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CONSTITUTIONAL ASSEMBLY

**MEMORANDUM**

**TO:** Participants in the Multi-lateral Discussions on the Council of Provinces/Senate, Provinces and Competencies

**FROM:** Executive Director

**DATE:** 26 February 1996

**RE:** Draft Proposal from Technical Advisors to the ANC/NP Bilaterals on Intergovernmental Co-operation - National Council of Provinces

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We enclose for your consideration a draft proposal on Intergovernmental Co-operation - National Council of Provinces from the Technical Advisors to the ANC/NP bilaterals on this matter.

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**H EBRAHIM  
EXECUTIVE DIRECTOR  
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## THIRD DRAFT

### DRAFT PROPOSAL ON INTERGOVERNMENTAL CO-OPERATION - NATIONAL COUNCIL OF PROVINCES

Draft proposal by Technical Adviser  
after taking into consideration  
discussions at a Bi-lateral between the  
African National Congress and the  
National Party on 22 February 1996

#### NATIONAL COUNCIL OF PROVINCES

There shall be a National Council of Provinces.<sup>1</sup>

#### 1. CONCEPT

- 1.1 The function of the National Council of Provinces shall be to act as a Chamber representing provincial interests. It shall have the powers to *propose revision and thus delay*<sup>2</sup> legislation regarding national competencies, and *more importantly* to initiate, amend or reject/~~veto~~<sup>3</sup> national legislation in respect of the functional areas in which the provinces have concurrent legislative and executive authority.
- 1.2 The Council will be premised on a direct and strong link with the provinces. Accordingly it should be owned by them and in regard to matters pertinent to provincial government its main activities will be to represent the concerns of that level of government.<sup>4</sup> *steered*

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<sup>1</sup> *There has been no final agreement on the name or the use of the word 'Senate', but it was recorded that there would be no objection to this name by the National Party provided this did not mean that the council would stand outside Parliament. See 1.4.*

<sup>2</sup> *See below. The exact nature of this delay is still to be specified.*

<sup>3</sup> *See below. See 2.2.*

<sup>4</sup> *There is still some debate as to the value of a second house or house of general legislative revision. Such Chamber is considered by some to be expensive and to present no new perspective in the legislative debates. It can not justify, it is argued, special legislature powers and it plays no meaningful function if it simply mirrors the composition of the Assembly. This reasoning would not, however, apply if the chamber is specifically structured to bring the province's views to Parliament. This is especially so if the provincial representations are determined by provinces and not national caucuses.*



1.3 It is this level of government which is largely responsible for and has administrative experience in the execution and implementation of Schedule 5 legislation. It will also serve the function of exposing the provincial governments and legislatures to the concerns of Parliament, of national government and of other provincial governments, and also promoting co-responsibility between levels of government for the joint administration of the country as a whole. The National Council will also have the power to monitor inter-governmental executive relations.

1.4 *It is recorded that this body is a legislative organ. The exact functions will be spelt out as specific to this body. It has been suggested it should have the status of a parliamentary chamber. It's formal inclusion in the definition of Parliament remains to be finally resolved.*

*to be resolved.*

## 2. Powers of the National Council

### 2.1. Review of legislation within the Exclusive Competencies of National Government

2.1.1 The National Council will have the power to object to and to propose amendments to legislation dealing with matters which fall within the exclusive competence of the national government. Where the National Council has proposed amendments or rejected such a Bill it must be reconsidered by the National Assembly but may be overruled. (See the formulation of the powers of the National Council in the document on Inter-governmental co-operation dated 2 February 1996, section 2(1), 2(2) and 2(3)).

2.1.2 *The question as to the extent of the permissible delay this occasioned is still to be agreed, however, it is agreed that where Bills are referred back then a joint committee should examine and discuss the proposed amendments or objections. Such a joint committee would function in the normal way and need not have the specific powers of the Mediation Committee which is required to break a deadlock in the event of a veto.*



2.2. **Legislation within the concurrent competencies of the Provinces including 'overriding' legislation shall require the support of the National Council.**

2.2.1. The National Council may propose amendments, or oppose a Bill dealing with matters within the functional areas listed in Schedule 5 (excluding expropriation Bills). Where the Council proposes amendments or opposes the Bill, it will be referred to a mediation committee.

