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THEME COMMITTEE	6.2
	AUD. GEN. DISC.
DATE OF MEETING	14/06/95
NUMBER OF TAPES	2
CONTENT OF ENVELOPE	
1) PRINT OUT	✓
2) NOTES	✓
3) TAPES	✓
4) COMPUTER DISK	✓

**TO WHOM IT MAY CONCERN**

I had some difficulty in determining the full names of speakers in this meeting because the Chairperson referred to speakers on a first-name basis and in almost all instances the speakers would state their views without being motioned by the Chairperson to do so.

**INAUDIBILITY OF TRANSCRIPTION OF TAPE ON DISCUSSION DATED  
14 JUNE 1995 - THEME COMMITTEE 6.2**

**COUNTER NO.**

**(Tape 1)**

036 - 044 Tape goes blank  
079 Inaudible comment  
111 he made a ?  
140 ? belongs to a  
276 - 279 Tape goes blank  
287 went ? provided  
291 You've got ? and not ? do which is legislation  
305 Inaudible comment  
471 one of these ?  
567 I'm a ?  
623 Inaudible comment  
645 Inaudible comment

**(Tape 2)**

035 Die komma. Ons kom nie terug vir 'n komma nie.  
052 - 055 Tape goes blank  
056 - 057 Tape goes blank  
067 - 068 Tape goes blank  
078 - 083 Tape goes blank  
168 Mr ? on the Reserve Bank  
198 - 211 Inaudible comments from floor  
222 - 226 Tape goes blank  
237 - 243 Tape goes blank  
245 with Danie ?  
253 technical advisor, Dr ?  
293 the presentation by Dr ?  
368 ? taking into  
374 Inaudible comment  
393 Tape goes blank to end.

TRANSCRIPTION OF THE MEETING HELD BY THEME COMMITTEE 6.2

DATED 14 JUNE 1995

(Tape 1)

Chairperson: ..... extra late this morning. Yes, there's a copy here for you. Would you like to have some time to just quickly go through that AG thing. Alright. I'll just report back before we go through the formal procedures of the meeting. Ken and I met around the Auditor General's Bill. We met with the legal advisors. There were some points that were still outstanding and we disagreed on one point between the ANC and the DP, and we thought we'll just bring it back here. It's a very substantial point and as the legal advisors say we can just note that as a point of difference, not really a point of conflict in any way. But I think Ken wants an opportunity just to go through it because he hasn't had... so if everybody else want to go through it, they can quickly look at it.

?: May I ask whether you're sure you had the unilateral right to change the ANC mandate?

Chairperson: I've got no unilateral right to change the ANC mandate. The ANC is sitting there. They're watching me.

?: I'm normally very happy when ANC members turn their back on the communist party interpretation of things within their alliance, but on this occasion I was astonished and disappointed because, well, Barbara moved to the left of Rob Davies and I was.....

Chairperson: Shall we then deal with the Auditor-General things first. I mean there's Minutes and everything that we have to approve, but shall we just be business like and go through to the Auditor-General thing.

?: Can I put on record that it's me that's here and not my colleague, WA.

Chairperson: I think where the point of difference arose was on the level of reporting. What point was that?

?: The first changes in 1(iv). 1(iv) and 1(v) have been combined into 1(iv). That's the first change.

Chairperson: Let me just explain. In 1(iv) and 1(v) there was a duplication in that we spoke about basically the Auditor-General having immunity and the immunity from prosecution so that he could execute his task autonomously. And that was just combined into clause into 1(iv) instead and (iv) and (v). The legal advisors just advised that. (Tape goes blank)

Andrew: May we ask them to indicate what they've changed. They haven't done it and they've changed some things that we didn't discuss,

which is not a problem. I mean 1(vi) has become 1(v) understandably. But they've actually changed the way they've worded it which immediately means we have to read every paragraph now to see if something else has changed.

Chairperson: Well, OK, let's just have time then for each of us just to go through this Auditor-General's thing. Ken, given that you've got the notes there with you, if you can just note the one's that we've discussed with the legal advisors and then if you can just report on that.

Andrew: Well, let me just say so people can pay particular attention 1(iv) and 1(v) were going to be combined. Then (iii) was either going to be changed or there were going to be alternate provided that 3(I)(a) and (b). 4(ii) - the comma had to go in. 4(iii) was going to be changed. 4(v) was going to be changed. Yes, that's where the changes were, but I see for example as I mentioned on this other one they have changed some of the others too.

Chairperson: OK, shall we just go through this matter and we'll come to 3(I). So we've done 1(iv). The next one, Ken your understanding was?

Andrew: Was 3(I)(a) and (b).

Chairperson: Dr Jacobsz, in number 3(I) Ken proposed an amendment and if you'll see in the footnotes there under 11, that it reads there was no consensus ..... sorry no, it's under option 3(I) in the footnotes. Do you see that? The Auditor-General shall submit all reports on audits conducted by him or her to such authorities at the relevant level of government and also to such authorities at such levels of government as may be prescribed by law or may be determined by the Auditor-General. Now Ken wanted to have eliminated "as may be prescribed by law". My feeling was and I didn't have the ANC people to consult with....

Andrew: No, Option 2 expresses what I wanted to.

Chairperson: Option 2. OK. If you go through option 2.

Andrew: Might I say that... Well, we want to discuss 3 now. Even in terms of the option you wanted, when you know you never actually changed the ANC position, the.....

?: Inaudible comment.

