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**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**THURSDAY  
17 AUGUST 1995  
14H00  
E249**

**DOCUMENTATION**



## CONTENTS

No	Content	Page
1.	<b>Independent Institutions Draft formulations - 15 August</b>	<b>1 - 17</b>
1.1	Auditor-General	1 - 5
1.2	Financial and Fiscal Commission(No text)	5
1.3	Central Bank	5 - 6
1.4	Public Administration Commission	6 - 7
1.5	Electoral Commission	8
1.6	Public Protector	9 - 12
1.7	Human Rights Commission	12 - 14
1.8	Gender Commission(No text)	15
1.9	General Provisions	15 - 17



## CONSTITUTIONAL ASSEMBLY

### MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

**DATE:** Thursday, 17 August 1995

**TIME:** 14H00 - 18H00

**VENUE:** E249

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#### DRAFT AGENDA

1. Opening
2. Independent Institutions\*
3. National Assembly, National Executive, Electoral system - *To be distributed when available*
4. Any other Business
5. Closure

*N.B. \* Please bring along the document of 14 August on Independent Institutions dealing with the General Principles and the Schematic overview.*

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**HASSEN EBRAHIM  
EXECUTIVE DIRECTOR  
CONSTITUTIONAL ASSEMBLY**

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**SECOND DRAFT - 15 AUGUST 1995**

**Status:** Processed as per instruction of  
CC Subcommittee for further  
discussion by the Subcommittee.

Chapter ...

**INDEPENDENT INSTITUTIONS**

**AUDITOR GENERAL**

Establishment and functions [independence and impartially]<sup>1</sup>

1. (1) There shall be an Auditor General for the Republic.<sup>2</sup>

[(2) The Auditor General shall be independent.

(3) The Auditor General shall discharge his or her powers and functions impartially and without fear, favour or prejudice subject only to this Constitution and the law.

(4) Organs of state shall through legislative and other measures accord the Auditor General and his or her assignees the necessary assistance and protection to ensure the independence, impartiality, dignity and effectiveness of the Auditor General, including all such immunities and privileges as are necessary for this purpose.

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<sup>1</sup> This section can be combined with the powers and functions and reporting clauses if the provisions in the section relating to independence and impartiality are moved to section 21.

<sup>2</sup> Agreed to.



**(5) No person and no organ of state shall interfere with the Auditor General in the discharge of his or her powers and functions.]<sup>3</sup>**

**[Powers and functions]<sup>4</sup>**

**[2.(1)](2)** The Auditor General shall audit, and report on, the accounts and financial statements of all national and provincial state departments and administrations and of all local governments, and also all such other accounts and financial statements as may be required by law to be audited by the Auditor General.<sup>5</sup>

**[(2)](3)** The Auditor General may audit, and report on, the accounts and financial statements of any institution funded from public money, as may be regulated by law.<sup>6</sup>

**[(3)]<sup>7</sup>**

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<sup>3</sup> The Subcommittee must consider whether Subsections (2) to (5) in bold brackets should be incorporated in the general provision on general principles in section 21 below. If this is agreed to the following sentence can be added to subsection (1):

"The general principles set out in section 21 shall apply to the Auditor General."

The Panel of Experts have advised that the phrases "and his or her assignees" and "including all such immunities and privileges as are necessary for this purpose" are unnecessary. See par. 2 of the Panel's opinion. However, during the discussion of the Panel's opinion one of the panellists suggested that subsections (3) and 4 should be combined and rephrased in a more positive way.

<sup>4</sup> See foot note 1.

<sup>5</sup> Formulation as approved by the CC.

<sup>6</sup> Agreed to in the Subcommittee, the DP reserving its position.

<sup>7</sup> It was agreed in the Subcommittee that the previous subsection (3) dealing with the AG's access to information be deleted. The DP reserved its position.



