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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE

INDEPENDENT INSTITUTIONS - SIXTH DRAFT
3 OCTOBER 1995

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SIXTH DRAFT - 3 OCTOBER 1995

Status: Processed as per instruction of CC Subcommittee of the 28 September 1995 for further discussion.

Chapter ...

INDEPENDENT INSTITUTIONS

INSTITUTIONS TO PROTECT PUBLIC INTEREST[1]

PUBLIC PROTECTOR

Establishment and functions

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

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

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

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[1] **This is a term for consideration by CC Subcommittee for possible use to refer to:**

Auditor General, Electoral Commission, Public Protector, Human Rights Commission and Commission on Gender Equality.

As suggested by the CC Subcommittee these Institutions have been dealt with separately in this document. Suggestions as to an appropriate term to be used for these Institutions were made at the Subcommittee though no decision was taken. There was a strong feeling that the word Independent to describe these Institutions should not be used.

(4) The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.[2]

(5) Reports issued by the Public Protector in connection with the discharge of his or her powers and functions shall except in exceptional circumstances be open to the public.[3]

Qualifications of the Public Protector and Tenure of Office

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

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

Provincial public protectors/Deputy Public Protectors[4]

3. ...

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[2] **This clause was criticized on a number of points in the CC, viz**

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

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

[3] **A concern was raised in the Subcommittee that the meaning of the term"exceptional circumstances" in the Subsection is unclear. The Subcommittee then agreed that the use and meaning of this term in the subsection shall be flagged for consideration by the Experts.**

[4] **Stands over for discussion on provincial competencies.**

HUMAN RIGHTS COMMISSION

Establishment and functions

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

(2) The Human Rights Commission shall promote the development, protection and attainment of, and respect for, human rights and, generally, the development of a culture of human rights in the Republic. It shall for this purpose have the necessary powers accorded to it by law, including powers to monitor, investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached and to perform research and educative functions.[5]

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[5] **The CC Subcommittee agreed that this clause should be refined but such refinement must consider the passion that accompanied the agreement on the present formulation.**

Appointment of members

5. ..[6]

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[6] There is no agreement among the parties on the method of selection and appointment of commissioners. There are two views, the one supports the approach in section 115(3) of the interim Constitution. The other view calls for the creation of an independent panel to select and recommend persons to the President for appointment as commissioners. Qualifications for members of the Commission also need further debate. These are the two options:

Option 1:

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

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

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

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

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

Option 2:

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

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

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

The Subcommittee has agreed that the appointment procedures to be applied here and those considered in the general provisions namely s11 and removal procedures in s12 shall be considered by the political parties in bilaterals and they shall report back to the Subcommittee.

COMMISSION FOR GENDER EQUALITY[7]

Establishment[8] and functions

6. (1) There shall be a Commission for Gender Equality for the Republic.[9]

(2) (i) The role of the Commission shall be to advance gender equality and all its powers and functions shall be prescribed by national law.

OR

(i) The Commission shall promote the development, protection, attainment of, and respect for gender equality. It shall for this purpose have the necessary powers accorded to it by national law, including powers to monitor, research, educate and advise on issues relating to gender equality.[10]

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7 **The NP noted that it has not agreed to the name used here.**

8 **All parties accept the establishment and constitutionalisation of this Commission, except that the ACDP has not indicated whether or not it wants it to be included in the Constitution. However, the FF accepts this with reservation as it is of the view that there is no real need for this Commission as its tasks could be assigned to the Human Rights Commission, whilst the DP proposes an inclusion of a sunset clause somewhere in the Constitution which would allow for this Commission to be eventually absorbed by the Human Rights Commission once its objectives are realised.**

9 **The CC has agreed to this formulation subject to the finalisation of the debate on the name to be given this institution.**

10 **All the parties are in agreement as to what the general Powers and Functions of this Commission should be. However, the ACDP and NP have slightly different views. The ACDP envisages a Commission dealing with issues broader than gender equality. The NP is of the view that the Commission has to deal with gender issues at first and eventually be broadened to cover other disadvantaged groups and communities.**

Despite the agreement as to what the Powers and Function of the Commission should be,there is disagreement as to whether or not these should be included in the Constitution or not. The

(3) ...[11]

ELECTORAL COMMISSION

Establishment and functions

7. (1) There shall be an Electoral Commission in the Republic.

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

Composition of the Commission

8. The Electoral Commission shall be composed of a minimum of three persons who shall be appointed for a fixed term of office as prescribed by National law.[12]

ANC is against the listing of the Powers and Functions of the Commission in the Constitution, preferring only an inclusion of a clause that defines the role of the Commission in advancing gender equality. The NP and DP prefer inclusion of a broad definition of these. The other parties have not committed themselves to any choice. Section (2) contains options for consideration by the Subcommittee.

The CC Subcommittee still awaits the report from the Beijing Conference and the Bill on the Gender Commission to consider this Subsection.

[11] **There was contention that a range of structures need to be established in and outside of governments, of which this Commission is but one structure. If there is a decision to include a clause to this effect in this Section the Subcommittee may consider this formulation:**

> **"The Commission shall establish a structure or structures in the executive branch of government which shall promote or advance gender equality "**

[12] **The Subcommittee agreed that the duration of the term of office of the Commissioner shall be a matter for consideration by National Law.**

AUDITOR GENERAL

Establishment and functions

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

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

(3) The Auditor General may audit, and report on, the accounts and financial statements of any institution funded from public money, as may be regulated by law.[13]

[(3)][14]

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

Qualifications of the Auditor General and Tenure of Office

9 (1) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office. The Auditor General shall be

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[13] **Agreed to in the Subcommittee, the DP reserving its position.**

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

appointed with due regard to his or her specialised knowledge of or experience in auditing, state finances and public administration, and shall not hold office in any political party or organisation.

(3) The Auditor General shall be appointed for a non-renewable term of not less than 5 years and not more than 10 years.

[(4)][15]

[Assignment of powers and functions and provision of funds

10.][16]

GENERAL PROVISIONS[17]

General principles

11. (1) The institutions **[provided for in this Chapter]**[18] shall be independent, impartial and subject only to the Constitution and the law. They shall discharge their powers and functions without fear, favour or prejudice.

