

2/4/6/1/1/14

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

3 APRIL 1995

17H30

GOOD HOPE CHAMBER

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6 SPECIALISED STRUCTURES OF GOVERNMENT

MONDAY, 3 APRIL 1995

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

Date : 03 April 1995

Time : 17:30

Venue : Goodhope Chamber Auditorium

AGENDA

1. Opening and Welcome
2. Adoption and noting of previous minutes:
 - 2.1 Core Group: 27 February 1995.
 - 2.2 Theme Committee: 27 February 1995.
 - 2.3 Core Group: 27 March 1995.
2. Tabling and discussion of TC6.2's report on the Reserve Bank and the Auditor General: Pages 13-24 (Schematic summary - Pages 25-53).
3. Tabling and discussion of TC6.3's report on the Public Protector: Pages 54-72 (Schematic summary - 73-78).
4. AOB

Enquiries: Mr N Nyoka and Ms P Fahrenfort, 10 Floor, Regis House, Adderley Street (Tel 24-5031)

CONSTITUTIONAL ASSEMBLY
MINUTES OF THE 8TH MEETING OF THE CORE GROUP
THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

MONDAY 27 FEBRUARY 1995

PRESENT

De Beer S J (Chairperson)

Chiole J
Davies R
Dyani M M Z
Schreiner J
Vadi I

Apologies: Kgositsile B

Ms B Levy and Ms K McKenzie were in attendance.

1. Opening and Welcome

Mr De Beer opened the meeting at 12:00 and welcomed the members.

2. Adoption of Minutes

2.1 Minutes of the Theme Committee, 14 February 1995

The minutes were adopted with the following changes:

2.1.1 pg 1, attendance, incorrectly reflects that Mr Chiole is an alternate member.

2.1.2 pg 3, item 4.2, Dr Davis should be read as Dr Davies.

2.2 Minutes of the Core Group, 14 February 1995

The minutes were adopted with the following changes:

2.2.1 pg 2, item 4, Dr Chiole should read Mr Chiole.

2.3 Minutes of the Subtheme Committee meetings 14-16 February 1995

The minutes of the Subtheme Committees were noted.

3. Matters arising

There were no matters arising from the minutes.

4. Any other business

4.1 Public Participation Event

It was agreed that the Subtheme Committees would each be asked to send a representative to the Public Participation events on 11 March 1995. In addition each Subtheme would forward proposals to the Secretariat with regard to issues to be dealt with at the different events.

4.2 Joint meetings of Theme Committees

4.2.1 Traditional Authorities

The meeting agreed that the joint meeting on traditional authorities needed to be approached on two levels. Firstly clarity needed to be sought from the Directorate as to the location of traditional authorities in the work of the Theme Committee. Mr De Beer reported that this area was no longer the brief of the Committee. However some Subtheme Committees were dealing with areas that may overlap with the issue of traditional authorities. It was agreed that these Subtheme Committees should elect representatives for this meeting.

4.2.2 Joint meetings:

Ms Schreiner reported that Subtheme Committee 6.4 had identified the need to re-examine the location of Correctional Services. The Subtheme Committee felt that it was more appropriate for this issue to be located in the work of Theme

Committee 5. A joint meeting had been set up with Theme Committee 5 in this regard.

4.3 Workshop on Intergovernmental Relations

The Commission on Provincial Government is holding a workshop on the institutionalisation of intergovernmental relations. They proposed that the workshop be held on the 18 May 1995.

The meeting agreed that further details on the programme would need to be sought from the Commission. In addition Subtheme Committees would need to appoint people to attend the workshop.

4.4 Correctional Services

The Department of Correctional Services has requested a meeting with Theme Committee 6 to brief the Theme Committee on Correctional Service matters.

The meeting agreed that this matter would be referred to Subtheme Committee 6.4.

4.5 Core Group meetings

Concern was raised with regard to the necessity of weekly Core Group meetings. It was agreed that it was not always necessary to meet as a core group weekly as much of the work was being carried out by the Subtheme Committees.

The meeting agreed that the chairs of the Theme Committee and Dr Davies would consult weekly in order to determine whether a Core Group Meeting was necessary.

5. Closure

The meeting rose at 13:00.

Chairperson.....Date.....

CONSTITUTIONAL ASSEMBLY
MINUTES OF THE 10TH MEETING OF THEME COMMITTEE 6
SPECIALISED STRUCTURES OF GOVERNMENT

MONDAY 27 FEBRUARY 1995

PRESENT

De Beer S J

Alant T G
Bekker H J
Bloem D
Booi M S
Chiole J
Davies R
Dyani M Z
Ebrahim E
Fankomo F C
Fenyane S L E
George M E
Hani L
Kgauwe Q J
Louw L
Love J
Makana S
Makgothi H G
Malan T J
Marais G
Mashimbye J N

Moatshe P
Mompoti R
Motshabi C H
Mpahlwa M B
Mtintso T E
Mti L M
Mufamadi F S
Nair B
Nogumla R Z
Phillips I M
Scott M I
Selke J
Tshabalala M E
Turok M
Vadi I
Van Eck J
Van Wyk A
Welgemoed P J
Zitha D A

Apologies: Kgositsile B, Schreiner J, Dexter P, Mlambo-Ngcuka P G

Ms B Levy and Ms K McKenzie were in attendance.

1. **Opening and Welcome**

Mr De Beer opened the meeting at 18:00 and welcomed the members.

2. **Minutes**

2.1 **Minutes of Theme Committee 6, 14 February 1995**

The minutes were adopted with the following changes:

2.1.1 pg 1, attendance, incorrectly reflects that Mr Chiole is an alternate member.

2.1.2 pg 1, attendance, Welgemoed P G should read as Welgemoed P J.

2.1.3 pg 3, item 4.2, Dr Davis should read as Dr Davies.

2.3 **Minutes of the Subtheme Committees, 14-16 February 1995**

The minutes of the Subtheme Committees were noted.

3. **Matters arising**

There were no matters arising.

4. **Reports from the Subtheme Committees**

4.1 **Subtheme Committee 6.1**

4.1.1 Mr Vadi reported the following:

The Subtheme had held a successful Public Hearing, on the future role of the Public Service with the Director Generals of 25 Departments. A series of further Public Hearings have been scheduled to take place over the next few weeks, however the practical arrangements still need to be finalised. Mr Vadi thanked the Secretariat for organising the Public Hearings.

4.1.2 Ms Love added the following to Mr Vadi's report:

There was a need to reschedule some of the Hearings in order that

key stakeholders could attend. Thus the Subtheme Committee may need to readjust their Work Programme with regard to the initial dates for the presentation of their final report.

Mr Robert Behrens from the Southern African Development Unit of the Civil Service Training College in the United Kingdom has offered to comment on the report of the Subtheme Committee.

4.2 Subtheme Committee 6.2

4.2.1 Dr Davies reported the following:

The work of the Subtheme Committee has been progressing well. The Committee has heard oral submissions and hosted a panel discussion on the Reserve Bank and the Auditor General.

The Committee has scheduled a meeting to prepare their final report on the Financial and Fiscal Commission.

4.3 Subtheme Committee 6.3

4.3.1 Ms Malan reported the following:

The Subtheme Committee had an input by the Chair of the Danish Equal Status Council on the issue of National Machinery for Women.

Reports on the Public Protector and the Human Rights Commission from the seminar programme have been completed and sent to the stakeholders for comment.

The Committee has drawn up a preliminary Work Programme.

Public Hearings from key stakeholders on the Public Protector are being organised.

The Committee is discussing Party submissions on the Public Protector.

4.4 Subtheme Committee 6.4

4.4.1 Dr Alant reported the following:

The Subtheme Committee has completed its first report on control and accountability of the security apparatus.

The Committee is planning a workshop on Policing for 20 March 1995.

There is agreement that the Interim Constitution failed to address the area of Correctional Services adequately. The view of the Committee is that this issue needs to be located in the work of Theme Committee 5. A joint meeting is being organised in this regard.

5. Core Group Report

Mr De Beer presented the report of the Core Group.

5.1 Public Participation Programme

There are two public meetings scheduled for 11 March, Subtheme Committees are requested to send a representative to each event.

5.2 Joint Meetings

5.2.1 Traditional Authorities

The relevant Subtheme Committees need to send a representative to the joint meeting on traditional authorities.

5.2.2 Joint meetings

Joint meetings between Theme Committees need to be facilitated through the relevant Subtheme Committees.

5.3 Workshop on the institutionalisation of intergovernmental relations

The Commission on Provincial Government is holding a workshop on the institutionalisation of intergovernmental relations. They proposed that the workshop be held on the 18 May 1995.

The meeting agreed that further details would need to be sought on the programme of the workshop. In addition Subtheme Committees need to appoint representatives to attend the workshop.

6. Any other business

The Theme Committee meeting was followed by Subtheme Committee

meetings.

7. Closure

The meeting rose at 18:30.

Chairperson.....Date.....

