laws protect them, and such assurances. Even the induction of the new Ministers, the new executive authorities, that point has to be driven home with cases and examples of where such unlawful instructions occurred and what were the implications.

CHAIRPERSON: I take and understand everything you say. It is just that my sense of unease is the human element.

PROFESSOR FIKENI: Yes.

CHAIRPERSON: Because it cannot be that prior to the statutory amendments you are referring to, that those who bowed to political pressure were not aware what the legal position is. So my sense of ease stems from is not that going to recur even in the face of the statutory innovation? I have a sense of unease just because, as I say, of the human element.

PROFESSOR FIKENI: Yes, I do think that that political economy of inefficiency has the political dimension to it. For as long as you have that culture permeating public service, so as long as you do have the sense of impunity where nothing happens, even when such egregious things

do happen, then people will be terrified. People will simply say, it is better to do nothing, it is better to be compliant, it is better to be sick on the day when this decision has to be made.

Precisely because the accountability and oversight system has failed them. Hence, I said, even if you were to have a new law now, if they know you are going to have people with impunity, nothing happens to me, and I am protected or I am senior politically and so forth, laws on their own do not make that much of a difference. They simply enhance and assist. If the political culture goes this way and laws go that way, that is what we find ourselves in.

In most instances, you have the harassment laws, you have the laws on unlawful instruction, you have many, many, many other things. But the human factor, which was reinforced by the political environment, allowed for impunity, allowed for immunity, and those people in powerful positions could kick people out. As PSC, we have been dealing with people who have been on suspension for seven years, five years, on special leave seven years, with full pay.

And we have also dealt with cases where people say, the department chucked me out and they simply changed lawyers, they brought senior counsel, hence, therefore, attention should also be brought to the state law

advisors and the abuse and the use of lawyers, which becomes a law-fare rather than an issue of administrative justice. It is for that reason that we said our input today is trying, by all means, to bring this broader context.

You may have an input from Dr Schoeman, you may have an input from international experts, they will come with this very nice boutique of laws. But if this particular political environment is not addressed, if this particular toxic culture within departments is not addressed, then there is a problem.

CHAIRPERSON: Thank you.

ADV CHASKALSON SC: Can I pick up on some other issues that you touch on? The one is the issue of acting appointments and the instability that it creates. Can you address that? And can you also consider whether there are remedies for it, whether it would be possible to put time limits on acting appointments or time limits on a requirement to fill a post, particularly at DG level? I think first, we need to hear about the problem and the uncertainty that it creates.

PROFESSOR FIKENI: We do have widespread acting arrangements, not only at your DG, HOD levels, but in different spaces. Like I say, if you have a person who has been suspended with full pay for seven years, you cannot fill that position. You have to put people who are acting.

And those people who are acting were not employed with specific skills of that area. So you have already downgraded that particular role and you have kept many people off balance. So we do have this problem. Some DGs have acted for more than two years and it is not quite clear what the problem is.

Among other things, when we have asked for a meeting with the State President and we met with the Speaker and raised the issue, it is precisely the impact, the corrosive impact, the performance impact this has on the entire department. Because if your head is just acting, it means, one, they do not have the full confidence and authority, it means they could be blind because they do not know when the manna will fall from heaven. It means they are not respected by those below because they know this one is great.

So that in itself has a very devastating impact on the morale within the department, on the performance, on the strategic projection to say we are planning for the next five years, the next ten years, and so forth. When you, who has to lead the support of the executive authority do not know whether it is next month or it is three months, then you cannot have participatory governance because you yourself are vulnerable. So that is a problem.

ADV CHASKALSON SC: Does the PSC do audits of how

many senior management posts are occupied in acting capacities? And would there be one of those audits for the criminal justice cluster?

PROFESSOR FIKENI: We can check. I do not have offhand such statistics, but we do but we also work with the Department of Public Service and Administration to have that information compiled. And it is on the basis of that information that we had to write to the President to say this situation is untenable. But we can provide such information as a supplemental information.

ADV CHASKALSON SC: Apart from political will, are there legislative reforms that you could think of that could resolve the problem? Would it be feasible to provide a legislative requirement that at certain levels posts must be filled within six months?

PROFESSOR FIKENI: Certainly. I do think that you could have such legislation, but you must have political and administrative will to see it through. And the accountability institutions such as your Parliament, your constitutional bodies, should be active in making sure that this is done. And at times, it could even be inserted as a performance indicator for the Minister's consent or MEC or Premier concerned.

ADV BALOYI SC: Why can there not be legislation or a position that says a suspension cannot endure beyond a

certain period? You speak about five-year, seven-year suspensions. Is there a reason that there is no cut-off or there cannot be a cut-off to say a suspension beyond six months or a suspension beyond a year, that person must come back to work or you must separate. There must be a termination of employment. Is there a reason that there cannot be that kind of position?

PROFESSOR FIKENI: As I said, Chairperson and Commissioners, this is not for the lack of policies. We already have such a policy that you can only suspend a person for 60 days. The extension could be granted by the Chair of a disciplinary. Those have simply been ignored. And when we asked the department that issued norms and standards which had issued the regulation, how many people are out there? They said it is decentralised and it took time.

When we had cases that came to us, a person says I was on special leave seven years ago, I am still getting paid, we approached the department, we met with the Minister, Deputy Minister, we said this situation is untenable. How much are we losing? In a very strange way, remember, we are so outraged. We thought this outrage would be shared. And we met and said we are going to take the matter directly to Cabinet Minister and we agreed and so forth.

