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CONSTITUTIONAL ASSEMBLY

MANAGEMENT COMMITTEE
THURSDAY
10 OCTOBER 1996
V16

ADDITIONAL DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

MANAGEMENT COMMITTEE

ADDITIONAL DOCUMENTATION

Hassen Ebrahim
Executive Director

MEMORANDUM

MC/12/10Oct96

To: **Members of the Management Committee**

From: **HASSEN EBRAHIM**
Executive Director

Date: **10 October, 1996**

Subject: **Proposal on Process**

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1. There are four categories of technical issues which require attention:-

1.1. Matters raised by the Constitutional Committee -

(a) Sec 243 - commencement; **(page 5)**

(b) Sec 101 and 140 - written decisions by President/ Premiers; **(page 6)**

1.2. Matter raised by the Technical Advisors:-

(a) Schedule 6 Item 22 - Technical reformulation. **(Page 10)**

1.3. Matters raised by Counsel:-

(a) Sec 23(5) - counsel recommends reformulation; **(page 54)**

(b) Sec 146 - Counsel has identified some shortcomings which are not fatal; **(page 39)**

(c) Sec 197(4) - Counsel recommend reformulation. **(Page 54)**

1.4. Other matters raised -

(a) Constitutional Development - Sch 6 Item 26 **(no document)**

(b) Chairperson - Sub-Committee 2 - Sec 155 **(page 56)**

(c) Parliament Rules Committee - sec 59, 72, 118, 65(2), 118; and item 21(5) of Schedule 6 **(Page 8)**

(d) Senator Van Breda - sec 45(2) **(page 7, 57-60)**

(e) Department of Defence Item 3 of Annex D of Sch. 6 **(page 11)**

2. Whilst there may be some substantive issues to resolve, the issues are by and large technical. There are three possible approaches -

2.1. that the issues be attended to by the Management Committee; or

2.2. that the issues be attended to by the respective sub-committee. Members of these committees have already been notified of a possible meeting at 13h00; or

2.3. that experts representing each party meet with the Technical Experts immediately after this meeting and seek to resolve the outstanding issues.

Proposed amendments : technical advisors

PART A

MATTERS REFERRED TO THE MANAGEMENT COMMITTEE BY THE CONSTITUTIONAL COMMITTEE AND CERTAIN OTHER TECHNICAL MATTERS

PART B

FURTHER CHANGES SUGGESTED AS PART OF THE REFINEMENT PROCESS

PROPOSAL REGARDING COMMENCEMENT

1. Replace section 243 with the following section:

"Short title and commencement

243. (1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect on a date set by the President by proclamation, which date may not be a date later than...

(2) Different dates before the date **[referred to]** mentioned in subsection (1) may be fixed in respect of different provisions of the Constitution.

(3) Unless the context otherwise indicates, a reference in a provision of the Constitution to a time when the Constitution took effect must be construed as a reference to the time when that provision took effect.

(4) If a different date is fixed for any particular provision of the Constitution in terms of subsection (2), any corresponding provision of the Constitution of the Republic of South Africa, 1993, mentioned in the proclamation, is repealed with effect from the same date.

(5) Sections 213, 214, 215, 216, 218, 226, 228, 229 and 230 come into effect on 1 January 1998, but nothing prevents the enactment before that date of legislation envisaged in any of these provisions."

2. Delete item 28 of Schedule 6.

NOTE

To be considered and settled by Management Committee.

PROPOSED AMENDMENTS TO SECTIONS 101 AND 140 BY REPLACING SUBSECTION (1) WITH THE FOLLOWING SUBSECTION:

"101.(1) A decision by the President must be in writing if it-

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member."

"140.(1) A decision by the Premier of a province must be in writing if it-

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member."

NOTE

The Constitutional Committee referred this matter to the Management Committee for finalisation.

PROPOSED AMENDMENT TO SUBSECTION 45(2):

"(2) Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a [**committee envisaged in subsection (1)**] joint committee of the Assembly and the Council as those they have before the Assembly or the Council."

NOTE

Proposed by Mr Alex van Breda MP.

PROPOSED AMENDMENT TO SECTIONS 59, 72 AND 118 BY ADDING THE FOLLOWING SUBSECTION:

"(2) The National Assembly * may not exclude the public, including the media, from a sitting of a committee unless the nature of the business discussed makes it reasonable to do so."

* Sec 72: National Council of Provinces
Sec 118: Provincial Legislature

NOTE

In discussions of the Rules Committee a concern was raised that committees such as the portfolio committee on national intelligence may need to close some of its meetings to the public and that the word "regulate" in section 59 may not be wide enough to authorise the closure of meetings.

A. PROPOSED AMENDMENT TO SECTION 65(2)

"(2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which **[provinces]** provincial legislatures confer authority on their delegations to cast votes on their behalf."

B. PROPOSED AMENDMENT TO ITEM 21(5) OF SCHEDULE 6

"(5) Until the Act of Parliament referred to in section 65(2) is enacted each [province] provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces."

NOTE

This change is purely technical. The Rules Committee pointed out that the use of the word "province" in the above context may lead to uncertainty as to whether the provincial executive or the provincial legislature is referred to.

PROPOSED REFORMULATION OF ITEM 22 SCHEDULE 6

"22 Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity."

NOTE

Purely technical. No change in meaning.

PROPOSED AMENDMENT TO ITEM 3 OF ANNEXURE D OF SCHEDULE 6

"Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council **[and]** or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution."

NOTE

Correction to mistake in text identified by the Department of Defence through defence portfolio committee. (Ms Jenny Schreiner, MP).

CONSTITUTIONAL ASSEMBLY

DRAFT AMENDMENTS TO NEW TEXT

OPINION

TABLE OF CONTENTS

INTRODUCTION

1. The constitutional court gave judgment on 6 September 1996 on the certification of the new text. It held that certain provisions did not comply with the constitutional principles. The constitutional committee of the Constitutional Assembly has now prepared draft amendments to the new text. The purpose of this opinion is to assess whether the draft amendments cure the deficiencies identified by the constitutional court and comply with the constitutional principles.

2. We assume, for purposes of this opinion, that the judgment of the constitutional court was correct and complete. We accordingly do not express any opinion on any new or further objections that might be raised to any of the provisions of the draft.

3. We will for ease of reference refer to,

- the interim constitution as "IC";
- the constitutional principles as "CP";
- the original new text as "NT"; and

- the draft amended new text as "AT".

AT23: LABOUR RELATIONS

4. CP XXVIII requires that the right to engage in collective bargaining be conferred on "employers and employees". NT23(4)(c) conferred this right on trade unions and employers' organisations. The court held that it fell short of the requirement of CP XXVIII in that the right was not conferred on individual employers.[1]

5. NT23(4)(c) has now been replaced by AT23(5) which reads:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining."

6. The implications of this amendment are:

6.1. The right conferred, is now a right "to engage in collective bargaining" and no longer a right "to bargain collectively". The new formulation coincides with the language of CP XXVIII.

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[1] Judgment 43:69

6.2. The court's objection is met by conferring the right to engage in collective bargaining on every employer.

6.3. The right to engage in collective bargaining is not conferred on every individual employee. The court held that this was not necessary because "individual workers cannot bargain collectively except in concert" in that "collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers".[2]

6.4. A new provision is introduced, which allows national legislation "to regulate collective bargaining". There are two possible interpretations of this provision. The first is that it adds nothing because regulation is in any event permissible in terms of the general limitations provision in AT36. On this interpretation, any regulation would be subject to the requirements for limitation in terms of AT36. The second interpretation is that this provision permits regulation free of the strictures of AT36.[3] The latter is,

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[2]Judgment 43:69

[3]It does not follow, however, that it would be permissible by national legislation, to prohibit collective bargaining because "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed". R v. Williams 1914 AD 460; Landelikelisensieraad, Krugersdorp v. Cassim 1961 (3) SA 126 (A); Steyn: Die Uitleg van Wette, 5th ed. 207-208

in our view, the more likely interpretation because the former would render this provision meaningless. There is a real risk that this provision might on the second interpretation be held to offend CP XXVIII which demands that employers and employees be afforded the right to engage in collective bargaining whilst AT23(5) merely affords them that right subject to unrestricted regulation.