CONSTITUTIONAL ASSEMBLY

MINUTES OF THE 9TH MEETING OF THE CORE GROUP

THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

MONDAY 27 MARCH 1995

PRESENT

Kgositsile B (Chairperson)

Chiole J
De Beer SJ
Makgothi HG
Powell P
Schreiner J
Vadi I

Apologies

Davies R

P Fahrenfort and N Nyoka were in attendance

1. Opening and Welcome

Ms B Kgositsile opened the meeting at 13h15 and welcomed the members.

2. Subtheme Committees' Progress Reports

The following progress reports were noted:

TC6.1 This subtheme committee reported that it has completed its public hearing programme and its report on the Public Service will be ready by the 25 April 1995.

TC6.2 This subtheme committee reported that its report on the South African Reserve Bank and the Auditor General will be finalised today. It was noted that the area of National Revenue Fund will be dealt with under the heading "Financial and Fiscal Commission".

TC6.3 This subtheme committee reported that its report on the Public Protector will be finalised at a meeting to be held later today. It was noted that the subtheme committee might not be in a position to complete its work by 30 June 1995.

TC6.4 This subtheme committee reported that it hosted a workshop on Policing. The report emerging from this workshop will form the basis for discussion in the committee and this will speed up the debates on Policing in the sub-committee.

3. Procedure for submitting reports to the Constitutional Committee

It was agreed that Theme Committee will be convened by the Core Groups when reports are to be tabled.

4. Revised workplan for the Theme Committee and its Subtheme Committees

It was noted that a revised workplan for meetings scheduled up to the June recess will be distributed.

The FF requested that:

- i) notices of meetings be distributed well in advance of the scheduled meetings;
- ii) given the change meeting times as stipulated in the original workplan programme, that the times reflected in Order Paper either be changed to be in line with Subtheme Committee times or be removed from it.

5. Theme Committee meetings

Dealt with under Item 4.

6. Next Core Group meeting

It was agreed that the next Core Group meeting will be held on Monday 3 April 1995 at 13h13 in Room E305.

There being no further business the meeting ended at 13h40.

.....
CHAIRPERSON

.....
DATE

CONSTITUTIONAL ASSEMBLY

**SUB-THEME COMMITTEE OF THEME COMMITTEE 6
FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES**

FIRST REPORT TO THEME COMMITTEE 6

SOUTH AFRICAN RESERVE BANK

THE AUDITOR GENERAL

PARTICULARS OF MATERIAL PROCESSED

1.1.1 LIST OF SUBMISSIONS RECEIVED AND PROCESSED

1.1.1.1 POLITICAL PARTIES REPRESENTED IN THE CONSTITUTIONAL ASSEMBLY

African National Congress
National Party
Inkatha Freedom Party
Democratic Party
Pan African Congress
African Christian Democratic Party

1.1.1.3 ORGANISATIONS OF CIVIL SOCIETY

South African Chamber of Business
Johannesburg Stock Exchange
Transnet
Cosab

Conservative Party
South African Communist Party

1.1.1.3 INDIVIDUALS AND OTHER

See Submissions Volumes 7-10

1.1.1.4 ORGANISATIONS OF STATE OR QUASI-STATE

Auditor-General
Small Business Development Corporation

1.1.1.4 PERSPECTIVES WHICH EMERGED FROM PANEL DISCUSSION

See Annexure A

1.1.1.5 RELEVANT CONSTITUTIONAL PRINCIPLES

Constitutional Principle VI:-

"There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

Constitutional Principle XXIX:-

"The independence and impartiality of the Public Service Commission, a Reserve Bank, an Auditor-General and a Public Prosecutor 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".

1.1.1.6 **TECHNICAL ADVISORS:- PANEL DISCUSSION REPORTS & COMMENTS (REFER ANNEXURE A)**

1.2 **OVERVIEW OF MATERIAL PROCESSED**

The attached tables (Annexure B and C) summarise the positions of the political parties and the other major submissions to the Sub-Committee. As the Sections of the Interim Constitution dealing with the South African Reserve Bank and Auditor General were the subject of considerable negotiation at Kempton Park and the drafters of the New Constitution are bound by principle XXIX, there was a high degree of consensus that clauses similar to those in the Interim Constitution should be carried over into the Final Constitution. On the Reserve Bank, the ANC proposed taking over Sections 195-197 of the Interim Constitution unchanged. Other parties proposed relatively small amendments only. On the Auditor General, one of the main issues was how much detail should be included in the Constitution and how much in subordinate legislation.

The tables in Annexures B and C record the position of the parties and the reaction to certain proposals from other parties. the following code applies:

- A** Denotes that the party or institution has explicitly accepted in its written submission, the position as stated in the table, on the particular issue under discussion.
- AQ** Denotes that in its written submission, the party or institution appears to have accepted the position as stated, with some qualification or minor addition or deletion.
- NCA** Denotes that from the general tone of proceedings in Sub-Theme Committee discussions, the party or institution concerned appears to indicate that whilst having made no specific comment on a particular issue, there is a reasonable likelihood that the party or institution concerned accepts the position as stated.
- D** There appears to be disagreement on the issues as stated.

DC There is disagreement between the parties which amounts to a Contentious Issue.

The Contentious issues and the gist of the contentiousness - are identified in the next section. Apart from these, differences between the parties could be identified as differences or emphasis, or suggestions not taken up by other parties, rather than matters of contention.

1.2.1

List of Contentious Issues

South African Reserve Bank

DC1 The IFP's proposal was rejected by the parties partly because it was felt that such matters should not be specified in the Constitution and, in some cases, because such restrictions were not felt to be necessary.

DC2 The IFP's proposal was opposed partly because it was felt that such matters do not belong in the Constitution and partly because the SARB is not obliged to purchase government securities.

DC3-6

The IFP's proposals to include additional provisions in the Constitution were opposed by other parties partly on the grounds that matters such as structure and appointment should be dealt with in legislation rather than in the Constitution.

Auditor General

DC7 The Freedom Front's proposal for each province to have its own AG was opposed by the ANC, NP and DP.

DC8 The Freedom Front's proposal that the AG should be appointed by taxpayers was felt to be vague by the ANC, NP, IFP and DP, all of whom preferred that he/she be appointed by parliament.

DC9 The IFP's proposals on provincial representation on the Audit Commission equal to that of national government was opposed by the ANC, NP, DP and Freedom Front.

1.3 MISCELLANEOUS

1.3.1 NOTIFICATION OF NEXT AGENDA ITEM

The next Agenda item comprises Financial Institutions and Public Enterprises. A report on Constitutional provisions related to the National Revenue Fund, Budget Procurement and other matters related to Financial Institutions and Public Enterprises will follow by mid-April, at the request of some parties that had not yet finalised their views on such matters.

1.3.2 SUGGESTED ADVERTISEMENT FOR NEXT AGENDA ITEM

See Annexure D - Text already submitted to Secretariat.

ANNEXURES

- A Panel Discussion Report
- B The South African Reserve Bank
- C The Auditor General
- D Suggested Advertisement
- E Positions of Political Parties [Submissions Volumes 6 and 6a]

**REPORT OF THE PANEL DISCUSSION HELD ON MONDAY 27
FEBRUARY 1995 IN ROOM E249**

PRESENT

Davies R (Chairperson)

Andrew KM
Hogan B
Makgothi H
Marais G
Nair B
Sisulu M
Van Wyk A
Welgemoed P

Apologies:

Jacobsz F

Absent:

Bekker H
Jordaan JA
Woods G

PANEL

Mr C Rustomjee (Technical Expert), Department of Finance, Parliament
Prof B Kahn Department of Economics, UCT
Prof H High Department of Economics, UCT
Prof L Loots Department of Economics & Management Science, UWC

In Attendance: Mr N Morrison, Technical Expert

Mr Rustomjee in his overview briefly addressed the following issues, which are fully detailed in the attached appendix containing the slides of his full presentation:

- the role of technical experts
- the importance considering a degree of simplicity in constitutional provisions. This is particularly the case in the light of comparative examples of 16 constitutions, including those of:- Germany, USA, France, Japan, New Zealand, Canada and others.
- the impact of financial issues on expectations and confidence

- broad observations made to date by Mr Rustomjee as the Technical Expert in assessing the various submissions and presentations which had been made to date. This included major elements of multi-party consensus, particularly on the Reserve Bank and the Auditor General provisions of the interim constitution
- external presentations to the committee reflected a degree of flexibility and stressed, in a number cases the need for simplicity in constitutional provisions
- Mr Rustomjee brought to the attention of the committee two important comparative texts which might be useful references for members of the committee

Professor High's presentation drew on the following main points to be considered:

National Commissions/Boards (Audit, Reserve Bank, FFC)

Constitutional provisions should be brief and cover:

- Method of selection
- assurance of independence
- method of removal
- duties of commissions/boards

Stressed the importance of the structure of constitution writing, that it should be sufficiently solid so that generations of people with widely difference preferences, can live within them and adapt to changing circumstances

Professor B Kahn:

Highlighted issues to be looked specifically with regard to the Central Bank and the Reserve Bank and to Budgetary Rules:-