**[Reports]<sup>8</sup>**

(4) The Auditor General shall submit the reports on audits to such authorities operating at the same level of government at which the audit was conducted, as shall be prescribed by law. If such a law so requires the Auditor General shall submit the reports also to other prescribed authorities operating at another level of government. All reports shall be made public.<sup>9</sup>

**Appointment, qualifications, tenure and dismissal**

- 2.[4. (1) The President shall appoint as Auditor General a person -**
- (a) nominated by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and**
  - (b) approved by Parliament by a resolution adopted, without debate, by a majority of at least two-thirds of the members present and voting.]<sup>10</sup>**

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<sup>8</sup> See foot note 1.

<sup>9</sup> It was agreed that a new formulation should be developed along the lines of the above formulation. Alternatively the following formulation can also be considered:

"(4) The Auditor General shall submit reports on audits to all authorities which have a direct interest in the relevant audit and also to any other authorities as may be prescribed by law. All reports shall be made public."

<sup>10</sup> If the parties agree to a standardised appointment procedure (see section 22) the following formulation can be considered for inclusion in section 2 above.

"(1) The Auditor General shall be appointed in accordance with the requirements set out in section 22."



(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office. The Auditor General shall be appointed with due regard to his or her specialised knowledge of or experience in auditing, state finances and public administration, and shall not hold office in any political party or organisation.<sup>11</sup>

(3) The Auditor General shall be appointed for a period of not less than five years. A person appointed for a period of less than ten years may be re-appointed to serve as the Auditor General for a further period, provided that his or her total period of service as the Auditor General shall not exceed ten years.<sup>12</sup>

**[(4)]<sup>13</sup>**

**[(5) The Auditor General may be removed from office only on the grounds of misbehaviour, incapacity or incompetence upon -**

- (a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and**
- (b) the adoption by Parliament of a resolution supported by at least two-thirds of the members present and voting calling for his or her removal from office.**

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<sup>11</sup> Agreed to in the Subcommittee.

<sup>12</sup> Agreed to in the Subcommittee.

<sup>13</sup> It was agreed in the Subcommittee that the provision on conditions of service of the AG be deleted. The DP reserved its position.



(6) The President may suspend the Auditor General from office when his or her removal from office is under consideration by Parliament, and shall forthwith dismiss him or her from office upon adoption of the said resolution.]<sup>14</sup>

[Assignment of powers and functions and provision of funds

5.]<sup>15</sup>

FINANCIAL AND FISCAL COMMISSION

3 - 8<sup>16</sup>

CENTRAL BANK

**Establishment**

9. The South African Reserve Bank, established and regulated by national law, shall be the central bank of the Republic.

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<sup>14</sup> This clause has now been incorporated in the standardised dismissal procedure in section 23. The following provision can be considered for inclusion in section 2 above:

"(4) The Auditor General may be removed from office in accordance with the procedure set out in section 23."

<sup>15</sup> It was agreed in the Subcommittee that the previous section 5 be deleted, the DP reserving its position.

<sup>16</sup> Provisions on this Commission have not yet been drafted.



**Primary objective**

10. (1) The primary objective of the South African Reserve Bank shall be to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank shall, in the pursuit of its primary objective [referred to in subsection (1)], exercise its powers and functions independently and without fear, favour or prejudice, subject only to a national law: Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.<sup>17</sup>

**Powers and functions**

11. The powers and functions of the South African Reserve Bank shall be those customarily exercised and performed by central banks. Such powers and functions shall be determined by a national law.<sup>18</sup>

**PUBLIC ADMINISTRATION COMMISSION**

**Establishment and functions**

12. (1) There shall be a single Public Administration Commission for the

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<sup>17</sup> This clause would need revisiting if the Subcommittee is of the view that the uniform provision on general principles (section 21) should also apply to the Reserve Bank. See footnote 42.

The words in bold brackets serve no purpose and can be deleted.

<sup>18</sup> It was agreed in the Subcommittee that the previous proviso to this clause prohibiting Parliament from derogating from the principles in section 10 be deleted. The DP reserved its position.



Republic as prescribed by national law. Each of the provinces shall be entitled to nominate a representative for appointment to the Commission.

