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THEME COMMITTEE	CC-SUB
DATE OF MEETING	31/01/96
NUMBER OF TAPES	3
CONTENT OF ENVELOPE	
1) PRINT OUT	✓
2) NOTES	✓✓
3) TAPES	✓✓✓
4) COMPUTER DISK	✓✓

**PROBLEMS WITH AUDIBILITY ON TRANSCRIPTION OF CONSTITUTIONAL
COMMITTEE SUBCOMMITTEE DISCUSSION DATED 31 JANUARY 1996**

COUNTER NO

(Tape 1)

- 017 the ? personnel
- 082 addressed to ?
- 135 DP ?
- 173 ? is designed to
- 174 not that ?
- 178 ? the Constitution
- 256 The ? would go
- 260 Inaudible
- 267 Inaudible
- 323 universal ?
- 335 elections ? of the
- 341 Inaudible
- 404 that in itself ?
- 530 ? seat of parliament
- 533 discussion ?
- 566 not necessarily ?
- 588 ? all 3 options
- 715 recording ? on this

(Tape 2)

- 054 Mr ? here agrees

(Tape 3)

- 016 Mr ? has joined
- 022 as a ?
- 163 Senator ?
- 202 the ? in relation
- 213 issues of ?
- 230 ? of the person
- 239 to see the ?
- 247 proposes that ?
- 360 Inaudible comment
- 363 Inaudible comment
- 403 Can we go to ? speech
- 425 and ? and other
- 465 the ? speech

**TRANSCRIPTION OF THE MEETING HELD BY
CONSTITUTIONAL COMMITTEE SUBCOMMITTEE
DATED 31 JANUARY 1996**

(Tape 1)

Chairperson: Issues we are discussing are essentially the National Assembly and thereafter, later this afternoon, the Bill of Rights. We start off with the National Assembly and we did agree that we will set aside time for people to caucus and report back to us at 5 o'clock so we'll be able to measure whether they need assistance or any progress has been made. So I think we should then start with the National Assembly. We have asked parties to have bilaterals, to have multi-laterals, to consult with their principals and so forth. Is there a report available from anyone what has happened.

Eglin: Mr Chairperson may I just record for the record because I think the decision was from my recollection that there should be multi-laterals. The Democratic Party was invited to a multi-lateral at 11 o'clock yesterday. We were then advised that the ? personnel was not available and that a new time would be set. In fact no time was set but we do understand in fact that a bilateral was held between the ANC and the National Party. We just want to record that in spite of the fact that there was a request for multi-laterals and that in fact the DP was invited to a multi-lateral, a bilateral was held with the exclusion of the DP.

Chairperson: OK, there's a report from Mr Eglin. Is there a report from the National Party or the ANC. What do you have to say for yourselves? Mr Mahlangu.

Mahlangu: Well, Chairperson the information I've got is not that the DP has been excluded from the multi-lateral, but the information I got was that we would have bilaterals with the National Party yesterday and we would find another suitable time to have bilaterals with the DP. Not to say they've been excluded in the whole discussion. That's the information I've got.

Chairperson: Mr Wessels.

Wessels: Mr Chairperson, it would appear that I am taking up the case for the administration, not that they need, but I do not believe that when we adjourn a meeting to deal with a specific topic namely to be dealt with on a bilateral or a multi-lateral basis that the administration is engaged in setting up that particular multi-lateral, so I guess the charge would be against the political parties and not against the administration. I do believe that for good administration in the future as Mr Eglin had done on previous occasion did request the assistance of the administration to organise it. I'm referring specifically to the meeting that will take place on the matters dealing with Finance, the administration will step up. But I believe that the administration was not charged to do anything in this particular case. And it is the responsibility of

the parties themselves to organise their bilaterals as well as their multi-laterals. Thank you.

Chairperson: Mr Chabane.

Chabane: Chairperson, I understood the position of the meeting not to have said, you are not going to have bilaterals until multi-lateral discussions have taken place, and therefore I didn't think that a bilateral in between before a multi-lateral is out of order. I thought it's probably part of the process of trying to resolve some of the questions so therefore I don't think there's a major crisis as far as that is concerned.

Chairperson: OK. Well I think we've noted the reports and that the multi-laterals didn't take place. Can I now ask and find out if there's anyone who would like to report on whatever discussions might have taken place. Failing which, we would then have to go through the clauses one by one until we make some progress. Well, maybe that's what we should do? Mr Mahlangu do you have anything to report?

Mahlangu: It depends on how the Chairperson wants us to go about it. If you want a general report on all the clauses, one can do so, but if you think it will save time to go clauses by clauses, it think it's also the best way. I'll adhere to the ruling of the Chairperson.

Chairperson: Well, we had a few matters outstanding on clause 41. Shouldn't we deal with that and certain requests had also been made, proposals have been made for the panel to draft something for us. Can we look at that? The panel as I understand it drafted something which is in this green document here. Professor Erasmus.

Erasmus: Chairperson, I think you are referring to the document which appears on page 24 of the compilation. May I just draw your attention to the fact that there was a meeting of the legal advisor and some members of the panel yesterday afternoon to discuss this formulation. The wrong document is included in this set. I see that's on the Electoral System. OK, no then I'm out of order Chairperson.

Chairperson: No, you're a little bit ahead of me now. I'm on page 22 of your document dated 30th addressed to ? from the panel of experts. Right. The issue that we needed to look at here was the question of Electoral System based on a common voter's role and result in general in proportional representation. Does the matter that the panel was asked to look at and to make some proposals. Panel are able to assist in clarifying anything for us or do you want us to do it for ourselves? Advocate Yacoob.