7. NT23(5) has been slightly amended. It provided that "(t)he provisions of the bill of rights do not prevent legislation recognising" union security arrangements contained in collective agreements. AT23(6) now provides that "(n)ational legislation may recognise" union security arrangements contained in collective agreements. The latter exception is somewhat narrower than the former and accordingly does not make any new inroads offensive to CP XXVIII.

AT37(5)(c): NON-DEROGABLE RIGHTS IN EMERGENCY

8. The court dismissed the objections to the provisions of NT37 relating to states of emergency but voiced strong criticism concerning the lack of rational selection of the rights classified as non-derogable.[4]

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[4]Judgment 60:94-95

9. A number of rights have now been added to the non-derogable list which makes for a more rational selection and in our view meets the court's criticism.

AT45: JOINT RULES AND ORDERS

10. AT45 has been amended but the amendment does not affect compliance with the constitutional principles.

AT57(2): RULES AND ORDERS OF THE NATIONAL ASSEMBLY

11. AT57(2) has been amended but the amendments do not affect compliance with the CPs.

AT61: ALLOCATION OF DELEGATES

12. AT61(2) and (3) have been amended but the amendments do not affect compliance with the CPs.

AT64(7): CHAIR AND DEPUTY CHAIR OF THE NCOP

13. AT64(7) is a new provision but it does not affect compliance with the CPs.

AT65(2): AUTHORITY OF NCOP DELEGATES

14. AT65(2) has been slightly amended but the amendments do not affect compliance with the CPs.

AT70(2): RULES AND ORDERS OF THE NCOP

15. AT70(2)(c) has been slightly amended but the amendment does not affect compliance with the CPs.

AT74: AMENDMENT OF THE CONSTITUTION

16. CP XV provides that amendments to the constitution shall require "special procedures involving special majorities". The court interpreted this requirement to mean that both "special procedures" and "special majorities" were required. It held that whilst NT74 prescribed "special majorities" for constitutional amendment, it did not require "special procedures" and accordingly fell short of the demand of CP XV.[5] In coming to this conclusion, the court gave a hint of the kinds of special procedures it had in mind:

> "It is of course not our function to decide what is an appropriate

[5]Judgment 90:156

procedure, but it is to be noted that only the National Assembly and no other House is involved in the amendment of the ordinary provisions of the NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required."[6]

17. AT74 distinguishes between four kinds of constitutional amendment:

17.1. Amendments of sections 1 and 74(1).[7]

17.2. Amendments of the bill of rights.[8]

17.3. Amendments of particular concern to a province or the provinces generally namely those which,

- relate to a matter that affects the NCOP;[9]

- alter provincial boundaries, powers, functions or institutions;[10]

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[6]Judgment 91:156

[7]AT74(1)

[8]AT74(2)

[9]AT74(3)(b)(f)

[10]AT74(3)(b)(ii)

- amend a provision that deals specifically with a provincial matter;[11] and

- concern only a specific province or provinces.[12]

17.4. All other amendments.[13]

18. The first three categories are subject to special and more stringent requirements. The last category is subject only to the general requirements which apply to all constitutional amendments. These are the requirements which have to meet the demand of CP XV because the latter makes its demand in respect of all amendments to the constitution.

19. AT74(4), (5) and (6) introduce the following new procedural requirements for all bills amending the constitution:

19.1. The bill may not include provisions other than constitutional amendments and matters connected with these amendments.[14]

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[11]AT74(3)(b)(iii)

[12]AT74(7)

[13]AT74(3) to (7)

[14]AT74(4)

19.2. At least thirty days before such a bill is introduced, particulars of the substance of the proposed amendment must be,

- published in the government gazette for public comment;[15]

- submitted to the legislatures for their views;[16] and

- submitted to the NCOP for public debate unless the amendment is one that is required to be passed by the NCOP.[17]

19.3. The bill may not be put to the vote in the National Assembly within thirty days of its introduction or tabling in the assembly.[18]

20. These procedures are new. But can they be said to be "special"? The court held that they had to be "more stringent" than the procedures applicable to other bills.[19] The new procedures are "special" in the

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[15]AT74(5)(a)

[16]AT74(5)(b)

[17]AT74(5)(c)

[18]AT74(6)

[19]Judgment 89:153

sense that they are more stringent and are peculiar to constitutional amendments insofar as they do not apply to ordinary bills in terms of AT75 and AT76. They are also of the kind contemplated by the court in the passage quoted above.

21. The new requirements introduced by AT74(4), (5) and (6) are rather weak insofar as,

- notice needs to be given only of the "substance" of a proposed amendment;
- the period of notice and the corresponding opportunity for response, is extremely limited; and
- there is no requirement that any comment be taken into account.

We are however on balance of the view that the new requirements probably pass muster and meet the objection raised by the court under CP XV.

AT74: ENTRENCHMENT OF THE BILL OF RIGHTS

22. CP II requires that the bill of rights be "protected by entrenched and justiciable provisions" in the constitution. The court interpreted this requirement to mean that more stringent protection of the bill of rights

was required than that which was accorded to ordinary provisions of the constitution.[20] It held that:

> "In using the word 'entrenched', the drafters of CP II required that the provisions of the bill of rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgment."

and added that:

> "A two-thirds majority of one house does not provide the bulwark envisaged by CP II."[21]

It went on to say that, what was required, was

> "some 'entrenching' mechanism, such as the involvement of both houses of parliament, or a greater majority in the National Assembly or other reinforcement which gives the bill of rights greater protection than the ordinary provisions of the NT."[22]

23. AT74(2) now deals with amendments of the bill of rights. It requires a two-thirds majority in both houses of parliament. This requirement constitutes an entrenching mechanism insofar as ordinary amendments do not require the assent of the NCOP.[23] It indeed adopts the

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[20]Judgment 91:157-159

[21]Judgment 92:159

[22]Judgment 92:159

[23]AT74(3)(a)

suggestion of the court of a mechanism involving both houses of parliament.

24. There are two other categories of constitutional amendment which are subject to stricter requirements than amendments to the bill of rights. They also require a two-thirds majority in both houses of parliament and are moreover subject to the following additional requirements:

24.1. Amendments of sections 1 and 74(1) require a majority of 75% in the National Assembly.[24]

24.2. Amendments of particular concern to a province or the provinces generally also require the approval of the provincial legislature or legislatures concerned.[25]

25. Might it not be argued that CP II requires the bill of rights to be more securely entrenched than any other provision of the constitution and that AT74 fails to meet this requirement insofar as it affords greater protection to these other two categories of special amendment? We think not. CP II requires merely that the bill of rights be entrenched. It does not require or suggest that the provisions of the bill of rights

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[24]AT74(1)(a)

[25]AT74(7) read with AT74(3)(b)

should be the only entrenched provisions or that they should be more securely entrenched than any other provision of the constitution.

26. We are accordingly of the view that AT74 meets the objection of the court raised under the requirement of CP II that the bill of rights be entrenched.

AT77: NATIONAL MONEY BILLS

27. AT77 has been amended but the amendments do not affect compliance with the CPs.

AT79: BILLS REFERRED BACK BY THE PRESIDENT

28. AT79(3)(b) has been amended by adding to the list of bills requiring reconsideration of the NCOP upon referral back by the president. This amendment does not affect compliance with the CPs except perhaps to enhance collective provincial power exercised through the NCOP. It does not detract from compliance with the CPs.