(2) Organs of state shall through legislative and other measures accord the said institutions the necessary assistance and protection to ensure their

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

[16] **It was agreed in the Subcommittee that the previous Section 5 should be deleted. The DP reserved its position.**

[17] **These are provisions that are to be considered for general application to all Institutions to Protect Public Interest.**

[18] **This supposes that the Institutions to Protect Public Interest shall be put in a Chapter of their own.**

independence, impartiality, dignity and effectiveness.

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

(4) The said institutions shall be accountable to Parliament and shall report to Parliament on their activities at least once per year.[19]

Appointments[20]

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

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

(a) nominated by a committee of Parliament ...;[21]

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[19] **This principle was not contained in the now adjusted provisions of the Auditor General, but there does not seem to be any reason why this principle should not apply to that office. All the Principles in this Section can be applied to all the Institutions to Protect Public Interest.**

[20] **The Subcommittee agreed that the options enumerated here as possible Appointment and Removal Procedures shall be considered by the political parties in bilaterals who shall then report to the Subcommittee on their progress.**

[21] **These are the four options suggested at the Subcommittee, as to the composition of such Committee.**

<u>Option 1</u>:

(a) nominated by a committee of Parliament which is broadly representative of the parties in Parliament,

and

(b) approved by Parliament by a resolution adopted by a majority of at least ... %[22] of the members present and voting.

Removal from office[23]

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

(a) ... [24] and participating in the committee; and

Option 2:

(a) nominated by a committee of Parliament composed of one representative from each party in Parliament,

Option 3:

(a) nominated by a committee of Parliament consisting of at least one representative of each party in Parliament,

Option 4:

(a) nominated by an ad hoc or portfolio committee of Parliament,

[22] **There has been no agreement as to the majority required here. The matter requires further debate.**

[23] **The Subcommittee has directed that the Removal Procedures should conform to the Appointment Procedures.**

[24] **These options are the same as those applicable to Appointment Procedure.**

(a) A finding to that effect by -

Option 1:

a committee of Parliament that is broadly representative of the parties in Parliament,

Option 2:

(b) the adoption by Parliament of a resolution supported by at least ...[25] of the members present and voting calling for his or her removal from office.

(2) The President may suspend a person from office when his or her removal from office is under consideration by Parliament, and shall without delay dismiss him or her from office upon adoption of the said resolution.[26]

OTHER INDEPENDENT INSTITUTIONS[27]

FINANCIAL AND FISCAL COMMISSION

Establishment[28]

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a committee of Parliament consisting of one representative of each party in Parliament,

Option 3:

a committee of Parliament consisting of at least one representative of each party in Parliament,

Option 4:

an ad hoc or portfolio committee of Parliament,

25 There has been no agreement regarding the majorities required.

26 This clause can be considered for application to all the Institutions to Protect Public Interest.

27 The CC Subcommittee agreed that these institutions be separated from the Institutions to Protect Public Interest. They have been put together here under the heading, "Other Independent Institutions", for ease of reference. It is suggested that the categorisation and the heading be given further consideration.

28 As required by CP XVII. This is per agreement of TC as reflected in Block 2 of its Schematic Summary. PAC wants relationships between levels of government clearly delineated and resolved first before giving recognition to the Fiscal and Financial Commission. See Block 28

14. There shall be a Financial and Fiscal Commission for the Republic. The Commission shall be independent and impartial and subject only to this Constitution and the law.[29]

Powers and functions[30]

15. (1) The Commission shall apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development. It shall render advice and make recommendations to the relevant authorities regarding the financial and fiscal requirements of the national, provincial and local governments in terms of this Constitution, including -

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TC Report.

29 This is per agreement as reflected in Block 1 of the TC Schematic Summary.

30 There seems to be broad agreement regarding powers and functions of the FCC as reflected in Blocks 3 - 8 of the TC Schematic Summary. However, some of the parties have registered their concern on some issues:

1. The ANC has expressed the view that section 199 of the interim Constitution should be incorporated in the final constitution in an abbreviated and revised form (see Block 33 of the TC Report.
2. The NP is of the opinion that provision should be made for the FFC in much the same way as outlined in the Interim Constitution.
3. The DP does not believe there is any need to change the formulation of section 199, but it has indicated that the primary purpose of the FFC should be to make recommendations on equitable financial and fiscal allocations between different levels of government. (See also Block 27 of the TC Report).
4. The PAC and the Commission on Provincial Government submitted that the Constitution should only contain the framework of the functions of the FFC. (See also Block 28 of the TC Report).

(a) financial and fiscal policies;[31]

(b) equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level;[32]

(c) any form of taxes, levies, imports and surcharges that a provincial government intends to levy;[33]

(d) the raising of loans by a provincial or local government and the financial norms applicable thereto;[34]

(e) criteria for the allocation of financial and fiscal resources; and[35]

(f) any other matter assigned to the Commission by this

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31 **This is per agreement in Block 3 of the Schematic Summary. However, the ANC holds the view that the Constitution should state clearly that the Commission has advisory and mediatory powers which must be reflected in the procedures for drafting budgets and fiscal legislation. The DP believes that there is no change required in this matter. [See also Block 34 of the TC Report).**

32 **This is per agreement in Block 4 of the TC Schematic Summary. The ANC is of the view that the allocation of equities should apply horizontally and vertically; it is concerned that with the present reference there is doubt as to whether that is the case. As regards the term "revenue collected", the ANC requires a clarification of meaning. Other parties are silent, on the issue whilst the DP is of the view that no change is required. [See Block 35 of the Report].**

33 **This is per agreement reached in Block 5 of the TC Schematic Summary, but the ANC argues for a new term that would take away the distinction between taxes. The DP does not see any need for change whilst all the other parties have not commented (See Block 36 of the TC Report).**

34 **This is per consensus reached in Block 6 of the TC Schematic Summary.**

35 **This is per consensus reached in Block 7 of the TC summary.**

Constitution or any other law.[36]

(2) In performing its functions the Commission shall take into account -

(a) the national interest, economic disparities between the provinces as well as the population and development needs, administrative responsibilities and other legitimate interests of each of the provinces;

(b) and the provisions of this Constitution dealing with the allocation of revenue to provinces.[37]

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[36] This is per agreement in Block 8 of the Schematic Summary.

