2/3/4/52

CONSTITUTIONAL ASSEMBLY

MANAGEMENT COMMITTEE

THURSDAY
6 APRIL 1995
08H00
V16

CONTENTS

CONSTITUTIONAL ASSEMBLY

MEETING OF THE MANAGEMENT COMMITTEE

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

Date : **Thursday 6 April 1995**

Time : **08h00 - 10h00**

Venue : **V16**

AGENDA

1. **Opening**
2. **Minutes: Pages 2 - 4**
3. **Matters Arising:**
   - **3.1 Extra Time for Constitutional Assembly: No Documentation**
4. **Theme Committee 6.4 Drafts: No Documentation**
5. **Theme Committee 1 Advert: Page 5**
6. **Tabling: Theme Committee 6.3 Report on Blocks 3 - 4: Pages 6 - 48**
7. **Tabling: Preliminary Submissions from CPG: Pages 49 - 55**
8. **Meeting of CA: No Documentation**
9. **Date of Next Meeting: No Documentation**
10. **AOB**
11. **Closure**

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

Enquiries : Ms MM Sparg, Tel 245-031, Page 418 4616 code 6970

Complete Document Embargoed until 08h00 6 April 1995

CONSTITUTIONAL ASSEMBLY

MINUTES OF MANAGEMENT COMMITTEE MEETING THURSDAY 30 MARCH 1995 (AT 08H00)

PRESENT

Ramaphosa MC (CHAIRPERSON)

Chabane OC
Marais PG *
Moosa MV
Mulder P *
Sizani RK
Smith PF
Van Breda A
Wessels L (Deputy Chairperson)

*(*Denotes alternate standing in for full member)*

Apologies: C. Eglin, B. Mabandla, R. Meyer and C. Viljoen

In attendance:

Ebrahim H, Lilienfeld P, Zondo L, Grové G, Msizi N, Ndziba M and Keegan M.

1. OPENING

1.1 Mr. Ramaphosa opened the meeting at 08h07.

1.2 The agenda was adopted with one addition:

7.1 "Freedom Day Celebrations".

2. MINUTES

The minutes of the meeting of the Management Committee of Thursday 27 March 1995 were adopted with the following amendments:

i. A sentence would be added to paragraph 4.3.2(a) to indicate that Technical Advisors could also pose "crisp" questions for Theme Committees to help them focus their discussions; and

ii. In paragraph 4.5.v., "the particulars on each individual event" would replace "preparations".

3. MATTERS ARISING

3.1 EXTRA TIME FOR THE CONSTITUTIONAL ASSEMBLY

3.1.1 Mr. Ramaphosa reported on the Chairpersons' efforts to secure additional time for Constitutional Assembly work.

3.1.2 The meeting agreed that the Chairpersons would continue to pursue the matter. If additional time were found for the week of 3 April, the Chairpersons would inform the members of Theme Committees and the Constitutional Committee. An additional meeting of the Constitutional Committee would be scheduled on

Friday 7 April if time were available.

3.1.3 The meeting agreed that the Administration would remain vigilant to ensure that parliamentary committees did not meet on Mondays, particularly given parliament's current lighter work load.

3.1.4 Concern was expressed that the Constitutional Assembly needed additional time on an permanent basis. It was agreed that the Chairpersons would also take this matter up with the appropriate parliamentary officers.

4. TABLING; THEME COMMITTEE 5 REPORT

4.1 Mr. Ramaphosa introduced the document entitled *"Theme Committee 5, Report, Blocks 1-4,"* included in the documentation. He highlighted

* The IFP submission on pages 101 - 103, which objected to the Theme Committee's Schematic Summary ; and

* The Theme Committee response on page 104, which requested that the Management Committee discuss how to further handle the matter.

4.2 The meeting agreed that the full report, including the IFP submission and the Theme Committee response, would be forwarded to the Constitutional Committee for its consideration on 3 April 1995. In addition the Theme Committee spokesperson who tabled the report at the Constitutional Committee meeting would be given the opportunity to explain how the Theme Committee had tried to accomodate IFP objections.

4.3 The meeting agreed, however, that the *"Overview of Submissions"* on page 92 would be corrected to show that the NP had given in a submission. This amendment would be included in the report distributed to the Constitutional Committee.

