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CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

THURSDAY
3RD OCTOBER 1996

Room V16

14H00

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

NOTICE OF MEETING

Please note that a meeting of Sub-Committee One will take place as indicated below:

Date: **Thursday, 3rd October 1996**

Time: **14h00**

Venue: **Room V16**

Agenda

(4) The powers and functions of the Commission are to -

(a) promote the values and principles set out in s195 throughout the public service;

(b) investigate, monitor and evaluate the organisation, administration and personnel procedures of the public service;

(c) propose measures to ensure effective and efficient performance within the public service;

(d) give directions aimed at ensuring that personnel procedures including recruitment, transfers, promotions and dismissals comply with the values and principles contained in s195;

(e) report in respect of its activities, functions -including its findings, directions and advice, and an evaluation of the extent to which the values and principles in s195 have been complied with;

(f) either of its own accord or on receipt of any complaint -

(i) investigate and evaluate the application of personnel and public administration practices and procedures and report to the relevant executive authority and appropriate legislature;

(ii) investigate grievances of public service employees concerning official acts or omissions and recommend the appropriate remedy;

(iii) monitor and investigate adherence to applicable procedures in the public service;

(iv) advise national and provincial organs of state regarding personnel practices in the public service, including recruitment, appointment, transfers, discharge and other career incidents of employees in the public service;

(5) The Commission has other powers and functions prescribed by national legislation.

(6) The Commission must report at least once a year in terms of 4(e) -
(i) to the National Assembly; and
(ii) to each of the provinces in respect of its activites in that province

197(4) Subject to the procedures agreed to in the collective agreement of the public service, provincial governments are responsible for the appointment, promotion, transfer and dismissal of members of the public service in their administrations.

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NEW SEQUENCE

196 (1) single (same text)
(2) indep & impartial (same)
(3) organs of state assist (same)
(4) powers and functions (new)
(5) other powers through law (new)
(6) reporting (new)
(7) appointment (new)
(8) removal (new)
(9) commissioners in the provinces (same)

NP Proposal: Clause 196

4 (a) The President (as head of the national executive) must appoint-

(i) five commissioners with the approval of the majority of members of the National Assembly on the recommendation of a committee of the National Assembly proportionately composed of all parties represented in the National Assembly; and

(ii) A commissioner for each province, designated by the respective Premiers of the provinces with the approval of the majority of members of the respective provincial legislatures on the recommendation of committees of those legislatures proportionately composed of all parties represented in those legislatures.

(b) The President must designate one commissioner as Chairperson of the Commission.

(c) ....

5 A member of the Commission may be removed from office only-

(a) on the grounds of misconduct, incapacity or incompetence; and

(b) after a finding to that effect by-

(i) the majority of the members of the National Assembly in the case of a commissioner appointed in terms of subsection (4)(a)(i), on the recommendation of a committee of the National Assembly proportionately composed of all parties represented in the National Assembly; or

(ii) the majority of the members of the provincial legislature involved in the appointment of a particular commissioner in terms of subsection (4)(a)(ii), on the recommendation of a committee of that legislature proportionately composed of all parties represented in that legislature.

MEMORANDUM

Ref: HC/CON30001/SEP96.MEM(3)

TO : **MR HASSAN EBRAHIM**
CONSTITUTIONAL ASSEMBLY

FROM : **H CHEADLE**
CHEADLE THOMPSON & HAYSOM

SUBJECT : **TECHNICAL COMMITTEE 4 - MEMORANDUM ON NT23 - LABOUR RELATIONS**

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1 The technical committee was asked to prepare a memorandum on whether the options proposed in the draft formulations dated 25 September are capable of certification under CP 28.

2 Before addressing this question, the TC wishes to review the reasoning that motivated the manner in which the NT23 sought to give effect to CP 28.

3 The difficulty that confronted Theme Committee 4 was that the formulation of the right to collective bargaining as an individual employer's right may constitute a constitutional preference in favour of plant level bargaining. A

constitutional preference not even the objectors to NT23 sought to advance in their argument before the Constitutional Court.

