[25]

DRAFT AGENDA AND DOCUMENTATION

for the meeting of the

PLANNING COMMITTEE

to be held at 10h00 on Thursday

28 OCTOBER 1993

VOLUME I

CONTENTS OF THE PLANNING COMMITTEE PACK FOR THE MEETING TO BE HELD ON 28 OCTOBER 1993 AT 10H00

DRAFT AGENDA FOR THE MEETING OF THE PLANNING COMMITTEE TO BE HELD ON 28 OCTOBER 1993 AT 10H00 AT THE WORLD TRADE CENTRE

Chairperson : C Eglin

1. **Moment of prayer/meditation**

2. **Welcome and attendance**

3. **Ratification of agenda**

4. **Minutes**
   - 4.1 Minutes will be distributed in a separate pack
   - 4.2 Report from Administration

5. **Substantive Issues**
   - 5.1 **Constitutional Issues referred to bilateral meetings:**
     - 5.1.1 Issues related to SPR's:
       - 5.1.1.1 Citizenship and citizenship laws
       - 5.1.1.2 Competencies (including the provision of electricity)
       - 5.1.1.3 Taxes and fiscal arrangements
       - 5.1.1.4 Constitutions
       - 5.1.1.5 Name
       - 5.1.1.6 TBVC States
       - 5.1.1.7 Boundaries
       - 5.1.1.8 The powers of the Constitutional Assembly with regard to the number, boundaries and competencies of SPR's
       - 5.1.1.9 The fleshing out of the adopted Constitutional Principles
     - 5.1.2 Self-Determination and confederalism
     - 5.1.3 Languages
     - 5.1.4 The deadlock-breaking mechanism in Chapter 5 of the Draft Constitution
     - 5.1.5 The composition and functioning of the Constitutional Court

   - 5.2 **Constitutional Issues referred to the Planning Committee:**
     - 5.2.1 Independent non-partisan statutory body on rationalisation of existing administrations (plus recommendations by the Planning Committee at the appropriate time)
     - 5.2.2 Technical group on financial and fiscal matters with regard to SPR's
     - 5.2.3 Local Government:

5.2.3.1 Possible processing of the Draft Bill of the LGNF (Planning Committee Members were requested to apply their minds to this issue at the meeting of 18 October 1993)

5.2.3.2 Alleged unilateral restructuring of local government in Natal (See Addendum A, p5 and B, p8)

5.2.4 National Electrification Forum:
Report back on the meeting held with representatives of the National Electrification Forum and the liaison committee on 20 October 1993 (see Addendum C, p9)

5.3 **The establishment of the Transition Structures:** (Sub-Committee)

5.3.1 The TEC:

5.3.1.1 Locality

5.3.1.2 Informal establishment of Subcouncils

5.3.1.3 Letter for nomination of members

5.3.2 The IEC:

5.3.2.1 Locality

5.3.2.2 Process of nomination

5.3.3 The IMC:

5.3.3.1 Locality

5.3.3.2 Process of nomination

5.3.4 The IBA

5.4 **Commissions:** (Sub-Committee)

5.4.1 Regional demarcation/delimitation:

5.4.1.1 Progress Reports of the Ad-Hoc Committees (See Addendum D, p25)

5.4.2 National Symbols:
Report from Sub-Committee

5.5 **Technical Committees and Task Groups:** (Sub-Committee)

5.5.1 Fundamental Rights during the Transition:

5.5.1.1 Progress report on the work of the Ad-Hoc Committee

5.5.1.2 Pensions (background document available in meeting)

5.5.2 Repeal or Amendment of Discriminatory Legislation:

5.5.2.1 Third Progress Report from the Task Group (See Addendum E, p30)

5.5.3 Violence

5.5.4 Draft Electoral Bill:

5.5.4.1 Progress report on the work of the Ad-Hoc Committee (see Addendum F, p33)

5.6 **Processing of the Draft Bills through Parliament:**
Report from the Task Group on the IBA and other legislation scheduled for the November session of Parliament

5.7 **Voter Education** (Report from the Sub-Committee on the proposed meeting with NGO's involved in voter education)

5.8 **Telecommunications/Cellular Telephones** (ANC & SA Government)

5.9 **Traditional Leaders** (Decision on when this issue should appear on the Negotiating Council agenda)

5.10 **Issuing of Election Documents** (Sub-Committee)

5.11 **Formation and composition of multi-party interim committee to work with the Department of Home Affairs on electoral matters**

5.12 **Raid on a House in Umtata**

5.13 **Cosatu** (See Addendum G, p35)

5.14 **National Housing Forum Request** : Report from R Meyer and C Ramaphosa (See Addendum H p38, I p40 and J p45)

6. **Procedural issues**

6.1 The National Economic Forum Liaison Committee : Reportback on the meeting held on Monday 25 October 1993

6.2 Appeal to participants at present outside the Multi-Party Negotiating Process to rejoin

6.3 Incident in Negotiating Council around distribution of AVU document (This issue was referred back to the Planning Committee by the Negotiating Council)

6.4 National Education and Training Forum : Reportback from Administration on preliminary meeting (See Addendum K, p63)

7. **Administrative and Financial matters**

7.1 Security

7.2 Correspondence to be noted:

7.2.1 Submission from the National Association of Democratic Lawyers (see Addendum L, p82)

7.2.2 Submission from the Black Lawyers Association (see Addendum M, p131)

7.2.3 The Baptist Union of Southern Africa (see Addendum N, p149)

7.2.4 African Council of Hawkers and Informal Business (see Addendum O, p152)

7.2.5 Republic of Bophuthatswana (see Addendum P, p153)
7.2.6 Reach for Clarity Women's Conference (see Addendum Q, p155)

7.3 Correspondence to be dealt with:
7.3.1 Panel of Religious Leaders for Electoral Justice (see Addendum R, p159)
7.3.2 National Association of Democratic Lawyers (see Addendum S, p160)
7.3.3 Qawukeni Regional Authority (see Addendum T, p162)
7.3.4 Memorandum from the Traditional Leaders of Mapulaneng (Bushbuckridge) (see Addendum U, p164)
7.3.5 Request from South African Police (see Addendum V, p170)
7.3.6 Letter from the General Council of the Bar on the 12th Report of Constitutional Issues (available in the meeting)

7.4 Financial Matters:
7.4.1 Financial assistance to groups/individuals submitting oral evidence to the Commission on Regions

8. **Agenda and Programme for the Negotiating Council** (available in the meeting)

9. **Schedule of Meetings** (available in the meeting)

10. **Closure**

CCTR
MR

Addendum A

SOUTH AFRICAN GOVERNMENT OFFICE
- WORLD TRADE CENTRE -

21 October 1993

Head of the Administration
Multi-Party Negotiating Process
World Trade Centre

Dear Dr Eloff

SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE ATTENTION OF THE PLANNING COMMITTEE

1. Attached is a submission by the South African Government entitled *ANSWER ON PROPOSED DRAFT RESOLUTION ON UNILATERAL RESTRUCTURING/AMALGAMATION AT LOCAL GOVERNMENT LEVEL,* proposed by Mr A Rajbansi on the 5th of October 1993 *(Addendum A)*.

2. Kindly transmit the document for immediate attention to the Planning Committee.

Yours sincerely

GOVERNMENT OFFICE: WORLD TRADE CENTRE

DEK

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ANSWER ON PROPOSED DRAFT RESOLUTION ON UNILATERAL RESTRUCTURING/AMALGAMATION AT LOCAL GOVERNMENT LEVEL

Umhlanga, Umhloti and Glen Anil are three adjoining areas. The so-called Non-White Areas referred to, are all a considerable distance from these three towns (15 kilometres in the case of Verulam).

The negotiations between the Local Authorities of Umhlanga, Umhloti and Glen Anil (Development & Services area) started in 1992 as a local rationalisation initiative.

They reached agreement to merge both the respective administrations and the political structures. The agreement was submitted to the Natal Executive Committee early June 1993 and after following the required procedures in terms of the Interim Measures Act, was proclaimed in the Provincial Gazette so as to coincide with the Municipal financial year (1 July - 30 June).

The negotiations were fully representative and inclusive of the residents of the three areas.

evpvw7
21/10/93

DRAFT RESOLUTION

UNILATERAL RESTRUCTURING/AMALGAMATION AT LOCAL GOVERNMENT LEVEL

The Multi-Party Negotiating Council;

Having noted:

the progress made in respect of proposed establishment of Democratic Local Government at this Council and also at the Local Government Negotiating Forum

and

Believing:

that any unilateral restructuring/amalgamation of local authorities would be detrimental to the negotiation process and can have a negative impact on the levelling of playing fields

Therefore resolves:

that the South African Government, through its Provincial Executive Committee immediately halts all unilateral restructuring/amalgamation of local authorities such as what is happening in respect of the proposed amalgamation of the borough of Unhlanga, the area of Town Board of Umhloti Beach and Glen Anil (all so-called White Areas) to the detriment of the adjacent areas such as Verulam, Amontama, Amoaxi, Osindisweni in Natal (all so-called Non-White Areas).

Moved by **A Rajbansi**

ADDENDUM B

DRAFT RESOLUTION

UNILATERAL RESTRUCTURING/AMALGAMATION AT LOCAL GOVERNMENT LEVEL

The Multi-Party Negotiating Council;

Having noted:

the progress made in respect of proposed establishment of Democratic Local Government at this Council and also at the Local Government Negotiating Forum

and

Believing:

that any unilateral restructuring/amalgamation of local authorities would be detrimental to the negotiation process and can have a negative impact on the levelling of playing fields

Therefore resolves:

that the South African Government, through its Provincial Executive Committee immediately halts all unilateral restructuring/amalgamation of local authorities such as what is happening in respect of the proposed amalgamation of the borough of Unhlanga, the area of Town Board of Umhloti Beach and Glen Anil (all so-called White Areas) to the detriment of the adjacent areas such as Verulam, Amontama, Amoaxi, Osindisweni in Natal (all so-called Non-White Areas).

Moved by **A Rajbansi**

Addendum C

NATIONAL ELECTRIFICATION FORUM

Tel. No.: (011) 313-3027

Fax No.: (011) 313-3663

P O Box 5719
HALFWAY HOUSE
1685

25 October 1993

The Chairman
Planning Committee
Multi-Party Negotiating Council
World Trade Centre
Kempton Park

Dear Sir

RATIONALISATION OF THE ELECTRICITY SUPPLY INDUSTRY AS DETERMINANT FOR THE POWERS AND FUNCTIONS OF FUTURE GOVERNMENTAL SPR'S

1. INTRODUCTION

The provision of affordable electricity on a sustainable basis to South Africans can be a major stimulus for economic growth and social upliftment in a new South Africa. To this end it will be necessary to accelerate the electrification of the country and that can only be achieved if major obstacles inherent in the electricity supply industry are overcome.

The magnitude of the task is depicted by the fact that appriximately 56 % (3 million) of South Africa's households involving about 23 million people do not have access to electricity (Appendix A). In addition the present highly fragmented industry will not be able to respond to this challenge efficiently and effectively.

2. THE CURRENT ELECTRICITY SUPPLY INDUSTRY (ESI)

2.1 Factual information on the industry

The ESI employs approximately 75 000 people and has an annual turnover in excess of R15 billion. It serves 3 million customers country-wide and contributes 4 % to the GDP. There are 36 power stations with a combined generating capacity of ± 40 000 MW, including a large generating capacity surplus. The surplus generating capacity obviates the need for additional capital investment in power stations in the medium term to meet the demand for extended domestic electricity usage.

Electricity enjoys a 29 % share of the end-use energy market at present.

2.2 A fragmented industry

In the existing ESI structure there are 450 distributors of electricity i.e. ESKOM, local authorities, TBVC countries and national states. More than 2 000 tariffs are applied by these distributors. Many of the so-called white local authorities derive a surplus from electricity sales collectively estimated at more than R1,2 billion. These surpluses are used to fund other services such as roads, libraries, parks etc. and to reduce rates and taxes.

Regulation / control in the case of ESKOM is effected through the ESKOM Council and to a limited extent the Electricity Control Board (ECB). In the case of local authorities it is done by the Local Councils and outside their legal boundaries the ECB. For the TBVC countries regulation is effected by the respective governments and by the ECB where electricity is supplied under licence.

3. THE NATIONAL ELECTRIFICATION FORUM (NELF)

3.1 Recognition of the need for change

For some time major stakeholders in the ESI have recognised the need for electrification, the opportunities for realising it, the benefits that could accrue and the obstacles inhibiting it. At the beginning of 1992 the Government and the ANC by separate means initiated the convening of a national conference on electrification on 1 and 2 September 1992. At this conference and a follow-up conference on 14 May 1993 a National Electrification Forum was established by the major stakeholders representing broadly based constituencies. The aim was to respond to the challenges facing the industry through proper consultation and shared decision making.

3.2 Structure

The NELF structure (Appendix B) provides for a Plenary which is inclusive of national role players, a Management Committee (Appendix C) which is exclusive and consisting of major role players as approved by the Plenary and seven Working Groups that are responsible for the detailed work of the Forum. A Trust administers the receipt and expenditure of funds which are dedicated to finance the efficient operation of the NELF structures. A Secretariat based at the offices of the Development Bank of Southern Africa is responsible for the administration of NELF.

3.3 Goal

The NELF goal is to develop an implementable strategy for the accelerated electrification of South Africa that will lead to general access to affordable electricity for the entire population on a non-racial basis as rapidly as possible to complement other developmental policies in a sustainable manner.

The intention is to substantially satisfy this goal which was translated into objectives within a year for NELF. (Appendix D).

4. ACCELERATED ELECTRIFICATION

4.1 Why?

Electrification is essential for

- economic growth. It is recognised, however, that electrification is a necessary but insufficient stimulus for economic growth since other initiatives are necessary in concert. Apart from the large generating capacity surplus referred to par. 2.1, the electrical contracting and equipment manufacturing industries have between 30 to 60 % spare capacity. For very little capital investment South Africa can therefore have better utilization of production capacity, significant job creation and increased wealth creation;
- social development and upliftment, especially the support of family activities;
- enhanced education (better lighting in dwellings and classrooms, use of audio visual equipment, television broadcasting etc.);
- health (sterilization of equipment, examination lights, cooling of medicines etc.);
- reduction of deforestation (at present about 12 million tons of firewood are used in a non-sustainable manner);
- expectations amongst people in rural and urban areas to improve their quality of life through access to electricity;
- population development; and
- improvement of the physical environment, especially at local level.

The balance between economic growth and social development hinges on affordability for the individual, the industry and the country (Appendix E).

4.2 A possible national electrification program

During 1992 a total of about 200 000 connections was achieved through the efforts of mainly ESKOM, Durban Corporation and a few other municipalities. Concerted efforts by all distributors will be required to increase the number of new connections up to a desirable and practical

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rate of 450 000 p.a. as depicted on the attached diagram (Appendix F) and even higher but it will require the removal of certain key constraints.

The capital requirements pose one such a significant constraint. In 1993 the average cost per connection amounts to R3 000 for connections which can be made on a financially viable basis. If all of the existing 3 million households without electricity have to be electrified, the average capital cost will increase to R5 000 per connection (i.e. a total cost of R15 billion), raising the issue of individual affordability.

Therefore the envisaged national programme provides for the electrification of households which can be connected to the grid on a basis which is viable for the industry and the country (Appendix G). The energy needs of the balance of the households should be met through other forms of electricity supply such as solar cells, wind of small hydro systems or other energy sources such as solid fuels, oil, gas, biomass etc. The other key constraint is the present fragmentation of the ESI as indicated in paragraphs 2 and 5.

4.3 Electrification issues

The following issues impact significantly on a possible electrification programme:

- population growth and urbanization;
- the provision and thermal performance of formal and informal housing;
- the availability of a water supply;
- an integrated energy policy and related research programme;
- the initial low consumption of electricity by newly connected customers thus requiring subsidization to cover costs;
- the management of subsidization policies to ensure sustainability and the effective allocation of resources;
- the shortage of funding;
- non payment;
- community participation;
- institutional issues;
- low-cost technology; and
- a large number of diverse tariff structures

5. FUNDAMENTAL CHANGES IN THE ESI

5.1 The need for restructuring

It is evident that many of the distributors do not and will not have the capability of implementing a programme of accelerated electrification. This may be due to a lack of resources (money, manpower, material) or a lack of incentives or political will.Furthermore, electrification can involve many risks as is clear from par. 4.3.

A national perspective and approach will be required to achieve a national programme for electrification. This can facilitate better access to funding, the benefits of standardization and achieving synergy through resource optimization which will in effect lead to a reduction in cost.

5.2 Criteria for the evaluation of ESI structures

When considering alternative ESI structures specific criteria should be used to assess the suitability of such structures for South African conditions. The criteria developed by NELF are listed in Appendix H.

5.3 An appropriate ESI structure

NELF favours a structure more or less as outlined in Appendix I.

In this structure GENTRAN (a national body responsible for generation and transmission) supplies electricity to a limited number (between 6 and 15) distributors who supply to customers in their area of supply. Provision is made for a separate funding mechanism for electrification. An independent regulator which implements the Government's policies is envisaged.

It must be emphasized that the abovementioned structure is still under discussion and a substantial amount of work and consultation still need to be done before the ideas and thoughts will cristalize into a definite proposal.

5.4 Transition

A restructured ESI will involve extensive and fundamental change for most of the stakeholders, be they distributors, consumers or employees. NELF realizes the need for this transition to be properly planned and to be managed with great care, wisdom and sensitivity.

6. PROPOSED MEASURES FOR ACCOMMODATING NELF PROPOSALS

6.1 Short term: constitutional debate

(i) Since sustainable electricity supply is in the national interest and of strategic importance to the country, it is of paramount importance that political accountability for electricity supply should be allocated with circumspection and great care to the various levels of Government. However, the allocation of accountability and regulation to the respective tiers still has to be worked out by NELF and that process will take time.

Attention still needs to be given to the ownership of these distributors. Their shares can for instance be held by constituent local authorities and representation given on their boards.

The request from NELF is that it be allowed time to develop recommendations pertaining to a new ESI structure, regulation, political accountability,ownership and legal personality of distributors, tariffs etc. It is also requested that in the meantime NELF be allowed access to the Planning Committee.

(ii) The Draft Constitution Chapter 9 Clause 118 Section 1 indicates that SPR Governments shall have exclusive legislative competencies, including all necessary ancillary powers in the functional area of "delivery of electricity".

In view of the need for an integrated national policy and an institutional approach for the resolution of fundamental problems facing the ESI, NELF recommends the following amendments to the Draft Constitution:

- delete clause 118 (1)(J) "Delivery of water, electricity and other essential services".
- add clause 118 (4)(M) "Supply and delivery of water, electricity and other essential services".

6.2 Medium term: TEC phase

During the forthcoming months NELF will develop recommendations as referred to in par 6.1 (i) and (ii). There will be a need to test these recommendations and to seek advice on the processing thereof.Furthermore, debates will take place and decisions will be made which affect electricity supply. NELF's involvement in these deliberations is crucial.

To this end NELF's request is that a link be structured between itself and the TEC via the Sub-Council for Local and Regional Governments and Traditional Authorities amongst others.

6.3 Long term: Government of National Unity

At present electricity supply is regulated through the ESKOM Act no. 40 of 1987 and the Electricity Act no. 41 of 1987 as well as through a legion of provincial and local authorities' bye-laws.

Amendments to legislation and bye-laws will be inevitable and NELF will as a priority have to establish appropriate links with the new government structures to enable it to initiate new legislation or amendments to legislation and to be consulted on legislative issues

affecting electricity supply. In this process cases may arise where fast tracking procedures need to be used.

7. CONCLUSION

The need for an efficient and effective ESI to supply and extend affordable electricity to a new South African nation has brought the industry to a watershed.

A broad based, inclusive forum that is functioning professionally and efficiently on a consensus basis and that is investing extensive resources can guide South Africa to a structure and policies which will best serve the interests of all existing and future customers.

Mechanisms need to be created between NELF and the Government structures as proposed to allow NELF to play its role and to make its contributions on the short, medium and long term.

The Planning Committee's response to this memorandum will be greatly appreciated.

Yours sincerely

Johan Kruger
CHAIRMAN
MANAGEMENT COMMITTEE

STATUS OF ELECTRIFICATION IN S.A. - 1992

	METRO	TOWNS	FARMER H	TRUST AREAS	TBVC	NAT. STATES	TOTAL
TOTAL DWELLINGS	2 314 112	1 366 539	390 000	85 000	1 165 225	1 467 503	6 788 379
WITH ELECTRICITY	1 775 840	758 944	65 601	20 767	98 170	246 461	2 982 983
WITHOUT ELECTRICITY	538 272	607 595	307 199	64 233	1 067 055	1 221 042	3 805 396
% WITHOUT ELECTRICITY	23	44	79	76	92	83	56
POTENTIAL	323 687	216 023	131 699	49 358	331 247	509 853	1 561 867
"LEFT-OVER"	214 586	391 572	175 500	14 875	753 808	711 189	2 243 529

NOTE: *UCT DATA USED TO CALCULATE FARM ELECTRIFICATION
SOURCES: DBSA, URBAN FOUNDATION, ESKOM, DINGLEY, TESCOR, VEKOR, DECOR, NEGIBSI

NELF
OCT 1993

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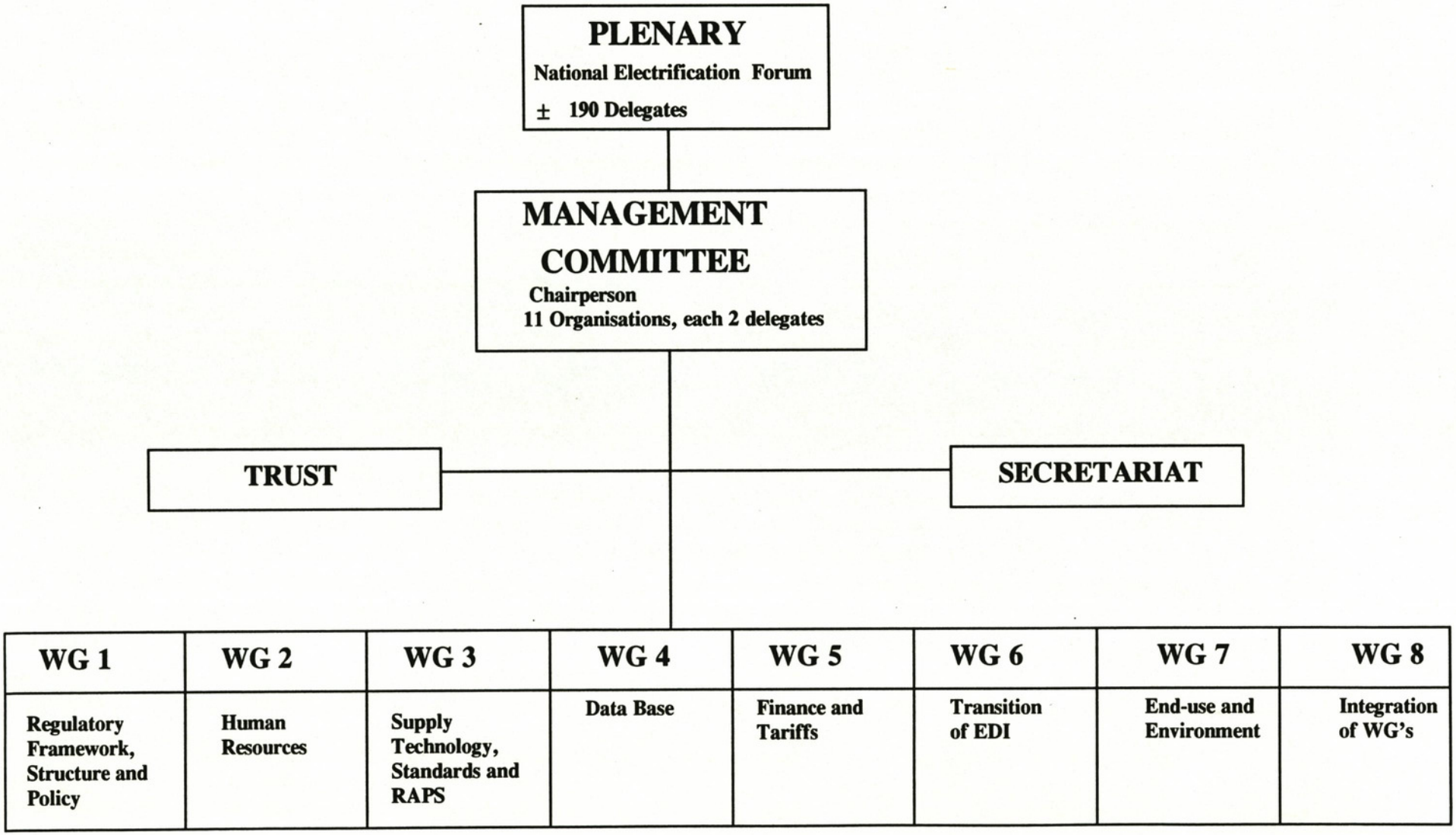
PLENARY
National Electrification Forum
± 190 Delegates
MANAGEMENT COMMITTEE
Chairperson
11 Organisations, each 2 delegates
TRUST
SECRETARIAT
WG 1
Regulatory Framework, Structure and Policy
WG 2
Human Resources
WG 3
Supply Technology, Standards and RAPS
WG 4
Data Base
WG 5
Finance and Tariffs
WG 6
Transition of EDI
WG 7
End-use and Environment
WG 8
Integration of WG's

NELF
OCT 93

NELF MANAGEMENT COMMITTEE REPRESENTATION

AMEU	ASSOCIATION OF MUNICIPAL ELECTRICAL UNDERTAKINGS
ANC	AFRICAN NATIONAL CONGRESS
BUSINESS SECTOR	
COM	CHAMBER OF MINES
DMEA	DEPT. MINERAL AND ENERGY AFFAIRS
ESKOM	
NUM	NATIONAL UNION OF MINEWORKERS
NUMSA	NATIONAL UNION OF METALWORKERS OF SA
SAAU	SOUTH AFRICAN AGRICULTURAL UNION
SANCO	SA NATIONAL CIVIC ORGANISATION
UME	UNITED MUNICIPAL EXECUTIVE
DBSA	FACILITATING CHAIRPERSON

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NELF
OCT 93

OBJECTIVES OF THE FORUM

To develop a strategy for accelerated electrification on a sustainable basis

To formulate a fundamental restructuring proposal

To co-operate with other fora

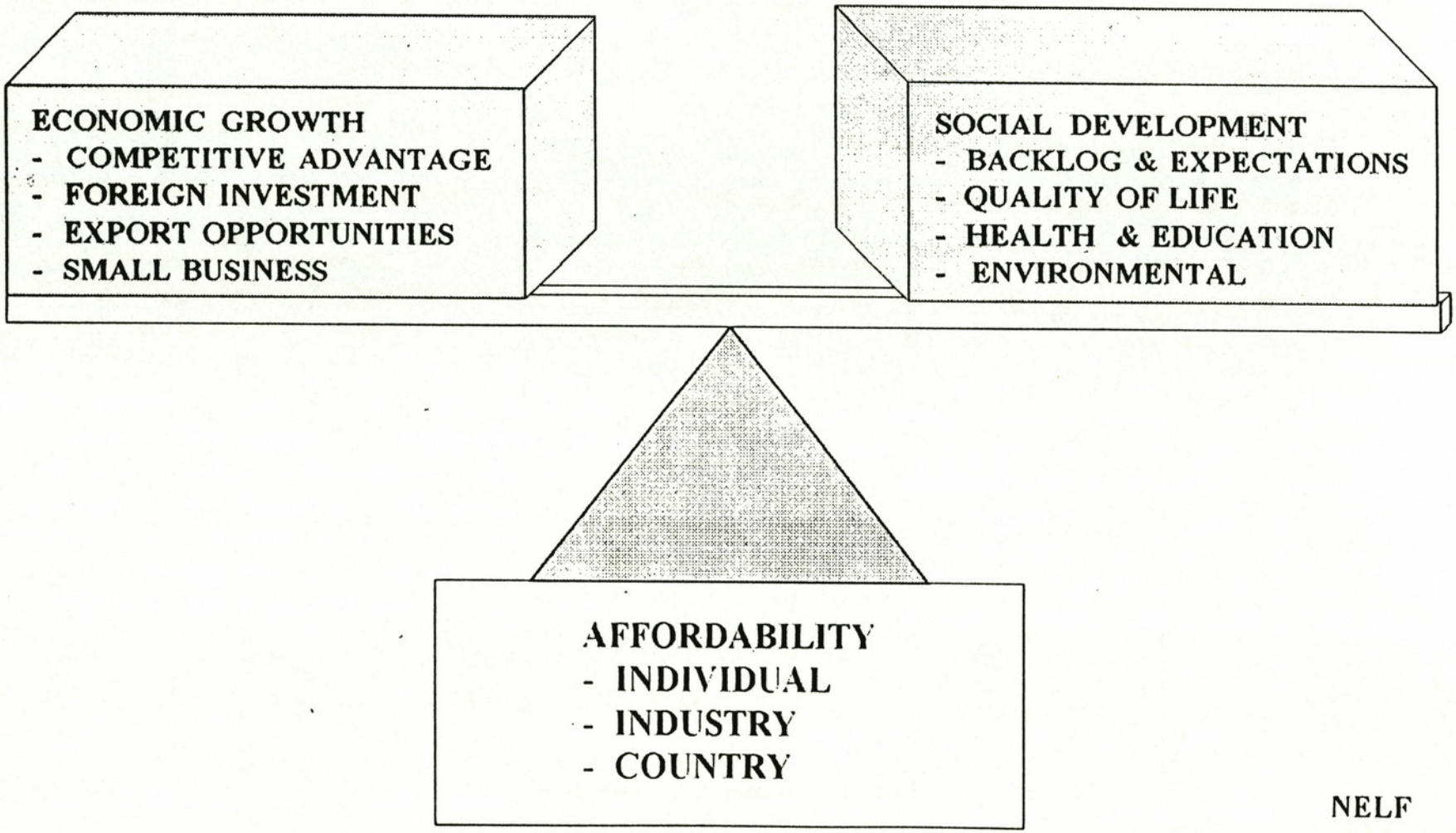
To allow current structures to execute

To operate on an inclusive, consensus basis

To give guidance

NELF
OCT 93

ELECTRICITY FOR ECONOMIC GROWTH AND SOCIAL DEVELOPMENT



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ELECTRIFICATION

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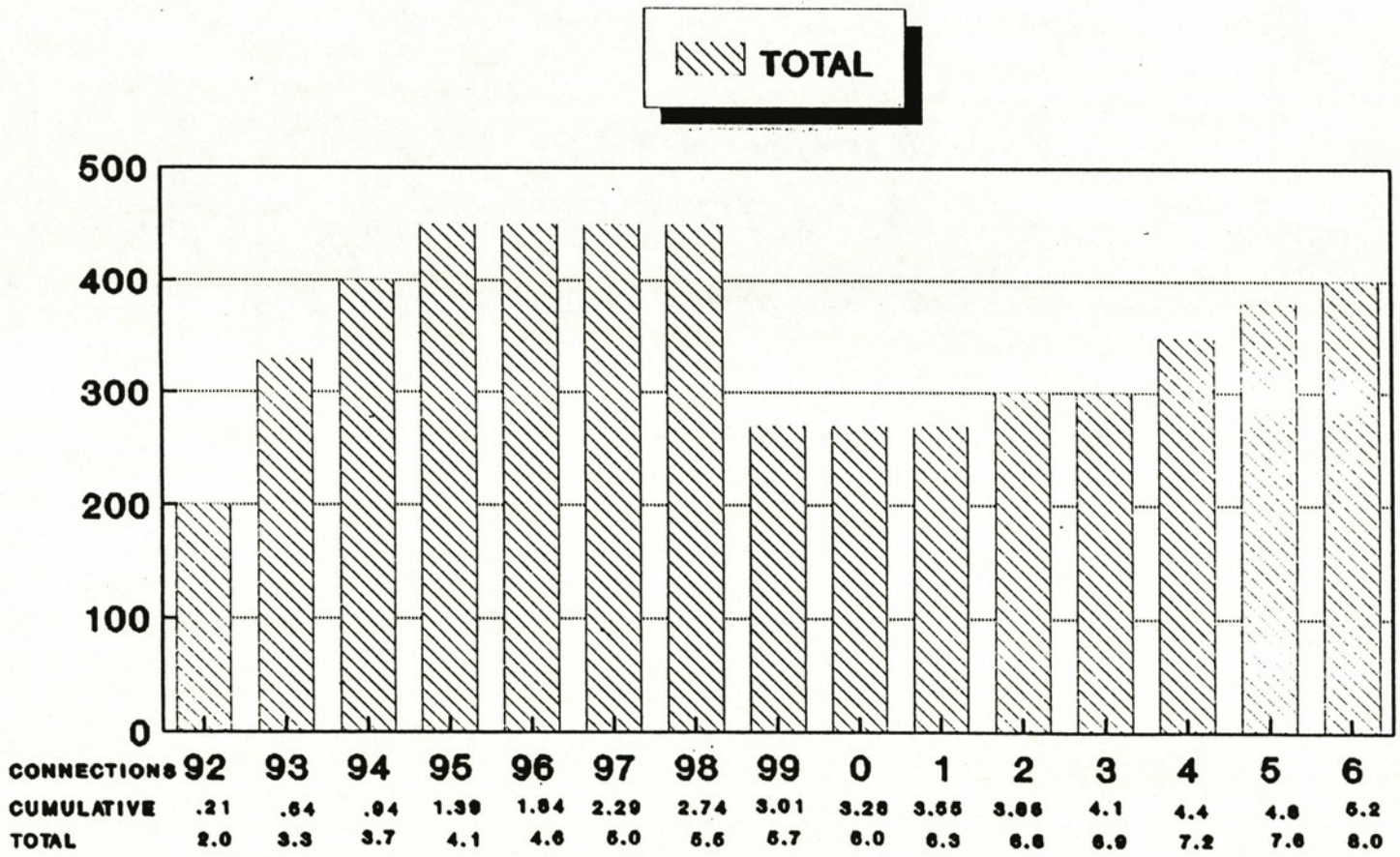
OCT 93