Andrew: Well, at our meeting before last. Remember in G(26), we agreed to a particular formulation and then the legal advisors didn't carry it out as we had agreed. And so we were then discussing it and then Barbara decided that I hadn't been clear as to the implications of what the ANC was agreeing to and she actually

wanted to revert to the other thing. But be that as it may, I think look, I think what we must do is we must decide now, I'm pulling her leg, but we had actually agreed to the other one. But they've now actually changed 3(I) from what it was because I thought they were simply going to repeat. Because as I would read this now and obviously I've just read it through quickly once. 3 option 1, I mean favour option 2 anyway, but if we going to have.... I'll rather have the second best than the 4th best. It would not seem to me that it makes provision for the Auditor-General for example to report to the accounting officer of say the Agricultural Research Council because it's only talking. It says "to such authorities at the relevant level of government and also such authorities at such levels of government as may be prescribed by law or as may be determined." So all the reports then are only going to levels of government which is I don't think what even you want, let alone what I want. In any event I've been pushing for option 2. So they've changed the old 3(I) and in fact lost some of the stuff in the process.

?: Ken, what is this last part? "Or as may be determined by the Auditor-General." Doesn't it cover your problem?

Andrew: No, but it's.... "And also to such authorities at such levels of government". OK, "it's levels of government comma as may be prescribed by law", that's a level of government prescribed by law or "as may be determined by the Auditor-General". So it's a level of government determined by the Auditor-General. So there's no provision here in the way it's worded now for the Auditor-General to report to the director of the South African Museum when his doing the museum accounts or the director whatever his called of the Agricultural Research Council when his doing those accounts.

?: My interpretation is that he made a ?, the Auditor-General.

Andrew: As I read this it's only in respect of which levels of government he can report to because it's... well I mean that's our English word.

Chairperson: The point is that in the original formulation it was both relevant levels of government and state institutions...

Andrew: Well 3(I)(b) said "shall submit". Well the start of 3(I) was "The Auditor-General shall submit all reports on audits conducted by him or her to such authorities of levels of government", and then (b) was "Any other institutions as may prescribed by law or as may be determined by the Auditor-General."

?: Can I just ask a question here? Coming back to 3(I). The option, first option, when it says here "and also to such authorities and such levels of government". Aren't we specifically then also

referring to a person? The authorities?

Andrew: Yes.

?: OK, so, but now the Auditor-General's Act also refers to the accounting officer as the person to whom these reports are given. Doesn't it then follow if you say here "as prescribed by law" that you're now really referring to the accounting officer.

Andrew: Well, I'm not a lawyer, but I think I understand English and to me....  
I'm not trying to.... other people are just as expert as me, but as I would read this "authorities at such levels of government" and then you're saying which such levels of government, they either prescribed by law or they determined by the Auditor-General. In other words, but it's only at levels of government. So the Agricultural Research Council is not a level of government and therefore the Auditor-General wouldn't be reporting to the accounting officer of the Agricultural Research Council as well as then handing it into Parliament. It would be only to Parliament which I think is not what was intended whereas previously.... I mean I don't particularly want to argue for the one I don't want, but ....

Chairperson: Jill wanted to speak. I wonder if we can just move to someone just rectifying.... Ken can you just work on a formulation just to make sure that it's clear that it's levels of government and institutions or whatever. And Jill, you wanted to comment?

?: ? belongs to a certain level of government.

Chairperson: Not necessarily. It was a kind of.....

?: It reports to a certain level of government.

Jill: I think there is a distinction and I think the question is it does exclude. I mean it can be interpreted to preclude things like the institutions and also there are a whole lot of things that you may want the Auditor-General to do and you don't want them precluded by the Constitution to do it. So I think Ken's right but I think it does preclude it. That would be my reading of 1.

?: You see, Chairperson, there's always because in the different Acts dealing with the different public enterprises, Transnet and Eskom. They must appoint an auditor from a private firm but also take into consideration the input from the Auditor-General. So sometimes the Auditor-General can even go to a Transnet or an Airport Company and that doesn't belong to any level of government. There is a minister responsible yes, but it's not the department

and I would like to say that we must also take into consideration the public enterprises that the Auditor-General has got a finger in it and then Ken is correct that we must accommodate it in a broader sense to accommodate even the public enterprises.

Chairperson: I remember we went through this debate before and we tried to do this whole shopping list of everything that we must include and the legal advisors, as I remember, had a very concise formulation which covered this whole extra other bodies that the Auditor-General could. Ken, what was that? Wasn't that in the first formulation that we looked at on the other day?

Andrew: Well, I've got all the versions here. I could start trying to go through them and pick it out. I might say that every sub-paragraph I'm coming across, they've changed the words. And I mean... this is what and really I'm close to moving a motion of no confidence on the legal advisors because you know, they have so multiplied our work. You know..... well you were directly involved, so it's not. ... We talked about, I think it's whatever clause those four clauses we talked about and we agreed what would be done. On (I) we said there needed to be two options because we couldn't reach agreement on what we should have. OK, but in actual fact, they've gone and changed words in, well, in (ii) for example. We wanted no changes in (ii) and they've changed 2(ii) and they've changed 2(iii). I'm not saying for the better or the worst or substantially, but they've actually changed the words. So now we have to look and say are we happy with these new words. Do they mean what we wanted. They just drive me mad. I think there's another problem that really needs to be looked at from the CA point of view, is if you are drafting a Constitution in English, I've not as yet come across one of the CA law advisors whose home language is English. And I would think if you're actually are trying to.... his first language is English. I mean I would think when you're doing something like a Constitution in a particular language, it would have made quite a lot of sense to have some people who... I'm not saying they're not competent in anyway, that's incidental. I think it adds to the problem. I'll look at all the things.

