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**TRANSCRIPTIONS OF THE NEGOTIATING COUNCIL HELD ON 24 OCTOBER (CONSTITUTIONAL ISSUES DEBATE)**

**CHAIRPERSON: MR LANDERS**

Dr Venter: On proposed procedure for discussion:

The basic idea for the proposed agenda is that in the sequence of the items listed we present the relevant parts of our 10th and 11th reports with reference to the constitutional text and we would propose that the council deal with those items not only in that sequence but complete its discussion on each of the items as we present them. We propose not to present you with the whole spectrum of things that we have dealt with but those parts in that sequence. If that is acceptable we will do our presentation.

Chair: Agreed.

Dr Venter: Can I start by referring you to our tenth report, the first 4 paragraphs of that report where we give you an overview of the reports as they stand before you. Firstly, we explain there that we dealt with the fruits of the previous debates in a specific manner. We made certain additions and omissions to the text. We have also indicate the manner in which it can be identified in the text. We have got a heading on each page, stating that omissions are indicated by square brackets and bold lettering and insertions are underlined. We have attempted some reformulations to achieve more clarity or to eradicate inconsistencies as identified in the previous debates and we have also tried to put into constitutional wording some of the consensus that we understand have been reached in these debates. Naturally, the draft constitutional text will have to edited finally and scrutinised by legal draftsmen. But as the text stands before you, those matters that have not been indicated as being under discussion or that has been changed, could be approved by the Council. Those items that we haven't identified specifically in the reports or which we haven't indicated as being changed, removed, represents texts that carry the consensus of the council. We say this specifically in order to promote progress. Its not been clear to us in previous debates, what the status of the texts are. We would urge you in support of progress, to be as concrete as possible. We have refrained from doing anything to texts that were discussed where there was clearly no consensus. In some instances some participants raised points but we couldn't deal with it because the discussion was not conclusive enough to give us an indication whether that was the position of the council. But we do indicate them in our report.

Going to paragraph 2 of the tenth report,we mention that we have added a preamble and two schedules, 5 and 6 to the draft text. The matter of the preamble has been referred to the Planning Committee. We did receive a request from the Planning Committee to present them with an outline of a preamble dealing both with technical and spiritual elements of a preamble. At the stage we had the text completed and we passed that on to the Planning Committee as a basis for further discussion. That preamble deals mainly with the structural and technical elements that should be in a preamble. Paragraph 3 of the second report refers you to paragraph 2 of the ninth report. We did mention that we have developed preliminary texts on other subjects. They have taken us some time to develop in such a form that we thought we could present it to you as a joint committee. We haven't attached many of those reports. We are still in the process of working on them. It is time consuming to develop complicated and sometimes volatile texts. Nevertheless we have presented you with new material to make further progress. It is has also taken more time than we have contemplated for the reworking of the texts that was before the Council in previous debates. That is one reason why we don't have a complete draft constitution before you. We will need more time. Most importantly we need on those matters which have been presented to you and which are going to be presented to you today, instructions. We need clarity to enable us to finalise things as comprehensively as is possible. In paragraph 4 of our tenth report we refer to our 11th report. We spent a lot of energy on the development of some thoughts regarding a future national executive. Exactly because of the fact that we have not had very comprehensive instructions on this matter which is also a complicated matter and a matter which could be politically volatile, we have developed a separate report in which we try to lay the table for your discussions on the matter of the national executive and possible a multi-party national executive. We have also added to that a carefully worded general text which could form the basis of the relevant chapter in the constitution regarding the executive. Especially on that matter we will need very clear instructions. It is not clear to us whether this Council as congregated here will be able to give us those instructions. Maybe there will have to be different procedures, such as multi-faceted bilaterals. This is the first agenda point for your discussion.

Chair: If there are no comments....it seems to be acceptable.

Dr Venter: The second item on our agenda deals with paragraph 5 of our tenth report. We tried to list certain matters which have remained unresolved in the debates in the Council and which needs attention. Many of these matters have been referred to the Planning Committee and we suppose that the Planning Committee will report to the Council on those matters. But we cant finalise the list of matters on page 3 and 4 before we receive further instructions from the Council. The first one is the

definition of the national territory. The second one is national symbols. Thirdly, the matter of languages, fourthly the deadlock breaking mechanisms in the constitution making process, fifthly the development of SPR constitutions, sixth,whether the constitutional assembly is able to alter the number boundaries and powers of the SPRs as established in the constitution for the period of transition. In the seventh place we have not dealt with the lists of exclusive and concurrent powers set out in 118 of the draft constitution, because that was also referred to the Planning Committee by the Council. Thats Item 2 Mr Chairman.

Mr Cronje: These matters have been referred and the Planning Committee is in the process of establishing a commission to deal with some of these outstanding matters. Once these things have been resolved we will come back to the technical committee.

Mr Webb: The Planning Committee felt that the council should be allowed to first engage in informal bilateral. Should this not bring about a result the planning committee will then take it in hand, review the process on Thursday and then instruct the bilateral.

Mr Cronje The Planning Committee has asked the Council to submit names for the Commission yesterday to deal with the issues. We have received those yesterday and a decision will be made as soon as possible.

Mr Titus: We are confusing the issue. The Commission only relates to what is set out in item 5.2. But the idea of bilaterals to sort out the matters appearing in 5.1, 5.3 up to seven, including other matters which were referred to the Planning Committee for resolution and for a suggestion for an appropriate mechanism. **I will request Dr Eloff to provide the Negotiating Council members with a list of those issues and also the technical committee members for purposes of avoiding confusion.**With regard to the commission there are some parties which did not provided us with CV's of people whose names appear on their lists. If they could do this as early as possible that would facilitate the finalisation of 5.2.

Mr Rajbansi: When Mr Webb and Mr Titus referred to bilaterals, do I take it that bilaterals with participants who are temporarily out of the Council, are the results of those bilaterals going to be taken into consideration?

Mr Webb: As chairman of the Planning Committee this week, I am able to state there are definitely bilaterals taking place between those who are present and those who are not and their views will be brought into the process.

Chief Nonkanyane: The commission which we are to appoint is going to deal with 5.2 and 5.3 only and then in respect of the others, we have mandated the Planning Committee to do that. Now the Planning Committee is letting

us down to say they are consulting informally on this.

Mr Rajbansi: Under 5.5 and 5.6 I want to give notice that I will make a written submission in respect of Inkatha's stand on 5.5 and 5.6 which is consistent with the stand taken recently by the Natal leader of the National Party.

Dr Venter: On paragraph 6: We have pointed out that there will have to be certain things to be done legislatively before this constitution can come into operation and when this was discussed last in the Council we were asked to list the specific thing on which there will have to be further legislation which has not been referred to a technical committee. 6.1 of our tenth report is being dealt with already. I think, the electoral act. 6.2 refers to the rationalisation of the existing citizenship laws that would also be subject to progress being made with the possible reincorporation of the TBVC states. Later on in our report we have elaborated on the possibility of establishing a process prior to the election to prepare for rationalisation of administrations and we think that statutory provision will be necessary for that. We suggest that the Council considers establishing special committees to deal with these matters.

Prof Repinga: A question on paragraph 5. I hear that there is a commission which is going to deal with 5.2 And 5.3. my problem is the combination of 5.3 With 5.2. the question of 5.3 would need separate attention because its a delicate issue. I have a problem placing this under one commission.

Mr Pienaar: I support that. I glanced through the nominations put forward for that Commission. The qualifications tend to.....

Mr Webb : We incorrectly indicated that languages are included in the commission.

Mr Moosa: My understanding is that the Planing Committee itself is going to consider 5.3 and they would bring to us a proposal or report on how the matter is to be dealt with.

Mr Webb: Mr Moosa is correct

Mr Repinga: The nominations, a number of names nominated are not experts on 5.2 and 5.3.

Chair: I am concerned that some people say that they have insight into these names. I haven't. That seems to be discriminatory. Perhaps somebody could explain.

Mr Webb: Various participants have submitted nominees for such a commission which will consist of 10 members. However CV's were not distributed, so the Planning Committee has had sight of this list. So there is a list which is confined to the Planning Committee.

Chair: Council will have opportunity to look at this list provided by the Planning committee. When that is done we will debate the issue.

Dr Eloff: The formal name of the commission is the commission on symbols and languages. Because its such a sensitive issue the Planning committee decided to refer it to bilaterals, thats why its on the list of bilaterals. The decision of whether the language should be dealt with by the commission has not been taken. So for the moment technically the commission will deal with language and symbols, thats what you agreed to, but the issue of language has been referred to bilaterals.

Mr Meyer: Languages was excluded from the terms of reference of the commission.

Chair: We accept that. Paragraph 6?

Mr Rajbansi: On par 6.3, when reference is made to preparatory work does that mean before an SPR legislature and executive is established. There is a request form the technical committee in respect of the drafting of legislation, could we get guidance from the committee whether they can deal with this or whether anther committee should be established for this purpose.

Dr Venter: This matter should be discussed when we come to par 7.15 of the tenth report where we flesh out the notion of this.

Chair: 6.2?

Mr Moosa: **I am concerned about us setting up a proliferation of technical committees and it may be better that both 6.2 and 6.3 should be dealt with by the technical committee and in consultation with the Planning Committee to enlist people specifically to deal with this matter but as part of the work of the technical committee.**

Dr De Villiers: I support that, we need continuity in this matter.

**Mr K Kelame** **I support Mr Moosa. But there is an adhoc committee which will be touching on 6.2 and 6.3. It will be necessary that the Council has the benefit of the report from the adhoc committee.**

**Chair:** **We will call on the adhoc committee to liaise with the technical**

**committee in this regard. Does anybody have any objections to Mr Moosa's proposal. Agreed?**

Mr Webb: Should we debate the issue of whether the haste warrants the possibility of an incomplete article. Or should we refer it to the Planning Committee cause you yourself have identified it as an issue.

Dr Venter: We can refer that to the Planning Committee.

Mr Slovo: I don't think we can discuss the issue of time in the abstract. We are dealing with the draft constitution and legislation which has to be promulgated before a certain time if we are to meet the deadline for an election and I would ask the government representative to give an indication to this Council in relation to the forthcoming session of Parliament, what is the latest time which we have to submit the draft constitution and other legislation, relating to the session which is starting in September. I think this would give us a sense of realism instead of general phrases of rushing.

Chair: Can I remind the Council that a certain individual tabled a resolution for discussion in the Planning Committee which pertains to this point.

Mr Meyer: Its not too easy to give exact dates in terms of how we need to make progress as far the constitution is concerned, but as far as other legislation is concerned with a view to taking legislation to parliament which starts on the 13 September. This week I would believe would be the latest for this Council to complete that legislation or at the latest early next week, you have legislation ready to take to parliament for decision on 13 September. That session wont last longer than two or at the most three weeks. It was indicated that it will be necessary to have the second session of parliament to take place towards the need of October through November to take care of the need to discuss the draft constitution. To have the constitution ready for such an envisaged session would mean that it will have to be completed by this Council by not later than the end of September. As I indicated the IMC, IBA, IMC, IBA and maybe the TEC, if they have to be ready for the September session than we should finalise them by not later than the end of this week or at the latest early next week.

Mr Titus: On two issues arising from this debate. With regard to your reaction to what Mr Kelame had to say I want to advise you that the adhoc committee dealing with the TBVC states has finalised its work and has presented the Planning committee with a detailed report. The matter is now being dealt with through bilateral. With regard to the submission you mentioned, with regard to the role of the international community and the preparatory steps that have to be taken to ensure

that the four bills which have to finalised this week will in fact be implemented after they have been introduced in parliament. The party which presented the proposal to the Council is the Labour Party. Would like to extent our appreciation of behalf of the Planning committee for the effort they put in drafting the resolution. Its comprehensive because it addresses everything that we need to focus our attention on in so far as the preparatory steps relative to implementation of legislation is concerned. The matter was deliberated by the Planning Committee and it was then resolved that this matter be referred to the subcommittee. They were given instructions on a number of issue and come back with a report.

Mr Webb: Mr Meyer has advanced dates and programmes. I need to draw attention to the fact that in terms of resolution number 7 there would be a pigeon hole concept. The packages would be taken out and in an holistic manner be dealt within a single package.

Mr Slovo: Mr Meyers answer has brought us down to earth. We have been trudging along in a manner which does not meet the urgency of the situation. Despite continuous references by some participants that we must not rush, if we are committed to the decisions we have taken, have a properly finished product to meet these dates. If we are to do so the discussions and process must be informed by a greater efficiency and urgency then has been the case in the recent period. This has a bearing on time wasting issues which delay the discussion on substantial issues. I would appeal to all of us to ensure that the deadlines which have been mentioned by Mr Meyer are met, if we don't this process faces disaster.

Mr Cronje: We are in exactly the position that we warned against before making sufficient progress and then deciding on an election date, find ourselves on a steam kettle because we put the cart before the horse.

Ms Kruger: I would like to enquire from the government whether parliament will disappear after September? Can they not sit in January February etc. We said before that this process is important and it is important that the product be legitimate and the only way it can be legitimate if it is a thorough process. There is no point in providing a product which has loopholes in it.

Mr Ramaphosa: In the first place I would like to agree with Mrs Kruger. I think we will have to give consideration possibly in the Planning Committee on how legislation that is arrived at here is piloted through parliament. We cannot leave it to the unilateral decision of the government. We co- own this process and we need full knowledge and understanding. It should be possible to have parliament meet in October and November. The issue raised by Mr Webb, he has given notice that he

would want to make a major intervention when it comes to resolution 7. Its only fair that we should also give notice that we would make a major intervention because it seems that Mr Webb seems to rely on resolution 7 and interpret it in his own way and this Council would have to interpret the contents of that resolution closely. I don't agree with Mr Cronje that we have put the cart before the horse. This process can proceed right up to conclusion only if we commit ourselves to ensure that we meet this conclusion. The setting of the election date was important for this country to have hope in the dismantling of apartheid. If people don't realise that they might be misreading a lot of the developments in our country. So we can still be on track if we stop the filibustering and apply our minds to the programme of work.