A POSSIBLE NATIONAL PROGRAM



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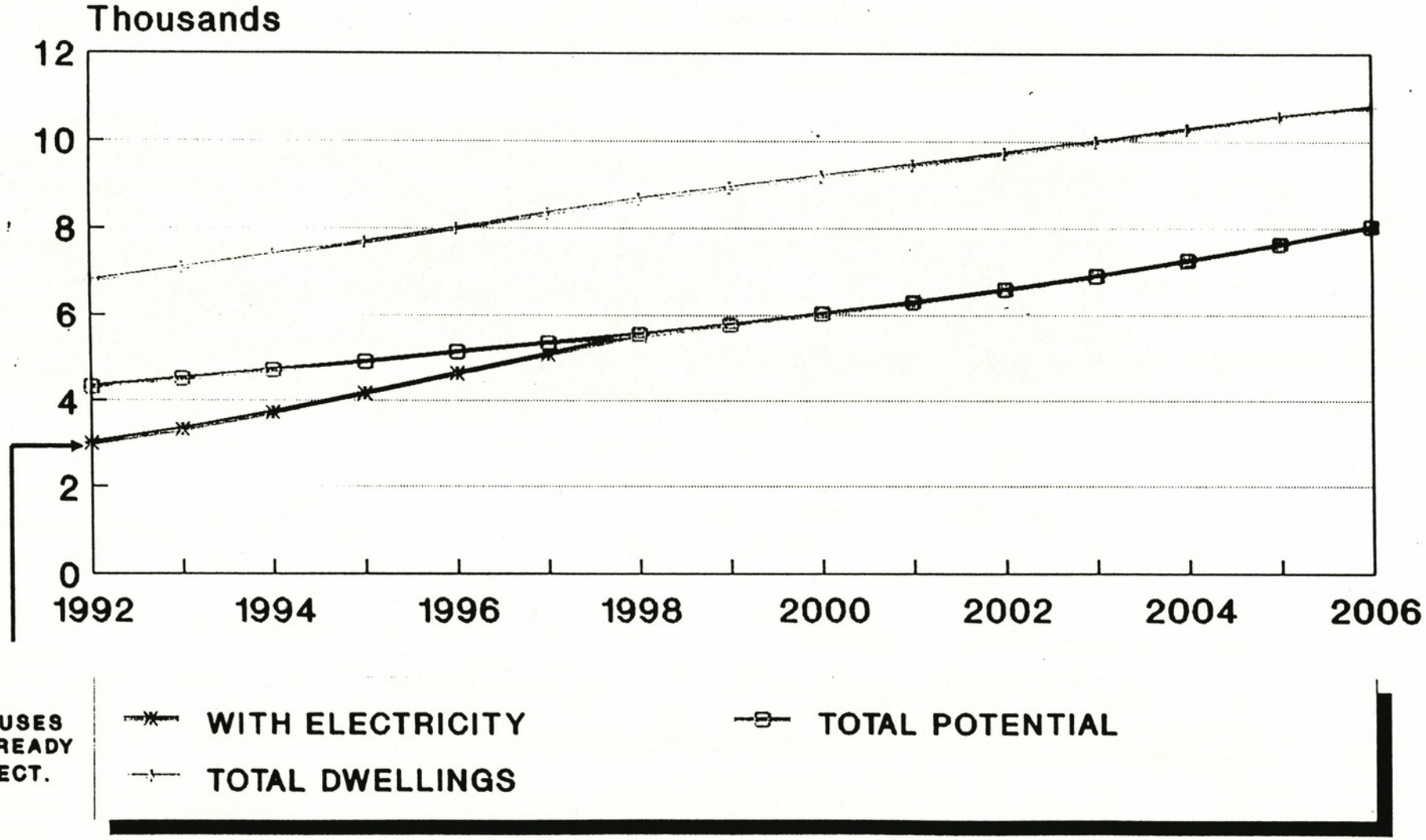
NATIONAL ELECTRIFICATION PROGRAMME
1992 - 2006



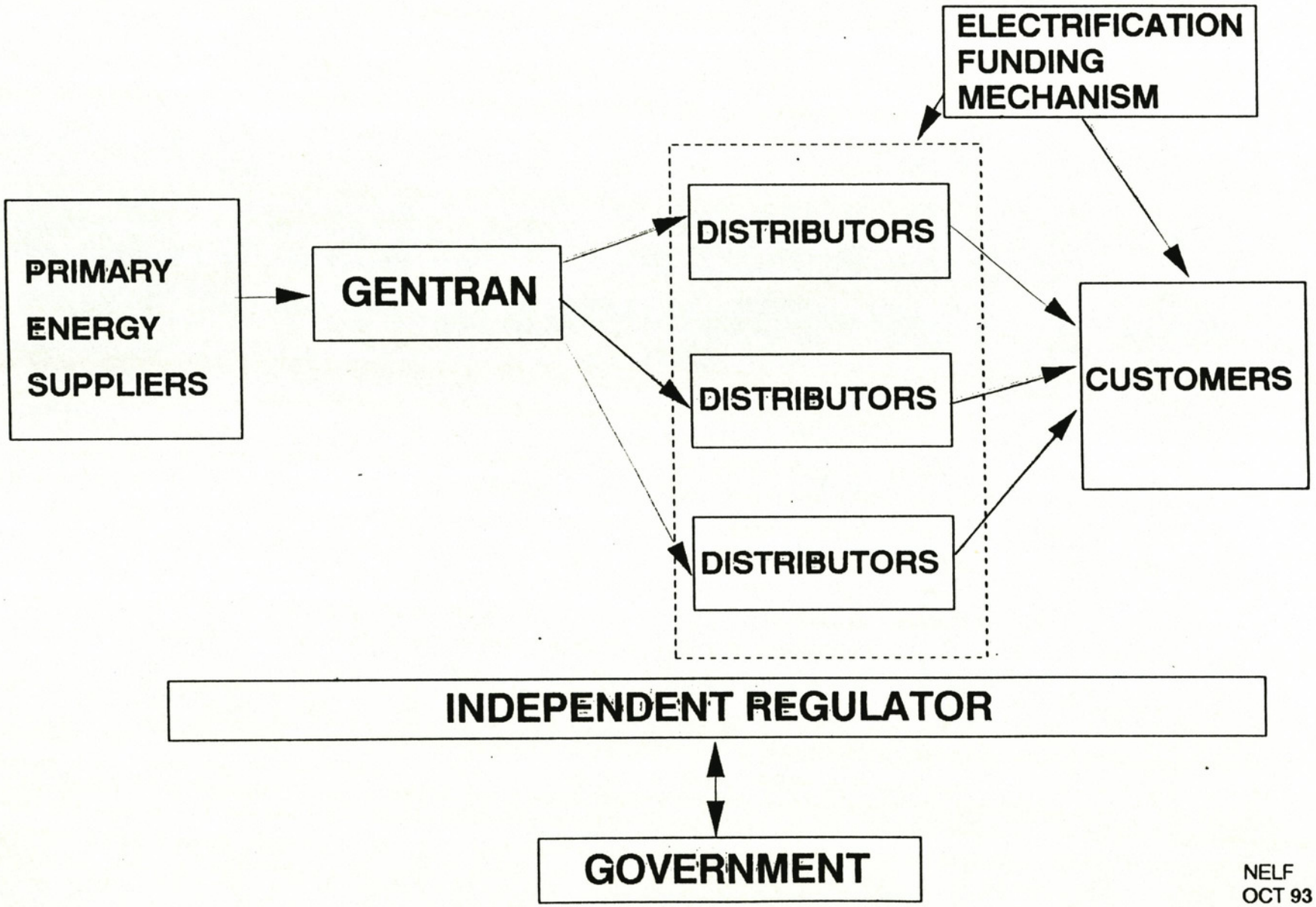
• TOTAL DWELLINGS (BACKLOG PHASED OUT)

NELF
OCT 1993

CRITERIA FOR EVALUATION OF ESI STRUCTURES

- IMPLEMENTABILITY
- COST EFFECTIVENESS
- ACCEPTABILITY
- FUNDING EFFICIENCY
- ATTRACTIVENESS TO STAFF
- OPERATIONAL EFFICIENCY
- APPROPRIATE PRICING
- CONGRUENCE WITH NATIONAL POLICIES
- BUSINESS PROFESSIONALISM
- CUSTOMER INVOLVEMENT
- SUPPORT FOR NATIONAL GOALS

APPROPRIATE ESI STRUCTURE DIAGRAM



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OCT 93

ADDENDUM O

THESE DRAFT MINUTES ARE CONFIDENTIAL AND ARE RESTRICTED TO THE MEMBERS OF THE CO-ORDINATING COMMITTEE ON THE DEMARCATION/DELIMITATION OF REGIONS, THE PLANNING COMMITTEE AND THE NEGOTIATING COUNCIL. THEY ARE STILL TO BE RATIFIED AT THE NEXT MEETING OF THE CO-ORDINATING COMMITTEE.

DRAFT MINUTES OF THE MEETING OF THE CO-ORDINATING COMMITTEE ON THE DEMARCATION/DELIMITATION OF REGIONS HELD AT 16H00 ON MONDAY, 25 OCTOBER 1993 AT THE WORLD TRADE CENTRE IN KEMPTON PARK.

PRESENT	:	Mr A Fourie (Chairperson)	-	South African Government
		Mr T Botha	-	African National Congress
		Ms L Jacobus	-	South African Communist Party
		Mr J S S Phatang	-	Dikwankwetla Party
		Mr P A Pienaar	-	Democratic Party
		Mr F du Preez (Administration)		
		Ms N Sithebe-Tsotetsi (Administration)		

1. **WELCOME**

Mr Fourie accepted his nomination as the chairperson of the meeting.

2. **AGENDA**

2.1 Reports from the four chairpersons of the Ad-Hoc Committees.

2.2 Decision whether the Co-Ordinating Committee would be ready to meet with the Negotiating Council on Wednesday, 27 October 1993.

3. **REPORTS FROM THE FOUR AD-HOC COMMITTEES**

3.1 Mr Botha reported on the KwaZulu/Natal, Eastern Cape and Kei areas that the Ad-Hoc Committee could not reach agreement on any of these areas.

3.1.1 <u>Natal/KwaZulu</u>

* The Ad-Hoc Committee could not reach consensus on a suitable final southern boundary for Natal/KwaZulu. The following compromise was suggested:

- That the current Provincial/State boundary between Natal/KwaZulu and Transkei should be retained as an interim measure. That would imply that the district of Umzimkhulu would remain with the remainder of Transkei whilst the magisterial districts of Alfred and Mount Curry would remain with Natal/KwaZulu.

- The following areas, North Transkei/Pondoland (comprising of the magisterial districts of Lusikisiki, Bizana, Tabankulu, Flagstaff, Mt Ayliff, Mt Frere, Mt Fletcher and Maluti), the district of Umzimkhulu and East Griqualand could petition a referendum within 18 months of the national elections to determine which SPR they wished to be permanently included in. Such a petition for a referendum must be supported by at least 20 000 signatures from residents from within that particular area. He went on to say that the members of the Ad-Hoc Committee decided to present this solution to their principals and the idea had received support from the ANC, the DP and Transkei.

- The Committee could not reach any agreement on the Eastern Cape.

3.1.2 The Northern Transvaal

Mr Fourie reported that no finalization and compromises were made in the area. However, the following options were suggested:

* that Groblersdal be included in the Northern Transvaal Region;

* that there should be flexibility regarding Lydenburg and Pilgrims Rest if the watershed could be used as the boundary;

* there was no concensus concerning Bushbuckridge. The suggestion that the area be included in the Northern Transvaal was supported by all present except Mr Zama from Inyandza National Movement;

* that a compromise could be reached regarding Lydenburg and Pilgrims Rest depending on how the issue of a Greater Pretoria was solved in relation to the Eastern Transvaal.

3.1.3 Pretoria

Ms Jacobus reported that there were strong arguments against Pretoria being included in the Northern Transvaal. The Intando Yesizwe Party, The Afrikaner Volksunie and the Democratic Party supported the inclusion of Pretoria in the Eastern Transvaal Region. The ANC, the SACP and the South African Government supported the inclusion of Pretoria in the PWV. She went on to say that after much debate the Committee decided on finding a compromise position which was of Pretoria being a separate SPR with the following five options:

* Greater Pretoria functional region: i.e Pretoria, Wonderboom, Soshanguve, Brits, Cullinan, Bronkhortspruit, KwaNdebele, Odi 1, Moretele 1, and Moretele 2;

* Greater Pretoria plus some adjacent Highveld districts, i.e. Witbank, Middelburg, Delmas, which are functionally linked to Pretoria;

* Greater Pretoria plus the adjacent Highveld, plus the Bushveld (this includes the four districts of Warmbad, Waterberg, Ellisras, Thabazimbi which requested inclusion with Pretoria), seventeen districts altogether;

* Greater Pretoria plus the Bushveld, plus the Greater Highveld, i.e. Balfour, Highveld Ridge, Standerton and Bethal;

* The Pretoria "(DC)" option; ("DC" option referring to the magisterial district). This option was not accepted as a practical solution.

3.1.4 Western Cape, Northern Cape, North West and the Orange Free State

* Mr Phatang reported that the Committee had reached general agreement that the Orange Free State should remain as it had been demarcated by the Commission and Sasolburg should be included in this region.

* Regarding the North Cape Region, five members representing the ANC, the SACP, Dikwankwetla, the DP and the Labour Party agreed that the Northern Cape Region as demarcated by the Commission should be disintegrated and that the Orange River should be used as a boundary. Therefore the magisterial districts of Gordonia, Hay, Herbert, Kimberley, Barkly West and Warrenton would be in the North West with the remainder of the districts being excised into the Western Cape. The South African Government could not agree on this compromise but indicated that its position could be revised if the Eastern Cape Region could also be considered in relation to the Western Cape/Eastern Cape border.

4. SUMMARY

After a lengthy discussion on the above reports the Co-ordinating Committee agreed that engaging in more debate would be time consuming because debating had been done in the different Ad-Hoc Committees. It was agreed that each member would consult with his/her principals, there would be bilateral discussions if necessary and a report comprising of a summary of the discussion of the meeting would be given to the Planning Committee which would then decide whether the Co-ordinating Committee was ready to report to the Negotiating Council.

The Summary is as follows:

4.1 **Eastern Cape/Kei Regions**

The Committee agreed that it appeared that there was a deadlock because two out of five participants wanted two regions in the area while three participants wanted the area joined to form one region.

4.2 **KwaZulu/Natal/East Griqualand Regions**

To reach a compromise three options were put forward by the Committee:

4.2.1 That the 1910 borders be reverted to.

4.2.2 That Umzimkhulu and Mount Curry should remain in Natal and Pondoland in Transkei.

4.2.3 That the magisterial districts in paragraph 4.2.2 should all be included in Natal.

4.2.4 That Mt Curry, Umzimkhulu and Pondoland can petition for a referendum within 18 months of the national elections to determine with which SPR they wished to be permanently included. Such petition for a referendum must be supported by at least 20 000 signatures from residents from within that area.

4.3 **Northern Transvaal and Eastern Transvaal**

4.3.1 The Committee proposed that Bushbuckridge should remain in the Northern Transvaal then Lydenburg and Pilgrim's Rest could remain in the Eastern Transvaal.

4.3.2 There was concensus that Groblersdal should be in the Northern Transvaal.

4.3.3 Should the Pretoria area include Wonderboom, Cullinan, Bronkhortspruit and KwaNdebele then there would be flexibility regarding Lydenburg and Pilgrims Rest being in Northern Transvaal.

4.4 **Pretoria**

The Committee wished to put on record that there appeared to be a deadlock regarding Pretoria. To solve the issue the following options were considered:

4.4.1 That Pretoria should be a separate SPR.

4.4.2 That Pretoria should be included in the PWV.

4.4.3 That Pretoria should be included in the Eastern Transvaal.

4.4.4 As a compromise the Committee would look at the following proposals made by the Ad-Hoc Committee on Pretoria:

* A functional region of a greater Pretoria comprising of Pretoria, Wonderboom, Soshanguve, Brits, Cullinan, Bronkhortspruit, KwaNdebele, Odi 1, Moretele 1 and Moretele 2;

* A greater Pretoria region joined by some Highveld districts, i.e. Witbank, Middelburg, Delmas which are already functionally linked to Pretoria.

* A greater Pretoria region plus the adjacent Highveld and Bushveld areas including the four districts of Warmbad, Waterberg, Ellisras and Thabazimbi.

* A greater Pretoria region plus the Bushveld and Greater Highveld areas i.e. Balfour, Highveld Ridge, Standerton and Bethal.

4.4.5 An alternative option was suggested by the Co-ordinating Committee which would be to put the border of Pretoria with the Witwatersrand at the Jukskei River and include Wonderboom, Soshanguve, Cullinan, Bronkhortspruit and KwaNdebele. The districts could then be excised into the Eastern Transvaal. Moretele 1, Odi 1, Odi 2 and Brits could be included in the Western Transvaal. This proposal was made bearing in mind the claim of Bophuthatswana on some areas in the Western Transvaal.

4.5 **Western Cape, Northern Cape and Orange Free State**

4.5.1 It was agreed that the Orange Free State Region would remain as demarcated by the Commission but Sasolburg would be included in the region.

4.5.2 Substantial agreement (5 out of 6 participants) (see paragraph 3.1.4 of these minutes) was reached regarding the proposal that the Orange River should be the boundary between the Western Cape and the North West Region with the magisterial districts of Gordonia, Hay and Herbert forming the southern border of the North West Region.

5. NEXT MEETING

No date was set, it would depend on the Planning Committee's decision.

6. CLOSURE

The meeting adjourned at 18h00.

Annexure E

CONFIDENTIAL

Third Progress Report

TO THE PLANNING COMMITTEE OF THE TASK GROUP ON THE IDENTIFICATION AND REPEAL OF LEGISLATION IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY LEGISLATION

25 October 1993

1. Since the submission of the first two progress reports, the members of the overall Task Group and the sub-groups have continued to work.

2. The convenor has since been notified that the Bophuthatswana Government did not deem it prudent to contribute to the Task Group's work under the present circumstances. Earlier a member of the Task Group visited Mmabatho, after previous arrangements had been made with Mr G Mothibe, but was informed on his arrival that members of the administration had been instructed not to co-operate with him.

3. From the KwaZulu administration no response to several telefaxed letters has been received.

4. On Wednesday 20 October 1993 a meeting of the members of the overall Task Group and sub-groups, including representatives of all the relevant regions, took place at the World Trade Centre. Substantial draft reports were presented and discussed.

5. At the meeting it was agreed with Dr T Eloff of the MPNP administration that a **first substantial report** will be made available for distribution on **Friday 29 October 1993** (instead of 22 October, as agreed earlier).

6. During the discussion two questions emerged, on which guidance from the Planning Committee would be most helpful:

   6.1 In view of the Task Group's mandate, as well as the earlier work of the Technical Committee on Discrimination, the identification of specific legislation for the purposes of repeal or amendment is indeed regarded as the most urgent matter and is receiving attention. However, the idea of once again proposing a "higher code" to serve as a "safety net" mechanism is being contemplated by some members. Is the "higher code" concept still a viable option at all, as far as the negotiators are concerned, and to what extent should the Task Group proceed to investigate this possibility, as addition to the first aspect?

6.2 The Task Group's initial mandate dealt with South Africa and the TBVC territories. In the First Progress Report an extension to KwaZulu was requested. After this had been agreed by the Planning Committee, a sub-group was appointed and very substantial progress has been made by a Durban lawyer. However, the decision to concentrate in quite considerable detail on KwaZulu, but not on other self-governing territories, may be open to criticism. Therefore it is suggested that the possibility to extend the Task Group's mandate to include one or more of the other self-governing territories deserves consideration, on the longer term. Alternatively, the reasoning behind a distinction between KwaZulu and the other territories may need some reflection. In view of the fact that a considerable amount of work has already been done regarding KwaZulu, it is suggested that information and recommendations on KwaZulu be included in the First Substantial Report, together with either an undertaking that other territories will also receive attention, or some explanation as to KwaZulu's "special" treatment.

7. Some feedback on 6 will be appreciated.

Johann van der Westhuizen
Convenor: Overall Task Group

25.10.93

ADDENDUM F

PROGRESS REPORT

AGREED TO BY THE MEMBERS OF THE AD HOC COMMITTEE ON THE ELECTORAL BILL ON 27 OCTOBER 1993

MEMBERS PRESENT :	K Andrew	DP
	P de Lille	PAC
	GNK Hetisani (Chairperson)	XPP
	N Jajula	Transkei Govt
	C Kruger	AVU
	P Molefe	ANC
	D Schutte	SA Govt
	M Cilliers-Reinecke (Minutes)	

CLAUSE 16

General agreement has been reached as to which persons should be entitled to vote, but there is no firm agreement as yet on the precise details.

CLAUSE 17

It was agreed that 17(a), (b) and (c) remain as is.

There is, however, no agreement in respect of (d) on the issue of prisoners voting. The parties are considering a variety of alternative options.

CLAUSE 18

It was agreed that voter's cards be issued. The categories, necessary documentation and exact issuing procedures still have to be agreed upon.

Further details are still being negotiated.

CLAUSE 22

It was agreed that voting take place over three consecutive days.

27 April 1993 (Wednesday) - confined to the casting of special votes
28 April 1993 (Thursday) - first general day of voting
29 April 1993 (Friday) - public holiday - second general day of voting

It has been agreed that the hours for the first and second general days of voting will be from 07h00-18h00.

The counting of votes cast in foreign countries will be done in the Republic of South Africa.

CLAUSE 30

* It was agreed that there will be two ballot papers.

* It was agreed that the ballot paper will not be pre-folded and that the official mark will be on the outside.

* It was agreed that the name of the leader will not appear on the ballot paper, but only the photograph.

* It was agreed that the colour of the photograph be left open to the discretion of the IEC.

* It was agreed that the different parties participating in the election can decide which leader's photograph they want on the ballot paper for the national and SPR elections. It does not necessarily have to be the leader's photograph, but can be anyone in the party. As long as the person in the photograph is a member of the party concerned.

CLAUSE 32

Voters may cast their votes at any voting station in the Republic of South Africa.

The procedures in terms of the above still need to be agreed.

CLAUSE 33

It was agreed that a voter shall receive two ballot papers and be entitled to record one vote in the election for the National Assembly and one further vote for the SPR legislature.

CLAUSES 35 AND 39

It was agreed to delete the words "subject to section 39(1)" from clause 35 and the whole of sub-clause 39(1)(a). The remainder of clause 35 remains as is.

COSATU

CONGRESS OF SOUTH AFRICAN TRADE UNIONS

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RECEIVED 27/10 @ 17h30 GH. ADDENDUM G

MEMORANDUM TO MULTIPARTY NEGOTIATIONS PROCESS 27 October 1993

From: Congress of South African Trade Unions

COSATU supports the need for a political settlement and is fully behind the present negotiations process. While not directly involved, since the process has only included political organisations, we follow with keen interest all reports produced by Technical Committees and any agreements reached to ensure that they do not in any way trample over worker rights which we have won over years and paid for through blood, repression, dismissals , injury and death. We also want to ensure that a future dispensation is one where all are equal irrespective of race, gender or creed.

It was with this in mind that our Central Executive Committee requested us to publicly state what our position was on three specific clauses and issues currently under discussion for inclusion into a Bill of Rights and the Constitution for the Transition and to approach the Multi Party Negotiating Process (MPNP) for a meeting to raise our concerns.

We have focussed on these issues in addition to clauses which we objected to earlier this year (clauses dealing with Property rights, etc.)

1. Labour Relations

Social relations between employers and workers are characterised by inequalities, based on the fact that all workers have is their labour to sell. To equate the right to strike with the right to lock out is to assume that we are dealing with equal partners to a relationship.

The clause on Labour Relations in the Interim Bill of Rights while it entrenches the right of workers to strike on the one hand, takes this away with the other, by granting and attempting to entrench into the Constitution the right of employers to lock - out . Employers have the right to ownership of property entrenched in the constitution. They own and control the means of production.

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Wits Region Shop no. 7 213 Park Road GERMISTON 1501 FAX: 873-1272 873-1250

Western TVL P.O. Box 3435 VEREENIGING 1930 FAX: (016) 22-5105 (016) 55-1855

Northern TVL 214 Fasser Building 520 Paul Kruger Str PRETORIA 0002 (0126) 322-7290/1

Highveld P.O Box 463 EVANDER 2280 FAX: (0136) 5-1737 (0136) 5-1216

Northern Cape/OFS P.O Box 2021 KIMBERLEY 8300 FAX:(0531) 2-5819 (0531) 81-1088

Northern Natal P.O Box 7229 EMPANGENI RAIL 3910 FAX: (0351) 92-1054 (0351) 92-2354

Southern Natal P.O Box 33274 MONTCLAIR 4061 FAX: (031) 307-3215 (031) 304-1720

Western Cape 1st Floor 16A Castle Mews New Market Str CAPE TOWN 7000 FAX: (021) 461-5909 (021) 462-3673/4

Eastern Cape P.O Box 4351 Korsten PORT ELIZABETH 6041 FAX: (041) 41-4898 (041) 43-3792

Cosatu Border/k 7 Gladstone Str 304 Camel Hse 3rd floor EAST LONDON TEL: 0431-431-9 FAX: 0431-436-3

The only right that workers have as a counter balance, is the withdrawal of labour -right to strike- and this should be equally entrenched in the constitution. The majority of countries with Bills of Rights grant workers the right to strike as an entrenched clause, but do not accord the same right to owners of Capital since this affects the balance of power between employers and workers.

We are not against regulation and legislation aimed at ensuring that strike action is orderly, but want to make it clear that our understanding of the right to strike means that once you have used all steps, you are entitled to strike without fear of dismissal and lock-out. Further we could be faced with the ridiculous situation for example, where employers ballot to lock out workers to force them to accept a cut in wages.

Giving them this right in the constitution will plunge the country into industrial war and chaos . We are therefore calling on you as the MPNP to scrap the part that grants employers the right to lock - out in sub clause(3) of the clause on Industrial Relations.

2. **Civil Service**

The present civil service has been designed to:

* ***protect minority privilege and power.***

* ***create a network of ethnically and sometimes racial based administrations, and patronage for those implementing apartheid.***

* ***operate in conditions of secrecy, corruption and unaccountability to the people of the country.***

* ***provide services to whites in the so-called white South Africa at the expense of blacks living in the same areas .***

We are keenly aware of the need to provide services to communities on day one after the elections as well ensuring certainty among workers against wholesale dismissal , retrenchments etc. We have taken note of the proposal for integration, transfers and rationalisation by the Technical Committee. We however are of the view that this applies mainly to the bantustans and does not cover those who fall under the Commission For Administration (CFA).

