CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE

FRIDAY
7 APRIL 1995
09H00
OLD ASSEMBLY CHAMBER

CONTENTS

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE

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

Date : **Friday 7 April 1995**

Time : **09h00 - 12h00**

Venue : **Old Assembly Chamber**

AGENDA

1. **Opening**
2. **Minutes: Pages 2 - 10**
3. **Matters Arising: See Agenda Items Below**
   - 3.1 **Drafting of Theme Committee 5 Report: No Documentation**
   - 3.2 **Sub-Committee on Various Theme Committee 5 Issues: No Documentation**
   - 3.3 **Date of Constitutional Assembly Meeting: No Documentation**
4. **Discussion of Theme Committee 6.4 Drafts**
5. **Tabling: Theme Committee 6.3 Report on Blocks 3 - 4: Pages 11 - 53**
6. **AOB**
7. **Closure**

PLEASE NOTE THAT YOU SHOULD BRING TO THE MEETING "DOCUMENTATION PART 2" CIRCULATED FOR THE 3 APRIL 1995 MEETING OF THE CONSTITUTIONAL COMMITTEE AS *IT CONTAINS* ***THE DRAFTS OF THEME COMMITTEE 6.4***

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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Entire Document Embargoed
Until 09h00 7 April 1995

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE SIXTEENTH MEETING OF THE CONSTITUTIONAL COMMITTEE

MONDAY 3 APRIL 1995

Present

Ramaphosa, M C (Chairperson)
Wessels, L (Deputy Chairperson)

Asmal, K
Bhabha, M
Camerer, S M
Cassim, M F (Alt)
De Beer, S J (Alt)
De Lille, P
Du Toit, D C
Eglin, C W
Fourie, A
Gogotya, N J
Gordhan, P J
Green, L M (Alt)
Hofmeyr, W (Alt)
Kgoali, J L
Kgositsile, B
King, T J
Ligege, M G
Lockey, D
Mahlangu, M J
Mahlangu, N J
Majola-Pikoli, N T (Alt)
Marais, P G
Mchunu, E S
Meyer, R P
Moosa, M V
Mtshali, L P H M
Mulder, C P
Myakayaka-Manzini, Y L
Ngcuka, B T
Nzimande, B E
Pahad, E G
Pandor, G N M (Alt)
Rabie, J A
Rabinowitz, R
Radue, R (Alt)
Schutte, D P A
Seaton, S A (Alt)
Sifora, R K
Sizani, R K
Smith, P F
Steenkamp, P J (Alt)
Van Breda, A
Viljoen, C
Van Heerden, FJ (Alt)
Viljoen, C L

Alternates for this meeting: the ACDP gave notice that LM Green would replace KR Meshoe; the NP gave notice that SJ de Beer would replace C Ackermann and PJ Steenkamp would replace D Makhanya; the IFP gave notice that I Cassim would replace R Rabinowitz for the first half of the meeting and P Powell would replace S Mzimela for the second half of the meeting.
Apologies: C Ackermann, J H de Lange, D W Makhanya, K R Meshoe, S Mzimela, and S S Ripinga.
Absent: OC Chabane, GJ Fraser-Moleketi, FN Ginwala, SP Holomisa, ZA Kota, BS Mabandla, and LB Ngwane.

1. OPENING

1.1 Mr. Ramaphosa opened the meeting at 14h10.

1.2 On behalf of the meeting, Mr. Ramaphosa extended condolences to the de Lange family and to the Breytenbach family, both of whom suffered the tragic loss of a family member.

1.3 The Agenda was adopted with one amendment: *"Item 6. Agenda for Constitutional Assembly of 24 April 1994"* would be deferred to the next meeting of the Constitutional Committee.

1.4 It was noted that Mr. Mtshali, Mr. Sizani, Mr. van Breda, and Mr. Viljoen did not receive documentation, even though their documents had been signed for on the return of service. It was agreed that the Administration would investigate the matter to see what went wrong. In the meantime, Mr. Ramaphosa asked that members enquire with the Administration should they not receive documentation before a scheduled meeting.

2. MINUTES

2.1 The minutes of the Fifteenth Meeting of the Constitutional Assembly on Monday 13 March 1995 were adopted.

2.2 Mr. Ramaphosa noted the *"Memorandum Re: Minutes of CC Meeting of 6 March 1995"* included in the documentation. The meeting accepted the document with one amendment: on page 17, "Mr. Eglin" replace "Mr. Egling".

3. MATTERS ARISING

There were no matters arising.

4. THEME COMMITTEE 5 REPORT ON BLOCKS 1 - 4

4.1 Mr. Schutte noted that the IFP on the day had circulated a document entitled *"Schematic Summary of Report on Blocks 1 - 4"*. Mr. Ramaphosa ruled that the meeting would not discuss the document, but rather focus on the original Theme Committee report included in the documentation. He cited two reasons for this ruling:

i. Alhough the document purported to be from Theme Committee 5, the IFP had not submitted it to the Core Group or Theme Committee for discussion and possible adoption.

ii. The Management Committee had been alerted to the IFP's

dissatisfaction with the Theme Committee report and had decided that discussion of the report would proceed and that the IFP would be given the opportunity during the discussion to raise any problems and concerns it had about the report.

4.2 Mr. Schutte briefly introduced the document entitled *"Theme Committee 5 Report on Blocks 1 - 4,"* included in the documentation. He then spoke to the *"Schematic Summary of Report"* included on pages 1 - 12.

4.2 The ANC expressed concern that the *"Remarks"* column of the *"Schematic Summary"* did not contain sufficient detail to guide discussions in the Constitutional Committee and suggested that future Theme Committee reports include more detail on suggested approaches to contentious matters and the support base for different views, e.g whether a particular view was a general view, a majority view or a minority view.

4.3 Regarding Item 1 on page 1, which reads:

***"Legal system"*:**

4.3.1 It was agreed that there was overwhelming support from political parties and civil society for one single national legal system, with only the IFP in opposition. The IFP stated that it was in favour of a "dual track" system in which " provincial courts would have the final say on matters within provincial competence."