2.2.2 The mediation committee shall be comprised of an equal number of representatives of both Houses. If both sides as represented in the mediation committee agree with the Bill or amendments to the Bill, it shall be referred back to the National Assembly for consideration and approval.

2.2.3 If the mediation committee does not agree to the Bill or if the National Assembly rejects the version of the Bill agreed to in the mediation committee, the Bill shall lapse: (1) unless the National Assembly again passes it with or without amendments by a majority of at least two thirds of its members. (See sections 2(2) and 3 of the above mentioned document of 2 February 1996)

Note:

*(It is recorded that the National Party wished to consider further developments of this assembly override provision)*

2.3. **Financial Bills**

Appropriation Bills shall be regarded as falling within the first category of *legislation regarding national competencies* but other Bills *having financial implications in regard to the functional areas listed in Schedule 5* will be subject to the approval of the National Council as set out in subparagraph 2.2.



## 2.4 **Constitutional Amendments**

The approval by a two thirds majority of the National Council shall be required for any constitutional amendment that impacts on the powers *and* functions of the provinces, *and if it impacts on the powers and functions of a specific province or provinces then the approval of that province's legislature shall be required*<sup>5</sup>.

### 2.2.4. **Availability of National Executive**

The National Council of Provinces shall have the power to summon national ministers and officials in the Executive before its committees. Members of the Cabinet shall have the right to address the National Council or its committees.<sup>6</sup>

### 2.2.5. **Function in Regard to Other Financial or Fiscal Matters : Open Option**

The National Council could be vested with powers in regard to, drawing up the national budget and in regard to the recommendations of the Fiscal and Financial Commission regarding the allocation of funds to the provinces:

It could have other appropriate financial powers, the precise formulation of which would depend on the "financial constitution" adopted or proposed in the relevant chapter of the constitution.<sup>7</sup>

### 2.2.6 **Appointments**

The National Council of Provinces should have no say over the appointments relating to *certain* national executive functions (Foreign Affairs, *Defence* Justice etc.). It may have a role in confirming national appointments in regard to Schedule 5 functions, *and in regard to certain other matters germane to provincial functioning (Provincial Public Protectors). The proper consideration of this will depend on how the constitution deals with these appointments (e.g. whether the Senate is represented in the Judicial Service Commission).*

<sup>5</sup> See constitutional principle XVIII(4)

<sup>6</sup> See Below 2.2.7

<sup>7</sup> See draft clauses 188(2), 193



2.2.7.

**Accountability of National Executive  
Option 1**

The President as the Head of the National Executive and the Cabinet, shall be accountable only to the National Assembly which is the body who elects the President and from whom the members of the Cabinet are drawn. Such office bearers would however *required* to be available to the National Council in respect of giving explanations or answering queries regarding national policy. *The National Council would have its ordinarily have the power to pass motions of censure and disapproval and to refer these to the Assembly, the President or the Premier.*<sup>8</sup>

3. **COMPOSITION**

**Options**

The National Council of Provinces shall be comprised of:

- (1) five (5) members of a provincial executive<sup>9</sup> or legislature<sup>10</sup> appointed by that legislature from time to time to attend specific council sessions and subject to the legislature's mandate in regard thereto and

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<sup>8</sup> *The National Council of Provinces represents an organ of inter-governmental legislative relations. It will be composed inter alia of persons to whom provincial executives are accountable. In general the Council is to be considered a legislative organ and not a site of executive inter government relations, nor a chamber to which the national or provincial executives are responsible. It will however monitor such relations and developments.*

<sup>9</sup> *There was agreement that Provincial representation should comprise at least an element coming directly from the provincial legislature so as to represent provincial legislature and/or Provincial Government interests.*