Chairperson: Ken, what I would appreciate if you would just look at the formulation of including all these other institutions. But I think the basic issue at stake in which Ken and I were disagreeing, wasn't this question of including other institutions, it was the level of reporting. In the formulation that we were looking at, the idea that the Auditor-General reports at a particular level of government but also has a discretion to report at any other level of government at his discretion. But in the formulation it also said at his discretion and that might be prescribed by law. Now Ken wanted that legal prescription removed and that it just be put in that it be entirely at

the discretion of the Auditor-General to which level he reports other than the relevant level of government. Now I don't think it's a major issue. I mean, as the legal advisors said, we could just make a note to the Constitutional Committee that there's a slight difference of opinion on this issue. I don't think we need to get bogged down into trying to reach consensus on such a minor issue, but I think from the ANC's point of view our understanding is that a lot of the levels of reporting will be regulated by government given that it puts the Auditor-General in a very unenviable task if he has to have the sole discretion to decide at which level to report at. So I think we can just put it through as a minor difference of opinion. I wouldn't want to spend time on just discussing this through until consensus is reached. Does anybody want to comment?

Andrew:

If I can just very briefly explain the motivation as other people won't and I will do it very briefly. Our starting point as a party was that you should have an Auditor-General. No actually, before that. Our starting is that we have three levels of government in South Africa and they have different levels of responsibility, different responsibilities, different spheres of responsibility to use the current terminology, but there is not a hierarchy relationship. In other words the National Government isn't the boss of the Provincial Government who in turn is the boss of the Local Government, therefore in the normal course of events we would have said that for example Provincial Government should provinch in the same way as the National Government has a mechanism with an audit commission and things, a National Parliament should I say, to appoint an Auditor-General and a set of procedures that a Provincial Legislature should have the same thing. Now, for a variety of reasons including the shortage of manpower and the need to follow the audit trail, we actually said, OK, we will accept, given the South African circumstances, one uniform structure. Well one Auditor-General structure. But the key thing still is that the Auditor-General's office when he or she is doing an audit at provincial level is in fact doing it on behalf of that Provincial Legislature and in turn is doing it at a local level on behalf of that city or town council. That is where it's being done. We are happy that there's a proviso if at any level things are emerging that the Auditor-General's office feels satisfied about. The Auditor-General's office or the Auditor-General then using his or her discretion can say "This in fact needs to be reported elsewhere because funds that are supposed to be channelled are not being channelled or whatever. So, that's our perspective. And in the same way as we would not see that a Provincial Legislature should be able to pass a law which says that the accounts of the National Department of Public Works must be sent directly to their parliament or accounts committee as well. In other words that they've got an oversight over National Government, exactly the

reverse we don't believe should be right. So that's our line of reasoning and that's the reason why the second option that is formulated is the one that we've put forward.

Chairperson:

Well, I mean, for me the question is that having in "as may be prescribed by law" does not necessarily take away from that. I think what it has is an advantage is that there may be certain issues that arise. Now you do want some kinds of reporting. It may not be that you report in terms of what is directed but your legislation may be that if a problem is of this magnitude, it has to be reported at a different level. It may not be a question that is simply related that you do (a) or (b) or (c). It may relate to different kinds of things. I think we should leave that legal option open and I think having this "may be prescribed by law" is not tying anybody to what kind of law but allowing you to have a proviso that does remove it as being purely discretionary. Look at the other option for me would be... well, not the other option, the worst case scenario. You take a situation, let's take Eastern Cape as an example where you've got a level of functioning at the financial control that's poor and you end up before you get it reported that you've got a billion rand debt and by the time you're coming to rescue it or to deal with it, it's gone pretty much down the line because the discretion of the Auditor did not want to infringe or whatever and would let it go too far. You may want circumstances where you put in law that certain things if you reach certain benchmarks that would judge that things are actually wrong that you need to actually alert it somewhere else. I feel that just leaving it as the discretion and the law may or may not be there, you can then look at it in terms of your legislative programme and what's necessary. So, I would be very unhappy leaving out a legislative option.

Andrew:

Can I just make one comment on that because I don't want... because it's partly a conceptual philosophical point of intruding on the levels of government and treating some as more superior than others, is that in terms of 3(ii) which has always been there "All reports of the Auditor-General shall be made public". So it's not as if this is some secret report. I mean it's in the public domain so it's not as if some level of government or some persons would not know that's what the report... So in a sense it's a technicality, if you know what I mean, but I think from our point of view in conceptual terms of how one is arranging government in the Constitution, it is of some significance. Thank you. Well, I think Jill and Barbara or Jill's motivated what the ANC have against it. They..... (Tape goes blank)

Chairperson:

..... refer to. You see the situation that we're referring to is in circumstances where the reporting has actually occurred at a particular level but there has been an unsatisfactory response.

And so in the original formulation the Auditor-General could exercise his discretion and it would also be subject to "as prescribed by law". Now I think that the question here is that if we went ? provided that whenever the Auditor-General deems it to be in the public interest and in any situations as prescribed by law, then it can be referred to any other level of government or institution. You see I think that there's going to be complications. You've got ? and not ? do which is legislation does stipulate where things need to be reported to and I think under certain exceptional circumstances. You know, I think it would be difficult for the Auditor-General to determine entirely on his own where he should record. I think it places him in a very unenviable position because there'll be comebacks on him that he'll be reporting....

Andrew:

Well, may I just say that in the Auditor-General Amendment Act which we've just passed, an Amendment Bill, because that's where I took my original formulation from. Needless to say the legal advisors decided you know, no legal advisor likes any formulation any other legal advisor has done, but be that as it may, that's where I took it from and I mean that's a Bill we just passed unanimously and that specifically says it's in the Auditor-General's discretion.

?:

Inaudible comment.