4.3.2 However, in view of the overwhelming support for a single national legal system, and because the matter was a fundamental one, it was agreed this was a " special case " and one draft should be prepared on the basis of one single national legal system. It was noted that should two drafts be prepared this would result in two chapters being drafted, and not just two draft provisions.

4.3.3 It was agreed the matter would be forwarded with the draft to the CA for further debate where the IFP would have a further opportunity to state its concerns and objections. It would be put the CA that there are indeed two views but the overwhelming support from the Constitutional Committee and from submissions from civil society were in favour of a single national legal system.

4.3.4 The IFP objected that this amounted to a ruling of " sufficient consensus" and that as a contentious matter, two drafts should

be prepared. This objection from the IFP was noted.

4.4 Regarding Item 2 on page 2, which reads:

***Highest Constitutional Court*:**

4.4.1 The meeting agreed to remove point 2, which reads *"After the present term of CC, a 'two chamber' highest court should be created,"* from the "Contentious Aspects".

4.4.2 This amendment rendered the issue non-contentious and is forwarded for drafting as such.

4.5 Regarding Item 3 on page 3, which reads:

"Constitutional Powers of Supreme Court"

4.5.1 The meeting agreed that this was a non-contentious item and would be forwarded to drafting.

4.5.2 The IFP expressed concern that the continuity of the Constitutional Court still needed to be addressed and was reminded that the terms and tenure of judges would be dealt with later in the report and that matter could also be raised in the Work Programme Block on "Transitional Mechanisms."

4.5.3 It was also agreed that account would be taken of the fact that:

i. The large number of Acts that may contain unconstitutional provisions; and

ii. Some proposals distinguish between pre- and post-27 April 1994 legislation.

4.5.4 Regarding the two queries, which read:

"Should the constitution and legislation be able to create exceptions to 'suspension' rule in point (b)?

and

"Should provincial courts have the power to test bills in provincial legislatures and declare provincial" [sic]

it was agreed to leave these matters to the drafters for their consideration.

4.6 Regarding Item 4 on page 4, which reads:

"Constitutional Powers of AD":

4.6.1 The meeting agreed to move the item from the non-contentious to contentious column, given that:

i. The IFP disagrees with the view set out in the document that the *"AD (or successor court) should have same powers as SC subject to appeal to CC"*, and believes that the Appellate Division should not have the power of adjudication over constitutional matters. And

ii. The disagreement occurred also in the Theme Committee report on pages 36 - 38.

4.6.2 The meeting agreed to forward both options to drafting.

4.7 Regarding Item 5 on page 4, which reads:

"Constitutional Powers of Magistrate's Court":

4.7.1 The meeting agreed that the matter was not contentious and be forwarded to drafting.

4.7.2 The ANC queried, however, whether the new constitution would include this kind of detail. It was agreed that the drafters would consider this aspect.

4.8 Regarding Item 6 on page 5, which reads:

"Procedure for CC Cases":

the meeting agreed that the item was non-contentious and would be forwarded to drafting.

4.9 Regarding Item 7 on page 6, which reads:

"Provincial Courts":

4.9.1 It is noted that the IFP expressed its concern that Supreme Court seats should not be moved without reference to the province.

4.9.2 The meeting noted that this matter was currently the subject of inquiry by the Department of Justice and the recomendation

of the Theme Committee that it be left over until the inquiry was completed. Concern was expressed when this inquiry would be completed.

4.9.3 The ANC, however, queried whether the new constitution would include this kind of detail. The meeting agreed to refer the matter to the Technical Advisers and CA Law Advisers for clarification.

4.10 Regarding Item 8 on page 6, which reads:

"Intermediate Courts":

4.10.1 The meeting agreed that this was a non-contentious item;

4.10.2 However, there was disagreement as to whether the item should be included in the constitution or would better be an item for legislation.

4.10.3 The meeting agreed to forward the item to the Technical Experts, who would advise the Constitutional Committee during the process of drafting.

4.11 Regarding Item 9 on page 7, which reads:

"'Split Judiciary'":

4.11.1 The meeting agreed that the item was not contentious and would be forwarded to drafting.

4.11.2 The NP expressed concern at the phrase in the remarks column which reads: *"and should not mention the magistrate's court expressly."* It was agreed that this matter would be discussed when examining the draft.

4.12 Regarding Item 10 on page 7, which reads:

"Community Courts":

4.12.1 There was general support for an enabling clause and it would be forwarded to drafting. It was noted that there was a great deal of support from civil society for the existence of community courts.

4.12.2 It was noted that it was not intended that the constitution should provide great detail on the matter

and it was agreed the drafters would be asked to consider this aspect.

4.12.3 It was agreed that if further detail were to be provided in the constitution, the matter would become contentious in the light of the IFP view that these courts should fall under provincial structures rather than national structures.

4.12.4 In the same vein, concerns expressed by the DP and PAC were noted on the definition and location of these courts within the hierarchy of courts.

4.13 Regarding Item 11 on page 11, which reads:

"Special Courts":

the meeting agreed that the item was non-contentious and would be forwarded to drafting.

4.14 Regarding Item 12 on page 8, which reads:

"Appointment of CC Judges":

noting that whilst political parties hold a wide range of views on the matter it was nevertheless not a fundamental disagreement, the meeting agreed that the Administration would facilitate the appointment of a sub-committee which would discuss the item and report back to the Constitutional Committee.

4.15 Regarding Item 13 on page 8, which reads:

"Appointment of SC Judges":

the meeting agreed that the matter was non-contentious and would be forwarded to drafting.

4.16 Regarding Item 14 on page 9, which reads:

" "Composition of JSC":

the meeting agreed to refer this item to the sub-committee to be facilitated by the Adminsitration.

4.17 Regarding Item 15 on page 9, which reads:

"Appointment of Magistrates":

4.17.1 The meeting agreed that the matter was non-contentious.

4.17.2 The ANC, however, queried whether detail like this would be included in the new constitution. The meeting agreed to refer the item to the drafters for their advise, and should they conclude that it would be included in the new constitution, the matter would be forwarded to drafting.