[37] Constitutional Principle XXVII. Par. (b) refers to the substitute for the present section 155(4)(b) (if there is to be such a provision in the new Constitution).

Appointment, qualifications, tenure and dismissal of members[38]

16. (1)

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[38] Blocks 10 - 19 of the Report of the Theme Committee deal with appointment procedure etc set out in section 200 of the interim Constitution, broadly covering:

(i) Method/manner of appointment of a Commissioner;

(ii) tenure of office;

(iii) qualitative requirements of a Commissioner;

(iv) dismissal and removal from office of a Commissioner.

The parties are not in agreement on these issues. It may be advisable to refer the matter to the CC Subcommittee presently looking at a formulation of an omnibus clause that deals with the appointment procedures regarding the Independent Structures of Government *viz*: Auditor General; Public Protector and Public Administration Commission. If such an omnibus clause is agreed to, the following formulation may go into Section 3(1):

(1) The members of the Commission shall be appointed in accordance with the requirements set out in section ... (being the omnibus clause).

The parties have agreed that section 200(2) of the I/C, dealing with the first appointment of the members of the Commission, should not be incorporated in the new draft. See Block 11 of the TC Schematic Summary.

There is agreement on the sentiments expressed in section 200(9) (prohibiting Commissioners from holding an office in a political party/organisation) and section 200(10) (influencing a member of the Commission). The parties have nevertheless expressed uncertainty as to where these issues should be covered in legislation or in the Constitution.

In terms of Constitutional principle XXVII each province must be represented on the FFC.

Reports

17. (1) The Commission shall present regular reports to both Parliament and provincial legislatures as may be prescribed by a national law.[39]

Other provisions[40]

...

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[39] As per blocks 95 and 102. The NP proposes that the Constitution should make provision for the establishment of provincial bodies similar to the FFC to attend to financial and fiscal relations between provinces and local authorities, and that provinces and local authorities should have equal representation in this body.

[40] In Blocks 21 to 26 the Theme Committee Report deals with:

(i) Block 21 - Section 201 of the interim Constitution, providing for Meetings of the Commission.

(ii) Block 22 - Section 202 of the interim Constitution, dealing with Committees of the Commission.

(iii) Block 23 - Section 203 of interim Constitution, providing for co-option of persons by committees.

(iv) Block 24 - Section 204 of interim Constitution, dealing with remuneration for members of the Commission.

(v) Block 25 - Section 205 of interim Constitution, providing for appointment of staff of the Commission.

(vi) Block 26 - Section 205 of interim Constitution, dealing with regulations for the Commission.

No agreement has been reached on any of the matters covered here. Regarding sections 201 to 205, covered in Blocks 21 to 25 of the Report, the ANC is of the opinion that these should be covered by legislation. On section 201, dealing with meetings, the DP concurs, with no other party committing itself. With regards to section 202 to 205 the NP concurs with the ANC; all other parties are silent. Regarding Block 26; on regulations, the parties' views have not been finalised.

CENTRAL BANK[41]

Establishment

18. The South African Reserve Bank, established and regulated by national law, shall be the central bank of the Republic.[42]

Primary objective

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

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

Powers and functions

20. The powers and functions of the South African Reserve Bank shall be

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

[42] **The DP proposed the following formulation:**

15(1) There shall be a South African Reserve Bank which shall be the central bank of the Republic.

15(2) The South African Reserve Bank shall be independent, impartial and subject to this constitution and the law.

those customarily exercised and performed by central banks. Such powers and functions shall be determined by a national law.[43]

PUBLIC ADMINISTRATION COMMISSION

Establishment and functions

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

[(2) The Public Administration Commission shall be independent and impartial.][44]

(3) The functions of the Public Administration Commission shall be to promote the basic values and principles governing public administration set out in Chapter ....,[45] as prescribed by national law.

(4) The function of the Public Administration Commission shall be

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

[44] **As there has been no decision to classify this Commission with any other Independent Institution there is no need for consideration of the removal of this clause to a general clause. For now it is proper where it is.**

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

to promote the values and principles of public administration set out in chapter ... as prescribed by law.[46]

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

[46] This formulation is per instructions of the CC Subcommittee.

M E M O

TO: ***EXECUTIVE DIRECTOR, CA***

FROM: ***PANEL OF CONSTITUTIONAL EXPERTS***

DATE: ***26 SEPTEMBER 1995***

RE: ***AUDITOR-GENERAL***

AUDITOR-GENERAL

This memo covers three issues:
(A) concerns raised by the DP in relation to the present draft on the Auditor-General;
(B) concerns raised by the Auditor-General; and
(C) additional factors that the Panel believes deserve consideration.

A DP's concerns

1. The DP has raised two separate issues:
(i) that the Constitution should protect the Auditor-General from personal liability for certain actions directly; and
(ii)that the Constitution should contain a special provision concerning funding of the Office of the Auditor-General.

2 The DP bases these two proposals on the idea that the position of the Auditor-General is unique. This is because, unlike other institutions designed to check the executive, its daily work involves monitoring the performance of the executive and thus conflicts with the executive are inevitable.

In addition, the DP argues that it is inadequate to protect the Auditor-General in ordinary legislation. Such legislation can be amended easily and, within a parliamentary system of government, the legislature is not sufficiently independent of the executive to protect the office of the Auditor-General adequately.

In the following comments we address both the question whether the office of the Auditor-General is unique in needing this protection and the substantial issue of whether constitutional provisions on the Auditor-General should include the clauses that the DP proposes.

3 Unique nature of the Office of the A-G

3.1 The DP asserts that the work of the Auditor-General is unique in its potential for conflict with the executive. There is no doubt that under certain political conditions the possibility of severe and on-going conflict between the Auditor-General and the executive or certain government departments exists. In such circumstances, the role of monitoring government action may frequently be seen to be unnecessarily invasive by the executive. However, the Auditor-General is not necessarily unique in this regard.

3.2 Potential for serious conflict with the executive seems inherent in the role of each of the institutions envisaged for the new Constitution which are to protect the public interest. The Public Protector is the obvious example. Like the Auditor-General, the Public Protector is expected to investigate government action. Like the Auditor-General, the Public Protector may have to write reports which could be damaging to the political reputations of those responsible for a particular matter.

If the Public Protector is functioning effectively, its daily work will involve as close scrutiny of executive action as that of the Auditor-General.