**[(2) The Public Administration Commission shall be independent and impartial.]<sup>19</sup>**

(3) The functions of the Public Administration Commission shall be to promote the basic values and principles governing public administration set out in Chapter ...,<sup>20</sup> as prescribed by national law.

**[(4) The Public Administration shall be accountable to Parliament for its activities.]<sup>19</sup>**

(5) Provincial representatives in the Public Administration Commission shall be competent to exercise and perform the powers and functions of the Commission with regard to provinces as prescribed by national law.

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<sup>19</sup> If the Subcommittee agrees that the uniform provision on general principles (section 21) should also apply to the P A Commission, the words in bold brackets should be replaced by the following:

**"(2) The general principles set out in section 21 shall apply to the Public Administration Commission."**

<sup>20</sup> The provisions of the Draft on the P A Commission dealing with principles governing public administration and the public service have an effect and application beyond the scope of the Commission. It would therefore be inappropriate to include these provisions in this Chapter under the heading "Independent Institutions". It is suggested that these other provisions be included in a separate chapter under "Public Administration" to precede the chapter on the Security Services.



**ELECTORAL COMMISSION**<sup>21</sup>

**Establishment and functions**

13. (1) There shall be an Electoral Commission [which shall be independent, impartial and accountable to Parliament.]<sup>22</sup>

(2) The Electoral Commission shall be responsible for the management of free and fair elections conducted at national, provincial and local levels of government.

**Appointment of members**

14. The Electoral Commission shall be composed of a minimum of three persons [who must be nominated by a representative Parliamentary Committee on Elections, approved by a seventy-five per cent majority of members of Parliament and appointed by the President.]<sup>23</sup>

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<sup>21</sup> TC 6.1's report has still to be discussed in the CC.

<sup>22</sup> The application of the uniform provision on general principles (section 21) to the Electoral Commission may require the deletion of the words in bold brackets.

<sup>23</sup> If the parties agree to a standardised appointment procedure the words in bold brackets can be replaced by the following:

"appointed in accordance with the requirements set out in section 22."



**PUBLIC PROTECTOR**

**Establishment and functions**

15. (1) There shall be a Public Protector for the Republic.<sup>24</sup>

**[(2) The Public Protector shall be independent, impartial and subject only to the Constitution and the law. The Public Protector shall discharge his or her powers and functions without fear, favour or prejudice.**

**(3) Organs of state shall through legislative and other measures accord the Public Protector the necessary assistance and protection to ensure his or her independence, dignity and effectiveness.**

**(4) No person and no organ of state shall interfere with the Public Protector in the discharge of his or her powers and functions.]<sup>25</sup>**

(2) The Public Protector shall have power, as regulated by law, to investigate and report on any conduct in the affairs of the State or public administration at any level of government which is alleged or suspected to be improper or to result in any impropriety or prejudice, and to take such remedial action as is appropriate in the circumstances. In addition, the Public Protector shall

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<sup>24</sup> Agreed to.

<sup>25</sup> The Subcommittee should consider the inclusion of subsections (2) to (4) in bold brackets in the uniform provision on governing principles in section 21. If so, the following words can be added to subsection (1) above:

"The general principles set out in section 21 shall apply to the Public Protector."



have such other powers and functions as may be prescribed by law.<sup>26</sup>

**[(5)](3)** The Public Protector shall be accessible to all persons and communities.<sup>27</sup>

(4) The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.<sup>28</sup>

**[(3)](5)** Reports issued by the Public Protector in connection with the discharge of his or her powers and functions shall except in exceptional circumstances be open to the public.<sup>29</sup>

**[(4)** The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities at least once a year.]<sup>30</sup>

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<sup>26</sup> The CC Subcommittee agreed to this formulation. Establishment and functions can be combined in one section if section 15(2) to (4) is moved to section 21.

<sup>27</sup> Agreed to in the subcommittee.

