

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**MONDAY
28 AUGUST 1995
E249**

**DOCUMENTATION
(AMENDED VERSION)**

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

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

DATE: Monday, 28 August 1995

TIME: 14H00 - 18H00

VENUE: E249

DRAFT AGENDA

1. Opening
2. Security Services* *Pages 1 - 13*
3. Independent Institutions, *Pages, 14 - 27*
4. National and Provincial Legislative and Executive Competencies* - draft formulations, *Pages 31 - 32*
5. Any other Business
6. Closure

*N.B. * Please bring along the CC document of 11 August (Vol 3) on the Security Services and the CC Sub-Committee documents of 7 and 21 August dealing with National and Provincial Legislative and Executive Competencies*

**HASSEN EBRAHIM
EXECUTIVE DIRECTOR**

Enquiries: Ms MM Sparg, Tel 245031, page 4184616 Code 6970

FOURTH DRAFT - 22 AUGUST 1995

Status: Draft by TC 6.4 technical advisers and the CA law advisers, as amended pursuant to discussion in the CC for discussion in the Subcommittee.

CHAPTER

STATEMENT OF PRINCIPLE

Since there is a need

- that national security should be based on the resolve of all South Africans, as individuals and as a nation, to live as equals and in peace and harmony, to be free from fear and want, and to seek a better life;

- that national security should be pursued in strict compliance with this Constitution, the law and all applicable international conventions and norms,

The following provisions are enacted to govern national security and the security services of the Republic, and these provisions shall be interpreted and understood in the spirit of this Statement of Principle.¹

¹ This statement of principle has been redrafted as per instruction of the CC.

SECURITY SERVICES

Composition and structuring of security services

1. (1) The security services of the Republic consist of a single defence force, [the police service]² and such intelligence services as may be established in terms of this Constitution.

(2) The security services shall be structured and regulated by national law.³

(3) The security services shall at all times act in accordance with and within the confines of this Constitution and the law, including the norms of international customary law and treaties binding on the Republic.⁴

(4) The security services shall discharge their powers and functions in the national interest. It shall, therefore, be unlawful for the security services to further or prejudice party political interests.⁵

² The notion of a single police service is an unresolved matter and has been referred to the Subcommittee of the CC for further debate.

³ Formulation as approved by the CC.

⁴ Redrafted at request of the CC.

For example international customary law and treaties relating to piracy, torture and prisoners of war. These inevitably affect defence forces, the police and intelligence services.

⁵ Contention on the definition of "national interest" has been referred to the CA.

This subsection is obligatory in terms of CP XXXI.

(5) The security services shall be broadly representative of the South African people.⁶

DEFENCE

Defence force

2. (1) The defence force shall be structured and managed as a disciplined military force.⁷

(2) The primary objective of the defence force shall be to defend and protect the Republic, its territorial integrity and its people.⁸ In pursuing this objective the defence force shall be guided by the principles of international law regulating the use of force.⁹

Political responsibility and accountability

3. (1) A member of the Cabinet shall be charged with [ministerial]

⁶ The question of representivity in the security services was raised by the CC. This formulation seeks to address this concern and is consistent with clause 1(1)(h) of the Public Administration draft, sixth draft, 13 June 1995.

⁷ Formulation as approved by the CC.

⁸ This objective includes the defence and protection of assets and interests not found within the borders of the Republic.

A transitional provision will be required to provide for the continuation of the SANDF which is presently established and structured in terms of the Interim Constitution. Transitional measures, however, can best be dealt with separately because of the temporary legal effect of such measures.

⁹ Formulation as suggested by a member of the CC; it seemed to find approval.

responsibility for defence and [shall be accountable to Parliament].¹⁰

(2) A (joint)¹¹ multi-party committee of Parliament shall oversee all defence matters¹². [In particular the committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of and draft legislation on the defence force, and to perform such other functions relating to parliamentary supervision of the defence force as prescribed by law.]¹³

¹⁰ Formulation as approved by the CC. The expression "ministerial responsibility" is used in the text, while the heading to the section refers to "political responsibility". Section 13 (Intelligence Services) also refers to "political responsibility". To avoid interpretation problems a single expression should be used.

¹¹ The question of a second chamber of Parliament must still be resolved.

¹² Formulation as approved by the CC.