"18.6 The contention is not that plant level or indeed any other level of bargaining should be guaranteed in the Text. The appropriate level of bargaining is a matter not for constitutions but for the parties to that process. BSA's contention is that by providing for such bargaining only through employer organisations and thereby dictating the level at which bargaining is to take place there is a failure to provide for the general recognition and protection of employers' collective bargaining rights as required by Principle XXVIII." (See the Written Argument of Business South Africa paragraph 18.6.)

4 The judgment of the constitutional court found that the formulation of the employer's right to bargain collectively in NT23 did not give full effect to the language of the principle. The right of individual employers, it said, must be included in the NT.

5 This injunction of the Constitutional Court can be achieved by simply reproducing the wording of the principle itself. That would be the safest approach for certification.

6 It is our submission that option 1 in the Draft Formulations meets the

requirements of CP 28 and the judgment of the Constitutional Court. It specifically includes the right of individual employers to engage in collective bargaining - see NT 23(3)(c) in option 1. We would hereunder propose a following amendment to bring it closer into line with the CP:

"23 (3) Every employer has the right —

(c) to engage in collective bargaining[1]"

7 But the simple reproduction of the wording cannot be the effect of the judgment. The CA cannot be bound to the exact wording of the text of the principle for several reasons -

7.1 the principle would cease to be a principle;

7.2 the court permitted deviation from the text in respect of employees. Notwithstanding the trite proposition made in the judgment that individual employees cannot bargain, the formulation of the right could have followed the formulation in section 27 of the interim Constitution: "Workers shall have the right to ....bargain collectively";

7.3 the court permitted the deviation from the CP, not just in respect of wording but in substance. The CP confers the right to bargain

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[1] The relevant portion of CP 28 reads: "The right of employers ....to engage in collective bargaining shall be recognised and protected".

collectively on "employees" and yet the NT limits the exercise of this right to trade unions and thus excludes other associations of employees - workers' committees, professional associations, informal groupings of workers etc.

8 The CA has the responsibility for drafting the constitutional text. It must do so in a manner that conforms with the CPs. The court has in its judgment interpreted CP 28 to include an individual employer's right to bargain collectively. It did not require the CA to adopt the wording of the principle. Nor did it prevent the CA from deciding the form and the substance of the right in a manner it considers meets the requirements of the NT. Accordingly any wording that includes an individual employer's right to bargain collectively conforms with the principle. The argument accordingly must proceed on whether the options presented include the right of individual employers to bargain collectively. That is what the court enjoins the CA to do.

9 It is our submission that option 2 meets the requirements of CP 28 and the judgment because:

9.1 the right of individual employer to engage in collective bargaining is specifically written into the text - see NT23(3)(c);

9.2 the proposed wording to NT23(6)(b)[2] does not constitute a "claw back" clause. NT23(6)(b) has two legal effects: it is an interpretive counterweight to the effect of formulating the right to bargain collectively as an individual employer's right; and it constitutes a constitutionally sanctioned purpose for limiting the right[3]. Neither of these purposes constitute a ground for refusing certification;

9.3 the Constitutional Court has certified a similar formulation on a right specifically required by a CP. CP 9 provides that there must be "freedom of information so that there can open an accountable administration at all levels of government". That CP is given effect to by NT32 - Access to information. NT32(2) provides that "[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state". The effect of the subclause is to constitutionally sanction the limitation of the right on grounds of administrative and financial burden, grounds not normally recognised as justifying the limitation of rights and freedoms under the limitations clause. That

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2 We have already drawn to the attention of the refinement team that NT23(5) is not cast in the proper form. The intention of these kinds of clauses is not to shield them from the limitations clause. They constitute constitutionally sanctioned purposes for limitation. We have proposed that NT23(5) be worded as follows: "The provisions of a right in the Bill of Rights do not prevent legislation....".