Yacoob:

The document is sufficiently short and speaks for itself. We've put up five different options but we have to say to the meeting as it's set out in the footnote which perhaps is the most important part of the document that all the formulations in fact mean that the Electoral System would have to be designed in such a way that proportional representation in general is achieved so that we are putting to you different words which may or may not be acceptable to the different parties but in an effort to help the settlement of this matter, but we're also saying that all these formulations mean that the system must be designed in such a way as to achieve proportional representation in general, and that is on the basis of an interpretation of the Constitutional Principle to which we have arrived which is that although the Principle uses the word "embrace", the only representational aspect at a level of the nature of voting which are referred to in the various elements which are to be embraced is the aspect of proportional representation. And if one thinks about it, proportional representation the other side of that coin is constituency based representation and a balance has to be found between the two, and the extent to which we believe proportional representation can be qualified is the extent indicated by the use of the word "in general". And it's on that basis that we've come to that conclusion and we suggest that each and everyone of these formulae lead to the same result which is that in the final analysis what must be achieved here is proportional representation in general. In general, meaning that proportional representation obviously can be qualified by an element of constituency representation not to the extent that proportional representation is diluted altogether.

Chairperson:

Thank you Advocate Yacoob. Mr Mahlangu.

Mahlangu:

Well Chairperson, having listened very carefully to Advocate Yacoob presenting the options which are in front of us now and having studied them very carefully as ANC and also having listened to the argument from the Democratic Party at the previous meeting that we had, we feel that the ANC will settle for option (d) and I think we'll be very comfortable with that and I think this will also make the DP ? argument which was placed before us at the previous meeting, which says option (d) elect in terms of the Electoral System that is prescribed by National Legislation based on common voter's role and in general embraces proportional representation. This will be our proposal to the meeting.

Chairperson:

Now, what you're saying is option (d). Embraces proportional representation, is that what you're saying? Mr Meyer.

Meyer:

Chairperson, the National Party believes that it would be important that in the Constitution there should at least also be reference to the Electoral System at least in a conceptual form either in the

Constitution itself or in a schedule to the Constitution, and we believe that should be the focus point for further discussions and negotiations between the parties. So that is the first point I would like to register because I believe that might have an impact in the end also on the formulation or the exact formulation of clause 41. But in view of the current discussions that were held on this issue, we would also thereby or in the process with this qualification support option (d), but with the understanding that there will be further discussions and that we will return in this subcommittee to the issue of how do we ensure reference to the kind of Electoral System in the Constitution or a schedule to the Constitution. Maybe not in a detailed kind of form that is currently provided for in the transitional Constitution, and therefore Chairperson we would like to also support option (d) but with the understanding that we will return to this issue once further negotiations took place on the question of the Electoral System to be referred to the Constitution.

Chairperson: OK. Thank you. Mr Eglin.

Eglin: Mr Chairperson, as I said we didn't have the benefit of the bilaterals that took place yesterday on this issue. We are very happy with the concept contained in the concluding remarks. It says all the above formulations effectively mean that any Electoral System has to be designed in such a way as to achieve PR in general. That's what they say it means. I just want to put it to the ANC, if that is in fact what we want to say what we mean, why don't we take (d) which says ? is designed to achieve in general proportional representation. In other words it's not that ? or by interpretation. It actually takes that what the panel says is the way it would be judged and it spells out in exactly those words. So if we want to achieve what the panel suggests is our concluding result, we would be better to say it ? the Constitution but not to leave it for a Court to decide whether that's what it means. So we would argue strongly on the basis all the above means is that the system has to be designed in such a way to achieve PR in general, it should be agreed and designed to achieve a general proportional representation. We can't see why it should not be put in the terms which the panel says would be the conclusion you must draw from it. So we just ask you to have a look at it. We must say that with all our love and respect for the panel, we also reserve our position until we've got an independent legal opinion as to whether in fact all these things mean exactly the same. We've got reservations. We're now at the moment have a clearer knowledge from the panel, but we would also say we would like to get legal opinion independently as to whether these do in fact mean what it says. But in the meantime if we're all agree that we want to achieve the concluding remarks from the panel, then we would merely ask that we should put those remarks to the clause

and not leave it to an interpretation.

Chairperson: OK. Thank you Mr Eglin. Mr Sizani.

Sizani: Thank you Mr Chairperson. I just wish to state that I share the comments that have been made by Mr Eglin and would also prefer option (b) for the reasons already stated. Thank you.

Chairperson: Mr Moosa, I thought I saw your hand.

Moosa: Mr Chairperson, before I respond to what Mr Meyer has said, I'd like to also cover the Democratic Party and as Mr Eglin has said not having had the benefit of bilateral, I would like to just put one question to the Democratic Party. Is the DP of the view that there should be a schedule similar to the schedule we had in the Interim Constitution on the Electoral System? We know that the ANC's view is that there should be no such schedule at all. I would just like to hear the view on that before I respond.

Eglin: Chairperson, this view has never been put either at this meeting or at meetings of bilaterals. We would say that if there's any ambiguity in the Principle, then that Principle has to be reinforced with some kind of schedule. If the Principle is in fact quite clear as to what we're talking about then there's no need for a schedule. So I'm just raising but if Mr Moosa says could we in addition to looking at the legal implications of these alternative phrasings, look at the needs of reinforcing the schedule, then we'll certainly come back and have a serious look at it. But we've not got a commitment one way or the other across the floor as it stands at the moment.

Chairperson: Mr Moosa.

