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REPORT OF THE TECHNICAL REFINEMENT TEAM

PART 1. INTRODUCTION

1.1 Mandate

At its meeting of 15 September 1995, the Constitutional Committee mandated the Directorate to establish a task team to review the draft formulations in preparation for the publication of the Working Draft by 15 November 1995.

1.2 Composition

The Directorate established a team composed of the Independent Panel of Constitutional Experts, a plain language expert, the Law Advisers, members of the Secretariat and the Research Departments.

1.3 Method of Operation

To facilitate the work of the team, a small working group was established. This Working Group was composed of two members of the Panel, a Law Adviser, a plain language expert and a member of the Directorate: Prof. Johann van der Westhuizen, Prof. Christina Murray, Adv. Gerrit Grove,
Mr. Philip Knight, and Adv. Louisa Zondo (Convenor).

On the part of the Panel, the two members serving in the Working Group carried the mandate of the Panel and served to co-ordinate the work of the Panel with that of the Working Group. Efforts of members of the Administration were co-ordinated by the Convenor. The Working Group met on a regular basis to consider the various aspects of the refinement process. It also served to integrate the work of members of the Panel with that of the Administration.

The initial draft produced by the Working Group was considered at a full plenary meeting of the entire Task Team including the Panel and the Administration, before its distribution for consideration by the CC.

1.4 Tasks of the Technical Refinement Team

At the convening meeting of the Working Group it was agreed to undertake the following tasks:-

a) considering the structure and organisation of the Working Draft;

b) refining the language of the draft formulations in accordance with the principles of plain language;

c) considering omissions, redundancies, legal consistency and coherence

whilst at the same time retaining the delicate political balance of political agreements as contained in the existing formulations;

d) considering the need for a definitions section and identifying matters to be provided for in an interpretations section;
e) surveying the draft formulations and report on those areas in respect of which national laws and transitional provisions were required;
f) considering compliance with Constitutional Principles.

PART 2. PLAIN LANGUAGE

2.1 The refined draft is written in the "plain language" drafting style, an approach to writing that respects and clarifies established legal meaning and enhances certainty while improving the readability and accessibility of the Constitution for most readers. This style has several advantages over the traditional style of drafting, but most importantly, it allows ordinary readers to visualize themselves as subjects of the Constitution, to imagine themselves among the people affected by the Constitution, and to understand how they can participate in the life of the nation as defined by the Constitution.

2.2 The goals of language reform in the refinement process were:

To make the text as useable as possible for all readers.
To reflect the intended meaning as clearly as possible.
To make the text legally certain, as far as possible.
To express the intended meaning precisely, and as simply as possible.
To use words consistently, accurately and grammatically.
To organise the material coherently and logically.
To present the law positively and actively, as far as possible.
To grace the text with elegant majesty, as far as possible.

2.3 Pursuing those goals, we changed the wording of many sections of the draft. Many of the significant changes are noted in the left margin, alongside the original draft. Here are examples of some of the changes -

Positive Tone
We changed language when it altered the tone from a negative to a positive message. See, for example pages 40 and 41.

Original Text:
Only South African citizens qualified to vote in elections of the National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

Refined text:
Every citizen is eligible to be a member of the National Assembly unless disqualified in terms of subsection (2).

Gender Free
We changed language to make the text generally free of specific gender references. See for example, pages 52 and 53.

Original text:
Decisions of the State President taken in the discharge of his or her office shall be

in writing under his or her signature.

Refined text:
Decisions of the President in consultation with the Cabinet must be in writing, signed by the President, and countersigned by a Minister.

When discussing qualifications for specific offices, we added references to men and women to emphasise that either a woman or a man could hold the relevant office. See for example, page pages 40 and 41.

Original text:
The National Assembly consists of . . . members.

Refined text:
The National Assembly consists of . . .women and men elected as members....

Precision
We changed language to express intended meaning more precisely. See for example, pages 64 and 65.

Original text:
The Constitutional Court may suspend a declaration of invalidity for a specific period to allow the competent authority to correct the defect and impose such conditions in that regard as it may decide.