3 There is common misconception of how these "nothing shall preclude" clauses operate in a Bill of Rights. They do not constitute a complete shield behind which the legislature can do what it likes. They constitute constitutionally sanctioned purposes for the limitation of rights - the limitation still has to meet the standards of the limitations clause. In other words a court can still enquire into whether: (a) the extent of the limitation is reasonable and justifiable; (b) there is a relation between the limitation and the purpose of the limitation; and (c) there are less restrictive means to achieve that purpose.

formulation of the CP was accepted by the court.

9.4 Constitutional Court certified a similar formulation on the right to freedom of association (CP12) and the right to join trade unions (CP28). NT23(5) specifies the purpose in respect of which the two rights may be limited.

10 The proposed wording of option 2 may be altered in order to remove any preference for one level of bargaining over another. It could read as follows:

"(5) The provisions of a right in the Bill of Rights do not prevent legislation -

(a) recognising union security arrangements contained in collective agreements.

(b) permitting different levels of collective bargaining".

11 Option 3 meets the requirements of certification. The right is cast in the passive and accordingly includes all those who capable of bargaining collectively. In light of the judgment of the Constitutional Court, that clearly includes individual employers. However this option can be made more explicit. It could quite easily be reformulated as follows:

"(6) The right of employees, employer organisations and trade unions to engage in collective bargaining is hereby protected and guaranteed".

NATIONAL PARTY

PROPOSALS: SUBCOMMITTEE 1: 26 SEPTEMBER 1996

1. LABOUR MATTERS

PROPOSAL:

Amendment to clause 23

23(3) Every employer has the right -

(a) ...

(b) ...

(c) to bargain collectively and to exercise economic power in collective bargaining; and

(d) to collective action against partners in collective bargaining.

2. IMMUNISATION OF THE LRA

PROPOSAL:

The deletion of clause 241.

DEMOCRATIC PARTY SUBMISSION

COLLECTIVE BARGAINING : SUB-COMMITTEE 1

The amendment of NT 23(3) to read:

(3) Every employer has the right -

(a) to form and join an employer's organization; and

(b) to participate in the activities and programmes of an employer's organization;

(c) to engage in collective bargaining; and

(d) to collective action and the exercise of economic power in furtherance of the right conferred in (c) of this section.

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FREEDOM FRONT

1. THE RIGHT OF AN INDIVIDUAL EMPLOYER TO BARGAIN COLLECTIVELY

The essence of the Court's decision on the right of employers to bargain collectively is contained in these words -

> "As stated above, 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. Individual employers, on the other hand, can engage in collective bargaining with their workers and often do so. The failure by the text to protect such a right represents a failure to comply *with the language* of CP XXVIII which specifically states that the right of employers to bargain collectively shall be recognised and protected".

2. POSITION OF THE FREEDOM FRONT

The Freedom Front supports the Constitutional Court's view that individual employers must have the right to engage in collective bargaining. The provision in the New Constitution (C.P. 23(4) supports the view that collective bargaining can only take place on a ***centralized*** basis between unions and employers organisations.

In practice, however, collective bargaining takes place at various levels in South Africa. It is common practice that collective bargaining take place at shop floor level between individual employers and employees.

3. THE TECHNICAL COMMITTEE PROVIDES THREE OPTIONS

The TC's first option: To include the right to bargain collectively as one of the employer's rights in section 23(3).

This option applies the Court's decision in the most simple and straightforward way. We must look for a process which seeks to implement the Court's ruling. This option clearly gives the most direct effect to the Court's ruling.

The TC's second option:

This option directly violates the Court's ruling on this issue. On the basis of CP XXVIII, the Court found for the right of individual employers to bargain collectively. Sub-clause 5 of Option 2 is simply a stratagem to undermine both the granting of that right and the Court's instruction. It runs a grave risk of non-certification.

The TC's third option: To delete the right to bargain collectively in section 23(4)(c) and to insert a new clause -

"(6) Collective bargaining is hereby protected and guaranteed"

This option is similarly uncertifiable in that it elects to ignore entirely the Court's instruction to grant individual employers the right to bargain collectively. Ignoring the Court's decision will not make it go away.

The only option available to the CA is the first one, and the Freedom Front support it that is to include the right to bargain collectively as one of the employer rights listed in section 23(3).