AT81: RETROSPECTIVE NATIONAL LEGISLATION

29. NT81 provided that an act of parliament took effect when published "or

on a later date determined in terms of the act". AT81 now speaks only of "a date determined in terms of the act". It no longer precludes retrospective legislation.

30. The CPs do not demand that the constitution should preclude all retrospective legislation. Any retrosopective legislation would be valid only if it passes muster under the constitution and more particularly, the bill of rights. We are accordingly of the view that the amendment does not introduce any violation of the CPs.

AT101: EXECUTIVE DECISIONS

31. A slight amendment has been made in AT101(1)(b). The amendment does not affect compliance with the CPs.

AT104: PROVINCIAL LEGISLATIVE COMPETENCE

32. There has been a slight amendment to AT104(1)(b) but it does not affect compliance with the CPs.

AT116(2): RULES AND ORDERS OF THE PROVINCIAL LEGISLATURES

33. AT104(1)(b)(iv) is new but it does not affect compliance with the CPs.

AT120: PROVINCIAL MONEY BILLS

34. The language of AT120 has changed but the changes do not affect compliance with the CPs.

AT123: RETROSPECTIVE PROVINCIAL LEGISLATION

35. NT123 provided that provincial legislation took effect when published "or on a later date determined in terms of the Act". AT123 now speaks only of "a date determined in terms of the Act". It no longer precludes retrospective legislation.

36. The CPs do not demand that the constitution should preclude all retrospective legislation. Such legislation would be valid only if it conforms to the constitution including the bill of rights. We are accordingly of the view that the amendment does not introduce any violation of the CPs.

AT130: REMOVAL OF PREMIERS

37. AT130(3) and (4) are new. They provide for the removal of a premier from office by a resolution of the provincial legislature adopted with a

two-thirds majority, on the grounds of a serious violation of the constitution or the law, serious misconduct, or inability to perform the functions of office. Anyone so removed from office on the grounds of a serious violation of the constitution or the law or serious misconduct, looses the benefits of the office of premier and may not serve in any other public office.

38. These new provisions do not affect compliance with the CPs.

AT146: NATIONAL OVERRIDE

39. AT146(2)(b) and AT146(4) have been amended. They relate to the circumstances in which national legislation override provincial legislation. We deal with these amendments when we address the question of provincial powers.

ATCH7: LOCAL GOVERNMENT

40. AT 154, 155, 157 and 160 have been amended. We deal later in this opinion with all the amendments relating to local government.

AT166: JUDICIAL SYSTEM

41. NT166 described the court structure. It identified five categories of court of which the last was any court "established or recognised by an act of parliament". AT166(e) amends the latter category to provide for any other court "established or recognised in terms of an act of parliament". The amendment does not affect compliance with the CPs.

AT167: EXCLUSIVE JURISDICTION OF THE CONSTITUTIONAL COURT

42. AT167(4)(d) extends the list of matters subject to the exclusive jurisdiction of the constitutional court by the addition of decisions "on the constitutionality of any amendment to the constitution". The amendment does not affect compliance with the CPs.

AT193 AND AT194: THE PUBLIC PROTECTOR AND AUDITOR GENERAL

43. CP XXIX requires that the independence of the public protector and auditor general "be provided for and safeguarded by the constitution". In terms of NT193(4) and (5) they were appointed by the president on the recommendation of the National Assembly and in terms of NT194(1) they could be removed from office by ordinary resolution of the National Assembly on the grounds of misconduct, incapacity or

.... incompetence after a finding to that effect by a committee of the National Assembly.

44. The court held that the independence of these functionaries was not adequately protected because they could, in effect, be removed from office by a simple majority in the National Assembly.[26]

45. AT193(5)(b)(i) and AT194(2)(a) now require super-majorities in the National Assembly for both their appointment and removal from office. A 60% majority is required for their appointment and a two-thirds majority for their removal from office. We are of the view that these amendments adequately address the court's objections.

AT196: THE PUBLIC SERVICE COMMISSION

Introduction

46. The provisions relating to the PSC raise three issues of compliance with the CPs:

46.1. The need to define the powers and functions of the PSC.

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[26]Judgment 95:163 and 96:165

46.2. The independence and impartiality of the PSC.

46.3. The impact of the powers and functions of the PSC on provincial power.

The powers and functions of the PSC

47. The court held that NT196(1) did not sufficiently define the powers and functions of the PSC. It merely provided that the PSC shall "promote the values and principles of public administration in the public service". The court contrasted this provision with IC210 which defined the powers and functions of the PSC in greater detail. It held that, although the CPs did not expressly require the powers and functions of the PSC to be defined, it was nonetheless necessary to enable the court to determine whether the NT complied with the requirement of CP XXIX that the independence and impartiality of the PSC be provided for and safeguarded; the requirement of CP XX that each level of government shall have appropriate and adequate legislative and executive powers and functions; and the requirement of CP XVIII(2) that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those under the IC.[27]

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[27]Judgment 103:177

48. AT196(4) now defines the powers and functions in as much detail as was done under the IC. We are accordingly of the view that this defect has been cured.

The independence and impartiality of the PSC

49. CP XXIX requires the independence and impartiality of the PSC to be provided for and safeguarded by the constitution. The court left open the question whether the NT complied with this requirement. It held that it could not come to any conclusion in this regard "without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially".[28]

50. The powers and functions of the PSC are now defined in AT196(4). It is to have little more than a monitoring role. Its powers are to investigate, monitor, evaluate, propose, report and promote the constitutional values and principles of public administration. Its only power of compulsion seems to be the power in terms of AT196(4)(d) to give directions aimed at ensuring that certain personnel procedures comply with the constitutional values and principles of sound public administration. Given these powers and functions, the role of the PSC

[28]Judgment 103:176

is that of monitor rather than watchdog.

51. AT196 introduces the following new provisions designed to ensure the independence and impartiality of the PSC:

51.1. In terms of AT196(2) the PSC "is independent and must be impartial and must exercise its powers and performance functions without fear, favour or prejudice".

51.2. Other organs of state are required in terms of AT196(3) "to ensure the independence, impartiality, dignity and effectiveness" of the PSC and may not interfere with its functioning.

51.3. AT196(7) and (8) provide for the appointment of members of the PSC. It has fourteen members nominally appointed by the president. The real power of appointment, however, vests in the National Assembly and the provincial legislatures. Five commissioners are appointed on the recommendation of a multi-party committee of the National Assembly and one by each of the provinces on the recommendation of a multi-party committee of its legislature.

51.4. AT196(11) provides for their removal from office. They may only be removed for misconduct, incapacity or incompetence and only after a finding to that effect by a committee of the legislature which recommended the appointment in the first place and a resolution adopted with the support of the majority of the legislature itself.

52. The only provision that might be said to detract from the independence and impartiality of the PSC, is the requirement of AT196(5) that the PSC be "accountable to the National Assembly". Might it not be said that this requirement renders the PSC subject to direction and control by the National Assembly? We think not. Given the very explicit provisions regarding its independence and impartiality, the requirement of accountability should, in our view, be interpreted to mean no more than that the PSC is required to give account to the National Assembly of the exercise of its powers and functions.

53. We are of the view that AT196 sufficiently complies with the demand of CP XXIV that the independence and impartiality of the PSC be provided for and safeguarded by the constitution. That is particularly so given its role of monitor rather than one adversarial to government.

