

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA
DATE: 20 MARCH 1996
RE: THE IMPLICATIONS OF CHAPTER 12 (SECOND MEMO)

1. This memorandum must be read in conjunction with the memorandum by the Panel, dated 14 March 1996.
2. The Panel has received additional instructions from the multi-lateral held on 18 March 1996 to draft alternative formulations which will encapsulate the different options discussed at the multi-lateral. As we understand the different options, they are based on the following points of departure:
 - (i) There is agreement that all institutions mentioned in the referral to the Panel, must be bound to apply the values and principles of clause 171(1) without unduly impinging on their autonomy.
 - (ii) There is a difference of opinion concerning **how** the institutions could be bound to the values and principles. The one option prefers the route as reflected by the current draft, while the other prefers the reference in clause 171(1) to "including the administration of institutions that are dependent on government funds or other sources of public money", to be deleted, and the principles to be made applicable through legislation.
 - (iii) There is a difference of opinion regarding the "control mechanism" currently reflected by clause 172(2). The one option prefers for 172(2) to remain intact, while the other prefers that the "control mechanism" currently established by 172(2) will apply to the public service only.
3. The reference to "public money" in addition to "government funds" in clause 171(1), gives rise to interpretational problems. As currently formulated, "public money" must be distinguished from and cannot be part of the notion of "government funds"; a different meaning must be ascribed to it. That being the position, it is uncertain what the notion of "public money" in addition to "government funds" entails.

4. It seems as if both the problem relating to "public money" and the problem relating to the ambit of 171(1) could be addressed by dividing the first part of clause 171(1) into two subclauses as follows:

"171 (1) Public administration includes administration at all levels of government and the administration of institutions that are dependent on government financial support.¹

(2) Public administration must be governed by the democratic values and principles enshrined ..."etc.

The suggested amendment obviously only applies to option 1, and the alternative formulation of clause 171(1) in option 2.

5. It seems as if the PAC may be renamed "Commission for Effective Administration" to satisfactorily capture the thrust of option 1, and "Commission for Effective Government" to satisfactorily capture the thrust of option 2

6. For the purposes of redrafting option 1 we have assumed:

- that the redrafted clauses 171(2) and 171(3) as are contained in our memo of 14 March 1996, are acceptable to the proponents of this option;
- that clause 172(2) will provide the "control mechanism" over all institutions which may be affected by clause 171(1); and
- that clause 171(1) is not intended to apply to organs of civil society which do not receive government money.

Option 1:

171 (1) Public administration includes administration at all levels of government and the administration of institutions that are dependent on government financial support.

(2) Public administration must be governed by the democratic values and principles enshrined ..."etc.

¹ There is some uncertainty as to what should fall under the notion of "Government financial support" (or any other notion that is used in this regard) e.g Government guarantees, levies charged by parastatals, etc. The exact phrase and the implications it is intended to convey, needs further considerations.

- (3) The appointment in the public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
- (4) Legislation regulating public administration **must** differentiate between different sectors, **taking into account their nature and functions.**

Note: Through clause 171(4) the amended version requires legislation to be sensitive to the differences among parastatals, statutory bodies and NGOs taking into account their "nature and functions".

172: Stays intact except that consideration may be given to renaming it "Commission for Effective Administration" be substituted for PAC.

173: Stays intact. The addition of 173(4) as suggested by the Panel in our memo of 14 March 1996 seems to be unnecessary.

Option 2:

Note: The Panel is not certain of the extent to which certain concerns raised at the ad hoc meeting on Public Administration were incorporated in its mandate regarding option 2. We have included them in the option to suggest how they may be accommodated, if this is desired.

(a) **171(1):** delete the words "including the administration of institutions that are dependent on government funds or public money" or the words "and the administration of institutions that are dependent on government money", if the formulation suggested by the Panel is followed.

or

(b) if the words referred to above remain part of the text, then **add** a new clause 173A:

"173A (a) Institutions of tertiary education are excluded from the public administration.

(b) National legislation may provide that the values and principles of section 171(1) (or 171(2) of the amended version), or similar values and principles, apply to institutions of tertiary education and other institutions that are dependent on government financial support to the extent that

the nature and functions of those institutions permit."

re 171(2): Move to the clause dealing with the public service (currently clause 173) and substitute "the public service" for "the public administration".²

re 171(3): Leave in amended form as suggested by the Panel (memo 14 March 1996). The amended version requires legislation to be sensitive to the differences among parastatals, statutory bodies and NGO by taking into account their 'nature and functions'.

Add 171(5) (if 171(1) option (a) applies):

National legislation may provide that the values and principles of section 171(1) (or (2)), or similar values and principles, apply to institutions dependent on government financial support to the extent that the nature and functions of those institutions permit.

re 172(2): Switch clause 172 and 173 around. Insert "as they pertain to the public service" between the words "administration" and "as".

The redrafted option 2 would then read as follows;³

Basic values and principles governing public administration

"171(1): Public administration includes administration at all levels of government"

or

"171(1): Public administration includes administration at all levels of government and the administration of institutions that are dependent on government financial support" (to be read together with 173A).

171(2): (the same as option 1)

² The Panel suggests that moving this clause is unwise, as it is directly related to the application of the principles.

³ This option assumes that the proposals by the Panel relating to 171(2) and (3) in their previous memo, are acceptable.

- 171(3): Legislation regulating public administration **must differentiate between different sectors, administrations or institutions in the public administration, taking into account their nature and functions**".

Add 171(5) (if 171 option (a) applies):

National legislation may provide that the values and principles of section 171(1) (or (2)), or similar values and principles, apply to institutions dependent on government financial support to the extent that the nature and functions of those institutions permit.

The Public Service

- 172(1): formerly 173(1): stays intact
172(2): formerly 173(2): stays intact
172(3): formerly 173(3): stays intact
172(4): formerly 171(2) or (3): to read as follows:

"The appointment in the public service of a number of persons on policy considerations as regulated by national legislation is not precluded."

Commission for Effective Government

- "173(1): There is a single Commission for Effective Government for the Republic, which is independent and must be impartial and regulated by national legislation. Each of the provinces may nominate a representative to be appointed to the Commission.
- 173(2): The object of the Commission for Effective Government is to promote the basic values and principles of public administration **as they pertain to the public service**, as prescribed by national legislation.
- 173(3): formerly 172(3): stays intact (change of name)
- 173(4): formerly 172(4): stays intact (change of name)

Exclusion of Tertiary Institutions

(To apply when the alternative wording of clause 171(1) of option 2 is preferred)

- "173A: (a) Institutions of tertiary education are excluded from the public administration.

- (b) National legislation may provide that the values and principles of section 171(2), or similar values and principles, apply to institutions of tertiary education and other institutions that are dependent on government financial support to the extent that the nature and functions of those institutions permit."