

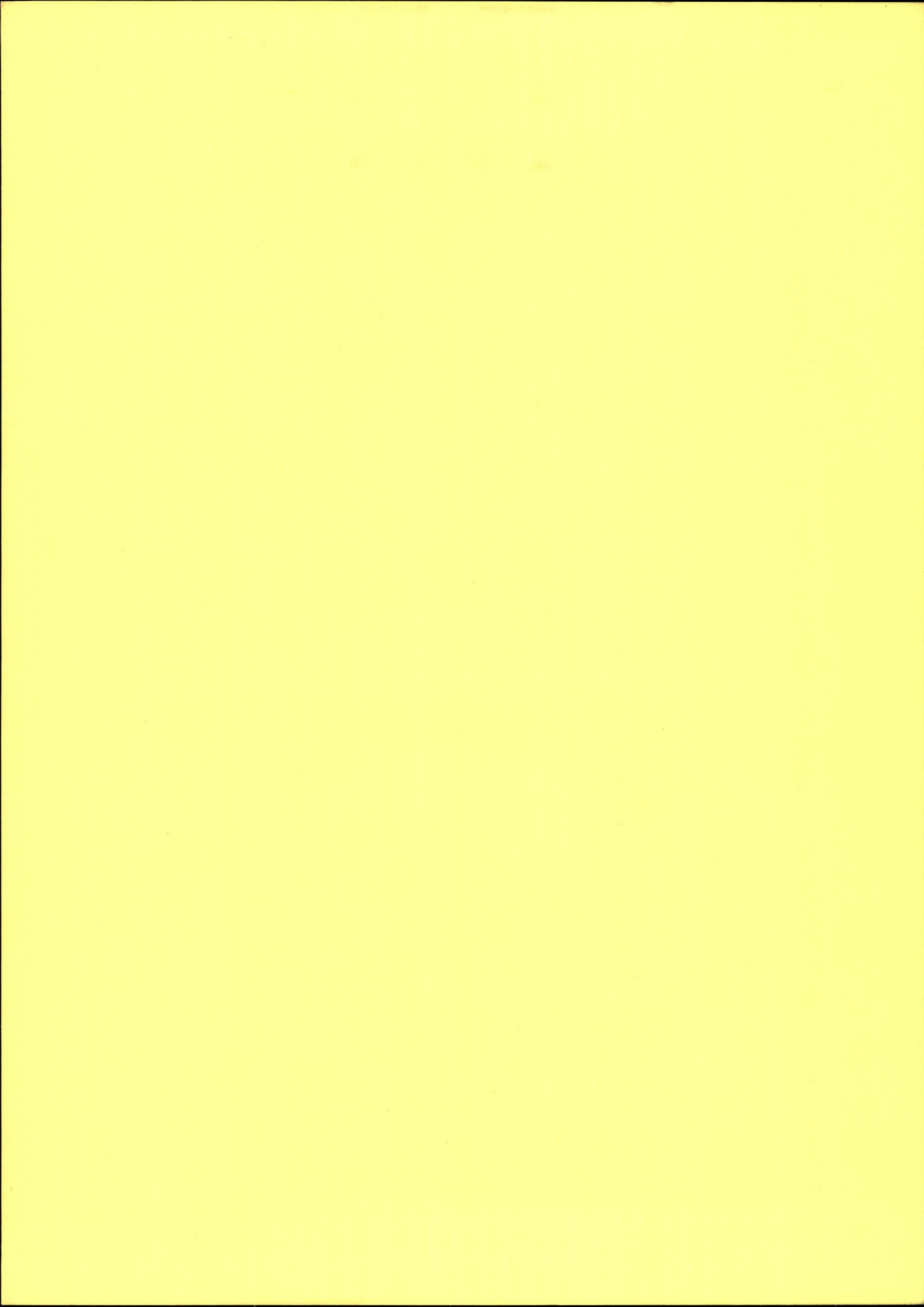
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TWENTY-THREE

**C O N S T I T U T I O N
R E P O R T S**

FIFTEENTH REPORT

12 OCTOBER 1993



EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

FIFTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 12 OCTOBER 1993

1. Introduction

In this report we present proposals for provisions relating to the establishment, independence and impartiality of a Commission for Administration and the public service. The draft provisions contained in the addendum to this report may be inserted either in a general chapter of the Constitution dealing with a variety of general, technical and transitional subjects, or in a separate chapter. This is however not a question of principle and could be left to be decided later as an editorial concern.

