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**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**TUESDAY  
26 MARCH 1996  
OLD ASSEMBLY CHAMBER  
(16h00)**

**DOCUMENTATION**

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## **CONSTITUTIONAL ASSEMBLY**

### **MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE**

Please note that the meeting time of the CC Sub-committee has changed as indicated below:

**DATE:** Tuesday, 26 March 1996

**TIME:** 16h00 - 18h00

**VENUE:** Old Assembly Chamber

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### **DRAFT AGENDA**

1. **Opening**
  2. **Security Services**
  3. **Institutions Supporting Constitutional Democracy**
  4. **AOB**
  5. **Closure**
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*N.B. - Please bring your copy of the 4th Edition of the Working Draft to the meeting*

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**H EBRAHIM  
EXECUTIVE DIRECTOR  
CONSTITUTIONAL ASSEMBLY**

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***Enquiries: Ms M M Sparg, Tel 245-031***

**DRAFT - 22 MARCH 1996**

**Status:** Revised draft of Chapter 13 including proposals from multi-lateral on 15 March 1996. (Not yet considered by CC Sub-committee)

## **CHAPTER 13 SECURITY SERVICES**

### **Governing principles<sup>1</sup>**

**174.** The following principles govern the national security in the Republic:

- (a) National security must reflect the resolve of all South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.
- (b) National security must be pursued in compliance with the law, including international law.
- (c) National security is subject to the authority of Parliament and the Executive.

### **Establishment, structuring and conduct of security services**

- 175.** (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
- (2) The defence force is the only lawful military force in the Republic.
  - (3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
  - (4) The security services must be structured and regulated by national legislation.

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<sup>1</sup> Ad hoc committee on Chapter 13 suggests that consideration be given to including a provision in the Constitution forbidding SA citizens from becoming mercenaries. There is a concern that the definition of a mercenary is unclear and that such a section may be difficult to draft. Also uncertainty about where it should be included. The most authoritative definition of a mercenary appears in Article 47 of 1977 Geneva Protocol I Additional to the Geneva Convention 1949. It states -

"2. A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."

- (5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
- (6) No member of any security service may obey a manifestly illegal order.
- (7) Neither the security services nor any of their members may perform their functions in a manner that furthers, or prejudices, the interests of any political party.

## DEFENCE

### Defence force

176. (1) The defence force must be structured and managed as a disciplined military force.
- (2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people, in accordance with the principles of international law regulating the use of force.

### Political responsibility<sup>2</sup>

177. (1) A member of the Cabinet must be responsible for defence.
- (2) A multi-party committee of Parliament must have oversight over all defence matters as regulated by national legislation.

### Command of defence force<sup>3</sup>

178. (1) The President must appoint a senior military officer or senior military officers to command the defence force.

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<sup>2</sup> Ad hoc committee on Chapter 13 suggests that the designation of the President as 'Commander in Chief' in s77(b) is anachronistic and should be deleted.

<sup>3</sup> Ad hoc committee on Chapter 13 proposes the following additions to s78:

S78(5): "The President may declare a state of national defence. A declaration of a state of national defence lapses unless it is approved by Parliament within 14 days."

*Note by TRT:*

This suggestion should be considered together with proposals relating to states of emergency.

S78(6): "When the defence force is employed for service in defence of the Republic or in co-operation with the police service, the President must inform Parliament fully of -

- (a) the reasons for the use of the defence force;
- (b) the place or places where the force is being used;
- (c) the number of people involved; and
- (d) the period for which the force is expected to be used."

*Note by TRT:*

- (i) This is a rough draft of the provision - it requires further consideration.
- (ii) Should the provision not be included as 177(3) or 178(3) rather than in s78?
- (iii) Certain details may need consideration - is there a method for informing Parliament when it is not in session? Would this require a special session during recess? (See draft section 78(3)(f).)

- (2) **Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence.**

#### **Defence civilian secretariat**

179. A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence, and to exercise any powers and perform any functions entrusted to it by that Cabinet member, or by the legislation.