Mr Meyer: Its clear that the two previous persons are not aware of the proceedings of parliament. The problem is that parliament cant operate without any business before it. So it would be of no use to have continued session from September through the end of the year. The business it has to deal with comes from here. The reason why I have indicated the envisaged sessions is because that puts the pressure on the council to do its work here... Legislation for the constitution must be completed by November to ensure that all preparations can take place for the election. We therefore have to complete our work here by the end of September to allow Parliament to complete what it has to do before the end of November.

Mr Rajbansi: Only one party which has seats in parliament is not represented in Council. So as far as parliament is concerned we wont rediscuss details. There are procedures which have to be followed . What worries me is regular signals about whether free and fair elections are possible in the present climate of violence.These signals come from across the Atlantic ocean they came from across the Drakensburg at the Natal Congress. We must watch out whether there are hidden agendas to postpone the elections, even if this Council meets parliamentary deadline with the draft legislation we are dealing with.

Mr Cronje: Are we dealing with clause 11 or 12 of the report. There is haste and it will be sad if a new process is built on faulty foundations and I hope that the right of parties to disagree is not deemed to be obstructive or filibustering process. We are a negotiating council we are in the process of laying the foundations for a new dispensation. We should lay them soundly and in a way that it will last. I still believe that we are finding ourselves in a situation where the determination of an election date far from reducing violence has led to an increase.

Mr Slovo: Of all the contributions I prefer the approach of Minister Meyer. The main question is not whether parliament can meet in October or November... the main question is to ensure that we give reality to the

decision which this council has taken which is to ensure that there is an election by April 27. We must do everything possible to ensure that we meet the deadlines which have been spelt out for us in regard to the forthcoming parliamentary session not because we are mesmerised by parliament but because the reality is that this illegitimate parliament is the only instrument which can set us on the path to move towards the election and therefore instead of this parliament being guided by our progress in regard to time frames must be guided by the urgency underlined by MR Meyer that at the latest by October we have got to be able to place the draft constitution before it. That is the correct approach.

Dr de Villiers: We all need to realise that we lose a lot of time by drifting into side issues and making interventions that is not aimed at taking the process forward. I propose that we return to the subject for debate today.

Mr Eglin: I don't believe that we have set ourselves an impossible target by announcing an election date. The indication that Mr Meyer has given is not geared towards parliament but to the electoral process is that if we want to get the pre-election and levelling of the playing fields structures in place they should be in place by October that means they have got to be passed by parliament in September. If want an election on 27 April that election will have to be proclaimed before the end of November. Therefore the laws will have to be passed by parliament. Parliament is not the critical element, it is the general election. From the point of view of this Forum the date of the 27 is still on track. If we are going to meet the deadlines theres got to be more structuring and discipline in directing our debate to the issues before us. The question of how many times people can participate on a single issue, how many times we revisit issues which have been dealt with before, theres going to have to be a tightening up on procedure and we decide that we are going to be more businesslike and more disciplined in our application to our work, I have got no doubts that we can meet the deadlines that we have set for ourselves.

Chair: That concludes the discussion this issue. To wrap up there is general agreement that time is of the essence, that our goals and time frames must be geared towards the September session of parliament with an eye towards the elections in April and that we do so without impacting upon the democratic process in view of what Mr Cronje has said. **We now go back to the report before us, item 6.2, in the light of what we have heard from the Planning committee the technical committee can go ahead with the question of legislation pertaining to the rationalisation of existing citizenship laws and in doing so you are permitted to extend you committee if need be and also take into consideration the report of the adhoc committee that deals with the question of the reincorporation of the TBVC states. We can now go further with the report.**

Dr Venter: I would like clarity on our instructions to deal with the other legislation. We havent had the opportunity to discuss it among ourselves. But as I understand it is not a matter of extending the committee but we could coopt other individuals or enlisting the help of consultants which may have financial implications.

Mr Landers: If you do that in liaison with the Planning committee you will get the necessary authority.

Dr Venter: The next item on the agenda in paragraph 4 under the heading the constitutional text. I would like to point out that pages 44-57 were not distributed. It will be distributed in the course of this meeting. It does not effect the following agenda items.This pages deal with sections 122 up to schedule 3.Under the constitutional text the first item we would like to present is chapters 1,2 and 3 of the draft and Ms Olivier will deal with that.

Ms Olivier: I will deal with chapters 1,2 and 3 which must be read together with paragraphs 7.1, 7.2 and 7.3 of the tenth report. Chapter 1 of the draft constitution on page 44, this chapter deals with the formal provisions of the constitution. This includes the definition of national territory and national symbols such as the national flag... as well as the matter of languages. We were not able to finally settle this matter as these matters are still undetermined and are referred to the Planing Committee to facilitate a decision in this regard. We need to obtain clear instructions from the Negotiating Council to complete this task. Section 4 of chapter 1 deals with the supremacy of the constitution. During the debate in Council the question was raised whether the draft electoral commission act is compatible with the constitution. Section 4 provides that the constitution shall be the supreme law of the land. As it appears from 7.1 of our tenth report the provisions of the draft electoral commission act should give way to those of the constitutional text. I return to chapter 2 which deals with citizenship and franchise which will be read together with par 7.2.

Chair: Are there any comments with regard to section 4 of the constitution in relation par 7.1.

Mr Webb: Could I ask for an explanation of the words in 7.1 "save for other transitional legislation"? Does it effect the supremacy of the constitution.

Ms Olivier: The constitution is included in transitional legislation in the definition given for transitional legislation in that Act and even if it was mentioned the constitution will enjoy supremacy.

Chair: On the question of the principle that the constitution is supreme?

Mrs Finnemore: Why does it say save for other transitional legislation? If you left it out it will mean the same thing.

Dr Venter: This definition of transitional legislation is not ours. It is given in the draft independent electoral commission Act. We simply interpreted that.

Mr Chaskalson: There seems to be confusion. 7.1 deals with the provisions of the electoral act, it doesn't deal with the constitution at all. What is pointed to was that in the constitution, theres nothing in the IBA which is inconsistent with the constitution because it purports to be subsidiary to the constitution. Whether it did or didn't the constitution would in any case prevail.

Me Eglin: To the extent that the constitution is the supreme law and the constitution contains certain fundamental rights is the technical committee satisfied that the application of these rights as overriding the existing law would not at any stage create a legal hiatus. But it is possible to superimpose this new code on existing legislation without there being any need to change legislation or fill any vacuum that may be created.

Mr Moseneke: During the last debate there was a suggestion from one of the participants that they may be in conflict between the provisions of the constitution and those of the independent electoral commission act. We looked at both provisions and we found that the electoral commission act purports to make the provisions thereof applicable even after the coming into operation of the constitution for the transitional period. The observation we make that whatever they may propose to do when the constitution comes into operation future elections will be held in terms of the new constitution that will come into being whether or not the Act purports to be operational even beyond the date of coming into operation of this present Act. It may well be that in certain instances to amend laws of parliament in ways that it would be consistent with the constitution but it goes without saying that the constitution is the supreme law where any act is inconsistent with the constitution such provisions will have to give way to provisions in the constitution. Sometimes it happens through legislation where a court will strike down a statute that is inconsistent. Its not in all cases where you have to repeal particular laws. But in some cases it may be possible.

Mr Chaskalson: There are techniques which could be used to avoid the situation which Mr Eglin has in mind. There is a way of giving the court the

discretion to put parliament in terms to amend its legislation to ensure there isn't a vacuum in a particular field. Those issues could be explored at the time we get to enforcement mechanisms.

Mr Tsenane: I am following up on Mr Chaskalson who pointed out that 7.1 does not deal with the constitution but with the independent electoral commission. If that is the case then these words save for other transitional legislation are in place,if however... it deals with supremacy of the constitution these words should be deleted because they cause confusion because by saying save for other transitional legislation one understands that this is an exception which one wouldn't expect when one is dealing with the supremacy of the constitution. It now depends on this house accepting that section 7.1 deals with independent electoral commission.

Mr Titus: There is no purpose in debating this issue further. We are dealing with two issues the constitution and the IEC. We will debate the IEC tomorrow. I would recommend that the reference here to the IEC that we note the comments, when we deal with the IEC tomorrow, we revisit the issue.

Ms Olivier: I will now deal with Chapter 2 which must be read with paragraph 7.2 of the tenth report. Section 5.3 which states that a South African citizen shall not be deprived of his/her citizenship other than as provided for by Acts of parliament. Section 20 which is in chapter 3 dealing with fundamental rights prohibits the deprivation of South African citizenship. It is common that states provided by law for the loss of citizenship if citizenship of another country is required. We have therefore retained section 5.3 and suggest that council reconsider section 20 in the light of the explanation.

Mr Cronje: It should be retained as it is. In terms of ones laws a government decides that it does not accept dual citizenship and if a citizen voluntarily by his action accepts a citizenship of another country you cannot argue that you are being deprived of citizenship. What is of concern is that a government can unfairly deprive a person of that citizenship without any such action on the part of the person adopting another country's citizenship. Deprivation means an action against my will and without me being involved. Its important that when you are a citizen of a country you have rights and should not be deprived unless that persons actions have led to the deprivation of it.

Chair: Should we retain section 20 or should we now accept the new section 5 subsection 3?

MR Webb: Cannot the Act of parliament which deprives a person of citizenship be tested in a constitutional court as to whether it offends the

fundamental right so these are not mutually exclusive and therefore Mr Cronje's proposal is that it should be retained.

Dr Venter: Section 5 subsection 3 and section 20 are incompatible. Something should be done about it. We want to suggest that this Council discuss this with the technical committee on fundamental rights when they come up before you. What will be needed is some change or qualification to section 20 and possibly not having subsection 3 of section 5.Also regarding the qualifications towards the end of chapter 3 regarding the possible limitation of fundamental rights.

Mr Pienaar: A question on 20, this does not in any way affect the right of the court to curtail the intention of people to leave the country in certain circumstances like in bail applications etc?

Dr Venter: No it would not have that effect but it should be discussed with the other technical committee.

Dr Rajah: Whether a voluntary act will be considered as deprivation or whether de[privation is only a deprivation when instituted by the state.

Dr Venter: Deprivation usually follows a voluntary act but it can also be a discretionary matter without a voluntary act and that is clearly against the spirit of this constitution.

Mr Mahlangu: Section 20 is going to far....

**tape ends**

Mrs Kruger: The distinction made by Mr Cronje was useful that we distinguish between a deprivation of citizenship and a voluntary renouncement of citizenship, section 20 is a well known clause and therefore it should remain as is and the technical committee should look at reformulating 5.3 in such a way that this distinction is clearly identified.

Mr Eglin: I don't agree that you can draw this distinction because as to whether taking up citizenship of another country is deemed to be renunciation of citizenship of your own country is matter of law not the constitution and in some countries you can take up 10 citizenship but you are always a citizen of the country of your birth.Ones problem is that this is very sweeping it doesn't only deal with what I call natural South Africans. It might deal with people who become naturalised citizens who retain citizenship of other countries. But I put it to the Committee isn't it perhaps dealt with if you read it together with clause 34 of the bill of right which makes provision for the law applying generally and not solely to an individual case provided that such limitation shall be admissible only to the extent that it is reasonable and justifiable based on the principle of equality. So to that extent it does seem to qualify 20 as it is and then permits 5.3 to stand subject to the rider contained

in clause 34.

Mr Riely: What will the effect be in section 20 if we delete "and no citizen shall be deprived of his/her citizenship?

Prof Wiechers: We havent discussed this but I think if we leave out 5.3 , in 2 the acquisition, renouncement and restoration of SA citizenship shall be regulated by parliament and leave section 20 because I agree that there is a distinction between deprivation and renouncement or waver voluntarily. So if its put into section 5.3 that covers the spectrum of acquisition, renouncement and restoration and then leave section 20 as it is.

Mr Titus: I would support those who say that this problem should be referred to technical committee dealing with fundamental rights but we need to add another instruction, if you look at 5.3 and you compare it to 34.1 there is some inconsistency there. With regard to 5.3 parliaments powers are unchanneled, not limited in any way,but when it comes to 34.1 the powers there are limited, that is the limitations set out in 34.1(a). If they could try and reconcile the two subsections.

**Dr Venter:** **It would be more constructive if this matter is debated when the fundamental rights committee reports again to you in order to get clarity of the meaning of section 20 read with 34.1 and from your discussion there a instruction to us or them or both could follow but it would be premature to come to a decision now.**

**Mr Cronje:** **Would it not be more constructive if the chairpersons of the two committees meet and sort it out?**

**Chair:** **Can we than allow the two technical committees to get together on this point? Agreed.**

Ms Olivier: To continue with chapter 3 which includes the draft fundamental rights as submitted by the technical committee on fundamental rights. One point regarding this chapter. One participant sought the inclusion of minority rights with regard to national ethnic, religious, linguistic and other minorities . Our reaction was and still is that this debate regards the brief of that specific technical committee and should not be dealt with by us. International law recognition of such rights could probably be dealt with under chapter 5 where the provisions and status of international law will be debated by Council.

Chair: In the light of the fact that this chapter is a product of another technical committee can we agree that we defer the debate on this until we get back to that technical committee

Mr Cronje: There are many constitutions in the world which provides for matters such as these. So you are not saying it should not be in the constitution.

Ms Olivier: Such international law documents will be dealt with under the appropriate heading in the constitution and the general test will be to ascertain whether such a document must be regarded as part of the law of the land.

Ms Kruger: Want clarity, I understand from the technical committee that this could be incorporated into chapter 12. The technical commission before us said that this could not be included under fundamental rights in chapter 3. The problem is should I forward this to the fundamental rights commission ? Would it be better if this commission dealt with it as part of the constitution in chapter 12 because the commission on fundamental rights is not charged with chapter 12 of the constitution.