Impact on provincial powers

54. The powers and functions of the PSC may have an effect on the powers and functions of the provinces in relation to their own administration. The definition of the powers and functions of the PSC may accordingly impact on the requirements of CPXX that provincial governments have "appropriate and adequate legislative and executive powers and functions" and CP XXVIII(2) that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those under the IC. We address this implication when we deal with provincial powers towards the end of this opinion.

AT199: MUNICIPAL LAW ENFORCEMENT AGENCIES

55. NT199(3)(b) allowed municipalities "in appropriate circumstances" to "establish a municipal law enforcement agency, the establishment and powers of which must be regulated by national legislation".

56. This provision has been deleted from AT199(3) but reintroduced in AT206(7). We are accordingly of the view that the amendment does not affect compliance with the CPs.

AT206 AND 206: PROVINCIAL POLICE POWERS

57. A number of amendments and additions have been made to AT206 and AT207 to enhance provincial police power. The significance of these enhancements are debatable. They have a bearing on the requirement of CP XVIII(2) that the powers and functions of the provinces may not be substantially less than or substantially inferior to those provided for in the IC. We deal with the latter requirement when we deal with provincial powers later in this opinion.

58. It seems to us, however, that the enhancements brought about by the amendments to AT206 and 207 are not sufficiently significant to make any material difference. We will accordingly not attach any weight to these enhancements when we deal with compliance with CP XVIII(2).

AT229: MUNICIPAL FISCAL POWERS

59. We deal with the amendments to AT229 later in this opinion when we address all the issues relating to local government.

AT239: DEFINITION OF NATIONAL AND PROVINCIAL LEGISLATION

60. AT239(1) includes new definitions of,

- "national legislation" to include "subordinate legislation made in terms of an act of parliament and legislation in force when the new constitution takes effect which is administered by the national government"; and

- "provincial legislation" to include subordinate legislation made in terms of a provincial act and legislation in force when the new constitution takes effect which is administered by a provincial government.

61. These definitions are apparently not intended to apply to the override provisions in NT146 because NT146(6) in effect provides that subordinate legislation is regarded as "national legislation" or "provincial legislation" for purposes of the override provisions, only if it has been approved by the NCOP. We would suggest that the drafting of AT146(6) and the new definitions in AT239(1) be improved to remove the following shortcomings:

61.1. It must be made clear that the new definitions do not apply to AT146, if that is the intention.

61.2. The effect of AT146(6) is that subordinate legilsation not

aproved by NCOP, cannot override but *can also not be overriden* by other legislation. That was presumably not intended.

61.3. What is the status of subordinate legislation not approved by the NCOP when it comes into competition with conflicting legislation?

61.4. How is subordinate legislation, and particularly subordinate provincial legislation, approved by the NCOP?

62. We are, however, of the view that the new definitions do not introduce any new violation of the CPs.

AT243: COMMENCEMENT OF THE CONSTITUTION

63. NT244(1) provided that the constitution would come into effect on a date set by the president by proclamation "but no later than 1 January 1997". AT243(1) is to be amended by extending the deadline to 1 July 1997 or omitting it altogether. The amendment does not, in our view, affect compliance with the CPs.

AT Sch 6 Item 21(5): AUTHORITY OF PROVINCIAL DELEGATES

64. AT schedule 6 item 21(5) introduces a new transitional provision which allows each province to "determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the NCOP" until an act of parliament is enacted in terms of AT65(2) which provides for a uniform procedure.

65. This provision might marginally and temporarily enhance provincial power. It does, however, not have any material effect on compliance with the CPs.

AT Sch 6 Item 21(6): LOCAL GOVERNMENT FISCAL POWER

66. AT schedule 6 item 21(6) introduces a new transitional provision which allows municipalities to continue to impose any tax, levy or duty which they are authorised to impose at the commencement of the new constitution, until national legislation is enacted in terms of AT229(1)(b) authorising municipalities to impose other taxes, levies and duties. This new provision does not, in our view, materially affect compliance with the CPs.

AT Sch 6 Item 22: THE TRUTH ACT

67. NT schedule 6 item 22(1)(a) incorporated the "national unity and reconciliation" statement of the IC into the NT. It was held to be consistent with the CPs. It has now been amended but its substance has been retained. The amended provision is in our view also consistent with the CPs.

68. NT schedule 6 item 22(1)(b) immunised the promotion of National Unity and Reconciliation Act 34 of 1995 against constitutional review. The court held that it was in conflict with CP IV which provides that the constitution shall be supreme and CP II and CP VII which provide that the fundamental rights contained in the constitution shall be justiciable.[29] This deficiency has now been cured by the deletion of the offending provision immunising the act.

AT Sch 6 Item 28: FISCAL MATTERS (TRANSITIONAL PROVISION)

69. AT schedule 6 item 28 is a new transitional provision. It provides that certain provisions of AT chapter 13 on a variety of financial matters[30]

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[29]Judgment 87: 149

[30]namely sections 213 to 216, 218, 226 and 228 to 230

may not be enforced before 1 January 1998.

70. This new transitional provision does not, in our view, affect compliance with the CPs.

AT Sch 6 Item 29: REGISTRATION OF STATE LAND

71. AT schedule 6 item 29 provides for the registration of transfer of state land into the names of the authorities created under the new constitution. It does not, in our view, affect compliance with the CPs.

AT Sch 6 Annexure "B" Item 1(g): CONSULTATION OF GNU

72. AT schedule 6 Annexure "B" item 1 introduces an additional matter upon which the president must consult the executive deputy presidents in the government of national unity. It requires him to do so "before signing any international agreements". The addition does not, in our view, affect compliance with the CPs.

IMMUNITY OF THE LABOUR RELATIONS ACT

73. NT241(1) immunised the Labour Relations Act against constitutional review. The court held that it was in conflict with CP IV which provides

that the constitution shall be supreme and CP II and CP VII which provide that the fundamental rights contained in the constitution shall be justiciable.[31]

74. The offending provision has been deleted from AT. It accordingly cures the defect.

LOCAL GOVERNMENT

Introduction

75. The court upheld three objections to the provisions of the NT relating to local government.[32] We will deal with each of these objections in turn.

A framework for local government

76. CP XXIV requires "a framework for local government powers, functions and structures". The court held that chapter 7 of the NT did not create

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[31]Judgment 87:149

[32]Judgment 165:299-305

such a framework.[33] It described the minimum requirements for such a framework as follows:

> "At the very least, the requirement of a framework for local government structures necessitates the setting out in the NT of the different categories of local government that can be established by the provinces and a framework for their structures. In the NT, the only type of local government and local government structure referred to, is the municipality. In our view this is insufficient to comply with the requirements of CP XXIV. A structural framework should convey an overall structural design or scheme for local government within which local government structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how local government executives are to be appointed (and) how local government governments are to take decisions...".[34]

77. The NT creates a framework for local government powers, functions and structures as follows:

77.1. NT152 and 153 describe the broad objects and duties of local government.

77.2. NT155 deals with the structure of local government. It creates three categories of municipality.[35] National legislation must

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[33]Judgment 166:301

[34]Judgment 166:301

[35]NT155(1)

define the different types of municipality within each category;[36] establish the criteria for the choice of category of municipality within each area;[37] the criteria and procedures for the determination of municipal boundaries;[38] and provide for an appropriate division of powers and functions between municipalities with overlapping areas of jurisdiction.[39] The legislation must take account of the need to provide municipal services in an equitable and sustainable manner.[40] Provincial legislation must choose the types of municipality to be established in each province.[41] Each provincial government must establish the municipalities in its province and monitor, support and promote the development of local government.[42]

77.3. In terms of NT151(2) the executive and legislative authority of a municipality is vested in its municipal council. NT157, 158 and 159 provide a framework for the composition, election,

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[36]NT155(2)

[37]NT155(3)(a)

[38]NT155(3)(b)

[39]NT155(3)(c)

[40]NT155(4)

[41]Nt155(5)

[42]NT155(6)

membership and terms of office of municipal councils.