¹³ The Constitutional Committee noted with concern the depth of detail specified in this clause. However, as explained by members of the Theme Committee, the extent of the detail provided is necessary to provide substantial powers for a committee that functions in a manner dissimilar to other parliamentary portfolio committees.

Command of defence force

4. (1) The defence force shall be under the command of a Chief of the defence force, who shall be appointed by the President.¹⁴

(2) The Chief of the defence force shall exercise command of the defence force in accordance with the directions of the member of the Cabinet responsible for defence and, during a state of national defence, of the President.

Civilian secretariat

5. A civilian secretariat for defence functioning under the direction and control of the member of the Cabinet responsible for defence, shall be charged with the administration of such matters in connection with defence as may be entrusted to it by law or that member of the Cabinet.

¹⁴ The procedure for appointing the Chief of the defence force is an area of disagreement. The understanding is that the appointment by the President involves consultation with the Cabinet.

The TC is further of the view that the procedure for the dismissal of the Chief of the defence force should accord with the appointment procedure.

This issue will be discussed in the CA.

Employment of defence force

6. The defence force may be employed only in the national interest and as authorised by law.¹⁵

POLICE

Police service

7. (1) The police service shall be structured and managed as a disciplined police service. [Its primary objective shall be to prevent and investigate crime, to maintain public order, to protect property, and to secure safety and

¹⁵ There is contention around the question of whether the Constitution should contain a definition of "national interest", and, if so, how such definition should be formulated. If a definition is included in the Constitution, the "law" referred to in the section will have to conform to the definition. Possible approaches include the following options:

Option 1: No definition of "national interest" in the Constitution, in which case it will be left to the courts to interpret and develop this concept as used in the section. In doing so a court will have regard to voluminous literature available in international jurisprudence on the meaning of "national interest".

Option 2: The Constitution should define "national interest" in specific terms to indicate the precise circumstances in which the defence force may be employed, for instance where it is necessary -

- (a) to comply with international obligations towards other states and international bodies;
- (b) for the preservation of life, health and property;
- (c) for the maintenance of essential services;
- (d) to assist the police service to uphold law and order; and
- (e) in support of reconstruction and development programmes and other efforts to improve socio-economic conditions.

A precise definition has the advantage of providing immediate legal certainty but leaves little room for legal development of the concept.

Option 3: The Constitution should define "national interest" in general terms to indicate that the concept embraces both the interest of the people and the interest of the state.

security [for] people and communities in the Republic].¹⁶

[(2) The police service shall be structured to function at both national and provincial levels under the direction of the national government and the provincial governments, respectively. The police service at provincial level may include police formations operating at the local level].¹⁷

Political responsibility and accountability

8. (1) A member of the Cabinet shall be charged with [ministerial] responsibility for police and [shall be accountable to Parliament].¹⁸

(2) A (joint) multi-party committee of Parliament shall oversee all police matters.¹⁹

[Control of police service²⁰

9. (1) The police service shall be under the command of a national

¹⁶ Reformulated as per instruction of the CC.

A transitional provision on the South African Police Service as presently structured will be necessary.

¹⁷ This clause is referred to the Subcommittee of the CC as it deals with matters related to national and provincial competencies.

¹⁸ Reformulated as per instruction of the CC. See footnote 10.

¹⁹ Reformulated as per instruction of the CC.

²⁰ This section is referred to the Subcommittee of the CC.

commissioner, who shall be appointed by the President.²¹

(2) The national commissioner of the police service shall exercise command of the police service in accordance with the directions of the member of the Cabinet responsible for police.²²

(3) A provincial commissioner for each province shall be appointed by the national commissioner in accordance with a national law. He or she shall be responsible for all [visible] policing functions in the province and such other functions as prescribed by a national law.]²³

Civilian secretariat

10. [(1) A civilian secretariat functioning under the direction and control of the member of the Cabinet responsible for police, shall exercise such powers and

²¹ As per Block 4 of Theme Committee 6.4's Police Report. The command of the national commissioner over the entire police service or only that part of it operating at national level is still in contention.

Further instructions are required concerning the dismissal of the national commissioner, for instance where the occupant of the post no longer enjoys the confidence of the Cabinet.

²² Subsection (2) is in line with the agreed position as per Blocks 8 and 9 of the General Report in so far as it relates to the national commissioner.