4.4 Concern was expressed that Theme Committee 5 report did not include draft texts, as requested. The meeting agreed that the Constitutional Committee would have to decide on issues in the report before Technical Advisors could begin to draft text. That draft text could be forwarded for discussion at the next meeting of the Constitutional Committee.

5. TABLING: THEME COMMITTEE 6.4 REPORT

5.1 The meeting noted the document entitled, *"Theme Committee 6.4 Draft Provisions for First Report,"* included in the documentation, and agreed that it would be forwarded to the Constitutional Committee for its consideration.

5.2 The meeting agreed that the Technical Advisors for Theme Committee 6.4 would be present when the report was discussed by the Constitutional Committee to answer questions or to receive instructions.

Embargoed until 08h00
6 April 1995

6. CONSTITUTIONAL COMMITTEE AGENDA FOR MONDAY, 3 APRIL 1995

The meeting agreed that the 3 April 1995 meeting of the Constitutional Committee would discuss: *"Theme Committee 5, Report, Blocks 1 - 4"* and *"Theme Committee 6.4 Draft Provisions for First Report."* In addition, Mr. Ebrahim was asked to table a report on the "National Celebrations Committee", for the Constitutional Committee's information.

7. ANY OTHER BUSINESS

7.1 "FREEDOM DAY"

Mr. Ebrahim noted that the Administration might produce additional media for the National Freedom Day celebrations on 27 April 1995, including an additional issue of *"Constitutional Talk"*, posters and leaflets. These would be examined and approved by the Editorial Board, which would be convened for the purpose. Mr. Ebrahim noted, however, that this previously unforeseen expense would require Management Committee approval. The meeting agreed that the matter needed further consideration and that the Chairpersons would continue discussions with the Directorate and would report back to the Management Committee.

8. CLOSURE

The meeting closed at 09h18.

CONSTITUTIONAL ASSEMBLY

3 April 1995

MEDIA STATEMENT

The Constitutional Assembly (CA) will soon be discussing the name of the country, language policy, the flag, national symbols and capitals where the government, parliament, constitutional and appeal courts should be housed.
Because of the importance of these subjects to all citizens, the CA would like to extend a call for submissions by individuals and organisations.
Below, are the topics that should be addressed in the submissions:

NAME OF THE COUNTRY

- What should the name of the country be?

SYMBOLS

- **The flag**: submit designs and explanatory notes of colours and symbols in it.
- **National symbols**: submit designs and explanatory notes.

NATIONAL TERRITORY

As regards national territory:

- Definition of national territory and of provincial boundaries.
- Limits of territorial waters.
- Prince Edward and other Islands.

SEATS OF GOVERNMENT

- In which city or town should the national legislature (parliament) sit?
- In which city or town should the national executive (cabinet and government departments) sit?
- In which city or town should the Constitutional Court sit?
- In which city or town should the Appeal Court?

LANGUAGE

- What official language (s) should the country have at national and provincial levels?
- How should the diversity of languages be protected and promoted?
- What kind of policies should govern the usage of language(s) in and by government and public institutions?
- In which language (s) should legislation - national, provincial or local - should be drafted?

The deadline for submissions is April 28, 1995.

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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.	**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.	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. Selection and Dismissal of PP should be by Parliamentary process.	**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	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 jurisdiction include such matters as the allocation of cases to judges, guidelines on bail and the disbursement of legal aid.

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

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

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.

COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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1995-04-03

The Executive Director
Constitutional Assembly
P O Box 15
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Dear Mr Ebrahim

PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

Preliminary recommendations in regard to a second chamber

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully

CHAIRPERSON

md472

23 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON A SECOND CHAMBER RECOMMENDATIONS - DOCUMENT 4

1. INTRODUCTION

1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 2).

1.2 The Constitutional Principles do not provide for the continued existence of the Senate in the new Constitution. The only reference to a possible second chamber of Parliament is contained in CP XVIII.4 dealing with an alternative in respect of majorities required for amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces. The relevant wording is: ".... if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives ..". It is significant that while there is no certainty in regard to the continuation of the Senate as such, there is reference to the possibility of a second chamber being composed of provincial representatives.