We are also worried by the Constitutional Principle that 'guarantees the independence of the civil service'. Unless it is made clear that a new government will have to be involved in the restructuring of state institutions this may be used to mean that the government have no say in matters relating to staffing and restructuring. This has been given substance by the continued unilateral restructuring and renewal of contracts of the likes of Manpower Director General Joel Fourie in haste, in secrecy and without consultation.

In negotiations with the CFA , we have detected an attempt by them and the government backed by conservative staff associations to seek guarantee of tenure of civil servants, particularly unproductive apartheid bureaucrats who implemented apartheid.

No blanket guarantee must be given to the bureaucracy, and a new government must not be forced to carry the present 14 departments of Education Health etc, each of which has a Director General, Deputy, secretaries etc. Within acceptable labour standards, no one must be immune from the democratisation process.

We also want a halt to the governments' present unilateral restructuring of the economy be it of the parastatals or not.

3. **Powers of Regions**

COSATU stands for strong government at all levels to render the centre effective in a national programme to redress injustices of the past and uplift conditions of those who in the past have been denied access to the economy. The proposals for exclusive powers of regions over social infrastructure such as electricity, water, health etc is unacceptable to us. The entrenchment of apartheid regional inequalities will make it impossible for communities in rural areas to receive electricity, clean drinking water and social infrastructure. Whatever powers are granted to the regions must not affect the need and ability for having a National Economy and Labour Standards that applies across the country. It must not lead to unions negotiating with 96 Departments as is currently the case.

We are hopeful that all the above can be resolved before your self imposed deadline and lead to the holding of free and fair elections on 27 April 1994. We must however make it clear that these are issues essential to the life of the Trade Union Movement and therefore we are prepared to engage in all forms of activities including strike action to win them. We are not prepared to turn the clock back 20 years through ill-considered proposals or agreements which will stifle economic progress and development.

4. **Conclusion**

We remain resolute in our support for democracy to dawn as speedily as possible. We therefore urge you not to deviate from the deadline of 5 November or the election date. Anyone wanting to challenge the legitimacy of the process should do so on 27 April when the real referendum will take place.

COSATU supports those who say that enough concessions have been made to parties in the 'Freedom Alliance', and that to continue to do so is to give them the right to veto the process. The same applies to the regime's attempt to hold the process hostage. Toying with the idea of a referendum will not solve the obstacles being put in the way of democracy. It will just send a signal that a small minority clinging on to apartheid privileges, will be allowed to dictate the pace of change. This we can never allow.

Addendum H 18

THE NATIONAL HOUSING FORUM

P O Box 1115
Johannesburg
2000
Tel. (011) 838 2822
Fax. (011) 838 1825

LETTER BY FAX: 011-397-2211

15 October 1993

The Chairperson: Planning Committee
Multi-Party Negotiations Forum
World Trade Centre
Kempton Park

Dear Sir

Deterioration in the relationship between Government and the National Housing Forum.

This letter is directed to you in the national interest. Over the past five months, explicit understandings between the members of the National Housing Forum collectively, and the Department of National Housing were disregarded. This has resulted in a steady deterioration in the relationship between the members of the National Housing Forum and the Minister of National Housing and his Department.

The National Housing Forum was established to bring together all the important, non-government role players in the housing sector in an attempt to secure consensus between them and the Government on a future housing policy and strategy for the country. During the past twelve months, the nineteen diverse parties in the Forum have managed to take a large number of very significant decisions and reach significant agreement on a consensus basis. The NHF and the Department of National Housing has been engaged since December 1992, in bilateral negotiations in the same spirit of co-operation and consensus. This was done in the absolute belief that the only way to get the housing delivery sector especially to the lower income groups, to operate effectively, was to secure broad consensus on the way forward.

Unfortunately the relationship between the Department and the National Housing Forum deteriorated significantly since June this year (when Minister Louis Shill took office). At that stage, agreement (with only four minor technical issues outstanding) had been established on interim housing arrangements. Minister Shill, however, rejected a large proportion of the agreement and re-opened a number of issues which were at that stage already settled.

Following confrontation between the NHF and the Minister and the intervention of a number of the members of the NHF, final agreement was reached on 30 August 1993. Unfortunately, in the process, the relationship between the Forum and the Minister was damaged. The members of the Forum, however, decided that it was in the national interest to continue with negotiations and to try to re-establish the spirit of co-operation and consensus.

A series of unilateral actions by the Minister and Department, in contravention of explicit understandings reached previously and reconfirmed after the initial confrontation between the Minister and the NHF followed. This culminated in a difficult meeting on 27 September 1993 where, despite deep disappointment on the side of the members of the NHF, it was agreed to put differences aside and to proceed in a spirit of good faith.

As outlined in the attached letter to Minister Shill, the Minister again, on 11 October 1993, acted unilaterally, which further damaged the delivery capacity of the housing sector. This was considered by the members of the NHF to be deliberately provocative and in direct contravention of the explicit understandings reached on 27 September 1993.

As a result of these events, the members of the NHF have come to the considered conclusion that continued attempts to resolve these problems on a bi-lateral basis with the Minister and the Department, are likely to be futile.

Although a number of the members of the Forum felt that the debate should be taken into the public domain, the decision was taken at a meeting on Thursday, 14 October 1993, to first approach both the State President as ultimate authority in the Cabinet, and the Multi-Party Negotiations Forum at Kempton Park, with an appeal for urgent intervention.

This appeal is made in an attempt to re-establish constructive negotiations on a basis of good faith and the continued elevation of the housing issue above party political considerations. We therefore urgently call on the members of the Planning Committee to take whatever steps deemed necessary in order to resolve the crisis.

In closure we would like to reconfirm the absolute belief of the members of the National Housing Forum that housing should be an issue of national reconciliation and reconstruction. Short term, ad hoc actions which threaten the considerable progress made to date in achieving broad based consensus on the way forward, cannot be afforded by the country. We sincerely believe that this view and approach will be shared by the members of the Planning Committee.

Yours faithfully

Mkhabela

ISHMAEL MKHABELA
for ERIC MOLOBI
Chairperson
National Housing Forum

cc: The State President, Mr FW de Klerk
Minister of National Housing and Public Works, Mr Louis Shill

Annexure I

THE NATIONAL HOUSING FORUM

P O Box 1115
Johannesburg
2000
Tel. (011) 838 2822
Fax. (011) 838 1825

LETTER BY FAX: 012-325-6396

15 October 1993

Minister Louis Shill
Minister of National Housing and of Public Works
Private Bag X
Pretoria
0001

Dear Minister Shill

This letter is directed to you on behalf of the following organisations, constituting the membership of the NHF :

African National Congress
Azanian Peoples Organisation
Construction Consortium
Development Bank of Southern Africa
Inkatha Freedom Party
Material Manufacture and Supply Sector
Non Profit Housing Delivery Sector
South African Housing Trust
South African Employers Consultative Council on Labour Affairs*
Association of Mortgage Lenders
Congress of South African Trade Unions
Democratic Party of South Africa
Independent Development Trust
Kagiso Trust
Urban Foundation
Pan Africanist Congress
South African National Civic Organisation
Association for Community Housing and Reconstruction

The above are members of the National Housing Forum, who represent both the homeless and low income families on the one hand, and the suppliers of housing and housing finance in the commercial and the NGO/non-profit sector, as well as the major national development agencies on the other.

These organisations are unanimous in their concern about the steady deterioration in the relationship between Government and the Forum which we believe are principally attributable to actions taken by you as Minister of National Housing.

We have always been supportive of clarifying and strengthening Ministerial and departmental authority and accountability for the performance of the housing sector. However, the above parties, in participating in the NHF, have always been united on the principle that housing should under no circumstances become an issue of party political contestation, but should be an issue of national reconciliation and reconstruction. It is only through creating a broadly supported and practical approach to housing, that progress can be made. This requires a serious commitment to co-operation, collaboration and negotiation between all concerned.

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* Due to time constraints, it was not yet possible to obtain firm mandates from all the members of SACCOLA.

The parties referred to above, have been encouraged over the last two years by consistent progress that has been achieved through a process of consultation between ourselves and representatives of the Government in matters affecting housing and housing policy. We are however, compelled to record our distress that the mutual trust which has been so arduously built is being destroyed by what is being perceived as unco-operative responses based on decisions taken and communicated by you or on your behalf, and a number of unilateral decisions which have created the impression of negotiating in bad faith. We set out below, some background which gives rise to this view.

1. **AGREEMENTS REACHED, between the NHF and the Department of National Housing (DNH) which bind the parties to consensus based policy making, cooperation and consultation, and ensure that no unilateral action on the part of either the NHF or the DNH is taken.**

(a) **NHF/DNH meeting of 2 December 1992** (negotiations level)

(i) Point 4 (d) of minutes: *"... to obviate unilateral actions this negotiation process will serve as clearing house..... "* (referring to the NHF/DNH negotiations)

(ii) Point 4 (e) of minutes: *"Unilateral actions,..., will not be undertaken by either side and detailed consultations will be part of the process..... "*

(b) **NHF/DNH meeting of 23 April 1993** (negotiations level)

(i) Point 9.1.1 of minutes : *"... agreed that the parties should meet to reconcile issues initiated by the DNH and the NHF in a joint programme of work and target dates".* (Parties being NHF and DNH).

(c) **NHF/DNH meeting of 6 July 1993** (negotiations level)

(i) Point 4.1.2.9.1 of minutes : *"... agreed that the process of policy negotiations will be dealt with at the joint DNH/NHF negotiation sessions".*

(d) **NHF/DNH meeting of 27 September 1993** (Ministerial level)

(i) Point 6 of NHF letter of confirmation of discussion, dated 28/9/93 : *"... existing understanding on unilateral public announcements on matters under negotiation and/or agreed between curselves, was reconfirmed".*

(ii) Point 7 of NHF letter of confirmation of discussion dated 28/9/93 : *"both parties have recommitted themselves to a joint and broad based consensus approach to finding solutions for the housing crisis in South Africa"*

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2. **ACTIONS TAKEN BY GOVERNMENT, breaching agreements reached under (1) above.**

(a) **End May 1993**: Unilateral announcement of implementation of a new capital subsidy of R7 500 applicable to the disposal of State Rental Stock. No prior consultation with NHF or negotiation on the wider implications of the announcement took place. Simply a notification by the Department to the NHF.

(b) **23 September 1993** (Extended Public Committee : House of Assembly): Announcement by Minister of intent to formally announce significant new policy initiatives in the near future, namely :

(i) "... about introducing a safety net for the private sector to enable it to finance housing...".

(ii) "... on further incentives to promote the sale of existing housing stock owned by the authorities".

(iii) ".. attention has been focused on developing equitable policy on rental payments in townships. That too is far advanced .."

(iv) "... reviewing the role and activities of government sponsored organisations and non government organisations..."

On none of these issues is consultation between DNH and NHF currently taking place. No information on the Department's plans and envisioned time frames has been received.

(c) **24 September 1993**: Unilateral announcement by yourself, as Minister, of key elements of agreement reached between the DNH and NHF on 30/8/93, despite various verbal and a written request (letter dated 17 September 1993) by the NHF that the agreement, to have the necessary impact and in line with existing understandings, should be jointly communicated to the public in terms of an agreed strategy.

Such an approach was deemed absolutely essential to indicate to the whole Country that the issue of housing had, in the national interest, been elevated above party political considerations.

(d) **11 October 1993**: Unilateral announcement of a drastic expansion of the R7 500 capital subsidy on State Rental Stock, now to also include service charge arrears and serviced sites. This initiative was announced, despite serious potential consequences in the market place, especially for the financiers of houses disposed of by the State. The announcement also breached previous understandings reached, noted above, namely:

- no consultation between the NHF and DNH took place
- the NHF was notified of the announcement, one hour before the embargo.

We note that a series of meetings between DNH and NHF took place during the time this issue must have been under consideration and approved by Government. Nonetheless, no attempt to consult with the NHF was made.

3. IMPLEMENTATION OF AGREEMENT ON INTERIM HOUSING ARRANGEMENTS (30/8/93)

(a) No agreement could be reached with the Department on creating a mutually acceptable and appropriate implementation capacity for the agreement, despite a formal proposal having been tabled by the NHF and various subsequent attempts to secure agreement over the past six weeks. No firm counter proposals have to date been tabled by the Department.

(b) Information in the NHF's possession, indicating that State machinery has been mobilized to finalise project proposals for approval, by 29 October 1993, utilizing monies set aside for the implementation of the Interim Housing Arrangements agreed between the NHF and DNH. This is despite the inability to reach agreement to create the capacity to translate the broad mutual understanding into detailed project guidelines and an explicit understanding (re-confirmed on 7/10/93) that the R500 million amount set aside will remain intact until implementation of the agreement between the NHF and the DNH.

In order, to refocus the process of developing a broadly supported, national housing programme it is essential that certain existing understandings be reconfirmed by you and your Department. The key issues around which a re-confirmation of commitment is necessary are the following :

(i) **The necessity of public participation.** Overriding acknowledgement that a primary factor negatively influencing the housing delivery process has been the lack of effective beneficiary participation in the decision making process is necessary.

(ii) **The unacceptability of unilateral restructuring**. Government needs to reconfirm its commitment not to embark in processes of restructuring institutions and organisations critical to the way in which the housing sector operates, without such approaches being broadly supported and consistent with agreed policy frameworks, and negotiated between the NHF and Government.

(iii) **The necessity of consensus based policy making and initiative development.** The Government needs to reconfirm their commitment to the development of a new National Housing Policy, strategy, and particular initiatives through a process of consultation and negotiation between the Department of National Housing and the NHF. Any new directions which do not have broad based support and legitimacy will further confuse and undermine the ability of the low income housing sector to begin to operate effectively.

(iv) **The unacceptability of unilateral disposal of state owned housing assets**. Continued introduction / implementation of ad hoc and unilateral measures for the disposal of these assets outside an agreed policy framework between the Department and the NHF is unacceptable.

(v) **Specific issues related to the implementation of the Agreement on Interim Housing Arrangements for Housing** reached between the NHF and the Department for which enabling legislation was passed in Parliament on 24/9/93 :

- agreement on a joint implementation team as a matter of extreme urgency
- deadlines for the appointment of National and Regional Housing Board members
- agreement not to pre-emptively approve projects or allocate funds to housing projects under the old system.

All the members of the National Housing Forum believe that unless the government explicitly and unambiguously re-commits itself to the above fundamental components to building consensus around housing, it is not possible to pursue negotiations on a good faith basis. Consequently, we are temporarily suspending discussions and negotiations on all issues currently under way between the Forum and the government (with the exclusion of the Hostels Agreement) with immediate effect so that all attention can be focused on getting the basis for negotiations back on track within the next week.

This decision does not, however, effect the joint implementation of the agreement on the upgrading of hostel accommodation, where slow but satisfactory progress is being made.

Because of the high public interest and concern regarding the solving of the housing crisis in South Africa, our members believe that the resolution of these concerns is in the broader national interest. Consequently, we have forwarded copies of this letter to you, to the State President, and to the Multi-Party Negotiations Forum at Kempton Park, with a request that they assist in the speedy and permanent resolution of the concerns raised.

On the interest of a speedy resumption of constructive negotiations, and although many NHF members believe the issue should be immediately taken into the public domain, the National Housing Forum proposes to delay the public release of this correspondence for a period of seven days.

The NHF members have committed themselves to not conclude any bilateral agreements with your Department on housing-related matters, except in so far as such bilateral arrangements are addressing the normalisation of relations between the NHF and your Department

We assure you that we all believe that between the National Housing Forum and the government of the day, a unique opportunity exists to lay the foundations for resolving our national housing crisis. The opportunity may not be squandered. In this spirit, we are awaiting an urgent and constructive response from you and your department.

Yours faithfully

IMkhabela

ISHMAEL MKHABELA
for ERIC MOLOBI
Chairperson
National Housing Forum

cc: The State President, Mr FW de Klerk
The Chairperson, Planning Committee, Multi-Party Negotiating Forum

Addendum J

MINISTRY FOR NATIONAL HOUSING AND OF PUBLIC WORKS

20 October 1993

Mr E Molobi
Chairperson
National Housing Forum
P O Box 1115
2000 JOHANNESBURG

Dear Mr Molobi

As you no doubt know I tried unsuccessfully to make telephonic contact with your Vice Chairperson, Mr Mkhabela last week. Had we been able to talk, I have little doubt that much of your faxed letter of the 15th would have become superfluous.

Your letter infers that many of your members apparently believe that I am the cause of deteriorating relationships between Government and the National Housing Forum (NHF). It is of course possible that this is at least partially due to a one sided picture which is presented to them. This could be easily rectified by having broader representation of the NHF at our important meetings. Above all I am sure that their identification with your letter reflects a desire to ensure that a sound and productive relationship between us should be developed in the interests of the housing sector, the economy in general and the country. My department and I fully support that wish and are committed to achieving "unity in housing".

In your letter to the State President you refer to my rejecting agreements reached at departmental level. This should not necessarily surprise you as you were always aware that committee negotiations had to be approved at Principal level. Much of the negotiation took place during the period between my appointment and date of taking office. Every revision I requested was in the interests of good government and the broad public. That the "agreements" were brought into better balance should hardly be described as disruptive behaviour, however frustrating you may have found collective bargaining to be.

Our own initiative in inviting the NHF to become a significant participant in the new National Housing Board substantiates fully our bona fides in this respect. It will be recalled that I opposed the establishment of a new Joint Housing Board with all its attendant structures solely to deal with a specific budget initiative. Instead I proposed that the NHF should

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become fully involved in all housing matters via our envisaged new non-racial single National Housing Board structure. In support we also recorded the attached memorandum of "understandings" between ourselves which established the basis for a defined relationship between the Government and a wide representation of stakeholders in the housing field within the new institutional structures. We achieved consensus on an overall value framework comprising a vision for housing, a national housing goal, numerous basic points of departure, extent of representation on the housing boards and also broad guidelines for the National and Regional boards to follow. Nothing I have done or said in public can justifiably be regarded as being against the letter or spirit of these understandings.

Having set this path together, the department and I proceeded urgently to bring the envisaged Housing Arrangements Bill to Parliament and this legislation was passed on 24 September 1993. Let me also state that this legislation was not automatically achieved as a considerable number of groups had to be assured that we were acting in the interests of all South Africa's communities.

What is now necessary, to bring the whole accord into being, is to establish the new boards urgently and to activate them.

There clearly are problems in making your board nominations as we have been awaiting them for three weeks. In your letters to the State President and me, you allege that housing issues on our part are politically motivated. These allegations are strongly denied and call for substantiation or apology. However, what is apparently a fact according to certain of your members, is that your six nominations are to be party political based whereas our understandings clearly stipulate the overriding consideration of knowledge of and ability in housing matters. I look forward to receiving nominations which will reflect that the NHF itself is not solely politically influenced in their choice of board members. Government nominations will follow urgently and I will be motivated by a desire to achieve a proper balance in every respect on the board before seeking cabinet approval of the final nominations. You have our assurances that we will move speedily in this regard.

Our fundamental approach is to have a statutory body on which all housing instances are represented, including a major representation by the NHF who in fact will be party to selecting half the boards.

Your own interpretation seems to suggest that the Government cannot act without prior indepth consultation with the NHF. It seems that you still wish to "engage the State" and hold the Government accountable to you for all its actions in the field of housing. It has been made clear at Ministerial level that this department cannot and will not abrogate its responsibilities, and being accountable in the final instance for this portfolio, Government must retain its authority. The whole purpose of setting up the structures referred to, is to ensure that we have an orderly and widely representative statutory body which will strive for maximum consensus. Our commitments are contained in the memorandum of understandings and it is not intended at this time to extend those understandings any further. Your required reconfirmations are not necessary as they are dealt with in our "understandings" and in any event their implementation will not take place between Government and the NHF but will flow from the deliberations of the Housing Boards. It

must be obvious to you that it is not practical to continue to negotiate laboriously with or take actions via a relatively amorphous body representing many widely differing interests. The NHF interests will be represented at the boards where decisions will be taken on all the issues raised by you in points 3(i) to 3(iv).

Until the boards are formed we will continue to deal with all matters of importance at "negotiations" and other levels with you. This does not mean that we have to seek your prior consent for exploring and developing initiatives and we will only bring those to the table when we feel satisfied about their viability. I must presume that much the same is happening with your own initiatives or those of your members. We are aware of certain of your own unilateral developments and are quite satisfied to consider these when they have reached an advanced stage. Eg, the Affordable Housing Corporation, in which a number of your members are participating. We also have lodged no objection to your unilateral discussions abroad on South African housing issues and nor have we expressed concern about your unilateral discussions with the Economic Forum where one would have envisaged a co-ordinated approach with our department.

I was obliged to take urgent definitive action without updating you in one instance. This was the recent case where we were obliged to announce the revised capital subsidy on existing housing stock. For the record incidentally, our proposal does not embrace service charge arrears as erroneously stated by you. We have to consider a wide variety of constituencies and representations in Government and in this case I judged that the urgency of the situation in certain areas of the country, where decisions have been awaited from us ever since May, warranted going ahead without further prior wide consultations. You have been aware of this pending matter for more than four months without making any proposals and I in turn had hoped to hold it over until the National Board was formed but in the event could not do so. The leaks which have undoubtedly taken place recently from NHF sources are understandable where so many people have to be taken into confidence but in cases such as this one any further leaks or delays before taking decisive action would have been untenable to many communities requiring clarity on their home ownership rights.

Your general allegations that we are breaching agreements or acting in bad faith are unfounded. Each of us has been involved in circumstances beyond our control from time to time but to suggest deliberate breach is totally unacceptable. A good example is where you suggest that I had to consult with you on my parliamentary duties or speeches. If you believe that I have to obtain your consent to express views regarding housing policy as Minister of Housing or to hold a press conference on a bill submitted is little short of ridiculous. I must repeat that I have a portfolio to run and that I am not subject to the veto of the NHF. I also deny announcing any issues emanating from our understandings, quite unlike certain press articles which appeared to emanate from NHF quarters.

Your suggestion that we are solely responsible for delays in implementing our understandings is again totally one sided. Not only have you not met your commitments in respect of agreed upon dates for nominating members but it has taken nearly two weeks to obtain a response on our suggested press release in connection with our understandings, not to mention the controversial nature of the radically revised document you eventually submitted.

Your threat to publish private correspondence is unfortunate but should you decide to do so

we will be obliged to consider responding in like fashion. Statements to the press by some of your members and your action in directing copies of your letters to the Multi Party Negotiations Forum of course are together tantamount to "public release" in themselves. Equally your suspension of negotiations with us, is in our view unwarranted and leads us to question what effect this action will have on the spirit of our understandings, or on other urgent actions which might have to be taken without your involvement.

As you know I am not given to lengthy correspondence but felt obliged to respond in fair detail, particularly given the suggestion of making our correspondence public property. A meeting between ourselves set for last Friday and cancelled by you would in our view have been a preferable course to follow.

In my view our "understandings" are an excellent basis for ongoing mutual developments in housing. The only sure way to begin operating together on an orderly basis is to expedite the establishment of the housing boards. Any further meetings to make this possible will be welcomed and I would wish to be personally involved in such discussions.

Let me say this once more. It is vastly preferable that both our organisations should fully participate in resolving the enormous housing problem. Relatively minor issues and misperceptions, however aggravating to both of us, should not be allowed to disturb the excellent progress we have made to date or the prospects for a constructive and productive relationship.

Yours faithfully

H L SHILL
MINISTER

ANNEXURE A

AIDE MEMOIRE

TO RECORD UNDERSTANDINGS

ON INTERIM ARRANGEMENTS FOR HOUSING

REACHED BETWEEN

THE DEPARTMENT OF LOCAL GOVERNMENT AND NATIONAL HOUSING

AND

THE NATIONAL HOUSING FORUM

(jointly referred to below as "the parties")

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1. PREAMBLE

The parties jointly recognise the urgent need for the delivery of housing in South Africa to continue and for the rate and scale of the provision of housing to increase even during the interim period while constitutional developments in South Africa are taking place and a new national housing policy and strategy is being formulated. The parties consider that increased housing delivery, coupled with the requirement that approaches adopted must be broadly supported and capable of being sustained in at least the medium term, is essential in order to secure a higher level of certainty and common purpose regarding the approach to resolving the housing crisis in South Africa.

In order for this to be achieved, the parties jointly recognise:

(i) that it is necessary to establish and to commit themselves to an overall value framework on housing matters in South Africa;

(ii) the need to make interim institutional arrangements in order to consider housing projects and programmes for which moneys are available in the National Housing Fund and other similar funds as well as funds to be provided in future budgets for housing (subject to the timing of the restructuring according to the proposals in paragraph 3.1) for as long as the arrangements contemplated in this record of understandings may endure; and

(iii) the need to establish a basis upon which broad based consensus can be reached upon key housing issues and policies to guide the housing sector in South Africa.

The parties support the overall value framework in paragraph 2 which will guide the proposed National Housing Board referred to in paragraph 3.1.

2. OVERALL VALUE FRAMEWORK

The vision, national housing goal and points of departure set out in 2.1, 2.2 and 2.3 below, serve as the overall value framework within which all interim actions for the delivery of housing will be pursued within the boundaries of the Republic of South Africa during the interim period or until substituted by or amplified in terms of a national housing accord as contemplated in 4 below. The intention is recorded that, subject to constitutional and other constraints, national housing policy and strategy should in future apply to South Africa as constituted in 1910.

2.1 Vision for Housing in South Africa

South Africa strives for the establishment of viable communities, situated in areas allowing convenient access to economic opportunities and health, educational and social amenities, within which all its people have access at least to -

2.1.1 a permanent residential structure, with secure tenure, ensuring privacy and providing adequate protection against the elements; and

2.1.2 potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.

2.2 National Housing Goal

To establish a sustainable housing process which enables all people to secure housing with secure tenure within a safe and healthy environment and in viable communities, in a manner that makes a positive contribution to a non-racial, non-sexist, democratic and integrated society, within the shortest possible timeframe.

2.3 Basic Points of Departure

Any housing policy and strategy for the interim or to be addressed in or pursuant to a national housing accord should create an environment conducive to achieving the above mentioned housing goal and be structured in a way that -

2.3.1 Is economically, fiscally, socially and financially sustainable.

2.3.2 Recognises and reinforces the wider economic impact and benefits derived from effective and adequate housing provision in the domestic economy.

2.3.3 Ensures security of tenure and provides for the widest feasible range of tenure options, whether individually or collectively.

2.3.4 Maximises the freedom of the individual to exercise choice in the

satisfaction of his/her housing needs.

2.3.5 Provides access for all people to as many housing options and opportunities as possible.

2.3.6 Facilitates co-ordination between various sectors so as to minimise conflict over demands on scarce resources.

2.3.7 Generates broad based support and involvement on the part of all key actors in order to maximise the mobilisation of resources.

2.3.8 Maximises social and economic benefits to the local community.

2.3.9 Effectively balances the need for increased housing delivery so as to achieve short-term impact, which is of fundamental importance, and the requirement that approaches adopted must be broadly supported and capable of being sustained in at least the medium term.

2.3.10 Promotes the establishment and development of socially and economically viable communities, with particular focus on members of historically and other disadvantaged communities. In particular, however, the most critical need is to ensure, through State intervention, affordable access for the poor to a minimum acceptable standard of housing and necessary services, within the context of both fiscal and other resource constraints.

2.3.11 Promotes the process of social, economic and physical integration in urban and rural areas.

2.3.12 Establishes and ensures equity, transparency and accountability by the public sector in its administration of housing in the appropriate government structures at national, regional and local levels. It is imperative that the housing sector is led and supported by a single national policy and rationalised administration which is accountable in a tangible and measurable manner, to achieve broadly based targets which are properly quantified.

2.3.13 Maximises the involvement of the community and leads to transfer of skills to and empowerment of the community. Active local participation in decision-making in and ownership of the process leading to the implementation of projects should ensure higher levels of appropriateness and acceptability of such projects as well as the development of skills and capacities within these communities to pursue other development objectives.

2.3.14 Creates an environment in which all the roleplayers meet their respective obligations.

2.3.15 Leads to effective State intervention and maximises sustained non-state involvement in housing provision. It is recognised and accepted that the resources available from the fiscus are limited.

2.3.16 Upholds the principles of vertical and horizontal equity in respect of the subsidisation of end-users. This implies that only people in real need of subsidisation should benefit (vertical equity) while comparable value must be received by beneficiaries with the same eligibility profiles (horizontal equity).

2.3.17 Deals sensitively and responsibly with the impact of housing development upon the environment.

2.3.18 Stimulates the effective functioning of a sustainable housing market with vigorous and open competition between suppliers of goods and services.

2.3.19 Ensures that housing is dealt with on a basis which is non-sexist, non-discriminatory in terms of religious conviction or race, nor party political.

2.3.20 Procures political commitment to sustainability of the housing process.

3. INTERIM INSTITUTIONAL STRUCTURES

3.1 Restructuring

To give effect to the basic points of departure, there is an urgent need to create interim institutional structures. Pending further constitutional developments, these structures may need to be adapted as the constitutional structures of the country change.

Accordingly, the Minister of National Housing and of Public Works deems it desirable to replace the National Housing Commission and other similar structures and to reorganise their functions, duties and powers.

The Minister therefore proposes to introduce and promote legislation to give effect to the interim institutional arrangements that will provide for a single national housing body, to be known as the National Housing Board, to replace with effect from 1 October 1993 the -

- National Housing Commission, and
- South African Housing Advisory Council; and

with effect from 1 April 1994 the -

- Development and Housing Board (House of Assembly),
- Housing Development Board (House of Delegates
- Housing Board (House of Representatives), and
- Development Board (House of Representatives).

The National Housing Board will consist of 18 members appointed by the Minister by virtue of their knowledge of and ability in housing matters, being as representative as possible of the various stakeholders in the housing field plus the chairpersons of the Regional Housing Boards. The Minister may, at the request of any member, with the exception of the Chairperson and Vice-chairperson, appoint an alternate member to act for limited periods in the absence of the member. An alternate member may attend a meeting of the Board in the absence of the relevant member and vote on his/her behalf on any matter on which the board is required to take a decision.

The Minister will appoint members of the National Housing Board for an initial 24 month term on the following basis:

- 6 members as nominated by the National Housing Forum;
- 6 members representing Government; and
- the remaining members who have, outstanding knowledge of or expertise in housing and related matters, to be agreed upon between the parties.