Moreover, it seems that the work of the Public Protector is no less important than that of the Auditor-General: while the Auditor-General monitors expenditure, the Public Protector monitors the fairness and impartiality of administrative action.

3.3 In considering the inclusion of immunity or budgetary provisions relating specifically to the Auditor-General, the implications of such provisions for the interpretation of the rest of the Constitution should be borne in mind.

In particular, the position of each of the institutions 'for the public interest' should be separately considered. It is inappropriate to give immunities to and/or include special budgetary protection for the Auditor-General and not do the same for at least some of the other institutions for the protection of the public interest.

4 Liability

4.1 The DP proposes the inclusion of the following clause:

> The Auditor-General, and any person acting under the authority of the Auditor-General, shall not be liable in his or her personal capacity in respect of anything done in good faith involving the performance of any duty or in the exercise of any power provided for in this Constitution or any law.

4.2 This is an indemnity clause. Its effect would be to protect the Auditor-General and those working under the authority of the Auditor-General from **personal** liability for the consequences of their work.

For instance, a report on a Department, might point to mismanagement of funds in a particular area and suggest

that the responsible officer had not placed adequate controls in place to control the funds. This assertion might cost the officer concerned a promotion or even his or her job. Although the Auditor-General's report would be based on factual information, conclusions drawn from such information frequently involve value judgements (for instance, about the adequacy of accounting practices). It is conceivable that the officer concerned could bring an action against the Auditor-General in such a case.

Similarly, it may come to the Auditor-General's attention that decisions relating to expenditure were being made on inaccurate information or on information that the Auditor-General believes to be incomplete. The Auditor-General's report would reflect this. Again the parties concerned may wish to take legal action.

In addition, the concept of performance audits is becoming important in public sector auditing. Here the focus would be on, among other things, overall management arrangements, the segregation of duties and the effectiveness of internal controls. Reports made on such issues may be contested.

Such cases may seldom succeed but the threat of such cases will have an undesirable 'chilling' effect on the Auditor-General's work and inhibit the fearless scrutiny of the use of public money. This presumably is the rationale for the protection currently extended to the Auditor-General in section 3(7) of the Auditor-General Act 52 of 1989.

Generally speaking, the legal proceedings covered by proposed clause (and by section 3(7) of the Auditor-General Act) would typically not be the result of conflict with the executive branch of government as such but would rather arise through the close examination of work of individual members of the public service.

4.3 The DP's proposal highlights the importance of protecting the independence of the Auditor-General.

The present draft provisions protect the office of the Auditor-General in certain ways.

cl 11(1): requires the Auditor-General (and other, similar institutions) to be independent, impartial and 'subject only to the Constitution and the law'; the Auditor-General shall discharge its duties 'without fear, favour or prejudice';

cl 11(2): requires the Auditor-General to be given 'the necessary assistance and protection to ensure their independence, impartiality, dignity and effectiveness'
cl 11(3): prohibits any interference with functions;

In addition, the very constitutionalization of the Auditor-General's office requires measures to be taken to ensure that its role can be fulfilled effectively.

(Appointment procedures and security of tenure also protect the ability of the Auditor-General to act independently.)

4.4 It is clear that clause 11 requires legislation to be passed or other measure to be taken that protect the Auditor-General from any actions that would inhibit its work. The danger of personal liability arising from legal proceedings described above will be an inhibition and clause 11 therefore requires some form of indemnity or immunity to be extended to the Auditor-General to protect him or her from the threat of such actions.

The essence of the DP's point, however, is that, as framed at present, the protection granted is 'indirect' rather than 'direct'. In other words, they argue that protection for the Auditor-General should exist in the Constitution itself. At the moment, they suggest, only the promise of protection is offered.

The specific question to consider is what the implications of the present clause 11(2) would be if the protection now granted by section 3(7) of the Auditor-General Act were removed. In such circumstances the Auditor-General would be able to challenge the constitutionality of the amending legislation before the Constitutional Court.

However, the requirement that the Auditor-General should be 'independent' and should act without 'fear' (cl 11(1)) and that measures must be taken to ensure this (cl 11(2)) means that the repeal of section 3(7) of the Auditor-General Act would be unconstitutional.

In other words, the protection from personal liability contained in 3(7) of the Auditor-General Act is secured by the present constitutional proposals.

4.5 *Constitutional Principles:* CP XXIX provides that the 'independence and impartiality' of the Auditor-General should be 'provided for and safeguarded by the Constitution'. There are many ways of achieving these goals and the reach of the Constitution in fulfilling this Principle can be judged only when the provisions on the Auditor-General are seen as a whole (including

appointment mechanisms and tenure provisions which have not yet been decided).

Providing an express and direct indemnity against personal liability would be a method of protecting 'independence and impartiality' of the Auditor-General but it is unlikely to be essential to fulfill the requirements of CP XXIX.

4.6 *Comparative examples:* Generally speaking, countries seem to follow one of two approaches to the institutionalization of the work of what we term the Auditor-General. The work of an Auditor-General may be done by court-like institution, for instance the Federal Court of Audit in Germany (Basic Law article 114(2)). This is typical of continental countries and those that follow continental systems (eg Argentine) and in such cases the Auditor-General or members of the Audit Court will be treated as judges. Thus the members of the German Federal Court of Audit 'enjoy the same independence as judges'. In Germany, the Basic law stipulates that other matters relating to the court are to be regulated by federal legislation.

On the other approach, the office of an Auditor-General is closely linked to Parliament. This is the approach followed in many Commonwealth jurisdictions. (See, for example, Constitution of Malawi article 184, Constitution of Ghana article 187.)

Spain presents an example of a combination of the two models. There the Court of Audit is directly 'answerable' to Parliament and discharges its duties 'by delegation' of Parliament. Members of the Court are given the same protection as judges (Constitution of Spain article 136).

Some countries following the continental approach and which have constitutionalized the Audit Court have an express provision in the Constitution granting the Auditor-General immunities similar to those of a judge. Others do not. As we understand it, once the auditing function is carried out by a court, those people exercising the function will have the usual judicial immunities whether or not they are expressly mentioned.