4.18 Regarding Item 16 on page 9, which reads:

"Qualifications of a Judge":

the meeting agreed to refer the item to the sub-committee to be facilitated by the Administration.

4.19 Regarding Item 17 on page 10, which reads:

"Accountability of Judges":

the meeting agreed that this was a non-contentious issue and it would be forwarded to drafting.

4.20 Regarding Item 18 on page 10, which reads:

"Tenure of Judges - Supreme Court":

the meeting agreed that the item was non-contentious and would be forwarded to drafting.

4.21 Regarding Item 19 on page 11, which reads:

"Tenure of Constitutional Court Judges":

the meeting agreed to refer the item to the sub-committee to be facilitated by the Administration.

4.22 Regarding Item 20 on page 11, which reads:

"Access to Justice":

4.22.1 The meeting agreed that the item was non-contentious.

4.22.2 However, the ANC queried whether detail of this kind would be included in the new constitution. The meeting agreed to refer the item to the drafters for their advice on this matter, and should they conclude that the issue should be included in the new constitution, the item would be forwarded to drafting.

4.23 Regarding Item 21 on page 12, which reads:

"Lay Participation":

4.23.1 The meeting agreed that the item was non-contentious.

4.23.2 The ANC, however, queried whether details of this kind would be included in the new constitution. The meeting agreed to refer the query to the Technical Experts for their consideration, and should they conclude that it would, the item would be forwarded to drafting.

5. ADJOURNMENT

5.1 The meeting agreed to adjourn at 18h04.

5.2 The meeting agreed to reconvene on Friday, 7 April from 09h00 to 12h00, to discuss the drafts of Theme Committee 6.4.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.3

SPECIALISED STRUCTURES OF GOVERNMENT

REPORT ON THE PUBLIC PROTECTOR (SCHEMATIC SUMMARY)

BLOCKS 3 - 4

3 APRIL 1995

THEME COMMITTEE 6.3
SPECIALISED STRUCTURES OF GOVERNMENT

REPORT ON PUBLIC PROTECTOR
(SCHEMATIC SUMMARY)

Blocks	CP	Issue	Agreements	Disagreements	Remarks
3 & 4	XXIX	**A. Establishment and Constitutionalisation of Public Protector's(PP) office**	**1. PP should be constitutionalised. Constitutional clause on PP should set out fundamental principles and detail must be left to legislation.** **2. Selection and Dismissal of PP should be by Parliamentary process.**	**1. Extent of detail on the constitutional provision on PP.** **Two views:** **1.1 Detail should be minimum to allow for innovativeness, flexibility and adaptability; and** **1.2 Need for specific detail to prevent overlap with other structures of govt,eg, HRC.** **2. <u>Selection and Dismissal</u>.** **2.1 Precise manner of selection of PP.** **Two views:** **2.1.1 Selection of PP should be through Parliament.** **2.1.2 Judicial Service Commission must recommend candidates to Parliament.** **2.2 Grounds of Review.** **Two views:** **2.2.1 Misbehaviour, incapacity and incompetence; and**	1. It has been suggested, for CC's consideration, that the constitutional provision on PP should cover essential features, such as, the creation of the office, independence and impartiality, powers and functions and accountability. 2. How should the PP be selected and dismissed?

3 & 4	XXIX	**A. Establishment and Constitutionalisation of PP's office.**	**3. PP's tenure of office should be fixed at 7 years.** **4. PP should be accountable to, and report annually, to parliament.** **5. PP's office needs to be accessible.**	2.2.2 Stronger grounds, such as, mental incapacity, gross misconduct and impeachable conduct. **3. Nature of tenure of PP's office** Three views: 3.1 Fixed term (7yr) and renewable; 3.2 Fixed term (7yr) and not renewable; and 3.3 Appointment until retirement.	3. Should PP's term of office be fixed or until retirement? If fixed, should it be renewable?

3 & 4	XXIX	B. Independence and impartiality.	1. Need for independence and impartiality of PP's office; and 2. PP's findings need to be made public.		1. Further suggestions, for CC's consideration, for purposes of ensuring the independence and impartiality of PP: 1.1 Assignment of privileges and immunities; 1.2 Non interference by the state in work of PP; 1.3 Reasonable assistance by the state to ensure effectiveness of PP's office; and 1.4 Indemnification of PP for work done in good faith.

3 & 4		**C. Powers and Functions**	**1. PP should have the following powers:** **1.1 Investigation of maladministration, corruption and impropriety;** **1.2 Investigation of systemic problems in administration;** **1.3 Power to refer; and** **1.4 Make recommendations.** **2. PP should receive and act on group complaints.**		**1. Additional suggestions, for consideration by the CC, on powers to be conferred to PP by way of a constitution:** 1.1 Extent of powers of investigation and nature of entrenchment of these in constitution; * Suggested approach: Define PP's power of investigation in general terms, eg, "the PP shall be given the powers necessary for the effective performance of his/her functions." 1.2 Power to litigate; 1.3 Wider power of referral, eg, referral to the HRC; 1.4 Power to direct disciplinary hearings where there is refusal to discipline persons found guilty of maladministration. 1.5 Power to request publication of reasons by an institution for declining to follow PP's recommendation. Power to review laws for constitutionality and make recommendations for legislative reform.

3 & 4		C. Powers and functions			2. Suggestions regarding wider powers for PP which can be considered for legislation: 2.1 Power to suspend prescription and statutory notice periods; 2.2 Power to protect complainants against victimisation; 2.3 Referral of complaints by third parties.

3 & 4		**D. Jurisdiction**	**1. PP should have jurisdiction with regard to government, the Public Sector which would include the administrative functions of the department of justice. The judicial function of the courts should not be subject to the PP.**		**1. Suggestions, for CC's consideration, on jurisdiction of the PP:** 1.1 On PP's jurisdiction in the courts the following suggestions were made; 1.1.1 If the power of review and appeal has failed then provision should be made for the PP to draw the attention of the Chief Justice or Judge Presidents. 1.1.2 The PP should be able to intervene where there are delayed judgements. 1.2 On extension of PP's jurisdiction to the private sector two views were expressed : 1.2.1 Important to extend the jurisdiction of the PP to private institutions performing a public function, eg, banks and the insurance industry. 1.2.2 Not necessary to extend PP's jurisdiction to private sector as there are sufficient mechanisms in the private sector.