Our intention is to provide no more than a constitutional framework for the subject matter: the details should be regulated by parliamentary, SPR and subordinate legislation (regulations). The issues addressed in this report may be classified into three categories, viz.:

- the functions, composition and operation of a Commission for Administration;
- the nature of the national public service; and

- public administration at SPR level, in connection with which especially transitional arrangements are relevant.

2. The Commission for Administration

Clauses 180, 181 and 182 of the addendum are designed to provide a framework for a Commission for Administration.

The essential effect of clause 180 is that the establishment of a Commission for Administration is constitutionally required.

Clause 181(1) empowers the Commission to make *recommendations* to government at national and SPR levels and to give *directions* relating to the public administration. Subparagraphs (a) and (b) delineate the areas of activity of the Commission and subparagraph (c) allows both Parliament and SPR legislatures to further specify its functions and duties.

Clause 181(2) requires the Commission to consider the following in the course of the performance of its functions:

- all relevant laws, which would include parliamentary and SPR legislation, and also the rules and regulations applicable to the public service;
- all relevant administrative practices, which would include those norms and conventions established by usage which form an important element of the conventional practice of public administration;
- recommendations and reports of the Commission on SPR Government, which should, in terms of its proposed objects and functions (clause 128 of the draft Constitution), be of direct relevance to the work of the Commission for Administration;
- recommendations and reports of the Financial and Fiscal Commission; this is relevant because the matter of financial and fiscal allocations will have direct consequences relating to many aspects of public administration;

- the interests of the public, because the primary intention of good public administration should be service to the public; and
- the interests of the public service, because the Commission is also intended to serve as a body representing the professional interests of the public service in its relationship with government and the public. The Commission should strive to balance all those interests.

Clause 181(3) should have the effect of promoting the development of national standards as well as coordination in the administration of the SPRs and the Republic. It would however be possible for SPR legislatures and Parliament to supersede directions of the Commission by means of legislation.

The manner of appointment and composition of the Commission is designed in clauses 182(1) to (5) to ensure both professional legitimacy and involvement at national and SPR level.

Clauses 182(6) to (9) are intended to uphold the independence and impartiality of the Commission.

3. The public service

Clause 183 establishes a constitutional framework for the national public service, leaving the detailed structuring to parliamentary and other legislation. The professional and non-discriminatory nature of the public service, both regarding its services and employment policies, is provided for, as well as the right of public servants to organise and to bargain collectively.

This provision should be read together with clause 185(1), which is a transitional arrangement providing for continuity regarding the existing public service.

4. SPR public services and transitional provisions

Clause 184(1) allows for SPRs to establish and regulate their own public services.

Clause 184(2) is a transitional provision. Its formulation is dependent on the outcome of the discussions relating to clause 119.

In view of the fact that a Commission for Administration is currently functioning nationally in terms of parliamentary legislation and similar institutions exist in the TBVC states and Self-governing Territories, transitional arrangements regarding them will be necessary. An informed political decision is required regarding their continuation after the coming into force of the Constitution. This matter is closely linked to the process of rationalisation and reorganisation contemplated in clause 119, which is currently subject to further consideration. On these issues we require instructions from the Negotiating Council in order to be able to formulate appropriate transitional provisions.

Subclauses 185(2) and (3) contain a possible approach to transitional arrangements regarding existing public services. The finalisation of these provisions is however dependent on the outcome of decisions of the Negotiating Council regarding the rationalisation and reorganisation process contemplated in clause 119. The subclauses are designed to ensure tenure of posts when the Constitution comes into force.

Clause 185(4) contains a mechanism intended to prevent exploitation of the circumstances surrounding constitutional and political transition.

ADDENDUM TO THE 15TH REPORT (CONSTITUTIONAL ISSUES)

Commission for Administration

Establishment

180. There shall be a Commission for Administration for the Republic which shall have the powers and functions provided for by this Constitution and by law.