Refined text:
The Constitutional Court . . .may suspend a declaration of invalidity, on any conditions and for any period, to allow the competent authority to correct the defect.

Clarity
We changed language to remove ambiguity created because what had been written could be interpreted in two different ways. See for example, pages 40 and 41.

Original text:
The election of members of the National Assembly shall be conducted in accordance with an electoral system which shall be based on a common voters' roll and, in general, proportional representation as provided for by national law.

This formulation created the incorrect impression that it was only "proportional representation" that was to be provided for by national law.

Refined text:
The National Assembly consists of . . .members elected in terms of a electoral system that is prescribed by national law, is based on a common voters roll, and results, in general, in proportional representation.

Certainty
We changed language to improve certainty. See for example, pages 45 and 46.

Original text:
. . .all questions before the National Assembly shall be determined by a majority of votes cast by the members present.

This formulation created uncertainty over the role of members present but abstaining from a vote. Having determined that the intention was to base decisions on a majority of votes cast, we changed the text.

Refined text:
All questions before the National Assembly must be decided by a majority of the votes cast, . . .

Present Tense
We changed language to have tense conform to the rule that the law speaks continuously in the present tense. See for example, pages 64 and 65.

Original text:
The Supreme Court . . .shall have . . .such other jurisdiction as may be conferred on it by an Act of Parliament.

Refined text:
Courts have the jurisdiction in matters other than constitutional matters that is conferred on them in terms of an Act of Parliament.

Ease of Reading
We changed language to improve readability by removing words that added padding, but no new meaning. See for example, pages 44 and 45.

Original text:
The National Assembly as constituted in terms of a general election shall continue for a term of five years as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.

The National Assembly may be dissolved before the end of the term for which it was elected if a vote of no confidence in the Cabinet is passed by the National Assembly.

Refined text:
The National Assembly is elected for a term of five years from the date of its election.

The National Assembly may be dissolved before the end of its term if it passes a

vote of no confidence in the Cabinet.

We changed language to express ideas in the active voice, which has been proven to be generally easier than the passive voice for most people to understand. See for example, pages 44 and 45.

Original text:
A Bill duly passed by Parliament in accordance with the Constitution shall without delay be assented to and signed by the State President.

Refined Text:
The President, without delay, must assent to and sign every Bill passed by Parliament.

We changed language by rewriting verb phrases which were previously interrupted by subordinate clauses. See for example, pages 66 and 67

Original Text:
A court, other than the Constitutional Court, with jurisdiction in constitutional matters may in relation to any constitutional matter concerned, make any order set out in subsection (5)(a), (b) or (c).

Refined Text:
A court, exercising its jurisdiction in constitutional matters may make any order set out in section 76(4).

Logical Ordering:
We changed language by rearranging text to improve the order of certain things. See for example, pages 40 and 41.

Original text:
Listed the persons excluded from eligibility in the National Assembly in this order:

- Bankrupts
- Persons of unsound mind
- Criminals
- Senators, etc
- State Office Holders.

Refined text:
Reordered the list to elevate office holders and politicians above the persons excluded for reasons of undesirability.

- State Office Holders
- Senators, etc
- Bankrupts
- Persons of unsound mind
- Criminals

We changed language by rearranging text to present events in a chronological order. See for example, pages 42 and 43.

Original text:
The National Assembly may determine the time and place of its sittings and its recess periods. The first sitting for the National Assembly after an election shall take place . . .

Refined text:
The first sitting of the National Assembly after an election must take place at a time and date . . .. The National Assembly may determine the time and duration of its other sittings and its recess periods.

PART 3. GLOBAL ISSUES CONSIDERED IN THE REFINEMENT PROCESS

The draft formulations contained a number of phrases and references which were used in the different chapters. Often, these phrases and references were either used to mean different things or different phrases were used to mean the same thing. In terms of the need to ensure both legal and language consistency, the Task Team effected global changes in the refinement process.