3 & 4		**Jurisdiction**			1.3 Regarding the relationship between traditional authorities and the PP there was general agreement that these authorities should be subject to the jurisdiction of the PP in their administrative functions. However the following suggestions were made with regard to this relationship namely: 1.3.1 The House of Traditional Leaders would need to be part of the selection process. 1.3.2 The PP should work in co-operation with chiefs and traditional leaders where possible.
		E. Name		**1. Three views emerged on the appropriate name for the institution:** 1.1 Support for the name Public Protector; 1.2 Support for the name Ombudsman; and 1.3 Support for names such as Ombud or Ombudsperson.	1. What should be the appropriate name for the institution?

		F. Qualifications		**1. Two views on the nature of the PP's qualifications:** 1.1 Necessity for legal qualifications; 1.2 Qualifications, other than legal, are adequate. **2. Views on inclusion or otherwise of qualifications in the constitution:** 2.1 Qualifications of PP should not be included in the constitution. 2.2 Legal qualifications should be entrenched in the final text.	1. Should PP's qualifications be constitutionalised? If so, what should be the nature of these qualifications?

3 & 4		**G. National and Regional PP's**	**1. Need for National and Provincial PP's.**	**1. Relationship between, and the powers of, National and Provincial PP's. The disagreements are:** 1.1 National and Provincial PP's must have separate spheres of influence and jurisdiction. 1.2 National PP may operate at all levels of government. Provincial PP's should be established by legislation and their function should not derogate from the powers of the National PP. 1.3 There is a need to delineate areas of exclusive and concurrent responsibilities of the various offices. 1.4 Stakeholders made additional suggestions with regard to this relationship: 1.4.1 One national office with provincial branches due to concern with regard to national standards, costs and efficacy.	1. What should be the relationship between, and the powers of, National and Provincial Public Protectors?

				1.4.2 Separate offices along provincial and national lines with structures of co-operation. 1.4.3 The relationship between national and provincial PP's should not be defined and should be allowed to evolve over time.	
		H. Nature of Office	1. No specialised PP's for areas such as Defence and Police.		

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.3

SPECIALISED STRUCTURES OF GOVERNMENT

REPORT ON THE PUBLIC PROTECTOR

BLOCKS 3 - 4

3 APRIL 1995

PART I - INTRODUCTION

1 Submissions received

This report is drawn up on the basis of submissions received from the following political parties, organisations of civil society, individuals and an information seminar:

1.1 Political Parties:

1.1.1 ACDP

1.1.2 ANC

1.1.3 DP

1.1.4 FF

1.1.5 IFP

1.1.6 NP

No submission was received from the PAC.

1.2 Organisations of Civil Society:

1.2.1 Association of Law Societies (ALS)

1.2.2 Black Lawyers Association (BLA)

1.2.3 Centre for Applied Legal Studies (CALS)

1.2.4 Community Law Centre, University of the Western Cape (CLC)

1.2.5 General Council of the Bar (GCB)

1.2.6 Human Rights Committee (HRC)

1.2.7 Lawyers for Human Rights (LHR)

1.2.8 Legal Resources Centre (LRC)

1.2.9 National Land Committee (NLC)

Public hearings were also held in respect of these submissions.

1.3 Individuals

1.3.1 Professor G M Barrie, Faculty of Law, Rand Afrikaans University

1.3.2 Professor Swart, The Netherlands

1.4 Information seminar

An information seminar was given by the current ombudsman, Judge van der Walt. He also provided verbal submissions to the technical advisors.

Three interim reports were prepared by the technical advisors:

1.5 Comments on the Public Protector - Alternative models and relationship with the Courts

1.6 First Summary of Party Positions

1.7 Summary of Public Hearings/Group Submissions

No information was forthcoming from any meeting held under a public participation programme.

2 Terminology

Although there is disagreement as to the future name of the Public Protector, we have used the term Public Protector throughout this report as this is the term used under the interim constitution.

3 Constitutional Principles

The Constitutional Principle applicable to this agenda item is Principle XXIX:

> The independence and impartiality of a Public Service Commission, a Reserve Bank, and Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

PART II - DISCUSSION OF MATERIAL PROCESSED BY THE COMMITTEE

4 General overview

The Theme Committee discussed the office of the Public Protector in some detail during its deliberations. An information seminar given by the incumbent Ombudsman, Judge van der Walt, together with inputs from the technical advisors and political party submissions, gave rise to a list of questions that were sent to organisations in civil society. These concerned the following issues:

4.1 To what extent should the office of the Public Protector be included in the final constitutional text?

4.2 What should be the title of the office?

4.3 What qualifications should the Public Protector have?

4.4 What should be the tenure of his or her office?

4.5 Should the Public Protector be complaints-drive or initiative-driven, or both?

4.6 Should the Public Protector have jurisdiction over the private sector?

4.7 Should the Public Protector have jurisdiction over the courts?

4.8 What should be the relationship between the national and provincial Public Protectors?

4.9 What should be the relationship with other constitutional structures?

Written submissions were made by the organisations on these points, followed by public hearings.

While there was a considerable amount of agreement on broad issues, the main issues of debate related to

4.10 name of the Public Protector;

4.11 the appointment and dismissal of the Public Protector;

4.12 the tenure of the Public Protector;

4.13 the qualifications of the Public Protector;

4.14 whether the Public Protector should have additional powers, over and above those already present in the interim constitution;

4.15 the ambit of jurisdiction of the Public Protector, whether this should include the private sphere, the courts and traditional leaders;

4.16 the relationship between national and provincial Public Protectors; and

4.17 the need for additional Public Protectors.