Ms Olivier: Some international norms of human rights coincide with human right norms in the municipal law. Its the task of that fundamental rights technical committee to incorporate such norms in chapter 3. Chapter 12 which will deal with international law will make reference to all kinds of international law documents , internally accepted norms of customary international law and so forth dealing with a multitude of subjects not only human rights.It will deal with their relationship with the constitution it will not by means of that chapter include such as the present declaration as part of the constitution. It will only deal with the status of such documents in municipal law not as part of the constitution.

Ms Kruger: What we propose has nothing to do with municipal law we are talking about international documents on human rights with specific reference to minorities and the problem is if we take it to the commission on fundamental human rights they would say that chapter 3 is what we have drafted we cant accommodate it within chapter 3 therefore we cant help you.

Ms Olivier: The term municipal law is a well known term referring in international law to the law of a specific land, its not the law applicable to a specific municipality. But the whole internal law of the land.

**Chair:** **We have agreed that chapter 3 or the debate thereof will be confined to when that specific technical committee appears before the council. Please proceed.**

Dr Venter: The next item on our agenda is 4.2, the legislature and the constitution making process. There is a long list of items and we would like to deal

with them separately. The first being 4.2.1 the question of delegation by parliament, section 38.2 of the draft. Prof Devenish will deal with that.

Prof Devenish: This is dealt with on page 58 under chapter 4 you will see that clause 38.2 has now been omitted. Parliament is the highest legislative authority and as such it is empowered to delegate by law any matter within its competence. The competence of parliament is circumscribed by the supremacy of the constitution which is provided for in clause 4.1 . Clause 4.2 stipulates that the provisions of this constitution binds all the legislative, executive and judicial organs of the state at all levels of government. So the important thing is to note that 38.2 is now omitted. It is provided for inclusively in section 38.1.

Mr Meyer: If this is correct would it then not be necessary for parliament everytime to decide when a specific power is to be delegated to a lower authority. What I am suggesting is that if 2 is to remain it seems that that authority will rest with the executive to take that action without everytime going back to parliament with the necessary legislation.

Prof Devenish: When powers are delegated provision must be specifically made for this in legislation. That is desirable.

Mr Cronje: I am still not clear why it is necessary to do it in this way because if you can do things without having to refer to parliament everytime why not just leave it and deal with it accordingly? It also makes the position quite clear.

Dr Venter: Part of the debate on subsection 2 regarded the word delegate, whether delegate is the appropriate term to be used for the allocation of powers by means of legislation. That caused this discussion. When we considered the original formulation we came to the conclusion that it does nothing to take away or give something to parliament that it hasn't in any case. A higher authority can always delegate within the framework of its powers. So whether its there or not it doesn't serve any real purpose.

Mr Cronje: The allocation and delegation of powers comes from a different context. When we talk about the powers of the central government and SPRs. We argued that those powers should not be delegated. They should be original powers contained in the constitution. Clearly if in terms of the constitution certain powers are those which constitutionally are the right of the central government and the central government wishes that a portion of those powers to be exercised by an SPR then they have to delegate to it. So they have to delegate their constitutional powers which is different to the allocation of powers. So if its there you don't have to go back to parliament cause you can

automatically do it.

Prof Devenish: I disagree with Mr Cronje. Even if it were to include clause 38.2 it would still be necessary in legislation for parliament to provide for delegation and the reason is that in our common law there is a prohibition against delegation and that as a result of that legislation must always expressly impliedly provide for delegation. So even ifit were to include clause 38.2 the legislation in question will still have to provide for delegation.

Mr Meyer: Will 38.1 therefore be sufficient to allow for delegation of power through an act of parliament without any amendment to the constitution?

Prof Devenish: That is the case

Mr Chaskalson: There may be some confusion between delegation by the executive and delegation by the legislature. The legislature makes laws and parliament makes laws and only parliament can delegate law making powers to another body to make a law authorising that other body to make laws. When it comes to delegation of executive powers you could have a general provision in a statute saying that an executive may delegate any of its powers to some subordinate powers and then you don't have to go back to parliament each time to do it. But as far as the constitution is concerned it really provides a framework in which laws have to be made. And our view was that it was sufficient as it stood without 38.2.

Mr Rajbansi: I agree with the technical committee

Mr Pillay: I agree with the technical committee it seems that those who are arguing for the retention of 38.2 is the mistaken belief that without subsection 2 parliament wont have the powers to delegate.

Mr Eglin: 8.1 reads legislative authority of the Republic shall subject to the provisions of this constitution be able to do certain things. Later on in 118 the constitution defines the areas of legislative competence of the SPRs. In spite of the definition of the areas of legislative competence in the constitution the legislature is free to add other areas of competence which are not mentioned in the constitution?

Mr Chaskalson: The distinction is that section 118 contains original powers which cannot be interfered with so when those powers are exercised they are exercised as original powers by the SPRs in terms of powers vested in them under the constitution. If the legislature wishes the SPRs to exercise certain other powers it can delegate additional powers to them but then it can take them away. It then becomes a delegated power. It

is not an original power.

Mr Ramaphosa: Removing the clause does no harm. The technical committee has explained and set out the reasons for its exclusion. It's elegant drafting to leave it out and we should leave it out.

Chair: We are going to have to make a decision.

Prof Wiechers: It does serve a purpose if you want to retain this subsection 2 it makes it clear that parliament can delegate some of these powers to local governments as well and providing them with the funds. It puts local government and SPR government clearly in a perspective of national power delegation which could be useful in a constitution.

Mr Tsenane: We agree theres no need for section 38.2

Mrs Jajula: This clause is vital to be retained.

Chair: Who is in opposition to it?

Mr Ramaphosa: We reserve our position

Chair: **Its the decision of this council that 38.2 remains.**

Dr Venter: The next item, 4.2.2, the electoral system involves schedule 5. Paragraph 7.22 of the tenth report indicates that we have drafted schedule 5. We have drafted this outline for an electoral system on the assumption that the first election must be as simple as possible to achieve the democratic result.We have therefore assumed that the best way is to be simple that that election would have to cater for only a single ballot paper on which the voter would be required to make a single cross in casting his vote. The council may have a different view. But there has not been discussion on this and therefore we present you with this approach to facilitate your consideration of what the electoral system must look like. We must point out that what we have devised after a certain point deviates from any precedent that we could find anywhere else in the world. Because we are contemplating in terms of this constitution the election of a national assembly on two different lists as well as at the same time the election of SPR legislatures. On schedule 5 we will have to go through this paragraph by paragraph, we say in par 1 that all registered parties will be allowed to nominate candidates by compiling party lists on which the names of the nominees appear in a particular sequence and this will have to be regulated by the electoral act being drafted by the relevant technical committee. We have passed on this schedule to the relevant technical committee for their consideration. In paragraphs 2-5 we deal with the election of the 200 members on the national assembly on the national party lists and in 2 we say that those lists drafted by the parties will be

submitted to a chief electoral officer and that each party for that list should present a list of 200 names as a maximum. Paragraph 3 deals with the quota, the quota for this list will be determined by dividing the total number of votes cast by 200, the number of seats and that quota is used in paragraph 4 to determine the number of seats allocated to each party and its done by counting the number of votes cast for a specific party divided by the quota and that would produce the number of seats out of that 200 seats that the relevant party will be entitled to. Subparagraph 5 just deals with the question of fraction that sum will produce, the fraction is inevitable and we tried to devise a simple system to allocate the remaining seats according to the sequence of the highest surplus fraction produced by the calculation made in paragraph 4. It would be conducive to the discussion if we deal with this separately. If you would like to have discussion first on the system proposed for the election of the members of the national assembly on the national lists dealt with in paragraphs 1-5?

Chair: We should discuss par 1-5 first. The matter is open for discussion.

Mr Rajbansi: In connection with par 1 while the details are going to be spelt out in the electoral act is it envisaged that the list shall be submitted to the commission prior to the commencement of the election and secondly that the list shall be made public just at the time of the commencement of the election?

Dr Venter: Those are details to be dealt with in the electoral act but in general it is clear that the lists will have to be public because the election is not only the endorsement of a party but of a party's candidates. We have not dealt with further questions of detail but we did in our deliberations consider it of utmost importance that some legislation, probably the electoral act should provide some form of enforced internal party democracy in the process of the drafting of those lists.

Mr Cronje: In clause 1 of the schedule it says parties registered in terms of the act shall nominate candidates to the national assembly and the SPR legislatures, could it be and or SPR legislature? Cause you may have a party which wishes to participate in the SPR as a party but not on a national basis?

Dr Venter: We will deal with the question of participating in some elections and others not later on and depending on what council decided we will have to revisit the whole drafting and the finetuning of the text.

Mr Sisane: What is the relationship of this section with the electoral act?

Dr Venter: Various positions of the draft constitution amongst others section 40 refer to the election in different ways of the relevant institutions. We

considered it necessary to give an indication in the constitution of the basic structure of the electoral process. The.. to be regulated in an electoral act.It would have been difficult not to deal with these matters in the constitution because it will not be clear how the constitution works. Its not a mechanical electoral question it is a constitutional question, what the basis of a system is.

Mr Sisane: I understand that but my point is that we had a technical committee dealing with the humans rights section and it is the work of that committee which is included here, so what is the relationship between this section and the people drafting the electoral act.

Mr Eglin: Then while we are discussing this we will only reach finality when we see this in the context of the electoral act. I don't understand there is a body drawing up the electoral act and we expect them to report in a few days are we preempting them or are we going to consolidate the two discussions into one at the time we get their report?

Mr Ramaphosa: I would have thought that the electoral act would take its cue from the constitution if we agree that the constitution is the supreme law we should be guided by drafts like this even as we are going to be discussing the electoral act this section here seems to be straightforward and logical I don't see how the electoral technical committee would have major problems with this and I think if they do we will see how best this can be reconciled with this but this should be the supreme position that evolves even during the negotiating process and they should take their cue from here and I am greatful that the technical committee had foresight to refer this draft to the technical committee dealing with the electoral act.

Mr Sisane: Still don't understand what the relationship between the two is

Mr Ramaphosa: This sets out the principles the broad parameters, the electoral act is a piece of legislation and will be setting out the detailed rules based on the principles that are enshrined in the constitution itself, the electoral act may set out more detail for instance on the question of the election of the 200 party lists much more detailed than will be set out in the schedule of the constitution. What is also pleasing in the one that deals with regions and national lists they specifically refer to the electoral act which will be going over and above the principles that are set out here. It is not something new that a constitution can refer to other acts it can do so. So theres no conflict between what is written here and what would be set out in the electoral act.

**Chair:** **Can we accept that the technical committee has set out the parameters and that there is another technical committee dealing with the electoral act and that they will have access to schedule 5**

**and liaise with this technical committee and when they bring their report before us we will able to discuss it too.**

Dr Venter: The way in which these bodies are going to elected goes to the structure of these bodies. If you look at sections 40 and 101 of the constitution you will see that it would be difficult to understand what those structures are intended to mean if you don't have an idea of what the method of election is going to be. It is not strange to have these kind of provisions in a constitution. It often happens.

PAC???: In relation to this separate list at the lower level we still reserve our position.

Dr Venter: Paragraph 6-10 deal with the election of the 200 members in the national assembly who are to be elected from regional lists in terms of section 40 of the constitution. This is a reflection of paragraphs 2.5 with the necessary changes.

**end of tape**

Dr Venter: In par 6 it is stated that the regional party lists should be submitted by the parties intending to take part in the election of that part of the national assembly and the lists will then be lists of candidates for each SPR. 7, contains a calculation of the number of seats which should come from each SPR. That number of seats to be filled from the regional party lists for each of the SPRs must be calculated on the basis of the number of votes cast in a specific SPR divided by the total number of votes cast nationally multiplied by 200 that is the number of seats to be filled from those lists. Thats a formula to be determined on a proportional basis of the number of voters in each SPR how many seats should be filled from each SPR on the regional lists. In par 8 the quota is determined by dividing the total number of votes cast in an SPR by the number of seats to be filled in that SPR as calculated in the previous paragraph. Say in a specific SPR 20 seats must be filled in terms of par 7 you will divide the number of votes cast in that SPR by 20 and that will produce the quota. Par 9, the total number of votes cast in an SPR must be divided by that quota as determined in par 8 to determine the number of seats allocated to a party. The quota determined in par 8 is the basis upon which the number of seats per party in an SPR is determined. Par 10 deals with the surpluses in the same way as par 5 deals with it.

Dr Rajah: Par 6, on the second line should we not include for consistency, "such registered parties". We understand that the number of seats in an SPR can only be determined after an election, there is no limitation to the number of seats that party may propose whereas in the national

assembly we said a maximum of 200. Will it prejudice any party to submit a shorter list?

Dr Venter: That is a detail to be dealt with in the electoral act but parties will do well by not having too short lists especially if those lists are to employed later on for the filling of vacancies. It shouldnt prejudice a party expecting a very small percentage of support in an SPR.

Mr Rajbansi: In par 8 reference is made to the number of votes cast in a general election in an SPR. For the purpose of the regional legislature the number of votes cast in an SPR will be counted to determine taking into consideration the number of overall votes cast, to determine the number of members who are going to be on an SPR legislature. Does this mean that in order to determine this number the person who is going to aim his vote for a particular SPR must be ordinarily resident within that area of that SPR? If that is the case than if we are going to use one ballot paper for both SPR and national lists and when a person casts his vote and depends where he casts his vote his vote will be counted for the SPR then it cuts across an important principle that you can cast your vote wherever you are. Is it envisaged that a voter must cast his vote wherever he is ordinarily resident? I would like participants to reconsider whether the allocation of seats to a particular SPR should be determined according to the number of votes cast or should we taking into consideration the report of the commission for regions and use that guide? There is a disadvantage of using the most votes cast as a guide it can be as a result for example if an area is subjected to heavy rain during April and the actual votes cast in that region might be low and if some third force is wise, they might say lets destabilise during the election in a particular region and the voters will get scared and they wont turn up. I want to suggest that Mr ramaphosa must seriously consider what I am saying because there can be unknown factors that can effect voter turn out in particular areas. What happens if 700 000 are cast in region they will get about 6 seats but the constitution says they must have 10 ministers in that region. The disadvantage is also is that if we don't have the ordinary resident qualification than you can cart your voters from area to vote in another region and gain control. It can be abused.