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

To: **Chairpersons & Executive Director**

Date: **1 October 1996**

Re: **National Unity and Reconciliation Provisions**

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1. THE TEXT AND THE JUDGMENT

1.1 At the meetings of the sub-committee on 25, 26 and 27 September 1996 experts were requested to again look at the proposed wording of Item 22, Schedule 6. Schedule 6 of the New Constitutional Text (NT) deals with transitional arrangements. Under the heading "National unity and reconciliation", Item 22 states:

"22. (1) Notwithstanding any other provisions of the new Constitution and despite the repeal of the previous Constitution-

(a) 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; and

(b) the provisions of the Promotion of the National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended by the Promotion of National Unity and Reconciliation Amendment Act, 1995 (Act 87 of 1995), are valid.

(2) Subitem (1)(b) does not prevent any further amendments to the Promotion of the National Unity and Reconciliation Act, 1995."

1.2 The relevant part of the Interim Constitution (IC) occurs at the end of Chapter 15, before Schedule 7, and reads:

"This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights,

democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South African and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God seën Suid-Afrika

Morena boloka sechaba sa heso. May God bless our country

Mudzimu fhatutshedza Afrika. Hosi Katekisa Afrika

[See also sec 232(4)]" (The reference to sec 232(4) seems to make little sense.)

1.3 In its certification judgment the Constitutional Court ruled that 22(1)(b) does not comply with CP's II, IV and VII, read together, because it seeks to exempt a statute (the promotion of National Unity and Reconciliation Act 34 of 1995) from constitutional review. The reasoning applicable to Item 241 of Schedule 6 also applies here, according to the judgment. The Court ruled

that 22(1)(a) is not in breach of the CP's. It adds the text of the "epilogue" of the IC to the final Constitution. As such, this provision is part of the NT and subject to constitutional amendments in the ordinary course. The epilogue could not have been argued to be in breach of the CP's.

1.4 The proposed solutions in the draft formulations put forward by the technical experts convened by the Executive Director of the CA envisage the retention of 22(1)(a), but the deletion of 22(1)(b) and, consequently, 22(2).

2. POSSIBLE PROBLEMS

Possible problematic questions which could arise include the following:

2.1 The entire "epilogue" or "post-amble" is carried over into the NT. Where exactly does the epilogue of the IC fit into the NT if it is deemed to be part of the NT? Can it be assumed that it fits in only under Item 22 of Schedule 6, or could it be argued that it is an epilogue to the NT? Furthermore, are the contents of the epilogue only relevant to the specific Act and Truth Commission, or also in a wider context, eg with regard to the interpretation of other provisions of the NT? The epilogue eg also includes phrases such as "a historic bridge between the past ... and a future" and states that the pursuit of national unity and the well being of South African citizens "require reconciliation between the people of South Africa..." It also mentions the need for "reconstruction." If the meaning of the epilogue is not restricted to the Truth and Reconciliation Act and its process, it could arguably have unforseen consequences eg for the later interpretation of various clauses of the Constitution, which were not agreed on or drafted with such an epilogue in mind.

2.2 For how long must it be deemed to be part of the NT - only for as long as the relevant Act and Commission is in operation, or also thereafter? Could its possible wider implications and influence on other clauses of the Constitution depend on the duration of the Truth and Reconciliation Commission process?

3. CUT-OFF DATE

Some concern was expressed as to the cut-off date for amnesty. The entire epilogue of the IC is deemed to be part of the NT. This includes details such as the dates. The date is thus part of the NT.

4. PROPOSALS

4.1 Schedule 6 deals with the arrangements necessary for the transition from the IC to the NT. The Promotion of National Unity and Reconciliation Act was passed as a direct consequence and in terms of the IC. Its constitutionality should be tested in terms of the IC, as has already happened with regard to one or more aspects, in the AZAPO-case. The idea behind Item 22 was simply to ensure that if the Act, or parts of it, cannot be challenged under the NT and perhaps found to be unconstitutional in view of the absence of constitutional provisions for unity, reconciliation amnesty etc, whereas it was drafted and passed to comply with the IC. (The insertion of 22(1)(b) went unnecessarily far and would mean that the Act was valid, even if found to be invalid in terms of the IC by the Constitutional Court. Therefore the Court declined to certify.)