After consultation between the parties, the Minister will nominate Chairpersons for the National and Regional Housing Boards and the National Housing Forum will nominate Vice-Chairpersons. Neither party will unreasonably withhold its approval of the nomination of the other party.

The object of the National Housing Board will be to guide and co-ordinate the execution of national housing policy and strategy, subject to the directions of the Minister.

Regional housing boards will be responsible for the execution of housing policy and strategy under the guidance of the National Housing Board. The Minister will appoint regional housing boards. Provisions relating to the constitution of the National Housing Board, the appointment of its members and ancillary matters will apply mutatis mutandis to regional housing boards. The Minister will, in consultation with the National Housing Board, determine the functions, of the regional housing boards. In appointing members to the regional housing boards, the parties will take regional interests into account. The chairpersons of regional housing boards will serve, ex officio, as members of the National Housing Board.

The Minister records that it is intended that the National Housing Board and regional housing boards should make every effort to reach consensus on all matters on which they are required to take decisions.

However, in the absence of consensus on a matter on which a board is required to take a decision, the relevant Chairperson will consult with the Vice-Chairperson in order to reach agreement on a binding ruling, which will constitute a decision of the Board.

Failing such agreement, between the Chair and Vice-Chairperson, the Chairperson, if so requested by the members, will adjourn the meeting, for such a period as he deems necessary, in the light of the nature of the decision to be taken. Should, on

the meeting not being adjourned or after adjournment of the meeting, consensus again not be attained on the matter at hand, the Chairperson, after consultation with the Vice-Chairperson, will make a ruling which will be binding on the relevant board.

The quorum at any meeting of a board will be two thirds of the members of that board. A member who is not in agreement with a decision of the Board, will be entitled to request that such dissention be recorded in the minutes.

For purposes of the administration of the assets of the National Housing Board, provision is made for the appointment of committees of officials at regional level. These committees are to administer the assets of the National Housing Board under the policy directives of the Board, as approved by the Minister. Chair-and Vice-Chairpersons of these regional administrative committees are to be appointed after consultation with the National Housing Board.

To assist the National Housing Board in the performance or exercise of its functions, duties and powers, the Minister, or with his authorization, the Director-general will, after consultation with the National Housing Board, designate an adequate complement of officers and employees (including employees on contract) of the Department as contemplated in section 7(1) of the Public Service Act, 1984, or appoint any such person as he may deem fit, to render an effective and objective service to the Board. To assist the Regional Housing Boards in the performance or exercise of their functions, duties and powers, the Administrators of the Provinces or, if authorised, the Directors-General of the Provinces will, after consultation with the relevant Regional Housing Board, designate an adequate complement of officers and employees (including employees on contract) of the Provincial Administration, or appoint any such other person as they may deem fit, to render an effective and objective service to these Boards. Appointments of the heads of the National and Regional secretariats are to be made in consultation with the Chairperson and Vice Chairperson of the relevant Board.

The Director-general: Local Government and National Housing will be responsible for the administration of the various statutory funds. He will be the accounting officer for purposes of the Exchequer Act, 1975, in relation to the moneys of such funds, subject to the Director-general of a Provincial Administration being responsible, as accounting officer, for so much of the moneys of such funds that have been

entrusted to him in connection with the performance or exercise of the functions, powers and duties of a regional housing board or committee of officials referred to.

3.2 Guidelines for the National Housing Board and Regional Housing Boards

In pursuit of its object, the National Housing Board will consider the following, as guidelines or criteria for application by itself and regional housing boards, within the agreed overall value framework and with due regard to existing housing policy and strategy, as well as to policy adjustments from time to time arising from the ongoing negotiation process on housing policy and strategy as well as changed circumstances:

For purposes of these guidelines "intervention" denotes any measures adopted by the National Housing Board, with the concurrence of the Minister, in furtherance of the vision, goal and points of departure set forth in paragraph 2 above.

3.2.1 Comprehensive Approach

3.2.1.1 In addressing the needs of disadvantaged communities, interventions should support the vision, goal and points of departure, set out in paragraph 2, as holistically as possible. In particular, attention should be devoted to interventions

- to address the need for end-user subsidisation and finance;
- to achieve the maximum gearing of public sector financial resources for housing with private sector/community resources;
- to build effective institutional capacity; and
- to secure ongoing physical and social development through community capacity building as part of the housing delivery process,

that are, wherever possible, aimed at the optimum realisation of the economic potential of the country and all its peoples. Participation by Government and its intervention in the economy should be limited to the minimum.

3.2.1.2 The upgrading, rehabilitation, consolidation and increasing of existing housing stock (especially in the townships and inner cities) as well as inner city land infill, the upgrading and consolidation of existing informal settlements and the promotion of new areas of informal and formal settlements (including rural areas), are to be supported. The upgrading and/or conversion of existing single accommodation (i e hostels) should also be addressed.

3.2.1.3 Interventions should, in principle, apply within the total geographical area of South Africa as constituted at Union in 1910, with due regard to constitutional, jurisdictional and administrative boundaries and constraints, including fiscal transfers.

3.2.2 Social Compacts

3.2.2.1 Intervention should serve to maximise harmony between sectors and community cohesion while minimising the potential for conflict over resources. Violence torn areas in which peace and reconstruction pacts have been formed should, where appropriate, receive priority attention.

3.2.2.2 Where appropriate, local initiative, participation in and contribution to the planning and implementation of social and physical development activities should be maximised.

3.2.2.3 Intervention should, where practicable, stimulate the formation of inclusive community based implementing structures.

3.2.2.4 Where necessary, implementing agencies (which may include local authorities), local authorities and representative community organisations should create appropriate institutional structures to ensure effective public participation in respect of project planning, implementation and maintenance.

3.2.2.5 Social and economic benefits to the locally affected community should be maximised.

3.2.2.6 Except in special circumstances, allocations of subsidies should be made directly to end-users, or in respect of a particular envisaged project, to end-users applying on a collective basis. If the subsidy scheme is project-based, each resulting project application should be supported by a broad social compact between the applicant community / group and all relevant other local stakeholders. Such compacts should result in the quantification of contributions to the project by each stakeholder (including relevant authorities and the community) and in the clear definition of roles and responsibilities.

3.2.2.7 Intervention should be based on the principle of payment for services rendered and received.

3.2.2.8 Local authorities should also be encouraged to play a full and supportive role. In all instances, such authorities must demonstrate capability to deliver and perform efficiently and productively.

3.2.3 New Housing Initiatives/Measures

3.2.3.1 Without pre-empting the outcome of longer term policy negotiations between the parties, the Board should consider, as a matter of urgency, an equitable level of subsidisation for the interim with due regard to existing subsidy schemes or formulae, as well as fiscal capacity and sustainability.

3.2.3.2 Interventions introduced during the interim period should be seen as the first phase of an ongoing process of rationalisation to improve transparency, efficiency and accountability within the housing sector.

3.2.3.3 Such interventions should achieve sustained involvement of both the public and private sectors in housing delivery.

3.2.3.4 Such interventions should be directed at maximising the freedom of choice of consumers in the housing market.

3.2.3.5 A primary objective should be security of tenure without any discrimination in terms of race, sex, marital status, financial means and other factors. Every person shall have the right to acquire, hold and dispose of rights in property and protection against arbitrary dispossession. The status of women with respect to access to housing should receive special attention.

3.2.3.6 Intervention should direct development towards existing economic opportunities and promote economic efficiency and spatial integration through the optimisation of location, service levels and housing standards.

3.2.4 Consideration of Projects

3.2.4.1 Project selection procedures should not exclude any potential roleplayers capable of fulfilling their responsibilities productively and effectively.

3.2.4.2 Project proposals should demonstrate level playing fields between government and non-government delivery agencies. For example there should be no additional subsidies or preferential State assistance favouring any delivery agencies, other than in exceptional circumstances.

3.2.4.3 Without neglecting rural areas, priority should be given to housing projects effectively addressing the deficiencies in spatial ordering in South African towns and cities and which provide housing opportunities with convenient access to economic opportunities and health, educational and social amenities.

3.2.4.4 Emphasis in terms of State assistance should be placed on project applications focusing on those with the least ability to contribute to the satisfaction of their own housing requirements.

3.2.4.5 Continued financial and economic sustainability of interventions should be demonstrated at the stage of application. Recurrent financial obligations for the State should be minimized as far as possible.

3.2.4.6 Projects should, other than in exceptional circumstances, clearly demonstrate appropriate provision for training and the transfer of skills and should also provide for appropriate ongoing support for local small business and/or co-operative development.

3.2.4.7 Other than in exceptional circumstances, project applications should demonstrate effective and sustainable participation of communities in decision-making processes around the planning and implementation of housing projects, with the focus upon the transfer of skills to and empowerment of local participants.

3.2.4.8 Emphasis should be given in projects to maximising the gearing of public sector funds with private sector finance, including personal savings and contributions in cash or in kind, within the affordability constraints of the individual.

3.2.4.9 Project proposals should contain and demonstrate an approach ensuring access to all housing opportunities which is not racially biased or based on discrimination in respect of religion, political conviction or gender.

3.2.4.10 Emphasis in the evaluation of project proposals should be placed on maximising employment creation.

3.2.4.11 Levels of service (especially municipal services) should be as affordable as possible and allow for upgradeability and sustainable operation and maintenance. Specific attention should be given to the electrification of new and existing housing projects.

3.2.4.12 The capital cost of bulk and connector services should not be recovered through the sale of the stand and should thus be excluded from the end-user subsidy. These costs are to be provided by a competent authority - exceptions to be referred to National Housing Board.

3.2.4.13 Project design should include continued organisational support and training in the medium term, so that the processes of consolidation - both social and physical - continue beyond the formal "project" phase.

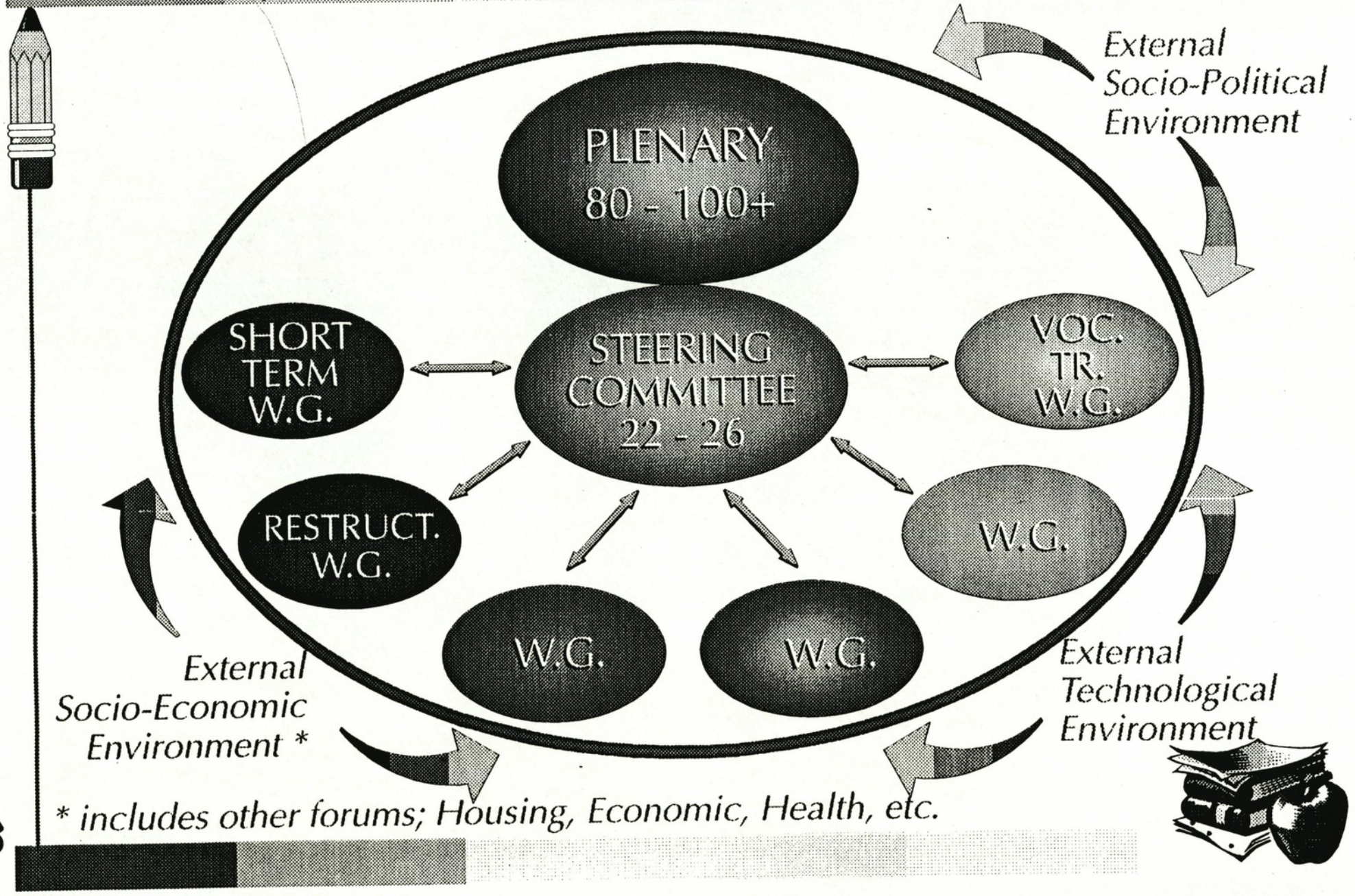
3.2.4.14 The promoters of projects should be encouraged to negotiate professional fees that reflect both the market segment and the social nature of the envisaged projects. Emphasis should be placed on supporting local initiatives and small companies on the basis of affirmative action, with larger, established companies providing appropriate support and training. The normal requirements of transparent, consistent evaluation procedures and standards, cost effectiveness and quality must in all instances apply.

4. NEGOTIATION OF NATIONAL HOUSING POLICY AND STRATEGY

4.1 Whilst the primary objective of the parties is to effectively increase housing delivery in the short term, the ultimate objective is to reach consensus, as a matter of urgency, on a comprehensive national housing policy, strategy and institutional arrangements for South Africa, to form the basis of a national housing accord.

4.2 Any extension of these understandings on matters of housing policy and strategy reached in the interim, is to be implemented on an ongoing basis in order to give effect to the basic points of departure and maintain progress towards achievement of the ultimate objective. Any such understandings are to be binding on the proposed interim institutional structures.

N.E.T.F. - AN INTEGRATED STRUCTURE

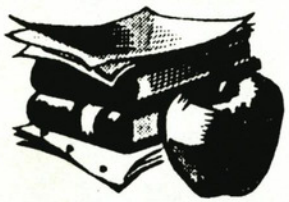


* includes other forums; Housing, Economic, Health, etc.

Arabsun K

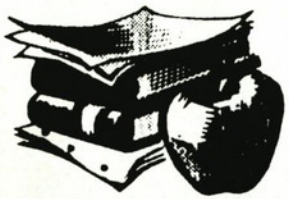
NATIONAL EDUCATION AND TRAINING FORUM

FOUNDING AGREEMENT



PROCESS TO DATE

- National Education Conference - March 1992
- Bilateral Talks between Govt and NEC - March 1992 - March 1993
- Trilateral Talks between Govt, Business and NEC - April & May 1993
- Facilitating Group of Six Stakeholders - May 1993 to date
- Consultative meeting on NETF - 3 July 1993
- Founding meeting where Founding Agreement will be signed - 31 July 1993 ?



STAKEHOLDERS

The following composition of PLENARY membership is proposed :-

Central Government

National Education Conference (NEC)

Business

Self-Governing Territories (SGT's)

TBVC States

Training Sector

Labour

Teacher Organisations

Tertiary Sector Educators

Student Organisations

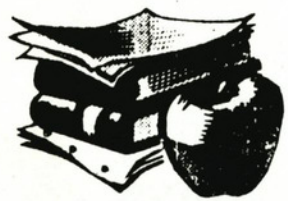
Parents

Providers:-

- Tertiary Providers
- Private Independent Sector Providers
- Non-Formal Educators

FACILITATING GROUP MEMBERS

Dr A P Dippenaar	Chairman
Dr J G Garbers	Department National Education (DNE)
Dr E H Davies	Education Co-ordination Service (ECS)
Dr Z B Louw	Department Education and Training (DET)
Mr R H du Preez	Department Education and Training (DET)
Mr A M Muller	House of Representatives
Dr G D Haasbroek	Department Manpower
Dr R Eberlein	National Training Board (NTB)



FACILITATING GROUP MEMBERS

Mr J Samuel	National Education Conference (NEC)
Mr A Essop	National Education Conference (NEC)
Mr T A Coombe	National Education Conference (NEC)
Mr M Leeuw	National Education Conference (NEC)
Mr J Waja	National Education Conference (NEC)
Mr H Hendriks	United Teachers Association of South Africa (UTASA)
Mr I Vadi	South African Democratic Teachers Union (SADTU)
Mr A S Powell	Teachers Federal Council (TFC)
Mr J L Stonier	National Professional Teachers Organisations of S.A. (NAPTOSA)

FACILITATING GROUP MEMBERS

Mr F A Sonn	Committee of Technikon Principals (CTP)
Prof G J Gerwell	Committee of Univ. Principals (CUP)
Mr N M Louw	Federal Committee of Technical College Principals (FEDCOM)
Mr R P de Stadler	Federal Committee of Technical College Principals (FEDCOM)
Prof A L le Roux	Committee of College of Education Rectors of S.A. (CCERSA)
Mr E Kretchmer	Afrikaanse Handels Instituut (AHI) & PRISEC
Mrs J C Lopes	Steel & Engineering Industries Fed. of S.A. (SEIFSA) & PRISEC
Mr A O Tonkin	South African Chamber of Business (SACOB) & PRISEC
Mr B A Phillips	Chamber of Mines (COM) & PRISEC

PARTICIPATION

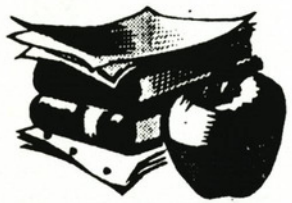
- Determined by the Plenary and based on Executive Committee recommendations, with due regard to the principle of INCLUSION

- NETF participation shall be based upon the following criteria :-

  - national stakeholders in education and training

  - subscription to the content of the Founding Agreement

  - accommodation of further members shall be provided for



PRINCIPLES

INCLUSION

- national education and training stakeholders

- continuously affected by education and training policy

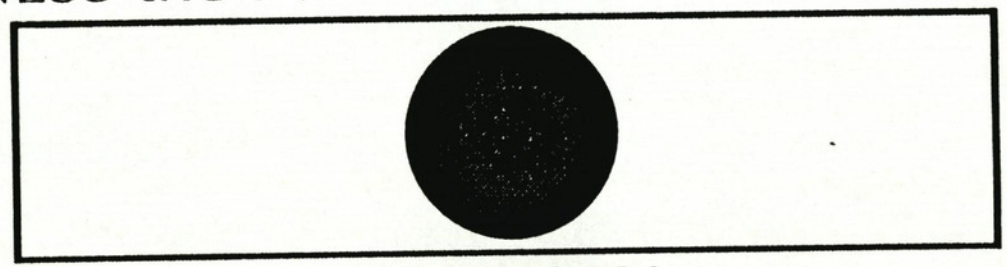
CONSENSUS-SEEKING

AUTHORITY

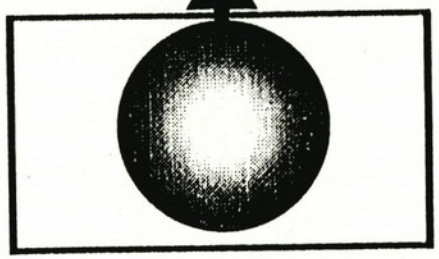
- the capacity to arrive at approved, implementable and effective policy

FORM AND STRUCTURE

To ensure FULL REPRESENTATION and
EFFECTIVENESS the Forum shall be structured as follows :-



PLENARY



EXECUTIVE COMMITTEE

WORKING GROUP *WORKING GROUP*

WORKING GROUP

FUNCTIONS

The functions of the Plenary shall be :-

- to agree the framework of values of the Forum's activities
- to seek agreement on matters relating to the MISSION and OBJECTIVES
- to receive, debate, amend and / or approve measures proposed by the Executive Committee on the basis of submissions by the Working Groups
- to monitor progress in honouring commitments entered into by parties

PROCESS

- *AGENDA*
  - procedures will be established
- *CONSENSUS*
  - strive for unanimous agreements
  - principle of sufficient consensus
  - dissenting views will be recorded
- *EXTERNAL LIAISON*
  - liaison on common interest
- *PROCEDURES*
  - to be specified in an annexure
- *FUNDING*
  - an appropriate mechanism

AGREEMENTS AND DECISIONS

A distinction is made between :-

- Agreements on Primary matters, includes all substantive matters relating to education and training policy and provision

- Decisions on Secondary matters, includes procedural or administrative matters relating to the effective functioning of the Forum

- Chairperson's ruling, shall determine whether a matter is to be treated as a primary matter for agreement or a secondary matter for decision

PROCEDURES ON AGREEMENTS AND DECISIONS

Reaching Primary Agreements :-

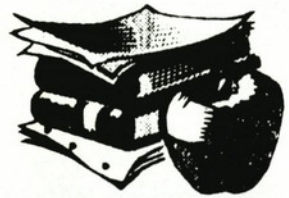
Tabling at the Plenary

Working Groups to investigate, prepare a draft agreement and implementation strategy

Executive approval sought following mandate

Consideration and approval by Plenary

Implementation



PROCEDURES ON AGREEMENTS AND DECISIONS

Implementation and Monitoring

- Primary matter agreements shall be made public
- Working Group shall monitor implementation of an agreement
- Executive Committee to establish an Implementation, Monitoring and Investigation Committee to resolve disputes on implementation of agreements
- Forum members shall be committed to a Code of Conduct

SHORT TERM (crises) COMMITTEE

OBJECTIVES :

- To resolve education crises on which effective action can be taken
- To involve all those parties (stakeholders) who need to be part of the solution
- To communicate solutions to all stakeholder groups effectively and speedily

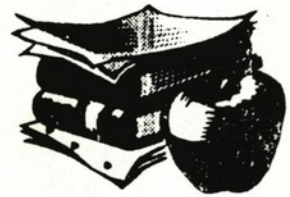
SHORT TERM (crises) COMMITT

MEMBERSHIP OF WORKING GROUPS :

- PERMANENT MEMBERS - major stakeholders involved in the issue to be resolved

- OTHER MEMBERS - may include experts in specific areas related to the issue being considered

Note:
There may be a number of sub-groups working concurrently on a variety of crisis issues



SHORT TERM (crises) COMMITTEE

ISSUES IDENTIFIED FOR CONSIDERATION :

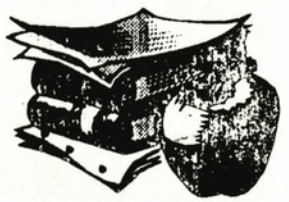
- Job losses / early retirements - H.O.R. 1993
- Disruptions to schooling - 1993
  (incl. days lost and violence in schools)
- Exam fees - 1994
- Other issues (still to be prioritised)

SHORT TERM (crises) COMMITTEE

CRISES RESOLUTION :

ISSUE : Early retirement of teachers - H.O.R.

- Deferment of package optional to 31/12/93 for those teachers still in service as at 29/06/93
- Consideration by H.O.R. education authorities of filling vacant posts created by early retirements where this disrupts education process
- No further rationalisation/restructuring without involvement of N.E.T.F.



DRAFT AGENDA AND DOCUMENTATION

for the meeting of the

PLANNING COMMITTEE

to be held at 10h00 on Thursday

28 OCTOBER 1993

VOLUME II

ANNEXURE L

CC TE Mea ITE

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

8th Floor, City Centre
71 Loop Street
CAPE TOWN
8001

P O Box 15503
VLAEBERG
8018

Tel: (021) 23 6309
Fax: (021) 24 3561

VERY URGENT

15 October 1993

The Chairperson
Technical Committee on Constitutional Issues
The Multi-Party Negotiation Process
World Trade Centre
Kempton Park

Attention: Dr. Theuns Eloff
Mr. Mac Maharaj
The Chairperson, Technical Committee
on Constitutional Issues

Dear Sirs,

Re: **SUBMISSIONS BY NADEL IN RESPECT OF THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.**

Our previous communications refer.

As indicated, please find enclosed herewith our submissions in respect of the Twelfth Report of the Technical Committee on Constitutional Issues dated 02 September 1993.

We would like to record that we shall be available at your convenience, to elaborate or elucidate upon any of the issues raised in our submissions, if required to do so.

Yours faithfully

ADV. J.H. DE LANGE
LEGAL EDUCATION, RESEARCH AND TRAINING PROJECT OF NADEL

Fax. no: 011-3972211

MEMORANDUM SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS ON THE TWELFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.

A. EXECUTIVE SUMMARY

1. The views contained herein are those held by the National Association of Democratic Lawyers (hereinafter referred to as Nadel).

2. The purpose of this report is to comment on the Twelfth Report of the Technical Committee on Constitutional Issues dated 02 September 1993 (hereinafter referred to as the Twelfth Report).

3. Nadel would at the outset respectfully acknowledge and congratulate the committee on the careful consideration, scholarship, draftsmanship and in particular, the approach, underpinning the Twelfth Report. It is our considered opinion that the model being proposed is on the whole appropriate for our country in the transitional period, although we differ, in some respects fundamentally, with certain aspects of the model being proposed. We would like to emphasize that the model being proposed must be regarded as a transitional arrangement, until the Constitutional Assembly has pronounced itself definitively on the issues under discussion. To this end, we acknowledge that whatever transitional model is agreed upon will not and cannot be everything to everyone.

4. The key elements that Nadel would want to see contained in a transitional model for our court structures and judiciary, are:

(i) Proposed Model

a) that a new and separate Constitutional Court (hereinafter referred to as a CC) be established, parallel to the Appellate Division of the Supreme Court (hereinafter referred to as the AD), creating a hybrid split stream system, within the existing two- tier court structures, with its own seat, its own President, its own judges, its own jurisdiction and its own rules and procedures;

b) that the CC will be the court of final instance in respect of all constitutional matters, and in some instances even a court of first instance in certain specified Constitutional matters;

c) that provision should be made for direct access to the CC in certain circumstances, as listed in paragraph 43 below;

d) that the CC should be provided with abstract review in certain circumstances;

e) that the CC will be able to provide legislation with relative validity in certain circumstances;

f) that only the CC be granted jurisdiction to adjudicate in disputes between different organs or levels of government;

g) that the CC will be composed of eleven judges;

h) that in certain specified constitutional matters the CC shall preside en banc;

i) that in certain unspecified constitutional matters the President of the CC may appoint a Bench comprising three (3) to eleven (11) CC judges to hear the matter;

j) that in all unspecified appeals of a constitutional nature the President of the CC may decide to appoint a joint panel of three (3) to eleven (11) judges, composed of an equal number of judges from the AD and CC, with an additional CC judge being appointed as senior presiding judge;

k) that the President of the CC will be empowered in any constitutional matter of first instance in which a dispute of fact exists, or a ruling on the facts is necessitated, to take whatever steps are necessary and appropriate to obtain a ruling in respect of such factual issue;

l) that it would be undesirable to make more changes to the structure, organization and functioning of the present court system than is absolutely necessary;

m) that provision must however be made in the constitution for a competent legislative authority to effect whatever changes are necessary to the existing court structures and judiciary, during the transitional period, including a provision to establish a single court system and specialized courts, if deemed necessary;

n) that in all matters of a non-constitutional nature the existing court structures shall retain their jurisdiction, with the AD retaining its appellate jurisdiction in all such matters;

o) that the AD may only exercise such constitutional jurisdiction, as may be derived

jointly with the CC, in terms of paragraph (j) above;

p) that the Supreme Court (hereinafter referred to as the SC) be provided with jurisdiction in all matters of a constitutional nature, which do not fall within the exclusive constitutional jurisdiction of the CC;

q) that in the event of the SC being granted jurisdiction to pronounce on the constitutionality of Parliamentary legislation, then the operation of such a ruling should be made subject to a definitive ruling by the CC, which must be dealt with and delivered expeditiously;

r) that the Magistrates Court (hereinafter referred to as the MC) be provided with constitutional jurisdiction, except in respect of adjudication relating to the constitutionality of any legislation or subordinate legislation, as well as disputes between different organs or levels of government;

s) that in the event of the constitutionality of any legislation or subordinate legislation being disputed in the MC, it shall deem same to be constitutional and adjudicate in the matter accordingly; and

t) that all qualified members of the legal profession shall have a right of appearance before the CC.

(ii) <u>Alternative Model</u>

a) that a new and separate CC be established at the apex of the existing court structures, as a third tier in a single stream court system, within the existing court structures, with its own seat, its own President, its own judges, its own jurisdiction and its own rules and procedures;

b) that the CC will be the court of final instance in respect of all constitutional matters, and in some instances even a court of first instance in certain specified Constitutional matters;

c) that provision should be made for direct access to the CC in certain circumstances as listed in paragraph 43 below;

d) that the CC should be provided with abstract review in certain circumstances;

e) that the CC will be able to provide legislation with relative validity in certain circumstances;

f) that only the CC be granted jurisdiction to adjudicate in disputes between different organs or levels of government;

g) that the CC will be composed of eleven judges;

h) that in certain specified constitutional matters the CC shall preside en banc;

i) that in certain unspecified constitutional matters the President of the CC may appoint a Bench comprising three (3) to eleven (11) CC judges to hear the matter;

j) that the President of the CC will be empowered in any constitutional matter of first instance in which a dispute of fact exists, or a ruling on the facts is necessitated, to take whatever steps are necessary and appropriate to obtain a ruling in respect of such factual issue;

k) that it would be undesirable to make more changes to the structure, organization and functioning of the present court system than is absolutely necessary;

l) that provision must however be made in the constitution for a competent legislative authority to effect whatever changes are necessary to the existing court structures and judiciary, during the transitional period, including a provision to establish a single court system and specialized courts, if deemed necessary;

m) that in all matters of a non-constitutional nature the existing court structures shall retain their jurisdiction, with the AD retaining its appellate jurisdiction in all such matters;

n) that the AD shall have jurisdiction in all appeals of a constitutional nature, except if one or more of the issues in dispute fall within the exclusive constitutional jurisdiction of the CC, or if the CC under any of the powers it may have decides that a specific appeal should be heard directly by the CC before and without being adjudicated upon in the AD;

o) that the SC be granted jurisdiction in all matters of a constitutional nature, except if such matter falls within the exclusive

constitutional jurisdiction of the CC, or if the CC under any of the powers it may have decides that a specific appeal should be heard directly by the CC before and without being adjudicated upon in the SC and/or AD;

p) that in event of the SC, including the AD, being granted jurisdiction to pronounce on the constitutionality of Parliamentary legislation, then the operation of such a ruling should be made subject to a definitive ruling by the CC, which must be dealt with and delivered expeditiously;

q) that the MC be provided with constitutional jurisdiction, except in respect of adjudication relating to the constitutionality of any legislation or subordinate legislation, as well as disputes between different organs or levels of government;

r) that in the event of the constitutionality of any legislation or subordinate legislation being disputed in the MC, it shall deem same to be constitutional and adjudicate in the matter accordingly; and

s) that all qualified members of the legal profession shall have a right of appearance before the CC.

iii) <u>Appointment Mechanisms</u>

a) that different selection mechanisms should be created for appointments to the CC, appointments to the SC and appointments to the magistracy;

b) that judges of the CC should be appointed by a multi-party Parliamentary committee, in which each party is represented proportionally and decisions are to be taken, by way of a two-thirds vote. Such a mechanism must also provide for Parliament to approve the nominees en bloc with a two-thirds vote; for the legal sector to be consulted in respect of such CC appointments; and for appropriate and effective deadlock-breaking mechanisms;

c) that judges of the SC should be appointed by a Judicial Service Commission (hereinafter referred to as a JSC), which should be broad-based and balanced with regard to race, gender and background, and in which a majority of members should come from outside of the legal sector, whilst retaining appropriate representation from such sector;

d) that the Chairperson of the JSC shall be appointed from amongst its members and by its members, at its first sitting; and

e) that judges should be appointed from all branches of the legal sector, without discrimination and in accordance with certain specified criteria.