The following is a glossary of issues attended to in the reformulation:-

No.	Issue	Reformulation effected
1.	References to the Constitution	In many instances it was found that these references were not necessary. The reference was however retained in those instances which required it.
2.	Reference to	In order to achieve consistency we have standardised the use of these terms as follows:
	"law"	- to refer to law in its broadest sense, including statutory law, common law, case law, customary law, etc.
	"Acts of Parliament"	- to refer to enactments of Parliament.
	"Provincial Acts" or "Acts of a provincial legislature"	- to refer to enactments of provincial legislatures.
	"legislation"	- to refer to statutory enactments in general, including Acts of Parliament and of provincial legislatures, proclamations, regulations, rules, government notices, etc.
	"national legislation"	- to refer to Acts of Parliament and subordinate legislation enacted in terms of Acts of Parliament.
	"provincial legislation"	- to refer to Provincial Acts and subordinate legislation enacted in terms of Provincial Acts.
	"national law"	- to refer to all law except provincial or local law.

3.	The use of "shall"	To improve certainty, the use of shall has been avoided. Shall had been used in 5 distinct ways. Instead we have used: "must" to impose a duty; "may" to confer a power or a right; "is", "does" etc. to declare a state of affairs; and "may not", to prohibit something.
4.	The use of "his or her"	The whole draft is presented in gender-free language. However, a proposal is made that the text emphasize that women are also eligible for any appointments provided for in the Constitution. This is done in qualifications and appointment clauses by expressly providing that the eligible persons are men and women.
5.	References to powers and functions	Phrases "exercise powers" and `perform functions' were used consistently.
6.	The use of the words "vested in" or "vests in"	The only changes necessary were to effect language consistency.
7.	The use of the words "of the Republic" and "in the Republic"	These phrases were only used when required in the context.
8.	The use of phrases intended to ensure the non-interference of the state.	The only changes necessary were to effect language consistency.
9.	The use of phrases intended to secure the necessary assistance and protection from the state	The only changes necessary were to effect language consistency.
10.	The use of phrases intended to secure independence and impartiality of institutions	The only changes necessary were to effect language consistency.
11.	The use of phrases requiring the signing of an oath or affirmation	Provisions for oaths and affirmations are consistent.
12.	The use of "government", "state"	Because these terms may be

	and "organs of state"	ambiguous we have attempted to use only "organs of state". However, because the draft is incomplete, we have not achieved this fully.
13.	The use of phrases securing remuneration of various officers	All the remuneration clauses are consistent.

PART 4: RECOMMENDED STRUCTURE OF THE WORKING DRAFT

4.1. Ordering of chapters

CHAPTER 1: FOUNDING PRINCIPLES/CONSTITUTIONAL DEMOCRACY

Section 1: Republic of South Africa/Constitutional Democracy

Section 2: Supremacy of Constitution

CHAPTER 2: "NATIONAL IDENTITY"

CHAPTER 3: BILL OF RIGHTS

(The order of these Chapters 2 and 3 depends on the contents of the chapter on National Identity. See notes below.)

CHAPTER 4: PARLIAMENT

CHAPTER 5: NATIONAL EXECUTIVE

CHAPTER 6: COURTS

CHAPTER 7: INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

CHAPTER 8: PROVINCIAL LEGISLATURES AND EXECUTIVES

CHAPTER 9: LOCAL GOVERNMENT

CHAPTER 10: INDIGENOUS LEADERS

CHAPTER 11: SECURITY SERVICES

CHAPTER 12: PUBLIC ADMINISTRATION

CHAPTER 13: FINANCE

CHAPTER 14: AMENDMENT

NOTE: It is proposed that Transitional Arrangements be dealt with in a separate Act.

4.2 Explanation of the proposed ordering:

4.2.1 The ordering of chapters proposed here is based on the following criteria:

(a) Every aspect of the Constitution, including its structure, should reflect our commitment to establishing a constitutional democracy.

(b) The Constitution should be easy to read and those parts most important to South Africans should appear near the beginning, with more technical issues introduced later.

4.2.2 The order reflects these criteria in the following ways:

(a) The first chapter identifies the key elements of the new constitutional order and, in simple terms, clearly asserts constitutional supremacy.