Dr Venter: We have still have to deal with the election of SPR legislatures and its something different. We were contemplating ordinary residents to be the basis for deciding where you can vote.

Ms Kgotisele: On the issue of the suggested chief electoral officer, given the fact that we have been talking about an IEC to what extent is this proposal going to effect the IEC in terms of its powers?

Dr Venter: We would like to leave those matters with the relevant technical committees.

Prof Devenish: The relationship between this schedule and the electoral act, the purpose of this schedule is to construct a particular model we are going to move from a system of regional constituency representation which we have had in our political history to a system of proportional representation. Thats a fundamental change. What we trying to do here is to present a particular model. The purpose of the electoral act on the other hand is essentially to ensure that the way in which that model operates is free and fair and it will contain technical and other regulations and rules so we have got to distinguish between the two. Its important not to get bogged down with the detail at this stage. Ultimately the two will have to be married.

Mr Eglin: This model presupposes a single vote which will then be distributed at the three levels to which this model applies. Having heard when we have gone through the whole model this council will be advised to canvass the question as to the single vote or more than one vote at that stage.

Chair: Can we move on?

Dr Venter: Par 11, deals with the election of the SPR legislatures and 11 makes certain provisions regarding the establishment of the party lists, the calculation of the results and the surpluses with the necessary adaptations applicable to the SPR elections. One thing that is different is that in terms of section 101 of the constitution the quota is predetermined. The suggestion was that each seat in an SPR legislator should represent at least 50 000 votes with a certain minimum and maximum thats why this quota is fixed at 50 000. In par 12 it is said that the election of the national assembly and the SPR legislators shall be conducted at the same time with a single ballot. In subsection 2 it is stated that the name of the party is to appear on the ballot paper that each voter shall have one vote only and that the vote will be counted depending on the rest of the provisions of this schedule as well as the electoral act in a particular fashion, if a party for example has a national list for the national assembly and SPR list for the national assembly and an SPR list for the SPR legislature that vote will be counted for all three of these lists. In par 13 we provide for the possibility of a deviation from the scheme of a party being forced to participate in the election on all three of these lists. If a party does not make a ceratin declaration it will be deemed to have entered the election of the national assembly on both lists as well as the SPR legislature. This is especially the thing for which we couldn't find a precedent elsewhere which will probably be necessary if it is to be decided that a single ballot and a single vote is going to be required. 13.1 deals with a situation where a specific party wishes to take part in the election of one or more of the SPR legislatures but not in the election of the national assembly. It is allowed to declare in terms of 13.1 that it supports another party which does take part in the election

of the national assembly and when the votes are counted the votes cast for that party which is for example a regionally based party can then be counted for the other party for which it has declared its support in the election of the national assembly. There are different possibilities of allowing this kind of thing and that is dealt with in subsections 2 and 3. deals with a situation where a party wishes to contest the election for the national assembly but not the election of or more of the SPR legislatures. Then it can declare its support for another party taking part in the SPR election. The third possibility in subsection 3 is that if a party wishes to take part in the election of one or more of the SPR legislatures but not in all of them it may declare its support of a party which does take part in the election of the SPR legislatures that it is not contesting. That provides for the situation where a party has a few supporters in an SPR where it has no hope of achieving any seats than it can make the necessary declarations that its votes can be counted for another party. Subsection 4 makes it possible for a party to support different parties in different SPRs.

Mr Cronje: The technical committee said that this was an innovative idea the concept of compulsory coalitions which seems to be manifesting itself in section 13 is that innovative or drawn from some international experience.

Chair: Is it compulsory coalition?

Dr Venter: The answer to that is no and no. Its not compulsory coalition and there are no precedents that we could find elsewhere. This is a function of our perception for a need for a simple electoral system for the first elections with a single ballot and a single vote cast.

Mr Webb: If the answer is no to the first question what does the voter who votes for a party participating in a regional election but not in a national election than that vote gets lost because his party is not represented at a national level and that the party may take a decision not to support another party. Is that not a flaw in the single vote system, you lose your national vote.

Mr Chaskalson: Thats correct if you vote for a party and it hasnt made a declaration and it hasnt entered all the possible elections then by casting your single ballot for a party you don't participate in the other elections which might possibly have been open to you to participate in . The question that was debated in some length in our committee is that if you have a multiple ballot it is likly that people will be disenfranchised by spoiling papers because the system is too complex to handle. You have got to balance on the one hand the loss of votes resulting from a multiple ballot against the loss of potential votes for a party wishing to enter one but not all of the elections and also not

wishing to make an alliance. Its an issue which calls for a lot of discussion.

Mr Cronje: We have to accept and let me use the USA where you have supposedly a sophisticated electorate, we have seen in the USA over the last ten years a situation where the vast majority of voters both at state level and national level, voted for the democratic party, but at presidential level they have voted republican. We have a situation where a person in his SPR would vote for this particular party but at national level vote another party so I am denying him that right, secondly, if you have a regional party well known to the people of the region who is not participating nationally, in order for that vote not to be lost and for it to have representation at national level will now have to vote for another party because your man will have to stand under someone elses name under this proposal not in the name of the regional party, there will be added confusion. I think that in both approaches there are pros and cons but the difficulty is that we are faced with the first election for the vast majority of the people. Votes to be brought out by people who from an electoral process are not sophisticated and we are presenting them with a complex process and I wonder whether it will not be acceptable and practical to allow two ballots. One for a national and for an SPR level. Its wrong that people supporting a regional party should have no say in the national party because in terms of these proposals are being presented, it does not give him that particular alternative. I would like to say also that looking at the boundaries as proposed now and looking at the average number of voters in each one of these SPRS bearing in mind that 50 plus % of the inhabitants are under the age of 18, I wonder how realistic 50 0000 is and whether we shouldnt consider 30 000. I have made a few calculations, it seems to be more reasonable. Secondly, whilst I understand the formulas that are proposed to determine the number of people from each SPR on a national level we have to accept that there are some SPRs which are far flung and not heavy concentrations of people in it. They are spread all over the SPRs. Whilst in the PWV area there is a big concentration of people making it far more accessible. Whilst on the one hand you have numbers on the other hand you have vast distances to be covered and for people to be represented.

Mr Sisane: I want to ask the technical committee whether it has in mind one person one vote and also a secret ballot. Are those principles included in their model. If the answer is yes how do they reconcile secret ballots and one person with section 13?

Dr Venter: The answer to the first question is that there is no other way. The constitution requires that. I'm not sure I understood the second question.

Mr Moseneke: Thats part of the constitutional principles,it will be one person one

vote and the ballot will enjoy secrecy. But on 13, a few things which underlie 13 which would have informed the formulation of 13, the first of these is you must extend the vote to as many people as possible. With regard to illiteracy you have got to simply the method of exercising the choice. We therefore sought to use one vote which presumably would be simpler than making more than choice in the process of voting. It might well be that council may come to the point that they would want look at a different principle where you have a ballot paper that would provide more than one selection that may be the more difficult way of exercising the vote. Once a decision is made that one should take that route than you can reformulate 13. Once you go for the one vote it must follow that you would have to devolve a mechanism for ensuring that the vote is used both at regional at national level. Hence the innovation of a declaration that a particular party that would seek to canvass votes in a region and has no inclination to canvass votes at a national level, may obviously make a declaration in favour of a party that may canvass votes at a national level and similarly the same declaration may be done in relation to SPRs. So that vote can be used nationally provided that there are arrangements and coalitions that would emerge between parties. That artificial method emerges directly from the fact that you seek to secure that national vote for parties or individuals who may support one party at a regional level which party would not contest another SPR or act at national level.

Mr Sisane: I appreciate what Adv Moseneke has said. Looking at 13 as it stands it seems that 13 really does not give an individual to make that choice of which party ... Its actually giving political parties to vote on behalf of their individual members, which is a different principle from one person one vote and secondly it violates the notion of secrecy of the ballot cause you are no longer going alone there to do the voting. Your party decides that nationally you have already voted for another party by making a declaration of support before hand, therefore another party is voting for another and taking individuality away from individuals to make the vote and saying we are voting for that party at national level.I am worried about this. Alliances , it will be block voting no longer one person, one vote and we would like to reserve our position on that.

Chair: It can also be argued that a party making a declaration of this nature puts its votes at risk because its potential supporters could decide not to vote for them because of such a declaration.

Mr Ngoepe: One must concede that every system that you can think of may have advantages and disadvantages. Its a difficult process to evolve which will be free of any problems and having said that I must try to explain some of the thoughts we had at the time that we formulated these provisions as we did. As a prerequisite for a proper functioning and

fair election, quite apart from making sure that you extend the franchise to everybody, it is also fundamentally important that people must have freedom of association, they must decide which party they would like to vote for and it is assumed that any decision any given party would come to with regard to the elections including for example the compilation of the list of the people it wishes to have elected into the national assembly and in its all its doings it is assumed that it will reach those decisions as democratically as possible. Every member of the electorate would hopefully participate in the decision making process of that particular party, there was a time we tried to think of how one could ensure that political parties would in coming to decisions do so as democratically as possible, if one were to accept that parties would come to decisions in a democratic manner than one would assume that hopefully every member of the electorate would have at least attended the meetings of that party of his choice, took part in the argument as to whether or not that party should borrow out his votes to another party and so on. But the whole idea is that people would be free to decide for themselves and to take decisions themselves. Those are some of the considerations behind these provisions. Its difficult to emerge with a system that is problem free and the members at the council should come up with systems they think would be better.

Prof Devenish: In weighing up the pros and cons in selecting a model that is suitable what must be borne in mind is that simplicity is of paramount importance because if we look at the level of illiteracy that is very high and its going to be counterproductive to accept a model that is very accurate and have many advantages but is complicated, its very important that we place the simplicity of the model as a high priority taking into account our socio economic position and the high level of illiteracy that prevails in SOuth Africa.

Mr Rajbansi: I want to take an important answer that Dr Venter has given and that is for the purpose of the regional list which will be applicable to SPR legislature a voter will have to cast his vote where he is ordinarily resident. A voter can be challenged if he decides to cast his vote where he is not ordinarily resident and therefore we have to give consideration to the identification of voters to establish where is ordinarily resident. I agree with Mr Cronje about the 50 000 because if we take thew 50 000 into consideration and the potential number of voters to be approximately 20 million this 50 0000 is calculated on the understanding that the percentage poll might be 100% there the argument of MR Cronje to reexamine this ...relevant, But I will put a counterproposal for the reasons I have advanced that there can be abnormal factors in particular SPRs that can effect voter turn out and would be safe to say that in all the SPRs there shall be a total number of 400 members of the legislatures and we can distribute them in advance according to a report from the commission of demarcation of

reasons and say that Natal/Kwazulu is going to have 80 seats, Northern Cape 40 seats etc. But I want to compliment the technical committee in respect of the principle which they have enunciated in 13. 1. But taking this principle to its logical conclusion the freedom of choice not of a party but of an individual voter is important. That voter must not be forced by a decision of a few members of the national executive of a party if he wants to support a regional party that he votes against his wishes because of that decision for the national legislature will go to another party. We had a situation where the same voters in a Natal wanted the national party to be the majority in parliament but the same voter in a different ballot wanted the United party to be the majority in Natal. For example voters might think that Inkatha is the best for Natal, but the same voter might say that Inkatha is not good for national legislature, the ANC is good for national legislature, so taking into consideration the expression of the freedom of the individual, I want to suggest that on the same ballot paper something could be devised to give the individual voter his right to choose different parties for the SPRs and the national legislature.

Mr Chaskalson: I think that Mr Rajbansi has identified the real issue and its been raised before, its a question of choice. Theoretically a system which gives the voter the maximum choice is theoretically fairer than a system which deprives a voter of part of the choice that he or she might want to make. What one has to do it is ask whether the voters are going to be capable of making the choices that they are asked to make. Because if they are not what you are doing is giving the choice to the literate voters and taking away a choice from the illiterate voters by disenfranchising them because if they cant handle the multiple ballot than their ballot paper will be spoilt. Its that issue which needs to be debated. Theres no doubt that theoretically a multiple choice system is fairer and it could be organised in different ways and there could be two ballot papers or one ballot paper where you indicate your choices for two different elections, thats a matter of detail, but the real question is whether the freedom of choice is best served by a multiple ballot system which gives literate voters the full range of the choice but may restrict illiterate voters or whether it is best served by a system which seeks to compromise by giving the illiterate voters a greater chance but depriving them of an important aspect of the right to distinguish between people whom they may wish to vote for at different levels.

**tape ends.**

Chair: The panel of chairpersons have been requested to look seriously at matters like needless representation of points that have been made by previous speakers, needless debate and panel of chairpersons have been

requested by the Planning Committee at even going as far as curtailing debate. I am appealing to you that in a debate on a particular issue if a previous speaker has made a point that you would wish to make please don't repeat it. When the Chair decides to curtail debate it is because he feels that the matter has been adequately debated and it is not intended to cut down on your democratic privileges and rights. That was what was discussed in the Planning Committee. When we broke for lunch we were in the process of discussing a particular point in the technical committees report, next speaker is Prof Repinga.

Prof Repinga: We wish to welcome the clauses made in 13 and 2 because it resolves some of our problems on the grounds that the parameters that are presented here look quite good. But what we have to do is to get down to practicalities to do some mathematical exercise on some of the presentations that have been made here because there might be difficulties. Some speakers have raised the practical difficulties, We will not anticipate these difficulties if we were dealing with one election. The election of a constitutional assembly. But the new dimension of regional elections make the issues more difficult. The parameters are acceptable to us because of the constitutional provisions that will address issues of a front, alliances and other issues. But our problem is that people who are going to vote whether the question of simplicity whether this proposal will simplify the process especially where one is going to use a single ballot to accommodate even regional elections. We will have to go home and do that practical analysis. Possibly some of the questions that we will like to raise should be raised with the technical committee dealing with the elections. Practical issues. But at this juncture the parameters are acceptable to us.