Andrew:

No, but it's only in the Auditor-General's discretion. I mean if you read that Bill as it's currently, well presumably it's an Act if it's been signed, that's what it provides for and that's simply what I was wanting to provide for here. To have it in line with that, not Bill, not for the sake of being in line with the Bill but because I thought that correctly encapsulated the relationships. So that was the.... And you see it's one-way traffic. I mean this is the point. You see it's only the National that can pass this kind of law saying that the accounts of a certain local authority or something must be referred to Parliament. The local authority can't request an account of Parliament because they can't pass a law that would be binding in terms of this. And the sort of thing I have in mind particularly when we get into the fiscal transfers that it may be that they discover that the Eastern Cape or the Northern Cape and the Eastern Transvaal have been short-changed in the budget allocations in terms of what was adopted and therefore... or some local authority if it gets involved in that, and the Auditor General would then refer that national account to you know, and it's that kind of impartial independent discretion and if the wording was fuller in the Bill, in fact I've probably got it here, in which it was saying if there's anything in the account which requires the attention, then the Auditor General can refer. Because they try and bat as many words out of it as possible and it ended up just being in the public interest. But the Bill actually says, in other words, the Bill that we passed says in effect that if the Auditor

General auditing the levels at one level finds anything that needs to drawn to the attention of another level, then that should be done. And I would be very happy, I've got no problem with that at all, but there is not a blanket law at National level saying you must do this or you must do that. And in the end I mean to take Jill's point in a sense if the Auditor-General, that is the critical power because that is the one that stops it before the report is even published. You know you can start involving the other level.

Chairperson:

I think the point of the law advisors said is that even the law might prescribe where an Auditor-General can report, at which level under exceptional circumstances. The Auditor-General still has the discretion to report where he or she wished. So that in a sense even though you have the legal provision, your provision to allow the Auditor-General to report wherever he wishes to is catered for. So I would say that we should go back to the original formulation because in a sense we understand we would like to have some things that there would be laws governing that. But the original formulation also allows the Auditor-General to be free of that. He can also exercise his discretion as well. He has the right to exercise that discretion. So I think we are combining both points of view in that original formulation.

Andrew:

Look, I mean I don't think there's any.... because if we differ, we differ, but I mean the essential difference is I don't want by way of law the National Parliament to be able to pass laws saying that reports of one or more provincial or one or more local governments must as of right and automatically irrespective of, be submitted to Parliament.

Chairperson:

But that's not the intention. We're not talking about regular reporting procedures. We're talking about under circumstances where reporting has been made to the relevant level of government and where it has been unsatisfactory and the Auditor-General's terms has been unsatisfactory. We're talking about those exceptional circumstances.

Andrew:

Well, I would not have a problem. You know I don't think one has to find the words in which one says provided further that ... well you may have to expand it but in other words that you can call for a special report in respect of activities at another level of government. In other words one uses the word "special" in saying you're not having a blanket provision that you know it's a kind of almost case by case situation, then I wouldn't have a problem because I haven't you know.... Look, everything is public in the end anyway and for that matter the President can appoint commissions of enquiry and all sorts of things. So there's a variety of mechanisms. So I would not have a problem if we had something that referred to special circumstances or special

reports, then they can be called upon. That I wouldn't have a problem with. I just don't want a blanket thing that erodes the independence status against each other.

Chairperson: Look that was the legal advisor's impression that that was what was catered for in the 4th revision. Perhaps we can just return to that 4th revision, have a look at it and see whether in the light of what we've discussed now whether that is actually catered for. If not, what I would like to suggest is rather than keeping up this Committee on this tangle, that we either see later on just to see if the ANC and DP can't reach some kind of consensus on that. If we can't, we just can notify it as a minor difference of opinion. I mean it's not an earth-shattering thing because otherwise we're just going to be holding back and holding back on this. Would that be alright?

?: As far as I'm concerned Barbara, just looking through this, the formulation of the 4th draft. I'm quite happy with that. I've got no problems with it either, but if it has to be changed to accommodate this, will it be done now because before we get back to the CC where they have to report on the Auditor-General.

Chairperson: I see the legal advisors said that what we could report is just say that there was a difference of opinion in the Committee on this particular issue. We don't have to report a consensus position and the CC can take it further. Obviously it would be preferable if they knew what was our position here. So we could say that the DP has a minority opinion on this rather than I think if we are going to try to reach consensus on this because I think there's a strong feeling from the ANC side that you do need some prescription by law around these issues. I don't know what our ANC people... if they want to revise that and I mean I don't think we need to be held back by this. We're not trying to fight for consensus on everything. So, Ken in the light of the 4th amendment what is your feeling about that in the draft of the 4th amendment.

Andrew: Well, you see it has the same flaw from my perspective in that (a) says "report conducted by him, such authorities at the relevant level of government and to such other authorities at other levels of government as may be prescribed by law or at the discretion". So again it's got the "prescribed by law".

Chairperson: But it's "or at the discretion of the Auditor-General".

Andrew: No, it's not an extra thing. I know the discretion remains and I'm happy with that.

Chairperson: But would you not be happy that... because your concern is that the Auditor-General should not be bound by law. He should also

be allowed to say where something can be reported to. So if the Auditor-General does have that discretionary right anyway...

Andrew: No, he should not be forced by law.

Chairperson: But he's not forced. He has a discretion here

Andrew: No, he hasn't because there's an alternative. The law can either tell him he's got to or else he can do so at his or her discretion.

Chairperson: OK, well I think we should leave this until later.

Andrew: I think if you look at it, it's quite clear. It says, I'm reading the 4th draft now, "The Auditor-General shall submit all reports on audits conducted by him or her to (a) such authorities at the relevant level of government comma and to such other authorities at other levels of government comma as may be prescribed law or as may be determined by the Auditor-General at his or her discretion." So the Auditor-General, I'm sure that would not mean that the Auditor-General can override the law, that he can say the law says I must report provincial audits to Parliament but he determines at his discretion that he's going to ignore that law. I don't think that would be...

Chairperson: In the meetings with the legal advisors they were saying that that was the interpretation that the Auditor-General would have the discretion to report at whatever level. But however, let's get clarification from them on that...

Andrew: Can I just ask what would be the point of the law if he has the discretion anyway.

