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**CONSTITUTIONAL
ASSEMBLY**

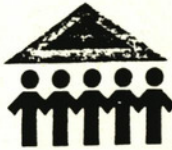
**MANAGEMENT
COMMITTEE**

**MONDAY
6 MAY 1996
(08H00)
V16**

**TECHNICAL REFINEMENT
ISSUES**

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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Management Committee
FROM: Executive Director
DATE: 5 May 1996
RE: Schedule 4

1. The following items on Schedule 4 are being referred to the Management Committee for further consideration in the light of the circumstances which are set out in paragraph 2:
 - 1.1 whether the power of the provinces concerning education should exclude all tertiary educational institutions or only universities and technicons.
 - 1.2 whether the provinces should have power in relation to property transfer fees;
 - 1.3 the provinces' role in respect of motor vehicle licence fees.
 2. These matters are being referred to the Management Committee because the multi-lateral which dealt with competencies was unable to reach agreement about whether these matters ought to be placed on Schedule 4. The reason for the failure to reach agreement was that further information was required from the departments concerned.
 3. The Management Committee is requested to assist by providing process directions.
-

H EBRAHIM
EXECUTIVE DIRECTOR

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P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487. E-mail: conassem@iaccess.za



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THE NEW CONSTITUTION



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TECHNICAL COMMITTEE 4 AND THE TECHNICAL REFINEMENT TEAM

TO: Members of the Management Committee
FROM: Technical Committee 4 and the Technical Refinement Team
DATE: 5 May 1996
RE: Changes to Section 35 (1)(e)

1. At the meeting on Saturday 4 May of the Technical Refinement Team with representatives of the political parties to verify the draft text of the Constitution of the Republic of South Africa Bill, 1996, members of the Technical Refinement Team and Technical Committee 4 were requested to prepare a draft formulation of section 35(1)(e) for possible inclusion as an amendment to the Bill.
2. Section 35(1)(e) presently reads:

"35(1) Everyone who is arrested for allegedly committing an offence has the right -

 - (e) at the first court appearance after being arrested, to be released unless charged and the court orders further detention; and*
 - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."*
3. The purpose of this right is to ensure at the first court appearance that there is a charge against a detained person before a court orders any further detention. Whether or not a court orders further detention or releases the accused pending trial depends on paragraph (f). The concern was expressed that by the time of the first court hearing there may be insufficient time to prepare a complete charge sheet.

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P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487. E-mail: conassem@iaccess.za



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4. Possible Re-formulation of section 35(1)(e)

"35(1) Everyone who is arrested for allegedly committing an offence has the right -

(a)....

(e) at the first court appearance after being arrested to be informed of any charge against them, failing which, to be released;

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TECHNICAL REFINEMENT TEAM

TO: Members of the Management Committee
FROM: Technical Refinement Team
DATE: 5 May 1996
RE: Memorandum re: Proposed definition of "organs of state"

Definition

236 (1)

In the Constitution, unless the context indicates otherwise, "organs of state" means -

- (a) *any department of state or administration in the national, provincial or local sphere of government; and*
- (b) *any other functionary or institution -*
 - (i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
 - (ii) *exercising a public power or performing a public function in terms of legislation.*

[(2) Despite subsection (1), "organ of state" does not include judicial officers or courts.]

Explanation:

The proposed definition is different from the definition previously included in the Draft Bill of 3 May 1996, which was, amongst other things, regarded as too wide by the relevant sub-committee. It mentions departments of state or administration in spheres of government in subsection (a), as the most obvious meaning of "organs of state". Subsection (b) is narrower than the previous definition, because it does not refer to "any functionary or institution exercising a power or performing a function in terms of ...any legislation", but refers to "a public power" and "a public function".

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

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Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487. E-mail: conassem@iaccess.za

In terms of this definition universities, for example, are most likely to be included, as institutions exercising a public function in terms of legislation. On the other hand, churches that may be established by or functioning in terms of legislation are not included, because they do not exercise a public power or perform a public function. Obviously the courts will have to decide whether some institutions or functionaries between the more obvious examples, are included or not, because absolute specificity and predictability is not possible. The context of the constitutional text will influence such decisions.

Courts

A decision may have to be taken as to whether courts are to be regarded as organs of state.

Certain clauses of the Interim Constitution (for example, Section 4(2)) indicate that courts are organs of state. Some sections of the new Bill indicate that they are, whereas others indicate that they are not. For example, Section 55(2)(b) indicates that courts are organs of state, whereas Section 165(4) indicates that they are not. Section 181(3) may indirectly indicate that they are not, because courts cannot be expected to assist and protect state institutions supporting constitutional democracy in the same way that, for example, state departments can do so.

Subsection (1)(b) of the above proposed definition would indicate that courts are included. Therefore, should the decision be that courts are not included, subsection (2) has to be included in the definition.

Consequential amendments regarding courts

Depending on whether courts are to be organs of state, some consequential amendments will be necessary in the text.

If courts are excluded from the definition, the reference to "*other than a court*" has to be removed from Section 55(2)(b).

If courts are not excluded from the definition of organs of state, Section 165(4) will have to be amended by including the word "*other*" before "*organs of state*".

Furthermore, the word "*other*" will have to be included before "*organs of state*" in section 165(4)(a).

Other consequential amendments

1. Section 217(1) and (2): "Procurement"

The meeting on 4 May decided that "organ of state" in Section 217 should cover -

- (i) all national and provincial state departments and administrations and all legislative bodies;

- (ii) all municipalities; and
- (iii) any other institutions identified by national legislation.

The phrase "an organ of state in the national, provincial or local sphere of government or any other institution identified by national legislation", read in the context of the proposed definition, covers the three categories mentioned above.

Replace section 217(1) and (2) with the following:

- 217 (1) *When an organ of state in the national, provincial or local sphere of government, or any other institution identified by national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
- (2) *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection implementing a procurement policy providing for -*
- (a) *categories of preference in the allocation of contracts; and*
 - (b) *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*

2. Section 181: State institutions supporting constitutional democracy

In terms of the proposed definition of organs of state, the institutions in Chapter 9 are organs of state. Therefore it would be technically more correct to include the word "other" in Section 181(3), which will then read:

Other organs of state... must assist and protect these institutions to ensure the independence... of these institutions.