4.7 *The judiciary and magistrates:* The present draft constitutional provisions on the judiciary contains no direct protection for judges similar to the protection that the DP proposes for the Auditor-General. Judges are afforded considerable protection by the common law. However, this protection does not extend as far as the protection proposed for the Auditor-General. For example, judicial proceedings are considered to be

covered by a qualified privilege. This means that a magistrate, judge, or party to a case usually will not be liable for defamatory statements made during the course of judicial proceedings. However, this privilege is not absolute. Protection will not be extended if the words are not germane to the subject of the proceedings, are not used reasonably, or if the person uttering them was prompted by malice (*Udwin v Day* 1978 (4) SA 976 (C)).

It is not clear whether the DP intends to suggest further protection for judges to match that proposed for the Auditor-General. Their legal opinion suggests not. Instead they justify special protection for the Auditor-General by reference to the daily opportunity for conflict with the executive that the Office entails.

In this context, one should take account of the fact that the positions of members of the judiciary and the Auditor-General are not identical. Although judges may face action for defamation, it is hard to conceive of a situation where a judge could be sued on the basis of a negligent misstatement. The Auditor-General, on the other hand, may face actions for negligent misstatements in cases such as those posited in 4.2 above.

4.8 *Implications for the rest of the Constitution of including an indemnity clause for the Auditor-General:* To single out the Auditor-General for such protection is likely to have a direct effect on the position of members of other 'institutions for the protection of the public interest': the Constitution may be interpreted as intending to withhold such protection from them. As we suggest in 3, we are not persuaded that this would be appropriate.

One solution to this problem would be to include indemnities for the personnel of all such institutions. However, this approach may introduce its own problems. Such provisions may water down the meaning of provisions ensuring 'independence' and the requirement that such people 'act without fear'. The concepts of independence and fearless action are central to the role of a number of constitutional institutions and to the establishment of a constitutional order with a system of separation of powers with effective checks and balances. If the Constitution spells out some elements of independence and freedom from fear and not others, the danger exists that those elements expressly mentioned will be considered the most important.

4.9 The decision whether or not to include a provision such as that proposed by the DP is a political one. In making a decision the following factors may be relevant:

4.9.1 There appears to be political agreement that personal protection from legal actions should be extended to the Auditor-General. The only issue of contention is whether this protection should appear in the Constitution or not.

4.9.2 The present draft provisions require other organs of state to grant an indemnity against personal liability to the Auditor-General.

4.9.3 In the case of a concerted attack on the Auditor-General by the executive and the legislature which results in the repeal of the present protection (in section 3(7) of the Auditor-General Act) the Auditor-General would have recourse to the Constitutional Court.

4.9.4 The Constitutional Principles do not seem to require the inclusion of such a provision.

4.10 If the CA decides to include a provision granting the Auditor-General indemnity against personal liability, other institutions with a similar function should be treated in the same way.

5 Budget

5.1 The DP proposes the inclusion of the following clause:

> Expenditure incurred during the exercise and performance of the powers and functions of the Auditor-General shall be paid from the money which shall be set aside by Parliament for such purpose and from fees raised or money obtained in a manner authorized by law.

[This is a matter also raised by the Auditor-General in his letter of 4 September 1995. In this letter the Auditor-General argues for the retention of section 194(3) of the interim Constitution. Section 194(3) is worded similarly to the DP's proposal.]

5.2 The purported effect of such a clause is to ensure adequate funding of the Auditor-General's Office. Although the DP realizes that such a clause will not actually secure the Auditor-General's budget, it seems to suggest that the strong assertion that the Auditor-General should be funded, combined with the fact that

this would be the only office whose funding is mentioned in the Constitution, would offer important protection for the Auditor-General.

5.3 It is not disputed that adequate funding is essential for the effective operation of the Auditor-General. The desire to include a provision requiring adequate funding in the Constitution reflects a belief that its constitutionalization will ensure funding where the ordinary political process would not. Most often it is implied that it would enable courts to scrutinize the Auditor-General's budget and to order the legislature to set aside a certain amount for the Office. Comparative experience shows, however, that courts are reluctant to intervene in budget decisions. (This point is acknowledged in the DP's legal opinion.) Such intervention could be expected only in extreme cases and, in such cases, the requirement in clause 11(2) that the Office should be able to function effectively would provide sufficient authority for the court to intervene.

5.4 Moreover, and as we explain in 5.3 above, even if it is decided that the Constitution should contain a reference to the Auditor-General's budget, we do not think that the Auditor-General should be singled out for special treatment in this regard.

B Problems raised by the Auditor-General

This part of our memo covers matter raised by the Auditor-General in his letter of 4 September (which incorporates comments made on a fax received on 17 August). The lettering used by the Auditor-General is used here (sections to which no response is necessary are not included). Reference is made to clause numbering in the draft of 6 August. (Where numbering has changed current numbering taken from the draft discussed by the CC Sub-com on 8 September - Fourth Draft 30 September - appears in brackets.)

In summary, we think that the present draft deals adequately with the Auditor-General's concerns. One proposal by the Auditor-General - that relating to tenure - has already been implemented (see 2(g)).

Point 2 (e) Clause 1(4): The Auditor-General claims that the requirement that the Auditor-General report to 'all authorities which have a direct interest in the relevant audit' is unclear and will give rise to legal and practical difficulties and should be deleted.

The Panel does not think that legal difficulties will arise in this regard. Limited as it is to those with a 'direct' interest, this requirement is not very far reaching.

Authorities with a 'direct' interest would cover those with which a report is concerned and any other authorities which grant funding to the subject of the report or to which the institution on which a report has been written is accountable. Thus, in terms of this provision the Auditor-General would be required to submit a report on a Provincial government department to that department, and to the Provincial legislature as well as to the National Parliament (which will have approved provincial funding). The Auditor-General is likely to be able to assess with ease which authorities have a direct interest in any matter that has been investigated.

The practical problems that the Auditor-General anticipates seem unlikely. To send a report to a number of different bodies can surely not be difficult.

There is, moreover, no reason why legislation should not spell out the implications of this provision fully.

(See **C** below for a comment on the relationship of the Office of the Auditor-General to Parliament. There we suggest that this relationship could be made clearer. If this were done, it would become abundantly clear that Parliament would have a direct interest in almost all reports.)