Chairperson: I think it's something that would guide where you would normally report.....

?: Madam Chair, no, it's prescriptive here in the first instance. In regard to institutions where the Auditor-General is compelled to report in terms of the law, to take for instance that which is governing Eskom. Now, there, he is compelled by that law to report either to a government. In the case of the second part of it is a discretionary clause that is humane. It's not relevant to the first issue in regard to institutions. Where institutions where he is compelled to actually report in terms of law, then he has no discretion there.

Jill: I understand what Ken's saying in terms of his philosophy but I actually think we're going around in a circle with it because the question for me is that we want them also ... Let's say we want to be able to report on the Transnet or whichever one of these ?. It's

got to be not at his discretion, it's got to be in terms of the law of some kind and if you're taking law out of it altogether, how do they report to the institutions? Where does it come in if there's no legal framework for it?

?: Could I just ask a question.

Andrew: No, just hold on, sorry just on a point of information. If you look at my option 3(l)(b) it says in the case of other institutions in other words other than levels of government such as Transnet to the persons prescribed by law. So there the law, in your law of Transnet you say, the Auditor-General will audit the account and shall report to Parliament and the Chairman of the Board or the law then is the complete boss, and then there's just a proviso. So the Transnet problem doesn't arise, that is prescribed by law.

?: I just to need to clear up the one cobweb that I still have here. If you go back to the 4th draft what it says here... Let's take the first one. "Such authorities of the relevant government and to such other authorities and other levels of government as may be prescribed by law or may be determined by the Auditor-General". That to me the first part is prescriptive. There's no question about that in my mind but the point is this if it's not clear where it has to be done, then it should be at the discretion of the Auditor-General. Isn't that the way one would interpret the way that this sentence is now being formulated? Because I can't see if the law lays down a certain procedure, isn't it only where that would not be clear?

Chairperson: Just on Ken's other point, is that then why do we have provided that in your own option 2 "whenever the Auditor-General deems it to be in the public interest to any other level of government, institution or person." If your only question of institution/person is provided for in (b)?

Andrew: Because the law, for example, let's take the Transnet which we used, the law may well say that the accounting officer or the chair or the managing director gets reported to as well as Parliament. OK. In doing that audit on a particular occasion, the Auditor-General may discover that Transnet has been... let's say the provinces are responsible for school travel subsidies or something, that Transnet has actually been ripping off the Eastern Transvaal and he's finding that they've actually been over-charging them. The Auditor-General may say well that particular account of Transnet on my report at least I'm going to submit to the Eastern Transvaal Legislature as well. Or Transnet may have been ripping off the Agricultural Research Council or something, and the Auditor General say in addition to the normal channels, I'm actually going to draw it, because somebody else now has a kind of relevant and vested interest.

Chairperson:

But my argument would be precisely for those reasons is why you want "may be prescribed by law" because you may want to put in some legislation which says that where there is this kind of problem, you do need to report it somewhere else. It's not just his discretion. What happens if his discretion is in that very example that the Eastern Cape doesn't have a capacity to actually deal with it anyway, there's no point in reporting to it and then you leave it at that.

Andrew:

Well, you see the thing is that in motivating your argument and Barbara did as well, you're putting in words that are not here. If those words were here then I would have no problem. So let's talk in layperson's language and not try and put it into.... If one said you report it at the appropriate level of government provided that where there were special problems or in the discretion of the Auditor-General it can be reported at other levels. And I'm using special province, may or may not be the right kind of terminology, I've got no problem. It's because there one is saying that there is something out of the ordinary happening and you report it somewhere else as well. I've got no problem with that. It's simply the routine mechanism of the ordinary reports go to the right level and that should be it. So I've got no problem with problems or special instances or special reports. No problem in that thing, which I think is what the Auditor-General... this Bill we did. I'm fairly certain those are the kinds of words that are used here.

?:

I have a feeling, Jill said we're talking in circles. Can't Ken.... I'm not a legal man like you, I'm a ?. Can you give me practical cases what you feel is not going to be handled correct according to what's in form, where we are not going to reach or attain the objectives we have in mind?

Andrew:

OK, two examples. Well, a Constitution is there to do various things. Amongst the many things, an important one if you are going to have a situation in which you don't simply have a Central Government who then delegates powers to various other governments. Besides protecting individual citizens and minority interests and parties and all those sorts of things, in fact the Constitution needs to provide the protection and the space for each level of government. So what this Constitution needs to do vis-a-vis an Auditor-General. You see if you've got a hierarchial view of saying that's the parent, that's the child and those are the grandchildren in your relationship between Central Government, Provincial Governments and Local Governments which means now not... in other words a hierarchial view of levels of government as opposed to saying they are .... just hold on, then you're saying the National Government is the senior partner in every respect and therefore the National Government can say I want what's going on with my grandchildren to be reported to me. I mean, that

is one approach. Our approach to this is that you have spheres of government, the National and various people depending on what they think is important in life might consider different levels of government to be more or less important. But you have National Government which has a whole range of spheres of authority, powers, functions. The same with Provincial, the same with Local. You also have to build in relationships between these various things. So where for example in a local Council the Auditor-General in doing an audit discovers that not only is there a problem with officials, with corruption or malpractice, but in fact some of the Councillors are involved as well and therefore to report to the Councillors themselves, is not sufficient. The Auditor-General can then say in this instance I'm actually going to send this with a covering letter to some other level of authority that can actually take action.

?: Inaudible comment.

Andrew: Well, I want him to be able to do it. But what I don't want... Sorry?

?: Inaudible comment.