## **POLICE**

#### **Police service**

180. (1) The national police service must be structured to function at national, provincial and, where necessary, local levels [, as set out in national legislation].<sup>4</sup>
- (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.<sup>5</sup>
- (3) The objects of the police service are to prevent and investigate crime, to maintain public order, and to protect and secure the inhabitants of the Republic and their property.

#### **Political responsibility and accountability**

181. (1) A member of the Cabinet must be responsible for policing.
- (2) A multi-party committee of Parliament must have oversight over all police matters as regulated by national legislation.

#### **Control of police service<sup>6</sup>**

182. (1) The President must appoint a woman or a man as National Commissioner of the police service, to control and manage the police service.
- (2) The National Commissioner must exercise control over and manage the police service in accordance with the directions of the Cabinet member responsible for policing.
- (3) The National Commissioner must appoint a woman or a man as provincial commissioner for each province, in accordance with national legislation.<sup>7</sup>

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<sup>4</sup> Words in brackets seem unnecessary in light of 175(4). DP suggest provincial legislation should regulate local police.

<sup>5</sup> DP concerned about limited power of provincial executives and suggests the insertion of words like 'taking into account the requirements of the provinces'.

<sup>6</sup> The Panel and ad hoc committee on Chapter 13 considered the submissions from the National Commissioner of Police and 182(4) has been amended to address his concerns but see *fn 8* below.

<sup>7</sup> The DP proposes the following formulation -  
"The National Commissioner must, in consultation with the responsible member of the Executive Council of a province, appoint a woman or a man as provincial commissioner, in accordance with national legislation."

- (4) Provincial commissioners are responsible for policing as prescribed by national legislation and subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).<sup>8</sup>
- (5) Each provincial government is responsible for monitoring and oversight over the conduct and efficiency of the police service and for cultivating good relations between the police and the rest of the community in its province.<sup>9</sup>

#### **Police civilian secretariat**

183. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing, and to exercise any powers and perform any functions entrusted to it by that Cabinet member, or by the legislation.

## **INTELLIGENCE**

#### **Establishment and control of intelligence services**

184. (1) Any intelligence service other than the intelligence divisions of the defence force and police service must be established by the President in terms of national legislation.<sup>10</sup>
- (2) The President must appoint a woman or a man as head of each intelligence service established in terms of subsection (1) and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

#### **Powers, functions and monitoring**

185. National legislation must regulate the objects, powers and functions of the intelligence services and must provide for -

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<sup>8</sup> DP proposes the following formulation -

"The National Commissioner may, in accordance with national legislation, direct the provincial commissioners, who are each responsible for policing in their provinces in operational matters; but, each provincial commissioner shall be subject to policy directions from the responsible member of the Executive Council of a province. The National Commissioner must consult each provincial commissioner with regard to the police service budget for the province concerned."

<sup>9</sup> DP reserves its position on 182(5) as well as 180(1) and (2); it believes provincial executive should have more power in order to fulfil their responsibilities in relation to policing. In addition the DP believes 'police' should form part of Schedule 5.

DP proposes the following -

"Each provincial government is accountable, through the responsible member of the Executive Council, and as may be developed by provincial legislation, for crime prevention, visible policing, protection services and public order in a province, as well as for developing mechanisms to monitor and oversee the conduct and efficiency of the police service and good community-police relations in a province."

<sup>10</sup> This wording is suggested in place of the present wording to make it clear that the President may only establish an intelligence service with Parliamentary approval and that only the President may establish such services.

- (a) a multi-party committee of Parliament to have oversight over all intelligence matters including any intelligence division of the defence force and police service;
- (b) civilian monitoring of the activities of those services by an inspector appointed by the President with the approval of the National Assembly by a resolution adopted by at least two thirds of its members; and
- (c) co-ordination of all intelligence services, including any intelligence divisions of the defence force and the police service.