These points are dealt with in detail below. Some of the disagreement may refer to matters which do not need to be included in the constitution, but are better left to legislation. Further clarity is required from political parties on the manner in which, and the extent to which, the office and powers of the Public

Protector should be constitutionalised.

5 *Areas of agreement:*

5.1 The office of the Public Protector in the final constitution

5.1.1 Constitutional Principle XXIX requires the final constitution to provide for the office of a Public Protector. There was unanimous support amongst all parties and stakeholders for this.

5.1.2 The constitution need only deal with broad issues relating to the Public Protector. Many of the details of the office of the Public Protector should be left to legislation. However, there was disagreement and a lack of clarity as to where to draw the line between constitutional entrenchment and legislation (see 6.1 below).

5.2 Independence and impartiality:

5.2.1 All parties and submissions agree on the need for independence and impartiality as set out in Constitutional Principle XXIX.

5.2.2 All parties and submissions agree that the Public Protector should be accountable to, and report annually to, parliament.

5.2.3 Appointment and dismissal

The Public Protector should be selected and dismissed by parliamentary process, with formal appointment by the President.

(however see the position of the IFP set out in 6.3.2 in respect of the JSC).

5.2.4 Tenure

5.2.4.1 All parties and a majority of stakeholders agreed on a fixed term of office for the Public Protector. This was felt to be important to gain the trust of citizens and ensure that the office was not vulnerable to the whim of politicians (ACDP, ANC, DP, IFP, NP, FF. Also BLA, GCB, NLC, LRC, HRC).

5.2.4.2 All parties agreed on a seven year term of office (but see 6.3.3 below).

5.2.5 Public findings and openness

There is agreement on the fact that the findings of the Public Protector should be public, although many parties were silent on the issue. The FF was the only party to mention this in submissions. Agreement on the need for openness was expressed in the deliberations of the sub-theme committee. The NP states that the interim constitution and Public Protector Bill (B16D-94) should be the guideline.

5.3 Powers and Functions

5.3.1 Powers set out in the interim constitution:

There seems to be general agreement among all submissions that the Public Protector should have the type of powers contained in section 112 of the interim constitution. The concern is that the government and public administration should be clean, incorruptible and responsive to the Public it serves. In other words, all agree that the office should be able to

5.3.1.1 investigate maladministration, corruption and impropriety in government and public administration;

5.3.1.2 refer any matter to the appropriate authority, person or institution.

5.3.1.3 make recommendations to the appropriate authority, person or institution.

(see further 6.5 below).

5.3.2 "On receipt of a complaint and on his or her own initiative":

There was general agreement that the Public Protector should act on the receipt of complaints and on his or her own initiative. The latter point was stressed by organisations of civil society who said that the fact that people were not used to being able to lay a complaint or felt extremely vulnerable in doing so, meant that investigation "of own initiative" would be an important part of the Public Protector's function (LRC, NLC, CLC). The CLC provided the example of Tanzania where the Public Protector

had travelled the country to establish what the problems of the public were.

5.3.3 Group complaints

There was agreement that the Public Protector should be able to receive complaints from a group, although the ANC and IFP were the only parties to make reference to this in their submissions. Agreement was reached in the deliberations of the sub-theme committee. The National Land Committee stressed that this was important in rural areas as the problems in rural communities were often problems of the group rather than the individual.

5.4 **Jurisdiction**

There was general agreement that the Public Protector should act as a watchdog on government and the public sector, including the administrative functions of the department of justice. It was also agreed that the judicial function of the courts (the individual decisions produced by the courts) should not be subject to the Public Protector (all parties and submissions) as it would interfere with the independence of the courts. Section 112(2) of the interim constitution was generally approved.

5.5 **Accessibility:**

There seemed to be implicit agreement that the Public Protector should

be accessible. (DP, IFP, GCB, NLC, Van der Walt, Barrie).

6 *Areas of Disagreement and need for further clarity:*

6.1 The Office of the Public Protector in the final constitution

There was both disagreement and/or a need for further clarity about the extent to which the office, powers and functions etc. of the Public Protector should be included in the constitutional text and which details should be left to legislation. This needs to be considered by the Constitutional Committee.

Political parties did not give clear guidance on this issue. The implicit division is that some parties support the view that less detail should be included in the final constitution than is found in the interim constitution (ANC) and others believe that the amount of detail in the interim constitution is necessary (IFP, NP). The NP states that the final constitutional text should not contain less than appears in the interim constitution. The DP was of the opinion that the roles and functions of the Public Protector need to be clearly defined to prevent overlap between the various constitutional structures and institutions, including the Human Rights Commission and the Commission for Gender Equality. Further clarification is needed on these issues.

Stakeholders, questioned on this issue, generally agreed that only the

broad principles and clearly indispensable features of the office of the Public Protector should be included in the constitution (CALS, HRC, LRC & GCB). These included:

6.1.1 the creation of the office;

6.1.2 the independence/impartiality of the office;

6.1.3 its accountability to the legislature (including manner of appointment and dismissal); and

6.1.4 its powers in broad outline, namely, those which were essential to its independence and effectiveness and which should not be able to be removed by ordinary parliamentary majorities.

Additional issues which some stakeholders felt should be included were:

6.1.5 Qualifications (Van der Walt, CLC).

6.1.6 Definition of the Public Protector to be derived from that of the International Bar Association (GCB):

> "An office provided for by the Constitution or by action of the legislature or parliament and headed by an independent, high level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports".

The CALS submission warned that if the powers of the Public Protector and its relationship with other institutions of government were too rigidly regulated in the constitution, it may prevent easy amendment and hence restrain subsequent developments of the office.

6.2 **The name:**

There is disagreement over the name of the Public Protector, with the majority supporting "Public Protector" and a minority preferring "ombudsman".