(b) It is proposed that a chapter tentatively named "National Identity" should include citizenship, franchise, symbols and language. Both this chapter and the Bill of Rights belong near the beginning of the Constitution because of the importance of their provisions to all South Africans. It might also be appropriate to put "National Identity" first,

because, in this scheme, it includes citizenship and the franchise. However, if the provisions are technical, for example referring the reader to proclamations describing symbols, the Bill of Rights should perhaps precede this section.

(c) Separation of powers between legislature, executive and judiciary, required by the Constitutional Principles (CP VI), and which is a key element of constitutionalism and has been reflected in the grouped, but separate, chapters on Parliament, the National Executive and the Judiciary. Chapter 7, dealing with Institutions to Protect the Public Interest', follows immediately because these institutions are national and provide the checks and balances on state power required by CP VII and essential to constitutionalism .

(d) Chapters 8 and 9 on provincial and local government reflect another aspect of separation of powers, that between the centre and sub-national units.

(e) The last chapters include matters which are more technical and which fill out the picture of a constitutional order in which the state is subject to independent controls and is accountable.

(f) In terms of this proposal, transitional matters would be dealt with in a separate Act which would become obsolete once all Constitutional institutions have been properly established.

4.2.3 Ordering within specific chapters:

In most chapters of this draft, sections have been arranged first to describe the powers of the relevant institution, then to describe the formation of the institution, and then to deal with more technical matters. This pattern varies sometimes where a slightly different order seems more coherent or allows related issues to be linked.

PART 5. NOTES ON SPECIFIC CHAPTERS

5.1 CHAPTER 4: PARLIAMENT

Summary: This chapter is incomplete as no decision has been made about a second chamber. Certain clauses in the Chapter would change or be reordered if a second house were established.

At present the most obvious omission in the existing provisions is a clause dealing with the National Assembly during a state of national defence. It seems that some provision must be made for the continuation of the national assembly or delaying of elections in such circumstances.

5.1.1 Structure of the chapter:

The Chapter starts with a description of the powers of Parliament and continues to describe the National Assembly.

Under National Assembly, the first clause deals with its establishment and

members (including the election of the Speaker and Deputy Speaker). Then sittings and the term of the Assembly are covered. The order of the remaining sections is arbitrary and awaits decisions on a second house and the manner in which legislation will be passed.

5.1.2 Notes on the provisions:

Section 39: Qualifications of members of NA:

(i) 39(2)(f) and (g): A number of small inconsistencies exist between these provisions:
(a) A person whose sentence expires just before the Constitution commences escapes the effect of the provision altogether.
(b) 39(2)(f) appears to cover people sentenced outside the Republic even if the conduct concerned would not have been an offence in the Republic. In this way it is wider than (g).
(c) 39(2)(f) does not protect people pending an appeal.

(ii) 39(4): This clause seems unnecessary. The provision giving the NA control over its internal arrangements would cover this. If there was any remaining doubt, the right could be given to the NA in legislation. There seems to be no need to elevate this provision to a Constitutional Principle.

Worded as it is at present - "anyone ... *will be fined"* - the provision mandates a fine*,* leaving no discretion with the NA.

Section 41: Oaths or affirmations by members
It is proposed that a schedule should be appended describing all the oaths or solemn affirmations, identifying the person who should administer each of them (ie a judge), and making provision for the Speaker to administer it to members filling vacancies.

Section 42: Sittings and recess periods
Some parties have suggested that the provision for special sittings contained here is too narrow. However, consideration should perhaps be given to the fact that the NA will be able to include any other provisions for special sittings in its Rules and Orders. It is necessary to include the provision in the Constitution giving the President the right to call an emergency sitting because it involves executive interference with the legislature. It is an example of a "check or balance" on the operation of separation of powers which is necessary for effective government.

Section 40: Speaker and Deputy Speaker:
40(4) states the obvious and is unnecessary. However, as the Chapter stands at the moment, the reason for electing a Speaker and the role of the Speaker is obscure. It requires a knowledge of parliamentary procedure to

understand why a section on the Speaker is included at all. To address this problem it may be worth considering the inclusion of a provision briefly describing the role of Speaker in managing the NA.