1.3 From the documentation relating to a second chamber of Parliament before the Commission, it appears that there is considerable support for the continued existence of a second chamber. However, there are divergent views on its role, powers and composition, as well as other aspects.

2. INTERIM CONSTITUTIONAL PROVISIONS

Sections 48 to 64 of the interim Constitution deal specifically with the Senate, and sections 55 to 67 relate to matters affecting both the National Assembly and the Senate. The text of these sections is appended for easy reference.

3. DISCUSSION

3.1 Purpose of a second chamber

3.1.1 It is necessary to clarify the purposes a second chamber might fulfil in order to justify its institution and continued existence. Agreement in regard to such purposes is necessary for the formulation of other provisions required to give effect to these, such as the composition, powers and role of the second chamber. The specification of purposes also provides a measure for determining whether a second chamber is in fact functioning effectively.

3.1.2 It is generally accepted that in a national legislature a second chamber can serve either one or both of two main purposes, in both unitary and federal states, namely

(a) to provide internal control over governmental actions, especially in the legislative process, and

(b) to broaden the system of representation, for example to provide specifically for the representation of subnational units (regions, provinces, or states), or to include other significant interests in the society.

In regard to (a) it is argued that a second chamber helps to prevent flawed legislation from being passed by a single chamber. Nor does the first chamber have unchecked power that could threaten the freedom of individuals or minorities. The second chamber in fact provides a second opinion on matters dealt with by the first chamber. Even by exercising a delaying power, it could compel a government or a first chamber to reconsider a matter or to amend its proposals. Such a delay would also focus the attention of the public on the matter and encourage public debate which could influence the final outcome. It therefore enhances the quality of democracy.

In regard to (b) it is argued that second chambers can represent interests and views that might otherwise be ignored or subordinated (for example, rural versus urban interests; or less populous regions versus those with large populations) and which should be given the opportunity to make their voices heard in the process of government; or where distinctive and significant interests (such as those of regions, provinces or states) cannot be adequately accommodated in the system of representation employed in the other chamber.

In the case of South Africa, where the national legislature has the power to override provincial legislation in certain circumstances in respect of all Schedule 6 functional areas, the checks and balances that a second chamber could provide, might seem to be particularly appropriate.

3.1.3 The Commission is of the view that the provision of a second chamber in the South African Parliament would be justified if it is composed and empowered in such a way that it could effectively fulfil the purposes discussed in paragraph 3.1.2.

The Commission is of the opinion that the representation of provincial interests is of particular importance in view of the discussion in paragraph 3.1.2, and that this should be the overriding consideration in determining the need for a second chamber. It

therefore recommends that a second chamber of Parliament be retained, but that it be structured as discussed below.

To accommodate the obligation on the Commission to consider the provisions of the interim Constitution, and to facilitate the drafting of provisions for the new Constitution, the discussion will be based on the present constitutional text relating to the Senate.

3.2 Composition of the second chamber

3.2.1 Section 48(1) provides that the Senate shall be composed of 10 Senators for each province, nominated by the parties represented in a provincial legislature. Section 48(2) stipulates that the nominations shall be in accordance with the principle of proportional representation as determined by the formula described in the section.

3.2.2 The provision of an equal number of members for each province is in accordance with general international practice for the representation of states/provinces in a second chamber and is also regarded as suitable for South African circumstances. No cogent reasons have been brought to the Commission's attention why this allocation should change in the new Constitution.

The possibility of reducing the number of members in the second chamber has been raised, but the Commission must caution that this could result in there being insufficient members to participate effectively in the various structures of Parliament, especially if the role of the second chamber itself is to be enhanced.

3.2.3 The Commission does not regard it as being within its jurisdiction to express a view in regard to the representation of other interest groups in the second chamber, but draws this to the attention of the Constitutional Assembly, which may wish to pursue the matter. It should be borne in mind, however, that the determination of interest groups qualifying for representation could be a controversial matter. In addition, such representation could pose serious problems in satisfying criteria for democratic accountability.

3.2.4 In terms of the interim Constitution, members of the Senate have to be nominated by political parties. This could have the effect that senators regard themselves as party representatives, and are also regarded in this light by the public. In a Parliament where the representation of political parties in the first chamber is largely replicated by the representation of parties in the Senate, a situation could be created in which senators are obliged to follow the directions given by their party caucuses. The Senate therefore becomes no more than a rubber stamp for the first chamber. In such circumstances the Senate would obviously not be fulfilling any distinctive purpose and would become superfluous.