5. In our submissions hereafter we elaborate upon each of these aspects, and we also deal with a few other pertinent and related issues.

B. INTRODUCTION

6. In these submissions we shall confine our comments and opinions, in the main, to the Twelfth Report. However, we have also had regard to and may comment on aspects of the Chapter On the Administration of Justice of the Technical Committee on Fundamental Rights; the Memorandum submitted on behalf of the Judiciary of South Africa on the Chapter on the Administration of Justice in the Draft Interim Constitution (hereinafter referred to as the Judges First Memorandum); the Memorandum submitted on behalf of the Judiciary of South Africa on the Twelfth Report of the Technical Committee on Constitutional Issues (hereinafter referred to as the Judges Second Memorandum); the submissions made by the General Council of the Bar to the MPNP in respect of the Twelfth Report (hereinafter referred to as the GCB submission); and the submissions made by the Association of Law Societies to the MPNP in respect of the Twelfth Report (hereinafter referred to as the ALS submissions).

7. These submissions are informed by decisions taken over the years by our General Council and our National Executive Committee, as well as the deliberations and recommendations emanating from our Conference on "Reshaping the Structures of Justice for a Democratic South Africa", which was held at the Farm Inn, Pretoria, on 30 September and 01 October 1993 (hereinafter referred to as the Conference).

8. Invitees to the Conference were drawn from a very wide spectrum of South African opinion, including: representatives from the Nadel membership; international speakers; representatives from South Africa's liberation movements, i.e. the African National Congress (ANC), the Pan Africanist Congress (PAC) and the Azanian Peoples' Organization (AZAPO); representatives from other lawyers organizations and structures like the Black Lawyers Association (BLA), the Lawyers for Human Rights (LHR), the Association of Law Societies (ALS), the GCB; representatives in the employment of the State, from the judiciary,

South African Law Commission (hereinafter referred to as the SALC), the Office of the Ombud and the Goldstone Commission; individual lawyers in private practice at the Bar and Side-Bar; and legal academicians from many of the South African Universities.

9. We intend responding to the Twelfth Report by broadly addressing the following key issues:

(a) The structures and functioning of our court system during the transitional period;

(b) The composition and appointment of our judiciary and magistracy during the transitional period; and

(c) Miscellaneous Issues.

C. **STRUCTURE AND FUNCTIONING OF OUR COURTS**

10. Under this heading the issues in the Twelfth Report to be addressed and in respect of which Nadel wishes to make recommendations relate to:

a) Whether there should be a new and separate CC, parallel to the AD, within a split stream two-tier court system, or whether the CC should be a Constitutional Chamber in the AD within a single stream court system.

b) The composition and functioning of the CC.

c) The structure of the ordinary courts during the transitional period.

d) The jurisdiction of the CC.

e) The jurisdiction of the AD in constitutional matters.

f) The jurisdiction of the provincial and local divisions of the SC in constitutional matters.

g) The jurisdiction of the MC in constitutional matters.

h) Single or split court system and judiciary.

i) Specialized courts.

j) Right of appearance in the CC.

k) Alternative model: whether there should be a new and separate CC, at the apex of the existing court structures, as a third tier, within a single stream court system.

11. We deal with these matters seriatim.

(a) Separate CC or a Constitutional Chamber of the A.D.

12. We are convinced that the arguments in favour of the creation of a CC are clearly decisive. In fact, we have noted that no serious or logical arguments have been put forward in the public domain for debate, nor in submissions to the Multi-Party Negotiation Process (hereinafter referred to as the MPNP), advocating a contrary position. However, that is where the consensus ends. Although there appears to be almost unanimity on the creation of such a CC, for the new constitutional state during the transitional period, almost all other aspects of such a CC appear to be in dispute, for example, the structure, composition and functioning of the CC; the relationship of the CC with the existing courts; and the appointment of judges to the CC; and so forth.

13. Nadel has noted and thoroughly discussed all the different models being proposed for consideration in the Twelfth Report, SALC Report, Judges Memoranda, the GCB submission and the ALS submission. Nadel is of the view that there would appear to be three possible models that should be considered:

a) a new and separate CC, parallel to the AD, within a split stream court system, creating a two-tier hybrid system within the existing court structures (hereinafter referred to as Model A);

b) a new and separate CC, at the apex of the court structures, creating a three-tier single stream system, within the existing court structures (hereinafter referred to as Model B); or

c) the CC should be a Constitutional Chamber in the AD, within the existing single stream court system (hereinafter referred to as Model C).

14. We intend dealing with Models A and C, by way of comparison, in paragraphs 12 - 29, as elaborated upon in paragraphs 30 - 70 herein; whereas Model B, we deal with, as an alternative option, in paragraphs 71 - 73 below. However, the comments made in respect of Model A, in paragraphs 29 - 70 herein, are to a large extent equally applicable to Model B. It would become clear that we completely reject Model C, as wholly inappropriate for our country, in the transitional period. On the other hand, we support both Models A and B, which to a large extent are similar in most respects, except for certain differences in terms of structuring, functioning and, in the main, in respect of the AD's constitutional jurisdiction.

15. Nadel, in broad terms, agrees with the model (Model A) being proposed by the Technical Committee on Constitutional Issues (hereinafter referred to as the TECCOM), as set out in paragraphs 3.1, 3.5, end of 3.6, 3.7, end of 4.2 and 4.6, pertaining to the structure and relationship of a new CC vis-a-vis the existing court structures. In other words, Nadel agrees to the establishment of a CC, parallel to the AD, as a new, independent and entirely separate court from the existing court structures, within a hybrid system, in which it will be the court of final instance, and in some specific instances even a court of first instance, on constitutional issues. To this end, we disagree with the proposals put forward by the SALC, GCB and the Judges for an integrated single stream model, where the CC is to be made a special Chamber of the AD.

16. Our support for Model A, a separate CC within a hybrid model, as outlined in paragraph 5.3 of the GCB submission, finds its rationale in the reasons listed in the Twelfth Report, at paragraphs 2.3, 3.7 and to some extent paragraphs 2.1 and 2.2, without having to list and elaborate on all such reasons again. However, to some extent, these arguments, although wholeheartedly supported, are of a technical nature, and Nadel would want to state hereafter what it regards as the fundamental reason for its support of a separate CC, whether as proposed in Model A or B above.

17. It has been accepted by the MPNP that South Africa will become a constitutional state in which the judiciary will have the power to review and set aside unconstitutional legislation and actions. Therefore the role of the courts in the future is going to be different to their role in the past. In the past they were called upon to apply statutory enactments and the common law to the facts of the cases before them. Part of their work involved the enforcement of apartheid and the draconian security laws by which apartheid was kept in place. That will now change. The courts will continue to interpret statutes and apply the common law, but the apartheid and security laws will be repealed, and the courts will be given a new responsibility. They will be required to interpret the constitution, to enforce and give substance to the fundamental rights which it contains, and to pronounce upon the validity of legislation that is challenged as being unconstitutional. In carrying out these tasks they will be dealing with sensitive and contested social and political values, and as a result, could easily be drawn into controversy over the decisions that they make.

18. The issue of constitutional adjudication therefore calls for special attention. The question which

must be squarely faced by the MPNP and the TECCOM is, whether the present court structures and judiciary, in particular the AD, which served and underpinned the Apartheid edifice, are the most appropriate structures to solely fulfill such a function of constitutional adjudication in the new emerging democracy during the transitional period. The representatives of the SALC, GCB and the Judges in their proposals do not address the disabling effects of the historical role of the South African courts. There seems to be an assumption that the old structures, which were part of an apartheid dispensation, can simply be transported into a democratic, rights-based society and be received with open arms by the community, of whom the majority were the victims of the prior system. For the reasons set out hereunder, Nadel believes that this assumption is wrong.

Legitimacy crisis facing our legal system and institutions.

19. Nadel believes that the whole South African legal order suffers from a very serious crisis of credibility, efficacy and legitimacy. This submission would apply equally to the substantive law itself, as well as the structures administering, underpinning and implementing such law. The reasons for this crisis are not hard to find.

20. The majority of South Africans have, for almost three and a half centuries, been excluded from, meaningfully and on a footing of equality, participating in the political and economic life of our nation. For instance, all constitutional orders devised to date, in 1910, 1961 and 1983, excluded Africans from a meaningful involvement in the political and economic arena. Therefore, each of these constitutional orders have allowed successive white minority governments to adopt and implement social and economic policies, which allowed for systematic and deliberate dehumanizing and degrading experiments at social engineering, particularly in the last four and a half decades. This has meant that the use of coercion, force and even violence by the state and those with economic power, against persons who in the main have been regarded as objects of the law, has not only been sanctioned by the law and become institutionalized in our legal system and governmental institutions, but it has become ingrained and entrenched in the very social fabric of our society itself.

21. Furthermore, our society has promoted and encouraged a culture of male patronage and patriarchy, leading to enormous gender inequalities, particularly in respect of Black women.

22. Small wonder that the social fabric of our society is tearing itself asunder, in every conceivable way, as all kinds of energies and forces, which have in the past been suppressed or hidden by a veil of secrecy and exclusion, have been released by the transitional processes. The legal system and its institutions, being part of the social fabric of society, is not spared the crisis. When the tide started to turn from the mid-seventies it was inevitable that the legal system and its institutions would become one of the focal points around which the resistance and abhorrence against Apartheid would be focussed.

23. There were of course individuals, who in their area of functionality, upheld all that which is decent and proper, to the best of their abilities. However, the crisis does not turn on the actions of a few, but is focused upon everything this society has been and is.

24. Therefore, perceptions of the disenfranchised, mostly black communities, with regard to the judiciary, as well as interaction between such communities and the structures involved in the administration of justice have also been adversely affected.

25. Nadel contends that the achievement of democracy in itself will not bring about the automatic legitimization of the structures which formed part of the Apartheid edifice, including and in particular the court structures.

26. In light of the above it is our view that with the creation of a new constitutional state, underpinned by a constitution based on non-racialism, non-sexism, democracy and a Bill of Fundamental Rights, we will be ushering in a complete move away from the Apartheid system, which was underpinned by a system of Parliamentary sovereignty. Equally, then in our view, it is imperative that the structures administering justice, in particular the CC, which will have to interpret and breathe life into the new and very different legal and constitutional order, should be new and different from the structures presently fulfilling such function and should clearly bring about a break with the past.

27. In practical terms we accept that it will take longer for the existing courts to be sufficiently transformed to be imbued with the required legitimacy. With regard to the CC, however, we do not enjoy the luxury of time. Our view is most eloquently captured by Professor Tony Honore, who after concluding that it was inevitable that the judiciary would for the most part remain unchanged under a new political order, stated that it was

"all the more important that the body which will in the last resort set the law to the other organs of state should be a body freshly recruited and not just an existing court with extended jurisdiction. Constitutional adjudication is unlike ordinary adjudication in that it is strongly political, not in the party sense, but in that it requires judges who are sensitive to the ways in which the values enshrined in the constitution can be translated into concrete rights and duties and in which a balance can be maintained between the different organs of government. It is equally important that the court of last resort should be of a representative character which commands confidence."

28. If the CC is established as a new and separate court it will from the first moment of its existence be able to shake off the distorted profile of the past and be constituted, without any links to the apartheid era, as a new court composed without regard to considerations of race or gender. We support the view that for the CC to divest itself of the baggage of the past, it should have its own seat, its own President, its own judges, its own jurisdiction and its own rules and procedures, to ensure that it is able to establish its own identity and particularly its own legitimacy. This is of vital importance to the nation both as a symbolic gesture, as well as a matter of substance. We accept Professor Honore's suggestion that we could in this regard learn from the experience of Germany, where following the collapse of the Nazi regime, a CC was established under the Basic Law of 1949 to uphold the new constitution. The fact that this was a new court without links to the past was seen at the time as being of particular importance and it has grown to be one of the most respected governmental institutions in Germany.

29. Finally, we wish to respond to the argument in the Judges Second Memorandum that the CC should be seen as a <u>Court of Law</u> and not as a "political" tribunal dealing with legal issues on "political grounds". From our understanding of most CC's all over the world, including the United States of America, Germany and so forth, is that they play a highly political role in the broad sense of the word, not in the party political sense of the word. In fact that is what they have been created for and that is what gives them legitimacy as a state institution in the eyes of the public at large and the body politic. However, they remain and operate as a <u>court of law with a broad political role</u>. In any case, a CC will be no more political than the role which has been played by our present SC, in particular the AD, which has always been the

legitimizing arm of the Apartheid edifice. The proposed separate CC, in our view would lead to the opposite contended for by the Judges, as it would reflect the diverse views of all our people. Also see the comments made in paragraph 89 below in this regard.

(b) <u>Composition and functioning of the CC</u>

30. Nadel broadly agrees with the composition of the CC, as proposed in paragraph 3.7 (d) of the Twelfth Report and section 87 (1) of the Addendum, although it must be pointed out that the exact manner of the functioning of the CC as a single panel of all eleven judges, as explained in paragraph 3.7 (d), is not contained in the Addendum. In other words, that in principle there should be one panel of eleven (11) CC judges which will preside in each constitutional matter brought before the CC, to ensure that the diversity of views of our nation, represented in the CC is brought to bear on each constitutional matter being adjudicated upon.

31. Nadel, however proposes that there should be a measure of flexibility with regard to the composition and functioning of the CC, as proposed in the Twelfth Report. There is a fear that the CC with one panel sitting en banc in all constitutional matters may only be able to hear a very small number of cases annually, as is the case with the Constitutional Courts in the USA, Canada and elsewhere. They hear approximately one hundred (100) cases each per year, in comparison with the German Constitutional Court which comprises two panels and adjudicates upon approximately four thousand (4000) cases each year. If litigants are not able to have their matters heard expeditiously and cost effectively by the CC, the stature and image of the CC in the eyes of the public may be diminished.

32. As a principle it should be stated in the constitution that the full panel of the CC must sit en banc in certain specified cases, for example, where it is necessary, in the interest of our nation and/or justice, for the full diversity of views of our nation to be brought to bear on a constitutional matter. These examples could include rulings as to whether the constitution being drafted by the Constitutional Assembly is in conformity with the agreed constitutional principles; when giving advice to the State President as to whether or not a bill which he or she is called upon to sign is in conformity with the Bill of Rights; when deciding upon the validity of Parliamentary legislation; when adjudicating upon disputes between organs of the State; and other matters permitted by rules to be

formulated by the CC itself. This list is by no means meant to be exhaustive.

33. In all other matters where the CC is not obliged to preside en banc, the President of the CC should be given a discretion to allow:

a) any unspecified constitutional matter to be heard by a panel of CC judges comprising of any size from three (3) to eleven (11) CC judges; or

b) to allow any appeal from the SC, on a constitutional issue, to be heard by a joint panel of CC and AD judges, as proposed in paragraph 57 below.

34. The President of the CC should also be clothed in the CC' rules with the discretion, in any constitutional matter of first instance, in which a dispute of fact exists or in respect of which a factual finding has not been made by a court of law, to take whatever steps are necessary and appropriate to obtain a finding in respect of such factual issues. (See paragraphs 48 - 50 below in this regard).

35. Nadel is of the view that by not laying down rigid rules cast in stone in the Constitution and by leaving the President of the CC, within certain prescribed parameters, with the discretions outlined above, that the CC would be given the necessary space and creativity within which to breath life into the new legal and constitutional dispensation. Otherwise, the CC runs the risk of becoming discredited as it may not be able to creatively, expeditiously and in a cost effective manner deal with the flood of constitutional litigation we anticipate in the first months of its creation. The Indian experience could serve as an example in this regard. At times, their CC has had a backlog of ten to twelve years, for cases to be finalized. With our history we cannot afford such luxuries.

36. Nadel disagrees with the proposals made in paragraph 6 (e) of the Judges First Memorandum and paragraph 5 of the Judges Second Memorandum in this regard.

(c) <u>The structure of the ordinary courts during the transitional period</u>.

37. Nadel is strongly of the view that it is the prerogative of the first democratically elected Parliament, the Constitutional Assembly and the Government of National Unity to make the final pronouncement on the structure and functioning of our courts in a democratic, non-racial and non-sexist society.

38. Therefore Nadel agrees with the conclusion reached in the Twelfth Report that it would be undesirable in a Constitution for the transitional period to make more changes in the organization and functioning of the present court system than are absolutely necessary. Nadel recommends that the present two-tier court structure should be changed as little as possible during the transitional period, except insofar as the creation of the proposed CC and the other factors listed in paragraph 39 below may necessitate change to the structure and functioning of the existing court structures.

39. However, Nadel acknowledges that certain changes to the structures and functioning of the existing court system would be inevitable, even in the transitional period, inter alia, as follows:

a) that with South Africa's move away from a state based on parliamentary sovereignty to the creation of a CC, and the establishment of a CC, it is inevitable that such drastic changes in the basis of state power will impact upon and influence the functioning of the structures and relationship between the different levels of courts. To this end, it will be necessary to provide for transitional mechanisms in the constitution to provide for such changes to be made to the structures and functioning of the ordinary courts, if and when they arise;

b) that the existing system of courts will have to be adapted to allow each SPR to have its own division of the SC. This restructuring should be catered for in the Constitution through appropriate transitional provisions, which would allow for time and resources for the reorganization of the Courts after the SPR's have been established. We are however not in favour of having a dual structure of "Federal Courts" and SPR courts, during the transitional period;

c) that the existing court structures and the new court structures which will be established must of course conform and be in accordance with all principles enunciated in the Constitution for the transitional period, including non-racialism and non-sexism. To this end, some problems may arise in respect of the composition and functioning of the Courts of Chiefs and Headmen and the necessary restructuring will have to be done to bring such courts in conformity with the dictates of the Constitution; and

d) that although Nadel in principle agrees that the Constitutional Assembly is best placed to effect the necessary restructuring in respect of the structures administering justice, mechanisms and processes, like the National Legal Forum being proposed, should be put in place at this stage to investigate and research new models and if consensus is reached, implement same, even during the transitional period.

40. To achieve the restructuring in paragraph 39 above and the possible restructuring mentioned in paragraphs 68 and 69 below, we recommend that provision should be made in the Constitution to allow for such changes to be effected, if and when necessary.

(d) Jurisdiction of the CC.

41. The respective jurisdictional capacities of the different levels of courts in a future dispensation are dealt with in this section, in section (b) above and in sections (e), (f) and (g) hereafter, and should be read as a whole. Nadel, to a very large extent, agrees with the approach in the Twelfth Report and the Addendum to the Twelfth Report (hereinafter referred to as the Addendum) in respect of the jurisdictional capacity of our courts in a future dispensation.

42. In broad terms, Nadel agrees with the jurisdictional capacity of the CC being proposed, as set out in paragraphs 4.6 and 5.1 of the Twelfth Report and sections 87 (2) - (7), read with sections 90 (2) - (12) and sections 90 (1) to (4) of the Addendum, save and except to the extent that any view to the contrary is expressed in this section, section (b) above, and/or sections (e), (f) and (g) below. In other words, the CC shall act as the final court of appeal in all matters involving a constitutional issue and in certain specified constitutional matters, the CC shall even enjoy a jurisdiction at first instance. To this end, the CC should have the jurisdiction to protect and enforce the Constitution. This would include the protection of fundamental rights, adjudication of the constitutionality of government actions and the validity of laws, disputes between organs of state, including disputes between different levels of government, and compliance with the Constitutional Principles in the process of constitution-making.

43. Nadel in particular endorses the TECCOM's recommendation that provision should be made for direct access to the CC in certain circumstances. Nadel suggests that these would include rulings as to whether the constitution being drafted by the Constitutional Assembly is in conformity with the

agreed constitutional principles; advice to the President as to whether or not a bill which he or she is called upon to sign is in conformity with the Bill of Rights; the validity of Parliamentary legislation and other matters permitted by rules to be formulated by the CC itself.

44. The reason for direct access in cases concerned with the constitutional principles and the giving of advice to the State President in regard to the signing of a bill is clear. The reason for direct access in cases concerning the validity of Parliamentary legislation is to avoid uncertainty and to ensure that the ruling has effect throughout South Africa, which would not necessarily be the case, if such a ruling were to be given by one Provincial Division only. The discretion to permit direct access in other matters under the rules would be to allow the CC to deal immediately with urgent matters if it is necessary to do so. One issue that Nadel wishes to stress in this regard is that it is important that the rules and procedures of the CC, as well as the rules as to locus standi in the CC, must be flexible and adaptable, within reason, inter alia, to provide for direct access to the CC, as advocated above.

45. Nadel strongly recommends that the CC must be granted exclusive constitutional jurisdiction in all disputes between different organs and levels of government. We are of the view that due to the fact that constitutionalism and regionalism/federalism is going to be introduced for the first time ever into our legal and constitutional dispensation, by the Constitution for the transitional period, such a provision is necessary to bring about legal certainty, in uncertain and uncharted constitutional waters, and to minimize forum-shopping, as well as friction between different organs and levels of government.

46. In respect of the issue of relative validity, as proposed in paragraphs 5.2 and 5.3 of the Twelfth Report and sections 87 (4) - (6) of the Addendum, as stated, Nadel endorses the proposal of the CC being clothed with such constitutional jurisdiction. It should be pointed out that this is not a novel suggestion and that other countries also have similar provisions relating to the jurisdiction of their CC to give such relative validity to legislation.

47. In respect of the question of abstract review, as proposed in paragraph 5.4 of the Twelfth Report, as stated, Nadel agrees with the proposal to clothe the CC with such a constitutional jurisdiction. We note that this power of abstract review has not been included or dealt with in the Addendum. We suggest

that consideration should be given to including such a power in the Constitution and to add a proviso that once the CC has pronounced itself on the validity of an Act of Parliament, under this abstract review, then the constitutionality of such an Act may not later be challenged in the MC, SC or AD, except, if necessary, in certain specified instances.

48. One issue which needs to be resolved, as it is not dealt with in the Twelfth Report, is whether the CC will only deal with matters on the basis of an appeal or whether it will have the capacity to hear evidence. For example, in those instances where the CC acts as a court of first instance, will this only include cases in which no dispute of fact exists? And if a dispute of fact does exist what procedure is suggested to dispose of the matter before the CC as a court of first instance? The same questions arise in those cases where the CC has direct access to a matter, but where a dispute of fact exists which has not yet been pronounced upon by a court of law. Clearly the CC cannot be bogged down by hearing lengthy evidence in matters of first instance before it, yet on the other hand it would not appear to be the intention that the only matters of first instance which can be brought before it are those which do not contain a dispute of fact.

49. A flexible, common sense approach needs to be adopted in this regard. Nadel would suggest that the proposal made in paragraph 34 above be considered as one possible option in this regard. In terms of this proposal the <u>President of the CC</u> would have the discretion to obtain a ruling on a question of fact, by employing, inter alia, one of the following mechanisms:

a) a panel of the CC, composed of one or more CC judges;

b) a panel of the CC, composed of one or more CC judges and such other lay persons and/or experts, as are deemed necessary by the President of the CC;

c) to appoint a commission composed of whomsoever the President of the CC may deem necessary; or

d) to refer the matter to any court of the land.

50. It would go without saying that provision must be made to ensure that the CC is not bound by such a ruling in respect of a factual issue. The President of the CC could be clothed with an appropriate and effective discretion to take whatever further steps he or she may deem necessary in respect of factual

issues in dispute or in respect of a ruling on a factual issue which the CC may not agree with.

(e) Constitutional Jurisdiction of the AD.

51. In summary, the effect of the proposal in the Twelfth Report, is that the CC shall only have jurisdiction to hear matters of a constitutional nature, whereas all matters of a non-constitutional nature shall be heard by the existing court structures, with the AD retaining its appellate jurisdiction in all such matters. Furthermore, that the SC and MC shall have jurisdiction to hear certain specified matters of a constitutional nature, whereas the AD shall have no jurisdiction in matters of a constitutional nature.

52. In section 90 (3), (8) and (9) of the Addendum it is proposed that the AD shall have no jurisdiction whatsoever to adjudicate on any matter within the jurisdiction of the CC. Therefore, in respect of all constitutional matters in terms of which the SC has jurisdiction, for example, as proposed in section 90 (4) of the Addendum, an appeal shall be noted directly to the CC and not via the AD. As stated, the AD of course retains the jurisdiction it presently has in non-constitutional matters.

53. Nadel has a strong sympathy with the dilemma faced by the TECCOM in the Twelfth Report in this regard and the ultimate approach adopted by it.

54. On the one hand, those who argue for the AD to be granted such jurisdiction, could strongly argue:

a) that there is a certain anomaly and irony in granting limited constitutional jurisdiction to the SC and then to preclude the AD completely from hearing constitutional matters, even such matters as are to be heard by the SC;

b) that to restore the rule of law and to secure fundamental human rights in our land, we must develop a human rights culture which is respected, nurtured and enforced at every level of every branch of government; and

c) that every judicial officer and indeed every officer of the state, must be faced with and engaged in the new legal and constitutional order, in which all state action is governed by law.

55. On the other hand, those who argue for the AD not to be granted constitutional jurisdiction, could equally strongly argue:

a) that it could diminish the stature and efficacy of the CC;

b) that to give the AD even limited jurisdiction on constitutional matters whilst retaining the CC as a court of final instance, will place the CC at the apex of the court structure in such a manner as will in fact diminish the standing of the AD; and

c) that it would make it even more difficult and costly to reach finality with regard to constitutional matters.

56. We are mindful of the difficulties inherent in whatever approach is adopted. On balance, however, we would endorse the proposal in the Twelfth Report and raise one possible option for consideration in this regard.

57. In accordance with the proposal in sections 90 (3) and (8) the President of the CC could be vested in all matters of appeal, in which a right of appeal to the CC does not exist, with the exclusive power to grant leave to appeal from the SC to the CC in respect of a constitutional matter, in which such leave was refused by the SC. (The CC shall of course retain all its powers in respect of direct access).

The President of the CC could be vested with a further discretion to decide whether any appeal of a constitutional nature should be heard by:

a) a full panel of the CC presiding en banc; or

b) a panel of the CC, composed of between three (3) and eleven (11) judges, whatever number the President of the CC deems necessary; or

c) a joint panel, comprising an equal number of judges from the AD and the CC, with an additional judge appointed from the CC as senior presiding officer. The number of judges on such a joint panel could vary from three (3) to eleven (11) judges, the size being entirely in the discretion of the President of the CC. The senior presiding officer from the CC and the other CC judges shall be appointed by the President of the CC, whereas the judges from the AD shall be appointed by the Chief Justice.

In this manner, it will be left to the complete discretion of the President of the CC which appeals of a constitutional nature merit consideration by the diverse views of the whole CC panel and which are of such a nature that they could be dealt with

either by a smaller CC panel or such a joint panel. It would appear that there may be a large category of cases, although of a constitutional nature, which may not have far-reaching implications to society as a whole and which could be dealt with by a smaller CC panel or a joint panel. In particular, one has in mind here those areas in which the MC and SC have been granted constitutional jurisdiction as a possible area in which the AD could be jointly involved with the CC in hearing matters in which an appeal has been noted and granted. It would also provide the President of the CC with a mechanism to allow such a smaller CC panel or a joint panel to deal with many of those cases that contain both matters of a constitutional and non-constitutional nature and which need not necessarily be dealt with by the full panel of the CC. This mechanism may also very well enable the CC to deal with and dispose of a far greater case load than when it sits as a single panel en banc, and thus dispel some of the fears raised in paragraphs 31 and 35 above and paragraph 67 below.

(f) <u>Constitutional Jurisdiction of the SC</u>

58. Section 90 of the Addendum proposes that the provincial and local divisions of the SC should retain their present jurisdiction, including inherent jurisdiction, (Section 90 (2)), and that the SC is further to be vested with a constitutional jurisdiction in three main areas, set out in Section 90 (4) of the Addendum. On a reading of sections 90 (4), (5), (6) and (10) this in effect would mean that these divisions of the SC will not have a constitutional jurisdiction in regard to:

a) a dispute dealing with the validity of an Act of Parliament (including presumably any provision of an Act of Parliament); and

b) disputes of a constitutional nature between organs of the state, or within the same organ of state, or between different levels of government.

59. Nadel broadly agrees with these proposals in the Twelfth Report pertaining to the constitutional jurisdiction of the SC, in particular in respect of paragraph 58 (b) above. However, some reservations are expressed in respect of the matter dealt with under paragraph 58 (a) above, which requires clarification and may even have to be revisited. Some questions which arise are: Is the constitutional jurisdiction of the SC also to be excluded when the validity of a provision of an Act of Parliament is being challenged in the course of a matter being heard before it? Will the SC in such an instance be obliged to suspend the proceedings

and refer the matter immediately to the CC, as proposed in Section 90 (5) of the Addendum? And what happens if the evidence has not yet been finalized, disputes of fact still exist and/or a finding has not been made on factual issues?