Moosa: Yes, if I can then just respond to Mr Meyer. I think we need to make it clear from our side that we are of the view that there should not be a schedule similar to the schedule in the Interim Constitution. It is very long, very detailed. It has some fine detail in there which best belongs to legislation. So I take it that Mr Meyer is not talking about that kind of schedule. We are not necessarily opposed to something more than this being said about the Electoral System and I don't want now to debate whether it should be in the schedule or it should be in the main body of the Constitution or wherever else. We're not opposed to that, but provided it deals in a general principle way with the Electoral System, I think that is something that we can look at and we'll be prepared to consider that as such. And it may well be then that if we tell ourselves at this stage that we are all prepared to pursue that kind of discussion, if I could have the attention of Mr Eglin, that we agreed here that we're prepared to pursue that discussion

then the Democratic Party and perhaps the PAC will have no difficulty in option (d) taking into account that we will pursue a discussion about some additional provision either in the schedule or not in the schedule about the Electoral System. Of course once we pursue that, we don't know whether we will succeed or not. If we don't succeed there may be a need to revisit the option. So I would propose that at this stage we insert option (d) with the minuted agreement that we pursue a discussion on some further elaboration but not similar in length and detail to the schedule that we have presently. That's what we would propose Chairperson.

Chairperson: Reverend Meshoe first.

Meshoe: Mr Chairperson, I think in general there was an agreement we want to achieve PR and if we truly want to achieve PR and option (b) states categorically that with the election system that we're going to use we want to achieve that goal. Now (d) with the word "embrace" is too broad and vague, it does not capture the goal of achieving PR that we want. The ? would go for option (b).

Chairperson: You'll go for option (b). In the light of what Mr Moosa has said... Does the Democratic Party want to state another view.

Eglin:260..... the eloquent response by Mr Moosa was why we in fact agree with the concluding that it should be designed in such a way as to achieve in general PR. We should not say it as it is under option (b). In other words we put it as a proposal but I'd like to know why if you can't say what you want, but hope that the Courts will interpret it that way. I'm just asking can you please.... because we would say we should actually put267.... and planning anything else because that actually specific words is designed to achieve what the panel has suggested but Mr Moosa says we should not. Can he just give me a response?

Chairperson: Let's give him a minute to think about it while we're listen to Dr Mulder.

Mulder: Chairperson, in response to Mr Moosa, I'm told there's a further formulation in terms of the structure and we would prefer that in the Act itself and not in the schedule. Until there's a clear further formulation on the structure that is indicated, until we've got that, we would prefer option (b) which states it quite clearly until we've got a further formulation.

Chairperson: There you are, Mr Moosa. The Freedom Front says until there's another formulation they prefer option (b) bravo instead of option (d) delta. Mr Moosa.

Moosa: Chairperson, the obvious response to what Mr Eglin is saying that

I'm not of the view that all of these formulations mean exactly what it says. So in that sense we agree with each other, otherwise there will be no point in arguing about one or the other if each one in every possible way and under every circumstance says the same thing. And the point about arguing for option (d) really is not to move away from proportionality but to give us some greater scope in determining an Electoral System which in the end all of us may agree to, but which may not, as I've argued yesterday, in strict mathematical terms achieve proportionality. That is really the reason as such.

Chairperson: OK, it gives your greater scope. Professor du Toit.

Du Toit: Mr Chairman, very quickly, I'm especially worried that the Reverend doesn't like the word "embrace". Perhaps you should just tell the public that when this word is written in the Constitution there's no necessity that all embracing in this country would have to be proportional (Laughter) and Mr Meyer also doesn't have to worry about this embrace. The reason for the word "embrace" is simply the word used in the Constitutional Principle and that as soon as we start using another word, even "embody" because we don't want everyone to embody proportional in the country as well. (Laughter). It's just a word in the Constitutional Principle. Thank you.

Chairperson: Quite entertaining Professor. Mr Eglin.

Eglin: Chairperson, you must always be careful with Professors. I think you have to look very carefully at the word "embrace" as used in the Constitutional Principles because there it doesn't say you embrace proportionality, it says embracing multi-party democracy, regular elections, universal ?, common voter's roll and in general proportional representation. In other words it's merely saying collectively all those things should be included. It doesn't specifically say yes you must all say embrace proportionality. It actually says all of those things and I would say to be embraced is the only qualification and proportionality has got to be in general. But then you must say embracing a common voter's role. You mustn't then just say embracing proportionality. So, the word "embrace" in the Constitutional Principle is merely to say that it must include those many factors, not embracing specifically on its own proportionality. But it makes a very significant difference because it gives proportionality the same weight as multi-party elections ? of this Constitution. 341.....

Chairperson: Now, can someone explain to me what the actual difference is between (b) and (d) particularly in view of the fact that the panel in their last but one paragraph have said that any Electoral System has to be designed in such a way as to achieve PR in general.

OK, can you cut all the riff-raff about embracing and all that and just get to the point and explain what the difference is. I would like to know.

?: Mr Chairperson, the way (d) turned out, it was not the way we suggested (d) actually. The difference should be that (b) describes result while the intention in which we started with the word "embrace" in (d) was that it should have described a characteristic of the Electoral System. And not necessarily the result which the Electoral System must as a result. Originally we said that the words "embracing proportional representation" must stand just after the words Electoral System. "The Electoral System, embracing proportional representation, that is prescribed by". Then it would describe the system characteristic and that is wider there as the more narrower achieving.

Chairperson: Is that the explanation from the ANC. I must say I still don't understand. Mr Meyer.

Meyer: Chairperson, are we not unnecessarily now further debating this point. I thought that we've heard the position that was sort of stated by myself originally and then formulated well by Deputy Minister Moosa, and I thought that we've heard an understanding that we will revisit this matter if it is necessary after further negotiations on the question of the Electoral System and what has to be put into the Constitution on that issue. And then we might revisit also (b) or (d) or whatever. So, for the moment whether we choose (b) or (d) to that extent is even immaterial.

Chairperson: OK, what do you think Mr Moosa, quickly. (Laughter) Thank you. I'm so relieved I always make this mistake when I address Mr Meyer.