Guess what? And we said the plan is by this date, everybody who has been on suspension for more than a year or two years should report back to work. When we are preparing to do that, we were hit by a letter from the lawyers – you are now overstepping your mandate. But we met with the Minister, we agreed, this is a crisis. So when I talk of the political economy of inefficiency, I am talking about such things which make no sense. Because that is ought to be basic common sense.

All kinds of laws, we were told if you bring these people, this matter was discussed in the bargaining. We said no, no. These people will come back so that we know who is still alive, who is dead, who has moved to Australia, Canada, and we know whether there was ever any process of charging them. But because we do not have budget to bring senior lawyers, we sort of started saying we will just hope the matter is resolved.

ADV BALOYI SC: The new, I think it is section 13.3, that says you must implement, would that fix that kind of problem unless you go to Court for review, a direction of the PSC must be complied with. Would that be a solution?

PROFESSOR FIKENI: It will go a long way, but what if we receive no cent and you go to Court, you need to have a lawyer. Because as I said, some policies are a Rolls Royce without an engine until you give some resources so that you

meet the other person on the other side. It is stipulated in our new Act, just like we are preparing for it, that you cannot have this policy without a business case, how much it will cost, what will be allocated.

What if no allocation is given? We will simply hope that some solution will come to the problem. That is where this inefficiency comes in, where decisions are made, but means to make them function are not in place. Let me give you another example which may look like unrelated to this. There were textbooks in Limpopo in the Eastern Cape that were not being delivered to the schools. They were in the warehouse, but the debate was who had won the tender. First month, second month, third month, fourth month, fifth month.

But you know for a fact, if you ask a woman in a township or a village, we have this crisis, can you organise so that we get the books? In one week, that person would solve it. But the state could not.

ADV CHASKALSON SC: Sorry, the tender was for transporting the books from the warehouse to the schools?

PROFESSOR FIKENI: Yes. And when the media kept on hounding, some creative people took the books and threw them to the river because they kept on coming after the books had been removed. So when I say in this situation, we ought to be talking about a country that just needs basic

common sense and honesty. That is why many things, the policies are there, but how you make them function is key. How we coordinate our approach is key.

ADV BALOYI SC: Your response seems to suggest, and it is worrying, that even the power that you have now in terms of that section, insofar as it can be litigated to directions, in fact, we may find it makes no difference that you now have this power, surely there has to be a way of enforcing your direction. Otherwise, directives, otherwise, they are meaningless. If they are completely dependent on willingness to participate, there has to be.

And if it is a function of litigating, surely you must be able to argue for a budget allocation for litigation. There is the State Attorney. Other departments do litigate and you should forcefully, I would think, forcefully in anticipation that your directives are going to be challenged, in anticipation of that, that you forcefully fight for ability to enforce and to seek compliance with your directions.

PROFESSOR FIKENI: Certainly.

ADV BALOYI SC: Because, maybe let me just finish.

PROFESSOR FIKENI: Sorry.

ADV BALOYI SC: The earlier discussion with Mr Chaskalson about the filling of vacancies within periods, they are pointless if people are acting in those positions, so if you continue to have people acting in a position for five

years, you cannot fill that vacancy. That is what you said. Because there is a substantive person who is holding the position. So, we may come out with a position that says vacancies must be filled within six months.

But it means nothing if this practice carries on. So there has to be some instrument that has force, that forces Ministers, DGs, officials to abide to your directives that, with the directive in fact that you say is already in place, suspension cannot endure beyond six months. There has to be a way of enforcing that.

PROFESSOR FIKENI: Thank you very much for that. You are correct. But let me give you another dimension to this. We lobby quite vigorously and we have created a good relationship now with the Ministers. But you find that there is an official that you meet within Treasury after the Minister has agreed, who met your team. They have never read this Constitution. One said, hey, in this austerity why cannot you cut your Commissioners, there are too many.

Remember, it is 14 Commissioners dealing with now close to 1.9 million. They are in every province. A person who says due to austerity change the Constitution and very often I find sometimes in a very strange way that the Minister will have agreed, then the letter comes, it says something else. Just like I said with these suspended persons. Minister, Deputy Minister, we are all in

agreement. But some official will come and say not me.

And I have a suspicion and I have asked this question. Are we a treasury-led or strategy-led country? Because at times you have these priorities, three priorities. You go look at the budget. Sometimes it is not actually mirroring what these. It is because people who are there who may not have even taken time maybe to watch those saunas and so forth ultimately will make a decision and there is no explanation.

That is why for constitutional bodies it is key that their budgeting should be insulated and some critical roles. And if you are to take it out, there ought to be some conversation, there ought to be some guardrails, because you may have this power and it is undercut by lack of resources.

ADV BALOYI SC: Thank you.

ADV CHASKALSON SC: I mean, getting back to the instability of acting appointments, it is also tied to the inefficiencies of the disciplinary systems, I would imagine, because a large number, some of those acting appointments are people who have left the job, but a large number of them are people who are appointed to positions vacated by incumbents who are facing disciplinary proceedings. Is there anything that the PSC has recommended in relation to disciplinary processes within the public service and

speeding those processes up?

PROFESSOR FIKENI: We called a conference where we brought in your CCMAs, the Department of Public Service and Administration, Labour Court, labour unions and so forth to deal with discipline management. We seem to agree on how we are going to approach this matter so that we speed up and we have clarity on how we deal with these prolonged suspensions. We all agreed and the sadness is then we heard that one department is doing this, saying this is my power, the other one is doing that, and yet we had come together.