77.4. NT160 describes the internal legislative and executive procedures of municipal councils.

77.5. In terms of NT151(3) a municipality has the right to govern the local government affairs of its community subject to national and provincial legislation. NT156(1) and (2) confer legislative and executive authority on municipalities in respect of the local government matters listed in parts B of schedules 4 and 5 and all other matters assigned to them by national and provincial legislation. National and provincial government are required in terms of NT156(4) to assign or delegate to municipalities, the administration of all matters listed in parts A of schedules 4 and 5 which necessarily relate to local government and which would be more effectively administered locally, provided that the municipalities concerned have the necessary administrative capacity.

77.6. The court suggested that the requirement of a framework for local government powers, functions and structures, "should indicate how local government executives are to be appointed". It is not clear to us why a constitutional framework for local

government, powers, functions and structures, should descend to this level of detail. AT160(1) does, however, provide that a municipal council must elect its chairperson[43] and may elect an executive committee and other committees in accordance with national legislation.[44] The latter provision is subject to AT160(6) which allows national legislation to prescribe criteria to determine whether municipal councils may elect an executive committee. These provisions are rather cryptic and open-ended. They do, however, in our view, constitute a sufficient indication how local government executives are to be appointed, for purposes of the demand for a constitutional framework for local government.

77.7. AT155(6) and (7) provide for national and provincial government to monitor and ensure the effective performance of local government powers and functions.[45]

78. These provisions do, in our view, create a framework for local government, powers, functions and structures as required in terms of

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[43]NT160(1)(b)

[44]NT160(1)(c)

[45]NT155(7) is rather ineptly worded. What may national and provincial governments do in the exercise of their power "to see to" the effective performance of local government powers and functions?

CP XXIV.

Legislative procedures of local government

79. CP X demands that all legislative organs at all levels of government adhere to formal legislative procedures. The court held that NT chapter 7 failed to meet this demand.[46]

80. AT160(3), (4) and (5) now provide for the formal legislative procedures of local government. They do, in our view, cure the defect.

The fiscal powers of local government

81. CP XX demands that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The court did not find that the NT failed to meet this demand. It did, however, find that it failed to meet the more specific demand of CP XXV that the framework for local government provide "for appropriate fiscal powers and functions for different categories of local government".

82. AT229 now deals explicitly and clearly with local government fiscal

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[46]Judgment 167:301

powers. Municipalities may impose,

- rates on property and surcharges on fees for services provided by or on behalf of the municipality;[47] and

- if authorised by national legislation, other taxes, levies and duties appropriate to local government but excluding income tax, value added tax, general sales tax or customs duty.[48]

83. These powers do, in our view, meet the demand of CP XXV for appropriate local government fiscal powers and functions. But CP XXV also demands that the appropriate fiscal powers and functions must provide for "different categories of local government." It does not necessarily mean that different categories of local government must have different fiscal powers. But insofar as differentiation is demanded, it is in our view adequately provided for by the power of national government to differentiate in terms of AT229(1)(b), (2)(b), (3) and (4).

84. We are accordingly of the view that the AT cures the objection raised by the court.

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[47]AT229(1)(a)

[48]AT229(1)(b)

PROVINCIAL POWERS

Introduction

85. The court held that the powers and functions of the provinces under the NT were substantially less than and substantially inferior to those in the IC in violation of CP XVIII(2). It suggested that this deficiency could be cured by doing away with the features of NT146(2)(b) and 146(4) which diminished provincial power. It qualified this conclusion however by holding that it could not give a firm or final answer to the question of compliance with CP XVIII(2) "until the issues relating to the powers of the provinces in regard to the appointment of their own employees, as well as the powers and functions of the PSC, have been clarified".[49]

National Overrides

86. The court held that the offensive feature of NT146(2)(b) was that it introduced "the criterion for the setting of norms and standards for a matter that it be required 'in the interests of the country as a whole' in place of the criterion in IC126(3)(b) that the norms and standards be

[49]Judgment 259:473

required for the 'effective performance' of the matter".[50] AT146(2)(b) addresses this complaint by reverting to the "effective performance" criterion. It accordingly does away with the offensive feature identified by the court.

87. The court held that the offensive feature of NT146(4) was that it created a presumption in favour of national legislation in respect of legislation passed by the NCOP.[51] AT146(4) now does away with the presumption and requires merely that the court "must have due regard to the approval or the rejection of the legislation by the NCOP". It accordingly removes the offensive feature identified by the court.

88. The AT in other words adopts the court's suggestion. The removal of the two offensive features in NT146 should tip the balance back to compliance with CPXVIII(2).

The impact of the PSC

89. We have already dealt with the provisions governing the PSC under the AT. They do not diminish the powers of the provinces or in any event

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[50] Judgment 262:480

[51] Judgment 262:480

not significantly so:

89.1. The provinces effectively appoint nine of the fourteen members of the PSC.[52]

89.2. The powers and functions of the commission are largely that of a monitor.[53] Its only power of compulsion is the power in terms of AT196(4)(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals, comply with the values and principles described in AT195. This power is, if anything, more limited than the power of direction under IC 210(1)(a).

89.3. The provinces were entitled under IC213 to establish their own provincial service commissions. AT196(13) now provides instead that the provincial nominees to the PSC "may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation".

89.4. AT197(4) provides that the provinces "are responsible for the appointment, promotion, transfer and dismissal of members of

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[52]At196(7) and (8)

[53]AT196(4)

the public service in their administrations" but "subject to procedures agreed to in any collective bargaining agreement of the public service". Insofar as the qualification is limited to agreed procedures, it does not materially inhibit the provincial power of appointment, promotion, transfer and dismissal. The qualification is, however, cryptic and its purpose unclear. Is a province to be bound by an agreement to which it is not a party? If not, what is the purpose of a constitutional provision which in effect says no more than that provinces are bound by their own agreements? We suggest that the qualification be deleted or reformulated.

90. We are however of the view that the AT provisions governing the public service do not diminish provincial power.

CONCLUSIONS

91. We are in conclusion of the view that the AT adequately meets the objections to the NT raised by the constitutional court except that there is a real risk that the second sentence of AT23(5) may be held to violate CP XXVIII. The latter risk may be avoided by deleting the second sentence of AT23(5) or by making it clear that the contemplated

regulation has to be subject to the requirements for limitation in terms of AT36(1).

WIM TRENGOVE SC

Chambers
Johannesburg
9 October 1996

Memorandum

To: Hassan Ebrahim Executive Director of the CA

CC:

From: P. Gordhan Chairperson Subcommittee 2

Date: 8 October 1996

Re:

A concern has been raised with me about whether in terms of section 155(1) it is possible for national legislation to determine that there will be in the same area

1) category (b) municipalities of different types with differing powers and functions and
2) a category (c) municipality where powers and functions differ in respect of the areas of jurisdiction of separate category (b) municipalities in its overall area.

If the opinion of the panel is that this is not so, kindly ask the panel to prepare an alternative draft which could be discussed with the parties. Kindly liase with Rudolf Mastenbroek on 403-3150/ 082 5705073.

Regards

P.J. Gordhan

PARLEMENT VAN DIE REPUBLIEK VAN SUID-AFRIKA

TEL: (021) 403-2911
☎: (021) 403-3364
FAKS: (021) 403-2385
Verw. Nr. AVB2/2/9 (GROVE/mh)

SENAAT
POSBUS 15
KAAPSTAD
8000

KANTOOR VAN DIE HOOFSWEEP

9 Oktober 1996

Adv Gerrit Grove
Grondwetlike Vergadering
10de Verdieping
Regisgebou
Adderleystraat
KAAPSTAD
8000

Geagte adv Grove

In die ontwerp van reëls vir die Nasionale Raad van Provinsies ondervind ons probleme met die bewoording van die nuut toegevoegde Artikel 45(2).