<sup>28</sup> This clause was criticized on a number of points in the CC, viz

- that the negative nature of the provision is inappropriate;
- that its operation should be limited to judicial decisions;
- that it should be moved to the chapter on the administration of justice.

The CC decided to defer further discussion of this clause pending discussion of the Draft on the Administration of Justice.

<sup>29</sup> Agreed to by the Subcommittee, the NP reserving its right to revisit the clause.

<sup>30</sup> To be considered for incorporation in section 21.



**Appointment, qualifications, tenure and dismissal**

**16. [(1) The President shall appoint a person recommended by Parliament as the Public Protector.**

**(2) Parliament shall only recommend a person for appointment as the Public protector -**

**(a) who has been nominated by a committee of Parliament ...; and**

**(b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least ... per cent of the members present and voting at a meeting.]<sup>31</sup>**

**(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with any other requirements prescribed by law.<sup>32</sup>**

**(4) The Public Protector shall be appointed for a period of seven years.<sup>33</sup>**

**[(5) The President may remove the Public Protector from office only on the grounds of misbehaviour, incapacity or incompetence upon a finding to that**

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<sup>31</sup> Subsections (1) and (2) in bold brackets can be deleted if the Subcommittee agrees on a uniform appointment procedure. In such a case the following provision can be considered for inclusion above:

**"(1) The Public Protector shall be appointed in accordance with the requirements set out in section 22".**

<sup>32</sup> Agreed to in the Subcommittee.

<sup>33</sup> Agreed to in the Subcommittee.



effect by a committee of Parliament and the adoption by Parliament of a resolution calling for his or her removal from office.

(6) The President may suspend the Public Protector from office when his or her removal from office is under consideration.]<sup>34</sup>

**Provincial public protectors/Deputy Public Protectors<sup>35</sup>**

17. ...

**HUMAN RIGHTS COMMISSION**

**Establishment and functions [governing principles]<sup>36</sup>**

18. (1) There shall be a Human Rights Commission for the Republic.<sup>37</sup>

[(2) The Commission shall be independent and subject only to this Constitution and the law.

(3) The Commission shall discharge its powers and functions impartially and without fear, favour or prejudice.

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<sup>34</sup> Subsections (5) and (6) incorporated in the standardised dismissal procedure in section 23. The following provision can be considered for inclusion in the above section:

"The Public Protector may be removed from office in accordance with the procedure set out in section 23."

<sup>35</sup> Stands over for discussion on provincial competencies.

<sup>36</sup> If the bracketed subsections are moved to section 21 the clauses on establishment and functions can be combined under the heading "Establishment and functions".

<sup>37</sup> Agreed to.



**(4) Organs of state shall through legislative and other measures accord the Commission the necessary assistance and protection to ensure its independence, impartiality and effectiveness.**

**(5) The Commission shall be accountable to Parliament for its activities and shall report to Parliament on such activities at least once a year.]<sup>38</sup>**

**(2) The Human Rights Commission shall promote the development, protection and attainment of, and respect for, human rights and, generally, the development of a culture of human rights in the Republic. It shall for this purpose have the necessary powers accorded to it by law, including powers to monitor, investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached and to perform research and educative functions.<sup>39</sup>**

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<sup>38</sup> The bracketed subsections (2), (3), (4) and (5) could be considered for incorporation in section 21. If agreed to the following can be added to subsection (1) above:

**"The general principles set out in section 21 shall apply to the Commission."**

<sup>39</sup> As agreed to in the Subcommittee.



**Appointment of members**

19. ..<sup>40</sup>

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<sup>40</sup> There is disagreement among the parties on the method of selection and appointment of commissioners. There are two views, the one supports the approach in section 115(3) of the interim Constitution. The other view calls for the creation of an independent panel to select and recommend persons to the President for appointment as commissioners. Qualifications for members of the Commission also need further debate. These are the two options:

**Option 1:**

"4. (1) The members of the Human Rights Commission shall be appointed by the President on recommendation by Parliament.