Same with the framework for professionalization. Fragmentation is a strategic goal now for some of the role players. It is not by default. The instincts of some departments is this is my power rather than what is in the national interest. And I keep coming back to this issue precisely because many laws have been proposed, many interventions were brought in, and you do not know how much it costs to develop one legislation. We have had to walk through nine provinces, consultations, went through a few years, you spend millions only for the policy once it arrives to be ignored or discarded.

And that happens policy after policy after policy. That is why in the morning I said we have become a cemetery of policies. One other colleague in our forum in

the African Forum of Public Service, they said you know South Africa, what we love about you guys, you have all these complicated processes, you get consultants, we develop policies, sometimes we go to your websites and just get the policy and change the name because we do not feel that much guilty because you are not going to use it anyway. [Laughter]

So we confuse the journey with destination. We measure activities, not the outcome.

ADV CHASKALSON SC: The last point I wanted to explore with you in relation to this executive administration tension is the issue of transition planning. And it is an issue that you touch on it at paragraphs 75 at the foot of page 36. And in some ways it presupposes a functional system where there will be some stability and then a turnover. But what have your observations been in relation to transition planning within the public sector generally and the criminal justice sector more specifically?

PROFESSOR FIKENI: It is almost non-existent. Even when Ministers from the same party one leaves, there is no process. And this, some of this we get from the very Ministers. And then what that creates is that even when people have come up with a good beautiful strategy, working together, they are including everybody, stakeholders, they sort of shelf this policy for the fear that

you will be seen to be having nostalgia for the person who left. And that makes the whole system inefficient. You start again. It is more like a treadmill. You are running very fast, you are sweating, but you are still standing next to the same window.

ADV CHASKALSON SC: Again, is there anything that can be done about it?

PROFESSOR FIKENI: I think it can just be regulated and be a must. The exit report, the handover, and also even the oversight institutions such as your AG, PSC and so forth should be saying if you submit this annual report what happened to that policy that you had started. But again, the fragmentation, when it comes to some of these things, the main focus tend to be those pages of annual report that speak to the AG. And yet you have findings from PSC, you are finding from the Public Protector, from the Human Rights Commission.

They feature nowhere, even by the way of a synopsis. For example, the Public Protector now has had this major report on NSFAS. It is possible that NSFAS could perform in its annual report and the audit as they sample without much reference to that. And we think that for combined assurance, all major reports, they may not be annual, of your constitutional bodies pertaining a particular institution should be cited in that report, so that you are

able to see how this particular entity has functioned.

But also the accountability system has its own weaknesses. As the Public Service Commission, we primarily report to the Portfolio on Public Service and Administration. Can you imagine, we do research inspections, policy recommendations across the board, forensic laboratory, you go there. Because they are not specialising that they say for noting, instead of going to the Portfolio Committee that speaks to the matter that you are working on.

And also that happens right across, we did work on Tembisa Hospital. No invitation to that particular, you know, Portfolio Committee because you had the word public and public service and service in another department, that is where you belong. With expanded power, we have had discussions with the parliamentary leadership to say it cannot be that our reporting on these various matters, which are specialised, end up being noted here. Because the Constitution says report to the National Assembly.

And also in the provinces, you find one province does allow our Commissioner to report to the entire legislature. In others, they are not even allowed to appear. They say just submit to the Premier's office, we will talk on your behalf. So these discrepancies are not actually helping in the accountability ecosystem.

ADV CHASKALSON SC: Maybe that is a useful point to move from to your third theme, which is really parliamentary oversight in the accountability chain. It is an issue that you address from page 43 of the statement and there are a number of different points that you make there. Maybe if you could start by what you refer to in this section of your statement when you are talking about the need for a closed-loop model in terms of parliamentary oversight. What is missing at present? What should be there?

PROFESSOR FIKENI: Well, I do think that the first thing is for the understanding that we are part of the accountability network. We are the extended arm of Parliament. However, when an incident like the floods in Durban come, Parliament is going there, understandably, so they demand a report. PSC goes there, demand a report. Auditor General goes there, demand a report. Human Rights Commission demand. And then the people who are supposed to be helping people on the ground, have to rush back to their offices all the time because the report writing takes precedent over the assistance of the people.

So to me that creates an oversight saturation and it is a very expensive exercise. These entities have specialisation. They have researchers who have specialised. If they were to work together, we recently have a strategy workshop where we asked one Chair of Chairs to

talk to this particular issue of how to have this integrated approach to oversight. If they knew it was part of them or they were part of it, it would be easy to follow up. Right now these entities come, report for noting. Then they come into the field, perhaps not specialised in that field, perhaps not having the history of other research and you know that has taken place in the field.

So it makes it to be for noting. It becomes more performative rather than a very solid accountability exercise. So I would think that that integrated approach, but also a standardised approach right across, would work a great deal.

ADV CHASKALSON SC: Coming down to the criminal justice sector, you make certain specific observations about how parliamentary oversight should work in relation to the criminal justice sector. In paragraphs 89A, 89B, do you want to elaborate on what you are saying there? Maybe starting with 89.

PROFESSOR FIKENI: What we are saying there is that there is a gap in accountability. And as such, starting with the fact that when you have certain findings, the follow-up is not there. It is just for noting. Even where there has been disclosures, the internal capacity to follow up to the logical conclusion is not there. Perhaps I should come back to a point I made before we broke for tea. The lifestyle

audit issue. Once something is flagged for lifestyle audit, at a forensic level, it will be your SIU which deals with. You refer the matter to them. But it does not come cheap. You have to pay.