- Agreement that the constitution be brief and not contain a range of conflicting criteria
- disagreement that it should not contain the goals of the Central Bank
- that the interim constitution contains a mission statement of the Central Bank as a protection of the internal and external value of the rand must avoid specifying conflicting objectives
- important to maintain price stability in setting out a range of goals of the Central Bank

- a concern being the role of the Finance Minister vis-a-vis the Central Bank with regard to exchange rate policy - presently the Central Bank has to conduct monetary policy, the responsibility for exchange rate policies lies with the Ministry of Finance
- agree that the main issue should be to maintain price stability in the long run that would then giving the Reserve Bank the power to try and implement necessary policies
- raised concerns regarding independence of the Central Bank - governor would not want to implement policies that would be diametrically opposed to the overall goals of government policy.
- suggesting that its a question of whether this should be in the constitution or in legislation that the function of exchange rate policy should be explicitly handed over to the RB although issues relating to capital controls which could be seen more as a political decision could still remain with the minister of finance
- Agrees with Professor High's theory of the composition of the Board
- role of the Central Bank seems limited
- that the board in fact meets once a quarter and therefore no way that board can be seen as having a major impact on the running of the Central Bank -
- in the event of important decisions for example the discount rate is not taken by the board - board simply to meet at a later stage
- referred to the Chilean Reserve Bank arguing that the international comparative experience suggests basic points for appointing board members which should be included in the constitution. That is, appointments made through a complex process not depending exclusively on the decision of the will of their president; once appointments are made the governor should not have the capacity to ask for their resignation or dismiss them except in the case of grave misconduct; that board members be renewed in gradual way of a process which is in line with what Professor High is saying and that the terms served by the board members be long and if possible be longer than those of the political authorities.
- the function of board members be incompatible with other remunerative activity in the public or private sector. In other words people shouldn't be a position to be able to profit from this - people involved in financial institutions shouldn't be on the board which implies that they could gain from inside information.

Professor Loots

Addressed issues of General Finance - more or less agreed with guidelines set out by Professor High

Auditor General:

- general comment about boards and councils is that it might be very problematic to write details into the constitution
- should something like an audit council be contemplated, a strong appeal be made that broad terms be dealt with
- writing into the constitution that each province shall be represented in many instances could be problematic
- provincial members required to negotiate on behalf of the province

Reserve Bank

- Agree with Professor Kahn i.e. supporting principle that the board of the RB composition should be different and houses of parliament to play a prominent role. Financial institutions may be beneficiaries of the board

Discussion

Mr Rustomjee presented a series of slides dealing with comparative international experience on several aspects of the Central Bank. The central purpose of this aspect of his presentation was as follows:-

- to illustrate the fact that many modern constitutions tend to contain broad principles and not detailed provisions with regard to Central Banks
- that many modern constitutions do not even include reference to Central Banks or Monetary Policy
- that many of the issues discussed during the panel discussion, for example the question of representation on the boards, the numbers of people on boards, the staggering of term of office of board members, the accountability of such members, etc are usually issues which are contained in subsidiary legislation, not in the constitutions themselves. Therefore although the discussions are extremely useful and relevant to the institutions concerned [eg the Central Bank, the Auditor General, the FFC etc] they are not necessarily directly applicable to the immediate objective of constitution writing. Mr Rustomjee noted, however, that it may well be the intention or desire of the committee members to write an extremely detailed constitution. However this was not necessarily in keeping with typical practice among other constitutions internationally.

- He also addressed a question of fact raised in the SACOB presentation to the Sub-theme committee:- this being the question of whether the term of office of the governor of the Central Bank in South Africa was shorter than the term of office of governor of Central Banks elsewhere. In the slides presented Mr Rustomjee illustrated the fact that the SARB governor's term of office is very similar to standard international practice

Responses

- Boards should not be too large to be effective - appealing that the constitution be drafted in such a way that they need not have to be large - rather to have 3 full time people than 35 part time people
- Balanced budget - favour of a balanced budget approach at lower levels
- balanced budget requirement is workable at provincial level but not at national level

Response

- composition of boards : would depend on the functions of these boards
- Are they there to run things on a day to day or regular basis or are they there to give input from diverse points of view - representative of diverse points of view.
- Different models of Central Banks have different situations emerging. In South Africa board meets every 3 months and the day to day running of the Reserve Bank is done by the governor's committee. Whereas you get the - in that case its probably not that important that members of the board are technocrats. But their role would be to try and discuss issues and raise issues from different constituencies with the governor and to try and influence monetary policy in very broad terms. Different in Chilean Central Bank where you have a board of governors which is composed of 5 people all of these specialists
- Very brief constitution needed that must only contain principles which are a guide to good governors. Can't legislate good governors. All one can do is to guide the government and to set bench marks against which the public can evaluate the performance of public institutions.

Wrap up by panellists

Neil Morrison

- need to steer away from short term legislative type of thinking

Mr Rustomjee made two final comments:

- the issues discussed by the panel are very relevant, but the committee may consider the appropriateness of introducing many of these issues in subsidiary legislation. In such a case, the bulk of the work in introducing subsidiary legislation will in fact already have been done, because of the extensive debates and discussions within the Theme Committees and the presentations made to the committee
- it was stressed that in many constitutions but certainly not all constitutions, as may have been intimated by a member of the committee earlier during the panel discussion, do not provide for Central Banks or Monetary Policy provisions

Hugh High

Nothing to add other than which is in my written submission except to reinforce the statement that you're well aware of that I hope ladies and gentlemen that you will write the constitution on the assumption that your worst enemy could be in power tomorrow.

Lieb Loots

Our discussion this afternoon revolves around two issues and I think they are critical issues, and that is who makes the decisions ie how does one compose the board or where who makes the decision. Secondly what do they make decisions about. What are the objectives that pursue and those key areas have been heard. As far as the first is concerned, the decision makers I think in addition to the principle that has already been outlined it there should not be details in the constitution which should mean legislation and I think there we can probably agree with ..I think one has to distinguish between the different kinds of boards or decision making bodies that you're talking about. In the case for example about the Auditor General who does not make decisions about policy. Its brief is very clear. I don't think one needs a board which can bring in different perspectives because there are no different perspectives he has to report truthfully and honestly on the following, well established international practises of what he should do. In the case of the Reserve Bank there is a policy making role. One might want to contemplate some kind of small board or a committee of which the functions are more clearly defined. But there I think because of the policy making role one might want to relieve the responsibility of it lying only in the hands of one person. But then again rearing to the principle that the constitution should not include details which should be legislation. And I think as far as the second area of discussion is concerned what should decisions be made about, perhaps in terms of the two bodies that I have referred to I think the AG is perfectly clear. there's not much debate there. As far as the Reserve Bank is concerned there is some debate there around the exchange rate policy, I would there appeal to get consideration before too many functions - and I think I want what Mr Morrison has said too many objectives prescribed to the Reserve Bank. In addition to that there is the idea of separation of powers which should be considered. In terms of the latter issue area - to what

extent does one try to write other objectives into the general financial section, Morrison was specifically we talked about balance budget, we talked about limit on expenditure. My view is that those things are not things that one can write into the constitution apart from definitional problems I think there are many other constraints. And I would argue in the final instance where you have governments which follow what might be described as responsible fiscal policies, it is not primarily I would argue because it is written into some kind of constitution but rather because they adhere to those norms. They adhere to the norms of what constitutes good governance. Its a culture of good governance which has to be promoted. It can always be easy to get around inadequate and then complete constitutional provisions.

Rob Davies

Discussion focused on issues that we have come across with in one way or another when receiving submissions. We are often getting submissions that are unclear unclear as to whether they are proposing matters to be included in legislation or the constitution. I think we have had from the panel different views about what constitutional provisions should entail. But nonetheless there's been a common view that the constitution should deal with very broad principles and not with details. I think its also been quite useful that it has been pointed out that in the interim constitution there is actually some unevenness that some of the provisions in the interim constitution are more or less broad general principles and other provisions deal, for various reasons that Neil Morrison indicated, with more details and that is also something that we are going to have to take on board. I think finally the recommendation that was made by Cyrus Rustomjee we've done in an ad hoc way and we need to think about it at the end of the process in a more systematic way that some of the submissions that we have heard would be appropriate inputs when legislation is being discussed or thought about or contemplated. We have passed on specific inputs to the Finance Committee in an ad hoc way I think because its covering some particular issue that they are dealing with but I think we need to think about a way at the end of systematising all those other inputs and passing them on to the relative authorities.

ANNEXURE B ; SOUTH AFRICAN RESERVE BANK

SARB	ANC	NP	IFP	DP	FF
<p><u>Section 195:</u></p> <p><i>The SARB, established and regulated by an Act of Parliament shall be the Central Bank</i></p>	A	NCA	AQ:- "The SARB shall be reestablished as "The Central Bank of South Africa"	NCA	NCA
<p><u>Section 196(1):-</u></p> <p><i>The primary objectives of the SARB shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic</i></p>	A	NCA	A	NCA	A
<p><u>Section 196(2)</u></p> <p><i>The SARB shall, in pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament, referred to in Section 197</i></p>	A	NCA	NCA	NCA	NCA
<p><u>Section 196(2) (Continued)</u></p> <p><i>provided that there shall be regular consultation between the SARB and the Minister responsible for national financial matters</i></p>	A	NCA	AQ (refer below)	NCA	A "Decisions affecting each other should be reached only after due consultation between the two authorities. Proper provision for this liaison should be made".