6.2.1 Support for "Public Protector": ACDP, ANC, IFP, NLC, CALS, HRC. ALS stated that this was a second choice.

6.2.2 No preference shown: DP, LRC.

6.2.3 The NP believes that "the debate on the name should be re-opened".

6.2.4 Support for "Ombudsman": FF, GCB, Barrie, Van der Walt. ALS stated that this was a first choice.

6.2.5 Additional names: "Ombudsperson" - BLA; "Ombud" - LHR.

Those who support "Public Protector" cite the following reasons:

* The sexist connotations of "ombudsman" in the context of a commitment to gender equality. These exist regardless of the Swedish meaning of the term.
* The term "ombudsman" is a foreign term with little meaning to the general public so that there is no need to maintain a known

term and concept.

* The fact that the Public Protector will exist in terms of the interim constitution and a later change of name will be confusing.
* The Public Protector will "protect" the public against maladministration and corruption by the government, especially in the context of the past. It conveys the view that the office will look after the interests of the public. The public will come to understand and accept the inherent limitations of the office.

Those who support "ombudsman" cite the following reasons:

* "Ombudsman" is not sexist as its Swedish translation means "officer" or "commissioner".
* It is an internationally recognised term
* "Public Protector" is misleading as it suggests that the office will "protect" the public, whereas the function is essentially one of impartial mediator.
* "Public Protector"is easily confused with "Public Defender".
* Translations can be confusing. Ombudsman need not be translated.

6.3 Independence:

6.3.1 Party submission contained further suggestions on independence that would need to be debated by all parties:

* The NP endorses the interim constitution re. privileges

and immunities, non-interference and assistance by the state.

* The FF suggests that an indemnity be included for work done in good faith.

6.3.2 Appointment and dismissal

There is disagreement and a lack of clarity on the precise manner of selection.

6.3.2.1 The majority supports the procedure laid down in the interim constitution (ANC, DP and NP. ACDP & FF silent on the issue).

6.3.2.2 The IFP suggests that the Judicial Services Commission (JSC) should play a role in the selection and dismissal process by compiling a short list of candidates for Parliament. The JSC would also conduct the initial investigation into grounds for dismissal and report findings to parliament and the President. Actual removal would be by the President acting on the recommendation of the JSC. The different roles of Parliament and the JSC are not always clear.

In addition, the National Land Committee emphasised that the procedure for selection should be transparent and IFP stressed

that where Provincial Public Protectors have jurisdiction over Traditional Leaders, there should be mechanisms to ensure that traditional leaders have confidence in the person selected (see below under Traditional leaders - 6.6.3).

There was also disagreement and a lack of clarity on the grounds for dismissal, although some parties were silent on the issue.

6.3.2.3 The ANC and NP supported the grounds currently found in the interim constitution, namely misbehaviour, incapacity or incompetence.

6.3.2.4 The IFP supported stronger grounds of mental incapacity or gross misconduct.

6.3.2.5 The LRC called for dismissal on grounds of impeachable conduct.

6.3.3 Tenure

There was some disagreement on the nature of tenure of the Public Protector.

6.3.3.1 Among the stakeholders who supported a fixed term tenure (BLA, GCB, NLC, LRC, HRC), the majority appear to support a term of seven years. Barrie suggested five years.

6.3.3.2 There is disagreement or a lack of clarity on whether the term should be renewable:

6.3.3.2.1 The majority felt that the term should not be renewable: Reappointment will encourage actions aimed at ensuring such reappointment and compromise independence. ACDP, IFP, GCB (but see 6.3.3.2), LRC, BLA, HRC.

6.3.3.2.2 Some thought that the term should be renewable (ALS, LHR, Barrie). The DP supported a renewable term, with the unanimous concurrence of parliament, in the interests of continuity.

6.3.3.2.3 The ANC and FF were silent of this issue.

6.3.3.3 Some stakeholders called for the option of appointment for a longer term until retirement. The GCB also felt that the appointment until retirement age was an option that should be considered. The ALS felt strongly about the issue, concerned that good candidates would not stand for office as a seven year term would effectively damage their careers and leave them unable to find a new job/go back to practice after their tenure expired. Hence

the seven year term should be renewable until retirement or the tenure should extend until retirement.

6.3.4 Budget

6.3.4.1 The IFP suggests that the Public Protector draft and propose to parliament its own budget. The ANC requires that the Public Protector be given sufficient funds to carry out its functions. The importance of an independent budget was also mentioned by the LRC which suggested that the Financial and Fiscal Commission be empowered to address the equitable allocation of resources to the Public Protector.

6.4 Qualifications

Is this a constitutional issue? It is unclear whether the qualifications should be included in the constitution. The ANC seems to support the view that they should not be; the NP believes that they should be (also Van der Walt). CALS suggested that qualifications should not be included as experience with the office may change the way in which the legislature perceives the required qualifications.

What is the debate? There were two views on the type of qualifications necessary for the position of Public Protector: Those who believed that legal qualifications were necessary and those who felt that alternative qualifications could be sufficient.

6.4.1 Legal qualification only: Some of the submissions stated that legal qualifications were necessary to the nature of the job: investigative skills, problem analysis independence etc. (IFP, FF, Van der Walt, GCB, Barrie).

6.4.2 Qualifications required in the interim constitution: The ACDP, DP NP, LHR and HRC agree with the qualifications as set out in the interim constitution. This provides for legal qualifications or experience in public administration or finance.

6.4.3 Additional qualifications.

6.4.3.1 CALS also mentioned that experience in managing large institutions may be a sufficient qualification.

6.4.3.2 The BLA, CLC and LRC felt that candidacy should not be drawn from lawyers only. The ALS shared this view, stating that the person should be a lawyer, but that this should not exclude candidates from other disciplines.

6.4.3.3 The LRC felt that the person should have a sound understanding of the underlying social and administrative consequences of actions in the public administration.

6.4.3.4 The NLC stated that the person should have a broad understanding of rural issues.

6.4.3.5 All felt that the personal qualities of the person were crucial. the person should be respected, independent, with integrity etc.

Some submissions suggested that additional skills can be obtained though the employment or co-option of appropriate persons (FF, CALS, GCB, LRC).

6.5 Powers and Functions

Several submissions suggested that additional powers be given to the Public Protector. This section lists those powers and provides some guidance as to whether the parties believe that these are issues to be included in the constitutional text or in legislation.