Section 49: Parliamentary privilege
49(1) Subclause (1) contains the sentence "This freedom may not be limited by or questioned in the courts". Its meaning is unclear and it should be deleted.

If it is intended to prevent courts from limiting parliamentary debate, it is unnecessary. The express inclusion of the right to open debate in the clause itself protects that right from limitation by courts. At worst, the assertion that this particular right may not be limited by the courts suggests that other rights may be limited.

The reference to questioning by the courts is equally problematic. It will always be open to a court to determine whether a particular incident is a case in which this parliamentary privilege applies or not. This provision does not, and could not, change the position. Moreover, the sentence is not necessary to prevent courts from `questioning' the right. Once the right is granted in the Constitution, the only role of the courts is to protect it.

Section 53: Assent to Bills

(i) In stipulating what the President must do after Parliament has amended a Bill to address concerns, subclause (2)(b) chooses one of two options. The option chosen is to *require* the President to sign the Bill if, on an objective test, the initial reservations were addressed.

The second option is to require the President to sign *only if* he or she has no further reservations, thus leaving the matter to the discretion of the President.

A choice needs to be made between these two options. The first ensures that the President would not be able to delay legislation for long periods by raising new concerns each time it is submitted for signature.

(ii) 53(2)(c) has been amended to require the President, rather than the Speaker, to refer a matter to the Constitutional Court. This seems more appropriate as, in these circumstances, the President, who has reservations about the Bill, will want to put the case to the Court. The role of Parliament is more like that of a respondent in an action.

5.2 CHAPTER 6: THE COURTS AND THE ADMINISTRATION OF JUSTICE

5.2.1 NOTES ON THE PROVISIONS

Section 74: Judicial Authority

74(2): The apparent objective is that all persons and organs of state must be bound by court decisions. A problem arises with the words "within its jurisdiction". The concept of "jurisdiction" has at least two meanings. Geographical jurisdiction relates to the area over which jurisdiction exists. In a different sense, jurisdiction relates to the particular court's power to hear certain matters and issue certain orders. The section, as presently worded, tends to restrict the meaning of the notion to the first mentioned. We recommend that the words in brackets, "within its jurisdiction", be deleted.

Section 76: Jurisdiction of Constitutional Court

76(2)(a): The initial draft did not provide for constitutional disputes between national organs of state. The section should convey that constitutional disputes between organs of state at a

national - national level
national - provincial level
provincial - provincial level

could only be decided by the Constitutional Court.

Another possible formulation could be: "...over disputes in constitutional matters between national, national and provincial, and provincial organs of state".

Section 78(3)(b): Exercise of constitutional jurisdiction: Final decision on invalidity of legislation

Must the invalidation of a provincial law (Act) also be finally determined by the Constitutional Court?

The envisaged procedure creates numerous problems.

The possibility for "referrals" of constitutional issues by other courts for immediate determination by the Constitutional Court (as is provided for in the interim Constitution) has been deleted from the current draft. Apart from exceptional cases where the Constitutional Court may be approached directly, the ordinary way in which the Constitution Court may be seized is by way of appeal. As no express provision has been made for an alternative procedure it seems as if a litigant in the High Court who wishes to obtain finality regarding an Act which has been declared invalid by the High Court, will first have to appeal to the Intermediate Appeal Court and the Supreme Appeal Court before finally reaching the Constitutional Court. Provision should therefore be made for a way to address what is obviously a cumbersome, expensive and time-consuming procedure.

The fact that the Constitutional Court may ordinarily only be seized on appeal, may give rise to some very awkward situations, particularly in civil suits. Take the following examples:

(a) Neither of the parties appeals; will the party in whose favour the decision went, be entitled to enforce the order of court? (the latter is premised on the invalidity of an Act but that finding has not been confirmed by the Constitutional Court nor will it be so confirmed).

(b) Neither of the parties appeals: will the decision by the court bind other courts in terms of stare decisis? Will the finding of invalidity have any effect at all on, say, other courts having to decided the same issue?