Mr Eglin: I understand the motivation of the technical committee coming with what is called a single ballot paper solution, on the grounds of simplicity. But equally I am concerned of the implications of such a technique. The constitutional principles which are supposed to guide us, government shall be structured at national, SPR and local level, at each level of government there shall be democratic representation and in the normal course of events there would be three separate elections for those there levels of government. It so happens that the first one is going to happen on the same day for two levels. But the effect is that we are going to cast one ballot for two different structures at national level you are choosing a national parliament cum CMB which will pass national laws, draw up a national constitution, choose a national executive and president. At regional level, You will be choosing a legislature which will pass laws which area prescribed in their function in terms of a constitution, chose a regional executive, regional premier and a regional senate to represent you in the national parliament. Voters in applying their minds to this will apply their mind in a different way. In every society where there are two tiers of government, you get a different result at national level and at regional

level. One party is accepted or one president is seen to be the president of the nation and equally at regional level people have got different preferences. Combining them on one ballot cuts against the concept of SPRs as being an important factor in the total national scene. On principle one should look in the other direction. Could you have two elections on one day? We should stop talking about multiple ballot papers. If there are going to be two elections there will only be two ballot papers. Its not a plethora of ballot papers as in the USA. I have seen systems operate where you do have two elections on one day. One ballot paper is coloured one way for the national and there a national box and the other is coloured in another way and thats for the regional box. But rather than throwing away that fundamental principle we should direct our minds to say can we devise a simple easy system for the new SA in which you could separate the elections and yet hold them on the same day. But not assume that you can't devise that system and therefore throw the baby out with the bath water.

Mrs Finnemore: Under the fundamental rights 21, it says that every person shall have the right to freely make a political choice, taking away this important freedom from some so that others will have the freedom not to make a mistake, is not a true tradeoff. We have talked about illiterates, illiterates are not stupid, people are coming to the poll to make one cross at the right place with voter education they can equally mae two votes at the right place. i have done a lot of ballots with people who are illiterate through strike and recognition ballots and once they have explained to them what the ballot is about there are few spoilt papers. Voter education that is now under way in SA is one of the growth industries in SA and its up to us not to say that the illiterates wont be able to do this but it up to the voter education people to make sure that people know whats on the ballot.

Mrs Kruger: Another practical dimension is that if you have a system where one party supports another how will you explain this to the voters out there, will every party have their own responsibility of telling their parties that our vote on national level will go that party or will it be publicised, will it have to appear on the ballot papers? How will you explain this to them.

Chair: I imagine thats the party's responsibility, you take that decision and you accept the responsibility for that.

Mr Pienaar: Internationally, recent experiences have shown that in Italy for instance and in Japan people have come out in revolt against the rule of party bosses. This article makes it ideal for the rule of party bosses. But its not in the interest of the individual who wants to express a vote in an election like this. So the party bosses around this table should give recognition to the principle that the individual should be heard in an election like this and the technical committee should apply their minds

for a system where it could be catered for and if a person is illiterate it doesn't mean that people are stupid, I know a lot of learned people who are extremely stupid, you can have a system, with different coloured ballot papers where it can b identified what you are voting for. In the constitutional principles in one of the schedules here I am disturbed about the prominent position given to political parties as to the individual which adds to the thing that party bosses are going to run the future of this country. With all sorts of secret organisations playing prominent roles in some parties this does not auger well.

Mr Slovo: We don't dismiss the submissions which have been made about some of the problems surrounding the proposals. There are problems, section 13 has some problems it should be looked at again in the light of the comments which have been made here. Its our contention that for the first election a single simple vote is imperative in the interest of democracy. People have spoken about illiteracy and I don't know what scientific evidence there is available for the relationship between illiteracy and attending to complicated voting procedures. Its a matter of common sense that the more complicated a procedure is the less practised is an individual is in the sphere of even putting a cross on a ballot paper, it follows in common sense that it would be an adverse result for those people who are illiterate and who are not practised. We ,must bear in mind when we talk about illiteracy in this country, and about those what have had experience with balloting, we are talking about 4 different communities, we are talking about the whites who are practised in the art of voting, we are talking about Coloured and Indians who had a little bit of experience, even if 500 people voted for Rajbansi, or whatever it is. But we are talking about a massive population which has never engaged in voting and it seems to me that if you have a complicated process, a process which involves people in making more than one vote on different ballot papers and so on, the poll as a whole will favour the privileged race group and the top layers of black society. It will certainly be to the disadvantage of the vast majority of people for whom this election will be a first time experience. Therefore while we are not opposed to the technical committee reexamining how to overcome some of the weaknesses that have been raised, it our contention that it is vital in the interest of democracy to have the most simple system possible at least for this first election.

Dr Rajah: The matter would go back to the technical committee to evaluate between the system that offers simplicity as against the one offering a wider democratic choice. But before parties decide between the two ballots from the voters point of view it might prove to be a simple system, but it may provide difficulties as far a campaigning on the ground for a political party to campaign at the national level that is casting its vote for party A and at the regional level its casting its vote for itself.

Dr Venter: May I suggest that the debate today points to an acceptance in principle of the relevant provisions of sections 40 and 101 subsections 3 and 4 regarding the composition of the national assembly and the composition of the SPR legislatures. That is useful but I would like to suggest that it would be useful if this Council could direct the relevant technical committee , the IEC to also apply its mind against the background of schedule 5 as drafted by us and than to interact with us. It would be difficult for us to come up with something completely new given that the parameters that is being provided thus far aren't that different from the approach that we had. In view of the fact that we have other things to deal with it would be helpful if the other committee could be instructed to assist us in this matter.

Chair: I accept the point you have made in terms of section 40.

Mrs de Lille: We want to agree with the DP and also to add on that the brief to the technical committee is to deliver to us one person one vote. It is not in the brief to deliver to us one party one vote. Therefore the PAC will insist that this declaration must be scrapped.

Mr Cronje: Do not underestimate the intelligence of people. Experience internationally has been that the outcome of elections where the same parties compete at national and regional levels are not the same. Lets make it as democratic as possible, lets make a simple procedure, a green voting paper for national and a red for regional and you have solved it.

Ms Manzini: With the experience in the various workshops which have been held on voter education which were based on one ballot paper, there has been a number of spoilt votes and thus whatever system we are going to adopt here we must bear that in mind that this is the first election where the majority will be taking part for the first time and we must thus make it as simple as possible. There is no way we can expect that people who have never voted and there is a correlation between literacy and the ability to vote apart from the ballot box which is intimidating, we must make sure that we adopt a system which is as simple as possible and accommodate the majority of people of this country.

**Chair:** **Clearly you have no difficulty with section 40.**

**Mr Eglin:** **When section 40 was dealt with I put forward the suggestion that it should be one hundred national and 300 regional. Mr Ramaphosa disagreed with that and it was left there and there was no formal decision taken by this body.**

**Chair:** **Who is in favour of the DP's proposal? Theres no support. Is there anybody else against section 40? Mr Sisane, you are against section 40?**

**Mr Sisane:** **We reserve our position**

Mr Pienaar: The question of ordinarily resident, has that been dealt with?

Dr Venter: Thats the next item we will deal with

**Chair:** **We have opposition from the DP, reservation from the PAC, do we take it than that the technical committee can accept section 40. Can we can then look at subsection 2.**

Mr Ramaphosa: Does acceptance of section 40 mean that we are accepting schedule 5 as a whole.

Chair: It does not mean accepting section 40 means automatic acceptance of schedule 5. Clearly there is a lot more debate to take place. Please look at section 40 subsection 2.

Mrs Finnemore: When they talk about ordinarily resident when we see that in 103 when it comes to a person qualifying to be a member of an SPR legislation, they have to be ordinarily resident within the boundaries of the SPR, to go back to another statement they made somewhere else that a hostel dweller should be ordinarily resident in that hostel. But if you have someone from Kwazulu who is ordinarily resident in a hostel from JHB would he then not qualify to stand for the election for the SPR?

Dr Venter: Can I suggest that this is dealt with on our next item on the agenda?

Mr Cronje: A suggestion has been made that this schedule 5 is also discussed with the IEC which I think we should do and secondly we have had an extensive debate on which various points of view have been put forward on something which is new and I suggest that we refer it back to the technical committee to give it their consideration and come forward taking this debate into account for the next proposals they put forward.

**Chair:** **We have had a good debate on this issue, we find ourselves with having to decide between one vote and one ballot paper or voting on two ballot papers taking into account the freedom of rights of an individual and at the same time not forgetting the illiterate voter, there is also the question of the proposed electoral act and the work being done by the technical committee on the IEC. So we can ask this technical committee to liaise with that technical committee and we can also ask parries to consult with their**

**principles and think about this matter and conduct some bilateral discussions.**

Dr Venter; The next point is ordinarily resident and it refers to par 7.5 of our tenth report, Prof Devenish will deal with that.

Prof Devenish: In clauses 42, 53 and 103 (a) , the expression ordinary residence is used as a required connection between a candidate for elections and a particular SPR as opposed to the term domicile. In our report we indicate that according to our common law where a person resides at a particular place and time will depend on all the relevant circumstances of a particular case and it depend on : that a distinction should be drawn between domicile and residence, it is possible for a person to have more than one residence at a time and a person cannot be said to reside at a place where he/she is merely temporarily visiting. We explain in our report that the term ordinarily resident is a narrower term than the term resident. The crux of the matter is that a person is ordinarily resident where such person has his usual or principal residence. This constitutes such a persons real home although such a person may be occasionally absent. This is essentially a question of affect that can be easily ascertained. For this reason depending on all the relevant facts and circumstances it is indeed possible that a hostel dweller who is domiciled elsewhere could be ordinarily resident in a hostel. In contrast with residence, proof of domicile in our law is often complicated and problematic. A persons domicile is ones address prescribed by law. That is employed mainly for private law purposes. It depends to some extent on subjective intention, in most cases. In some cases the common law ascribes a a persons domicile regardless of such persons physical presence, such for instance is the case of a minor following his/her guardians domicile or a wife following her husbands domicile. All thing considered, the term ordinary resident is an appropriate identification criteria for nomination of a candidate for an SPR for this constitution designed for the transitional period.

Chair: The decision before you is do you accept the technical committees proposal that we use the term ordinarily resident or do we retain the concept of domicile.

Mr Rajbansi: I will go along with the proposal of the technical committee. In our present voter registration, if a university student is living in a hostel you are entitled to be registered there, but beyond 42,43 and 103 (a) we had a new factor emerging where ordinarily resident will be applicable and that is where identification of a voter for the purpose of electing 50% of the members of the assembly through the regions and for the purpose of electing members onto the regional legislature. My question is that one does when somebody disputes, a party placing

a person on a candidate list and dispute that he is not ordinarily resident in that particular region. Could it be that a provision be made that just a declaration by the candidate that he is ordinarily resident there in terms of law should be accepted. And if a person decides to vote for example in Western Cape, his word that he is ordinarily resident there, because what we want to avoid is legal disputes at the time of election. It can put the entire election for the courts to decide.

Mr Pienaar: I want to support Mr Rajbansi in the sense that the IEA should take this out of the ambit of the court otherwise it could end up with endless litigation in this regard, even then we are going to be confronted with problems on how to have some sort of definition which makes it easier than the commission has tried to do in this instance.

Chair: Do you accept the committees proposal that we use the term ordinarily resident?

Mr Pienaar: On condition that we have clarification of the process in the electoral act

Chief Nonkeyane: We agree with analysis of the technical committee as regards the interpretation of the ordinarily resident. We have a problem however when they include the question of hostel dwellers in the meaning of ordinarily resident. members of the hostel do not reside there ordinarily, they are there for a purpose, we cannot legitimise the status of a hostel by elevating the status of a hostel to a residence. What we would suggest is that the identity document of everybody should determine where your home is.

Proff Devenish: I said in my explanation that it is indeed possible for a hostel dweller who is domiciled elsewhere. It would depend on the circumstances. It doesn't apply in an unqualified way.

Mr Pillay: In an identity book ordinarily resident refers to a persons domicile rather than where he is ordinarily resident. I am in favour of the interpretation of the technical committee

Mrs Finnemore: The problem is with these hostel dwellers.There are hundreds of thousands of people who are migrant labourers. What happens in a place like Transkei where there are many people living in hostels elsewhere, but they might want to stand for regional government, are they going to be prevented from standing in the Eastern Cape area.

**Chair:** **Can we move off this item. Does Council accept the Technical committees proposal in this regard? Agreed? Thank you**

Dr Venter: Par 7.6 of the tenth report regarding the anti defection clause notion, Proff Devenish will deal with

Proff Devenish: Clause 43.1 (b) contains an anti defection clause and stipulates that a member of the national assembly shall vacate his/her seat if he/she inter alia ceases to be a member of the political party which nominated him/ her to sit in the national assembly. This is a significant departure from our political tradition. Inherent in the Westminster model involving the constituency or first past the post electoral system was the theory and practice of a free mandate theory. This permitted members of parliament to change political alliances and to cross the floor of the house form political party to another with impunity. Such persons are not equally obliged to resign their seats. This has occurred on numerous occasions in our own political history. The use of proportional representation i this constitution involving national and regional lists and the need for political stability in the interim period motivated us to include an anti-defection provision which in essence protects minority parties. Now the Indian Constitution provides for an anti-defection provision and contains important qualifications based on their political experience. The tenth schedule to the Indian constitution provides for qualifications in regard to defections and it stipulates that this particular anti-defection clause does nt apply in the case of a political split which involves not less than one third of the members of a political party. It also provides that it doesn't apply in the case of mergers of parties and thirdly it doesn't apply in the case of persons elected as speaker or deputy speaker in this case where these officials resign they are not affected in this way, they do this in order to increase the manifest impartiality of those particular officers of speaker and deputy speaker. During the debate in the council it was suggested that the anti-defection clause be qualified as provided for in the Indian Constitution. submission has also been made to us that the anti-defection clause should be deleted. The council is requested after careful deliberation and bearing in mind that the anti defection provision is designed to protect minority parties and that this constitution is for a transitional period in which party political stability would be highly desirable, to indicate to us whether the provision contained in clause 43 1 (b) should indeed be retained or whether it should be qualified to some extent as indicated in the schedule 10 of the Indian Constitution.