Filename CASARB1

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
<p><u>Section 195:</u></p> <p>The SARB, established and regulated by an Act of Parliament shall be the Central Bank</p>	A	NCA	<p>(1) SACOB:- "The enabling Act of Parliament establishing and regulating the Bank shall not detract from the ... principles..." (mentioned in Section 196(1)).</p> <p>(2) CP : NCA</p> <p>(3) SACP: NCA</p>
<p><u>Section 196(1):-</u></p> <p>The primary objectives of the SARB shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic</p>	A	A	<p>(1) SACOB "SACOB strongly supports the principles contained in Section 196 of the Interim Constitution";</p> <p>(2) COSAB:- " We support the retention of provisions based on Sections 196 and 197 of the Interim Constitution, setting out the primary objectives and the general nature of the powers and functions of the Bank, which powers and functions of the Bank, which powers and functions should continue to be determined by a separate Act of Parliament".</p> <p>(3) SACP</p> <p>D:- Too narrow:- "instead the primary objectives should be to manage the currency in the interests of reconstruction, development and a balanced, sustainable economic growth in the RSA".</p>
<p><u>Section 196(2)</u></p> <p>The SARB shall, in pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament, referred to in Section 197</p>	A	NCA	<p>(1) SACP</p> <p>AQ:- Independence should include not only independence from government but also from other powerful interest groups.</p>
<p><u>Section 196(2) (Continued)</u></p> <p>provided that there shall be regular consultation between the SARB and the Minister responsible for national financial matters</p>	A	NCA	<p>(1) SACOB:- "SACOB endorses the proviso to Section 196(2) of the Interim Constitution that there should be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters";</p> <p>"Any conflict between the Minister of Finance and the Governor of the Reserve Bank should be resolved by Parliament".</p> <p>(2) SACP</p> <p>AQ:- "We assume that "regular consultation" means "in consultation with" and NOT the weaker "after consultation with". This needs to be made clearer. The Ministry of Finance and the Reserve Bank need to work as a team"</p>

Filename CASARB2

SARB	ANC	NP	IFP	DP	FF
<p><u>Section 197:-</u></p> <p><i>The powers and functions of the SARB shall be those customarily exercised and performed by Central Banks.</i></p>	A	NCA	<p>AQ:- "The Bank shall have the powers of regulating banking and credit and shall be independent within the parameters of the law and within the scope of predetermined monetary and general economic policy frameworks (as determined in conjunction with government), to use tools of monetary intervention in the public interest"...</p> <p>"... the Bank ... power to regulate banking ... and to undertake all other powers and functions customarily exercised by central banks"</p>	<p>Amend to read:</p> <p>"The powers and functions of the SARB shall be those customarily exercised and performed by the <u>SARB and other Central Banks</u>" [supported by NP]</p>	NCA
<p><u>Section 197:- (continued)</u></p> <p><i>which powers and functions shall be determined by an Act of Parliament and shall be exercised or performed subject to such conditions as may be prescribed by or under such Act.</i></p>	A "We believe that the details of the operation of the Bank should, as at present, be governed by legislation, with the Constitution specifying general principles only".	NCA	<p>D:- "In order to increase the independence of the Bank, its fundamental powers and functions should be specified in the Constitution rather than left to the discretion of the majority of Parliament"</p> <p>"...the Bank should enjoy "autonomy" which is the power to adopt the fundamental rules of its organisation and operation. It is debatable whether this scheme leaves any space for the legislative competence of Parliament, which in any case should be limited to giving the Central Bank additional or "secondary" goals with related powers, functions and resources, and should not prescribe how such powers and functions are to be organised".</p>	<p>AQ:- Add:- "provided that such Act shall not derogate from the primary objectives and independence of the SARB as provided for in Section 196".</p>	NCA

SARB	ACDP	PAC	COMMENTS FROM OTHER SUBMISSIONS
<p>Section 197:-</p> <p><i>The powers and functions of the SARB shall be those customarily exercised and performed by Central Banks</i></p>	A	<p>AQ:- "... it may intervene in the money markets (to inter alia fix interest rates) to achieve its primary objectives"</p>	<p>(1) SACP</p> <p>D:- "This assumes some universal agreement and practice in regard to the powers of Central Banks. This is simply not the case... For instance in many successful East Asian economies, the central bank has been a subordinate institution within government". We are trying to debunk the common belief that "all economically successful countries have absolutely independent central banks".</p> <p>"The new Constitution needs to ensure that... the degree of Reserve Bank independence is not so extreme that the possibilities of achieving a coherent, democratically-mandated reconstruction and development programme are undermined".</p>
<p>Section 197:- (continued)</p> <p><i>which powers and functions shall be determined by an Act of Parliament and shall be exercised or performed subject to such conditions as may be prescribed by or under such Act.</i></p>	NCA	A	NCA

Filename CASARB4

SARB	ANC	NP	IFP	DP	FF
<p><u>Proposed new Section 197(2)</u></p> <p><i>(Proposed by the DP).</i></p> <p><i>(Reporting & Accountability)</i></p> <p><i>Also includes comments & references from other submissions, with regard to reporting & consultation requirements to Parliament</i></p>	<p>NCA</p>	<p>NCA</p>	<p><i>"The Governor shall submit a half-yearly report to Parliament on the monetary status of the Republic and on the status of the banking system of the country".</i></p> <p><i>"Parliament shall have the power to review any activity of the Bank and to hold hearings to investigate its policies. The Bank shall hold regular consultations with the Ministers responsible for national and provincial matters".</i></p>	<p><i>"The South African Reserve Bank shall submit an annual report to Parliament and authorise senior officers to give evidence before a joint commission of both houses of Parliament on the policies and activities of the South African Reserve Bank"</i></p>	<p>NCA</p>

Filename CASARB5

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
<p><u>Proposed new Section 197(2)</u></p> <p><i>(Proposed by the DP).</i></p> <p><i>(Reporting & Accountability)</i></p> <p><i>Also includes comments & references from other submissions, with regard to reporting & consultation requirements to Parliament</i></p>	NCA	NCA	<p><i>(1) SACOB:- "SACOB recommends that in order to enhance the accountability of the Bank, provision could explicitly be made for appearance before the Joint Standing Committee on Finance".</i></p> <p><i>(2) COSAB:- "Transparency ... would enhance credibility. A suitable vehicle for this could be regular televised testimonies to a specific Parliamentary Committee (eg:- the Joint Standing Committee on Finance) in the form of a report-back, but not to account for or seek approval of actions".</i></p>

Filename CASARB6

SARB	SARB GOVERNOR	SARB : HEAD LEGAL SERVICES - MEMORANDUM TO GOVERNOR
<p><u>General Comments</u></p> <p><i>(From SARB Governors' submission to the Sub-Theme Committee; from SARB Head - Legal Services' Memorandum to SARB Governor)</i></p>	<p><i>(1) "A general statement about the independence of the Reserve Bank would be sufficient";</i></p> <p><i>(2) "The independence of the bank is provided for in Sections 195 - 197...";</i></p> <p><i>(3) (the independence of the bank) "... is the most encouraging factor to investment and the building of confidence in the future of the South African economy".</i></p>	<p><i>With regard to Sections 195 - 197:- "I would, with respect, advise against any drastic departure from the current wording of the said sections ... because in their present form they constitute, in my submission, a well-balanced arrangement of the relationship between the Government and its monetary policy agent. It is generally acknowledged that the relationship between the Government and the Central Bank is essentially one of mutual trust and consultation and close co-ordination of economic policy targets and measures. Such relationship, creating as it does the opportunity for the blending of socio-economic forethought and professional economics expertise runs the risk of being impaired if made subject to a plethora of prescriptive legislative provisions"</i></p>

Filename CASARB7

SARB	SARB GOVERNOR	SARB : HEAD LEGAL SERVICES - MEMORANDUM TO GOVERNOR
<p><u>Section 195:</u></p> <p><i>The SARB, established and regulated by an Act of Parliament shall be the Central Bank</i></p>	<p><i>"To date the Bank is accountable to Parliament through a special Act that spells out its role and functions";</i></p> <p><i>"The section, together with Section 196, recognises the need for autonomy of the central bank</i></p>	
<p><u>Section 196(1):-</u></p> <p><i>The primary objectives of the SARB shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic</i></p>		
<p><u>Section 196(2)</u></p> <p><i>The SARB shall, in pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament, referred to in Section 197</i></p>		<p><i>"The crucial problem of the exact nature and purview of the "independence" granted to the Bank in Section 196(2) of the Constitution ... still remains to be solved... Section 196(2) ... has not yet formed a subject for interpretation by a court of law".</i></p> <p><i>Assuming the definition of "independent" in the Concise Oxford Dictionary (8th Edition) is the true meaning intended by the legislator, the Bank "shall be entitled and is indeed obliged to act on its own authority and shall be free from control, whether by way of any directives, instructions or any other form of direct or indirect control, by any entity outside the Bank".</i></p>
<p><u>Section 196(2) (Continued)</u></p> <p><i>provided that there shall be regular consultation between the SARB and the Minister responsible for national financial matters</i></p>	<p><i>"It is important to keep monetary policy out of the political system by allowing the Governor to effect such decisions without prior approval by the Minister of Finance".</i></p>	<p><i>"The circumscribed autonomy postulated above is, in accordance with the best-informed opinion currently prevailing in the relevant field, terms whereof a significant number of central banks, while closely collaborating with government in the form of macro-economic policy, are nevertheless required to autonomously pursue price stability through the application of the monetary expertise at their disposal".</i></p>