(2) Parliament shall only recommend a person for appointment to the Commission -

(a) who has been nominated by a committee of Parliament composed of one representative of each party represented in Parliament and willing to participate in the committee: and

(b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least 75% of the members present and voting.

(3) A member of the Commission shall be an independent and impartial person of integrity who has a personal commitment to the promotion of fundamental rights."

**Option 2:**

"4. (1) The members of the Human Rights Commission shall be appointed by the President on recommendation by an independent panel of human rights experts, who do not hold office in any political party or organisation.

(2) Such panel of human rights experts shall be appointed by a multi-party parliamentary committee by resolution of a majority of at least two-thirds of its members.

(3) A member of the Commission shall be an independent and impartial person of integrity who has a personal commitment to the promotion of fundamental rights."

The Subcommittee must consider whether members of the Commission should be appointed in terms of the standard procedure clause, in which case the above can be replaced by the following:

"A member of the Human Rights Commission shall be appointed in accordance with the requirements set out in section 22."



GENDER COMMISSION

20. ...<sup>41</sup>

GENERAL PROVISIONS

General principles<sup>42</sup>

21. (1) The institutions [provided for in this Chapter] shall be independent, impartial and subject only to the Constitution and the law. They shall discharge their powers and functions without fear, favour or prejudice.

(2) Organs of state shall through legislative and other measures accord the said institutions the necessary assistance and protection to ensure their independence, impartiality, dignity and effectiveness.

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<sup>41</sup> TC 6.3 must still report.

<sup>42</sup> See Comparative Analysis pages 18 - 25. The question before the Subcommittee is whether a uniform formulation such as suggested above could be applied to all the independent institutions established in terms of this Chapter, i.e.

Auditor General  
Financial and Fiscal Commission (no report yet)  
Reserve Bank  
Public Administration Commission  
Electoral Commission  
Public Protector  
Human Rights Commission  
Gender Commission (no report yet).

If it is not feasible to apply the section to all the institutions the same approach as suggested in sections 22 and 23 can be considered, i.e. by applying it only to specific institutions. In such a case subsection (1) above can be adjusted by replacing the words in bold brackets with "to which this section applies".



(3) No person and no organ of state shall interfere with the said institutions in the discharge of their powers and functions.

(4) The said institutions shall be accountable to Parliament and shall report to Parliament on their activities at least once per year.

### **Appointments<sup>43</sup>**

22. (1) Where the Constitution requires an appointment to be made in accordance with this section, such appointment shall be made by the President acting on the recommendation of Parliament.

(2) The person recommended by Parliament shall be a person -

(a) nominated by a committee of Parliament ...; and

(b) approved by Parliament by a resolution adopted by a majority of at least ... % of the members present and voting.

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<sup>43</sup> See Comparative Analysis pages 27 and 28.

As appointment procedures are in contention, the above formulation has been included just for the sake of form and to indicate that it will only apply where there is another provision requiring some or other appointment to be made in terms of the standard procedure. This would mean that the appointment of members of the Reserve Bank board, the Public Administration Commission, etc, will not be affected by this clause as these persons will be appointed in terms of legislation (as political agreements presently stand).

The appointment of the Auditor General, Public Protector and members of the Electoral Commission and the Human Rights Commission in terms of a uniform procedure would seem to be feasible. It can also be considered for other appointments mentioned in the Comparative Analysis.



**Removal from office**

23.<sup>44</sup>-(1) Where the Constitution provides for the removal from office of a person in accordance with this section, that person may be removed from office only on the grounds of misbehaviour, incapacity and incompetence upon -

- (a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and
- (b) the adoption by Parliament of a resolution supported by at least [two-thirds] of the members present and voting calling for his or her removal from office.

(2) The President may suspend a person from office when his or her removal from office is under consideration by Parliament, and shall without delay dismiss him or her from office upon adoption of the said resolution.

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<sup>44</sup> See Comparative Analysis page 30.

The above formulation comes from the Auditor General Draft and would appear to be suitable also for the Public Protector. Its application to other office-bearers should perhaps also be considered.