²³ A transitional provision will be required to provide for the continuation of the present division of responsibilities between the national and provincial commissioners as set out in the Interim Constitution.

functions in connection with police as may be entrusted to it by law or that member of Cabinet.]²⁴

[(2) A province may establish a civilian secretariat to function at the provincial level of the police service as prescribed by law.]²⁵

Powers and functions of police service

11. [The powers and functions of the police service shall be set out in a national law. Such a law shall entrust sufficient powers and functions to the police service in order to enable the national and provincial commissioners to discharge their responsibilities effectively.]²⁶

INTELLIGENCE

Establishment of intelligence services

[12. An intelligence service operating independently from the defence force and the police service may be established by the President only. The objectives, powers and functions of such an intelligence service shall be set out and regulated

²⁴ This subsection deals with the structure and functioning of a civilian secretariat; a concern was raised in the CC that this provision goes beyond what is needed in the Constitution.

²⁵ This section is referred to the Subcommittee of the CC.

²⁶ This section is referred to the Subcommittee of the CC.

by a national law.²⁷

Political responsibility and accountability

13. A member of the Cabinet shall be charged with the political responsibility for an intelligence service and [shall be accountable to Parliament].²⁸

Control of intelligence services

14. (1) An intelligence service shall operate in accordance with the control and directions of the President or the Minister of the Cabinet responsible for such an intelligence service.²⁹

(2) The head of an intelligence service shall be appointed by the President (subject to parliamentary approval).³⁰

²⁷ As per agreement in Blocks 2 and 5 of Theme Committee 6.4's Intelligence Report.

²⁸ It was suggested in the CC that the President should maintain ultimate political responsibility. However, the intention is not clear, viewed in the light of the powers of the President in terms of the National Executive Draft.

²⁹ As per Block 5 of Theme Committee 6.4's Intelligence Report.

³⁰ As per Block 8 of Theme Committee 6.4's Intelligence Report. The words in brackets are in contention.

Co-ordination of intelligence activities

15. A mechanism regulated by a national law for the co-ordination of intelligence services and the intelligence divisions of the defence force and the police service shall be established by the President.^{31]} ³²

Parliamentary oversight of intelligence activities

16. A (joint) multi-party committee of Parliament shall oversee intelligence matters as set out in a national law. Budgetary oversight of intelligence services shall be performed jointly with the parliamentary committee on public finance.³³

[Civilian inspectorate

17. A civilian inspectorate shall monitor the activities of intelligence services and perform such other functions as prescribed by law. Inspectors shall

³¹ As per Block 10 of Theme Committee 6.4's Intelligence Report.

³² Although supported by the parties, there is uncertainty as to whether sections 12, 13, 14, 15 and 17 should be included in the Constitution in their current detail. The technical advisers and law advisers, as instructed by the CC, suggest the following alternative formulation for discussion:

"Establishment, control and co-ordination of intelligence services

An intelligence service operating independently from the defence force and the police service may be established by the President only. A member of the Cabinet shall be charged with the political responsibility, and shall be accountable to Parliament, for such an intelligence service. The objectives, powers and functions of such an intelligence service, and measures providing for the control and co-ordination of intelligence activities and the establishment and functions of a civilian inspectorate of intelligence activities shall be set out and regulated by a national law."

³³ As suggested in the CC, oversight of budgetary matters of intelligence services shall be performed jointly with the parliamentary committee on public finances. This provision is based on an assumption that a parliamentary committee on finance will be provided for in the Constitution.

be appointed by the President with the approval of Parliament by resolution adopted by a majority of at least two thirds of the members.]³⁴

GENERAL

Code of conduct for members of security services

18. Members of the security services shall at all times act in accordance with a code of conduct prescribed by law. In particular members of the security services shall be obliged to -

- (a) comply with all lawful orders;
- (b) refuse to comply with a manifestly illegal order; and
- (c) refrain from furthering or prejudicing any party political interest.

Training

19. Members of the security services shall be properly trained in accordance with the relevant international standards of competency and discipline. The members shall be instructed in the applicable basic concepts of South African law, the inviolability of human rights and international conventions and law.

³⁴ See footnote 32.