Many more examples may be given but for present purposes these will suffice. If these problems are not addressed it may lead to serious

legal uncertainty.

For obvious reasons, similar absurd results may follow if temporary relief is granted, based on a finding of the invalidity of an Act. If provision is not made for a procedure providing for ways (other than appeal) to take the matter to the Constitutional Court, what was intended as "temporary relief" may become permanent relief.

Section 84: Judicial Service Commission

84(c): The effect is to constitutionalize the office of the Judge President. Is this the intention? Possible alternative formulation: "One judge to represent the High Courts to be designated in terms of a national law."

84(e) and (f): In view of problems experienced in the past (what body/bodies represent the attorneys'/advocates' profession?) an alternative formulation based on a political decision should be considered.

Note: It may be necessary to provide for tenure of the JSC, or at least those members who do not hold their positions ex officio.

84(h): "designated en bloc/together"; meaning is not clear. If one of the 4 senators dies, must the process be repeated?

84(4): Is it necessary to provide for a quorum? Does "all its members" refer to the total number of its membership? Is there not a need to provide that decisions may only be taken at formal meetings and then by a majority of the total number of the members?

5.3 CHAPTER 7: INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

This chapter is called "Institutions Supporting Constitutional Democracy". The name tentatively suggested captures the purpose of all the institutions included in the chapter.

Structure of the Chapter

The establishment provisions and the basic principles governing these institutions are placed at the beginning of the chapter, in the section called, "Establishment and governing principles". This was done to avoid repetition and to highlight the principles governing these institutions, such as independence and impartiality so that on reading the more detailed provision concerning each section, the reader is aware of these principles.

General provisions concerning appointment and removal from office appear at the end of the chapter.

5.4 CHAPTER 8: PROVINCES

5.4.1 Summary: The provisions in this chapter have been taken directly from the provisions on Parliament. In some cases changes will be necessary.

At present the most obvious omission in the existing provisions is a clause dealing with provincial legislatures during a state of national defence. It seems that some provision must be made for the continuation of the legislatures or delaying of elections in such circumstances.

5.4.2 Structure of the chapter:

The Chapter starts with a description of provincial legislatures, based on the equivalent provisions in the Chapter on Parliament. At the end of this part is a section on provincial constitutions. The next part of the Chapter deals with provincial executives, again modelled on its National counterpart, and the last part covers competencies. The order will have to be reconsidered when a final decision is taken on provincial constitutions and when competencies are settled.

In particular, it seems misleading to start the Chapter (as is done at the

moment) with a description of the provincial legislatures when a provinces may decide to establish a legislature running on different lines. The reader should at least be warned that not every provincial legislature will necessarily follow the pattern given in the Constitution.

As far as provincial legislative competencies are concerned, it may be more appropriate to include them under the section on Parliament. The description of Parliament should probably start with a description of the powers of Parliament. To do this, one might need to describe the powers of provinces as well. This is a matter which cannot be decided until the exact structure of provincial is settled.

5.4.3 Notes on the provisions:

Section 99: Qualifications of members of provincial legislatures:
99(2)(f) and (g): A number of small inconsistencies exist between these provisions:
(i) A person whose sentence expires just before the Constitution commences escapes the effect of the provision altogether.
(ii) 99(f) appears to cover people sentenced outside the Republic even if the conduct concerned would not have been an offence in the Republic. In this way it is wider than (g).
(iii) 99(f) does not protect people pending an appeal.

99(4): (i) This clause seems unnecessary. The provision giving a provincial legislature control over its internal arrangements would cover this. If there was any remaining doubt, the right could be given to the legislature in legislation. There seems to be no need to elevate this provision to a Constitutional principle.
(ii)Worded as it is at present - `anyone ... *will be fined*' - the provision mandates a fine*,* leaving no discretion with the provincial legislature.

Section 104(4) states the obvious and is unnecessary. However, as the Chapter stands at the moment, the reason for electing a Speaker and the role of the Speaker is obscure. It requires a knowledge of parliamentary procedure to understand why a section on the Speaker is included at all. To address this problem it may be worth considering the inclusion of a provision describing briefly the role of Speaker in managing a legislature.