Again, if you are an institution with little or no resources, or the CFO says we do not have money, it stops there. So it is those loops and gaps that we ought to close. Similarly, when we raise an issue or a finding to be directed to the relevant parliamentary committee, rather than going to this common basket where we say we are reporting to this Portfolio Committee, which has no specialisation, sometimes no interest. Yes, we do have meetings with the Ministers, and that has improved a great deal of follow-ups. But it is at the level of implementation, any recommendations or directions that we issue, that we still experience challenges in this accountability fragmentation.

ADV CHASKALSON SC: The next discrete topic that I would like to canvas with you is the PSC engagement in relation to the intelligence services. It is an issue you address from the foot of page 51 of your statement. Maybe if you could take the Commission through what you say there, and whether you have any suggestions as to how the situation could be improved.

PROFESSOR FIKENI: We engage with their HR council, which deals with career incidents, because their legislation

says they must consult with us. But also they have raised issues which need attention. We have assisted in their strategy workshops, and we have received some of the issues they said were pressing issues and Commission has met with the Minister in the presidency to raise some of those issues. Of course, some of the issues are not some of the issues that we do ventilate in the space, but we have relayed those.

But there is also a need for intervention. There is a need for strengthening of systems of accountability and some degree of transparency within those who are monitoring the space. Because we are also raising the question of what happened to the Sydney Mufamadis' own investigations and recommendations. Again, you have seen many Commissions, you have seen many investigations, you have seen many policies at times that come out. The main issue is how do we make sure that this time it is not the process, but it is the destination, it is the outcome that matters.

Because people are on the verge of despair, and this particular platform has captured public imagination, and hope is beginning to whisper. It is only when we come up with interventions, even in the intelligence organisations, the relevant persons, the Inspector General, the Minister concerned, that we professionalise that space as well.

ADV CHASKALSON SC: Well, it is a bit sort of at right angles to where we are going, but would you have any suggestions to this Commission as to how it should frame recommendations, how it should frame suggestions in the report in a way that is most likely to get them implemented from this sort of sad experience of a whole lot of previous, not just Commissions, but oversight bodies making recommendations that do not happen?

PROFESSOR FIKENI: Well, to me, I do think that it should be put forward that many such Commissions have been in place. Good work has been done, but follow-ups are not there. Therefore, we ought to have a serious engagement on why would recommendations never get through. First, focussing on the people factor, leadership, the political will, the administrative will. Second, focussing on the nature of recommendations and policies fit for purpose, contextualised to our environment.

And thirdly, resourcing them, because we seem to have had good leaders at times who want to do something, good policies in place, good recommendations, but with no resources. I do know that some people who deal with the finances, they say, how much is the cost? But we never ask the question what the cost of not doing it will be, because it could be running into billions. Maybe we should be looking at the reforms that SARS has undertaken, after the Nugent

Commission and the near paralysis of that institution.

They said, should you give us this to modernise our systems, to put the latest IT systems, the tracking systems, the verification systems, if you give us this billion, we are going to bring you maybe another 30 or 40 billion. Maybe that language worked in a sense because they were seeing what is going to come. But now the challenge comes when it comes to security establishment, where the cost of doing nothing is in lives that are lost. The cost of doing nothing is the republic that is not protected.

The cost of doing nothing is not the statistics, it is the experience that each and every family that goes through challenges that otherwise could have been avoided. Maybe if we begin to have that particular conversation and begin to have a workshop that speaks to one thing and one thing only, why would policies, why would recommendations never see the light of the day? Because it is often treated as a footnote, as a result it behaves like a footnote.

If we were to just shut down everything and say why all these systems, we may come closer to seeing the heart of the political economy of inefficiency, where things are designed to be inefficient, where certain processes are done as a pure exercise, no, after three years they will forget, let us just shove them away. So to me, whatever we come up with and whatever this Commission comes up with,

we have come today to tell you the level of resistance to implementation that you will see.

Some will even quote the Constitution as to why A and B cannot be done. A simple matter such as we raised, which country do you go to Marabastat and find a person carrying one metre of SIM cards un-RICA's? And you know these days crime, communication, whatever, cyber is commuted through these gadgets. When you raise that, they say you know, you have to be careful, we will look into this and so forth. It is because that feeds into some ecosystem. That feeds into this ecosystem of doing wrong. I am giving that as one of the examples.

So we should be very much aware, as in this document, the weaving thread is yes, we will understand the problems, but the most difficult part will be in the implementation. You will be given a thousand reasons why this cannot be done. Yes, we will do it next year. No, something happened and so forth, because the system is designed to operate in silos, to be fragmented, not to be modernised and so forth, so that we meet again to talk about the same things.

ADV CHASKALSON SC: There are essentially two topics that I still want to canvas with you. The one is very briefly to go through your responses to Dr Schoeman. The second is to deal with your more general proposals for reforms. I

think, I am not going to finish either of them by one o'clock and particularly the more general proposals for reforms, I think I would be happy if people had had some lunch and a rest and cleared their minds before they heard that. Chair, can we take a break now?

ADV KHUMALO SC: Can I ask one question? Prof, can I take you back to page 17, PSC's implementation record across criminal justice system departments? I will not bore you with the statistics because they are there, but my reading of this chapter is that the implementation rate of your recommendations is very low. Has there been follow-up from PSC when you deal with the criminal justice system players to establish what the reason is?

Because we are sitting where you would have been sitting for many years, and we will study the evidence, we will write a report and implement, but you said you are here to give us a warning that there is a resistance to implementation of recommendations. So let us take it a step further. In your follow-ups, what has been the reason and how can we overcome that problem, bearing in mind that once the Commission has done its work, our job is done, we cannot enforce our recommendations?