Personnel administration

20. [The conditions of service and the rights and duties of members of the security services shall be regulated by law with appropriate mechanisms established to accommodate the specific needs of the security services. Mechanisms and procedures for the resolution of labour disputes within the security services shall be established.]³⁵

³⁵ In response to the CC's question concerning the principle at stake in this section, the second sentence could be retained as containing that principle, and the first sentence deleted.

Section 20 should thus read:

"Resolution of labour disputes

20. Mechanisms and procedures for the resolution of labour disputes within the security services shall be established."

Name:

• Distinction between
2 Categories

• Draft
distinctions indicate

• Appointment procedures
various options

for Mandy

4/9

• meeting between
Archib & General &
Law Advisers plus

2 Practitioners

see page 107

distinction between those that monitor + others,
distinction also to be made in the general
provisions clause; separate provisions needed for
see;

THIRD DRAFT - 23 AUGUST 1995
Status: Processed as per instruction of CC
Subcommittee of the 17 August 1995 for
further discussion by the Subcommittee.

Reserve Bank
FKC
PSC

Monitoring

Reserve Bank
Public Admin...

Auditor General in
Public? in
FKC
elect.com. in
general
provision.

Chapter ...

INDEPENDENT INSTITUTIONS

AUDITOR GENERAL

Establishment and functions¹

1. (1) There shall be an Auditor General for the Republic.²

[(2)]³

[(3)]³

[(4)]³

[Powers and functions]⁴

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

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

² Agreed to. The previous Subsection (2) and (5) have been removed as per instructions of the CC Subcommittee.

³ The previous Subsections (2); (3) and (4) are to be moved to section 21 as per instructions of the CC Subcommittee.

⁴ See footnote 1.

⁵ Formulation as approved by the CC Subcommittee.

(3) The Auditor General may audit, and report on, the accounts and financial statements of any institution funded from public money, as may be regulated by law.⁶

[(3)]⁷

[Reports]⁸

(4) The Auditor General shall submit reports on audit to all authorities which have a direct interest in the relevant audit and also to any authorities as may be prescribed by law. All reports shall be made public.⁹

Appointment, qualifications, tenure and dismissal

2.4. (1) The President shall appoint as Auditor General a person -

- (a) nominated by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and**

⁶ Agreed to in the Subcommittee, the DP reserving its position.

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

⁸ See foot note 1.

⁹ The CC Subcommittee agreed that this formulation should replace the previous one.

(b) approved by Parliament by a resolution adopted, without debate, by a majority of at least two-thirds of the members present and voting.]¹⁰

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

a single non renewable term of office

(3) The Auditor General shall be appointed for a period of ~~not less than five years.~~ *not more than 5 years and not more than 10 years*. A person appointed for a period of less than ten years may be re-appointed to serve as the Auditor General for a further period, provided that his or her total period of service as the Auditor General shall not exceed ten years.¹²

Prop by Rob Davis

[(4)]¹³

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

¹⁰ It was agreed that this Subsection, shall be held in abeyance until it has been considered by the CA.

¹¹ Agreed to in the CC Subcommittee.

¹² Agreed to in the CC Subcommittee.

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

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

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

[Assignment of powers and functions and provision of funds

5.]¹⁵

FINANCIAL AND FISCAL COMMISSION

3 - 8¹⁶

¹⁴ The CC Subcommittee agreed that these sections should be held in abeyance until the section on appointments has been dealt with.

¹⁵ It was agreed in the CC Subcommittee that the previous section 5 be deleted, the DP reserving its position.

¹⁶ Provisions on this Commission have not yet been drafted.

CENTRAL BANK¹⁷

Establishment

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

Primary objective

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

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

Powers and functions

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

¹⁷ The CC Subcommittee agreed that the provisions on the Central Bank would remain as they are and would not form part of the general provision.

¹⁸ It was agreed in the CC Subcommittee that the previous subsection (3) dealing with the AG's access to information be deleted. The DP reserved its position.

PUBLIC ADMINISTRATION COMMISSION

Establishment and functions

12. (1) There shall be a single Public Administration Commission for the Republic as prescribed by national law. Each of the provinces shall be entitled to nominate a representative for appointment to the Commission.