Chair: You are requested to decide whether to retain provisions of section 43 1 (b) , whether this provision should be deleted. if you decide it should be retained, whether there should be qualifications.

Mr Eglin: I have a technical and principle problem. Clause 41 B ceases to be a member of a political party. Nowhere in the constitution does it say that he has to be a member of the political part in order to be nominated. So you say you cease to a member of the parliament if you

don't belong to the party but it doesn't say you have to a member of the party i n order to be nominated. I am going to assume that many parties on an alliance basis might well nominate people who aren't technically members of their party. The second one is that you put it totally in the hands of the constitution of a political party over which the constitution of SA and the law has no control. One is to say that voluntarily cease to be a member, but different political parities may have different ways of expelling members. So you are going to deprive a person of his formal right to be a member in circumstances in which there is no certainty in terms of the law. I believe that in the field situation in which SA finds itself where there are alliances where there are going to be regrouping and individuals and compromises

**tape ends**

Mr Eglin: It is the wrong time to try to freeze the politics of SA in what is a preelection mould. It is not going to very helpful to the politicians if people are regrouping outside and in the end politicians are sitting there making decisions but on the ground people are regrouping and making other decisions as far as the political parties are concerned.In SA the members, party appeared on the ballot paper, when you voted for Pieter Hendrikse, it wasnt just Pieter hendrikse there stood the LP, in other words it was a party vote, and we believe that one of the most creative things in SA when people have said that in this stage , my country, the decision on the constitution is more important than my political affiliation. I hope than we don't fail to get a two thirds majority because there are 5 MPs who would like to vote in favour of the two thirds majority but their party says they mustn't.The anti defection clause is fine for the party bosses. In the fluid situation of SA the normal restraints of party politics are adequate and it should not have the anti-defection clause in the form of which it is here.

Chair: The DP is saying that the anti-defection clause should be deleted.

Proff Devenish: Mr Eglin is correct about the first point. It is possible for parties to include on their list people who nit members of the party. In regard you your second point if you study the tenth schedule of the Indian Constitution, the Indians from their political experience have endeavoured to build in a certain degree of flexibility into the way the clause operates and we will see that provisions are made in that schedule to give the operation a certain flexibility and that may take into account some of the issues you have raised Mr Eglin, relating particularly to he expulsion of people from parliament and whether the party bosses would be the exclusive arbitrators because they make the provision that there can be an adjudication body that will look at the matter.

Mr rajbansi: When this matter was debated the last time, there was strong support for the anti defection clause. There is a difference from what prevails

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Mr Rajbansi: When this matter was debated the last time, there was strong support for the anti defection clause. There is a difference from what prevails

at the present time where a person is going to be elected through a name of a political party, the voter is going to chose the representatives of the party and we must ensure that during the period of transition there is stability and we must protect the will of the people, if the people had willed that 85 members are gain to be elected through the SACP we must ensure that throughout the duration of that interim parliament the will of the people must prevail. It has been stated in recent times there have lot of crossings of the floor. there may be situations where one party may sent candidates to stand in the name of another party with the hope that after the election that there can be wholesale crossing of the floors, there I appealed that the Indian constitution be studied, I am appreciative of the fact that the technical committee has obtained the amendment of the constitution where various concerns as expressed by Mr Eglin are addressed and I suggest that the anti defection be retained and certain safeguards for the individual be examined by the technical committee. I believe that when the first white parliament was elected there was the biggest crossing of the floors and the prime minister has to spend everyday dishing out cigars to the MPs to keep them within his party.

Dr Rajah: My support is for the retention of the clause and also to embody the principles that are contained in the schedule of the Indian constitution because we have many examples of political parties poaching and members riding piggy back on other peoples strength and that has to be contained through this matter. because the principle is enunciated that if you are on a proportional system the allegiance is to the party, if you are on a constituency system the allegiances is to the community. So if you accept the proportional system you must also accept the principles that is embodied in that concept. If you cease to members of that party you must not be given cigars or give bottle store licences he must be thrown out.

Dr De Villiers: We are in favour of the anti defection clause. We must remember that the system of proportional representation is already introducing a measure of instability into the electorate, many people argue that the weaknesses of governments like the Italian government is due to the proportional representation. So one hand we look for some form of stability particularly in the crucial years and therefore as people vote a party that stability will be maintained if that party is protected by an anti defection clause. But as its stands it might be too rigid. We need stability but we also need flexibility, I would support that we request the technical committee to look at the there issues raised by Proff Devenish. If there is a breakaway from a party and it consists of at east 20% of the party that that should be in order. Equally if smaller parties believe they can strengthen their position and mergers take place that should be equally allowed. I think we need to accept that in the first 5 and 10 years there will be major realignments in SA political and that will be good for the system and we shouldnt make it

impossible.

Mr Shilowa: The one thing that needs to be redressed by way of reformulation is 43 1 (b) on the question of ceases to a member of a political party. We have to find a way that ensures that the point that is being raised here is that if a church minister comes into parliament through the LP that that church minister is answerable in terms of whatever mandate. When they ceases its in relation to the fact that whether he/she ceases to enjoy the support of that particular party . WE need to reformulate but retaining the need for party discipline. The second point relates to what has been said, that lets find flexibility. I'm not sure what that flexibility is suppose to mean because these elections are primarily for the constitution, governance and everything else is secondary because w want to ensure continuity etc. Surely if I have been elected on a party list to write a constitution based on that mandate I cant suddenly decide with my friends whether we are 20 or 30% to say that the platform we told people we are standing on we don't agree and without a mandate of anyone we now want to sit across and be drafting a constitution which we have told people we are going to put across. I also believe that the technical committee is correct by saying that we have to ensure that t least the replacement is deal with terms of the party.

Mr Pienaar: The thing that doesn't seem to be taken into consideration is that the fact if this is too rigid you would corral people into a particular party despite some idiotic decision by that party people will have to stay within that party. And if a party doesn't take i to account the realities of a particular situation people will be compelled to stay in that party, that is a problem we inherit from a proportional system. I would go along with what Dr Villiers says about a sifter line on this. But my point of departure is that i am against an anti defection clause.

Mrs de Lille: We support the retention of the anti defection clause with qualifications as set out in the Indian Constitution.

Chair: No more speakers. Are we ready to take a decision?

Mr Cronje: The election is on a party list system, you are elected on this basis , that is why people voted for you thats the principle.

Chair: Can we take a decision? who is in favour of the deletion of the clause? DP and the AVU. Do we accept than the rest of the council wants the retention of the clause? With qualifications?

Mr Ramaphosa: What qualifications would be referring to. I don't fully subscribe to the view put forward by Dr Villiers where he suggests that there could well be certain percentage of members wanting to defect than you need to be flexible. I don't think you want to build that into this clause. Mr

Cronje is right. You have been elected to represent a party with a mandate and programme and that is what you are in assembly for. I don't think there should be qualifications.

Chair: Should there be qualifications and safeguards?

Mr Rajbansi: May I give Mr Ramaphosa wise council. The flexibility which Dr de Villiers doesn't mean that we are going to go against a principle which was enunciated by Mr Cronje. The flexibility would also protect the party in the sense that if one or two members want to leave your party and they cannot leave because of the clause as it is nothing prevents them from voting against their own party. That is a danger and that danger must be catered for and that I respect of the flexibility we should leave it to the technical committee.

Chair: Qualifications and safeguards or not?

Dr Rajah: I prefer no qualification because we have got a specific task and we must get ahead and do the task with little complication.

Mr Piennar: There are inherent dangers in this thing, if you look at the extract from the Institution constitution, 2b thereof, if the party takes a decision and digress from its programme and you take stand against that you are fired from the party and that the end of the story and that means rule by the party bosses.

Mr Pillay: We support the clause as is.

**Chair:** **Anybody else in favour of safeguards? Do we take it that council accepts the retention of the clause without safeguards and qualifications. Agreed. Thank you. Can we move on**

Dr venter: Can I now refer you to par 7.7 of the tenth report. It concerns the provision in 43 subsection 2 . When council last debated this provision, there was a suggestion by some of the participants that more flexibility should be provided for i the process of filling of vacancies. When we dealt with this subsection we noted that it should have been improved in at least one specific manner to obtain greater clarity. We have done that. The change that we made, the underlined part does nit really go to the substance of this whole matter. We embarked on some research regarding this matter,. We havent had enough time to do extensive research but we did concur whatever we could find. We obtained comparative statistics regarding the election systems in a number of countries and from those comparative studies it appeared to us that there no examples to be found where you have a proportional representative system and such measure of flexibility as has been suggested is allowed. The overwhelmingly used system is the next in line on the list of a particular party is allocated the vacated seat. if the

person next in line is not available. the next person in line is entitled to fill that vacancy. The only exceptions to this rule is were a few cases where you have a mixed system of proportional representation and single member constituencies whereby elections are held. One other form which is also sometimes used is the nomination at the time of the election of another person to be appointed in a vacancy should that occur. The basic message is therefore, greater flexibility in the nature of allowing parties to choose from their own lists not according to the sequence of preference, the originally published sequence of preference or from outside those lists would be most exceptional and we propose that the next in line system be followed.

**Chair:** **Do we accept the next in line principle or the one proposed for greater flexibility and the right not to observe the order of preference.**

Dr De Villiers: First a question, the anti defection clause applicable to members of the parliament must certainly also be applicable to the list because you cannot retain a member on your list once that member leaves the party or is not a member of the party any longer. There is no such provision applicable to the list. if that is the case the technical committee might want to consider how that qualification should also be applied to that list. The second point is the I pleaded previously for more flexibility but I think Dr Venter's argument is convincing. It is however 5 years being a long time for a party to retain a list after a few years many things might have changed even in that party, but I would accept that in view of what D Venter has said and that is members on the list could decide that they are not available anymore and the party could then go down on the list and particularly the qualification at the end of the paragraph that once the list has been exhausted the party can then nominate whoever it wishes. So I will accept it as it stands.

**Chair:** **Does council accept it? Yes. Thank you**

Dr Venter: The next item is par 7.8 of the tenth report which deals with section 47 (2) which originally read : Candidates for the election of the senate shall be nominated by a party represented in the SPR legislature and the election shall be conducted according to the principle of proportional representation, each voter having a single transferable vote as set out in schedule 5. We tried to set this out in schedule 5 and we made use of existing subordinate legislation regarding the election of indirectly elected members of the three houses of the present parliament. Those provisions were originally used for the election of members of the union senate and to some extent for the lection of members of provincial executives. It appeared to be one of those things that would be complicated to formulate in constitution. It was

impossible to reduce it as we did in schedule 5 regarding the list system to a number of simple rules. It is a very good system, especially for indirect elections, it is too complicated for the popular election of parliament, but its not too complicated at legislative ;level for the election of smaller groups of people such as senators or possibly for the election of executives. WE therefore suggest that section 47 (2) simply refer to the electoral act and that that electoral act should set out the details of such a system.

Ximoko: What is meant by a single transferable vote?

Dr Venter: It boils own from the point of view of the voter who is required from a list of names to indicate his first choice by writing down the number one next to the name of the person he would like to be elected. That is his single vote. Than he is allose allowed to next to the other names list in order of preference who else he may want some of his votes to be transferred in the counting process and in this process some of the second third and forth choices can be transferred t other candidates who do not need a particulars voters votes because he or she already has a quota. The important point of this system is that it is fair and proportional when you have to elect a few people from a small body.

Chair: Do we accept the technical committees proposal that we amend clause 47 (2) as they proposed and that this matter be referred to the relevant technical committee? Agreed. The matter is agreed to. Dr Venter please proceed.

Dr Venter: Par 7.9 section 58 (3) will be dealt with by Ms Olivier.

Ms Olivier: I will deal with section 58 (3) of the draft constitution. 58(3) deals with the procedure for the adoption of ordinary legislation where it is passed by only one of the houses and rejected by the other. It stipulates that such legislation will be referred to a joint committee consisting of members of all the parties represented in parliament to report on proposed amendments where after the bill shall be referred to a joint sitting of both houses which may adopt the bill by a majority of the total number of members. We were requested during the debate to investigate other possible ways to resolve the deadlock. We did research in this regard and identified 4 other possible methods which can be used to promote consensus between the houses. Firstly adoption by a joint sitting of both houses by a special majority of the members of both houses, (2) if the two houses cannot agree after a minimum period of for example 3 months parliament may be dissolved for an election, (3) a process where bills are considered and amended by each house and than submitted to the other until agreement is reached. This process is also referred to as la navete.(4) Reference of a bill to an arbitration committee consisting of equal number of members of both

houses.

Chair: You have to decide on the procedure to be adopted in cases where legislation is passed by one house and rejected by another.

Ximoko: What is a special majority

Dr Venter: Anything other than an ordinary majority.

Dr Rajah: The option that we prefer is the first one because if you go for that procedure it will incorporate within the system that the bill will be referred to the various committees and it is in the committee stag where it will be threshed out. And having reached consensus it comes back to both houses adopted by special majority.

Mr Chaskalson: Its not there are four options, there is an existing provision which could be retained plus four additional options high have now been out on the table. So its one of five not one of four.

Mr Rajbansi: Ordinary legislation should not have a special majority. The very fact that if one houses passes an ordinary legislation and its rejected by the house the legislation as it is drafted forces parliament to refer that to a joint committee consisting of members of all the parties. In that joint committee an agreement could be reached. As its is drafted we would support that.

Mr Cronje: I don't have a particular preference, but I will have a problem if they cannot reach agreement that a general election should be held because it depends on the nature of the bill. But in respect of specific issues, money bill and bills affecting SPRs we should look at a specific mechanism because we must bear in mind that thew senate is wholly representative of the regions and in the allocations of funds to the regions it has a direct bearing on the SPRs.