<sup>10</sup> *It is possible that the floating delegation referred to in sub-paragraph 1 of persons mandated and emanating from the provincial executive or legislatures could in fact be confined only to members of the provincial executive. However no party has specifically proposed this.*

<sup>7</sup> *It was also agreed that a proportion of the delegates and representatives of the province should act in a full-time capacity. This could be persons elected directly or indirectly from the provinces.*



- (2) five (5) persons who will attend the National Council of Provinces on full-time basis<sup>11</sup> and who will be indirectly elected *by the provincial legislature<sup>12</sup> and in proportion to party support in the provincial legislature<sup>13</sup>* / or be directly elected by the provincial electorate.

### **Additional Delegations/Representation**

#### **3.3. Option 1**

The National Council of Provinces shall be confined to representation by or from the provinces and no provision should be made for local government or other interest groups.<sup>14</sup>

#### **Option 2**

The National Council of Provinces may have an additional delegation of (5/10) persons representing local government.<sup>15</sup>

### **4. VOTING**

#### **Option 1**

Save where otherwise provided for in the Constitution, the National Council of Provinces shall take its decisions by a majority of votes cast.

#### **Option 2 (in addition to 4.1)**

- 4.2 All the delegates and/or representatives from one province shall cast their vote *en bloc*, the majority of the delegates and representatives from that province deciding on the vote of the province. *An M.E.C. shall be required to be present when the delegation cast its vote at the formal session of the National Council.*

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<sup>12</sup> *If the persons were indirectly elected from members of the provincial legislature, provision could be made for the provincial legislatures to 'top-up' their legislatures so as not to upset the political balance within the political legislatures. Such a provision would not be necessary if the members were directly elected.*

<sup>13</sup> *No finality has been reached as to whether this group should be proportionate to party support or whether the issue should be left to the legislature.*

<sup>14</sup> *Allowing other interest groups to be represented could open the door to a variety of special interest groups seeking direct legislative representation (labour, gender, youth, traditional leaders etc.)*

<sup>15</sup> *In general it is agreed that the Council is an organ of provincial power or influence. Those in favour of a local government presence point out that unlike other 'interest groups' local government is a level, not an organ, of government. The question of how or whether an appointing body will be established has not been raised.*



**Option 3 (in addition to 4.1)**

- 4.3 *The vote from each province shall be weighted in accordance with their population size save that the smallest province shall not count for less than 4 votes and that of the largest shall not count for more than 8 votes<sup>16</sup>.*

5. **FUNCTIONING**

5.1. **Chairperson**

**Option 1**

The Chairperson of the National Council of Provinces shall be a member of the National Council elected by the Council. Once elected he shall have no vote and his or her delegation may fill the vacancy caused by his election. The Chairperson shall hold office for a year and be succeeded by a person chosen from another province, the Chairpersonship rotating in provincial sequence. *There shall be a deputy Chairperson/s.*

**Option 2**

There shall be a President of the Senate appointed by the President who shall have no vote and who shall be responsible for the secretariat. There shall be two vice-presidents who shall be Premiers. The Vice-Chairpersons shall be elected annually at a National meeting of Premiers and one of the vice-presidents shall come from *one of minority parties but which is a provincial majority party.*

**Committees**

5.2. **Option 1**

The National Council should establish such committees as it requires to process legislation remitted to or initiated by it.<sup>17</sup>

6. **SITTINGS**

- 6.1. The National Council of Provinces may determine the time and duration of its sittings and its recess periods.
- 6.2. The seat of the National Assembly is the same as that of the National Assembly.

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<sup>16</sup> *This nuance gives a limited protection to larger urban provinces that the council will not always reflect, say, smaller rural provincial interests.*

<sup>17</sup> *The National Council could, it has been suggested, establish three committees, one dealing with national legislation, one dealing with Schedule 5 legislation, and one dealing with financial matters. At least one full-time provincial representative shall sit on each of these committees. This is, however, a matter that could be left to the council to determine.*



6.3. The National Council of Provinces may make its own rules and orders.