[(2) The Public Administration Commission shall be independent and impartial.]¹⁹

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

(4) The function of the Public Administration Commission shall be to promote the values and principles of public administration set out in chapter ... as prescribed by law.²¹

¹⁹ The CC Subcommittee must consider whether Subsection 12(2) in bold brackets should be incorporated in the general provision on general principles in section 21.

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

²¹ This formulation is per instructions of the CC Subcommittee.

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

ELECTORAL COMMISSION²²

Establishment and functions

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

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

Appointment of members

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

²² It was agreed that these provisions shall be held in abeyance until the discussion by the CC Subcommittee.

PUBLIC PROTECTOR

Establishment and functions

15. (1) There shall be a Public Protector for the Republic.²³

[(2)]²⁴

[(3)]

[(3)]

(2) The Public Protector shall have power, as regulated by law, to investigate and report on any conduct in the affairs of the State or public administration at any level of government which is alleged or suspected to be improper or to result in any impropriety or prejudice, and to take such remedial action as is appropriate in the circumstances. In addition, the Public Protector shall have such other powers and functions as may be prescribed by law.²⁵

(3) The Public Protector shall be accessible to all persons and communities.²⁶

(4) The Public Protector shall not have the power to investigate the

²³ Agreed to by the CC Subcommittee.

²⁴ The previous subsections 15(2) to 15(4) have been moved to section 21 as per instructions of the Subcommittee.

²⁵ The CC Subcommittee agreed to this formulation. Establishment and functions can be combined in one section if section 15(2) to (4) is moved to section 21.

²⁶ Agreed to in the CC Subcommittee.

performance of judicial functions by the courts of the Republic.²⁷

(5) Reports issued by the Public Protector in connection with the discharge of his or her powers and functions shall except in exceptional circumstances be open to the public.²⁸

[(4) The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities at least once a year.]²⁹

Appointment, qualifications, tenure and dismissal³⁰

16. (3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with any other requirements prescribed by law.³¹

²⁷ This clause was criticized on a number of points in the CC, viz

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

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

²⁸ Agreed to by the CC Subcommittee, the NP reserving its right to revisit the clause.

²⁹ To be considered for incorporation in section 21. The NP reserved its position on section 15(3)/(5).

³⁰ The CC Subcommittee has agreed that the previous section 16(1) and (2) would move to section 22 and section 16(5) and (6) would move to section 23.

³¹ Agreed to in the CC Subcommittee.

(4) The Public Protector shall be appointed for a period of seven years.³²

Provincial public protectors/Deputy Public Protectors³³

17. ...

HUMAN RIGHTS COMMISSION³⁴

Establishment and functions [governing principles]³⁵

18. (1) There shall be a Human Rights Commission for the Republic.³⁶

(2) The Human Rights Commission shall promote the development, protection and attainment of, and respect for, human rights and, generally, the development of a culture of human rights in the Republic. It shall for this purpose have the necessary powers accorded to it by law, including powers to monitor, investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached and to perform research and educative functions.³⁷

³² Agreed to in the CC Subcommittee.

³³ Stands over for discussion on provincial competencies.

³⁴ The CC Subcommittee agreed that sections 18(2) to (5) shall be moved to section 21.

³⁵ If the bracketed subsections are moved to section 21 the clauses on establishment and functions can be combined under the heading "Establishment and functions".

³⁶ Agreed to.

³⁷ As agreed to in the CC Subcommittee.

Appointment of members

19. ..³⁸

³⁸ There is disagreement among the parties on the method of selection and appointment of commissioners. There are two views, the one supports the approach in section 115(3) of the interim Constitution. The other view calls for the creation of an independent panel to select and recommend persons to the President for appointment as commissioners. Qualifications for members of the Commission also need further debate. These are the two options:

Option 1:

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

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

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

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

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

Option 2:

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

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

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

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

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

GENDER COMMISSION

20. ...³⁹

GENERAL PROVISIONS

General principles⁴⁰

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

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

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

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

³⁹ The draft for this Commission is still to be considered.

⁴⁰ The CC Subcommittee agreed that the provisions of this section shall remain as they are.

ref. common - consistency of at least 1 rep
to party

Third draft: 23 August 1995

Appointments⁴¹

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

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

- broadly rep, 1 to party, at least 1 rep party, or (2/3 or 75%)*
- (a) nominated by a committee of Parliament ...; and *as ad-hoc public body committee.*
- (b) approved by Parliament by a resolution adopted by a majority of at least ... % of the members present and voting. *uniform majority throughout to be disc.*

Removal from office⁴¹

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

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

⁴¹ It was agreed in the CC Subcommittee that sections 22 and 23 would be debated in the Constitutional Assembly.