Dr de Villiers: It is correct that ordinary legislation eventually be passed by both houses as put forward in clause 58 (3) However if I get support for one proposal to encourage consensus, one could consider a lapse of time, that if he two houses disagree, the joint committee makes proposals that if consensus could not be reached the joint session should not take place before a certain time. The original draft for union legislation there was a similar clause, but it prevented parliament from passing such legislation in the same year. It required it to stand over for a year. A cooling off period would allow sufficient time to negotiate between the two houses and would strengthen the position of the senate without unduly loading the majorities. If there is support for such a view one could refer it to the technical committee if not the way its stand it is the most practical solution.

Mr Hendrikse: **We propose that 58 (3) remains as it is.**

Mrs Finnemore: I want to refer to the arbitration committee because such a committee doesn't usually promote consensus it usually imposes a decision on parties.I am suggesting that arbitration is a final decision.

Mr Eglin: We would favour the clause as it was originally formulated.

Mr Mahlangu: This is an ordinary legislation. You need ordinary laws to be passed as quick as possible and we favour the situation as stipulated i the text.

**Chair:** **Does Council accept the provision as drafted? Agreed. Thank You**

Dr Venter: The next matter deals with schedule 6. It contains formulations regarding oaths of office. There are references to that in the chapter dealing with parliament and the chapter dealing with the SPRs and there will have to be reference to that in the chapter dealing with the executive.

Proff Devenish: Schedule 6 deals with the oaths or affirmations for office for the present or acting president, for a cabinet or SPR minister and for a member of parliament or a member of the SPR legislature. It is important to note that in each case provision is made for either an oath or an affirmation. In the body of these three oaths and in particular in regard to the oath relating to the president or acting president there is no reference to deity only in the case of the use of an oath as opposed to an affirmation will the expression "so help me God" have to be used. The reference to deity is in accordance with the freedom of religion and belief set out in clause 14 of chapter 3 dealing with fundamental rights. From a religious point of view freedom of religion is of great importance from a religious point of view.

Chair: Do you accept schedule 6?

Mr Webb: I express a personal choice for the reservation of.. perhaps the technical committee could find some compromise whereby the religions are acknowledged in the oath or affirmation, the reason being that most of us respect some sort of deity and whilst christians may want to have a christian country there are other religions. As a responsible body we should acknowledge the deity in the oath of office,. It gives a sense in the current world of some sort of acknowledgement to our being .

Proff Devenish In the 1983 constitution, oath in regard to the preside t there was a reference to almighty God there is some difficulty even for religious people, that reflects a monotheistic approach to deity and there are religions that are not necessarily monotheistic, so even considering

religious people there may be some difficulty in recognising deity.

Mr Rajbansi: In respect of the oath of a member of parliament or Spr Legislature I suggest that the technical committee including respecting and upholding the constitution and all the laws of the RSA as is contained in the case of the state president.

**Dr Rajah:** **On the second oath of affirmation of a cabinet minister on the third line whether we need the words to be a true and faithful councillor. Its not a cabinet ministers function to be a councillor.**

Dr De Villiers: You are a councillor to the state president. On the remark of Mr Webb from a religious point of view the oath provides for a person in terms of his conviction would like t take that oath and therefore bind himself to God and that is an act of religious significance, so there is provision in the oath for a religious dimension.

Mr Cronje: Its not an issue. He who wishes to say So help me god does so and he who doesn't want does not do so.

**Chair:** **Does the technical committee wish to comment on Mr Rajbansi's proposals.**

**Dr Venter:** **That seems to be a good suggestion and we could work it in.**

**tape ends**

Dr Venter: Par 4.2.9 of our agenda lists them and Mr Ngoepe will take you through them beginning with section 39 on page 59.

Adv Ngoepe: You will see that these things look familiar and you will recall that we tried to suggest that you could this time round try to concentrate on the insertions, and we tried to identify them by underlining, at the same time we tried to identify things we suggest should be left our by bold and square brackets. We will start with section 39. We have added there "until it is dissolved" to add a further dimension, further circumstances under which parliament could be dissolved. 39.3 that was reformulated. there was a debate, it gave the impression that whole parliament could have been said to have been dissolved, people wondered how you again bring to life an activity, so tried to reformulate that in order to streamline the idea.

Chair: Section 39 as amended. Do we accept the proposed amendments?

Dr Rajah: On 39.3 I presume that it includes the executive because the executive could be outside of the elected representatives.

Mr Eglin: As I read this a dissolution of the house would be mandatory upon a vote of no confidence in the national executive. In many systems provided they are not able to have a vote of no confidence in an alternative executive, in many systems given an opportunity of restructuring the government without having an election if you want stability and rather than have a plethora of elections there should be provision for restructuring the executive if you cannot then get a vote of confidence than you might have to go to an electorate. But as its stands here it mandatory even if its obvious that there is an alternative national executive available.

Mr Chaskalson: What we have in mind here was that when we come to deal with the executive we will deal with what happens as to whether or not an executive can be reconstituted and then we would have to link it up to this. Its only if a reading .... as a result of no confidence it wont necessarily be resolved everytime there is a vote of no confidence and we should deal with that and the executive to define the circum,stances in which dissolution is necessary and when it is not.

Chair: Is council now in a position to accept these amendments. Anybody opposed? Thank you, the measure is accepted.Mr Rajbansi feels that we are not yet in a position to accept this. How say you.

Mr Chaskalson : It may have to revisited after the executive, but if the provision in the executive does deal with this along the lines suggested by Mr Eglin and Mr Rajbansi then there will be no need to change this wording.

Chair: Can we then proceed?

Adv Ngoepe: We come to section 42. You will see that under 42 1 (e) there is a list of possible exceptions to the holding of an office. We tried to redraft 42 1 (e). The portion that we held earlier on is in the brackets. We tried to give a more concrete definition. They have not been properly defined. But they could be food for debate.,

**Mrs Brink:** **I made a suggestion with regard to 42.1 that the following qualification should also be included and that is that no person may become a member of the national assembly if or unless he/she does not qualify as a voter as set out in clause 6. Don't know whether the technical committee took notice of that. I would like to reiterate it. The same argument applies to 103 pertaining to SPR legislatures.**

**Chair:** **The technical committee has taken note of that**

Mr Cronje: 1b describes a process of a fine, what is the significance of saying unless or she has received a pardon. I only refer to the fact that I am aware of a country where a cabinet minister was involved in something

for which he received a life sentence but received a pardon.

Adv Ngoepe: We take note of it.

Mr Rajbansi: The existing constitution in resect of 42 1 (e) also refers to a member of a commission of inquiry. Does the technical committee intend including that?

Adv Ngoepe: It is under roman 5.

Dr Rajah: On 42 .1 we deleted the word nominated and in 42.1 (a) we say at the date of such nomination -election, shouldnt we delete the word nomination?

Mr Ngoepe: Its a good point

Mr Sisane: A question in relation to section 42.1 (a) . Are there any qualifications with regard to offenses or are we dealing with any type of offence there? Does it include political offenses and so on?

Mr Moseneke: The provision is clear which is at the date of actual election. One should not be serving a sentence of imprisonment. You would have no voting booths in prisons.

Mr Sisane: What about people who have arrested by the apartheid regime because at that time people might not be out of prison at that time.

Mr Moseneke: Its a standard provision. Other provisions would in fact often make reference to past convictions which doesn't find in these qualifications. This particular one during our debate we agreed that it would restrict the vote to persons who would not at the time be serving a prison sentence. The opposite we leave to your imagination. You would have to set up voting facilities in every single prison you have in this country.

Chair: Clearly it needs more debate. If council wishes to allow this section as it stands.

Mr Slovo: I have the same problem as the PAC. This is not a question of voting. Its a question of whether you can become a member of the national assembly and in the light of what we have inherited there might be some injustices and perhaps the technical committee should have a look at it in order to find some formulation. There are still political prisoners in South Africa which means by April 27 some of them could not be elected to parliament. This would be a gross injustice.

Mr Moseneke: What Mr Slovo raises than becomes a policy question which must be decided by the council . Its not a technical matter.

Chair: I was going to make that point myself. I would prefer that participants made submission to the technical committee in this regard so that they could come back with a clear proposal for council to take a final resolution.

Mr Eglin: A point of order I was under the impression that we were dealing with 42.9 of the schedule and those are the amendments proposed and underlined by the technical committee and this particular discussion falls outside of that. If we are going to start revisiting the clauses we are not going to make progress and I urge for this debate we confine ourselves to the amendments which the technical committee has proposed.

Chair: Mr Eglin is correct. It doesn't take away your right to make a submission to the technical committee.

Mr Ramaphosa: I am in agreement with you. But it does no harm to say that the technical committee should look at it again. Mr Moseneke says that it is a policy matter. It goes slightly beyond that because they have a limitation. They say more than 12 months meaning that anybody who has served less than 12 months can be nominated. So we ask them on that to look at it again because at that point it becomes a technical matter, the policy matter which I agree with you on we can deal with later.

**Chair:** **Can we move on. But participants are asked t please make written submissions to the technical committee in order to help them. Its not a technical matter for the technical committee to decide but for participants in this council to decide. If you want it drafted in a particular way than you must tell the technical committee how you want it drafted. Can we come back to the amendments . Do you need further time to consider these amendments. Do you want to decide now.**

Mr Webb: Go for it Sir.

**Chair:** **Can I hear who is not in favour of the amendments please? Do I take it that Council is in favour of the amendments as before us? Thank you**

**Adv Ngoepe:** **That then would bring us to section 46. You will recall that 43 was dealt with a little while ago. Very little was introduced under section 46. We wanted to make the speaker subject to the rules and orders of the national assembly.**

**Chair:** **Accepted? Agreed**

Adv Ngoepe: **I think I have committed an oversight. 43 .1 (d) there have been some changes there we took out 30 consecutive days and proposed 15 days.**

**Chair:** **Does council accept that amendment? Agreed**

**Adv Ngoepe:** **43.2 We have inserted a further qualification who is eligible and available to become a member of the national assembly.**

**Chair:** **Any opposition? No. Thank you**

**Adv Ngoepe:** **46.1 (a) We have already dealt with that. We move to 48.2 .Theres has been a lot of redrafting. We have inserted a new 48.2 largely to create mechanisms to deal with the election of a deputy president.**

**Chair:** **Any Opposition? Accepted.**

**Adv Ngoepe:** **48.3 follows logically to the previous one.**

**Chair:** **Agreed? Agreed**

**Adv Ngoepe:** **The old 48.3 becomes superfluous in the light of subsection 6 below and in the light of the previous innovations and we propose that it be deleted.**

**Chair:** **Agreed? Agreed**

**Adv Ngoepe:** **46.4, the deputy president again to give his rightful place**

**Chair:** **Are we in favour? Agreed**

**Mr Ngoepe:** **And sub 5.**

**Chair:** **48.5 Agreed? Thank you**

**Adv Ngoepe:** **48.6 as I said the idea has been captured under the new 48.6.**

**Chair:** **Any opposition? None**

**Adv Ngoepe:** **48.7**

**Chair:** **Are we agreed? Agreed**

**Adv Ngoepe:** **That should apply to 53.1 (a)**

**Chair:** **All agreed? Agreed**

**Mr Webb:** **Could the technical committee say what is the definition of qualification. Could they indicate where it is?**

Adv Ngoepe: Section 50

**Mr Eglin:** **A textual amendment. the technical committee has deleted be eligible and put the word qualify, earlier on when they amended 42. 2 you have a person who is eligible and available to become. I suggest that if you have gotten rid of eligible and put qualified, that should be qualified and able to become.**

**Mr Ngoepe:** **We have no problems with that**

**Chair:** **Does Council accept that amendment? yes.**

Adv Ngoepe: Section 54.1 (a)

**Ms Jacobus:** **Under 53 (c) there is some inconsistency when it comes to the allocation of seats. In 43 (d) we refer to 15 days and we should make 15 days applicable here as well.**

**Chair:** **The technical finds that acceptable? Yes**

Mr Slovo: Why in this section 53 why there is no provision for vacation of seats by senators who are no longer members of the party who sent them here as is the case of the national assembly.

Mr Chaskalson: It is deliberate we had amended the whole provision for the election foe the senate as a result of a previous debate where it was argued in the council that people should stand for election and that people may wish to elect people who are not necessarily members of a political party and so you don't have to a member of a political party to be elected to the senate.

Mr Moseneke: Senators don't come via party lists and therefore the qualification would not be present here.

Chair: They come via the party lists in terms of the fact that they are elected to the SPR legislature and the SPR legislature is elected in terms of party lists. But I am open to correction.

Mr Cronje: You are correct. that how the person lands in the senate and even if the person does not belong to a political party to end up in a senate he would have to be supported by a political party.

Mr Chaskalson: Its correct you have to have the support of the party to get into the senate but the elections for the senate are not on party lists in other words previously we had a provision that the senate should be elected by the SPR members from amongst their number. We deleted that. Its now open to SPR members to elect anybody they choose whether they they are members of a party or not.

Mr Moseneke: Throughout the constitution you wont find a party list that relates to senators at all.

Mr Cronje: Unless there has been amendment which I havent seen the procedures you described it is the way you become a senator. A person is elected to an SPR. The people in the SPR elect the number of senators. So you could not have become a candidate unless you have been elected on a party list system to an SPR.

Mr Hendrikse: The part referring to amongst their own was deleted meaning that a person did not have to be member of an SPR to become elected as a senator. So you don't have to be member of the SPR in order to be elected. But in order to accommodate the problem that we have bacchus these senators will have to be accountable to the senators to the people who have voted for them we could possibly include a clause allowing for a motion of no confidence in a particular senator by the relevant SPR.1

Mr Cronje: I can refer to clause 47 thats the composition of the senate. The senate shall be composed of 10 members from each SPR elected by the members. candidates shall be nominated by a party represented i the SPR. 3 says any member of an SPR legislature elected in terms of subsection 2.