Meyer: I was addressing you. (Laughter)

Moosa: Chairperson, I am now thinking that what we should do is ignore all the options and I'll tell you why. If we say in 41 that the Assembly shall consist of between three and four hundred people, then we have a clause which is what Mr Meyer had proposed, a clause which describes the Electoral System. So we don't debate whether it achieves and whether it promotes proportional representation or not, we describe the Electoral System not in the detail in which it is in the schedule and then we forget about how to describe what that is because that in itself ?. But I think we go for that. Let's try to do that, we commit ourselves all of us to negotiate something on that and put in a provision and then not debate and question the panel as to whether they mean what they say.

Chairperson: There's a proposal from Mr Moosa and we come back to the description of the Electoral System later. Very well I'm quite willing to go along with what you're proposing, what you're saying, what I'm however concerned about is when are you going to do this because it's all very well to say no we will do it and do it by next week as Mr Meyer is saying. You've had more than eighteen months to do it and you haven't come up with an Electoral System proposal. Let me hear you on that Mr Moosa, Mr Eglin, Mr Sizani, Reverend Meshoe and everyone.

?: While Mr Moosa is gathering his thoughts Mr Chairperson. Just to say that within the Theme Committee of the sub theme that was dealing with this, our original starting position was that one wanted a fair amount of the Electoral System set out in the Constitution and not in the detail that's in the Interim, but a fair amount set out as per our submission to the Theme Committee at the time. Subsequently in discussions it was felt that maybe one shouldn't put in that amount of detail and the Democratic Party then in part of those discussions said well if we have results in general in proportional representation, then we didn't mind not having the system in because it then made it clear what the end result of the system would be. So on that basis at Theme Committee level we were fairly relaxed that the differences have been largely resolved and so on. So that's why there hasn't been a great deal of subsequent discussion on this from our point of view. So, in answer to your question, that's why it hasn't happened up until now. But obviously, and I think Mr Moosa's proposal will be a good one because if you can actually put the key element into the system in, then you don't have to try and argue about what words correctly describes the system.

Chairperson: Mr Meyer.

Meyer: Chairperson, I thought your question was when do we come back. May I suggest the 12th February.

Chairperson: 12th February with a proposal of an Electoral System or the key element thereof.

?: Yes, Chairperson, that would suit us. I'm actually looking at the time program and the schedule before me here. The 12th would actually be the day for bilaterals and multi-laterals on this issue. So we could try to present it on the 12th, but certainly I think that the 12th would be the time when we can in earnest try to reach agreement on this issue. It may well be the 13th or the 14th that we actually present the proposal.

Chairperson: The 12th seem to be fine. I'll settle for the 12th. Thank you. So it is decided. We now move on to 45(3). Your seat of the National

Assembly. Is there anything to be said or to be reported on this one? Mr Chabane.

?: Chairperson, considering that there's no major agreement first of all whether this part should form part of the question or not. We propose as the ANC that we put it in the side bar. The matter is not closed but we have not agreed that it should be part of the question as yet because we have proposed that it should not. And other parties have not, except the DP who said it should be in, and we proposed that it should not be there, it should go to the side bar.

Chairperson: OK. There's proposal that it should go to the side bar. Mr Eglin.

Eglin: Chairperson, you will then have three with nothing there but a whole side bar. All I suggest if the ANC is insisted on not being they would like it be deleted that that whole clause be put in brackets. In other words it can either be taken away or it can be left.

Chairperson: Just repeat that Mr Moosa.

Moosa: Chairperson it would be proper in terms of the formatting that we've been following for it to be in the side bar because then it would be one could say that is the proposal of the Democratic Party that it should be that sort of clause which would then accurately state the case. Everybody can see that and then we leave it at that.

Chairperson: So you are saying it should all of it be in the side bar and it should be said there that the Democratic Party proposes that there should be such a clause and the seat of Parliament should be in Cape Town. OK. Mr Marais. No, OK. It's already in the side bar but I think Mr Moosa is saying all of it. All of it can be in the side bar. Reverend Mitchell, do you find that agreeable?

Mitchell: ? seat of Parliament being in Cape Town. I did not make reference to it the other day because the discussion ? that should be constitutionalised or not. But to clarify a point because I got some calls the ACDP favours Cape Town to be the seat of Parliament although we do not want that to be constitutionalised.

Chairperson: So you got some calls from your members, supporters and you toed the line and now you're saying the seat of Parliament should be in Cape Town, but you don't want it in the Constitution. OK, is there agreement then that we take it all out, put it in the side bar and then put in a note that this clause is proposed and the DP proposes that it should be in the side bar.

?: There's one thing about the Constitution designating where the seat of Parliament is. There's a second issue is whether even if it doesn't designate where the seat of Parliament is, whether in fact the Constitution should not at least indicate what kind of process is involved if the seat of Parliament is going to change or be decided upon. So it's a separate issue.

Chairperson: A separate issue which has not yet been introduced here.

?: Well it has. It has been discussed at great length on Monday.

Chairperson: But in terms of the draft...

?: That's correct, and we would suggest that depending on, I mean I don't know what the National Party's current position is, on Monday I got the impression that in fact they believe there should be some reference to it not necessarily ?, and therefore one should possibly be looking under this as putting in two options or even three if the one option is nothing if that's what the ANC wants and no reference whatsoever in the Constitution to a capital legislative seat of Parliament at least. Secondly, a specific proposal such as the DP's that it be stated or thirdly, the other proposal that a procedure such as Parliament is required to pass by two-thirds majority or whatever in any decision to either establish or move a seat of Parliament.

Chairperson: There's a proposal that we should set out three options. Mr Chabane.