Filename CASARB8

SARB	ANC	NP	IFP	DP	FF
<u>Other Issues Arising:</u> 1. The Bank to be independent from party political interference	A	NCA	NCA	NCA	A
2. <u>New Section:-</u> Proposed by the IFP	DC1 Opposes IFP proposal	DC1 Opposes IFP proposal	DC1 There should be specified limits on the Bank's direct financing of government.		
3. <u>New Section:-</u> Proposed by the IFP	DC2 Opposes IFP proposal	DC2 Opposes IFP proposal	DC2 The Bank should not be obliged to purchase government securities.		DC2 Opposes IFP proposal
4. <u>Bank's Structures</u>	DC3 opposes IFP proposal	DC3 opposes IFP proposal	DC3 "Since the final guarantees of independence of the Bank lie in the Bank's structures, this should be determined by the Constitution and not by an Act of Parliament"..		DC3 opposes IFP proposal

Filename CASARB9

SARB	PAC	ACDP	COMMENTS FROM OTHER SUBMISSIONS
<p><u>Other Issues Arising:</u></p> <p>1. The Bank to be independent from party political interference</p>	NCA	A	<p>(1) SACP AQ:- "But this should be supported with mechanisms to ensure that the bank is accountable to the broad, democratically-mandated goals of Government (in this case the goals of reconstruction and development ... through ... legislation".</p> <p><i>A more representative Board of Governors, who are more in tune with the present social challenges; increasing transparency by ensuring greater answerability to Parliament.</i></p>
<p>2. <u>New Section:-</u></p> <p><i>Proposed by the IFP (& any related comments from other submissions)</i></p>			<p>1) CP "The SARB in a confederal system may under no circumstances finance any deficits of any of the participating states".</p>
<p>3. <u>New Section:-</u></p> <p><i>Proposed by the IFP</i></p>			
<p>4. <u>Bank Structures</u></p>			

Filename CASARB10

SARB	ANC	NP	IFP	DP	FF
<p><u>Other Issues Arising:-</u></p> <p><u>5. Appointment & Representation:-</u></p>	DC4 opposes IFP proposal	DC4 opposes IFP proposal	DC4: The Governor, the two deputy governors and 3 other Directors of the Central Bank shall be appointed by the President in consultation with Parliament or a select committee thereof. A further 10 directors of the Bank's board should be appointed by organised commerce, industry and labour.	DC4 opposes IFP proposal	DC4 opposes IFP proposal
6. <u>Term:-</u>	DC5 opposes IFP proposal	DC5 opposes IFP proposal	DC5: "All members of the Bank's board should serve for a 5-year term which may be renewed on one or more occasions"	DC5 opposes IFP proposal	DC5 opposes IFP proposal
7. <u>Executive:-</u>	DC6 opposes IFP proposal	DC6 opposes IFP proposal	DC6: "The Executive should be made up of the Governor, the two Deputy-Governors and three other Directors from those appointed by organised commerce, industry and labour".	DC6 opposes IFP proposal	DC6 opposes IFP proposal
8. <u>Comments on drafting:-</u>	"Given the broad support these sections enjoy, the ANC proposes incorporating them into the Final Constitution unchanged".			"While many of these proposals are couched in "quasi-legal" terminology, they are not intended to convey the final, precise wording required in the Constitution.	

Filename CASARB11

SARB	PAC	SACP	ACDP	COMMENTS FROM OTHER SUBMISSIONS
<p><u>Other Issues Arising:-</u></p> <p>5. Appointment & Representation:-</p>				<p>(1) SACOB:- "The Board should be more representative than at present; future appointments should enforce the independence, credibility and the professionalism expected of a Central Bank"; "Persons who are politically active should not be eligible for appointment and the Directors and Governors should not be political appointees in a more representative Board of Directors for the Reserve Bank".</p> <p>(2) COSAB:- Central Banks should not be made politically accountable by placing political appointees on their Boards or in Executive positions. Persons who are politically active should not be eligible for appointment. Competence, not population or interest group representivity to be the main criteria for appointments.</p> <p>(3) SACP:- The Board of Governors should be more representative and should be more in tune with the present social challenges.</p>
<p>6. Term:-</p>				<p>(1) SACOB:- "The terms of Directors are not necessarily tied to Parliamentary election terms"</p> <p>(2) COSAB:- Effective functioning would be served by increasing the terms of the four Governors to 8 years and the 4 Directors to 4 years.</p>
<p>7. Executive:-</p>				
<p>8. Comments on drafting:-</p>				

Filename CASARB12

SARB	SACOB	TRANSNET	COSAB
<p><u>General Comments</u></p> <p><i>(From COSAB, SACOB and TRANSNET submissions, on the SARB).</i></p>	<p><i>(1) "The Reserve Bank should be independent within the system, not of the system";</i></p> <p><i>(2) "While the provisions in the Interim Constitution are being supported, it is suggested that accountability and transparency be strengthened";</i></p> <p><i>(3) "SACOB ... believes it to be vitally important that the independence of the Bank should be clearly enshrined in the final Constitution";</i></p> <p><i>(4) "SACOB ... strongly supports the principles contained in Section 196 of the Interim Constitution";</i></p> <p><i>(5) "SACOB endorses the proviso to Section 196(2) of the Interim Constitution</i></p>	<p><i>"We agree with the existing status of the paragraphs in the Interim Constitution regarding the Reserve Bank and FFC. It is our recommendation that these paragraphs be included unchanged into the Final Constitution. It is of the utmost importance that the independent status of the Reserve Bank be acknowledged in the Final Constitution".</i></p>	<p><i>"We support the retention of provisions based on Sections 196 and 197 of the Interim Constitution, setting out the primary objectives and the general nature of the powers and functions of the Bank, which powers and functions should continue to be determined by a separate Act of Parliament".</i></p>

ANNEXURE C : THE AUDITOR GENERAL

AUDITOR-GENERAL ("AG")	ANC	NP	IFP	DP	FF
<p><i>General Comments (where submitted by political parties or other institutions)</i></p>	<p>"We are generally happy with the provisions of the AG in Sections 191-194 of the Interim Constitution and propose that they be incorporated into the Final Constitution with ... small amendments only".</p> <p>"Section 193(3) to 193(8) should be deleted and replaced with a clause indicating that the powers and functions of the Office of AG will be covered by an Act of Parliament. (Matters of details such as those covered in these sections would, in our view, be better dealt with in legislation than in the Constitution".</p>	<p>"The NP supports the principles set out in a memorandum submitted by the Office of the AG ... dated 25 January 1995"</p> <p>"The NP approach is similar to that adopted by the Audit Commission at its meeting held on 16 February 1995";</p>	<p>"The role, status, powers and functions of the AG should be included in the Constitution so as to complete the Constitutional system of checks and balances"</p> <p>Establishment & Appointment:- "The AG should be regulated by an Act of Parliament as is the case at present"</p> <p>Powers and Functions:- "The AG's primary objective(s) should be set out in the Constitution and shall include furthering the optimum employment of all public moneys which includes the desirable levels of efficiency, productivity and sound management"</p>		<p>DC7: "At present the AG finds it difficult to handle all the work. Because of this each province should have its own AG that should be in a better position to determine priorities in his province and devote his attention to where needed most";</p> <p>"The Provinces' AG's should form a body, the National Council of AG's, under the chairmanship of a national AG". Opposed by ANC & DP</p>

Filename CAAG1

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
<u>Section 191</u> <u>Establishment and</u> <u>Appointment</u>			<i>"The AG should be regulated by an Act of Parliament as is the case at present"</i>		
<u>Section 191(1)</u>					
<u>Section 191(2)</u>		<i>The AG should be appointed by the Audit Commission after consultation with the President</i>	<i>AQ:- "The AG should be appointed by the State President after nomination by the Audit Commission and approval of that nomination by a two-thirds vote in the National Assembly and Senate".</i>	<i>"The President should fill a vacancy within eight months".</i>	<i>DC&:- "Appointments of AG's should be made by the taxpayers and not by the Government".</i> <i>[Opposed by ANC, NP, DP and IFP]</i>
<u>Section 191(3)</u>			<i>A. "The AG should be a person of appropriate character and expertise"</i>		
<u>Section 191(4)</u>	<i>Delete the words "unless the new Constitutional text provides otherwise".</i>		<i>AQ:- "The AG should serve in that capacity for a maximum of two five-year terms"</i>	<i>Delete the words " unless the new Constitutional text provides otherwise"</i>	
<u>Section 191(5)</u>				<i>Change the terminology to "most senior officer present" from "highest ranking member".</i>	
<u>Section 191(6)</u>			<i>A</i>		
<u>Section 191(7)</u>					