4.2 One possible way to achieve the above aim, was to make the relevant IC provisions part of the NT. Another is the earlier formulation put forward by the technical drafter(s) of Schedule 6, which was more or less the following: "The... Act...is valid to the extent that it is consistent with the Interim Constitution."

5. POSSIBLE FORMULATIONS

<u>Option 1</u>

The present proposal, namely Item 22(1)(a) of Schedule 6, renumbered as 22.

<u>Option 2</u>

"The ...Act... is valid to the extent that it is consistent with the Interim Constitution."

Option 3

"For the purpose of the validity of the Promotion of the National Unity and Reconciliation Act... all the provisions of the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution, notwithstanding any other provision of the new Constitution and despite the repeal of the previous Constitution..." (perhaps subject to further technical refinement).

6. CLOSING REMARK

Option 3 is recommended. It would make it clear that the contents of the IC epilogue become part of the NT only for purposes of the Truth and Reconciliation process, regulated by the relevant Act, and would thus prevent any unforseen and unintended consequences. It provides more clarity than Option 1. It is closer to the formulation already scrutinized and approved by the Court, than Option 2.

General Provisions

Appointments

193. (1) The Public Protector and members of any Commission established by this Chapter must be women or men who are South African citizens, each of whom is fit and proper to hold the particular office and complies with any other requirements prescribed by national legislation.

(2) The need for commissions established by this chapter to reflect broadly the race and gender composition of South Africa must be considered when commissioners are being appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances, and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and members of -

(a) the Human Rights Commission;

(b) the Commission for Gender Equality; and

(c) the Electoral Commission.

(5) The National Assembly must recommend persons -

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted by a majority of the members of the Assembly.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(a).

Removal from office

194. (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on -

(a) the grounds of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution, calling for that person's removal from office, and adopted by a majority of the members of the Assembly save that in the instance of the Public Protector and the Auditor General a majority of at least two thirds of the members of the Assembly is required.

(2) The President -

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of a resolution with the required majority calling for that person's removal.

deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

Provincial taxes

228. (1) A provincial legislature may impose -

(a) taxes, levies, or duties other than income tax, value-added tax, general sales tax, rates on property, or customs duties; and

(b) flat-rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation, other than the tax bases of corporate income tax, value-added tax, rates on property, or customs duties.

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges -

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

Municipal rates and taxes

[303]

More information is required on the term 'selective'. This is to be obtained

229. (1) A municipality may impose rates on property, **[and excise taxes]** selective taxes on user charges in respect of services rendered by the municipality or on its behalf, and, subject to national legislation, may impose other taxes, levies or duties, but a municipality may not impose any income tax, value-added tax, general sales tax, surcharge or customs duty.

(2) Any recommendations of the Financial and Fiscal Commission must be considered before -

(a) the national legislation referred to in subsection (1) is enacted; or

(b) a municipality imposes rates on property or **[an excise tax]** a selective tax in terms of subsection (1).

Provincial and municipal loans

230. (1) A province or a municipality may raise loans for capital or current expenditure in accordance with reasonable conditions determined by

14 September 1996

DP Proposed Amendments

Public Protector & Auditor-General

1 NT s193 (5)

Delete and substitute:

193 (5) Parliament must recommend persons -

a) nominated by a multi-party parliamentary committee on which minority parties have at least proportional representation, which nominations must have the support of at least 75 percent of its members, and which may take evidence or receive nominations from other bodies and persons; and

b) approved by the National Assembly and by the National Council of Provinces by resolutions adopted by at least 75 percent of the members of the National Assembly and by at least 75 percent of the members of the National Council of Provinces.