Chabane: It's more of a question, if my understanding is correct is that the DP is suggesting that the DP puts three options which we then have to believe that one being constituted against the other one being because all of them comes from the DP. ? all three options of the DP in the main part of the Constitution because if those options are put there I would suggest that if there is that proposal, let it go to the side bar.

Chairperson: Well, as I understand it I think the DP would then be making two proposals, two options really. The first one which they themselves say would be what they understand to be the ANC proposal as now supported by the ACDP that there should be no constitutional provision. Secondly, would be as set out here that it should be stipulated that it shall be Cape Town and the third one would be the process.

?: Yes, I wasn't certain for example the ACDP as you refer to them whether in fact they don't want any reference to the capital even the process.

Chairperson: Yes, but they say they don't want reference to the capital. Mr Meyer.

Meyer: Chairperson, my understanding is that if the matter is to be side barred, then we are not debating it now.

Chairperson: Yes, that's right.

Meyer: And for that reason we also don't put positions down. The essence therefore of that proposal is that we leave the debate for a later moment.

Chairperson: OK, so it is then, it is side barred and we will obviously have to come back to it. The next matter then is Internal Autonomy. There is a proposal on Internal Autonomy. It is being distributed and I think Professor Erasmus was about to speak on it the last time. Do you want to address us.

Erasmus: Chairperson, not really this was the document I referred to earlier. I just wanted to draw your attention to the fact that the new one is to be distributed today and if there are questions one of my colleagues will speak on the content of the document if necessary.

Chairperson: OK, there it is then. Now that's Internal Autonomy. Mr Mahlangu.

Mahlangu: The party which was very concerned about 51 was basically the National Party on the issue of an Internal Autonomy and we had looked at the first proposal by the panel which we discussed yesterday with the National Party. We're just getting this one now, which we really didn't discuss. So we would like to base our argument on the first proposal which we got. Our agreement was that we maintain 51 as it is and then that 52 then be replaced by the Principle in the Constitution as Mr Marais has raised it last time which will then read "The rules and orders must provide for the participation of the minority parties in the legislative process in a manner consistent with democracy" and then that (ii) becomes (iii) and that was our agreement. So, that's our proposal.

Chairperson: What does it say? Just repeat it.

Mahlangu: 51 remains as it is and then we insert a new 50 sub (ii) which will read "The rules and orders must provide for the participation of the minority parties in the legislative process in a manner consistent with democracy" and that the former (ii) then becomes (iii).

Chairperson: OK. Is that agreed to? Thank you. That now takes us to.... Thank you for recording ? on this one. Now 54 Assent to Bills. Where are we with this one? Professor van der Westhuizen.

vd Westhuizen: No, I don't know how far we are on that one Chair. Just a small question for clarification on the previous.....
(Tape 2) regarding the minority parties, that's not what I'm referring to but is the decision now to use the words "in cooperation with" or the later one, the "in consultation" one.

Chairperson: Mr Meyer.

Meyer: Our understanding Chairperson is that that be deleted altogether.

Chairperson: It falls away.

?: But Chairperson, may I just say something else on this issue. Not necessarily in terms of this specific section but rather in general, I just would like to report that we would like to come back to the whole issue of the participation of minority parties in whatever structures. So I just want to record that we'll come back to it.

Chairperson: The record will then reflect that the NP would like to come back to the question of minority parties in the whole number of processes, not only this process but a number of them. Right 54 then, Assent to Bills. Is there agreement. Can we record agreement on this one. We've made some progress now. Any agreement on this one.

Eglin: Chairperson, we've got no disagreement on this clause as it stands but there's another provision under the Judiciary that gives the Constitutional Court certain rights to intervene and we don't know where it's going to be dealt with either the Judiciary or it's going to be dealt with here. Whether there should be a joint meeting or a Judiciary sub committee meeting.

Chairperson: Can I propose in the light of what Mr Eglin has said that this matter should be looked at when we deal with the question of the Judiciary in the Constitutional Court and how they would deal with it in terms of what is provided. I'm told there's going to be some consultation. Can we agree to that? Mr Meyer.

Meyer: Chairperson, I believe that was some progress in discussions on this matter. I believe it's not been finalised yet but can't we set this also for the 12th like the previous item, like Section 41.

Chairperson: Mr de Lange.

De Lange: Chair, we can raise it tomorrow at the meeting with the legal sector. I just want to make it very clear. There are two distinctions one has to make and I think that Mr Eglin has conflated it. The one that we have in the Judiciary is the principle that there will be abstract review and that will be the exclusive jurisdiction of the

Constitutional Court. That's a principle of jurisdiction. What we dealing with here is a mechanism which is more of a political issue whether it's in or out. I mean you can have at least five hundred different mechanisms if you agree to have one, so I just want to make it clear that we can raise it tomorrow and I'll happily do so, but that probably you'll find there'll be as many mechanisms as people propose or are there at that meeting. So I just want to make that issue very clear that this is a political issue ultimately that needs to be dealt with, not necessarily a legal one. This part of it. The principle of abstract review has already been agreed to. We don't have a problem with that.

Chairperson:

OK. I suppose if it does arise in the consultation that will be held, well and good. But from what Mr Meyer is saying there has been some progress and a report will be tabled on the 12th. OK. So we'll wait for both processes then to produce something positive. That then seems to bring us to the end of this one. We've recorded some progress. We've advanced a little further than where we were the last time. So it has not been a wasted one and a half hours. And I think even Mr ? here agrees. Thank you very much. We reconvene at 5 o'clock to receive a report from those of the Bill of Rights subcommittee. Soccer is at 8 o'clock tonight Mr Moosa and we'll make sure that you're out of here before 8 o'clock.

(Tape 3)

Right, can we settle down then. Mr ? has joined us now. He's just come back from the gym. Right Equality. Are we all equal? Mrs Pandor we're all equal?