AUDITOR-GENERAL (AG)	PAC	ACDP	AUDITOR-GENERAL
<u>Section 191</u> <u>Establishment and Appointment</u>			
<u>Section 191(1)</u>			
<u>Section 191(2)</u>	A		Insert "but not later than 8 months after the vacation of office"
<u>Section 191(3)</u>	A	AQ:- "Due regard must be had to financial and fiscal expertise ... It is also suggested that hands-on experience, rather than "Ivory tower" academic background should be preferred".	
<u>Section 191(4)</u>		AQ:- "Security of tenure is a necessity and the period of approximately 7 years without eligibility for re-appointment is suggested, subject to the option being left open for resignation from the position".	Delete "unless the new Constitutional text provides otherwise, the"
<u>Section 191(5)</u>			Substitute "highest ranking member of the AG's staff" with "most senior officer present in the Office of the AG"
<u>Section 191(6)</u>	A	A	
<u>Section 191(7)</u>	A		

Filename CAAG4

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
<u>Section 191</u> <u>Establishment and Appointment</u> (Continued)					
<u>Section 191(8)</u>			A		
<u>Section 191(9)</u>				"Removal should be subject to the same two-thirds majority as with appointment".	
<u>Section 191(10)</u>					
<u>Section 191(11)</u>					
<u>Suggested New Section 191(12)</u>			"The AG should have no personal interests in any of the organisations and bodies audited by the AG's office".		

Filename CAAG5

AUDITOR-GENERAL (AG)	PAC	ACDP	AUDITOR-GENERAL
<p><u>Section 191</u> <u>Establishment and Appointment</u> (Continued)</p>			
<p><u>Section 191(8)</u></p>	A		
<p><u>Section 191(9)</u></p>	A	<p><i>AQ:- "The discretion left to the President is a cause for concern. If a taint is proven beyond doubt on the fitness and preperness of the official, it would be to the detrement of the whole institution to have him remain".</i></p>	<p><i>Add "by a majority of at least two thirds of teh members present and voting and substitute "sitting" with "meeting".</i></p>
<p><u>Section 191(10)</u></p>			
<p><u>Section 191(11)</u></p>			Delete
<p><u>Suggested New Section 191(12)</u></p>			

Filename CAAG6

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
<u>Section 192</u> <u>Independence and impartiality</u>					
<u>Section 192(1)</u>			AQ:- "The AG must exercise his/her powers and functions in an independent and impartial manner, and in doing so must only be subject to the Constitution and to the law"	"Persons appointed under Section 194(1) should also be independent and impartial".	A
<u>Section 192(2)</u>			A	Delete and substitute:- "The AG and the persons appointed under S194(1) shall not be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of anything which he or she has said, produced or submitted in or before or to Parliament or any committee thereof or by reason of anything which may have been revealed as a result of what he or she has said, produced or submitted in or before Parliament or any committee thereof in respect of anything said or produced or submitted in good faith in the performance of any duty or the exercise of any power imposed or conferred upon him or her in terms of this Act or any other law".	
<u>Section 192(3)</u>			AQ:- "The state should protect the AG and his/her staff from any outside interference..."		
<u>Section 192(4)</u>					
<u>Suggested New Section 192(5)</u> <u>(IFP)</u>			"All institutions audited by the AG must co-operate fully with the AG and shall respect the AG's position of independence".		

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AUDITOR-GENERAL (AG)	PAC	ACDP	AUDITOR-GENERAL
<u>Section 192</u> <u>Independence and Impartiality</u>			
<u>Section 192(1)</u>			<i>Add "the persons appointed under Section 194(1)";</i> <i>Substitute "his or her" with "their".</i>
<u>Section 192(2)</u>	A		
<u>Section 192(3)</u>	A		
<u>Section 192(4)</u>	A		
<u>Suggested New Section 192(5)</u> <u>(IFP)</u>			

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
Section 193 <i>Powers and Functions</i>					
Section 193(1)			A		
Section 193(2)	<i>"Should provide for the AG to have the right to audit accounts and financial statements of persons in the employment of bodies to who public funds have been entrusted; the present text could be interpreted as imposing a duty on it to do so"</i>			<i>"The AG should be required to audit the accounts and financial statements of all enterprises owned or controlled by any level of Government".</i>	
Section 193(3)	<i>Delete and replace with a clause indicating that the powers and functions of the Office of the AG will be covered by an Act of Parliament</i>	Agrees with ←		<i>"Provincial and local governments should also be entitled to request performance audits".</i>	
Section 193(4)	<i>Delete and replace with a clause indicating that the powers and functions of the Office of the AG will be covered by an Act of Parliament</i>	Agrees with ←	<i>"The AG may, whenever he/she considers it to be necessary..." (Currently "...to be in the public interest ..."</i>		
Section 193(5)	<i>Delete and replace with a clause indicating that the powers and functions of the Office of the AG will be covered by an Act of Parliament</i>	Agrees with ←			
Section 193(6)	<i>Delete and replace with a clause indicating that the powers and functions of the Office of the AG will be covered by an Act of Parliament</i>		<i>AG:- "The AG must have full access to all relevant books, records and other information necessary to satisfactorily conclude an audit".</i>	<i>"All persons involved with entities which are subject to audit by the AG should be obliged to supply any information or explanation reasonably required by the AG and persons appointed under Section 194(1) in the exercise or performance of their powers and functions".</i>	

Filename CAAG9

AUDITOR-GENERAL (AG)	CP	PAC	SACP	ACDP	AUDITOR-GENERAL
Section 193 Powers and Functions				<i>D:- "The functions of the official should rightly be dealt with in a separate legal instrument as circumstances change and amendments might need to be made that would detract from the basic immutability of a Constitution".</i>	
<u>Section 193(1)</u>				<i>As above</i>	<i>Substitute "office" for "Office" and add "the" before "AG".</i>
<u>Section 193(2)</u>				<i>As above</i>	<i>Delete "all persons... any other assets" and replace with "funds and assets entrusted to any person in the employment of such a body".</i>
<u>Section 193(3)</u>				<i>As above</i>	
<u>Section 193(4)</u>				<i>As above</i>	
<u>Section 193(5)</u>				<i>As above</i>	
<u>Section 193(6)</u>				<i>As above</i>	

Filename CAAG10

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
<p><u>Section 193</u> <u>Powers and Functions</u> <i>(Continued)</i></p>					
<p><u>Section 193(7)</u></p>	<p>Delete and replace with a clause indicating that the powers and functions of the Office of the AG will be covered by an Act of Parliament</p>	<p>Agrees with ←</p>	<p>DC9: "The AG should report to the Audit Commission which should have provincial and central government representation with no one government having greater representation than others";</p> <p>"The AG's audit reports should go through the various Parliaments to their public accounts committees for any possible reaction. Any concerns held by the national Minister of Finance arising out of specific provincial level reports should be dealt with between his/her Ministry and the relevant provincial Ministry of Finance";</p> <p>"The Constitution should stipulate the time allowed between the completion of an audit and the submission of that report to Parliament".</p> <p>[Opposed by ANC, NP, DP and FF]</p>	<p>Delete and substitute:-</p> <p>(a) The AG shall report on the accounts examined by him or her and submit such report to the controlling body or accounting officer concerned and to the legislature under whose jurisdiction such body or accounting officer falls.</p> <p>(b) Such reports or a report by the AG or on any other matter shall be submitted to the legislature within 7 days after receipt thereof by such controlling body or accounting officer.</p> <p>(c) The AG shall report unresolved problems at local government level to the appropriate provincial government and unresolved problems at provincial level to Parliament"</p>	
<p><u>Section 193(8)</u></p>	<p>Delete and replace with a clause indicating that the powers and functions of the Office of the AG will be covered by an Act of Parliament</p>	<p>Agrees with ←</p>			

Filename CAAG11

AUDITOR-GENERAL (AG)	PAC	ACDP	AUDITOR-GENERAL
<u>Section 193</u> <u>Powers and Functions</u> (Continued)		<i>Refer paragraph above</i>	
<u>Section 193(7)</u>			<i>Delete "working".</i>
<u>Section 193(8)</u>			<i>Delete "working".</i>

Filename CAAG12

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
<p><u>Section 193</u> <i>Powers and Functions</i> <i>(Continued)</i></p>					
<p><u>Proposed New Section (ANC)</u></p>	<p><i>The relationship of the AG to the Parliamentary Committee on Public Accounts should be specified in the Constitution.</i></p>				
<p><u>Proposed New Section (DP)</u></p>				<p><i>"The AG shall in respect of regulatory audits report whether accounts and financial statements represent a true and fair reflection of the finances of the entity being audited"</i></p>	
<p><u>Proposed New Section (DP)</u></p>				<p><i>"The AG shall report on any entity which does not have its accounts ready for audit within 12 months of the end of its financial year or such shorter period as may be prescribed by law".</i></p>	
<p><u>Proposed New Section (IFP)</u></p>			<p><i>"All audits should include annual regulatory and systems audits and should include annual regulatory and systems audits and should include economy, efficiency and effectiveness audits at least every second year. The Audit Commission may request special audits should it consider these to be necessary.</i></p>		