Point 2 (g) Clause 2(3): The Auditor-General thinks that Auditor-Generals should be appointed for non-renewable terms as the possibility of renewal may effect independence. This suggestion has been adopted by the CC Sub-com.

Point 2 (h) Clause 21 [now cl 11]: The Auditor-General is concerned that, if the Constitution deals with all 'independent' or 'public interest' institutions as a group, introducing uniform independence and appointment provisions, for instance, the specific (and unique) role of the Auditor-General's office will be compromised.

The CC Sub-com is aware that this matter must be dealt with very carefully and that it that will need special consideration when the separate provisions are finally put together in a draft of the entire Constitution and when the relationship of such bodies to the legislature and executive can be examined. At present it is not clear, for instance, that the Auditor-General's assertion that the 'Auditor-General is the only Office that has a unique relationship with Parliament' will remain valid under the new Constitution (if, indeed, it is valid at the moment).

In any event, the Auditor-General raises only one specific problem with the present formulation. This is that clause 21 treats the Auditor-General as an institution rather than a person in an office. This is a matter to which attention

will have to be paid in the process of technical refinement of the draft.

Points 2 (i) and (j) Clauses 22 and 23 [now cls 12 and 13]: The Auditor-General appears to argue that the unique nature of the office of Auditor-General means that it should have unique appointment and removal procedures. He also seems to support appointment by an all-party parliamentary committee. In these comments the Auditor-General raises two separate issues: the uniqueness of the office of the Auditor-General *and* the need for an impartial and independent Auditor-General.

As far as the uniqueness of the office is concerned, the Auditor-General's claim appears to be that this requires distinct (or even unique) appointment and removal procedures. However, there does not appear to be any reason for believing that a method of appointment suitable for the Auditor-General might not also be suitable for other bodies and thus appropriately contained in a general provision. If the Auditor-General is merely asserting that these issues must be carefully considered, our comments under 2 (h) are relevant.

The Auditor-General's support for appointment by an all-party parliamentary committee and removal only after adoption of a resolution supported by a special majority is related to the independence and impartiality of the Auditor-General which are required by Constitutional Principle XXIX. The requirements of independence and impartiality must be met but a variety of different appointment and removal mechanisms might secure them.

Point 2 (k) In this section of the letter the Auditor-General suggests inclusion of a number of provisions which appear in the interim Constitution but which have not been picked up in the current draft.

(i) Section 191(5)(catering for a situation in which the Auditor-General is not appointed timeously): The legislation envisaged in cl 11(2) should cover this.

(ii) Section 191(6)(protecting remuneration and conditions of service): The Auditor-General is concerned that in the absence of an express constitutional provision protecting the conditions of service and remuneration of the AG, the possibility of alteration of these by ordinary legislation might be a means of influencing the AG. In our opinion, the protection of the independence of the Auditor-General in clause 21 [now cl 11] guards against this form of influence adequately.

(iii) Section 193(5)('No further duties or functions may be imposed upon or assigned to the Auditor-General other than

by means of an Act of Parliament'): Legislation should deal with this. In any event the independence of the Auditor-General and the proposed Constitutional requirement that he or she should be able to operate effectively would nullify any attempts to overload the Office by extending its workload beyond that required in the Constitution without also extending its capacity.

(iv) Section 193(6) (access to materials): The constitutionalization of the office of the Auditor-General and the requirement that the Auditor-General 'audit', combined with the instruction in clause 21(2) [now cl 11(2)] that the Auditor-General (and other similar bodies) should be assisted in their work mean that it would be unconstitutional to deny the Auditor-General access to necessary materials.

(v) and (vi): Section 194(1),(2) and (3)(dealing with staff, delegation and funding): The Auditor-General suggests that to constitutionalize these provisions would prevent the Auditor-General being rendered ineffective by legislation limiting his or her staff and powers of delegation. This, the Auditor-General argues, would make the Auditor-General's independence 'academic'. The answer to this is that such legislation could be challenged as unconstitutional as both these provisions are covered in the existing draft. Clause 21(2) [now cl 11(2)] states:'Organs of state shall through legislative and other measures accord the said institutions the necessary assistance and protection to ensure their independence, impartiality, dignity and effectiveness'. It clearly covers the Auditor-General's concerns in this regard and provides a much more flexible means of ensure that the Auditor-General is able to fulfil his or her constitutional role as the requirement of effectiveness may cover more than staffing and powers of delegation.

The question of adequate funding is dealt with more fully in A 5 above

C Additional comments

1. The relationship of the Auditor-General to Parliament: One noticeable feature of the present draft provisions relating to the Auditor-General is that they make no reference to the Auditor's relationship to Parliament. This also appears to be a matter which was not directly dealt with by the Theme Committee in its report.

Nevertheless, the main (although not necessarily only) task of the Auditor-General's Office in South Africa is to assist Parliament in its role of monitoring the executive. Thus, the Auditor-General has no 'teeth'. He or she can investigate matters but, thereafter, they must be dealt with

by other bodies. **The present draft builds on this model but fails to articulate its underlying premise - that the main task of the Auditor-General is to assist Parliament in monitoring the manner in which the Executive spends the budget.**

Perhaps the CA should consider acknowledging this function expressly in the Constitution. This would be consistent with the idea that the Constitution should articulate the principles underlying the establishment of state institutions. It would clarify the specific watchdog function of the Office, distinguishing its role very clearly from that of a body such as the Human Rights Commission. (The HRC is obviously concerned with different issues. But it also has a much more active role. It will interact directly with the public in carrying out both its education function and in securing redress for the breach of human rights, for example.) A clear statement of the link between the Auditor-General and Parliament would also make it abundantly clear that Parliament is required to act on such reports. (Unlike the HRC the Auditor-General cannot act on his or her own.)

Expressing the relationship of the Auditor-General to Parliament more clearly might also have some practical advantages. For instance, it would clarify the meaning of clause 1(4) which requires the Auditor-General to submit reports to authorities with a 'direct interest' in an audit. Constitutional recognition that one of the Auditor's main functions is to assist Parliament would remove any uncertainty that might remain about what bodies have a 'direct interest' in an audit. It might also provide guidance to the kind of measure necessary in terms of cl 11 to ensure the effectiveness of the Office.