Pandor:

Well, I wouldn't quite agree with that one Mr Chairperson because some are more equal than others as a ?, but anyway If I can report on our meeting this afternoon. There is a proposal that emerged from our discussions. Perhaps I should begin by saying that the Democratic Party in the meeting indicated that they had a particular position and were not prepared to move from that position. We indicated that we had a position. We had made concessions and indicated yesterday that we were not prepared to make further concessions. The Democratic Party therefore couldn't really continue participating in the discussions after we agreed to a particular point, but perhaps we should note that they have now come to this meeting with a proposal that in some way does show that in fact they are prepared to be reasonable. So if I could tell the meeting where we are Mr Chairman in terms of option one which is subclause (ii) of the Equality clause 8(ii) is we are proposing that we reword this and that the reworded clause would read if I could dictate "Equality includes the full and equal enjoyment of all rights and freedoms to promote the achievement of equality, legislative and other measures that have as their objective the protection and advancement of persons or categories

of persons disadvantaged by unfair discrimination may be used". That is what our meeting arrived at. The microphones appear not to be working. So, that's where we ended Chairperson. The Democratic Party as I've indicated has now come up with something rather different. However, I must indicate that what I have read is the shared and agreed position that the National Party and the ANC arrived at.

Chairperson: Right, can I find out from the Democratic Party what their thinking is.

Smuts: Mr Chairperson as Ms Pandor has reported we were unable to shift the two big parties from what was by now their joint position. Our history of concern for having reasonable legislative other measures or measures designed and likely to is well-known I think. We would like to have an effective equality clause dealing with the matter of affirmative action. Now I think that it is unusually important in the case of the Bill of Rights because it deals with individuals and minorities to achieve consensus. I could simply have come here and stated our dissent because it remains for us a very difficult matter. But I have found a solution which would satisfy us and it deletes both the words "design" and "likely" and I think it has the further virtue Sir of not using the formulation "have as their objective" the new one, which in our view slides. To us that is even less acceptable than having only "designed". So it becomes from our point of view and for the sake of people in this country, even more important is to achieve what we think ought to be achieved. The deletion of both the words "designed" and "likely" is an idea we have got in consultation from persons who are going to submit a public submission to this process and it's due for release on Friday. They are the Association of Law Societies. I stress that it's this aspect of their proposed submission that we have taken on board. We table it at this stage because we believe that affirmative action is important. We believe that it's desperately important that we implement it in a sensible way and we table this for your consideration.

Chairperson: Right. Where have you tabled it Ms Smuts? OK, is the other one that you read out typed and distributable? Alright. Did we all hear it. Mrs Camerer.

Camerer: Thank you Mr Chairperson. Yes, in the bilaterals we did try to reach agreement. The reason for using the word that has the objective "protection and advancement of persons" is that it's the wording used in the relevant Constitutional Principle. So we felt we couldn't go wrong sticking to the Principle but we don't want... you know this has just been given to us, so certainly we'll look at it and sympathetically but as I say I'm not quite sure why Ms Smuts wants to leave out the word in the Constitutional Principle

seeing as that's what binds us.

Chairperson: Would you like to answer.

Smuts: The Constitutional Principle constitutes a minimum. There's nothing to prevent us. In fact I think that we have a duty to elaborate where necessary to achieve the realisation of the right in question and the right in question here is equality. If we stuck only to the words in the CP's we would be very limited in what we could do with other things.

Chairperson: I would agree entirely with you. Maybe they just thought that it's much more elegant to stick to the Constitutional Principle. Was it elegantly drafted and we all love elegant things. Alright, so we've got two proposals. The one has actually urged us to a point of agreement and the other one is a fresh one which we've just seen. I would like to propose that we do the following, that option two be deleted, that the new drafted one be incorporated and on the side bar we should say we should give consideration to a proposal tabled by the DP. Would that be acceptable all round? Thank you very much. Now on (iii), what are you people reporting? On sub (iii).

?: On (iii) Chairperson we still await the view of the panel of experts on the "but not limited to" and "including" etc.

Chairperson: OK. Let's hear. Are you able to report, not today? Tomorrow, next week, next year. Next week, alright, let's move on. Any progress on 10. No progress.

?: Although Chairperson I think it's important to point out that we had as our task today really the finalisation of a proposal on the equality sections and we were given the space by you of your deadline of next Wednesday to address all the other matters and we handled the meetings in that way.

Chairperson: Actually today, this afternoon's meeting was really to give you the opportunity of reporting it. One, you met, because we wanted some certainty that you would have met and two, just to see if there has been some progress. You've reported a lot of progress and I can see even a number of people who are not members of this committee smiling away and writing furiously. So that is progress that's recorded. Is there anything else that you dealt with that you need to report here? Having met, having solved the one thing which is the Equality clause, have you solved any other or touched on any other.

?: Chairperson, I think I must be honest to say that we've had several others. However, we haven't moved beyond where we were

yesterday and we are going to be exploring all the matters further. We have in fact set up processes to do so.

Chairperson: OK. Mrs Camerer.

Camerer: Yes, Chairperson, we are waiting on the panel of experts' opinion but if we're going to be bogged down on this "including but not limited to", we indicated in the bilateral that we're prepared to look at completely different wording that would meet the case and we put some wording, but we'll wait to put that later, but if the panel of experts don't resolve everybody's difficulties.

Chairperson: OK. The parties are going to be caucusing again. I mean what do you call it, bilateral, on Monday. So the experts must give us something by Friday. Professor van der Westhuizen, the opinions that are being sought, I'm sure we can have something on Friday because you see the bilaterals are taking place on Monday again.

Vd Westhuizen: On Equality you can. I could even give you a tentative opinion but we do want to consult the Canadian cases referred to just to make sure. So let us just do that and then we'll give you the one on the "limited to" part.