60. Certain practical problems arise when excluding such jurisdiction from the SC, for example, to mention but a few:

a) When disputing the validity of an Act of Parliament, such an issue may be one of ten points relating to general factual and/or legal issues. In the event of the constitutional point being decisive of the matter it could mean that the SPR/provincial division will have to deal with the other general matters and then thereafter refer the constitutional point for adjudication to the CC. This could prove to be a very time-consuming and expensive exercise as one particular case will have to be dealt with in different forums.

b) If on each occasion that a constitutional issue is raised, in respect of an issue on which the SC or MC has no jurisdiction, the matter must be suspended and referred to the CC this could have negative consequences. It could lead to time-consuming and costly delays, and could very well lead to the CC being overloaded with cases. It could also lead to legal uncertainty if matters are not resolved and dealt with expeditiously. Unscrupulous practitioners and litigants would exploit every such procedure to the utmost, allowing for abuses. It is difficult to envisage all the practical difficulties which could arise but there are numerous. For example, who would bear the costs of all such suspended cases from across the country, which would have to then be heard at the seat of the CC, presumably in Johannesburg?

61. A possible contradiction exists between sections 90 (2) and 90 (4) (a) of the Addendum which requires clarification. On the one hand, section 90 (2) proposes the retention of the SC's present jurisdiction, which includes the power to invalidate Parliamentary legislation, whereas section 90 (4) (a) excludes such power in the case of a constitutional matter from the jurisdiction of the SC. Or is section 90 (2) only referring to the SC's future general jurisdiction of invalidating pre-Interim Constitution legislation and not post-Interim Constitution legislation? To this end, Nadel suggests that the SC should at the very least have the power to pronounce on the validity of pre-Interim Constitution legislation. SC's have this

power at present and such a recommendation is in accordance with section 90 (2) of the Addendum.

62. If it is decided to exclude the constitutional jurisdiction of the SC to pronounce on the validity of Parliamentary legislation being challenged, the following two options/procedures could be considered, instead of or as an alternative to section 90 (5).

63. The SC should not have a constitutional jurisdiction relating to the validity of Parliamentary legislation, but should have constitutional jurisdiction in respect of SPR legislation and local government ordinances. Should such a constitutional issue arise in a case coming before it where the validity of an Act of Parliament is challenged, then the law in question must be presumed to be constitutional, but the constitutional point may be taken on appeal to the CC, if leave of appeal is granted. A similar proposal is made in section 91 (2) of the Addendum in respect of MC's.

64. The other option is to clothe the SC in this type of matter, with constitutional jurisdiction, with the state being given a right of appeal to the CC if any provision of an Act of Parliament is struck down and to provide the SC and the CC with the power to grant leave to appeal to any other litigant which does not agree with the SC's decision to uphold the validity of an Act of Parliament or a provision of an Act of Parliament. It could further be provided that a decision by the SC to invalidate a provision of or an Act of Parliament, shall be suspended, until the CC has pronounced itself on the matter. The rules of the CC could provide for such matters to be heard as a matter of urgency.

(g) Constitutional jurisdiction of the MC

65. In section 91 of the Addendum it is proposed that all matters pertaining to the MC and other courts, including the issue of jurisdiction, should be regulated by statute and not by the Constitution. As the proposal recommends that the jurisdiction of the MC be regulated by statute and such statute is not available for perusal, one is left somewhat in the dark as to what constitutional jurisdiction, if any, is envisaged for the MC, from the Addendum. However, if one has regard to paragraph 4.6 of the Twelfth Report, it would appear that the TECCOM envisaged that the ordinary courts, which we assume includes the MC, will have constitutional jurisdiction to apply and interpret the Constitution, adjudicate on matters relating to fundamental rights (and to determine the validity of legislation of SPR and local governments) but subject to appeal to, and the authoritative

interpretation of, the CC (we assume that the portion we placed in brackets above only applies to the SC and not the MC).

66. Nadel agrees that MC's should have constitutional jurisdiction as specified above, except in those instances where:

a) the validity of an Act of Parliament or legislation of a SPR or a local government, or a provision of such an Act or legislation is being challenged; and

b) disputes of a constitutional nature between organs of the state, or within the same organ of state, or between different levels of government are being adjudicated upon. (This latter exclusion is not dealt with at all in the Twelfth Report and Nadel would suggest that it should be specifically excluded from the jurisdiction of the MC).

67. However, one aspect of the jurisdiction of the MC though is dealt with in section 91 of the constitution, creating a mechanism for the MC to deal with matters where the validity of <u>any</u> law is being challenged, as being repugnant to the constitution. In such instances it is proposed that the matter be postponed and suspended, if the Magistrate deems it to be in the interests of justice, pending the matter having been dealt with as proposed in sections 90 (3) and (4). The issues raised in paragraph 60 above, are applicable mutatis mutandis here. We would want to recommend that the procedure provided for in sections 90 (3) and (4) must only be provided for in the most exceptional cases, otherwise speedy adjudication of matters may become a pipedream, because of inflexible and impractical provisions in our constitution.

(h) <u>Single or split court system and judiciary</u>

68. Nadel finds the notion of transforming the existing South African split court system into a single court system, on similar lines to the continental systems most appealing and with much merit. The merits and demerits of such a system are for obvious reasons not dealt with herein. This issue has not been raised at all in the Twelfth Report and it would appear that it has been assumed that the existing split court system will remain unchanged. Therefore, Nadel recommends that this issue be referred to the MPNP and National Legal Forum, for further investigation and research, as it would require major restructuring of the present legal institutions. However, Nadel would want to warn that this issue is of vital importance and should not be left on the shelf to gather dust, but should

be dealt with urgently and, if broad agreement is reached it should be implemented, to dispel the notion of a system of A justice in the SC and B justice in the MC, existing in our court system. To this end, we propose that provision be made in the Constitution to allow for such restructuring, if and when necessary.

(i) **Specialized Courts**

69. The idea of specialized courts, particularly in the administrative, family and labour arena, also appeals to Nadel. The question to be posed for the transitional period is whether specialized courts should be divisions of the present court system or whether there should be a separate system of courts, as is the case in the continental legal systems. The merits and demerits of each system are for obvious reasons not dealt with herein. It is accepted by Nadel that specialization, even during the transitional period, should not be resisted. However, the introduction of the continental system, i.e. to have specialized courts as separate court systems, although having much merit, may be too drastic and far-reaching at this stage. It seems more appropriate that the Anglo-Saxon system, where specialized courts are divisions of the ordinary courts, should be implemented during the transitional period, particularly in the area of administrative, family and labour law. To this end, we propose that provision be made in the constitution to allow for such restructuring, if and when necessary.

(j) **Right of appearance in the CC**

70. Although raised out of context, we wish to make one further point here. Nadel is strongly of the view that **all** qualified members of the legal profession should have a right of appearance before the CC and such a right of appearance must definitely not be restricted to the advocates profession.

(k) **Alternative model: A new and separate CC, at the apex of the existing court structures, as a third tier within a single stream court system**

71. As stated above, our alternative, Model B, is in most respects similar to our Model A. The major points of difference turn on two aspects. Firstly, in Model A, the existing single stream two-tier court system is only retained to the SC level, with the CC and AD splitting into parallel structures, the former being the exclusive court of final instance (and sometimes first instance) in constitutional matters, the latter being the exclusive court of final instance in general matters; whereas Model B retains the existing

single stream court system, with the CC being created at the apex, as a third tier, having the exact same jurisdiction as in Model A. Secondly, the AD's constitutional jurisdiction in some respects differs in the two models.

72. The principles underpinning our Model B have already been spelt out in detail, in paragraph 4 above, which are applicable mutatis mutandis here, and we do not intend repeating same here again. In the event of the AD being granted constitutional jurisdiction to adjudicate in disputes challenging the validity of an Act of Parliament, it is suggested that the comments made and options raised in paragraphs 62 - 64 above, be repeated here mutatis mutandis.

73. On balance, we favour Model A, as it may in some instances be more cost-effective and less time-consuming, although in principle there is not much difference between Models A and B. In the event of Model A not being found to be appropriate for the transitional period, we shall strongly suggest that Model B be adopted instead, as the only other appropriate option. To this end, we strongly disagree with the comments and proposals of the Judges, GCB and SALC, to the contrary, in respect of either Model A or Model B.

D. APPOINTMENT MECHANISMS FOR JUDICIAL OFFICERS

74. Under this heading the issues in the Twelfth Report to be addressed and in respect of which Nadel wishes to make recommendations relate to:

a) Appointment mechanisms in general.

b) Appointment mechanism for judges of the CC.

c) Appointment mechanism for other judges.

d) Appointment mechanism for magistrates.

e) Criteria for the appointment of judicial officers.

f) Continuation in office of existing judges and magistrates.

g) The prosecuting authority.

75. We deal with these matters seriatim.

(a) Appointment mechanisms in general

76. The World Conference on the Independence of Justice of 1983, which was attended by an extraordinarily wide range of lawyers' organizations, adopted the

Universal Declaration on the Independence of Justice at its final plenary session, in Montreal, Canada (hereinafter referred to as the Montreal Declaration). The Conference recommended to the United Nations the consideration of the Declaration, which includes the following provisions relating to the appointment of judges:

"Qualifications, selection and training:

2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14 (a) There is no single proper method of judicial selection but the method chosen should provide safeguards against judicial appointments for improper motives.

(b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate."

The Basic Principles on the Independence of the Judiciary adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, Italy in 1985, contain a briefer version of the above, to much the same effect.

77. Evaluating the appointment procedures applied, the composition and the extent to which the present judiciary reflects South Africa's society in all its aspects, against the aforesaid international norms, it is beyond dispute that our judiciary fails to meet the criteria and norms laid down.

78. Nadel is of the view that no matter how competent they may be, as a group the present judiciary is not consequently perceived to be sensitive to the needs and aspirations of all the people of South Africa, nor to enjoy the confidence of all South Africans.

79. There can be no doubt that the profile of the judiciary needs to be changed to be broad-based and enjoy the confidence of the people it serves, but it should also be skilled and competent. On the other hand, because of the distorted profile created by the historical exclusion of blacks and women, the present pool from which appointments can be made to all levels of the judiciary is relatively small. Therefore, if we look at both sides of the equation we must acknowledge the enormity of the task in the short term of attempting to transform the existing white male dominated structures, into broad-based structures that reflect the diversity of our population. (Also see the comments made in paragraph 111 below in this regard). However, the dilemma does not lie in identifying the pitfalls, but rather in how to achieve this objective. Hereinafter we deal with our proposals for achieving this short term objective.

80. At present in South Africa, the power to appoint judges rests in the Executive . Since Union in 1910, the Executive conventionally exercised this power by making appointments from the ranks of Senior Council practising at the Bar, after consultation between the Minister of Justice and the senior judge of the division to which the appointment was being made. We fully support the TECCOM's rejection (by implication) of this specific appointment mechanism for judges in a future legal and constitutional dispensation.

81. The TECCOM in the Twelfth Report proposes that a distinction should be made between the appointments to the CC, and appointments to other courts, drawing a further distinction between appointments to the SC and MC. For the reasons stated herein, we endorse this approach. We disagree with the suggestions to the contrary, as contained in paragraph 5.4 of the GCB's submission, as well as in the Judges' memorandum.

82. Nadel is broadly in agreement with the proposition in the Montreal Declaration that there is no single proper method of judicial selection, but the method chosen should provide safeguards against judicial appointments for improper motives. It is our view that deciding on an appropriate method of judicial selection for our country during this transitional period will be dependent on a whole host of historical factors and practical realities, mixed with a good dose of common sense and practical and political expediency. Furthermore, that there is no individual, political party, organization or sector of our society which is able to propose the correct mix, so as to please everybody.

(b) **Appointment mechanism for judges of the CC**

83. It is in accordance with the short term objective, stated in paragraph 79 above, which will also lead to positive medium and longer term results, that we have proposed the creation of a separate CC, either parallel to the AD or at the apex of the judiciary, to be the final arbiter in all constitutional matters. It will establish the precedents which will be binding on all other courts; precedents which will have to be adhered to by all organs of the State, and people, subject to the Bill of Rights. If it is established as a new and separate court it will from the first moment of its existence be able to shake off the distorted profile of the past and be constituted, without any links to the apartheid era, as a new court, constituted and composed without being influenced by prejudicial race or gender bias, as in the past.

84. The pool from which to make eleven (11) appointments to such a single court is sufficiently large to enable these requirements to be met and to appoint persons of ability and integrity. It could include existing judges, but need not necessarily do so. All candidates will be considered on their merits, and a court which has the confidence of all the people of South Africa, can be brought into existence. It is for these reasons, as more fully elaborated in paragraphs 12 - 29 above, that we strongly oppose the CC being a chamber of the AD, and we propose a new and separate court with its own seat, its own president and its own members.

85. In the Twelfth Report it is proposed that appointments to the CC be made by a joint committee of both houses of parliament on which all political parties will have one representative. The proceedings of the joint committee shall be conducted in camera. The CC should consist of 11 judges who should, if possible, be appointed en bloc by a unanimous resolution of the joint committee, which should in turn be approved by a majority of at least 75% of all the members of parliament. A deadlock-breaking mechanism is provided for. Cases should be heard by all the judges to ensure that the different attitudes existing within a broad-based court are brought to bear on all the decisions that are made.

86. The judges in their memorandum agree that the CC should sit as a bench of 11 judges, but disagree with the TECCOM proposal as to how such judges should be appointed. They say that a court appointed by a Multi-Party Committee of Parliament in the manner suggested by the TECCOM would be seen as a "political" tribunal dealing with fundamental legal issues on political grounds, and would

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accordingly not gain acceptance by the public. In their view judges of the SC, including the CC, should be appointed on the advice of a Judicial Service Commission.

87. The GCB in paragraphs 15.4, 16 and 17 of their submissions also favour the approach that all judges be appointed by an independent JSC, rather than a joint parliamentary committee.

88. Nadel in broad terms agrees with the approach and principles underlying such approach, as is being proposed in paragraphs 7.6 and 7.7 of the Twelfth Report and section 88 of the Addendum, in respect of the appointment of CC judges, although we differ, in some respects markedly, in respect of the details of such proposal.

89. We state some of our reasons for supporting the proposal in the Twelfth Report:

a) The reasons, historical and otherwise, already dealt with elaborately herein;

b) This proposal is in accordance with the principle enunciated in section 2.14 (b) of the Montreal Declaration.

c) We endorse the comments and the reasoning for the selection procedure proposed, as outlined in paragraphs 7.6 and 7.7 of the Twelfth Report, but only to the extent that they have not been amended in terms of our proposal in paragraph 91 below. We in particular want to echo the sentiments that no party, person or profession should be in a position to dominate the selection process.

d) It is common throughout the world for CC's to be appointed through procedures involving either Parliament or the Executive. Indeed, as far as we are aware, there is no example of a specialized CC anywhere in the world that is appointed in any other manner. The reason why Parliament is involved in the appointment of CC's seems to be that such courts do have a political role to play, and should accordingly have the confidence of the participants in the political process. The role is not party political, but political in the sense that they will be dealing with highly charged political issues, to which they should be sensitive. In the proposal in the Twelfth Report, Parliament, and not the executive, is involved, to ensure that the court is broad-based and acceptable to all the major actors in the political process, and not only the party from which the executive is composed.

e) It is not clear why the Judges suggest that a CC appointed by a multi-party joint parliamentary committee will not be accepted by the public. That proposition is not supported by experience in other countries that have CCs; on the contrary, the German CC which is appointed in this way, has consistently been rated as one of the most respected and valid institutions in Germany, and CCs in other countries where this type of selection process is followed are also held in high regard. The assertion made by the Judges also ignores the fact that the overwhelming majority of the South African population had no say in electing the government which appointed the present judges, and may wish to see a new court, with no links to the past, appointed by their elected representatives to act as guardians of the Constitution.

f) The objection by the Judges and the GCB that the process proposed is entirely in the hands of the politicians and that politicians should play no role at all or a very limited role, is not sound and is flawed in many ways. Firstly, this aspect has been dealt with to a large degree in paragraphs 27 - 29 and paragraphs 89 (d) and (e) above. Secondly, the argument conflates the present National Party politicians in the form of the Executive, who presently appoint judges, with a multi-party joint Parliamentary committee which is being proposed. Thirdly, an erroneous assumption underlies their whole proposition, i.e. that the present judges and senior lawyers, who are mainly white males, are the only or most appropriate sector of society which could be trusted to select not only judges of the highest independent spirit, integrity and ability, but who also will act without fear or favour. The present judiciary is in a privileged position precisely because of the wrongs of the past. It is our view that they should not now be placed in a position to decide how those who have been deprived and denied privileges in the past should be allowed to participate. This is morally and politically unacceptable to Nadel. The present judiciary, as well as other institutions involved in the administration of justice need to come to terms with the fact that their role in the past is tainted by apartheid, and, further, that until there is significant and visible transformation within these structures, it will not be appropriate to place them centrally within the scheme of things.

90. In our view, although broadly in agreement with the approach in the proposal, the proposal as it now stands, if implemented, will in all probability have disastrous consequences and will undermine, to a large extent, the very basis for creating a new and separate CC. We say so because to allow each political party, no matter how big or small, to have an absolute veto over the composition of the CC, will mean that the CC will comprise of eleven men and women who are everything to everybody. In the end we envisage that the proposed formula would bring about an insipid, pallid Bench, once again, comprising mainly white males. That is hardly in accordance with the letter and the spirit of the Twelfth Report, as it pertains to the CC. It is also not the type of CC Bench Nadel believes would restore the sensitivity and legitimacy of the Bench, required during the transitional period. It is of vital importance that a formula be found which would allow for a CC Bench, which will be broad-based, reflecting the wide diversity of views within our nation. We are of the opinion that the practical effect of the present proposal will not achieve such an objective.

91. As stated above, in some respects we differ on detail in respect of the proposed selection mechanism for appointing judges of the CC. In our opinion a mechanism must be established which comprises the following principles:

a) that the selection committee shall comprise of a multi-party committee of Parliament;

b) that each political party represented in Parliament shall have a representative or representatives on the committee, commensurate with the proportion of the vote received by each such party in the elections;

c) that decisions are to be taken within the committee by way of a two-thirds majority vote both in respect of the appointment of the President of the CC and the other CC judges;

d) that the nominees agreed to by the committee must be approved en bloc by resolution adopted by a two-thirds majority of the members present at a joint sitting of the National Assembly and the Senate;

e) that no debate shall be allowed in respect of such a resolution;

f) that in the event of the joint committee being unable to reach a decision in respect of the nominees, an appropriate and effective

deadlock-breaking mechanism must be devised, in accordance with the principles stated above;

g) that in the event of Parliament being unable to reach a decision in respect of the nominees, the matter be referred back to the joint committee and an effective and appropriate deadlock-breaking mechanism must be devised, in accordance with the principles stated above, to enable the joint committee to deal with the matter;

h) that in accordance with section 2.14 (d) of the Montreal Declaration, a mechanism must be established within the above framework, to consult the legal sector, in respect of the proposed appointees to the CC Bench; and

i) that the State President shall appoint such nominees as President of the CC and as judges of the CC, if all the above procedures have been properly adhered to.

92. Nadel proposes that the selection mechanism being proposed in section 88 of the Twelfth Report, be amended to reflect the principles enunciated in paragraph 91 above.

93. Nadel disagrees with the proposal that there should not be separate selection mechanisms, for judges of the CC and other judges, as suggested in the Judges Memoranda and in the submission by the GCB. More specifically, we do not agree that appointments to the CC should be by way of the JSC. We obviously also disagree with the composition of the JSC, as proposed in the Judges Memoranda and in the GCB submission, as is more fully elaborated upon hereafter.

(c) **Appointment mechanism for other judges**

94. The Twelfth Report recommends that appointments to all divisions of the SC, other than the CC, be made on the advice of a JSC.

95. This is also the view of the SALC, the Judges and the GCB, although, as stated above, they all go a step further and include the appointment of the CC judges in such an arrangement.

96. There are however differences between the proposals in the Twelfth Report and the submissions made by the Judges, GCB and SALC, pertaining to the composition of a JSC. Furthermore, there are even differences between the proposals put forward by the latter three, although the effect of each of their proposals will be to maximize the representation of

the existing legal institutions and minimize parliamentary representation.

97. A JSC is usually composed of representatives of the judiciary, the practising legal professions, Parliament and/or the Executive.

98. In the Twelfth Report it is proposed that a JSC be established, composed in a balanced way of representatives of the judiciary, the executive, the legislature and the legal profession. It should, however, be constituted in a way which does not permit any person, party or profession to dominate the selection process.

99. The Twelfth Report suggests that a JSC composed as follows meets these requirements: the Chief Justice; the President of CC; the Minister of Justice or a person designated by him/her; a practising advocate designated by the GCB; a practising attorney designated by the ALS; a Professor of Law designated by the deans of the law faculties of the South African universities; and five senators designated en bloc by the Senate by a two-thirds majority. When the appointment of judges to SPR/Provincial Divisions are under consideration, the Judge President and the head of the SPR Executive or his or her designate should be included.

100. The judges object to the inclusion of senators in the JSC. They support a suggestion that the JSC should consist of the Chief Justice; two judges of Appeal; four other judges; three representatives of the executive; an advocate; an attorney and a law teacher nominated by a Council for Justice; and a representative of the Attorneys-General. The proposed Council of Justice would consist of the JSC and a Magisterial Services Commission, sitting together. In effect the judges would dominate the process having half the members of the JSC and a significant voice in the choice of the advocate, attorney and law teacher representatives.

101. The GCB have a more flexible approach, broadly accepting the proposal embodied in section 93 of the Addendum, although they are of the view that the parliamentary representation is unduly loaded.

102. The SALC recommends that the JSC be composed as follows: the Chief Justice; the Minister of Justice; the six Judge Presidents of the SC's; two members of Parliament; one senior advocate of the GCB and one senior attorney of the ALS.

103. The question which is raised by the various proposals are whether technical expertise as a judge, and a standing in the legal profession,

should be a requirement for appointment to the JSC, or whether the JSC should be broad-based and more balanced with regard to race, gender and background.

104. In approaching this matter Nadel, in accordance with paragraph 7.5 of the Twelfth Report, is of the view that in the circumstances that presently exist in South Africa, the judiciary, senior advocates and senior attorneys, consist almost entirely of white men. We are of the view that if they dominate the appointment panel of a JSC this could have a very serious bearing on perceptions concerning the legitimacy of the Courts. Furthermore, we are of the view that no party, person or profession should be in a position to dominate the selection procedure of our future judges.

105. The proposals of the Judges and the SALC, in respect of the composition of the JSC, are wholly inappropriate for the transitional period. The GCB submission, which attempts to minimize parliamentary representation in the proposal of the Twelfth Report, is also inappropriate for this reason. The proposal made in the Twelfth Report has much more merit and is more in line with thinking within Nadel, although we differ in certain respects.

106. On balance, and in accordance with sections 2.11 - 2.14 of the Montreal Declaration, Nadel is in favour of a JSC which should be broad-based and balanced with regard to race, gender and background. To this end, we propose a JSC composed of the following:

a) the President of the CC;
b) the Chief Justice;
c) the Minister of Justice or his/her nominee;
d) two representative designated by the legal profession as a whole;
e) one professor of law designated by the deans of all the law faculties at South African universities;
f) five Parliamentarians designated by Parliament en bloc by a two-thirds majority;
g) six men and women to be designated by the State President, after consultation with the Government of National Unity, taking into account the need to achieve an appropriate balance of race and gender; and
h) on the occasion or the consideration of matters specifically relating to an SPR division of the SC, the Judge President of the relevant division, the Premier or a member of the SPR executive designated by the Premier and one member of the SPR Legislature of the SPR.

107. It is further recommended that the Chairperson of the JSC should be elected from its ranks by all its

members at its first sitting and should not be appointed.

108. Two aspects of our proposal require emphasis. Firstly, we are firmly of the view that the majority of the members of the JSC must come from outside of the legal sector, although retaining appropriate representation from the legal sector. Our proposal does just that. Secondly, the two representatives from the legal profession must be appointed by the legal profession as a whole, not only from the GCB and ALS. To this end, a mechanism must be established to ensure that organizations like Nadel, BLA and LHR are consulted with regard to such appointments from the legal profession.

109. We recommend that the above-mentioned changes should be made to the Twelfth Report with regard to the JSC. All other aspects pertaining to the JSC, as contained in the Twelfth Report, are fully endorsed and supported by Nadel.

(d) **Appointment mechanism for Magistrates**

110. Subject to the comments made in paragraphs 39, 40 and 68 above, we endorse the proposal made in section 90 of the Addendum.

(e) **Criteria for appointment of judicial officers**

111. The views of Nadel in this regard, are rather eloquently encapsulated in the following quotation from a paper, recently delivered by Adv. Arthur Chaskalson S.C, which we quote at length:

"When it comes to the pool from which appointments to the judiciary can be made there may be a need to re-examine the convention which has been followed in South Africa for many years. The convention is that appointments to the Bench are made from the ranks of senior counsel in practice at the Bar. There is no doubt that this convention has resulted in the creation of a technically skilled Bench. But it is not the only way in which competent and well trained judges can be found. If the ranks of senior counsel were balanced from the point of view of race and gender, there would be more to be said in favour of retaining the present system. But they are not, and as we all know senior counsel in South Africa consists overwhelmingly of white men. Once again, there is a need to bring into the equation the question of race and gender, and to look for ways of identifying a much broader pool from which judicial appointments can be made of persons with the necessary skills and integrity to be our judges.

"This is not simply a cosmetic exercise. A greater degree of representativeness in the judiciary than

is produced by the present method of selection is valuable, not only because of the impact that it will have on the many litigants who presently feel alienated from the courts, but also, because the broadening of the base of the judiciary, sensitizes the judges to different views. There is a difference between debates which take place between persons of the same backgrounds and attitudes, and debates between persons with different life experiences and different backgrounds. The broadening of the debate is important, not only because of the greater fairness that is likely to result therefrom, but also because it will enhance the way in which the law develops and bring it closer to the needs of the population as a whole. Professor Jeremy Webber of McGill University explains the need for diversity among judges in the following terms:

> 'Justice never utters itself, but depends upon women and men for its formulation. That being the case, we must have more of the diversity of our society represented on the Bench so that the inescapable residue of attitudinal bias in adjudication reflects something of the range of attitudes present in our society.'

This statement is particularly apposite to the situation in which we presently find ourselves in South Africa. We are emerging from a long history of racial discrimination and authoritarian rule. It is simply not appropriate that at a time of political change of these dimensions, a white judiciary which was appointed by the apartheid government, and enforced its laws, should be given control over judicial appointments, and, without even securing the approval of the new democratically elected legislature, should become the guardians of the constitution.

The principal argument against a deliberate policy of changing the profile of the judiciary is that appointments to the Bench should be based solely on merit. But what is merit? No one could deny that appointments to the South African Bench, including appointments to the Appellate Division, have historically been influenced by language, religion and political attitudes. When the National Party came to power it immediately embarked upon a deliberate policy of appointing white Afrikaans speakers to the Bench. At the time Afrikaans speakers were heavily under-represented within the white population both on the Bench and at the Bar. As a result of this policy of affirmative action within the white community, Afrikaans speaking judges gradually increased in number, and became a substantial majority on the Bench. In the early days of this process, Afrikaans speaking juniors

with comparatively modest practices took silk (sometimes being appointed without the recommendation of the Chairman of their Bar Council) and shortly afterwards were appointed to the Bench over the heads of more experienced and more skilled English speaking counsel. One of the results of this policy was to encourage Afrikaans speakers to join the Bar, because of the opportunities which were opening up for them. And today, Afrikaans speakers are the leaders of most of the Bars and the core of the present judiciary.

What needs to be understood is that appointments to the South African bench have not in recent memory ever been made solely on merit, and there is no reason why at this crucial time in our history, when there is an urgent need to reconstruct our society, we should become converts to that abstract standard. This does not mean that merit is irrelevant and should be ignored, or that the sole criterion for appointment to the Bench should be the race or gender of the candidate. Merit is an elusive concept. It certainly includes technical skills, but that is not all; it also includes other qualities which are attributes of good judges, and which may be as important as technical skills. There is a minimum threshold of skills and qualities that all judges require, and these should be met in every case. They include integrity, experience, an ability to listen to and understand witnesses stories (a quality which is not always valued under the present system) and an intellectual capacity to master the law, to deal with arguments, and to write judgements in a clear and reasoned manner. This minimum threshold should always be met, and to that extent merit must always be a requirement, and the appointment of persons who do not meet the threshold requirements should not be entertained.

Those whose responsibility it will be to appoint, or advise on the appointment of judges, should set an appropriate threshold. They should also accept that the profile of the judiciary needs to be changed with all deliberate speed, and set themselves that goal. It would be appropriate for them to identify and compile lists of black and women lawyers who meet the threshold requirements. They should be willing to go beyond the ranks of Senior Counsel and look to all branches of the profession for candidates whose appointment to the Bench would bring about a change in the racial and gender composition of the present judiciary. Positive action should be taken through training courses and seminars to promote the development of the technical skills of these potential candidates for appointment to the Bench, and everything possible should be done to increase the size of the pool of suitable candidates.

It will, I believe, take time before the process is completed. But the process must begin, and all of us in the legal profession, including the existing judiciary, should give it our wholehearted support. The new appointments when made should be welcomed and encouraged, and should not meet with hostility or carping criticism from the judges and the profession." (Our underlining, for emphasis).

112. In accordance with the above approach, which we fully subscribe to, Nadel is of the opinion that the appointment of judges should be made from all branches of the legal profession without discrimination and broadly in accordance, inter alia, with the following criteria: integrity and independence of judgement, professional competence, experience, humanity and commitment to uphold the rule of law and human rights. These principles are in accordance with international norms, reflected in various written instruments, including the Montreal Declaration and the report of the Banjul Seminar, held in Gambia, in 1987. (See the International Commission of Jurists, The Independence of the Judiciary and the Legal Profession in English-speaking Africa (1987) at 144- 145).

113. In light of the criteria laid down above for appointment to the Bench, we are of the view that the expression fit and proper, to connote a candidate suitable for appointment to the Bench, is vague and devoid of any meaning, other than the technical and very rigid meaning presently ascribed to it, and we suggest that it should be replaced in favour of the aforesaid criteria.