Aangeheg vind u as Bylae A 'n opinie in dié verband met 'n voorgestelde verbetering vir goedgunstige oorweging deur die tegniese adviseurs en vir deursending na die Bestuurskomitee wat Donderdag om 08:00 vergader.

Vind ook 'n Bylae B wat 'n verdere gebrek uitwys.

Vriendelike groete

SENATOR ALEX VAN BREDA
VOORSITTER: SUB-KOMITEE REëLS

AFSKRIFTE: ***Adv. Werner Krull***
Mnr Abré Hanekom

SECTIONS 58 AND 71 OF THE CONSTITUTION

1. It is noted that Sections 58 and 71 confer freedom of speech on the Members of Parliament and on specified other office bearers or officials who are entitled to sit and speak in, or participate in the proceedings of, or the relevant House, or are summoned by it.

2. This appears to be a departure from the "philosophy" whereby the privileges of Parliament belongs to the institution, as evidenced by the words of the Bill of Rights (1707?), as follows (quoted from memory): "There shall be freedom of speech in Parliament...." This formulation protected everybody who took an official part in the proceedings of a House of Parliament; not only Members of Parliament were protected.

3. It is further noted that a Member of the Cabinet or a Deputy Minister in charge of a Bill (and also other persons referred to in Section 66) enjoy freedom of speech when they speak in the NCOP. That privilege is apparently not available to a delegate or committee member of the NCOP who introduced a Bill in the latter House under Section 73 (4), and wishes to steer it through the National Assembly.

4. Indeed, there is no provision at all that a delegate in charge of a Bill may sit and speak in the National Assembly - a right which should be a corollary to a delegate's right to introduce a Section 76 Bill in the NCOP. In the absence of a provision similar to Section 66 (1), a delegate from the NCOP will have to depend on permission granted by the National Assembly, **ad hoc** or in its rules and orders, to deal with his or her Bill in the National Assembly; otherwise, the delegate will have to procure a member of the National Assembly to do it on his or her behalf.

A

PROPOSED SUBSECTION (2) OF SECTION 45 OF THE CONSTITUTION

1. The proposed subsection is said to remedy an accidental omission to provide for privileges and immunities. From the contents of the subsection it appears that the omission is seen as relating only to "a committee envisaged in subsection (1)" of Section 45, that is to say, a joint committee composed of representatives from both the National Assembly and the NCOP and established for a purpose and in the manner prescribed by that section.

2. The omission to be remedied is perceived because Section 58 and Section 71, dealing with privileges an immunities relating to the National Assembly and the National Council of Provinces, respectively mention only the relevant institution and "its committees", without referring to joint committees envisaged in Section 45.

3. However, neither Section 58 nor Section 71 mentions joint committees of any nature. The Mediation Committee established by Section 78(1) is certainly a joint committee. There is nothing preventing the National Assembly and the NCOP from establishing joint committees other than those envisaged in Section 45 or 78; for instance, joint committees on the library, or on catering, or on staff matters, or to investigate a matter of interest to both Houses.

4. It appears, therefore, that the remedy should cover joint committees generally.

5. Furthermore, there appears to be no good reason why the remedy should be effected in Section 45, which deals with joint rules and orders, and not in Sections 58 and 71, which deal specifically with privileges and immunities.

6. It is suggested that Section 58 be amended -

(a) by the substitution in paragraph (a) of subsection (1), for the words "and in its committees" of the words, "in its committees and in joint committees composed of representatives of both the Assembly and the National Council of Provinces,"; and

(b) by the addition after the word "committees", wherever it occurs in paragraph (b) of that subsection, of the words "or any joint committee".

7. If the suggestion in 6 above is accepted, Section 71 should be amended in the same manner.

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE
CONSTITUTIONAL COMMITTEE

MONDAY, 7 OCTOBER 1996

Present

Ramaphosa, M C (Chairperson)
Wessels, L (Deputy Chairperson)

Ackermann, C	Alant, T G
Asmal, K	Beyers A S (Alt)
Bhabha, M	Camerer, S
De Beer, S J (Alt)	De Lange, J H
Du Toit, D C	Eglin, C W
Fourie, A	Ginwala, F
Gordhan, P J	Graaff, D (Alt)
Green, L M	Groenewald, P J (Alt)
Hofmeyr, W	Hogan, B (Alt)
Holomisa, S P	King, T J
Ligege, M G	Lockey, D
Louw, L (Alt)	Love, J
Mahlangu, M J	Mahlangu, N J
Malatsi, D M	Malebo, S M A (Alt)
Marais, P G	Maree, J W (Alt)
Meyer, R P	Moosa M V
Moosa M W (Alt)	Mulder, C P
Myakayaka-Manzini,YL	Ngcuka, B T
Pandor, G N M	Rabie J A
Radue, R (Alt)	Schreiner, J (Alt)
Selfe, J (Alt)	Skweyiya, Z (Alt)
Smuts, M (Alt)	Surty, M E (Alt)
Tsenoli, S L (Alt)	Van Breda, A
Van Heerden, F J (Alt)	Verwoerd, M (Alt)
Viljoen, C L	Watson, A

Apologies: D Makhanya

In attendance: Directorate: H Ebrahim, **Minutes:** K McKenzie, **Law Adviser:** G

Grové, **Panel of Experts:** G Erasmus, J Kruger, C Murray, P Sedibe-Ncholo, I Semenya, J Van Der Westhuizen, Z Yacoob.

1. OPENING

1.1 Mr Ramaphosa opened the meeting at 11:55 and welcomed members to what was probably the last meeting of the Constitutional Committee.

1.2 Mr Gordhan reported that the IFP had been represented in subcommittee two by Mr Smith and Mr Felgate. Mr Felgate had informed Mr Gordhan that the IFP would no longer be participating in the work of the Constitutional Assembly as per a decision of the IFP national council meeting of 6 October 1996. This had occurred even though the ANC had spent between 15 and 20 hours in bilateral meetings with the IFP in the course of which an agreement had been reached on local government.

2. REPORT BY CHAIRPERSONS OF SUBCOMMITTEES ONE AND TWO

2.1 Subcommittee two

Mr Gordhan reported that subcommittee two had completed its work as follows:

2.1.1 *Constitutional amendments*

The subcommittee confirmed the amendments proposed by the technical advisors and contained in the documentation for the meeting, except for the following change:

- 74(4) should read: "A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with these amendments."

The consequential amendment contained in section 167(4)(d) was agreed to.

2.1.2 *Provincial powers*

The subcommittee confirmed the proposed amendments to sections 146(2)(b), 146(4) and chapter 11 with the following changes:

- The phrase "needs and priorities" contained in section 206(1) and (2) should be replaced by the phrase "policing needs and priorities".

- The phrase "crime, safety and security" in section 207(5) should be replaced with the word "policing".

The consequential changes to section 199 were agreed to.

Gen Viljoen of the FF suggested that section 206(4) should make reference to provincial legislation. This was not agreed to.

Mr Marais of the NP said that the new draft on policing was an improvement as it provided provinces with the opportunity to significantly influence national policing policy.

2.1.3 ***Local government***

The subcommittee confirmed the proposed amendments to chapter seven dealing with local government with the following changes:

- 155(1)(b) contained a typographical error - "are" should read "area".
- The technical advisors would look at 155(1) and decide whether the subclauses should be separated by ";or" and ";and".
- 155(3)(b) of the text of 8 May 1996 should be incorporated into the new 155(6).
- 160(1)(a) should read: "makes decisions concerning the exercise of all powers and the performance of all functions of the municipality."
- 160(1)(c) should read: "may elect an executive committee and other committees subject to national legislation; and".
- 160(2)(b) should read: "approval of budgets;".
- 160(2)(c) should read: "The imposition of rates, other taxes, levies and duties".
- 160(3)(a) should read: "A majority of the members of a Municipal Council must be present before a vote may be taken on any matter."
- 160(4) should be deleted.