Chairperson: OK. Senator ?.

?: Chairperson, we also draw your attention officially to the fact that the long awaited document from the National Party has now in fact been tabled and members are free to collect a copy, but why I'm referring it to you is because there are a number of requests for clarification from the panel referred to in that particular document. So if the panel could also have sight of that document, it might assist them.

Chairperson: Mrs Pandor.

Pandor: Chairperson, I wondered whether in terms of just seeking a little more progress, we couldn't perhaps ask the panel to address the opinion that they've presented to the one dealing with Section 25(iii) and the other dealing with the whole issue of privacy of communications. The intercepted versus violation. That may help us to resolve some other matters today.

Chairperson: Very well. Will the panel be able to address any of those.

?: Yes Chairperson, I can speak on that Privacy document.

Chairperson: Please proceed. The Privacy one is 13, isn't it? OK.

?: On the Privacy document, Chairperson, two issues were raised by

the Democratic Party. The first one was the question whether "intercept" actually is a broader concept than "violate" or whether we could use both and the second broader issue was the one raised by Mr Colin Eglin which said why isolate and violate and only relate it to privacy of communications and use this and that in relation to the home, property and possession. Now in relation to the first one, I think it's quite clear on the document that one relies among other things on the explanatory memorandum which was written for this house and the Constitutional Committee by the technical experts, the Theme Committee 4. So the opinion doesn't in any way retract or even attempt to replace that opinion in relation to issues that previously raises the comparative aspect and all the other little niceties, but it was trying to give a different aspect there of the problems which, at least to our understanding, the ? in relation to the usual concept and a look at the English Oxford dictionary actually gave the true meaning. For "intercept" it was stopping, seizing and catching. Whilst for "violate" it was disturbing, disregarding or treating in a profane manner, and it became a little bit obvious that "intercept" is a particular way of interfering or disturbing and on the face of it and even the way the dictionary explains it in the different stages, it became very clear that "intercept" is very narrow. It's a narrow concept and if one is talking about communication, one is looking at the broader issues beyond issues of ? and I think the examples which are sort of like put together there to show that communication is sort of a different sphere of privacy, it's a different category which actually go slightly beyond what one perceives on a day to day level of printed matter. The Internet has complicated communications. So, on the other hand Chairperson as one appreciates the fact that communication can be interfered with by intercepting in the sense that someone can take it and interfere with communications before it reaches the destination. The complicated beat that if it did interfere with, we doubt you'll know it. You are not able to actually say or contend that it had been interfered with and that's the aspect which violates it to actually cover in the sense that any disturbance whatsoever is actually a disturbance of your communications. So it sort of embraces a wider parameter of protection and if that is how they actually want to embrace, then that's the advice of the panel. But if privacy of communication is what actually talks about the ? of the person, your mind, your feelings, your perception, then that has to be protected, if that's .. and that's the distinction which is extended when one deals with other types of privacy, the house, possessions and property because in that respect one is dealing with property which is real which people can exercise a reasonable amount of control in the sense that if it is indeed interfered by authorities of whatever kind, then you have ways of seeing if it absolutely needs the general limitation clause in the sense that if officials come into your house you have an opportunity to say you want to see the ?, is it a valid

one and so forth. And definitely you cannot put those two categories in the same plane with communications. So I think that's sort of the general plan of what the opinion is trying to say that you cannot use the same concept for all things in one house. There may be all forms of clarity but the categories are different because of their material nature.

Chairperson: The panel proposes that ? should embrace this as their advice and we should embrace this approach. Is this not clear to all of us. I thought it makes it quite clear. Mr Moosa, do you have any problems?

Moosa: No, it's just a question of clarification. Would the word "communications" cover stored electronic information which is not necessarily being transmitted. Communications imply an act of transmitting something. It's in communication and then it gets bugged. That's the idea one gets in the head, but if somebody comes into your database.... Is that covered by perhaps (a), (b) or (c) already and if not, does Communications cover that. That's the only question I have.

Chairperson: The matter of property. Mr Moosa, would that not be your property.

Moosa: Most certainly it would be regarded as your property.

Chairperson: Advocate Sedibe-Ncholo.

Sedibe-Ncholo: Chairperson, I would have difficulty giving a stand off the cuff, but I suppose it forms part of one property but also because of the nature that it is, then it creates problems. I mean would you say a disk from a computer which is stolen is your Communications, but obviously if one has to print then it becomes your Communications because it reveals something different. So, I don't know I'd have difficulties saying it immediately, but if one were to print something which they found from your disk obviously that then goes into a different field of property in a sense that it begins to reveal certain perceptions, whatever, which one would tempt the softer part of the personality. So it bottles up.

Chairperson: Mr Moosa, I think it is property I think. Ms Smuts what do you say.

Smuts: If it's property, whether the verb "searched" is then still appropriate.

Chairperson: Yes, indeed. Professor van der Westhuizen.

Vd Westhuizen: Whereas we seem to be slightly uncertain as to whether it's property or whether it's already communications, the question is

whether it matters all that much because the clause starts with the introductory sentence "Every one has the right to privacy" and then only including those specific aspects. So if it's property the words "searched" may not be entirely correct in that sense but then it is still covered by the top part. Because it is certainly privacy. One last footnote on the "intercept" versus "violate", I think part of what used to be find also in the opinion given by us is that if you take a letter after, if I send the letter to someone and you come and read it after that person has already received it, then perhaps it's not interception but it is certainly still violation of privacy in the widest sense and that is one of the reasons why I think it was thought that "intercept" is perhaps a narrower concept.

Chairperson: Good. I think that solves it. If the Democratic Party wants to take this under advisement, then we'll hear from them. Mr Eglin.