Section 108(1): Parliamentary privilege

(i) The subclause contains the sentence "This freedom may not be limited by or questioned in the courts". Its meaning is unclear and it should be deleted.

If it is intended to prevent courts from limiting parliamentary debate, it is unnecessary. The express inclusion of the right to open debate in

the clause itself protects that right from limitation by courts. At worst, the assertion that this particular right may not be limited by the courts suggests that other rights may be limited.

(ii) The reference to questioning by the courts is equally problematic. It will always be open to a court to determine whether a particular incident is a case in which this parliamentary privilege applies or not. This provision does not, and could not, change the position. Moreover, the sentence is not necessary to prevent courts from "questioning" the right. Once the right is granted in the Constitution, the only role of the courts is to protect it.

5.5 CHAPTER 11: SECURITY SERVICES

5.5.1 Statement of Principle

The status of the `Preamble' to this Chapter is unclear and may cause interpretative problems.

Although it is likely that the general Preamble to the Constitution will influence (although not determine) interpretation of the Constitution, the implications of a mini-preamble are more difficult to gauge. The proposed mini-preamble contains in (a) a general sentiment which does not appear elsewhere in the Constitution and should not be lost. However, (b) and (c) restate principles which occur elsewhere. It is not clear why these principles should be outside the formal, binding (and numbered) provisions of the Constitution.

At least three options exist in regard to the mini-preamble:

1. It could be retained as it is. This would mean that it might influence the interpretation of the Chapter. As (b) and (c) repeat important principles

that underpin the entire Constitution, if it is retained as a mini-preamble, great care will have to be taken to see that its existence does not imply that these general principles are some way less binding on other parts the Constitution where they are not specifically emphasized as in this Chapter.

2. The provisions of the mini-preamble could be included as an introductory section - perhaps headed `general principles' - in the Chapter itself. (The Chapter on Public Administration presents an example of this.) If this is done certain provisions in the Chapter must be redrafted to avoid repetition. For example, clause 127(4) is very close to (b) and the two could possibly be merged.

3. The provisions of the mini-preamble could be incorporated into other provisions in the Constitution as a whole. (a) seems appropriate for a general preamble. (b) is already covered almost completely in clause 127(4) and could easily be incorporated into that provision. Although (c) also covered (in cls 129 and 130 for defence, cls 133 and 134 for police, and cls 136 and 137 for intelligence), South Africa's history may justify repetition of this critical provision with the general provisions contained in cl 119. (This clause could perhaps be divided into a part dealing with principles - including (c) and the present cl 127 (2), (4), (5) and (6) - and a part dealing with structure - including cl 127 (1), (3) and, if they are retained, (7) and (8).)

We recommend

a) that the CC considers, as a matter of principle, the desirability of including `mini-preambles'; and

(b) that, whatever decision is taken, the mini-preamble is carefully reconsidered so that its provisions are consistent with the chapter and the rest of the Constitution.

Provisions relating to International Law in the Security Services chapter: mini-preamble (b), and clauses 127(4) and 128(2)

The Security Systems Chapter contains 3 separate provisions relating to international law. Although a general interpretation clause for the Constitution has not yet been drafted, it is likely that such a clause will direct that the entire Constitution must be interpreted in accordance with South Africa's international law obligations. When such a general international law provision has been drafted, the provisions in the Security Systems Chapter will have to be refined so that they are consistent with that provision. In the meantime, the three provisions in this Chapter need to be brought into line with one another.

(i) In the mini-preamble, (c), the reference to `strict' compliance with international law should be amended. The term `strict' invites the idea that compliance need usually be less than absolute.

(ii) Clause 127(4) contains a direct statement that international law binds the security forces.

(iii) Clause 128(2) refers to the defence force as being `guided' by international law. This provision contradicts the previous two as it reduces international law to a guide while the previous provisions require international law to be followed. As South Africa as a member of the international community is in any event bound by the provisions of international law relating to the use of force, and as these principles of international law clearly allow any action that is necessary in the defence of a country, there should be no problem in requiring compliance with international law here.