What is it that you think maybe we need to put in our recommendations to ensure that the implementation rate is not as low as what we see in this chapter of your

statement?

PROFESSOR FIKENI: The first reason, Commissioner, has been I am relatively new, I am acting. So stability of leadership. Come to think of it, which one of the Police Commissioners have lasted going way back, I think, to Selebi, going way, way, way back. That in itself should concern us, this revolving door, as to why. Because leadership needs some stability so that it can plan properly. How many Ministers of Police have we had? Again, to use the language used in the roadworks, stop, *ry*-go, that arrangement, it is a problem.

You may have the best intentions, but if people come in one year, two years, they are gone, one year, two years, they are gone, it is a problem. The second one, from the preliminary indications, it is quite clear that you may have some elements of people who have organised themselves into different pockets, call it factions. If a team building to create one team, rather than these fragmentations within the police service, it would be yet another thing.

But also, taking those recommendations that were given by NACAC, that Advisory Committee on Anti-Corruption, where we think of establishing a standing independent anti-corruption body that will also have within itself capacity to deal with issues of lifestyle audit, instead

of people saying it is too expensive, therefore we have to go to, and it has all those skills within itself. Again, changing the whole range of policies, modernising, digitising and so forth, so that the vetting, the issues of lifestyle audit, the issues of whistle-blower protection, because you need the whole basket of safeguards.

And begin to think of professionalising the service again, and modernising it, because we might be solving problems of today. The world is moving very fast, and the nature of crime, and the biggest problem is that organised syndicated criminals are swift, are agile. Their workshops come with results, and they implement. Those who want to respond to them, they engage forever, they plan tentatively, they commit tentatively.

And that is to me, the problem, is to say how serious, how intense is the nation responding to the crisis that keeps showing itself up. It might be criminal justice today, we saw in the state-owned entities yesterday, you will see it in the water mafia, in this and that. Hence, an approach should be hitting the ecosystem, and modernising it such that the errors of human element are limited as well. Thank you.

CHAIRPERSON: Let us adjourn and resume at 2 p.m.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Yes, Mr Chaskalson.

ADV CHASKALSON SC: Thank you, Chair. Professor Fikeni, we are going to briefly deal with the topic of disclosure, and maybe if I could start by taking you to page 49 of the annexure bundle? Do you have it?

PROFESSOR FIKENI: Yes.

ADV CHASKALSON SC: And that is the recent report by the Public Service Commission to the Minister of Police on its implementation of the financial disclosure framework for the SAPS. The report is fairly lengthy, but there are a couple of places where we get a summary of the findings. I think the first is at the foot of page 57 of that bundle, paragraph 53. And if you could just explain to the Commission what that is addressing? No, 5.3, not 53, 5.3.

PROFESSOR FIKENI: What is this?

ADV CHASKALSON SC: Paragraph 5.3 of the report, page 57.

PROFESSOR FIKENI: Okay. In this paragraph, which reads:

> "The PSC verified all financial disclosures forms in terms of Regulation 21 of the PSR 2016 and found that 33 SMS members, because we mainly focus on SMS for disclosures in the SAPS, did

not disclose all their financial interests. This is in contravention of Regulation 19 of the PSR 2016."

And we then recommended that the Minister, the executive authority, must direct the National Commissioner to engage these SMS members concerned to determine the reasons for not fully disclosing their financial interests. After such consultation, the National Commissioner must consider taking disciplinary action against these SMS members in terms of section 16(a) of the Public Service Act and the DPSA explanatory manual, which is a guide to what should be done. So in essence, we did conduct these disclosures and did the verification process, and we normally write to the Minister and indicate what steps should be taken.

ADV BALOYI SC: Maybe, Professor, for the record, you should say it is 33 out of how many?

PROFESSOR FIKENI: Let me just confirm.

ADV CHASKALSON SC: Just paragraph 5.1 on the same page.

PROFESSOR FIKENI: Yes. There are 737 SMS members.

ADV KHUMALO SC: And the issue is that all of them did submit, but 33 did not make a full disclosure.

PROFESSOR FIKENI: Yes.

ADV KHUMALO SC: And then maybe just SMS stands for Senior Management Service.

PROFESSOR FIKENI: Yes. And what makes these disclosures and the discrepancies be detected by the PSCs is because we do not just accept what people do or say. We then go to your Deeds Office, to SARS, we go to the different institutions so that we verify. And it is on the basis of that when we say what the person has disclosed and what we are finding, there is no correlation, as even with the case of General Khan, as we have indicated.

ADV CHASKALSON SC: Now, this process, as I understand it, is still essentially manual. So you get sent a form and then you manually check that form with the Deeds Office.

PROFESSOR FIKENI: Indeed. In fact, SMSs across the public service are in the region close to 10 000 and we only have about three or four persons who are doing all that work. If we had resources, we would then modernise it. And also not only that, as I indicated, we have to pay money to get some of the documents. Something that I am still battling with because when I was told you have to pay in order to expose some of these things.

So some of the laws that we have inherited or that we embrace do not make any sense. We would now be saving so much money for government if we took that R400 000 or R300 000 to use in developing our software, our tracking systems, our verification systems, but you end up

having to pay that money.

So when we met with the Deeds Office, what was even more startling, they said you guys say we take your money, we do not even taste one cent of it, we have to actually pay it back to Treasury. So Treasury will assign you money and then it is brought back to it. And you ask yourself why?