Eglin: Chairperson, I want to be sure I understand the explanation. Basically under (d) "violated" is an all embracing one. The others don't read to be all embracing because it would seem to be reading much if you put the word "searched", you will have other forms of invasion of privacy but "searched" is specifically mentioned here. And likewise your property search, but can you enter the property without searching it. In other words can you violate the property, privacy of the property provided you don't search. Now I hear van der Westhuizen says but for that you rely on the original clause, the right to privacy. So what I can't understand why when it comes to Communications you've got to have violations and make quite sure that it covers everything, but the others you see, there are very severe strictions of what is meant by privacy. And I don't know what I can accept? We will get a legal opinion as to whether by putting "searching, searching, seizing", you don't limit the invasions of privacy in those particular areas. I mean I would like my property not invaded whether it's searched or not. And I would like my property searched but what happens if it's seized? Here it says you can't seize possessions but you can... It doesn't say you can't seize property? I'm just saying I don't know that by putting those very definitive verbs, those first three, but is not restricting the protection of privacy. I hear what Professor van der Westhuizen's says you rely on the first phrase, everyone has the right to privacy, but I think it creates some legal confusion as to how far that goes.

Chairperson: Mrs Pandor.

Pandor: Really Chairperson, could we get on with this as the parties have had sight of this document for some time and there hasn't been any issue taken with the verbs that are used here. So really the opinion that has been sought has been provided for and I think we should really restrict ourselves to that for the sake of progress.

Now the experts have provided what I think is a very useful all encompassing affiliate and really all we can await would be the DP's legal voice. However, we remain convinced that the use of "violate" is appropriate at this point.

Chairperson: I think when the DP said that they would like to get an opinion, they mean through their own means, not an opinion for all of us. An opinion has been given, explained to us and from what I could sense there was some agreement with the explanation that was being put forward. So we must however recognise and accept the DP's right to want to take this under advisement for a further opinion because they too like all other parties have legal experts. You're not the only party that have legal experts, they have that too, and they would like to have this checked out and you might have your legal experts amongst you somewhere. They don't have them here so let them go and have this checked out. But generally the signal I'm getting is that there is no problem with it as it is now and then we move on. And the footnote or side note says that the DP gets further advice on this matter. Is that not correct Mr Eglin. Thank you very much.

?: Inaudible comment.

Chairperson: You know, we don't need to go to war on this matter.

?: Inaudible comment.

Chairperson: Let me say the following. You know we're going to have a soccer match in exactly two and a half hours. Now if you are fighting amongst yourselves, we may lose this match. So please take it easy. I think I made a ruling. I made a ruling the DP will go and take this under advisement. Let us not spoil our chances of winning this match please. So let us move on to the next issue. Mr Chabane.

Chabane: Mr Chairperson, it is an attempt to understand your ruling. Is your ruling relating to the side bar or is it relating to the other issues which Mr Eglin reached.

Chairperson: No, Mr Eglin has in his input raised questions and he would in getting his legal advices analysing this document also obviously want them to apply their minds to this other words or terms that is unlimited. So that has nothing to do with us now please. It has a lot to do with the DP's understanding of this opinion and also the way the clause is structured. The way I sensed it nearly everyone is happy with it as it stands. In any event it was the DP that originally raised this concern and we asked the opinion that has now been given to us. I take it there is no problem with it and we accept the explanation and we move on. Thank you. Can we then

address the other opinion? Can we go to ? speech. 15. OK, I'm told that maybe we shouldn't do it now, we should allow parties to read it first. I thought Advocate Sedibe-Ncholo will just explain it to us. But it's alright. OK, then the next one would be Equitable and Equal. 25(3). Do you think that's a very lengthy one that will need you to study this one for hours in your libraries. It's a one page document with five paragraphs. "Everyone has the right to have equitable access to land. The State may take reasonable and ? and other measures to facilitate this access". Now do we want to have this explained to us quickly.

?:

Chairperson the document is before you. What we did was that we briefly looked at the dictionary meanings to words. In the second paragraph it is said that the word "equal" means the same as quality, quantity, status etc and on this basis two people cannot be said to have equal access to land if one person has access by reason of his ownership of some land while another has access because he occupies one room in a boarding establishment by way of an example. The word "equitable" on the other hand is an adjective derived from the noun "equity" and is concerned with justice and fairness. Now that is basically the call or the crux of the meaning of equitable. So the one pertains to justice, fairness and the other one equal as is set out in paragraph (ii), and then we point out that difference in access would certainly give rise to inequality of access but may still qualify as equitable in other words fair access. So that's the basic explanation of the difference in meaning.

Chairperson:

Alright. Can we hear what the NP has to say to that.

?:

It seems to me that it's fairly straightforward Mr Chair.

Chairperson:

You understand and accept. Thank you. Is there any other matter that you would like us to deal with right now. The other one we accept. The ? speech one we will read first and deal with it at a later stage. Clearly the bilaterals did take place, they've yielded some results. There is a need for bilaterals to continue. It might appear like we not making a tremendous amount of progress in the bilaterals, but let me say sitting where one is sitting one is able to see that progress is being made. You may have wanted to see progress being made all in one day. But it's not going to be that possible. We've given an entire week until next week Wednesday for bilaterals to be concluded and I think by that time a lot of progress will have been made. I know for a fact that there are other meetings tomorrow, over the weekend, on Monday and possibly on Tuesday, and by Wednesday we should get a more or less positive report on a number of these rights. So, I'm very much encouraged and I would like to encourage all of you to continue. I'm encouraged to the point where I believe this is a

very good omen for our victory tonight over ?. In the absence of anything else that we need to deal with, happy watching of the match. Thank you very much and then we meet again as Management Committee tomorrow.