PART 6. REPORT OF THE PANEL OF EXPERTS ON COMPLIANCE OF THE FIRST DRAFT CONSTITUTIONAL TEXT WITH THE CONSTITUTIONAL PRINCIPLES (CPs)

Introduction

1. The Panel has been requested to produce a report addressing the question (to the extent that it is possible to do so) as to whether the draft Constitutional Text which is to be published during November complies with the CPs.

2. This report can be preliminary only. It does not attempt to identify those CPs which are not covered by the draft Text. In addition, in the final analysis, it will be necessary to weigh the CPs as a whole against the Constitutional Text as a whole to determine whether there is compliance. The incompleteness of the Constitutional Text makes this impossible with the result that the views expressed in this report can be regarded as preliminary only. It is obvious that the addition of other matters into the text will have an effect on the text as it presently is.

The Approach

3. The Panel has begun to develop an approach to the way in which specific provisions of the text, and the text as whole, could be evaluated in a workable way. The approach is based on the understanding that, broadly speaking, the CPs may be said to fall into 3 categories n.l.:

3.1 Some of the CPs read together constitute broad requirements against which the Constitution can be measured either by reference to each specific term, section or chapter, or the whole constitution. Examples of these CPs are those which require the constitution to be supreme, South Africa to be a sovereign state, the entrenchment of the universal rights, an equitable legal system and equality before the law, representative government, regular elections, proportional representation, etc.

3.2 The second category of CPs, interrelated with the first, enjoins certain values to be reflected and furthered by the constitution. Examples of these values are equality, equatability, accountability, openness, responsiveness, etc.

3.3 Finally there are specific CPs which relate to specific aspects of the constitution or which require a specific to be incorporated in a particular way. Examples of these are the CPs relating to the Reserve Bank, the Auditor-General, the Public Protector, the Public Service, the Judiciary, etc. These apparently specific requirements need also evaluated in the context of the values and broader CPs discussed above.

4. The 3 categories of CPs may perhaps be seen as concentric circles, with the outer circle representing the generally applicable CPs discussed in 3.1 above while the inner circle would refer to those CPs discussed in 3.3.

Preliminary Evaluation

5. In the preliminary evaluation the Panel has evaluated each specific chapter of the constitution excluding the Bill of Rights against each of the 3 specific categories described above. However, because it is incomplete, it has not been possible to measure the incomplete text against the CPs read together.

6. **General**

This report proceeds on the basis that unless matters have not been specifically mentioned below, it must be assumed that it is our preliminary assessment that there is no obvious inconsistency to which it is necessary to

draw attention.

7. The Judiciary

7.1 The chapter appears generally to comply with the CPs but there are 2 matters which concern us.

7.2 In the first place we are not sure that the chapter as currently drafted satisfies the requirement of CP VII that the judiciary must be "appropriately qualified". We believe that some concrete statement on qualifications or the procedure to ensure that judges are appropriately qualified may have to be included.

7.3 Secondly, the requirement that any declaration of invalidity of an act of Parliament (or a Provincial Act) require confirmation of the Constitutional Court before becoming effective could result in difficulties for litigants who cannot afford to go through the appeal procedure from a division of a high court through the superior court of the appeal and the appellate division to reach the Constitution Court. Unless there is some direct access provision in these circumstances, there may be doubt as to whether the legal system is "equitable" or whether there is "equality before the law" as required by CP V.

8. The Public Service

CPs XXIX and XXX include requirements for the Public Service and the Public Service Commission. Attention needs to be given to the question whether these Principles have been fully addressed.

9. National - Provincial Legislative and Executive Structures

9.1 It is impossible to even begin to assess whether the Constitutional Text complies with the CPs in so far as they deal with these matters. This is because the CPs concerning provinces make no real impact unless the national and provincial competencies have been determined and until there is a draft relating to local government.

9.2 We have not considered at all whether the most recent draft text concerning competencies complies with the CPs. This is because we believe that this draft text is far too tentative and not the subject of sufficient agreement.

10. Conclusion

In conclusion we simply stress that this report represents only a preliminary view.