Objects and functions

181. (1) The Commission shall be competent to -
- (a) make recommendations and give directions in accordance with law, in order to -
 - (i) promote and maintain professional standards of public administration in the public service at national and SPR level;
 - (ii) promote efficient, open and accountable public administration and to ensure the continuity thereof at national and SPR level; and
 - (iii) develop policies relating to the appointment, remuneration, training, promotion, discipline, retirement and management of the personnel of the public service at national and SPR level;
 - (b) conduct studies in organization, procedure and methods with a view to making recommendations regarding the establishment, structure and efficiency of departments and their substructures; and
 - (c) exercise the functions and perform the duties entrusted to it by Act of Parliament and SPR laws.
- (2) In performing its functions the Commission shall, *inter alia*, take into consideration all relevant laws and administrative practices, the recommendations and reports of the Commission on SPR Government and of the Financial and Fiscal Commission, and the interests of the public and of the public service.

(6) Members of the Commission shall perform their duties fairly, impartially and independently.

(7) Members of the Commission shall not perform or commit themselves to perform remunerative work outside their official duties.

(8) A member of the Commission shall not hold office in any political party or political organisation.

(9) It shall be an offence to influence or attempt to influence a member to act otherwise than in accordance with the provisions of subsection (6).

The Public Service

The national public service

183. (1) There shall be a public service for the Republic, structured in terms of law to provide effective public administration.

(2) The composition, organisation, administration and control of the public service, and all matters relating to the obligations, rights and privileges and in general the conditions of employment of members of the public service, shall be determined by Act of Parliament and by other legislation made in terms of an Act of Parliament.

(3) The public service shall -

(a) be administered as a career service; and

(b) serve all sections of the community in an unbiased and impartial manner.

(4) Employment in the public service shall be open to all South African citizens who comply with the requirements determined or prescribed by or in accordance with law.

(3) Subject to any law to the contrary, directions of the Commission shall be followed by the public services at national and SPR levels.

Constitution, independence and impartiality

182. (1) The Commission shall consist of -

(a) a chairperson and deputy chairperson appointed by the President on the advice of the Cabinet; and

(b) 9 members each of whom shall be nominated by a different SPR executive and who shall be appointed by the President.

(2) A person shall be qualified to be appointed to the Commission if he or she -

(a) is a South African citizen; and

(b) is a person who has specialised knowledge of or experience in public administration.

(3) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, a member of the Commission shall be appointed for a term of 5 years and during such term may only be removed from office by the President on account of misconduct or unfitness for his or her duties or incapacity to carry them out efficiently: Provided that removal of a member of the Commission from office and the reasons therefor shall be communicated by the President by message to Parliament and to the SPR legislatures within 14 days after such removal or, if Parliament or an SPR legislature is not then in session, within 14 days after the commencement of its next ensuing session.

(4) Vacancies in the Commission shall be filled in accordance with the provisions of subsection (1).

(5) A member of the Commission shall be eligible for re-appointment.

(5) Members of the public service shall have the right to organise and to bargain collectively in matters of mutual concern to them and to the state as their employer, on the conditions and within the limits determined by law.

SPR public services

184. (1) An SPR legislature may provide by law for the establishment and regulation of a public service for its SPR.

(2) Pending the establishment of a public service in any SPR in terms of subsection (1), the provision of public administration in such SPR shall be carried out in terms of section 119. *[This formulation is subject to the finalisation of the wording of the proposed section 119 relating to the reorganisation and rationalisation of public administration.]*

Transitional arrangements

185. (1) The public service of the Republic, as regulated by legislation consistent with this Constitution at the time of its coming into operation, shall continue to exist subject to changes made thereto by law.

(2) Every person employed in the public service immediately before the commencement of this Constitution shall continue to hold his or her post and position in accordance with the applicable law. *[This formulation is subject to the finalisation of the wording of the proposed section 119 relating to the reorganisation and rationalisation of public administration.]*

(3) Every person employed by the government of Transkei, Bophuthatswana, Venda, Ciskei or a Self-governing Territory prior to the commencement of this Constitution, shall continue to hold his or her post and position in accordance with the applicable law: provided that such posts and positions may be adapted by the Commission for Administration for the purpose of achieving its objects set out in section 181. *[This formulation is subject to the finalisation of the wording of the proposed section 119 relating to the reorganisation and rationalisation of public administration.]*

(4) The appointment, promotion and award of permanent benefits in terms of legislation passed prior to the coming into force of this Constitution and occurring between 1 October 1993 and 30 September 1994 in respect of any person employed by any public service or public service institution referred to in this Constitution may, within one year of the coming into operation of this Constitution, be reviewed and, if considered by the Commission to have been improper, be amended by the Commission for Administration in accordance with the laws and regulations applicable to the public service of the Republic on 1 October 1993.