The Commission is consequently of the opinion that the new Constitution should contain provisions that clearly provide for provincial representation in the second chamber (CP XVIII.4) and for its members to have sufficient independence so as to enable them to represent their provinces effectively. This is discussed below.

3.2.5 More independent and effective representation of the provinces could possible be provided by -

(i) direct election in each province of members of the second chamber. This would probably be the most democratic way to ensure representation of the provinces in the second chamber. The feasibility of such a procedure requires further investigation; or

(ii) representation of the provinces by elected members of the provincial legislatures nominated by the legislatures on a proportional basis. This method would create a much closer relationship between members of the second chamber and their province's legislature, and could also allow for the interchangeability of members of the second chamber in Parliament and members of the provincial legislature; or

(iii) requiring parties to submit lists of candidates for nomination to the second chamber together with their lists of candidates for election to the provincial legislatures. This would at least identify the candidates for the second chamber beforehand, but would not directly influence their appointment as this would still be by proportional representation according to the number of votes registered for each political party; or

(iv) nomination of members of the second chamber by the provincial legislature on the basis of proportional representation instead of by the parties. This method would not differ materially from the present method provided in section 48, but may serve to strengthen their identity as the selected representatives of the province and its legislature and less as representatives of political parties; or

(v) representation of the province in the second chamber by the requisite number of members drawn from the province's Executive Council. The feasibility of this method would require careful investigation, however, in the light of demands likely to be made on members of provincial Executive Councils simultaneously attending to parliamentary duties.

3.2.6 The Commission is of the view that, at this point in our constitutional history, the method described in paragraph 3.2.5 (ii) above could provide an effective form of representation for the provinces in the second chamber. In effect this system combines elements of the other methods described.

The Commission therefore recommends that this method be considered by the Constitutional Assembly.

3.2.7 Whatever the system adopted for appointment to the second chamber, the members' relationship with the provincial legislatures would be strengthened if they were required to report to the provincial legislature from time to time in regard to their activities and efforts to promote the interests of their provinces at national level. This would make their role as provincial representatives much more meaningful and accountable. Accountability could be strengthened further by making provision for the recall of members by their provinces if deemed to be performing unsatisfactorily. The Commission recommends that provisions to this effect be incorporated into the new Constitution.

3.3 **President and Deputy President of the second chamber**

Section 49 of the Interim Constitution provides for the election of the President and Deputy President of the Senate and deals with other non-contentious matters relating to these offices. Similar provisions will have to be incorporated into the new Constitution if a second chamber is retained.

3.4 **Qualification for membership of the second chamber**

Section 50 specifies that no person shall be qualified to become or remain a senator unless he or she is or remains qualified to become a member of the National Assembly. These qualifications are prescribed in section 42 which should be retained. However, the section does not provide for residential qualifications. Nor does section 48 require that a senator should be ordinarily resident in the province that he or she represents. The CPG considers it essential that a member of the second chamber should be ordinarily resident in the province that he she represents. A similar opinion has been expressed by the Commission in respect of members of the provincial legislatures (paragraph 3.10.3 of Recommendation 3). The Commission recommends that provisions similar to those contained in section 50 should be incorporated into the new Constitution. However, if the recommendation in paragraph 3.2.6 above is adopted, the section may be omitted. If not, it should be amended to provide for residential requirements for members of the second chamber similar to those provided for members of provincial legislatures.

3.5 **Vacation of seats by members and filling of vacancies**

3.5.1 Section 51(1) stipulates that a senator shall vacate his or her seat if he or she ceases to qualify, resigns or is absent without leave for 15 consecutive days. This provision should be retained.

3.5.2 The Section [paragraph (b)] also provides for the vacation of a seat if a senator ceases to be a member of the party which nominated him or her as a senator. The issue is similar to that relating to members of the provincial legislatures dealt with in paragraph 3.11.2 of Recommendation 3. The Commission is of the opinion that democratic principles would be better served by the deletion of the provision which terminates membership of the second chamber if the member ceases to be a member of the party which nominated him or her. This recommendation will fall away if members of the second chamber are nominated by provincial legislatures instead of by parties, as recommended in paragraph 3.2.6.