2 NT s194 (1)

Delete and substitute:

194 (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on -

a) the grounds of misconduct, incapacity or incompetence;

b) a finding to that effect by a multi-party parliamentary committee on which minority parties have at least proportional representation, which nominations must have the support of at least 75 percent of its members, and which may take evidence or receive representations from other bodies or persons;

c) the adoption by the National Assembly and by the National Council of Provinces of resolutions, calling for that person's removal from office, and adopted by at least 75 percent of the members of the National Assembly and by at least 75 percent of the members of the National Council of Provinces.

3 NT s74 (2)

Delete "Section 1"

Substitute :

"Section 1, 193 (5) and 194 (1)"

4 Consequential Amendments:

4.1 NT s193 (4)

Delete "the National Assembly"

Substitute "Parliament"

4.2 NT s194 (2) (a)

Delete "the National Assembly"

Substitute "Parliament"

4.3 NT s194 (2) (b)

Delete the whole paragraph

Substitute

b) must remove a person from office upon adoption by the National Assembly and the National Council of Provinces of the resolutions referred to in subsection (1) (c).

NATIONAL PARTY

PROPOSALS: SUBCOMMITTEE 1: 25 SEPTEMBER 1996

AUDITOR-GENERAL AND PUBLIC PROTECTOR

Proposal:

Amendment of clause 193(5)

"(5) The National Assembly must recommend persons -

(a) nominated by a committee of the National Assembly proportionally composed of members of all parties represented in the National Assembly; and

(b) approved by the National Assembly by a resolution adopted, in the case of the Auditor-General or the Public Protector, by a two-thirds majority of the members of the National Assembly, or in the case of a member of any Commission established by this Chapter, by a majority of the members of the National Assembly.".

Amendment of clause 194

" The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on -

(a) the grounds of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee proportionally composed of members of all parties represented [of] in the National Assembly; and

(c) the adoption by the National Assembly of a resolution, calling for that person's removal from office, and adopted, in the case of the Auditor-General or the Public Protector, by a two-thirds majority of the members of the National Assembly, or in the case of a member of any Commission established by this Chapter, by a majority of the members of the National Assembly.".

(2) The President -

(a) may suspend a person from office at any time after the start of the proceedings of a committee proportionally composed of members of all parties represented [of] in the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the National Assembly of a resolution calling for that person's removal.".

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FREEDOM FRONT

The Constitutional Court held that certain provisions of the new Constitution did not comply with the Constitutional Principles.

The Freedom Front hereby comment and make certain submissions on how the deficiencies can be cured and how the amended new text on these provisions should read.

(A) *PUBLIC PROTECTOR*:

PURPOSE OF PUBLIC PROTECTOR:

The purpose of the office of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics (C.P.XXIX).

The new text 182(1) provides that the Public Protector has the power "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any unpropriety or prejudice".

The new text 182(4) provides that the public Protector must be "accessible to all persons and communities".

The Public Protector is an office modelled on the institution of the ombudsman whose function is to ensure that government officials carry out their task effectively, fairly and without corruption or prejudice.

The New text 181(2) provides that the institution of the Public Protector must be exercised without fear, favour or prejudice.

The New text 193 and 194 provides for the appointment and removal procedures.

It is our view that the independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government and that the independence of these functionaries was inadequate because only a simple majority was required and we submit.

That a majority of at least two thirds of the members of both Houses will be required for the removal and appointment of the Public Protector.

(B) ***AUDITOR-GENERAL***:

PURPOSE OF AUDITOR-GENERAL

The Auditor-General is to be a watch-dog over the government. The focus of this office is the proper management and use of public money.

Therefore this office should be independent and the powers and functions of the office should be exercises without fear, favour or prejudice.

The functions of the Auditor-General is central to ensuring that there is openness, accountability and propriety in the use of public funds and such a role requires a high level of independence and impartiality.

It is therefore our view that the independence of the Auditor-General must be safe guarded by the constitution and we submit that a majority of at least two thirds of the members both Houses of Parliament will be required for his appointment and removal.

SHOULD N.C.P.S. BE INVOLVED IN THE APPOINTMENT:

All the institutions impact on provincial and local government as well as national government, so there is logic in saying that they should also be involved in the removal and appointment.