The current provisions could be amended to make the relationship of the Auditor to Parliament more clear in a number of ways: An express provision stating that the Auditor's main task is to assist Parliament to monitor the executive could be included. Alternatively, clause 1(2) could be amended to describe the purpose of audits to be to monitor the executive, and the reporting provision could specify that reports should be submitted to the relevant *legislative authority* as well as to other authorities with a direct interest.

2. Budgeting for 'institutions for the protection of the public interest': Although we do not agree with the DP's proposal relating to the Auditor-General's budget we think that about funding for the office of the Auditor-General and other similar institutions is obviously well-founded. It is a concern that extends to all the so-called 'institutions for the protection of the public interest'.

One method of protecting such institutions would be to require their budget to come from Parliament's budget rather than the general budget. This is the way in which the Swedish deal with the Ombud. Parliament would then be required to fund the HRC, the Commission on Gender Equality, the Public Protector and the Auditor-General from its general budget. Parliamentarians can be expected to protect their own budget.

Whether or not such a funding mechanism should be included in the Constitution may depend on the mechanisms which are chosen to secure the independence of the 'institutions to protect public interest'.

OFFICE OF THE AUDITOR-GENERAL
KANTOOR VAN DIE OUDITEUR-GENERAAL

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

REFERENCE / VERWYSING
ENQUIRIES / NAVRAE
DATE / DATUM

446 PRETORIA 0001
AUDITOR
FAX / FAKS

4 September 1995

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Mr Ebrahim

DRAFT CONSTITUTIONAL FORMULATIONS REGARDING THE AUDITOR-GENERAL

1. Following the agreement reached at our informal meeting in Cape Town on Wednesday, 30 August 1995, I enclose my informal comments on the present proposed wording of the Constitution as provided, which - to prevent the misunderstanding which existed at our informal meeting - is enclosed as Annexure A.

2. My specific comments are as follows:

   (a) The remarks made in my formal letter of 17 August 1995 are pertinent and must be viewed as a basic point of departure regarding the specific comments below.

   (b) Section 1(1): No comment - appears adequate.

   (c) Section 1(2): No comment - appears adequate.

   (d) Section 1(3): No comment - appears adequate.

   (e) Section 1(4): The meaning of the words "all authorities which have a direct interest in the relevant audit" is unclear and will give rise to legal and practical difficulties. A better wording would be: "The Auditor-General shall submit reports to the relevant authorities as may be prescribed by law. All reports shall be made public." Extensive detailed provisions are and can be contained in ordinary legislation.

(f) Section 2(2): No comment - appears adequate.

(g) Section 2(3): This should be reconsidered. Please see my specific comment under 5 in my letter of 17 August 1995.

(h) Section 21: Please see my specific comments under 4 of my letter of 17 August 1995. However, the wording as it pertains to the Auditor-General specifically, appears sound, except that the Auditor-General is not an institution but a particular person holding a particular office.

(i) Section 22: Please see my specific comments under 4 of my letter of 17 August 1995. The wording in the substituted section 4(1)(a) and (b) on pages 15 and 16 of Annexure A is in my opinion necessary, however.

(j) Section 23: Please see my specific comments under 4 of my letter of 17 August 1995. However, the wording (assuming the portion in brackets are retained) appears sound.

(k) In my opinion, the following sections in the interim constitution should be explicitly and appropriately addressed in the final constitution:

(i) Section 191(5) - to cater for an instance where an Auditor-General is not appointed timeously. This in fact happened in a neighbouring country recently and caused damage to the public accountability process.

(ii) Section 191(6) - to guard against the reduction of remuneration or adverse alteration to conditions service by way of ordinary legislation as a manner of attempting to influence the Auditor-General. This should be extended to include vested retirement benefits.

(iii) Section 193(5) - to make it quite clear that the Executive alone cannot direct the Auditor-General to carry out certain functions (for example in terms of powers granted to the Executive in terms of one or the other law).

(iv) Section 193(6) - to provide for proper access to records etc. See footnote 7 on page 15 of Annexure A. Serious difficulties were experienced in this regard in the past and this should not be allowed to reoccur.

(v) Sections 194(1) and (2) - an Auditor-General is only as effective as the supporting staff make him or her. This aspect should therefore be addressed constitutionally to avoid the provisions in the Constitution regarding the Auditor-General's own independence becoming merely academic as a result of changes in subsidiary legislation.

(vi) Section 194(3) - to provide explicitly for adequate funding of the Auditor-General and his or her Office.

3. As promised, I also enclose, as Annexure B, copies of the relevant sections of the present legislation where the immunities and privileges of the Auditor-General and his or her staff are addressed.

4. In conclusion, it should be borne in mind that ordinary legislation may be amended by a simple majority. Given the fact that the Auditor-General audits the Executive and reports thereon in public, a measure of tension (or worse) from time to time between a Government and an Auditor-General that does his or her job is virtually unavoidable. In drafting the Constitutional provisions relating to the Auditor-General, this fact should be borne in mind throughout.

Yours sincerely

H E KLUEVER
AUDITOR-GENERAL 4/9/1995.

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Demokratiese Party
Democratic Party

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
11th Floor
Regis House

BY HAND

20 September 1995

Dear Mr Ebrahim

Legal Opinion on Provisions Relating to the Auditor-General and the Reserve Bank

I refer to your letter dated 14 September 1995 and to my conversation with Ms C Basson of your office on the same day.

I enclose the legal opinion which we have obtained, some background to our request for a legal opinion and our proposed amendments in Annexures 1 and 2 to this letter.

If the Panel of Experts requires further information or explanations, I would be glad to assist.

Yours sincerely

K M Andrew MP
Democratic Party

Encs.

Annexure 1

Auditor-General

1. Background

The Auditor-General's position is unique. While other institutions such as the Public Protector, the Human Rights Commission and the Gender Commission may from time to time criticise or be in conflict with the executive, the daily work of the office of the Auditor-General is examining the performance of the public administration and therefore by implication, the executive.

The Auditor-General, in his letter dated 17 August 1995 to the Constitutional Assembly, pointed out that "Attempts at interference and influence may vary in method and form, but in practice take place regularly."

It is for these reasons the Democratic Party believes that the Auditor-General should have special protection in the Constitution.