But just to take you off tangent, these things which do not make sense, I was asking the other day why in these feeding schemes you have bread when you have economies of scale where you spend R40 for bread, R35. And I was politely told, here in the public service, you do not go to a bakery. You do not go to a shop where bread is R18. You must look at the database for a person to go do shopping for you. So they mark up the price.

When I talk of the political economy of inefficiency, I come back to that. It is those things which do not make any sense, especially for a government that is reported to be borrowing R2 000 000 000 per day and spending almost half of that money to pay the debt. To have such things which are illogical, which make no sense.

So you are paying a person to go to Shoprite and buy bread and then add R10 more for shopping for you. So those are some of the things that do not make sense. I know I have gone off tangent from the disclosure part, but I

am still coming back to the issue where I say certain things do not make sense.

ADV CHASKALSON SC: Then on page 60, paragraph 11, there is a summary of the total findings. 11.1 reflects these 33 members who did not properly disclose. 11.2 relates to a different issue, conflicts of interest. Can you just explain that?

PROFESSOR FIKENI: The conflict of interest comes in because they are involved or they may be involved in companies that may have a relationship with the work that they are doing. Hence then we say the issue of probity and investigation beyond what is being disclosed becomes very much important.

Earlier in the day I explained that if you have a person who is in Crime Intelligence and that person runs a body shop and the country has one of the highest car theft, carjacking and so forth, any person who is receiving those disclosures ought to make a follow-up in the risk register of that organisation. It ought to be standing right on top of the risk profile. It should not just be one official in a corner just receiving the disclosures.

ADV CHASKALSON SC: Then if we go to page 73, you have a list of the disclosed – we will not display it because it is got everybody's names and disclosed income, but there is a list of people who are earning through remunerative

work which has been disclosed. What is interesting to me about this list is that there are 62 people on the list and nobody other than General Khan whose forms have been ventilated publicly or everybody else earns under a R1 000 000 a year from external remunerative work. He earns R3 000 000 a year, so he is clearly an outlier in this regard.

PROFESSOR FIKENI: He is certainly an outlier which should draw attention. Even those who are actually earning less than a R1 000 000, we ought to be asking ourselves in which space are they operating. There ought to be a profiling of people who are doing work outside the work they are doing. Also to analyse how much time are they spending. Does this not pose conflict of interest? And that in itself is what we do not generally see.

I have not yet come to even areas which now are not even part of disclosures where systems are made to be so inefficient that, as you remember, one municipality, they wanted – I do not know, I cannot remember now that it was close to R47 000 000 for overtime. There are people who simply disappear during the day. They start at overtime period so that they claim overtime.

It is a slippery slope which does not look like a disclosure because it is from within. So an analysis of how these things happen, we had a discussion with Minister Hlabisa where we said PSC is concerned about these things

as it is in other departments. Others make travel so frequent. In one instance one person said, I want to travel so much this year because my son is getting married in December, I need those allowances.

So to the ordinary person, whether it is a syndicated criminal gang, or it is other work outside what you are working for, or it is some of these things that just slide into your purse and it is a cost to company. By the way, I have said this in different strategies and forums. Do you know that South Africa at times has more delegation than China and US combined in international conferences? And all those expenses are part of this political economy of inefficiency.

No guidelines. When people leave, they do not know what the brief is. They do not even arrive that side, meet the ambassador to say this is the country's position, because the issue was not getting there. The issue was travel, the issue was allowances, the issue was everything else.

ADV CHASKALSON SC: Those are the specific points I wanted to make in relation to the report on SAPS disclosure. Is there anything else you would add to the report on SAPS disclosure?

PROFESSOR FIKENI: Not much. Even the one on Doctor Schoeman, I would simply say we have worked with him

very well. Our team have been interfacing and we generally agree with his observations. Suffice to say, today we said let us bring the context of the political culture within which these disclosures are going to be placed ...[intervenes].

ADV KHUMALO SC: I wanted to ask, Prof, on page 69.

PROFESSOR FIKENI: On the annexure, or on the ...[intervenes].

ADV KHUMALO SC: Yes, the same report. We were in 73, so let us go back to 69. The same issue Advocate Chaskalson was dealing with. And here PSC recommends lifestyle audits for two SMS members. Now, is this the first time, I do not know if I should mention the names, it is General Sibiya and General Khan.

And General Sibiya, just to be clear, is the Deputy National Commissioner of Crime Detection and General Khan is General Khan. Was this the first time that PSC has made such a recommendation in relation to SAPS senior management?

PROFESSOR FIKENI: To the best of my knowledge, yes. Even though we do these verifications and we do recommend – in fact, we do flag this was the escalation to a level where we said, now let us take it to the next level.

ADV KHUMALO SC: Because my understanding is that these facts that are set out here are the reason for these recommendations. This would not be facts that arose in

2025. I am assuming they would have been there even in 2023 with the annual disclosures. Why is this only being picked up now? And the reason I am asking this is we do not want an impression to be created that PSC is reacting to the work of the Commission and, you know, is now making these recommendations because of the evidence that came out of the Commission. I want to know that in the ordinary course, PSC does its work and these are the things that it picks up.

PROFESSOR FIKENI: I can assure you that we do this work all the time. And if there is any specific supplementary report, we would actually provide it to show that. There are other HR issues that came before us on senior management, in the SAPS, where we have made our own findings before the Commission came.

ADV KHUMALO SC: Thank you.

PROFESSOR FIKENI: Thank you.

ADV CHASKALSON SC: You have responded to, I mean, you have briefly addressed the evidence of Doctor Schoeman. I think maybe at this point it probably makes sense to go to the reforms that you suggest because there is quite a lengthy list and I think it would be useful to hear your motivation for each one. That list starts on page 61 of the statement bundle under the heading proposed reforms for consideration by the Judicial Commission.