114. Accordingly, we disagree with the Judges proposal in paragraph 7 (c) of the Judges First Memorandum that as a rule judicial appointments should be made from the ranks of senior advocates in private practice, as is the present position. We agree with the Judges Memoranda, insofar as it recognizes that a distinction must be made in the appointment of Judges to the CC. However, we disagree on the criteria for such appointment, as has already been dealt with more fully herein. Indeed, the Judges' proposal would once again entrench and promote all the historical imbalances and exclusions of the past. In the South African context we believe that this proposal does not begin to deal with fundamental issues which deprive the present judiciary of the legitimacy and credibility a judiciary should enjoy.

(f) Continuation in office of existing judges and magistrates

115. We leave this issue, as dealt with in paragraph 8 of the Twelfth Report and section 96 of the Addendum,

open in these submissions, as we intend making representations in this regard in the future, as we are not satisfied with the approach adopted in this regard.

(g) **The Prosecuting Authority**

116. We endorse the proposal in paragraph 97 (3) of the Addendum, in respect of qualifications of an Attorney-General, except that if the section could be interpreted to mean that a suitably qualified attorney or legal academician cannot qualify for the post, then we suggest the section be amended accordingly.

E. **MISCELLANEOUS ISSUES**

117. Two further issues on which Nadel and the Conference have madé recommendations must be dealt with, as follows:

(a) **Unilateral Restructuring**

118. In the last year or two the Department of Justice has actively and unilaterally commenced with the restructuring of the legal system and its institutions. To this end, some important and far-reaching changes to the structures administering justice have been introduced. Most of these changes appear to be designed to have an impact, directly or indirectly, on the future structures which shall be tasked with administering justice, regardless of the form of the constitution South Africa finally adopts.

119. Nadel finds these actions of the Department of Justice totally unacceptable and will thus neither for reasons of political or practical expediency provide such changes with any credibility, efficacy or legitimacy. Nadel rejects the unilateral imposition of such changes upon the populace and records its intention to actively oppose the imposition of same, and further calls on the Department to immediately place a moratorium on all unilateral restructuring, as well as the further implementation of steps already taken in this regard.

(b) **National Legal Forum**

120. It is Nadel's view that proper, effective and appropriate administration of justice is one of the pivotal cornerstones of any democracy. This issue therefore needs to be handled with the utmost sensitivity, care and diligence. If any of the legal institutions we have at present are to be transported into the future, in their present or changed form, and if any changes need to be made to

any aspect of the legal system, the legal fraternity needs to ensure that all restructuring is done through a broad consensus, with the legal fraternity and society more broadly to generate maximum confidence in such changes and to ensure that we are all able to defend such transformation of our legal institutions and the institutions of our legal profession. Otherwise, in Nadel's humble submission it is preferable not to make any changes at all until appropriate, representative and accountable structures are in place.

121. To this end, Nadel has initiated a process for the formation of a broad, national forum, the National Legal Forum, composed of representatives of stakeholders in the legal fraternity. The task of such a forum would be to reach consensus on any future, and the implementation of any past, restructuring in respect of the structures, personnel, jurisdiction, powers and other relevant issues of all South African legal institutions.

122. Nadel's views in respect of unilateral restructuring and the formation of a National Legal Forum, are more fully dealt with in Annexure A, annexed hereto.

DATED AT CAPE TOWN THIS 15TH DAY OF OCTOBER 1993.

p.p.

ADV. PIUS N. LANGA
President of Nadel

Compiled by:

The Legal Education, Research and Training Project of Nadel.

(Reference: Adv. Johnny de Lange and Dr. Vela Sibisi).

ANNEXURE A

Unilateral Restructuring

1 In the last year or two the Department of Justice has actively and unilaterally commenced with the restructuring of the legal system and the legal institutions underpinning it. We have in mind here the Attorney-General Act, No. 92 of 1992, The Magistrates Act, No., 90 of 1993, the continued and rapid increase of jurisdiction in the inferior courts, and so forth. Each of these legislative enactments or proposed legislative enactments have important and far-reaching implications. In a period of supposed negotiations and consultations, these legislative amendments have been rushed through Parliament, with indecent haste and without meaningful or any consultation at all, neither with stakeholders in the legal fraternity or with the government's negotiating partners.

2. Most of these changes appear to be designed to have an impact, directly or indirectly, on the future structures which shall be tasked with administering justice, regardless of the form of the constitution South Africa finally adopts. It is thus Nadel's considered view that the predominant intention of the Department of Justice with these changes is not aimed at furthering the interests of all the people of this country, but rather to stifle and even preempt a future democratically elected government from bringing about a meaningful, integrated and comprehensive transformation of the legal system and its concomitant legal institutions.

3. Nadel is of the view that these changes should not be made at this stage, "when the sun is busy setting on our racist past", most certainly such changes should not be made unilaterally by a Government which has not yet won the confidence of particularly those who are still disenfranchised. Moreso, as this government is not only politically and morally bankrupt, but has proven itself to be corrupted and corruptible to its very core, stretching to each nook and cranny of its administration, whether high or low. Every change Government will propose or has brought about as presently constituted, will remain tainted with the same racist, apartheid brush and remains totally unacceptable to Nadel and we believe to the vast majority of South Africans.

4. Nadel finds these actions of the Department of Justice totally unacceptable and will thus neither for reasons of political or practical expediency provide such changes with any credibility, efficacy or legitimacy.

5. Although some of these changes/reforms to the structures and/or procedures pertaining to the administration of justice in our country, may in themselves be deserving of support, Nadel rejects the unilateral imposition of such changes upon the nation and records its intention to actively oppose the imposition of same. Furthermore, we reserve the right to ourselves to lobby and pressurize the present government or any future government, whether transitional or permanent, to reverse such changes, or at the very least any consequences which may flow from the unilateral imposition of such changes, for example, the establishment of any structures or positions to facilitate such changes, the employment of personnel, the promotion of personnel, or material benefits any person may enjoy or derive from such changes. We intend putting the Department of Justice to terms, to immediately place a moratorium on all unilateral restructuring, as well as the further implementation of steps already taken in this regard.

6. We believe that it is equally imperative that the judiciary, magistracy and the organized legal profession are transparently and actively seen to distance themselves from such unilateral restructuring by the Department of Justice and to join in the rejection of, and opposition to, such changes. For the sake of the future credibility of the structures administering justice, now is not the time for the organized legal profession, the judiciary, the magistracy and other stakeholders in the legal sector to be siding with the wrong side of history.

National Legal Forum

7. It is Nadel's considered opinion that a comprehensive, integrated and holistic approach is necessary in all spheres of South African life, to address the legacy and vestiges of Apartheid and to start transforming our society and its institutions into a non-racial, non-sexist, democratic and more human environment. This is not to submit that any particular area of society cannot be addressed or transformed without dealing with the whole. The point merely being that tinkering with one peripheral issue whilst Rome continues to burn, in a manner of speaking, is not going to put an end to the raging flames, in fact it may merely serve to fan and encourage it. Clearly this submission is not intended to address all the social ills of our society and to this end we only intend addressing that aspect of the legal system which pertains to its institutional or structural capacity under the new legal and constitutional order being created. In other words the structures which in the future will administer or implement, or fulfill a role or

function in the administering of justice or the law of the land.

8. Against this background it is Nadel's considered view that the only realistic and correct way of addressing the crisis of credibility, efficacy and legitimacy pervading the South African legal system and its legal institutions, including the legal profession, is by adopting a comprehensive, integrated and holistic approach, to deal with the restructuring and transformation of the legal system and its concomitant legal institutions, as well as the legal profession. To this end Nadel suggests the adoption and implementation of the following approach.

9. Since February 1990, our nation has embarked on various initiatives to address the severe legitimacy crisis facing the organs of state, and in an attempt to reach a political negotiated settlement for our country. These initiatives have emanated from various and varied sources, ranging from the government, to the ANC, other organizations or parties which form part of the negotiation process and to various organs of civil society.

10. It is our submission that all these initiatives need not be enumerated here or even discussed. Suffice to say that these various initiatives, in a number of areas, are aimed at agreeing to and putting in place enduring transitional arrangements, which will at the very least enjoy the confidence and support of the majority of our people during the transitional period. We have in mind here the Multi-Party Negotiating Process (hereinafter referred to as the MPNP) at the World Trade Centre.

11. As you are aware, the ultimate aim of the MPNP being to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races. In order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles. It is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution. To this end and to provide for all the above processes, it is intended, in the near future, to promulgate the Constitution of the Republic of South Africa 1993.

12. In turn, the MPNP have ushered the promulgating of a TRANSITIONAL EXECUTIVE COUNCIL BILL through Parliament to establish a Transitional Executive Council (hereinafter referred to as the TEC), with a view to facilitate the preparation for the transition to the implementation of a democratic order in South Africa. This Act will enable multi-party control and governance over the following areas of government:

a) Regional and Local Government and Traditional Authorities:
b) Law and Order, Stability and Security;
c) Defence;
d) Intelligence.
e) Finance;
f) Foreign Affairs; and
g) the Status of Women.

13. However, there have also been further initiatives, to put in place transitional arrangements, in those areas of government which are not intended to fall under multi-party control of the TEC during the transitional period. We are referring here to the National Economic Forum, National Housing Forum, National Local Government Forum, the proposed National Education Forum, and so forth.

14. These forums invariably comprise of the relevant government department and stakeholders operative in the area of functionality of such department. Although such structures are referred to as advisory, decisions within such forums are usually taken by consensus and the relevant department seizes all unilateral decision-making and restructuring in its area of functionality. In other words, multi-party consultation, control and decision-making has been introduced, as a transitional arrangement, into those areas of government which fall outside the terms of reference of the TEC. The reason for this eminently sensible and inclusive approach, we humbly submit, is to clothe the decisions and functioning of these departments, during the transition, with a measure of multi-party consensus and thus legitimacy.

15. The Department of Justice does not fall within the parameters or realm of any of the above transitional arrangements or intended transitional arrangements.

16. It is Nadel's view that proper, effective and appropriate administration of justice is one of the pivotal cornerstones of any democracy. This issue therefore needs to be handled with the utmost sensitivity, care and diligence. If any of the legal institutions we have at present are to be transported into the future, in their present or changed form, and if any changes need to be made to

any aspect of the legal system, the legal fraternity needs to ensure that all restructuring is done through a broad consensus, with the legal fraternity and society more broadly to generate maximum confidence in such changes and to ensure that we are all able to defend such transformation of our legal institutions and the institutions of our legal profession. Otherwise, in Nadel's humble submission it is preferable not to make any changes at all until appropriate, representative and accountable structures are in place.

17. It is against this background that Nadel proposes the formation of a broad, national forum, the National Legal Forum (hereinafter referred to as the Legal Forum) composed of representatives of those organizations and institutions, which have a vital interest in the administration of justice. This could possibly include representatives from:

a) government institutions, like the Department of Justice, the judiciary, magistracy and the Legal Aid-Board;
b) the Legal Departments of the liberation movements;
c) the ALS;
d) the GCB;
e) lawyers organizations, such as Nadel, BLA, LHR and the Association of University Law Teachers;
f) law faculties of the respective universities; and
g) institutions, such as the Legal Resources Centre, the Centre for Applied Legal Studies, the Community Law Centre (University of the Western Cape), the Community Law Centre (University of Natal) and the Legal Education Action Project.

18. Consideration needs to be given to the inclusion of Legal Aid Clinics, Legal Advice Centres and Para-Legal Projects, if practically possible. The list is not intended to be exhaustive, but should merely serve as an indication of the suggested composition of the Legal Forum. There has, for instance, been a view expressed that membership of the forum should include other organs of civil society, whose constituencies bear the brunt of the adverse effects of the actions and even abuses of the structures charged with the administration of justice. We however have to start somewhere.

19. It is proposed that the following terms of reference and procedures, in respect of the forum should at the very least be accepted, as a basis for its existence:

a) The forum shall be patterned on similar lines to the National Economic Forum and other forums of a similar kind;

b) the forum shall mainly act as a policy-making forum in the legal arena and not necessarily as an investigative body. It shall however have all the powers necessary to establish and create mechanisms which shall act as its investigative arm;

c) The forum shall look into and consider all aspects pertaining to formal legal education, the legal profession and the administration of justice (i.e. the Department of Justice) and make recommendations as to the necessary changes, to be brought about in these areas of functionality, during the transitional period;

d) All changes to the legal system and its concomitant legal institutions, as well as the consequences flowing therefrom, which have been unilaterally effected by the Department of Justice, shall be revisited by the forum;

e) This would mean that an immediate moratorium is to be called on all changes, as well as the further and continued implementation of such changes, unilaterally effected by the Department of Justice, including those areas where there has been consultation only with the ALS and GCB, or their constituent parts, respectively;

f) The forum shall exist with these terms of reference only until a democratically elected government is in place. This does not exclude the possibility of such a forum or a similar forum continuing to exist as an advisory body, in respect of aspects pertaining to the legal order, to advise a future democratically elected government, in respect of such issues, provided all affected parties agree thereto;

g) Decisions of the forum should be taken by consensus; and

h) Decisions taken by the forum shall not be ignored or undermined by any of the parties, in the execution or implementation of such decisions.

20. It is now more necessary than ever before to ensure that any restructuring of the legal system and its legal institutions, which is undertaken, is not only in the interests of the broadest consensus concerned, but in fact enjoys their sanction. To this end, Nadel will not be prepared, under any

circumstances whatsoever, to impart any form of credibility, efficacy or legitimacy, to any changes effected in the past, or future intended changes, to either the legal system and its legal institutions, or the legal profession, by either the Department of Justice, or the organized legal profession, without such restructuring being a process of consultation and agreement in a Legal Forum as proposed above.

21. Nadel will thus be urging the Milne Commission in the circumstances to suspend its deliberations, until the said Forum has been established and has decided not only upon the fate of the Commission, but also on the method for dealing with the restructuring of the structures administering justice and the legal profession.

22. It may be recorded that Nadel has taken the first tentative step towards the establishment of the aforesaid Legal Forum. A meeting of some of the organizations and institutions from the legal fraternity, was held in Johannesburg, on 02 September 1993. Absent was the GCB and Lawyers for Human Rights, although invited. All parties present tentatively expressed their support for the kind of forum proposed above.

23. The meeting agreed to establish an interim Steering Committee, comprising Adv. Pius Langa (Nadel), Adv. I. Semenya (BLA) and Mr A. van Vuuren (ALS), with the task of:

a) convening a more representative meeting, including the Department of Justice, within two weeks or as soon as possible;

b) to brief all parties invited and who were not present at the last meeting of its deliberations and the aims and objectives of establishing such a forum; and

c) to draft a discussion document for the next meeting pertaining to the possible composition and terms of reference of the proposed forum.

24. Hereafter, the Conference also gave its approval for the establishment of the Legal Forum, as a matter of utmost urgency. Nadel undertook to continue with its endeavours in this regard with all due haste.

25. A further, much more representative meeting, was held in Johannesburg, on 15 October 1993. It was agreed by all parties present to establish the Legal Forum and it shall be formalized at its next meeting on 04 November 1993.

Annexure M CC ME

SCHREINER GROUP 14

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JOHANNESBURG
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JOHANNESBURG
2000

21 October 1993

To:

Dr Eloff
Head of Administration
Multiparty Negotiating Process

FAX NO. 397-2211

SUBMISSION TO TECHNICAL COMMITTEE FOR CONSTITUTIONAL ISSUES

From:

Black Lawyers Association
Fax No. 333-1392
Ref: (Ms) K D MOROKA
Secretary

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BLACK LAWYERS ASSOCIATION

SUBMISSIONS TO THE MULTIPARTY NEGOTIATING PROCESS, TECHNICAL COMMITTEE FOR CONSTITUTIONAL ISSUES

The submissions made herein are under the direction of the Black Lawyers Association. In formulating the submissions we acknowledge that constitution making is inherently the product of a political process and that it invariably embodies political choices. Nonetheless, we have sought to base our submissions on considerations which bear upon the administration of justice and more particularly on the judiciary with specific emphasis on the establishment of the Constitutional Court.

1. It is universally acknowledged that in a democracy the trident of State apparati comprise of the legislature, the executive and the judiciary. We have noted that in the Multiparty Negotiating Process the debates have principally centred on the restructuring of the legislature and to some extent the executive but there has been minimal discussion concerning the restructuring of the judicial system and the administration of justice as a whole for a future democratic dispensation.

2. In a modern constitutional democracy, the judiciary and particularly the Constitutional Court have a pivotal role in ensuring that the Constitution is *suprema lex* by vigilantly keeping a proverbial eye upon the ever increasing bureaucratization of the body politic and the concomitant proliferation of the terrain of administrative actions and decisions whereby the executive governs by delegated authority through an array

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of decrees, proclamations, regulations or otherwise. To ignore the sweeping exercise of executive powers and administrative actions which are necessary in a modern state is to turn a proverbial blind eye to the inherent risk which may adversely impinge from time to time upon the fundamental rights of the citizens.

3. First and foremost the judiciary must be structured in such a manner so that it will constantly guard against unwarranted executive intervention and administrative tampering with the rights of the governed. The judiciary is required to maintain a proper and delicate balance between the exercise of executive powers and administrative actions on the one side and the rights of the governed on the other side.

4. Having regard to the peculiar and pervasive history of the absence of a human rights culture in this country, we consider that the Constitutional Court will indeed be a formidable dynamo in developing a human rights ethos and thereby enhancing the legitimacy of the judicial system and administration of justice. But this will depend upon the composition of the Constitutional Court. If the appointments to the Constititonal Court is to be confined to the ranks of senior advocates and judges presently available then we are o fthe consisered view that it will be by and large white bench with one or two Blacks. This composition will certainly undermine the image of the Constitional Court.

5. Further, or without overlooking the historically ingrained perceptions, more particularly by the majority of blacks, of the prevailing legal system which has been instilled by brutal encounters and bitter experiences with "the law" which including the courts have been inimical to black interests and aspirations. Hence, the envisaged Constitutional Court will have to ensure the justiciability of the Constitutional principles, will have to cultivate a rights culture and will have to inculcate the meaningful acceptance of the Constitution by all, which will demand a balance composition. Thereby, the Constitutional Court will give legitimacy to the judicial system and administration of justice.

6. The Constitutional Court will have to be astutely independent with the fundamental responsibility of maintaining the scales of justice in proper and even balance and constantly striving to avoid the castigation of '*executive mindedness*'. In its pivotal role the Constitutional Court will be the flagship:

> *"...[with] a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion."*

(Per Mahomed A J, as he then was, in **S v Acheson** 1991 (2) SA 805 (NmHC) at 813B).

7. The legitimacy and credibility of the Constitutional Court, we emphasise, will be contingent upon the appointment of judges from a larger pool of existing judges, advocates, attorneys and legal academics. A possible consideration is to appoint constitutional experts, for example political scientists (and even to consider the appointment of non-lawyers if need be to enhance the image of the legal system. But this is a matter for in depth consideration).

8. Indeed there is an ongoing need to restore credibility to the judiciary we suggest that the pros and cons of appointing persons having a human rights track record in their practices be favourably considered in spite of their lack of experience. At the very outset of establishing the Constitution Court, its very credibility must be established to mirror the composition of a non-racial democratic State.

9. The Technical Committee *thinks* "that consideration should be given to creating an independent and entirely separate Constitutional Court, to serve as the court of final instance in all constitutional issues" (paragraph 3.6, page 5). The Committee has also provided examples of models for a Constitutional Court.

10. In this regard, we support the creation of an independent and separate Constitutional Court as the final arbiter in all matters pertaining to

constitutional issues but we favour direct access to the Constitutional Court by the litigants themselves. At this juncture we strongly advocate that the Constitutional Court must be independent from the Appellate Division of the Supreme Court and constituted of judges who are totally independent of the *ordinary* judges of the Supreme Court. In this regard we add that there should be no secondment of ordinary judges on *ad hoc* basis from the Supreme Court to the Consitition Court.

11. We submit there ought to be a system of referral from the ordinary courts whenever in any case the constitutional validity of any action is put in issue or disputed by one of the parties or *mero muto* raised by the ordinary court. In such circumstances the proceedings in the ordinary court which would also include the Appellate Division must be stayed or stopped and the issue or dispute proceed for adjudication by the Constitutional Court.

12. We also submit that in any discussion a provision similar to Section 131A of the Constitution of India must be considered and we have adapted the said section for present purposes to read:

Exclusive jurisdiction of the Constitutional Court in regard to questions as to constitutional validity of central laws.

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(1) *Notwithstanding anything contained in any other provisions of the Constitution, the Constitutional Court shall, to the exclusion of any other court, have jurisdiction to determine all questions relating to the constitutional validity of any national law.*

(2) *Where a Supreme Court is satisfied -*

(a) *that a case pending before it or before a court subordinate to it involves questions as to the constitutional validity of any national law or, as the case may be, of both national and regional laws; and*

(b) *that the determination of such questions is necessary for the disposal of the case.*

the Supreme Court shall refer the question for the decision of the Constitutional Court.

(3) *Without prejudice to the provisions of clause (2), where an application made by any Attorney-General, the Constitutional Court is satisfied,*

(a) *that a case pending before a Supreme Court or before a court subordinate to a Supreme Court involves questions as to the constitutional validity of any national law, or, as the case may be, of both national and regional laws; and*

(b) *that a determination of such questions is necessary for the disposal of the case,*

the Constitutional Court may require the Supreme Court to refer the questions to it for its decision.

(4) *When a reference is made under clause (2) or clause (3), the Supreme Court shall stay all proceedings in respect of the case until the Constitutional Court decides the questions so referred.*

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(5) The Constitutional Court shall, after giving the parties an opportunity of being heard, decide the question so referred, and may -

(a) either dispose of the case itself; or

(b) return the case to the Supreme Court together with a copy of its judgment on such questions for disposal of the case in conformity which such judgment by the Supreme Court, or, as the case may be, the court subordinate to it.

13. We are of the view that in the process of constitution making some very serious consideration ought to be given to the totality of the restructuring of the judicial system and administration of justice for the future dispensation.

14. We propose that a special technical committee or a commission be established to consider the restructuring of the entire South African judicial system and administration of justice and fashioning a *draft* judicature bill. The establishment of a Constitutional Court must be considered in the context of the proposed restructuring in a holistic form.

15. Therefor, this proposed special committee or commission ought to examine the existing structures and statutes, namely, the Magistrates' Court Act 32 of 1944, Supreme Court Act No. 59 of 1959 and Small Claims Courts Act 61 of 1984 as well as other legislations currently

dealing with specialist courts such as the Industrial Court, Water Court, Income Tax Court, etc. including those of the TBVC states. Such a committee or commission will then be in a position to identify with a tremendous degree of precision and greater insight in defining the precise roles of the Constitutional Court and the ordinary courts and the *modus* for the restructuring of the existing Supreme Court in the light of the creation of SPRs.

16. Furthermore, the creation of the Constitutional Court as an independent and separate entity without the consideration of any referral mechanisms from the ordinary courts may result in hampering the role and task of the Constitutional Court.

17. In the future democratic dispensation the appointment and removal of judges should rest with the newly elected Parliament upon the recommendation and advice of a Judicial Service Commission.

18. The Commission as it is suggested by the Technical Committee should be composed in a balanced manner of representatives of the judiciary, the executive, the legislature and the legal profession.

19. But, before any debate regarding the appointment and removal of judges takes place there has to be a vigorous debate concerning the

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appointment of a Judicial Service Commission itself in view of the fact that there is a great risk that it will be composed of almost all white male elite which will certainly detract from the legitimacy of the intended independent judicial system.

20. We submit that an enlarged Judicial Services Commission which will accelerate the process of democratisation and empowerment, hence, in addition to the representatives of the judiciary, the executive and the legislature, there should be two advocates (irrespective of their seniority) nominated by the General Council of the Bar, one of whom shall be a black man or a woman advocate and similarly there should be two attorneys (not necessarily of senior rank) nominated by the Association of Law Societies, one of whom shall be a black man or a woman attorney. The first and foremost step will be to ensure that there is a reasonable balance in the composition of the Judicial Service Commission.

21. We have also considered the possibility of inviting grassroots representation such as lay persons from popular organisations as part of the Judicial Service Commission. But we view the introduction of such representation on the Commission with a degree of caution and circumspection as well as problematic.

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22. However, we submit that the Black Lawyers Association, National Association of Democratic Lawyers, NICRO and the Association of Law Teachers of South Africa should have one representative each on the Judicial Services Commission. This Commission will also be responsible for the appointment of judges to the ordinary courts.

23. We consider that the first appointments to the Constitutional Court in the interim phase should be by a *Special Judicial Committee* comprising of the Joint Judicial Committees of Parliament and the Judicial Services Commission. The first appointments shall be an *en bloc* election by two-thirds majority of the Special Judicial Committee.

24. Since the Constitutional Court is envisaged to play a pivotal role and having regard to the Technical Committee's suggestion that the Executive or head of State may approach the Constitutional Court for an opinion on a bill passed by Parliament in the event of doubt as to its constitutionality, then we also suggest that the Constitutional Court may also be approached by the Executive or head of State for advice on a proposed bill in the draft form as to its constitutionality prior to the bill being debated in Parliament.

25. The suggestion we make will certainly impinge upon the time of judges of the Constitutional Court and there will be the risk of burdening them.

hence, with a view to ameliorating the risk we suggest that some consideration be given for the *ad hoc* appointment of additional judges who will be appointed by the head of the Executive in consultation with the President of the Constitution Court.

26. These *ad hoc* additional judges may be appointed from the ranks of lawyers and constitutional experts and if need be to include lay persons to prepare opinions and advice to be handed down by the Constitutional Court acting in its advisory capacity. Further these additional judges may also be considered to perform extra curial functions such as heading commissions and enquiries which touch upon constitutional and human rights issues.

27. The purpose behind the idea of *ad hoc* additional judges is to create a pool of readily available and trained persons who will be potential candidates for future judicial appointments to the Bench at large. These persons coming via the Constitutional Court will certainly have gained experience in constitutional and human rights issues which will be of benefit even in the ordinary courts.

28. We reiterate that any debate concerning the establishment and structuring of a Constitutional Court will be meaningless if such a debate is independent and separate from the debate concerning the role

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of the ordinary courts within the totality of the judicial system and the administration of justice. In any debate it will have to be resolved whether judicial review of administrative action ought to be within the jurisdiction of the Constitution Court or the ordinary courts or both or only if such administrative action impinges upon constitutional validity then the Constitutional Court will have jurisdiction thereat.

29. In the report of the Technical Committee the expression "constitutional issues" is not defined or elucidated or elaborated upon.

30. In our opinion the expression simply means disputes between different organs of the State or matters arising out of unconstitutional legislation and action. The crisp question is should it also include litigation arising out of a dispute between private persons, for example where a landlord attempts to evict a tenant and the latter pleads that the attempted eviction constitutes a violation of the fundamental rights of privacy and an interference with his or her right of decent family life which would include his or her home. This may, at first blush seem a frivolous example but a similar proposition was considered by the European Court of Human Rights. A further example is that in a bail application before the ordinary criminal court the question will be whether the State should bear the *onus* in view of the fact that in a constitutional dispensation an accused has a right to liberty. The question arises whether the

accused, as a corollary to that right, has a right to bail. If the answer is in the affirmative then the State will have to bear the *onus* which is different from the present position where the accused bears the *onus*.

31. Therefore, we consider that the expression "constitutional issues" need to be defined with utmost consideration and debate by probing at the advantages and disadvantages for a clear definition. Furthermore, whether the "constitutional issues" embraces only issues of law or law and fact for adjudication by the Constitutional Court.

32. We reiterate our suggestion that a special technical committee be established to research and investigate the various facets of the judicial system in its entirety and make recommendations as to the best possible changes that are needed for the restructuring of the judicial system and system of administration of justice as well as the establishment of a Constitutional Court.

33. In our opinion the criminal justice system particularly in the lower courts has no legitimacy whatsoever with the majority of the citizens. It cannot be imported into a democratic dispensation, it needs urgent restructuring and this can only be actioned by means of proper diagnosis.

34. Furthermore, we envisage that the reconstruction of the judicial system and the administration of justice ought to take place during the transitional phase as a matter of urgency. In nurturing a healthy and meaningful reconstruction and development we submit the following for and during the interim phase:

(a) We acknowledge that the establishment of the *new* Constitutional Court will be preceded by establishing an Interim Constitutional Court during the interim phase ensuring that the judges who will be appointed in the Interim Constitutional Court will be persons who will recognise the pivotal role they will play in developing a constitutional and a human rights ethos during the transition. These judges will have to be persons of tremendous sensitivity and perception. They must have a track record of human rights and public interest experience from their practice as lawyers. They should be drawn from all sections of the people to ameliorate the inequalities of the past.

(b) The question is how will the judges for the Interim Constitutional Court be appointed. We propose that in the interim phase a *Special Judicial Committee* be established. This *Committee* should be composed of the Judicial Services

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Commission and the Joint Judicial Committee of Parliament. This will certainly ensure that the appointment of the judges for the Interim Constitutional Court will not solely rest within the purview of the legal fraternity but will certainly draw in the larger public interest through the Joint Judicial Committee of Parliament which we suggest should be constituted on the basis of proportional representation of party strength in both Houses of Parliament.

(c) During the interim phase we suggest that there should be as a matter of policy to appoint assessors to the Interim Constitutional Court. We predicate that during the transition phase the Interim Constitutional Court will engage in a process of developing a jurisprudence of its own. It is envisaged that a wide variety of issues will come before the Interim Constitutional Court, for example issues of customary law or matters pertinent to religious rites and practices for example Islamic and Hindu customary marriages which are posited on theocratic laws, thus needing the expertise of persons who will assist the court as assessors.

(d) We strongly suggest that consideration be given as a matter of priority for the need to establish a committee to review the

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existing rules of practice of both the Supreme and Magistrates' Courts and to seek if necessary amendments thereto and thereby making the courts far more accessible to the people as well as to enhance and expedite proceedings before the ordinary courts and Interim Constitutional Court. Such will occur if the rules are amended in such a manner that they interact between the different fori in the whole of the judicial system.

(e) Furthermore, having regard to the fact that there is a poorly developed legal aid system in this country, we also suggest that as a matter of priority consideration be given that the funding of constitutional and human rights litigation ought to be from State treasury during the interim phase. In this regard we submit that a special fund be established to assist litigants who may not be able to afford access to the Interim Constitutional Court simply because they do not have the funds.