3.5.3 Section 51(2) provides for the filling of vacancies in the Senate by nomination by the party which nominated the vacating senator. The provision will have to be amended if the recommendation in paragraph 3.2.6 above is adopted.

3.5.4 Section 51(3) provides that if a provincial legislature is dissolved, the senators from the province in question shall vacate their seats and that the vacancies shall be filled in terms of section 48(1)(a). The Commission is of the view that, in the event of a provincial legislature being dissolved, the province's members in the second chamber should vacate their seats. The vacancies should then be filled on the basis recommended in 3.2.6.

3.5.5 In the event of any other vacancies occurring in the second chamber before the expiry of the normal term of office, persons nominated to fill such vacancies should be appointed only for the balance of the unexpired period.

3.6 **Oath and affirmation by members of the second chamber**
Sittings of the second chamber
Quorum

These matters of a procedural nature are provided for in sections 52 to 54. The new Constitution should provide for similar provisions.

4. DISCUSSION - THE NATIONAL ASSEMBLY AND THE SECOND CHAMBER

4.1 Powers, privileges and immunities of Parliament and benefits of members
Parliament and benefits of members
Penalty for sitting or voting when disqualified by law
Joint sitting of Houses
Rules and orders

These are procedural matters dealt with in sections 55 to 58 of the interim Constitution. The new Constitution should contain similar provisions.

4.2 Ordinary Bills

4.2.1 Section 59(1) provides for the introduction of ordinary Bills in either the National Assembly or the Senate and for their adoption in each House in order to be passed by Parliament. Similar provisions should be incorporated into the new Constitution.

4.2.2 Section 59(2) provides that an ordinary Bill passed by one House and rejected by the other shall be referred to a joint committee consisting of members of both Houses and of all the parties represented in Parliament and willing to participate in the joint committee. After consideration and report on any proposed amendments to the Bill, it shall be referred to a joint sitting of both Houses, at which it may be passed with or without amendments by a majority of the total number of members of both Houses.

This procedure is fair up to the majority requirement at the joint sitting. The Senate is at a disadvantage in joint sittings requiring a simple majority to pass a Bill because of the relative smallness of its membership, namely 90 out of a total of 490 members. It could be argued that as half of the 400 members of the National Assembly have been elected from provincial lists of the political parties, this accommodates the interests of provinces. However, they are members of the National Assembly and their election from provincial lists instead of from national lists is of no practical significance. Moreover, political parties may not be obliged to present provincial lists in future elections.

On the other hand, deadlock-breaking mechanisms should be available in order not to bring government to a complete halt. Investigations of the deadlock-breaking procedures employed in other countries indicate that no absolute procedure has as yet been devised, except for referral of the matter to a constitutional court for judgement. The most effective political mechanism available is to provide for a cooling-off period which may persuade the government to reconsider or amend the Bill.

The Commission is consequently of the opinion that a Bill which has been referred to a joint committee as contemplated in section 59(2) should be reported on to both Houses and if still rejected by one House, should be reconsidered by both Houses after a period of six months. If the Bill is again passed by one House and rejected by the other, it should be referred to a joint sitting of both Houses, at which it may be passed with or without amendments by a majority of the total number of members of both Houses.

4.3 Money Bills

4.3.1 Section 60(1) provides that Bills appropriating revenue or moneys or imposing taxation shall be introduced in the National Assembly only. However, section 60(4) provides that the National Assembly shall not pass such a Bill unless it has been considered and reported on by a joint committee of both Houses. The Senate may not amend any Bill in so far as it appropriates revenue or moneys or imposes taxation [60(6)]. Section 60(7) stipulates that if the National Assembly passes a Bill imposing taxation or dealing with the appropriation of revenue or moneys and the Senate rejects it or proposes amendments to it, or fails to pass it within 30 days after it has been passed by the National Assembly, the Bill shall be referred back to the National Assembly for reconsideration. It may then pass the Bill with or without amendment, and if so passed it shall be deemed to have been passed by Parliament.