Andrew: Yes he can and I'm in favour. Well, you're missing the point. The point is ..... Well I think Jill and Barbara and I understand exactly what the point is. We're not going in circles but we are having to go over the same ground. My problem with 4 is that the National Parliament can say every single report that the Auditor-General does in respect of every province and every local authority must be sent to the Joint Standing Committee on Public Accounts. Which means even when there isn't a special problem or a special circumstance, we as the Central Parliament are saying we are the bosses and we want to see what everybody is up to and read all those reports.

?: Inaudible comment.

Andrew: Yes. Well, you know I've tried to explain five times. You may not agree with me that there's anything wrong with that? I think you don't understand, if I can use the horrible word, what Federalism is about, what spheres of government of equal status but with different spheres is all about because the local authority cannot pass a bi-law which says the Auditor-General must submit all the reports of our province and the National Government to us, so we can see if they are giving us our fair share etc. In other words we want to monitor what National Government... Having been a Minister I can understand, but you've got a centralised mentality and that's the difference.

Chairperson: I'm not sure if this meets it but I think that what I understand as to be trying to look at is how we ensure that where there's a problem it can be referred. Right? I mean, that's really the issue, we're not saying... There are two levels, the one is that we want to be able to ensure that the reporting is done at the level at which the incident or the issue is being dealt with and that in any circumstance that warrants it, that reporting can go to any other level or institution. Right? That's what I understand us wanting to be doing. I don't think there is, certainly not my understanding, that there's any intention that says we want to then pass laws that will ensure that whatever you want must be reported at all levels. I think that's the opposite of what we wanting to achieve. That's my understanding of it. And whether we put in something that says, because my concern is just leaving it to the discretion. That's my concern because the discretion may or may not be appropriate to the problem and whether one puts in just say provided that whenever the Auditor-General deems it to be in the public interest in special circumstances as may be prescribed in law to any other level of government, institution or person, whether that would meet your need of that as well as our need to actually see that there is another mechanism that is not only the discretion. You know let's take the worst scenario situation....

Andrew: I have no problem so you don't even have to convince me. That would meet my requirements.

Chairperson: Provided that whenever the Auditor-General deems it to be in the public interest, in special circumstances as may be prescribed in law to any other level of government, institution or person. I don't know if that would.....

Jill: Yes, that helps.

?: That could be looked at in terms of legislation for example it could be precisely that. The example Ken used that you have a completely corrupt Council, that it's involving total manipulation, you can't report to them and maybe you want to put in "in certain circumstances". It can act as a protection for the Auditor-General to take certain decisions. That you can say if corruption is at this level or if this happens, these are routes you can take.

(Tape 2) It's an opening that if you want to put it into law, it's not that you would.

Chairperson: I think Dr Marais, what guides these special circumstances is the preceding clause when the Auditor-General deems it to be in the public interest. So in other words he has a discretion. So I think therefore we've reached some kind of consensus and I want to thank all players for being so brilliant at reaching such consensus. Ken, can I just finalise then? In this final section here it's revised

to mean and we're taking Option 2 now. Nothing gets changed in 1(a) or (b) but that provided that then reads "provided that whenever the Auditor-General deems it to be in the public interest comma in special circumstances as may be prescribed in law may refer to any other level of government, authority or institution.

Andrew: Yes, that sounds perfect to me. I would think possibly you might want to using the same words but put "or" in so you would read "provided that whenever the Auditor-General deems it to be in the public interest comma or in special circumstances as prescribed by law comma to any other level of government, institution or person".

Chairperson: Well, I think that's satisfactory.

Andrew: Yes, thank you, I appreciate it.

?: I would like to ask a question? You say "government comma institution" or is it government institution.

Chairperson: Government, authorities, institution. So it's a general thing.

Andrew: Actually, there's an error here that the ... In this option 2 in the last line, it should be "level of government comma, institution or person".

?: Yes, that's why I'm asking that so we're not coming back for a comma next week.

?: Excuse me. We had in just after public interest "or in special circumstances". That's all we put in.

Chairperson: Yes, and then "as may be prescribed in law". It's just a changing of the wording.

?: .....035.....

Chairperson: Ken, as I understand it the next question was number 3.

Andrew: Yes, they put the thing in that comment 2, 3 is the same. No, 3 they've changed in accordance with what we've agreed. Yes, I'm happy with that.

Chairperson: It was just a slight technical amendment. It relates to the period of service that the Auditor-General can serve and we just amended it as I remember our discussions that we had in this group.

?: Excuse me, you guys are a bit ahead of us now. Can you just go

back to the previous one.

Chairperson: Clause 4(iii). You will remember that our discussion on the tenure of office of the Auditor-General was around that we didn't want him to exceed ten years but we also wanted the discretion that he could be elected for seven years and whatever. So it was just that the 4th formulation didn't make quite clear and so if you're happy with this reading, this is what Ken and I agreed with the legal advisors would be put in.

?: As I said we're graduating to semi-colons now.

Andrew: Piet feels relaxed because we're very happy that these days you're catching up with us after 45 seconds and not 45 years.

Chairperson: I think I shall ban snide remarks. And now number 5, clause 4(v).

Andrew: It's said in good humour. Yes, alright, if you come back into power, don't give me a job.

Chairperson: Now, we go on to clause 4(v). Ken, are you happy with that formulation.

Andrew: Yes, I'm interested in the way they've done it but I express what we agreed. If they hassle from a legal point of view. I mean it interest me that they haven't actually put in anywhere that the President actually removes the Auditor-General, but I'm happy as it is.

Chairperson: Yes, we said we would leave the President out, that it was....  
Tape goes blank.

Andrew: Yes, (vi) they've added the Parliament.

Chairperson: Remember you requested that Parliament be in so that it's clear?

Andrew: Well, he's actually put ... the "by Parliament" should be after the "under consideration". So that should actually be that (vi) should read "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/her from office upon adoption of the said resolution". So the "by Parliament" comes after "under consideration". ....078.... There's a typographical error in 1(iv) which hasn't been corrected. It's the third line. It should be "protection to ensure the independent's impartiality" as opposed to ..... On the very first page of this Bill of the 5th draft. OK. In the 3rd line it says "protection to ensure the independent's impartially, indignity" and it should be "impartiality".