Relying on ordinary legislation is not enough. If one has an executive which is hostile to an Auditor-General because he or she is being too diligent in exposing maladministration or malpractice, the Auditor-General must be fully protected by the Constitution. Invariably, the executive is drawn from the party or parties forming the majority in parliament and largely constitute the senior leadership of those parties or party. It is therefore dubious, to say the least, to expect that parliament can be relied upon in times of serious conflict between the executive and the office of the Auditor-General to side with the Auditor-General.

It is against this background that the Democratic Party proposed two additions to the Fourth Draft set out on pages 19 to 30 of the Documentation for the Constitutional Committee Sub-Committee meeting on Friday 8th September 1995.

2. Liability

The DP proposes that an additional clause as follows:

> "Clause 1(5) The Auditor-General, and any person acting under the authority of the Auditor-General, shall not be liable in his or her personal capacity in respect of anything done in good faith involving the performance of any duty or the exercise of any power provided for in this Constitution or any law."

Our legal advice, which we were asked to convey to the Panel of Experts, is based on the Seventh Draft (dated 6 August 1955) when Clause 1(4) read:

> "Clause 1(4) Organs of state shall through legislative and other measures accord the Auditor General [and his or her assignees] the necessary assistance and protection to ensure the independence, impartiality, dignity and

effectiveness of the Auditor-General [including all such immunities and privileges as are necessary for this purpose.]"

The following is the legal opinion we obtained:

" Section 1(4) of the draft text on the Auditor-General:
As I understand it, the DP's concern is that this section should serve to protect the office of the Auditor-General in regard (a) his power to delegate, and (b) his immunity from civil liability.

As I said to you on the phone on Friday, I do not think that the power of the Auditor-General to delegate functions necessarily needs to be spelt out in the Constitution. The position is however arguably different as regards the immunity of the Auditor-General. I do not agree with the State Law Advisers that the general provision in s 1(4) would be said to require the Legislature by implication to accord the Auditor General the necessary immunities. On the other hand, it should be noted that the words in square brackets do no more than to offer the Auditor-General some "indirect" protection. The protection is "indirect" inasmuch as the clause in square brackets places an obligation on the State to take the necessary steps to immunise the Auditor-General from liability; since the actual protection to be afforded an Auditor-General is to be situated "at a second remove" within ordinary legislation, the only complaint of an Auditor-General who felt that his immunity was inadequate would be the indirect complaint that the legislature had not taken the steps required by s 1(4). While such a complaint is actionable in principle in a court of law, it is of necessity a circuitous one.

There is no reason why the necessary protection could not be offered to the Auditor-General directly in the constitution. Direct protection would mean that the immunity is entrenched in the constitution itself, rather than being situated at a second remove in ordinary legislation. My own view is that this would be a more direct and a preferable form of protection. An immunity provision in the Constitution might run something like this: The Auditor General, and any person acting under the authority of the Auditor General, shall not be liable in his or her personal capacity in respect of anything done in good faith involving the performance of any duty or the exercise of any power provided for in this Constitution or any Act of Parliament."

3. Expenditure

The DP proposes an additional clause as follows:

"Clause 3 Expenditure incurred during the exercise and performance of the powers and functions of the Auditor-General shall be paid from money which shall be set aside by Parliament for such purpose and from fees raised or money obtained in a manner authorised by law."

This clause is identical to Clause 5(2) of the Seventh Draft referred to above. The legal opinion obtained was:

"Section 5(2) of the draft text on the Auditor General:

I can see no reason why the clause in its present form should not be said to perform the specific function which the DP wishes it to accomplish. As I understand it, the DP places the stress on the second "shall", and reads this clause as placing an obligation on Parliament to set aside money accordingly. There is no doubt that the clause in its present form is mandatory and does indeed create an obligation in this way. While it is true that courts are notoriously reluctant to intervene in budgetary matters, there seems to be no other way of affording the Auditor-General the protection which the DP seeks in this clause. I do not think that this clause needs to be amended in any way."

By way of further explanation, the DP wishes to point out that the work of the office of the Auditor-General can be seriously hampered if it is not adequately funded. This is exactly what happened in the 1980's.

In an inflationary climate, it is not necessary for a government to cut the expense budget of the office of the Auditor-General, but merely to permit it to grow well below the rate of inflation or not at all. (At 12% inflation, the value of money halves every 6 years).

The effect of this would be to cripple the office of the Auditor-General and make it impossible to scrutinise the accounts of government properly. It is for this reason that the DP wants a Constitutional injunction to provide the necessary funding spelt out as strongly as possible.

Annexure 2

Reserve Bank

1. Background

The Democratic Party is concerned that providing only for the Reserve Bank "to exercise its powers and functions independently" is inadequate as, for example, the Board Members and Governor could all be close friends or relatives of the President or the Minister of Finance. Then being entitled to function independently would be of little value.

The DP recognises that the Reserve Bank should not enjoy the same degree of independence as, for example, the office of the Auditor-General, but it does deserve greater institutional independence than provided for at present.

The amendments proposed by the DP are similar to the provisions for the Public Administration Commission, which should be less independent of government than the Reserve Bank.

2. Proposed Amendment

Delete Clause 15 of Fourth Draft - 30 August 1995 on Central Bank on page 30 of Documentation for meeting of Constitutional Committee Sub-Committee on 8th September 1995 and substitute:

"15. (1) There shall be a South African Reserve Bank which shall be the central bank of the Republic.

(2) The South African Reserve Bank shall be independent, impartial and subject only to this Constitution and the law."

3. Legal Opinion

"As re s 16(2) of the Draft Text on the Central Bank:
Your first concern was that the phrase "subject only to a national law" allowed for legislative derogation from the provisions of the constitution. For the reasons indicated in para 1 above, I believe this fear is unfounded so long as a constitutional supremacy clause is included elsewhere in the text.
Your second concern was that the existing requirement that the bank exercise its powers independently is considerably weaker than a requirement that the bank must be independent. It seems to me that independence can operate at two different levels : it can operate (a) at the level of the institutional structure of the Bank, and/or (b) at the level of decisions made by functionaries of the Bank. Bear in mind that the Bank will be a juristic person, separate in law from its officers. Now the existing formulation seems to secure the independence of decisions made by the bank's officers, while your suggested formulation seems better designed to secure the bank's institutional independence. Since independence is important at both levels, I would go for a "belt and braces approach" and require both formulations to be inserted (though at different places in the text)."