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

**OFFICE OF THE AUDITOR-GENERAL
KANTOOR VAN DIE OUDITEUR-GENERAAL**REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKAREFERENCE
VERWYSING }ENQUIRIES
NAVRAE }DATE
DATUM }

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Mr Hassen Ebrahim
Executive Director
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8000

Dear Mr Ebrahim

**DRAFT CONSTITUTIONAL FORMULATIONS REGARDING THE
AUDITOR-GENERAL**

1. Your letter and enclosures dated 16 August 1995, which I received this morning, have reference.
2. I will deal with the questions put to me in the above letter *ad seriatum*, after which I wish to make certain further observations. As requested, my response is based on practical experience gained during almost twenty years of very close association with the Audit Office in various capacities. The questions put to me reads as follows:

"... a decision was taken that the Auditor-General's comment be sought with regard to s1(4) of the formulations. This section reads as follows:

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

4. *Respecting the above provision, the CC seeks the following information:*
 - 4.1 *What kind of constitutional protection is required to ensure the independence, impartiality and effectiveness of the Auditor General's Office?*

4.2 *Is it necessary to have, in the final text of the constitution, a phrase referring to the Auditor General and his or her assignees? Or does mere reference to the Auditor General, ipso facto, include his or her assignees?*

4.3 *Does the constitution need to contain a clause on immunities and privileges to ensure that the Auditor General's independence, impartiality and effectiveness is protected? Or should the constitution just establish the principle of independence and impartiality, leaving all ancillary matters, such as immunities, privileges and resources to subsidiary legislation?"*

3. My response to the specific questions are:

Ad 4.1 - Specific, detailed and unambiguous constitutional protection is necessary for the Auditor-General and his or her staff so as to be able to function as an essential and unique tool in the system of governmental checks and balances in South Africa. Attempts at interference and influence may vary in method and form, but in practice take place regularly.

Ad 4.2 - The Auditor-General has extensive responsibilities which extend to all parts of our country. In fulfilling these responsibilities, powers are of necessity delegated and assigned to various functional levels throughout the Office of the Auditor-General. These functionaries are in practical need of a clear mandate which is not subject to possible spurious challenge. Although it is possible to resolve such challenges after personal intervention by the Auditor-General, it is, in my opinion, as a practical requirement necessary for the wording to be explicit and consequently include the words "his or her assignees".

Ad 4.3 - It is, in my view, inappropriate to leave critical ancillary matters to subsidiary legislation, as this will give rise to unnecessary ambiguity, conflict and consequential ineffectiveness. So for example, the provision of adequate resources is a critical element of the practical independence of the Auditor-General and his or her Office. In my view, therefore, critical elements which contribute towards independence and impartiality should be explicitly and appropriately addressed in the Constitution itself.

4. It should be borne in mind that various "independent institutions" have certain similar - but very importantly - also different relationships with the various role players, such as for example the Executive. In the process of possibly trying to deal with institutions such as the Reserve Bank, the Public Protector and the Auditor-General as a group, that which may be appropriate for one institution may be wholly inappropriate for another. A consequence of such an approach will most likely be the lowest common denominator of differing main principles (especially from a legal and jurisprudence point of view) which may result in the particular principles which must be protected in a

need for clarity
between Law Advisors,
Auditor-General,
1 & 2 paragraphs

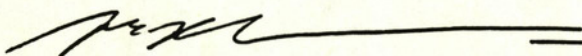
specific instance being significantly diluted or even negated. This, in my view, cannot be allowed to happen. The fact of the matter is that the Office of the Auditor-General is *sui generis* which fact should be addressed by way of specific and unambiguous provisions in the Constitution and with proper appreciation of the various practical nuances which exist. The Auditor-General is the only Office that has a unique relationship with Parliament.