Gen Viljoen stated that he was concerned that the term municipality had not been defined and could exclude the rural areas. He suggested that section 212 dealing with the role of traditional leaders be included in the local government chapter. It was agreed that this matter could be discussed in bilateral meetings between the FF and ANC.

2.1.4 ***Municipal fiscal powers and functions***

The subcommittee confirmed the proposed amendments to section 229 with the following changes:

- The section heading should read: "Municipal fiscal powers and functions".
- 229(3) should be deleted.
- 229(4) should read: "When two municipalities have the same fiscal powers with regard to the same area, an appropriate division of those powers must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:"
- 229(4)(a) should read: "The need to comply with sound principles of taxation."
- 229(4)(b) should read: "The powers and functions performed by each municipality."
- 229(4)(c) should read: "The fiscal capacity of each municipality to raise revenue."

Mr Groenewald of the FF stated that they differed in principle with section 229 as reflected in the minutes of subcommittee 2.

Mr Moosa of the ANC thanked members of all political parties including the IFP for the constructive approach they had adopted in finalising these matters.

Mr Marais of the NP thanked Mr Gordhan for his efficient chairing of subcommittee two.

2.2 **Subcommittee one**

Ms Myakayaka-Manzini reported that subcommittee one had completed its work as follows:

2.2.1. ***Collective bargaining***

The subcommittee confirmed the proposed amendments to section 23 including the following change:

- 23(5) should read: "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining."

Mr Eglin of the DP said that these amendments were based on the understanding that national legislation which has to give effect to 23(5) was subject to the limitations clause.

2.2.2. ***States of emergency***

The subcommittee confirmed the proposed amendments to section 37.

2.2.3. ***Public Protector and Auditor General***

The subcommittee confirmed the proposed amendments to sections 193 and 194. It was noted that committee had agreed to changes to the appointments procedure even though this was not referred back by the Court.

Mr Eglin proposed a further amendment to deal with the appointment and dismissal of members of the Electoral Commission like the Auditor General and Public Protector.

Mr Moosa said that the Constitutional Court judgment did not require this amendment and this matter had been dealt with in legislation.

Mr De Beer of the NP said that although this suggestion had a lot of merit, it should not be dealt with now.

Mr Green of the ACDP said that they supported the DP's proposed amendment.

Mr Mulder of the FF said that although they supported the proposed amendment it could not be dealt with in this process.

2.2.4 ***Public Service Commission***

The subcommittee confirmed the proposed amendments to sections 196 and 197, but noted that they had mandated the technical advisors to prepare an opinion on whether the inclusion of norms and standards would prevent certification. It was agreed that this opinion would be placed before the Management Committee.

2.2.5 ***Section 241***

The subcommittee agreed to delete this section.

2.2.6 ***Truth and Reconciliation Commission***

The subcommittee confirmed the proposed amendments to section 22 of schedule 6.

3. CONSIDERATION OF AMENDED FORMULATIONS AND REFINEMENT

The index of technical and substantive amendments, contained in the documentation for the meeting, was agreed to with the following exceptions:

- The Panel of Constitutional Experts proposed that a definition of "written decisions from the President" as set out in section 101(1) be included in the Constitution. It was agreed that the Panel would table a definition in the Management Committee meeting of 10 October 1996.

- It was agreed that the commencement date of the Constitution as set out in section 243 would be finalised in the meeting of the Management Committee. It was agreed that it was preferable that most sections of the new Constitution come into effect on 1 January 1997.

- It was noted that the technical amendments to section 213 as agreed to by Subcommittee 2 were not included on the list.

4. ANY OTHER BUSINESS

There was no other business.

5. CLOSURE

The meeting closed at 13:45.

ENQUIRIES Dr. T. Sutcliffe
NAVRAE
IMIBUZO
TELEPHONE 483-3561
TELEFOON
UFONINI
REFERENCE H402/3/28
VERWYSING
ISALATHISO
DATE 4 October 1996
DATUM
USUKU

PROVINCIAL ADMINISTRATION: WESTERN C
Department of Health

PROVINSIALE ADMINISTRASIE: WES-KAA
Departement van Gesondheid

ULAWULO LWEPHONDO: INTSHONA KOLO
Isebe Lezempilo

Dr. Abe Nkomo, The Head, Portfolio Committee on Health (Fax: 403-3177)
Dr. Yogan Pillay and Mr. Ray Mabope, Department of Health (Fax: 012-3258721)
Mr. Pravin Gordhan
Senator Haroun Bhabha
Minister Vali Moosa
Mr Andrew Borraine

Dear Minister Moosa

RECOMMENDATIONS TO THE CONSTITUTIONAL ASSEMBLY ON CHANGES TO THE CONSTITUTION

We have been informed by the National Department of Health that the Constitutional Court has referred various sections of the Constitution to the Constitutional Assembly for redrafting, and that this presents us with a final opportunity to influence the constitution making process.

Certain sections of the constitution, as adopted by the Constitutional Assembly on 8 May 1996, are very problematic to the health sector and conflict directly with the national vision for health sector restructuring, which has been developed over the last 2 years.

We thus submit comments from the Department of Health of the Western Cape Province, for your attention and support.

Yours sincerely

Dr. T. Sutcliffe
HEAD: DEPARTMENT OF HEALTH

4 DORP STREET
PO BOX 2060
CAPE TOWN
8000
FAKSIMILE (021) 483-4372

DORPSTRAAT 4
POSBUS 2060
KAAPSTAD
8000
FAKSIMILE (021)
483-4372

SUBMISSION ON NEW CONSTITUTION FOLLOWING RULING OF CONSTITUTIONAL COURT

1. INTRODUCTION

This submission on the new constitution comes from the Health Department of the Provincial Administration of the Western Cape.

It would have been wonderful if the version of the new Constitution, adopted by the Constitutional Assembly on 8 May 1996, could have been embraced by all sectors as a major milestone, setting in place a broad framework for detailed transformation and restructuring within which each sector could operate.

Instead, for the health sector, the new constitution led to confusion and concern within much of the sector. The constitutional provisions relating to health appeared to be in certain ways completely out of contact with the vision of health sector reform led by the National Department of Health. A particular problem was that the whole concept of the District Health System, around which much of the National Health Plan is based, appeared potentially undermined by different and sometimes undefined concepts or terminology in the constitution.

It is thus with great hopes that the health sector views the potential for redrafting certain sections of the new constitution, and in particular the chapter on local government, following the recent Constitutional Court decision.

2. SCHEDULE 4 PART B

2.1. PROBLEMS WITH SCHEDULE 4, PART B

The single major source of confusion which the new constitution has led to in the health sector has been the inclusion of the term "municipal health services" in part B of schedule 4.

There are several major problems with this section:
(i) The term "municipal health services" is not defined.

(ii) The section appears to suggest that all municipalities should render some form of health services. Many local authorities or municipalities in South Africa definitely do not have the capacity to render health services, or could not do so efficiently. The new National Health Bill, which is close to finalisation, deals with this issue at length. Provision is made for the establishment of health districts, and 3 main options are laid out for how such districts should be governed. One of these options is indeed the local government option - which would be appropriate in certain areas, but not in others. The Bill lays out in detail a process for how individual districts should be evaluated to establish the optimal; governance option.