**Chair:** **In other words Mr Cronje 47 is saying in fact that you don't have to be a member of the SPR to be elected to the senate. But you are free to make a submission or persuade the council otherwise.**

**Dr Venter:** **We will undertake to look at it in detail and come back to you.**

Chair: We have completed 53?

Adv Ngoepe: We are now at section 54.1 (a) The underlining there is self explanatory.

**Chair:** **Any difficulty with the amendment? No**

**Adv Ngoepe:** **Finally, section 60, we inserted boundaries at the suggestion of some of the parties**

Chair: Two amendments have been inserted.

Mr Eglin: Can we have clarification. This refers to effecting powers, functions and boundaries under chapter 9. I am assuming that these bills are not in themselves constitutional amendments. they deal with matters affecting the functions but they aren't in fact constitutional amendments and that is why they are approved of in the ordinary manner?

Adv Ngoepe: That is correct.

Mr Webb: Would this impact o the earlier discussion on the delegation of powers/laws?

Mr Ngoepe: Its likely to be the case

Mr Meyer: Last time during the discussion of 60 we raised the possibility that the senate should approve of bills in relation to this matter with a two thirds majority and not with an ordinary majority. may I ask whether the technical committee has considered that possibility? it was indicated and it is now made clear that it will be separate decisions by the two houses. In that context the passibility was raised that the senate should decide with a two thirds majority.

Adv Ngoepe: I do recall such a debate I don't remember their being consensus on that point and we were careful not to change the substance of any provision unless we were confident that was the general agreement in the house.

Mr Cronje: Was this matter not referred to the planning committee. if I look at the list than it is. Whether the constitutional assembly will have the power to alter the number, boundaries and powers for SPRs described in the constitution for the transitional period.

Chair: We are dealing here with the senate and Mr Meyers point is that the government had proposed a two thirds majority within the senate for any such changes.

Mr Cronje: The whole principle has been referred whether its the house of assembly or the senate. The question of whether it should have the power to alter it was referred to the planning committee.

Chair: If that is correct than we will move of it.

Mr Ramaphosa: Mr Cronje is referring to a different matter altogether. he is referring to whether the constitutional assembly should have the right to alter Mr Meyer is saying when it does alter, through which decision making mechanism should it alter. Two thirds or a simple majority.

Mr Meyer: With due respect, I think both gentlemen are wrong. What we have in 6o is amendments to the constitution we are now drafting. Under

chapter 5 referring to the task of the constitutional assembly that is an altogether different matter, but I wouldnt have a problem if this matter dealt with under 60 is also added to the other one and be referred to the Planning Committee

Mr Eglin: 60.1 does not involve constitutional amendments. It is merely the application of the law within the competencies described int he constitution and thats why it is as it is. the issue raised by Mr Meyer is probably the next one 61.1.1 where you amend the constitution. there is no provision for a separate two thirds majority of the senate in respect of SPRs. It merely says two of them sitting together. if you look at the constitutional principles XVII it does elude to the fact that there should be separate specific majorities when you affect SPRs. Thats where it should be looked at.

Mr Ramaphosa: I am covered by what Mr Eglin says. I would not agree with Mr Meyer that this is a matter which warrants being taken to the planning committee because it does not arise in that context.

**Mr Meyer:** **I agree with Mr Eglins interpretation. But the point is that 60 has to be read in the context of 58. The procedure for dealing with legislation and then in 58 specifically SPR boundaries, functions are now being excluded and being dealt with under 60. In view of the fact that 60 provides for an alternative procedure for the amendment of legislation and those provided for in 58 I am suggesting that in 60 the required percentage should also be specified if it is not ordinary majority.**

**Mr Ramaphosa:** **In that regard we should ask the government to make a submission in writing and sent three copies to the technical committee and give a full motivation why it should be amended in the way Mr meyer is proposing.**

Mr Meyer: If it will be helpful I will also explain it to Mr Ramaphosa.

Mr Chaskalson: I think it is covered by what MR Eglin has to say. The word is affecting. Its really quite far reaching because if you get onto the exercise of powers and functions its really goy quote a road application and ... could affect the [powers can fall under this. So one must distinguish between affecting and changing. Changing is dealt with as amendment to the constitution and affecting really means something that impacts upon us. So there is some confusion among us.

Mr Cronje: How will a bill affect SPR boundaries?

Mr Chaskalson: Its not easy to think of that. We were asked specifically to put it in the last time. The reason why we left it out originally was we thought that a bill would be unlikely to effect SPR boundaries. But it was suggested

that out of caution we should put it in.

Dr Venter: It would be useful if I try to explain or interpret sections 58, 60 and 61 in conjunction with each other. Section 58 deals with the adoption of ordinary legislation and subsection 3 makes it possible under certain circumstances where there is no consensus between the houses to have such legislation adopted by a majority of the total number of members of both houses of parliament sitting jointly. Section 60 deals only with legislation concerning specified SPR matters. Its not a matter of amendment to the constitution. Bills affecting boundaries, powers and functions could be wide ranging of things. Boundaries for example legislation dealing with how hard or soft boundaries should be for example. may an SPR have boundary control. It would not deal with the changing amendment of those boundaries, because that would involve an amendment of this constitution. The boundaries of the SPRs will be included as part of the constitution in the schedule. Section 61 deals specifically with the amendments of this constitution and there we have specific procedure. The difference between 60 subsection 2 and subsection 3 is that in the case of bills affecting specific SPR matters the approval of the senate is requited> There is no exception to the fact that both will have to be involved as there is in 58.3.

Dr Rajah: The question was raised how the bill could affect SPR boundaries. I wANt to know whether this example was one of those instances. For example in one of the delimitation proposals, Kruger national park was split across two regions and there could be also regarding conservation that might impact on both the regions and in that instance boundaries shall not affect the application of a conservation measure. Is that an example where a bill might effect an SPR boundary?

Mr Cronje: I want to be clear. Chapter 9 deals with SPrs we have asked that the powers and functions and to a degree that has been accommodated should be clearly spelt out in the constitution of the central government in terms of concurrent and exclusive powers. That is in the constitution. What I am not clear about, if those powers are spelt out in the constitution how will a bill affecting those powers and functions how will that operate in terms of the constitution.

Chair: I am almost certain that this provision came about as a result of those in favour of SPR constitutions and powers and functions and now we still have a difficulty with it.

Mr Chaskalson: I could give Mr Cronje an example, if you were to turn to page 82 there are special areas of these crosscutting powers of parliament where parliament may make legislation on matters which fall within the functional areas of SPRs any legislation made under that power would effect the powers of SPRs and it would therefore have to be passed by the senate as well as by the assembly. I have thought of an

example now of a bill which could effect SPR boundaries. If you had a commission of inquiry appointed to enquire into the boundaries to see whether they should be changed or not presumably that would affect boundaries but it is difficult to think of how legislation could affect boundaries.

Chair: Mr Cronje, I am almost convinced that you are not in favour of this provision.

Mr Cronje: I don't know what it means and in respect of 6.2 I still don't understand and maybe we should have a bilateral with the technical committee because 62 also says that a bill which .... of a particular SPR only. I believe that should be done with the approval of the SPR and not of the majority of senators representing the SPR thy are two different bodies.

Chair: Than as in the case of MR Meyer, can I ask you Mr Cronje to also make a submission to the technical committee?

Proff Wiechers: Can I help Mr Cronje, its a further protection in the field of exclusive and concurrent competencies. If parliament wants to use its powers under the exclusive or concurrent then that bill affecting in the exclusive or in the concurrent side must also have the approval of senate and also if such a concurrent or override so one SPR has got specific in the override than the senators of that SPR must also agree. So it is protecting both the exclusive and the concurrent sphere of competencies of SPRs.

Chair: We have much debate on this issue can the technical committee take us to the next point on the agenda is par 4.3 which deals with chapter 5 regarding the adoption of the new constitution. Prof Devenish will deal with the whole chapter.

Prof Devenish: Chapter 5 on page 71. This chapter deals with the matter of the drafting and adoption of a new constitution. The constitution making body is designated as the constitutional assembly and its composed of the national assembly and senate sitting in joint session. The new constitutional text will have to be divided and adopted in accordance with the provisions and procedures stipulated in chapter 5. In this regard the constitutional principles will be of fundamental importance in the process of devising and drafting the new constitution. The new constitution will have to comply in every respect and detail with these constitutional principles set out in schedule 7. In this regard the constitutional court referred to in clauses 66 and 67 will play a role as an impartial and adjudicating institution ensuring that the constitutional principles are complied with in both latter and spirit. Provision is also

made in clause 67 for the appointment of commissions, committees and advisory body to assist in the drafting of the new constitution in particular provision is made for the appointment of an independent panel of five South African citizens being recognised constitutional experts and not being members of any legislature and holding office in any political party to assist the chairperson on constitutional matters. we draw your attention to clause 67.3 which is a new provision found on page 73 and it reads as follows: if the constitutional assembly fails to reach agreement upon the panel of constitutional experts in accordance with the requirements of subsection 2 a panel with the qualifications referred to in subsection 2 shall be appointed consisting of a nominee of each party holding at least 40 seats in the constitutional assembly. Clause 68 deals with the mechanics of the adoption of the new constitution and all the steps involved in the deadlock breaking process. This matter has been referred to the planning Committee and we await your further instruction in this regard. Finally clause 67 deals with the amendment procedures in regard to chapter 5, the constitutional principles set out in chapter 7 and certain procedures involving the constitutional court are rendered inviolable. All the other provisions of chapter 5 will be capable of being amended by a two thirds majority of the total number of member of the constitutional assembly.

Dr venter: Subject to any reports that the planning committee might want to make we want you to deal only with section 67 subsections 2 and 3.

Chair: Thats the procedure we should follow. So we are considering 67 subsection 2 and subsection 3.

Mr Webb: I have to record my own disapproval of this part of the constitution. In the spirit of cooperation is it possible to resolve the dispute resolution mechanism by saying that in the event of this constitution or a new text for this constitution not having being prepared within say 24 months than this constitution will be the final constitution?

Dr Venter: Our proposals for the amendment deal only with the composition of the panel of constitutional experts.

Dr Rajah: In terms of the nominee for each party holding at least 40 seats in the constitutional assembly whether it can be reduced because earlier on we disallow smaller parties with 5% seats in the national assembly could it be reduced to parties holding at least 20 seats in the national assembly to allow smaller parties the right to nominate members. The reason is if you allow just parties who hold 40 of the seats that would exclude smaller parties.

Mr Pillay: If you have a party which holds out 210 seats in the constitutional assembly and the other 190 seats are divided between 10 other parties and none of them can each muster up 40 seats does it mean that all the nominees come from one party?

Dr venter: We are dealing with the constitutional assembly that would be the 400 members of the national assembly plus the senators which depending on how many SPRs there are going to be. Therefore the percentage is lower than 10%. The answer to that question is yes. If you have one party with such kind of representation and only a number of very small other parties that would be the situation.

Mr Sisane: We are not keen on this idea of seats and parties. Theres nothing wrong with the constitutional assembly electing nominees to fill a certain number of experts and doing that by the two thirds majority of how it takes decision. So we don't want this division.

Mr rajbansi: I wouldnt propose any amendments to the 40 seats in the constitutional assembly. We may get a situation where many parties may not qualify to nominate members and I suggest to the technical committee to look at the larger parties in proportion to the size to nominate more than one person.

Chair: We now have several suggestions, one from Dr Rajah that the number be reduced to 20, one from Mr Sisane that it be a straightforward two thirds majority to take such a decision.

Mr Eglin: If a party has got 280 members would it also qualify for a seat and a party with 41 would qualify for a seat in terms of this. You may have a combination of smaller parties who are in alliance who may well have more than 40 seats on that basis. I which case that should be taken into account and whether it should not be that this makes provision for 10 members elected by a simple transferable vote system within the constitutional assembly.

Mr Chaskalson: We should repeat why this provision is here. The provision dealing with two thirds stands, its only if that panel cannot be elected that there needs to be some mechanism to ensure that the whole constitutional process is not blocked. So the first choice is a panel elected by two thirds of the members of the constitutional assembly. If we get beyond that stage and if they cant get such a panel then there must be some alternative means of constituting the panel and thats whats being dealt with here. Mr Eglins suggestion is a possibility. There could be five members elected by a single transferable vote.

**Chair:** **So Mr Sisane's proposal is accommodated. Dr Rajah's hasnt found favour yet. Is there a need for further discussion? Do we accept it as it stands. Yes. Thank you**

Dr Venter: We are now coming to chapter 9 on SPRs. The first issue being the law making competence of SPR legislatures, par 7.10 of the tenth report and section 101. Mr Moseneke will deal with that.

Mr Moseneke: I urge you to look at page 11 which will be dealt with in conjunction with section 101 of the text. It will be remembered that during the previous debate of 101 a request was made that the legislative powers of SPRs should be spelt out and as you see in section 101 we do so and in subsection 2 we introduce a new provision which is intended to emphasise the fact that the SPR legislative powers would be limited to such an SPRs territory.

Mr Webb: The point is made that this may have to be reconsidered i the light of possible SPR constitutions. Is there in fact a proforma that we can receive now which will enable us to consider what that will be. Should it not read that they are entitled to make laws in terms of their own constitutions.

Mr Moseneke: That remark is premised on the outstanding decision on SPR constitutions as soon as there is finality on those matters which have been handled by the planning committee we may have to redraft that position. But for now the provision makes no more than in 1 to spell out the legislative powers of an SPR and 2 sets out the territorial limits within which such powers may be exercised.

Chair: Mr Webb, have we not also agreed that this constitution will be the supreme law of the land?

Chair: We are due to curtail this debate at 4pm and the technical committee has informed the administration that they will before this council on thursday during which they would like to discuss item 6 which is the national executive in terms of their 11th report. On thursday we could continue discussion on SPRs . We don't have enough time to consider these amendments in addition to which the planning committee is looking at certain matters affecting this chapter and under the circumstances there seems to be no point in debating this further.

The technical committee was thanked by the chair for their work.

Meeting ends.