5. In the last instance, I wish to comment on clause 4(3) of the Sixth Draft of the Constitutional Provisions relating to the Auditor-General, dated 15 June 1995. The wording of this clause makes it possible for the term of office of the Auditor-General to be extended, which may result in the conduct of a particular person during a "first term" of say five years being influenced by the possibility of being awarded a "second term" ("currying favour for reappointment"). This is, in my view, clearly inappropriate. The principle of a fixed, non renewable term of office should be articulated to replace the current wording.
6. I am fully aware of the need to balance the requirements of, *inter alia*, unambiguity with that of brevity, but the central theme of my argument is that this process should not result in the baby being thrown away with the bath water.
7. In summary I am of the opinion that for the above and also practical reasons the formulations in the Interim Constitution on the independence, protection, appointment and discharge of the Auditor-General should in the interest of transparent public accountability be absorbed into the new Constitution with substantially the same wording.

single term
5 + 10
not by
Aud. Genl -
Davies
to be looked
at after
reedy

I trust the above comments are of assistance and shall be happy to discuss them further should you so desire.

Yours sincerely


AUDITOR-GENERAL 17/8/1995

hassem/A1

MP

Subsidiary?

what about assembly?

independent body?

→ (1) transfer
of power to planning

Ans: →

1/10

**FIRST DRAFT TEXT
NATIONAL AND PROVINCIAL
LEGISLATIVE AND EXECUTIVE COMPETENCIES**

THEME COMMITTEE 3

This is a preliminary draft which could, due to time constraints, not be finalised by the full technical committee prior to distribution.

Legislative authority of the Republic

1. The legislative authority of the Republic vests in Parliament, which shall be competent to make laws on any matter in and for the Republic in terms of this Constitution (CPXVI, CPXVIII(1), CPXIX).

could be deleted or be reformulated.

Legislative authority of provinces

2. (1) The legislative authority of a province vests in its provincial legislature which shall be competent to make laws in and for its province in terms of this Constitution (CPXVI, CPXVIII(1), CPXIX).

(2) A provincial legislature shall have the competence to legislate on any matter which falls within a functional area specified in Schedule 1 (Note: Schedule 1 could include functional areas such as provincial planning and development (CPXXI(6)(a)).

Framework legislation

3. (1) ~~An Act of Parliament~~ may make legislation which shall be binding on all provinces regarding any matter referred to in Schedule 2 in terms of which principles or standards are laid down to ensure uniformity across the nation.

*do these not
apply to
anyway?*

agreed/del;

If not leg. enforce a. province, framework leg. becomes redundant.

(2) Such legislation shall be referred to as framework legislation.

(3) Every provincial legislature shall be empowered to make laws for the achievement of those objectives set out in the legislation referred to in subsection (1).

Conflict of laws

4. (1) Parliament shall be competent to legislate on any matter which falls within a functional area specified in Schedule 1.

(2) In the event of a conflict between an Act of Parliament and a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the Act of Parliament shall prevail over the provincial law where:

(and only to see extent that)

- (i) the province is unable to regulate the particular subject matter effectively (CPXXI(1));¹
 - (ii) the Act of Parliament is necessary for the maintenance of essential national standards, for the establishment of minimum standards for the rendering of services, the maintenance of economic unity, the maintenance of ^{Nation} social security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole (CPXXI(2);
 - (iii) the Act of Parliament deals with the determination of national economic policies, the promotion of inter-provincial commerce or the protection of the common market in respect of the mobility of goods, services, capital and labour (CPXXI(5)).²
- (3) Notwithstanding subsection 2, Parliament shall not exercise its competence so as to encroach upon the geographical, functional or institutional integrity of the provinces (CPXXII).
- (4) In the event of a conflict between an Act of Parliament and a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the provincial law shall prevail over the Act of Parliament if the provincial law deals with the specific socio-economic and cultural needs and the general well-being of the inhabitants of the province (CPXXI(6), CPXVIII(2), CPXIX).
- (5) In the event of a conflict between an Act of Parliament and a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, which cannot be resolved by a competent court on a construction of this Constitution, precedence shall be given to the Act of Parliament (CPXXIII).

see for similar aspects

Necessary ancillary powers

5. The legislative competence referred to in sections 1 and 2, shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence (CPXXI(8)).

¹ The subsections contain a particular application of the applicable Constitutional Principles. See our earlier opinion. It is however possible to interpret the Principles other than by the formulation of an override.

² See footnote 1