PROFESSOR FIKENI: Well, I do think that, let me start with what I ended with when we were going for lunch. Before we even think of any recommendation, we should think deep and hard on why the previous recommendations seem to struggle to find expression. If we were to concentrate the minds of the nation, the minds of our public administration on the simple question, why have we become obsessed with reacting after effect?

Because most of the things that come before any Commission will have been ventilated, media will have exposed it, sometimes they will have even landed in Parliament, in Cabinet. Our constitutional bodies will have raised some of these issues. What is it that is so broken that these do not get implemented? And what is the institutional culture, what is the leadership orientation that makes some of these things difficult to do? Because some of them are basic common sense and they need honest reflection. If we were to just train our minds on that question, then we will not find ourselves waiting for another crisis reacting with another Commission.

The second part, how do we make sure that an outfit which has such probing, investigative, forensic dimension like this one is inbuilt in different key areas, whether it is that anti-corruption agency or whether it is in different locations, so that it is inbuilt, it reacts, it deals

with the issues, and you have this multi-agency approach.

The third issue is the one of digital transformation and modernisation, which is part of your professionalisation. I have been alluding to that one again and again, so I will not go back to it. And that in itself, in the era of AI, could also be laced with that AI capacity. Of course, it would start with AI literacy. Because I keep saying, most of us sit in companies, expensive laptop, you have these multi-million contracts with Microsoft, only to use it for Microsoft Word, PowerPoint, and email.

When in fact, when you look at that instrument at a basic computer literacy level, you could be doing so much, it could improve your productivity and so forth. So that issue of literacy, because it does not really – it will not work if you say to this department let us go digital transformation. Only to find that the old guard are the ones who still have to ask a PA, where is the power to open this computer? Where is the power to open the camera? And you hope that those people will lead digital revolution.

I think it should start there and certain things should be compulsory with the National School of Government, so that we begin to understand this, whilst our human resource development strategies start with our preschools and primary schools, so that the future cohort of public servants will be at ease.

ADV CHASKALSON SC: Can I just pick up on something there? One of the things that has both surprised me and frustrated me is that when we look at police dockets, almost without exception, all of the statements are handwritten, and that reflects one of two things. Either a failure to resource SAPS members properly, so that people do not have access to computers inside stations to type up statements, or a failure to train people, because it is possible that the computers are there, but people do not know how to use them, even basic Word processing. Do you have any sense of which of the two it is, and whether there is scope for sorting that out?

PROFESSOR FIKENI: Well, I do think that that conventional notion, that some of the police who are being recruited, you get people who are not doing well and therefore you just recruit maybe one part of it, when in fact you ought to be looking now.

You have enough pool of unemployed people. You could therefore be even saying a degree or something. People who have had exposure to computers. So you may have that issue of computer literacy. You may also have the issue of resources.

If we inspect some of the police stations and find that you go to a police station and there are no lights, people are operating sometimes using the phone to light

certain corners. To think of the computers and all this other digital stuff is a long shot. So there is an overhauling that is needed.

To give you a practical example, at one stage I went to Pretoria West where the car had been impounded. After being retrieved, it was stolen. And we were told, we cannot help you if you do not know the hour when the car was brought in here because we have to look at this Croxley book, 80 page physical manual. Everywhere, and that you see in hospitals as well.

Then you say, why do files get lost? And then you end up with medical legal claims. You see this in the courts, in the police. Why do files get lost? It could be lack of imagination or it could be resistance to modernisation.

ADV CHASKALSON SC: Sorry, that was just an aside triggered by me. If you want to continue at this point?

PROFESSOR FIKENI: Yes, I do think that the issue of integration, because we spoke to fragmentation and I have been repeating it and coming back to it. And the issue of a seamless link or chain in terms of the oversight institutions, I spoke to that as well, so I will not come back.

The issue of having policy on these prolonged suspensions or the prolonged acting appointments, and have a limit. Since you are going to submit this report to the President, I do think that it should be impressed on the

President that each department, there could be a commitment and it should be a performance agreement that you will solve this problem by this time in terms of the appointments where you have vacancies.

Because there is no reason why at times, unless there were exceptional circumstances, which would also be transparent and be known, that you would have certain people acting for three years, four years and so on. So that in itself is one of the things, of course, they hand over when one Minister moves out and the other one is coming in or a Commissioner.

Let it be that there must be a handover, even if it was not on happy terms, but contractually, where you have either a Commissioner and the Minister or a DG and the Minister to say this is what we were doing and we are now going to hand over and these are the commitments which have been made, this is the annual performance plan, this is what the auditors had raised and all those things, these are the disclosures and the letters that PSC had sent, which were to respond to this is the package.

If we could codify that into a particular law, whilst at the same time making it transparent as a performance agreement with the respective Ministers. Again ...[intervenes].

ADV CHASKALSON SC: Sorry, if I can come in here?

PROFESSOR FIKENI: Yes.

ADV CHASKALSON SC: I am not suggesting that that is not something that should happen across the board, but it does seem to me that in an environment like SAPS in particular, which operates on more of a command structure than the ordinary public service department, to have instability of leadership in that environment is incredibly damaging and that across, certainly SAPS, the Intelligence Services, we do not deal with Defence, but there ought to be an added urgency to secure stability at the top of those structures so that you have continuity of leadership, stability of leadership and the ability to run organisations like that which do operate more on a command basis than others, from a position of stability, not from a position of precarious, I am here for six months and the next acting appointment will replace me.