Chairperson: With that I think we've reached consensus. Now the second issue that we have to deal with was the issue which Ken raised. It was an issue raised formally in the Committee, was that the process is now that this report of the Auditor-General will go to the Constitutional Committee, and as was stressed by the legal advisors this is just the first bite of a very long process because the Constitutional Committee will mash around with it and it will go through all kinds of processes and there can be reformulations and whatever, but in effect the work of this Theme Committee on this will be completed when it gets referred to the Constitutional Committee. It doesn't mean that political party work will stop because they will obviously feed into the Constitutional Committee, but our work will be completed. Ken felt it was very fitting and I tend to agree with him that in the report to the Constitutional Committee the members here should be very clear on what gets reported to that Constitutional Committee given that anything could be reported. And Ken was just suggesting just a minor small resolution saying that this Committee having considered this, wishes to... begs to report etc etc. Just so that it is formal so that people know that what goes through is a written record is there so that there's no come back later when people say no, we have points of difference and this and that and whatever. I haven't drafted any resolution and I was wondering, Ken, you seem to have a good idea whether you couldn't draft a resolution. I think you had some idea already. You were quoting some kind of resolution.

Andrew: This is on the agenda for the CC which is now in session.

Chairperson: Pat, could you clarify?

Pat: No, the Reserve Bank report was supposed to follow.

Andrew: I know, but this is the Auditor-General.

Pat: Yes, but I actually told them we're not ready yet.

Andrew: OK, because it's on the agenda so it's not going through today.

?: It's postponed to a later date.

Andrew: Do they know that?

Pat: Yes.

Andrew: Because that's where I had to go this morning because they told me it was on the agenda.

Pat: Yes, but I actually explained that we were still debating and that

we weren't finished.

Chairperson: I think that because there was just this minor hitch, it went through and then Pat just rectified it.

Jill: Just on what happens afterwards because I accept that we've sort of done our bit in terms of the Auditor-General's Bill, but I would also like to see that what comes out the other side has some resemblance to what we've discussed and I'm a bit concerned if one's looked at the different drafts. In a sense it almost reminds me a little bit of somebody who wrote a story and then somebody edits and somebody edits and somebody edits and they come back to the end and they say how do you like your story? Here's your story in print. The person reads it and they don't recognise one word in it. And I'm just hesitant that also partly it's not as much that, it tends to be a desire or my impression is that there's a desire to simplify and in the simplification you actually losing some of the content and I'm just not sure whether in putting in the resolution that we're doing, I think whether we can sort of try to say that simplification.... I mean I haven't got the words... but I just feel that in trying to make it accessible, you cannot.... it won't have meanings other than the English literal translation and you can't actually just reduce it to the English language understanding of the word. It's actually got some other content and meaning. I'm not sure how, if that can go into something that Ken is looking at, that we just a little bit over-concerned about an over-simplification that in fact alters the meaning beyond what should be altered.

Chairperson: To follow up on that the legal advisors already gave us prior warning that where we will come under fire is that we already have too much detail in this around the Auditor-General's Bill. My personal opinion is that there's not a lot of detail. If you look at the detail that was in prior, we've actually cut down enormously. I think what we've shorn it down to are the basic essentials. That's my personal opinion and I would say that in the resolution that goes to them, I think we need to address this question of the detail. I think it follows on very closely to what you were saying Jill is that we have shorn it down and we would, although it could be argued that this is still too much detail, we feel that to cut it down even further would be to nullify I think very important points that have to be maintained in the Constitution and there's general consensus on that. Ken, could you include that? OK, whilst Ken is busy with the resolution, what we need to do is to confirm the Minutes of the previous meetings. The first one is on page two of our documentation. That was the meeting in which we had, it was a discussion on the 5th June, and it was the presentation by Mr ? on the Reserve Bank. If we could just....

?: Yes, I've got one thing. I mean it's now in a sense because it

happened, it's historic, but we may as well get... Under 4(b) the agreement actually was that we would have 48 hours to consider the revised draft agreement before it was finalised for submission. I mean it actually happened that way anyway, so in practise it ends up not being a problem, but the agreement was that we would have 48 hours. We could then speak to the Chair if we wanted any changes and only after that process had taken place, and in fact when the process took place we found there were some problems and that's why we've gone through this.

Chairperson: Any other amendments? OK, the next is the Minutes for the 12th June. You will recall that was the presentation that the South African Reserve Bank gave to us. Attached to is the annexure which was the actual submission. Are there any amendments to that? I take it there are no amendments to these Minutes.

?: .....198.....

Andrew: I drafted a sort of resolution. I don't know whether it will meet with what the Committee has in mind. That Theme Committee 6.2 noting that its members are not lawyers nevertheless resolves, because we wanted that point you will recall, nevertheless resolves to submit its unanimously agreed legal draft in respect of the Auditor-General and (b) draws attention to the importance of specific words used in the draft and to the danger of destroying the consensus reached if alternative wording is proposed. Well, I'm quite happy to look at amendments.

?: ....222.....

Chairperson: Dr Jacobsz I think it would be "specific wording" and not words.

Andrew: Any other amendments? And do you think it's wrong to start with the thing.. Would you rather end up with saying "nevertheless wishes to" because in a sense what we are doing is we've reached agreement, we're saying but look we're actually reserving our rights in respect of referring it to our legal advisors, but one doesn't want to put it quite like that. But do you want me to try and put the "lawyer" bit into the end rather than at the beginning. Oh, you're happy, you're just pulling my leg. Alright. ....237..... I would like to say to my colleagues on the left here if they think I'm problematic, try doing the Electoral Act and the IEC Bill with Danie Schutter.