6.5.1 Systemic problems - *Inclusion in the constitution should be considered*

Although not explicit in most of the submissions, there seems to be agreement on the need for the Public Protector to investigate systemic problems in the administration. Some felt that this would lead naturally from the investigation of complaints (Ombudsman, GCB). Clarification on consensus on this is required from the NP.

Both the ANC and CALS made direct reference to this in their submissions. The ANC stated that the Public Protector should endeavour to identify the systemic causes to the act or omission complained of. CALS made reference to the need to investigate systemic problems arising from individual complaints. The NLC commented that problems in rural areas are often problems of entire communities.

6.5.2 **Powers of investigation** - *to be considered for the constitution*

While there is agreement on the need for effective powers of investigation, there is some disagreement and lack of clarity on the extent of the Public Protector's powers of investigation and the nature of their entrenchment in the constitution. It was suggested by the sub-theme committee that these powers be included in the constitution in general terms only. For example: "the Public protector shall be given the powers necessary for the effective performance of his or her functions".

Specific recommendations, although not necessarily for the constitutional text, included:

6.5.2.1 The IFP supported the power to compel the appearance of witnesses and the production of documents through a sub-poena which could be

enforced by referral to a competent court.

6.5.2.2 The GCB - powers to search and obtain documents essential to carrying out functions.

6.5.3 **The power to litigate** - *to be considered for the constitutional text*

There was some support for the Public Protector being able to take matters to court.

6.5.3.1 The IFP felt that he or she should be able to bring proceedings to ordinary courts for remedy of the wrong, compensation for victims or modification of offending procedures, as well as to the Constitutional Court to challenge the validity of a law or regulation.

6.5.3.2 The HRC and CLC felt that the Public Protector should be able to take matters to court if necessary. The CLC felt that mediation was insufficient to set authoritative, normative standards.

6.5.3.3 The LRC said that the Public Protector should be able to go to court to enforce the performance of his or her own powers. This was seen to be particularly important with respect to 6.5.6 below.

Other organisations were specifically opposed to litigation (GCB).

6.5.4 **The Power to Refer** - *to be considered for the constitutional text*

Several submissions called for wider powers of referral than are contained in the interim constitution (GCB, LRC). For example, the power to refer to the Human Rights Commission should be expressly stated.

6.5.5 **The power to direct disciplinary hearing** - *to be considered for the constitutional text*

The LRC suggested the Public Protector should have the power to override decisions where the power to effect discipline is abused. In other words, where there is a consistent refusal to discipline persons found "guilty" of maladministration in a particular department or office, the Public Protector should be able to direct a hearing in that office or department. This power should be exercised in consultation with the Human Rights Commission and with the approval of the Public Service Commission. It should be enforced through litigation. See 6.5.4.3.

6.5.6 **The power to request publication of reasons by a person, entity or institution** - *to be considered for the constitution or legislation*

The GCB suggests that the Public Protector should be empowered to require written reasons as to why a particular

department, person or institution declines to follow his or her recommendation. These reasons should then be tabled in parliament or published in the press. The LRC supports this view.

6.5.7 **The power to review laws for constitutionality and make recommendations for legislative change** - *to be considered for the constitution or legislation*

The IFP calls for this power in respect of laws in force before the commencement of the constitution. Recommendations should be made to parliament or the President.

6.5.8 **The Power to suspend prescription and statutory notice periods** - *legislation only*

The LRC suggests that the Public Protector should have this power of suspension pending his investigation.

6.5.9 **The power to protect against victimisation** - *for legislation only*

Both the GCB and LRC suggest that the Public Protector should be empowered to protect complainants or any affected person (including the alleged transgressor) from victimisation.

6.5.10 **Complaints by a third party** - *for legislation only*

The GCB suggested that provision should be made for the referral of complaints by a third party such as a member of parliament or any responsible person acting on behalf of an aggrieved party.

6.6 Jurisdiction

6.6.1 The private sector:

There was some support for the jurisdiction of the Public Protector being extended to the Private Sector. However it was generally felt by the sub-theme-committee that this was a matter for legislation.

6.6.1.1 The IFP indicated some support for private sector jurisdiction.

6.6.1.2 The NP said that the definition of "public function" in the text of the interim constitution needed to be clarified.

6.6.1.3 The LRC called for the extension of jurisdiction to bodies performing public functions on the basis of four criteria:

* whether the body fulfilled a public purpose;
* whether the laws of privilege or institutional independence mitigated against this;
* the effect that the Public Protector would have on

the body; and

* where no other remedy was available.

Institutions which fell under these criteria would include deposit-taking institutions, provident or pension funds, medical scheme or unit trust schemes; insurance companies; and bodies with control over professions.

Other submissions felt that there were sufficient mechanisms in the private sector. (GCB, BLA, CLC, LHR, Barrie).

6.6.2 **The Courts:** There was general agreement that the jurisdiction of the Public Protector should not extend to the judicial function of the courts. However the DP suggested that if the usual safeguards of Appeal and Review failed then provision could be made for the Public Protector to draw the attention of the Chief Justice or the Judge Presidents of the Provincial Divisions of the Supreme Court to matters which, in his or her opinion, constituted maladministration within the system of justice. Moreover the ALS stated that the Public Protector should be able to intervene in such matters as unnecessarily delayed judgements. The LRC felt that the jurisdiction of the Public Protector should extend to Rules of Court and practice rulings by judges as these were matters did not address the merits of an

individual case, and the LHR suggested that the jurisdictic include such matters as the allocation of cases to judge guidelines on bail and the disbursement of legal aid.

6.6.3 **Traditional Leaders:** During the course of the discussions, th issue of the relationship between traditional leaders and th Public Protector was raised. While there seemed to be genera agreement in the various submissions and public hearings tha traditional leaders could and should be subject to the Publi Protector in the carrying out their public and administrativ functions, the concern was raised by the IFP that traditiona leaders may perceive the Public Protector as a threat to the traditional roles as mediators within the community, and henc to the institution of traditional rule. It was felt that Publi Protectors would not necessarily understand the institution c traditional law.