PROFESSOR FIKENI: I fully agree with you. In fact, I would dare suggest that we ought to have the national interest document understood by the nation. Those four or five things. And those factors which could risk this national interest could be ranked higher than others, hence then the sequencing, the prioritisation, is to say if you neglect this, so that you do not have the same approach of approaching small business with approaching the army in the borders or approaching, let us say, many other departments where the

risk is very high, but I can also ask another question.

When we see what we are seeing and we hear what has been revealed and this darkness made visible, where was our intelligence to say there is a threat? Are we only looking at a threat that comes from outside? Or are we looking at a threat that threatens the national interest? So that in itself I think to me, as you rank order, if you know what your national interest is, for example, a country like Egypt, water and water supply from the Nile River will come as number one national security issue. So anything that would disrupt that water will rank high. It is almost an emergency response to it.

You cannot say we will deal with it in the same way as we deal with sports because the very survival of the nation depends on that. So to me, I think if we have that approach and therefore we assign seriousness in terms of intervention accordingly and later on we could even assign seniority and capability and resources into those areas which could impact massively on the national security.

ADV CHASKALSON SC: Sorry, again, I have taken you out of your sequence, but please go back to ...[intervenes].

PROFESSOR FIKENI: Well, what I would say is perhaps because we have just compressed a compendium of issues here, we can cluster them. I can propose that we will neatly write the recommendations and submit as a supplementary

because right now we were so anxious to put everything together.

They are all important but some of them can be clustered and they can be more targeted. So with that we could, because we do want to assist this process as much as possible. If there is any residual information that you need, we will be ready and happy to furnish that particular information. Thank you.

ADV BALOYI SC: Can I just ask? In this list at paragraph 135, I just want to understand where that comes from. You say:

> "Develop a graduated legal model for PSC recommendations rather than them being wholly advisory or universally binding."

Where does this come from?

PROFESSOR FIKENI: Yes. We do have in the Constitution two forms of interventions. One is recommendations. Then the other one is directions. Directions are more binding. So the issue of saying very often we engage departments and we say we have come here just to assist you on an advisory basis, we are not making findings. We see that there are systemic problems.

We are making these recommendations and so forth, but where it becomes extreme or serious, we make

directions. There it is more binding in a sense. The case law and the new Act are actually affirming that. Because ours, unlike many constitutional bodies or departments or agencies, since we are generally assigned with ensuring effective and efficient public service, where we have to advise, where we have to recommend training, where we have to work with a team to develop a strategy, we do just that.

So we do not wait until you have problems. That anticipatory governance is what we want in strategic foresight to permeate across, to say, do not see us only when we are investigating or when we are asking for disclosures. If you have systemic problems, we do have a relationship with the National School of Government, we do have a relationship with the Auditor General, Public Protector. We have signed all those.

Let us intervene when there are challenges. We do mediate as well, to say, we see here there are challenges and we call in different experts and a multidisciplinary team to assist departments. In fact, that developmental approach seemed to have worked well because people do not see us as those people who, when they are wounded and down, we come to finish them.

We see, we work with them, we understand their plight, and even more important, if they say our challenge is

caused by Department A, like we went to Home Affairs to say, why are people queuing outside? They said the IT is down or the internet. Then we are able to call in the, you know, CETA to say, can we have a strategy? Can you intervene? Can we also link up with government communication services and community radio so that people will not have to travel to town only to be told the system is down? Because some of them have to borrow money.

So we have that approach which is more developmental in orientation, and I think it has yielded a lot of results. But the long and short, we do have those categories. Thank you.

ADV CHASKALSON SC: Prof, I am not sure if you want to address any of the other specific recommendations that you make from, you know, from page 61 onwards. Some of them we have already traversed, but if there is anything you would like to amplify, please do.

PROFESSOR FIKENI: To me, I do think that the approach of whatever we are doing in the form of recommendations, if it had clarity on what the problem is and what the proposed solution is. So the first one, clarity. The second one, urgency because most of these things are on urgent basis. The third one, agency. Who is going to do what, when? And the fourth one, collective action, because at times you may need collective response.

And if I were to put a trilogy of that, you have people where leadership, where integrity, values, principles, institutional culture is. Then you have systems and policies. What should be in place that was not there? Then the third one is the resources.

If that approach speaks to those four, then I am sure we will begin to have recommendations if they are aligned or they are attuned to those that will have an effect. But I come back to say this country needs a national conversation on why policies, promises have not been implemented and why have we come to be a society of ideas, of policies, of consultations, of commissions, where people hope only to be disappointed.

That to me is a matter that I think is of fundamental importance, even as you workshop, you release your report, because this cannot be for those who have to implement a PR exercise, where it is a guilt cleansing exercise. I feel better now that we have done something when we have done nothing. What we are doing now is to expose the darkness that has been there, but society expects more.

CHAIRPERSON: Professor, thank you very much. Most appreciated. We will be waiting for that document on the recommendations.

PROFESSOR FIKENI: Thank you very much, Chairperson. Thank you very much, Commissioners and Evidence Leader

for the opportunity. We have been waiting for a long time to find a platform because we have written reports after reports.

CHAIRPERSON: Thank you.

PROFESSOR FIKENI: Thank you.

CHAIRPERSON: Adjourn until 09:30?

ADV CHASKALSON SC: 09:30 Monday.

CHAIRPERSON: Let us adjourn and resume at 09:30 on Monday. Let us adjourn.

HEARING POSTPONED TO 21 SEPTEMBER 2026

HEARING ADJOURNS

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