Chairperson: Ken, if you can give that draft to Pat. OK. I think the next item that we need to move onto in terms of this agenda, is the question of the South African Reserve Bank. That's under 4.4(ii). We've gone through the process now where we've had the presentation by the technical advisor, Dr ? and as an outcome of that meeting

we requested that the Reserve Bank come and give us some idea of a consultative process that they are presently engaged in with government. I think that arose specifically because of the ANC's concerns around the consultative relationship between the Reserve Bank and the government. You will recall that there was earlier debate about whether "consultation with" or "consultation after" should be included in the wording. According to the precise definitions in the Constitution, "consultation with" would mean the concurrence of government. "Consultation after" is a very weak form of consultation. And I think what the ANC needed was some kind of reassurance was that the kind of consultation envisaged in the wording of the Interim Constitution neither bound future people to either the weak or the strongest form of consultation. In other words the "consultation with" or "consultation after", but that it did allow for a range of consultative patterns, models, whatever. Now as I understand it the legal advisors were going to look into Case Law, just to see if there was any precedent around the relationship between the Reserve Bank and the government. We haven't got the legal advisors here. I would say that there's no great hitch at the moment in terms of the wording in the Interim Constitution as long as there is some satisfaction and I think we got some idea from the Deputy Governor's report but there is a range of consultative procedures. But I think that we would only be satisfied finally if the legal advisors could give that concrete assurance that that is the case, that it does allow for a range. So in other words we're not arguing for one or other kind of consultation as was initially argued, but that the room still be open for a range of consultations. So I think that it's more formality at the moment but I think that we just do need some reassurance. So we do not wish to engage in any further major debate about the wording as it presently stands. I think the presentation by Dr ? has assured us that the questions of accountability are accounted for in the wording of the Interim Constitution, and it's just then related to this question of consultative processes. Now that is our position. So we would just await a report from the legal advisors on this. Are there any other matters that the other parties would like to raise?

?: I just want to be actually sure that I understand correctly. The legal advisor is now being tasked with an investigation into the wording as it exists in the Interim Constitution to see whether it covers the consultative process sufficiently.

Chairperson: Yes.

?: And in investigating that he would also have insight into the paper that was submitted here by Dr de Swart giving an indication of exactly what this involves? OK, that's fine.

Chairperson: The ANC would not necessarily say that we confine ourselves to the kind of consultative relation that Dr de Swart presented, but we would not be insisting that it be "in consultation with" as it was previously. But we would like to be assured that for future generations a range of consultations can be provided for in terms of that process. In other words we're not arguing for the weaker form of consultation or for the strongest form.

?: May I just take one further point. The Reserve Bank Act will probably be reviewed at the moment to cover a lot of things. Do you envisage then that in the Act itself in the Bill that will be presented by us that more description could be given then about the consultative process? There is already a lot in the Bill itself which gives an indication of how it operates. Would the idea then be to incorporate some of those one's to cover what may happen in future generations?

Chairperson: I wouldn't want to pre-empt any discussion on the Reserve Bank and I think it would be wrong of me to do that, but let me just note that when I was listening to Dr de Swart, I mean I made quite a detailed study of that Reserve Bank Act, there were some issues of consultation that were not even covered in the Act itself. So, look, our opinion is that we must allow for a fairly flexible situation. We recognise that there must be a healthy tension between the Reserve Bank and government, that that kind of autonomous relationship must exist, there must be possibilities for consultation. But we want to be assured that that range is catered for, possibilities are catered for rather than specificities.

Andrew: On that point I'm quite so so. Just on the primary objective, I've read some things and given further thought to the suggestion of Chris Levenberg, the Minister of Finance, and in fact De Swart I think had touched on it, the problem of saying the internal and external value it's in fact an impossible mission, and that I would suggest that it's not in our original submission and in fact it hasn't particularly occurred to me until now, that we take out the words "internal" and "external" so one should simply say the primary objective of the South African Reserve Bank is to protect .... Oh, have we agreed. I must have been late or sleeping or something. I was looking for a comma.

?: May I ask the Chairperson, when will we get the new wording so that we just get an opportunity just to have a look at it.

Chairperson: Look, we not necessarily saying we want new wording. If you recall the wording is quite careful when we talk about consultation. In the Constitution when we talk about consultation, it's to find it's "consultation with" or "consultation after" and the Constitution is very precise on what that means. The Interim Constitution on the

Reserve Bank uses neither of those one's. It says "consultation between" and all the ANC is looking for is just firm opinion that that would allow for a range of consultation in legislation, but that it would not then veer to the "consultation with".

?: My question Chairperson is he coming back to report to us that that problem is solved or how is he going to deal with it?

Chairperson: The legal advisors will come back to us and report on that. We will refer to them and they will report to us.

?: ? taking into account the presentation that the Deputy Governor General gave last time.

Chairperson: Preferably it will be next week but we've been told that Constitutional Committee work is banned for next week, so at the soonest possible opportunity we .....

?: It's banned for the week after as well.

?: Inaudible comment.

?: Since when?

Chairperson: Gossip, gossip, gossip. Dr Jacobsz.

Jacobs: May I just make the point that Monday at 12 o'clock would not be suitable because the Audit Commission is having a special session from 12 to 2.

?: Can't we sit then let's say for, just to get that report back, let's say 10 o'clock or so on Monday morning to finalise this Reserve Bank. Then it can also go through to the CC.

Chairperson: Jill.

Jill: I think, rather than fixing a time now, let's see when we get the report from the law advisors because it's no good us setting that unless we've got a response from them. So let's get that and ask Pat to then convene and my own feeling is that if there's something on, I've no doubt that we can actually set aside half an hour somewhere and deal with it provided that we've actually had the response from the law advisors. ....393.....