Filename CAAG13

AUDITOR-GENERAL (AG)	PAC	ACDP	AUDITOR-GENERAL
<u>Section 193</u>			
<u>Powers and Functions</u>			
<u>(Continued)</u>			
<u>Proposed New Section (ANC)</u>			
<u>Proposed New Section (DP)</u>			
<u>Proposed New Section (DP)</u>			
<u>Proposed New Section (IFP)</u>			

Filename CAAG14

AUDITOR-GENERAL (AG)	ANC	NP	IFP	DP	FF
<u>Section 194</u> <u>Staff and Expenditure</u>					
<u>Section 194(1)</u>				<i>Such persons" should include private audit firms if it does not already do so.</i>	
<u>Section 194(2)</u>					
<u>Section 194(3)</u>			<i>"The AG will as far as possible recover all costs incurred from bodies audited so as to be self-financing. Charge out rates should be market-related"</i>	<i>In the second line, after "money" insert "which shall be".</i>	
<u>Section 244</u> <u>Transitional Arrangements</u>					

Filename CAAG15

AUDITOR-GENERAL (AG)	PAC	ACDP	AUDITOR-GENERAL
<u>Section 194</u> <u>Staff and Expenditure</u>			
<u>Section 194(1)</u>			<p>Delete "appoint"</p> <p>Add "regulate the appointment of" before "such persons"</p> <p>Replace "The work of the Office of the AG" with "his or her powers and functions".</p>
<u>Section 194(2)</u>			
<u>Section 194(3)</u>			Delete "appropriated.. raised or".
<u>Section 244</u> <u>Transitional Arrangements</u>			<p>Section 244(1)(a):-</p> <p>(i) Delete "AG Act, 1989,... to Section 191" and replace with "Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) to hold office and to exercise and perform the powers and functions of the AG in accordance with";</p> <p>(ii) Add "for the unexpired term of his or her office; and";</p> <p>Section 244(1)(b) delete ";and";</p> <p>Section 244(2) delete the whole clause.</p>

Filename CAAG16

AUDITOR-GENERAL ("AG")	AUDITOR-GENERAL
<p>General Comments submitted by the Auditor-General.</p>	<p>(1) <u>Provisions in the Interim Constitution:-</u></p> <p>"The present Constitutional provisions concerning the AG and the Office of the AG are considered adequate. However, certain minor improvements and changes currently under consideration may be appropriate whilst drafting the Final Constitution".</p> <p>(2) <u>Key Principle:-</u></p> <p>"The key principle underlying present and future audit related Constitutional provisions is that of the independence and impartiality of the AG and his or her Office. This enables unhindered independent auditing and public reporting on the collection and utilization of public funds by all tiers of Government, as one of the pivotal checks and balances in a democracy".</p> <p>(3) <u>Link with Legislature not Judiciary:-</u></p> <p>"The governmental audit function, albeit unique, is most closely linked to the legislative branch of Government and not to that of the Executive or Judiciary. The basic philosophy, especially with regard to the Executive institutions, is that once can not independently and impartially audit something that you are a part of".</p> <p>(4) <u>Other Types of System:-</u></p> <p>"The Cours of Audit ... "arrangement does not appear to offer significant benefits which our system does not produce ...".</p> <p>(5) <u>The Number of Audit Institutions:-</u></p> <p>"It is considered imperative that there should only be one Government audit institution for all levels of Government in South Africa and that the constitutional provisions should therefore be maintained";</p> <p>Reference is made to:- (i) the possibility of splitting the Government audit function; (ii) the fact that this occurs in certain developed countries; (iii) the practicability of this approach in South Africa with its rather limited resources, especially of adequately trained and skilled technical staff; (iv) the comparatively limited size of the Government audit function in the country as a whole; (v) the problem that an unresolved local authority financial problem becomes the problem of the next tier of Government; (vi) and that a unitary audit configuration can audit the use of transfer payments from higher tiers of government to the lowest, which has obvious advantages in terms of efficient government.</p> <p>(6) <u>Detailed Nature of Provisions in the Constitution:-</u></p> <p>"Given the importance of an effective Government audit function, the detailed nature of the provisions in the present Constitution are not regarded as inappropriate".</p>

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.5

SPECIALISED STRUCTURES OF GOVERNMENT

REPORT: PUBLIC PROTECTOR

DRAFT

**THEME COMMITTEE SIX - SUBTHEME THREE
SPECIALISED STRUCTURES OF GOVERNMENT
REPORT ON THE PUBLIC PROTECTOR**

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
- 1.2.2 Black Lawyers Association
- 1.2.3 Centre for Applied Legal Studies
- 1.2.4 General Council of the Bar
- 1.2.5 Human Rights Committee
- 1.2.6 Lawyers for Human Rights
- 1.2.7 Legal Resources Centre
- 1.2.8 National Land Committee

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 () 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 some 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 - incomplete

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 on the issues from the technical advisors and political party submissions gave rise to a list of questions that were sent to organisations in civil society. Written submissions were made by these organisations, followed by public hearings.

Public Protector**3**

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

- 4.1 name of the Public Protector;
- 4.2 the manner in which the institution should be included in the final constitution;
- 4.3 the tenure of the Public Protector;
- 4.4 the qualifications of the Public Protector;
- 4.5 whether the Public Protector should have additional powers, over and above those already present in the interim constitution;
- 4.6 the ambit of jurisdiction of the Public Protector, whether this should include the private sphere, the courts and traditional leaders;
- 4.7 the relationship between national and provincial Public Protectors; and
- 4.8 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.

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.

Public Protector

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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.

5.2.4 Tenure

There was agreement on the need for a fixed tenure, but disagreement as to what this meant (see 6.3.3 below).

5.2.5 Public finding

There appears to be implicit 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.

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.

Public Protector**5****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 the National Land Committee, stating that rural communities have little organisation through which to channel complaints. Others 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, ...

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 and organise its offices at a regional or district level (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.

Public Protector

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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 (NP). 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.

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 (CAL5, HRC & 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.

CAL5 warned that if the powers and 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.

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

Public Protector

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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".

6.2 The name:

There is disagreement over the name of the Public Protector:

- 6.2.1 Support for "Public Protector": ACDP, ANC, IFP, National Land Committee, CALS, Human Rights Committee,
- 6.2.2 No preference shown: DP, LRC,
- 6.2.3 Support for "Ombudsman": NP, FF, General Council of the Bar, Prof Barrie,
- 6.2.4 Additional names: "Ombudsperson" - BLA; "Ombud" -

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 a the interim constitution and a later change of name will be confusing, losing any goodwill that may have been built up.
- * 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.

Public Protector**8**

Those who support "ombudsman" cite the following reasons:

- * "Ombudsman" is not sexist as its Swedish translation means
- * 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 will not be translated.

6.3 Independence:**6.3.1 Further suggestions on independence:**

- * 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. The majority appears to support the procedure laid down in the interim constitution (ANC, DP, NP,... FF silent on the issue). However the IFP suggests that the Judicial Services Commission (JSC) should compile a short list of candidates for the Parliament. The JSC would also conduct the initial investigation into dismissal and report findings to parliament and the President. However, actual removal would be by the President acting on the recommendation of the JSC.

In addition, the National Land Committee emphasised that the procedure for selection should be transparent and IFP stressed that where Public Protectors would have jurisdiction over Traditional Leaders, they should be some 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. Some supported the grounds currently found in the interim constitution, namely misbehaviour, incapacity or incompetence (ANC and NP). Others supported stronger grounds of mental incapacity or gross misconduct (IFP). The LRC called for dismissal on grounds of impeachable conduct (LRC).

6.3.3 Tenure

There was disagreement on the nature of tenure of the Public protector.

6.3.3.1 The majority of parties and stakeholders agree with 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 silent, BLA, GCB, NLC, LRC, HRC). The majority appear to support a term of between five and seven years. However, there is disagreement or a lack of clarity on whether the term should be renewable:

6.3.3.1.1 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, LRC, HRC.

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

6.3.3.1.3 The ANC and FF were silent of this issue.

6.3.3.2 Some submissions called for the option of appointment for a longer term until retirement. The NP did not support this view strongly, but felt that it should be debated. The GCB also felt that the appointment until retirement age was an option that should be considered. The Association of Law Societies 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.

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

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 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. CALS also mentioned that experience in managing large institutions may be a sufficient qualification. The BLA felt that candidacy should not be drawn from lawyers only and the LRC felt that the person should have a sound understanding of the underlying social and administrative consequences of actions in the public administration.

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

Some submissions suggested that this is not an issue which needs to be covered by the constitution as experience with the office may change the way in which the legislature perceives the required qualifications (CALS). Others felt that legal qualifications were important enough to be entrenched in the final text (Van der Walt).