To resolve this all parties agreed that the matter should b treated with sensitivity and understanding. The IFP suggeste that the provincial House of Traditional Leaders be included i the selection process of a provincial Public Protector havin jurisdiction in respect of traditional communities. The IF suggested that this may be an additional provincial Publi Protector with special jurisdiction over traditional communities. I

general, Public Protectors should work in co-operation with the chiefs and traditional leaders where possible.

A further question that was raised was whether the traditional leaders fulfilled the role of Public Protector in their communities. Traditional leaders are seen as "protectors" of their communities. This was disputed in so far as Public Protectors are not part of the system of administration or government, whereas many traditional leaders are. An example was given of Ghana where the traditional "ombudsman" was a commoner who interceded with the rulers on behalf of the people. Nevertheless, the IFP suggested that there was a twofold need in South Africa:

6.6.3.1 to "protect" traditional communities against the onslaught of the "modern world"; and

6.6.3.2 to protect the community and the individual from maladministration and abuse of power by traditional leaders.

All other verbal submissions felt that traditional leaders were in the same position as any government official, insofar as a negotiated/mediated settlement would always be a first option. If opposition was met, the Public Protector would proceed to investigate any complaint fearlessly and independently.

The LRC and GCB stated that the text of constitution would have to be carefully worded to include traditional leaders. The LRC said that they would not necessarily fall within the definition of "level of government" of section 112(1)(a)(i) and the GCB said that the jurisdiction and powers of the Public Protector should be defined broadly enough to include bodies whose existence is recognised in customary law.

6.7 National and Provincial Public Protectors

All parties appear to agree that there should be national and regional Public Protectors, and that the latter may be established by provincial legislation to act as watchdogs over the administrative system of provincial government. The ACDP calls for local Public Protectors, stressing the need for accessibility of the office. However there is a major division on the relationships between, and the powers of, national and regional Public Protectors.

6.7.1 The IFP states that the national and regional Public Protectors should have separate spheres of influence and jurisdiction. The national Public Protector should not act with respect to areas of regional autonomy, except in consultation with the Public protector of the Province concerned. The National Constitution should not dictate the role and scope of the regional Public Protector.

6.7.2 The ANC states that the National Public Protector may operate

at all levels of government. Provincial laws could establish provincial Public Protectors, but provincial legislation should not derogate from the powers of the national Public Protector and the national and regional Public Protectors shall work in a consultative manner.

6.7.3 The DP suggests that a way of resolving the potential conflict between national and regional Public Protectors would be to delineate areas of exclusive and concurrent responsibilities of the various offices. The provincial Public Protectors will operate on a provincial and local level, with the national Public Protector concerned with the administration of the central government. The work of Public Protectors should be guided by the areas of concurrent exercise of powers.

This matter was also discussed in public hearings and submissions from organisations of civil society. There was a majority and a minority view:

6.7.4 Most submissions supported one national office with provincial/ regional branches. They were concerned with national standards, costs and efficacy, as well as the ability of the national office to function authoritatively in the provinces. (CLC, GCB, LRC, Van der Walt).

6.7.5 Others felt may be divisions of the office along lines of regional and national powers was acceptable with structures of co-

operation and liaison (LHR, BLA, HRC).

CALS felt that the relationship between national and provincial Public protectors should not be defined, and should be allowed to develop over time. If there was a need to define in the Constitution, the present sections 114(1) and (2) were sufficient.

6.8 **The Nature of the Office - One or many Public Protectors**

6.8.1 A important issue raised in the public hearings was that of whether there should be separate Public Protectors for the police, military etc. There was unanimous opposition to this. Reasons cited included:

6.8.1.1 The independence of these Public Protectors would be quickly compromised as they became immersed in the culture of the police of military;

6.8.1.2 An outside perspective on fairness was required;

6.8.1.3 An overall view of the public sector with the setting of national standards and national principles was important;

6.8.1.4 It would involve unnecessary duplication of cost; and

6.8.1.5 The argument that outsiders did not "understand" the police of military merely amounted to a mystification of the institutions.

6.8.2 A second issue raised by the HRC was the suggestion that the office of the Public Protector be established not as an in individual, but as a team or commission allowing for specialisation and diversification. This was supported by the IFP who were particularly concerned that provincial Public Protectors be appointed with specialist knowledge of traditional communities. However this was thought not to be an issue for the constitutional text.

6.9 **Relationship with other structures:** - *not a constitutional issue*

Several stakeholders felt that the relationship between the Public protector, the Human Rights Commission and the Commission for Gender Equality should not be formalised in the constitution, but should be left to evolve and to develop their own methods of referral and liaison.

7 ***Suggestions for the way forward:***

The areas of agreement are clearly listed above. In respect of the areas of disagreement, it appears that some of these are obviously issues that need only be dealt with in legislation. These should be identified and discarded. The remaining issues can then be settled.

The most compelling issues which remain for negotiation and debate within the Constitutional Committee appear to be:

7.1 A decision on principles of inclusion in the constitutional text;

7.2 The name;

7.3 The details of appointment and dismissal;

7.4 The details of tenure;

7.5 Whether qualification go into the constitutional text and how;

7.6 Which additional powers and functions go into the text;

7.7 Jurisdiction, especially with respect to traditional leaders;

7.8 The relationship between national and provincial Public Protectors; and

7.9 Whether additional Public Protectors are required in the text.

CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO	:	**ALL MEMBERS OF THE CONSTITUTIONAL COMMITTEE AND THE SUBCOMMITTEE**
FROM	:	**EXECUTIVE DIRECTOR**
DATE	:	**29 OCTOBER 1995**
RE	:	**COMPETENCIES & THE SENATE**

The draft on the Competencies and the Senate, includes as best as possible, the ideas of all political parties. It should however be noted that the submission from the National Party was received at approximately 16h30 on Wednesday 25 October 1995 by which time the Technical Advisors to TC2 and TC3 had completed their drafts.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

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