4.3.2 While the provisions of this section illustrate the dominance of the National Assembly in respect of money Bills, there are important reasons why such Bills should not be delayed unreasonably. As matters are, the Senate can delay such a Bill for 30 days if it wishes to do so. Further unreasonable delay may be harmful to good government if it should impair the ability to collect revenues or expend moneys.

A problematical situation arises in regard to the ability of the Senate to influence discretionary appropriation of revenues or moneys for provincial activities, and even the determination by law of the share of national revenues to be allocated to the provinces and local governments. In theory the second chamber should protect the interests of the provinces in these matters by using all mechanisms at its disposal. As indicated under paragraph 4.2.2 the interests of good governance dictate that it can at most use delaying mechanisms to achieve reconsideration of a relevant Bill. However, such delays could also be harmful to the activities of the provinces.

4.3.3 It is evident that the distribution of national revenues between the three levels of government will remain an issue for the foreseeable future. The Financial and Fiscal Commission may play an important role in resolving many of the disputes which could arise over money matters. As far as the parliamentary process for money Bills and the role of the second chamber in that process are concerned, no further solutions for breaking deadlocks have presented themselves to the Commission. It is a known fact that the need for money for government activities at all levels is almost infinite, while the sources of revenue are finite. All that could be achieved by any mechanism is to ensure a fair distribution of the available revenue. To this end, the administrative processes preceding the introduction of money Bills should be developed to the extent that as far as possible disputes are resolved before the parliamentary processes commence. Once such a Bill has been introduced, in the National Assembly, the views of the National Government can only be influenced to a certain extent during the procedures prescribed in Section 60. It does not appear to the Commission that the second chamber could be given more powers in respect of such Bills without increasing the possibility that the process may adversely affect efficient and effective governance.

4.4 **Bills affecting certain provincial matters**

4.4.1 Section 61 stipulates that Bills affecting the boundaries or the exercise or performance of the powers and functions of provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses. Such Bills can be passed by an simple majority in each House. The section further stipulates that a Bill, other than a Bill amending the Constitution, which affects the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, must also be approved by a majority of the senators of the province or provinces in question.

4.4.2 The provisions in Section 61 are not very clear. However, what is relevant is that Bills dealing with the exercise of concurrent powers in respect of Schedule 6 functional areas should enjoy the special attention of the second chamber. In effect, in terms of the interim Constitution Parliament can pass Bills in respect of such matters with ordinary majorities in both Houses. Additional protection of provincial interests could be provided by requiring a special majority for such Bills in the second chamber. However, this may be too onerous and in effect elevate every such matter to the level of constitutional changes for which such special majorities are required. The power of the second chamber in regard to provincial matters could be enhanced be requiring Bills of this nature to be introduced in the second chamber only, as the equivalent of the case with money Bills in the National Assembly. The Commission is consequently of the opinion that provision should be made for Bills

dealing with Schedule 6 functional areas to be first introduced in the second chamber. In addition, any such Bills relating to a particular province should also require the approval of the majority of that province's representatives in the second chamber. These requirements would open the way for discussions between the national government and the provinces to address issues and resolve differences before such Bills are considered in the first chamber.

4.5 **Bills amending the Constitution**

4.5.1 Constitutional Principle XVIII.4 provides as follows:

> Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

4.5.2 Section 62(1) provides generally that a Bill amending the Constitution shall require a two-thirds majority at a joint sitting of the National Assembly and the Senate. Section 62(2) further provides that amendments of section 126 (legislative competence of provinces) and section 144 (executive authority of provinces) shall require a two-thirds majority of each House sitting separately. It further provides that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature.

4.5.3 The provisions of section 62 therefore appear to be in accordance with the stipulations of CP XVIII.4 and similar provisions could be incorporated into the new Constitution.

4.5.4 The Commission is of the opinion that certain constitutional principles should be incorporated into the new Constitution to further entrench the constitutional position of the provinces. The following principles are relevant:

CP XVI, CP XX, CP XXI, CP XXII, CP XXIII, CP XXVI

4.6 **Requisite majorities**
Assent to Bills
Signature and enrolment of Acts
Rights and duties of President, etc, in Houses
Public access to Parliament

The above matters are procedural in nature and similar provisions need to be incorporated into the new Constitution.

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