6.5 Powers and Functions

Several submissions suggested that additional powers be given to the Public Protector.

6.5.1 Group complaints

It did not seem to be controversial that the Public Protector should be able to receive complaints from a group, although the ANC was the only party to make specific reference to this. 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.

6.5.2 Systemic problems

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.

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.

6.5.3 Complaints by a third party

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.

6.5.4 Powers of investigation:

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.

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

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

6.5.5 The power to litigate:

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

6.5.5.1 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.

6.5.5.2 The HRC and CLC felt that the Public Protector should be able to take matters to court if necessary.

6.5.5.3 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 6.5.4. below.

Other organisations were specifically opposed to litigation (GCB).

6.5.6 The Power to Refer

Several submission called for wider powers of referral than are contained in the Interim constitution (GCB, LRC).

6.5.7 The power to direct disciplinary hearing

The LRC suggested the Public protector should have the power to override decisions where the power to effect discipline is abused.

6.5.8 The power to request publication of reasons by a person, entity or institution

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

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recommendation. These reasons should then be tabled in parliament or published in the press. The LRC supports this view.

6.5.9 The power to protect against victimisation

Both the GCB and LRC suggest that the Public Protector should be empowered to protect complainants from victimisation.

6.5.10 The power to review laws for constitutionality and make recommendations for legislative change

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.

6.5.11 The Power to suspend prescription and statutory notice periods

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

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

* (to be added)

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

over professions; traditional leaders.

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

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 administrative functions, the concerns 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 law. It was felt that Public Protectors would not necessarily understand the institution of traditional law. To resolve this the IFP suggested that the House of Traditional Leaders be included in the selection process of the Public Protector having jurisdiction in respect of traditional communities. Public Protectors should also work in co-operation with the chiefs and traditional leaders where possible. It was acknowledged however, that there

may be cases in which this co-operation may not be forthcoming and it would be necessary for the Public Protector to pursue the case regardless.

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.

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 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

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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 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 provinces where an autonomous provincial Public Protector may take an opposing view to the National Public Protector or establish networks. (GCB, LRC, Van der Walt
- 6.7.5 Others felt that a division of labour 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

6.8.2 A second issue raised by the HRC was the suggestion that the

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office of the Public Protector be established not as an individual, but as a team or commission allowing for specialisation and diversification.

ISSUES	CP *	CONSENSUS/NON CONTENTION	CONTENTION	FURTHER CLARITY
<p><u>Establishment of the office of the Public Protector (PP).</u></p>	<p>XXIX</p>	<p>1. Office of the PP should be constitutionalised (para 5.1).</p> <p>1.1 The constitution should deal with broad formulations, details should be left to legislation.</p> <p>2. The PP should be selected and dismissed by a parliamentary process (para 5.2.3).</p> <p>3. The PP tenure of office should be fixed (para 5.2.4)</p> <p>4. The PP should be accountable to, and report annually to parliament (para 5.2.2)</p> <p>5. The office of the PP needs to be accessible (para 5.5).</p>	<p>1. There is disagreement on the precise manner of selection and dismissal of the PP. Three views emerged (see para 6.3.2);</p> <p>1.1 Selection process should be through the parliamentary joint committee.</p> <p>1.2 The judicial service commission (JSC) must make the initial selection and make a recommendation to parliament.</p> <p>1.3 Where the PP would have jurisdiction over traditional leaders they need to be consulted on the person selected.</p> <p>2. There is disagreement as to what is the nature of the fixed tenure (6.3.3).</p>	<p>1. The extent to which the office, powers and functions of the PP should be included in the constitution and what detail needs to be left to legislation needs to be clarified. Two views have emerged on this issue (para 6.1);</p> <p>1.1 Less detail so that the role of the office is able to change over time.</p> <p>1.2 There is a need for specific detail on roles and functions in order to prevent overlap.</p> <p>2. Grounds for dismissal, two views emerged (para 6.3.2);</p> <p>2.1 Support for the formulation in the Interim Constitution (IC).</p> <p>2.2 Support for stronger grounds for dismissal namely, mental incapacity, gross misconduct, impeachable conduct.</p> <p>3. On the nature of tenure three views emerged (para 6.3.3);</p> <p>3.1 Fixed term, 5 - 7 years, and renewable.</p> <p>3.2 Fixed term, 5 - 7 years, not renewable.</p> <p>3.3 Appointment until retirement.</p>

<p><u>Independence and impartiality.</u></p>	<p>XXIX</p>	<p>1. Need for independence and impartiality of the PP (para 5.2.1)</p> <p>2. The PP's findings should be made public (para 5.2.5).</p>	<p>1. Additional suggestions on independence (para 6.3.1);</p> <p>1.1 Privileges and immunities, non interference and assistance by the State.</p> <p>1.2 Indemnity for work done in good faith.</p>
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<p><u>Powers and Functions</u></p>	<p>1. There is broad agreement that the PP should have the type of powers contained in section 112 of the IC, namely (para 5.3);</p> <p>1.1 Investigation of maladministration, corruption and impropriety.</p> <p>1.2 Power of referral</p> <p>1.3 Make recommendations.</p> <p>1.4 Act on the receipt of complaints and own initiative.</p>		<p>1. Submissions suggested that additional powers be given to the PP namely (para 6.5);</p> <p>1.1 The PP should have the power to receive group complaints.</p> <p>1.2 The PP should have the power to investigate systemic problems.</p> <p>1.3 There needs to be a provision for the referral of complaints by a third party.</p> <p>1.4 While there is agreement on the need for effective powers of investigation, the extent of the PP's power of investigation and the extent to which this reflected in the constitution needs to be clarified (para 6.5.4).</p> <p>1.5. On the power to litigate (para 6.5.5);</p> <p>1.5.1 There was support for the PP to have the power of litigation.</p> <p>1.5.2 Others were specifically opposed to litigation.</p> <p>1.6 The PP should have wider power of referral (para 6.5.6).</p> <p>1.7 The PP should have the power to direct disciplinary hearings (para 6.5.7).</p> <p>1.8 The PP should have the power to request publication of reasons by a person, entity or institution (para 6.5.8).</p> <p>1.9 The power to protect against victimisation (para 6.5.9).</p> <p>1.10 The power to review laws for constitutionality and make recommendations for legislative change (para 6.5.10).</p> <p>1.11 The power to suspend prescription and statutory notice periods (para 6.5.11).</p>
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<p><u>Jurisdiction</u></p>		<p>1. The 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 (para 5.4).</p>		<p>1. There were some suggestions made with regard to the jurisdiction of the PP:</p> <p>1.1 With regard to the PP's jurisdiction in the courts there were suggestions that (para 6.6.2);</p> <p>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.</p> <p>1.1.2 The PP should be able to intervene where there are delayed judgements.</p> <p>1.2 With regard to the PP's jurisdiction extending to the private sector two views were expressed namely (para 6.6.1);</p> <p>1.2.1 The one view maintains that it is important to extend the jurisdiction of the PP to private institutions performing a public function.</p> <p>1.2.2 Another view maintains that there are sufficient mechanisms in the private sector.</p>
				<p>1.3 With regard to 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 a number of suggestions were made with regard to this relationship namely (para 6.6.3);</p> <p>1.3.1 The House of Traditional Leaders would need to be part of the selection process.</p> <p>1.3.2 The PP should work in co-operation with chiefs and traditional leaders where possible.</p>

<p><u>Name</u></p>			<p>1. There is disagreement over the name Public Protector, three views emerged (para 6.2);</p> <p>1.1 Those who support the name Public Protector.</p> <p>1.2 Those who support the name Ombudsman.</p> <p>1.3 Those who supported additional names such as Ombud or Ombudsperson</p>	
<p><u>Qualifications</u></p>			<p>1. Two views emerged on the nature of the qualifications of the PP (para 6.4);</p> <p>1.1 Those who believe that legal qualifications were necessary.</p> <p>1.2 Those who believe that alternative qualifications were sufficient.</p> <p>2. Two views emerged as to whether the issue of the nature of qualifications should be included in the constitution;</p> <p>2.1 Those who believe that the qualifications of the PP should not be included in the constitution.</p> <p>2.2 Those who believe that legal qualifications should be entrenched in the final text.</p>	

<u>National and Provincial Public Protectors</u>		<p><i>1. There is agreement that there should be national and provincial PP's (para 6.7)</i></p>	<p><i>1. There is disagreement, as to the relationships between, and the powers of, National and Provincial PP's. These disagreements are (para 6.7);</i></p> <p><i>1.1 There must one National PP's office and this office must have provincial branches;</i></p> <p><i>1.2 There must be division of labour between National and Provincial PP's.</i></p> <p><i>1.3 No definition of relationship between National and Provincial PP's. This will evolve over time.</i></p>	
<u>The nature of the office</u>		<p><i>1. There was agreement that there should be not be separate PP's in different areas such as the Police and Military (para 6.8.1)</i></p>		<p><i>1. There was a suggestion that the office of the PP should be composed as a team or a commission (para 6.8.2).</i></p>