A schedule of the Bill specifies approximately 44 functions of health districts, including:

- Health promotion services
- Rendering health services in communities, clinics, community health centres, community hospitals.
- Nutritional services
- Appropriate treatment for diseases and injuries
- Midwifery and maternity services

- Preventive, promotive, curative and rehabilitative health services for children and youth, including services at schools and institutions
- Care of the elderly
- Care for people with disabilities
- Mental health services
- Oral health services
- Treatment of chronic diseases
- Medical social work services
- Care for the terminally ill, including community nursing and home care services

(iii) If "municipal health services" are defined as primary health services, and every local authority has the right to administer these services in their own area of jurisdiction, this will result in a very much more geographically fragmented health service than we have ever had in the past. Facilities will be duplicated, services will not be operated at economies of scale, many more health management structures will need to be established, offices of urban and rural authorities will be duplicated within the same towns.

(iv) One of the central tenets of current health sector reform is that fragmented curative and preventive health services, currently managed by various authorities, should be integrated under one authority within any particular (district) area. The problem with this section of Schedule 4B is that it discourages this process of integrating services, and instead suggests that "municipal health services" be rendered by the municipality, other services by implication, would then be run by some other authority. This would constitutionally perpetuate the current fragmentation of services.

(v) The qualification covering the whole of Part B is complex, confusing and has already received various conflicting legal opinions. Part B is made subject "to the extent set out in section 155(3)." Section 155(3) is in turn subject to Sections 44, 151 and 154. S151 (3) states that municipalities have the right to govern...subject to national and provincial legislation. All this is confusing and subject to varying interpretation.

(vi) What this all amounts to, is that certain interpretations of "municipal health services" (schedule 4, part B) would result in continuation of the current system of fragmented health service delivery, and will seriously undermine (and perhaps destroy) any attempts to introduce a true district health system in the country. In the worst scenario, much of the district health model, the central element of the National Health Department's vision of health system restructuring, and many parts of the Draft Health Bill could, unless this section is altered, be declared unconstitutional, and health sector reform set back by at least a decade.

2.2. SOLUTIONS TO PROBLEMS WITH SCHEDULE 4, PART B

The following solutions are proposed for how the term "municipal health services" should be rephrased:

(i) The best option would be: "Aspects of health service delivery subject to national and provincial health sector legislation".

Alternative options are:

(ii) Removing the function completely: thus relying on S156(4) which in any case appears to require delegation of health services to local authorities under certain specified

conditions. This is compatible with the integrated service delivery concept of the health district, in which integrated Primary Health Care Services (at the very minimum; district hospital services could be added) be devolved either completely or not at all (i.e. primary health care services should not be fragmented by partial devolution).

(iii) Using the term municipal health services, but defining this as environmental health services - which would be compatible with the objects of local government as described in S152(1). This would also allow for separate delegation of district health services in terms of S156(4).

2.3. SUPPORTING DOCUMENTATION

The points made in this document are further substantiated by and should be considered together with the following important documentation:

(i) Department of Health. Restructuring the National Health System for universal primary care - Official policy document of the Department of Health, February 1996.
(ii) Department of Health. A policy for the development of a district health system for South Africa. 1996.
(iii) Department of Health. National Health Bill. Draft 8, 11 September 1996 (especially chapter 4)
(iv) Western Cape Provincial Health Plan, 1995
(v) Minutes of the joint MINMEC meeting of Health and Local Government (especially summative comments by Ministers Moosa and Zuma).
(vi) Address by Minister Zuma to joint MinMEC meeting.
(vii) Memorandum from Dr. T. Sutcliffe to MEC Rasool on legislative provisions for the establishment of a district health system.

For those who wish to refer more broadly to national and international literature on the issue of health districts and on their relationship to local government, the following references are recommended.[1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16]

2.4. CONCLUSION

The chapter on local government in the Constitution, as adopted by the Constitutional Assembly on 8 May 1996, appears likely to seriously undermine fundamental issues in health system reform, as outlined in numerous national health policy documents. This document has focused particularly on one major problem - the section on "metropolitan health services" in Schedule 4, part B. Three possible options to this section are proposed.

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[1]. World Health Organisation. Challenge of implementation. District health systems for primary care. WHO

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[3]. Newell K. The way ahead for district health systems. World Health Forum 1989;10:80-87.

[4]. Vaughan PV, Mills A, Smith D. The importance of decentralized management. World Health Forum 1984;5:27-30.

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6. Waddington C, Kello AB, Sumah DW et al. Financial information at district level: experiences from five countries. Health Policy and Planning 1989;4(3):207-18.
7. Eichhorn H, Blecher MS, Jeebhay M, Frankish JG. Implications of the Interim Constitution and Local Government Transition Act for the establishment of health districts. S Afr Med J 1994;10:647-9.
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9. Zwarenstein M, Barron P. Managing primary health care in South Africa at the district level: The MRC/IUPHC workshop. Medical Research Council: Cape Town, 1992.
10. Tollman SM, Mkhabela S, Pienaar JA. Developing district health systems in rural Transvaal. Issues arising from the Tintswalo/Bushbuckridge experience. S Afr Med J 1993;83:565-8.
11. Zwarenstein MZ, Barron P, Tolman S et al. Primary health care depends on the district health system. S Afr Med J 1993;83:558.
12. Frankish JG. Comprehensive PHC services rendered by local authorities - the experience of the Department of Health Services and Welfare, House of Representatives. S Afr Med J 1993;83:559-60.
13. Kark S. The practice of community orientated primary health care, 1981.
14. Barron PM, Fisher SA. A district health service in Khayelitsha - panacea or pipedream? S Afr Med J 1993;83:569-72.
15. Harrison D, McQueen A. An overview of Khayelitsha: implications for health policy and planning. Parrowvallei: Medical Research Council, 1992.
16. Epstein L. Eshed H. Community-orientated primary health care - the responsibility of the team for the health of the total population. S Afr Med J 1988;73:220-3.

To : Members of the Management Committee

From: Halton Cheadle

Re: Amended Text 23 - Labour Relations

1. I have read the opinion of Adv Trengove, SC on AT Labour Relations. He is of the view that there are two interpretations to the second sentence of AT 23(5) which reads "national legislation may be enacted to regulate collective bargaining."

2. I disagree with the opinion in paragraph 6.4 of his opinion. Firstly the sentence does not regulate the right to engage in collective bargaining, but the institution of bargaining itself. In other words the first interpretation he gives to the sentence does not apply. The object of the sentence is to permit Parliament to regulate the institution of collective bargaining and to make the kinds of policy choices as to the levels of bargaining, the procedures and the institutions of collective bargaining. If in regulating collective bargaining the right to engage in collective bargaining guaranteed in the first sentence of 23(5) is limited, that limitation must in terms of section 36(1), meet the requirements of a constitutional limitation. Because the first interpretation is a misreading of what national legislation is meant to do, the second interpretation must fall away.

3. I am of the view that NT 23(4)(c) may remain as it is because any regulation of collective bargaining that infringes on the right to enagage in collective bargaining by virtue of the pre-emptory language in 36(1) shall be subject to the requirements of justifiable limitation.

4. Paragraph 91 of the opinion of Adv Trengove, SC states that the risk of non-certification of AT 23(5) may be avoided by subjecting any regulation of collective bargaining to requirements for limitation in terms of section 36(1). If the members of the Management Committee, given the late stage of finalising the Constitution, wish to settle on a wording that meets the concerns raised by Adv Trengove, SC the wording may be altered as follows:

> **"National legislation, subject to section 36(1) maybe enacted to regulate collective bargaining."**

5. I do however wish to raise that there maybe a difficulty for the interpretation of other provisions of the bill of rights. See for example section 22 which permits the regulation of the practise of the profession in a very similar way as the proposal made in relation to collective bargaining.