(f) If it is intended that the legal system as a whole should be restructured to be consistent with the dawning of a democratic dispensation and having regard to the fact that the organised legal profession is conservative and will not cause

tremendous changes during the transition stages and beyond, we suggest that consensus be reached by way of consultations with all parties concerned to compile an unbiased and unfavoured list of twenty or more senior/junior black and women advocates to be granted silk upon the installation of the Government of National Unity on 1 May 1994. In this way the Interim Government will be enlarging the pool of senior black and women advocates from which judicial appointments could be made.

(g) Finally, we submit that the primary and fundamental role of the Constitutional Court both in the transition stages and beyond is to give essence and spirit to a human rights ethos which will concomitantly embrace, from time to time, the political and social values of a society in transition. In this regard we are of the view that there is indeed a case for non-lawyers to be appointed as judges and assessors to the Constitutional Court.

ESSOP M PATEL
KGOMOTSO MOROKA

21 October 1993

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ADDENDUM N

THE BAPTIST UNION OF SOUTHERN AFRICA
48 Geoffrey Street, Roodepoort, Transvaal, 1725
P.O. Box 1085, Roodepoort, 1725 Telephone 766-1066/7

257/JWL/mf

7 October 1993

Dr T Eloff
Multi Party Process
P O Box 307
ISANDO
1600

Dear Sir,

MOTION RE PEACEFUL NEGOTIATING PROCESS

The Baptist Union comprises of 307 Churches and has a membership through these Churches of approximately 36 000.

The Union of Churches meets annually at an Assembly and the last Assembly was held in Pretoria from 24 - 29 September 1993 at which 166 Churches were represented by 249 Church delegates and 11 Executive Committee Members. There were also 136 non-voting delegates making 396 people in attendance at the Assembly.

At the Assembly the attached resolution was passed. It was agreed that it be sent to all political parties.

Having looked at the resolution we would be grateful if you could let us have the addresses of all the political parties including the Cosag Group in order that we fulfil our instruction to send it to all political parties.

Yours faithfully

J W LOCK
FINANCIAL & ADMINISTRATIVE SECRETARY for GENERAL SECRETARY

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Christian Citizenship Committee The following motions were accepted by the Assembly:

Violence/Preparation for Democracy

Believing that God wills believers to seek the peace and prosperity of every nation in which they have been called, this Assembly of the Baptist Union of Southern Africa wishes to record both sorrow and gratitude: sorrow on account of the ongoing violence ravaging our country and the contempt shown by some for the negotiation process and the Peace Accord; gratitude for that progress which has been made in the negotiations towards a constitutional settlement of the country's future.

To all the political parties and leaders playing such an important rôle in the current political process we urge the following:

1. To persevere in the process of peaceful negotiation, making every effort to find solutions that will be in the interest of the country and its peoples and to be willing to make whatever sacrifices of sectional interests necessary for the interests of the whole country.

2. To reject all forms of intimidation and any actions, statements or slogans that could result in promoting hatred, violence and bloodshed between the various communities in this land.

3. To respect the democratic process and to be willing to accept the outcome of negotiations and the resulting election in a spirit of reconciliation and commitment to the welfare of the country and all its peoples.

This Assembly also calls upon all churches and their members to continue to bear witness to the Gospel of our Lord Jesus Christ as the source of ultimate peace and to take radical action in current issues through:

1. **PRAYER:** To pray all the more earnestly for all political leaders, that they might use their power and influence in a wise and responsible way;

2. **PEACE:** To engage in acts of compassion for the victims of violence; to be willing to serve as counsellors and peace monitors and to get involved at a local level in Peace Committees such as those initiated by the National Peace Secretariat/Accord;

3. **PROMOTING DEMOCRACY:** To exercise their vote in an informed and responsible manner in the coming elections and to help in educating others to understand such basic concepts as voting and the meaning of democracy.

To promote those values vital to a culture of

democracy, such as tolerance, mutual respect, commitment to peace, a willingness to serve and a concern for the rights of others.

To participate in educational, community, statutory and other bodies that shape the policies of society.

This Assembly requests that the General Secretary and Territorial Association Co-Ordinators take urgent action to implement this resolution.

Addendum O

AFRICAN COUNCIL OF HAWKERS AND INFORMAL BUSINESSES

YOUR ADDRESS

OUR ADDRESS:

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SOUTH AFRICA

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YORK HOUSE
CORNER RISSIK & KERK
STREETS
JOHANNESBURG
2001

TEL: (011) 836-0005/8
FAX: (011) 836-0099

I WILL SUCCEED AGAINST ALL THE ODDS

Our Ref: Your Ref: Date:

We are 52 000 ACHIB members and 900 000 in total. You can not ignore us.

We say to the South African Government you can not ignore us . You can not pretend that everything is Okay.

1. We want to go into the new era free like everybody. Legalize Spazashops, Hawkers and Shebeens. Decriminalize these businesses.

2. IDT, DBSA and self governing development corperations must be restructured to ensure that help reaches its intended recipients namely small business, the largest and most disadvantaged sector being hawkers.

3. Cooking in the street and selling liquour should be legalised as soon as possible.

4. The Government and its agencies should provide funds for training, loans and infrastructure to organisations such as ACHIB.

6. ACHIB would like to say to the National Party and other political parties that we want freedom to be enterprising.

If you want to win our votes give us :

* Laws allowing us to be enterprising.
* Loans and government guarantees for securing loans for our members.
* Training and infrastructural support, (shelters and storage facilities).

We want the freedom and the means to create economic security and wealth for our disadvantaged members.

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ACHIB IS AFFILIATED TO THE NATIONAL AFRICAN FEDERATED CHAMBER OF COMMERCE AND INDUSTRY

N.A.F.C.O.C. RISE IN FAITH

PC agenda

Correspondence to be Noted.

cc TE July

Program D

REPABOLIKI YA/REPUBLIC OF BOPHUTHATSWANA

Te B 200

LEFAPHA LA BOSIAMIS

DEPARTMENT OF JUSTICE

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TO: SOUTH AFRICA GROUP

ATTENTION: MR JOHANN VAN DER WESTHUIZEN (PROF)

RECIPIENT FAX NO.: (012) 397-2411

FROM: MS. NCO JAGGA

OUR FAX NO.: (0140) 84-2407

DATE SENT: 19/10/93 TIME SENT: .....

NO. OF PAGES: 3 (INCLUDING THIS PAGE).

FAXED BY: MRS BOTSHELENG

MESSAGE: MAY YOU PLEASE GIVE THAT LETTER TO MR VAN DER WESTHUIZEN

THANK YOU

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REPABOLIKI YA/REPUBLIC OF
BOPHUTHATSWANA

Ts B 199

LEFAPHA LA BOSIAMISI

DEPARTMENT OF JUSTICE

Tshupetso/Reference

M. JAGGA
Botsa go/Enquiries
89-9199

Nr Moo/Tel No.
842406

Nr Faks/Fax No

KANTORO YA MOGAKOLODI WA MOLAO
OFFICE OF THE LAW ADVISER

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Mmabatho
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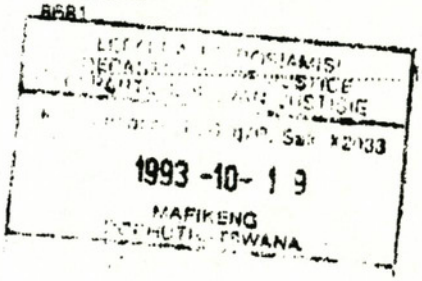

Mr Johann van der Westhuizen
The Convenor:
Task Group
Multi-Party Negotiating Process
P.O.Box 307
ISANDO
1600

Dear Mr Van der Westhuizen

TASK GROUP ON THE REPEAL OF LEGISLATION IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY LEGISLATION.

1. Your facsimile dated 14 October 1993, has reference.

2. In view of the stance taken by the Government of the Republic of Bophuthatswana in relation to the negotiating process, this Division deems it prudent to at this stage refrain from making any contribution to the abovementioned task group.

3. We trust that you find this in order.

Yours sincerely.

CHIEF STATE LAW ADVISER

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cc 1R
MR

Annexure Q

We a group of South African Women from various regions and communities of our country came together to deliberate those issues which affect our lives and well-being. Violence was identified as the most pressing issue and will no doubt affect the upcoming elections in a very real way and needs urgent attention at the highest level. We feel strongly that thus far violence has not been given the attention it deserves. Whilst government is proclaiming to have made every effort to curb violence none of their efforts have been seen to be adequate.

We resolved that this concern be brought to the attention of the negotiators at World Trade Centre and therefore demand that the violence be brought to an end without any further delay. These concerns have been raised many times before, but has not been addressed adequately and in a visible and effective manner. We the women of South Africa are angry and we are hurting and our families and communities have broken down. This anger we register with the negotiators to deal with NOW.We call on all the political parties especially the South African government to end the violence today! Enough is enough!

Signed at the Holiday Inn this day 24th October 1993

Chairperson.....V.V. Smith (V.V. SMITH).....

List of participants attached .

List of Participants at The Reach for Clarity Women's Conference Hosted at Holiday Inn on 24 October 1993

Name	Surname
Ankie	Motsoahase
Anne	Swanlow
Bongi	Mkhabela
Bulelwa	Melapi
Cecily	Palmer
Dinah	Nkobo
Ditty	Tshongweni
Doris	Sikhosana
Dudu	Chili
Elizabeth	Mpotulo
Feroza	Motara
Geraldine	Fraser-Moleketi
Gertrude	Mofokeng
Jeannie	Noel
Jenny	Dammons
Joyce	Mashamba

Kenosi	Mofokeng
Kimmy	Losabe
Leonie	Rousseau
Lilly	Mabongo
Marley	Fakier
Matsho	Mathibe
Maureen	Madumise
Natalie	Africa
Nellie	Mgenge
Nomsa	Ndaba
Nosimo	Balindlela
Novula	Mokonyane
Petra	Kahle
Rashida	Abdullah
Rehana	Adam
Rowayda	Halim
Ruth	Mokubung
Suraya Bibi	Khan
Susan	Nkomo
Theresa	Mpofu

Vesta	Smith
Zaiboonisha	Jamal
Zanele	Mbeki
Zeni	Tshongweni

PANEL OF RELIGIOUS LEADERS FOR ELECTORAL JUSTICE

P.O. BOX 4921
JOHANNESBURG 2000
TEL: (011) 492-1380
FAX: (011) 492-1449

cc Team

Observers R

Multi-Party Negotiations Forum
P.O. Box 307
Isalda 1600
ATTN: Working Group of the Negotiations Forum

07 October 1993

To the Working Group of the Multi-Party Negotiations Forum:

I am writing on behalf of the Panel of Religious Leaders for Electoral Justice in South Africa. The Panel is composed of leaders of every major religious faith in South Africa. It is a unique non-partisan grouping which is capable of staying above the political process. For this reason, the Panel is in a special position to monitor the transition to democracy, and to help guarantee a free and fair electoral process. Among its members are Bishop Mogopa, Archbishop Desmond Tutu, and Reverend Frank Chikane.

To help achieve these ends the Panel has produced a Code of Conduct for the elections. The Code includes guidelines on political party behaviour before, during and after the election. The entire Panel is also meeting on 26-27 October to determine how it can contribute to free and fair elections, and to review the legislation for levelling the playing field produced by the Multi-Party Negotiating Forum.

I would like to request a meeting between a delegation from the Panel and the working group of the Multi-Party Negotiating Forum in November. The meeting would provide an opportunity for the Panel to formally present its Code of Conduct, to share the outcome of its 26-27 October meeting, and to offer any contribution it might to both the Negotiating Forum and the Transitional Executive Council. I understand the fact the working group is very busy, but I feel that such a meeting could be extremely important. I would appreciate it if you would reply promptly with any possible date and time in November for a meeting. The Panel is very flexible in this regard because it views a dialogue between itself and the Negotiating Forum as a major priority.

If you have any questions feel free to contact me at the above phone number, extension 255, or fax number.

With thanks
Sincerely,

Jonathan Sacks
Facilitator
Panel of Religious Leaders for Electoral Justice

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HODGSONS 5

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

2nd Floor Nedbank Mall
145 Commissioner Street
Johannesburg
2001

P.O. Box 3934
Johannesburg 2000
Tel: (011) 3319726/7
Fax: (011) 3319728

6 October 1993

Dr T. Eloff
The Administrator
Multi Party Negotiating Process
P.O. Box 307
Isando
1600

FAX NO.: 011 - 3972211

Dear Sir

The NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS held a conference on the theme "Reshaping the Structures of Justice for a Democratic South Africa" at the Farm Inn, Pretoria on 30 September and 1 October 1993. This was a widely representative gathering of lawyers, judges, academics and others who are involved in the administration of justice.

A wide range of subjects was discussed and, arising out of that conference, the NADEL Annual General Meeting passed the resolution which is annexed hereto on the subject of "property rights".

We request that the resolution be distributed among the delegates to assist in the discussion on the Interim Bill of Rights. We share the very strong feeling which was expressed at the conference that:

(a) the Property Clause should be left out of the Interim Bill of Rights, and that

(b) Parliament ought to be empowered to pass appropriate legislation to regulate both public and private discrimination and that the provisions of the Bill of Rights should be of application both vertically and horizontally.

Yours sincerely

P.K. LANGA (ADVOCATE)
PRESIDENT

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RESOLUTION

This Conference of the National Association of Democratic Lawyers

1. Recognising that constitutional provisions should not impede attempts to provide reparation, restitution or compensation with victims of resettlement and other apartheid legislation;

2 Recognising further that access to land and the demand for land redistribution have been central to the demands of the democratic movement;

3 Holds the view that any property clause within the Interim Bill of Rights should not affect the right of a National Parliament to establish a Land Claims Tribunal;

4 Demands that the property clause in the Interim Bill of Rights recognises the need for an equitable balance between public needs and private right in all issues concerning the expropriation of land for public purposes and in computing compensation;

5. Demands further that in the absence of any provision relating to the striking of such a balance between public and private interests, that there should be no property clause in the Interim Bill of Rights;

6 Resolves to submit urgently the text of this resolution and the argument in support of it to the Multi Party Negotiating Process or the Technical Committee dealing with the Bill of Rights as well as to all democratic structures;

7 Reiterates its support for the proposition that the Bill of Rights shall apply to public organs and to all other transactions between persons when it is appropriate and equitable.

Annexure T cc TE FD

QAWUKENI REGIONAL AUTHORITY

26 October 1993

Dr T Eloff
Head of Administration
Multi-Party Negotiating Process
P O Box 307
ISANDO
1600

Dear Sir

DEMARCATION AND DELIMITATION OF BOUNDARIES

We are given to understand that the above matter will serve before the negotiating parties on **Wednesday 27 October 1993**.

In the circumstances, we urgently request you to place this submission before the Chairman of the Session.

We fully support the conclusion that the functional linkages between **Northern Transkei, East Griqualand** and **Umzimkulu** are very strong as contained on p.47 of the Report of 15 October 1993. This area has always been known as the **KINGDOM OF FAKU** and on NO account should it be divided up without reference to the people concerned.

You are also kindly referred to a report by Messrs Manona and Bekker compiled in 1992, quite independently of the Commission. *

We are most concerned that on p.57 (paragraph 4.5) the report concludes:

> "The majority of the white population identifies with Natal, while the black majority express strong sentiment towards the Cape and/or Transkei."

How could the Commission possibly have reached that conclusion when the nearest they came to the Qawukeni Region was **Kokstad**?!

Furthermore, there are only a handful of whites living in the area and the permanent residents have demonstrated their allegiance to the region by becoming citizens of Transkei.

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* Bekker, S and Manona, *Pondoland Looking North to Natal: Common Economic Interests or Different Regional Loyalties*. JCAS Vol 11, No. 2 (1992)

We challenge the Commission to prove that the opinions of the Black people of the Qawukeni Region have been tested in any meaningful way.

If there is no other way of reaching a satisfactory conclusion on this matter, we would a expect a Referendum to be called

Trusting this urgent request receives your much appreciated co-operation.

Yours faithfully

J M SIGCAU

Paramount Chief
QAWUKENI REGIONAL AUTHORITY

P SIHLOBO

Convenor
QAWUKENI REGIONAL AUTHORITY

Annexure U

Mapulaneng Regional
Authority
Private Bag x9303
BUSHBUCKRIDGE
1280

19 October 1993

The Chairman
Multi Party Conference
World Trade Centre
KEMPTON PARK.

MEMORANDUM FROM THE TRADITIONAL LEADERS OF MAPULANENG (BUSHBUCKRIDGE).

Attached please find a memorandum that has been drawn up and signed by the Traditional leaders of the above-mentioned area for your urgent attention.

.....
CHAIRMAN
MAPULANENG REGIONAL AUTHORITY

MEMORANDUM DRAWN UP BY THE TRADITIONAL LEADERS OF MAPULANENG (BUSHBUCKRIDGE) DISTRICT PILGRIMSREST.

According to us, the Traditional Leaders of Mapulaneng, our area should fall within Region (F) for the purpose of future Regional Governments.
The reasons being as follows:

1. **DISTANCE:**
   Pietersburg is 280 Kilometres away from Bushbuckridge, whilst Nelspruit is only 98 Kilometres.

2. **ECONOMY:**
   (a) The Bushbuckridge people are doing their shopping in Hazyview, Whiteriver and Nelspruit. It is impossible to drive to Pietersburg to buy groceries or ckitges etc,
   (b) Bussiness people, f.i. Wholesale Firms, Farmers, Furniture Shops, etc. from Nelspruit, Whiteriver and Hazyview bring their products to Bushbuckridge- we are trading partners on a daily basis for many years.
   (c) Local bussinessmen and the community at large make use of Building Societies and other financial institutions in Nelspruit and Whiteriver.
   (d) All taxes paid from this district are paid to the Receiver of Revenue Nelspruit. The Magistrate's office at Bushbuckridge are in fact a sub-receiver for the Nelspruit office.

3. **TRADITION:**
   (a) The Mapulaneng area has always been part of the Eastern Region. The Bushbuckridge Commissioner's office used to be the government office for all the Mapulaneng, Swazi and shangaan people of the East.
   (b) The Mapulaneng people do not speak a pure N.Sotho language as is the case with the rest of Lebowa in Northern Transvaal.

2/.....

At Mapulaneng the language spoken is Sepulana.

(c) The traditional boundry of Pilgrimsrest was the Olifantsriver in the North and Lebombo mountains in the East.

4. PRESENT DISTRICT BOUNDRY:

Mapulaneng has not been proclaimed as an independant district up to date. Mapulaneng is therefor still part of the Pilgrimsrest district. See Annexure A - According to the Schedule of the Lebowa magistrate's court act this area is defined as the area of the Mapulana Regional Authority and not the district of Mapulaneng as is the case with the other areas in Lebowa.

5. HUMAN RELATIONS:

A Good human relationship has been built up between the people of Mapulaneng and the Whites and other peoples of the Nelspruit and surrounding areas. There is no relationship at all with the Whites of Pietersburg.

6. LITERATURE:

According to the well known ethnologist N.J van Warmelo in his book "Bantu Tribes of S.A" the Mapulana people are grouped with the Eastern Sotho group and not with the North-Sotho group. In this respect we wish to refer to page 111 of the said book. In this book it is clear that the Eastern Sotho is grouped in 3 groups i.e The Ba-Kutswe, Ba-Pai and the Mapulana. - see Annexure "B".

7. GEOGRAPHICALLY we are clearly part of the East and not the North.
It is clear therefor that we can not fall within Region (G).

3/.....

This Memorandum has been Signed at Bushbuckridge
on 19th day of OCTOBER 1993.

1. MOLETELE LOCAL GOVT.	KGOSHI A.L CHILOANE	
2. SETLARE LOCAL GOVT.	KGOSHI R.N CHILOANE	
3. MOREIPUSO LOCAL GOVT.	KGOSHI R.W MASHEGO	
4. THABAKGOLO LOCAL GOVT.	KGOSHI D.G MASHEGO	
5. MALELE LOCAL GOVT.	KGOSHI E.S MALELE	
6. MATHIBELA LOCAL GOVT.	KGOSHI A.K MOKOENA	
7. MOGANE LOCAL GOVT.	KGOSHI L.L MOGANE	
8. MOHLALA-MORUDI LOCAL/G.	KGOSHI M.G MOHLALA	
9. MASHILANE LOCAL GOVT.	KGOSHI M.J MAHILE	

A

SCHEDULE

MAGISTRATES' COURTS IN LEBOWA

Column 1		Column 2	Column 3
Area of Jurisdiction of Court		Seat of magistracy where court will be held	Places in addition to seat of magistracy where court may be held
Definition of Area	Name of area		
The district of Seshego as defined from time to time	Seshego	Seshego	Matlala
The district of Thabamoopo as defined from time to time	Thabamoopo	Mankweng	Malipsdrift
The area of the District of Moutse, as defined from time to time excluding the following farms: (i) Tribal farm: Weltevreden J158 JR; (ii) Trust farm: Matjesgoedkuil 3 JS; (iii) Trust farm: Vrieskraal 4JS; (iv) Trust farm: Kameelrivier 160JR; (v) Waterval 34 JS; (v) Pieterskraal 190 JR; (vii) Wolvenkraal 192 JR; (viii) Klipplaatdrift 193 JR, excluding portions 7 and 8; and (ix) Valschfontein 33 JS	Moutse	Elandsdoorn	
The district of Nebo as defined from time to time	Nebo	Nebo	Motetema
The district of Sekhukhuneland as defined form time to time	Sekhukhuneland	Sekhukhune	Praktiseer and Mecklenburg
The district of Naphuno as defined from time to time	Naphuno	Lenyeenye	
The district of Bolobedu as defined from time to time	Bolobedu	ga-Kgapane	
The district of Bochum as defined from time to time	Bochum	Bochum	Kibi
The district of Mokerong as defined from time to time	Mokerong	Mahwelereng	Selekaslocation Sonkwastad Tiberius and Zebediela's Location
The district of Sekgosese as defined from time to time	Sekgosese	Uitspan	Lemondokop Locatie van Ramagopa 774 LS
The area of the Mapulana Regional Authority as defined from time to time as well as the farms Oakley 285 KU, Alexandria 286 KU and Portion 1 of the farm Marite 287 KU in the District of Pilgrim's Rest	Phalaborwa	Bushbuckrigde	Elandsfontein
The area consisting of — (a) the areas as defined from time to time, of — (i) the Phalaborwa (Silwane) Tribal Authority, (ii) the Sai Tribal Authority, (iii) the Ba-Phalaborwa Tribal Authority, and (b) the Bantu area known as Maseki's Location mentioned in paragraph 8(a) of the Schedule to the Bantu Lands Further Release and Acquisition Act, 1927 (Act 34 of 1927), situated in the District of Letaba.		Namakgale	Silwana's Location

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35. EASTERN *SOTHO*.

The tribes of the Eastern Sotho group, enumerated below, have not to my knowledge been mentioned in literature before and thus the few remarks that follow will not be considered superfluous. There are three distinct elements (*baKutswe*, *baPai*, *maPulana*) and any connection that may exist between them must be comparatively remote, but since they are all of Sotho origin they have to be grouped together. My remarks prefaced to Pilgrimsrest district in Part 2, No. 8 should be read in conjunction with what follows, because conditions in this district are unique.

I hold the theory, though there is not enough evidence to prove it, that the *baPai* and *maPulana*, while distinct from one another, are the only remaining representatives of the old Sotho population of Swaziland. One has to meet these Eastern Sotho and to study their extraordinary dialects to really understand what absorbing interest attaches to both. The following remarks contain what else there is to say about them, without exceeding the limits imposed by the scope of our book.

Most of the tribes dealt with hereunder live in Pilgrimsrest district, and the distribution of their kinsfolk living under chiefs other than their own is best seen in the district return of this area.

This applies especially to the *baRôka*, who live scattered about in small numbers and have no chief of their own. They are found mostly under the chiefs *Schlare*, Stephen and *Nariše* (all *maPulana*) and further also under *Kabiše*, *Matluše* and *Šobyana*. One should also refer to the remarks on the *baRôka* in the foregoing section.

baKUTSWE.

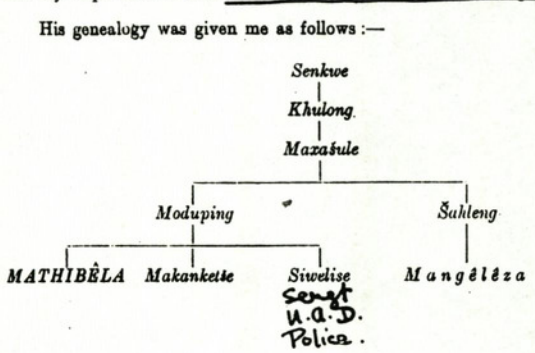
The *baKutswe*, whose totem is the crocodile (*kwena*), belong to the Sotho group. They say that they originally came from *Thabanthso*, *za Sethšêlê* (Sechele?), which is described as a locality in Rustenburg district, near a water which runs one way at certain times and the opposite way at other times. I am not sure whether *za Sethšêlê* is an old name handed down by tradition or whether it refers to the present tribe of baKwena at Molepolole in the Protectorate.

The *Kutswe* chiefs were always known as great rain-makers, that is to say, their prayers for rain to their ancestors (to-day offered at the graves at *Mongomeni*) were believed to be productive of very good rains. Their most well-known *serêtô* also refers to this when it says: *Bakwena ba metse mazolo ba za pelo kzolo masokolo, za e sokoloza e a loma, za e sa lome e thšuba boi ba yôna* (The people of the crocodile, the great rain-makers, the brave hearts, though changeable, when they turn they bite, but when they are afraid they are but afraid of their own fear).

These *baKwena* left the place *Thabanthso* referred to above long ago, and, trekking East came to near the Swaziland border, where they subjected the *baPai* (*vaMbayi*, see below) to their rule, after which they migrated further North to avoid the Swazis, and occupied their present area, which is Low and semi-Low Veld. They fought with the *vaNhlanganu* vaTonga who were entering the country from the East, and with the *maPulana* further North, the *Kutswe* chief *Mazašule* being slain by *Maakere*, one of the chiefs of the *maPulana*, though this did not result in the subjection of the *baKutswe* to the *maPulana*. The chief *Moduping*, *Mathibêla's* father, at one time left the district with Albasini (*Jiwawa*) in order to escape from the Swazis, but practically the whole tribe remained, and *Moduping* returned to it at a later date, and the *baKutswe* are to-day, as in earlier days, an independent tribe with *Mathibêla*, still a rain-maker of repute, as chief over two sections, his own and that of Mangeleza.

The *baKutswe* also still lay claim to suzerainty over the *baPai*. I have not been able to examine in detail the validity of these claims, nor to satisfy myself as to the extent to which the baPai take notice of what Mathibêla says, but my impression is that to many of them he means nothing at all.

His genealogy was given me as follows:—



baPAI.

The *baPai*, usually called by strangers *vaMbayi*, are undoubtedly of Sotho stock, as proved by their customs, and by their language about which more anon. They are said to have taken their name from a hill called Mbayi, which is thought to be situated far to the South near or in Swaziland, where they lived in former times, until Swazi raids forced them to move to the North. They appear to have associated with the Kutswe from early times, the latter having first met them in the South, and they migrated thence in company. They may also have been subject to the Kutswe in the past, but this is no longer the case. There are a number of small sections as will be seen below, but about the relation in which they stand to one another nothing is known. The *baPai* clans have as totems *phuthi*, *kzalo*, *klanga* and *khwaduwa*, which last I am told is a small monkey otherwise known as *kalašane*.

It may not be out of place to say something about the language of these people. I have had a fair number of texts dictated to me, and a small vocabulary, and from these it is possible to form an opinion of the affinities of the language. It is merely a peculiar form of Sotho, but it certainly is peculiar. In vocabulary it is Sotho, though of course *Pai* equivalents of *Tonga* and *Nguni* roots are also found, apart from those which are quite obviously recent borrowings. Some very common words nevertheless appear to have no parallel elsewhere, as *xo aha* "make, do", *xo thina* "dwell", *xo khôma* "sit", *xo hingila* "walk". Interest attaches to equivalents like *-hara* for Sotho *-swara* "seize", *-šuñwana* for Zulu *-fumana* "find." One is most of all struck by the phonological feature that, whereas Ur-Bantu *ka* > *xa*, Ur-B. *ki* has changed to *hi*. Thus the language is called *hiPai*; *hihlôza* "axe" (Tonga *ihloka*), *hilô* "thing". However, they say *hilô šinyana* "a small thing". Note also *xo khina* "dance, have as totem". The plural (cl. 8) is no less valuable to the philologist, for it is the oldest form we know, namely *vi* (bilabial) or *vyi*, as e.g. *vilô*, *vyilô* "things". The demonstrative is remarkable, e.g. *mayisêngana ka*, "this lad", *kawô* "that", *kzomu ki* "this ox". The perfect of verbs is *-iyê*, e.g. *-riyê* perf. of *-ri* "say"; *-zoliyê* from *-zola* "grow", *-hihlamiyê* from *-hihlama* "hide". The objective use of *ki* in e.g. *ki nêyê vyidzô* "give me food", reminds one of Zulu, not Sotho usage. The following sentences from one of my texts may give an idea of connected speech. The use of *se*, I may add, is adopted from Zulu, through the *Tonga* of these parts. It is a great favourite throughout South Africa with all those who ornament their speech with borrowed Zulu forms.

Huku kini na? Huku i nonyani yi kzolo. Kini i ka thšavi muthu? A i na xo thšava, ka zore i riyê i ti-vôna se i khôciyê li vathu zorani. Ki vyêlê xo tswalêla za yôna, yaha vyayi? (What is a fowl? A fowl is a big bird. Why is it not afraid of man? It need not be afraid, because it sees that it has always thus been living together with men. Tell me about its method of reproduction, how does it do it?). *Tê xo li li hihlupehi ku musaḍi a khôva a šanisêha tê se xo šwiye munna wazê a vulayê ki tisilavôya. Tê se va rêkisiyê tôhlê tikzomu ta vôna, se zu sele kzomu yiñwê.* (Once upon a time there was a poor woman who lived in destitution after the death of her husband, who had been killed by bandits. They had eventually sold all their stock, so that only one beast was left.)

maPULANA.

The *maPulana*, whose totem is the lion (*tau*) also belong to the Sotho group. They say that in early times they were settled along the Crocodile River (*Mokwena*) and fled to the North to be out of reach of the Swazi raids. Their language is a dialect of Sotho with certain peculiarities. (Cf. *-tšiba* for *-tseba*, *-ze* for *-xo* rel. vb. suffix, *hokala* for *mokola*, *koneng* for *ka fale* and so on).

There are two divisions, between whom no connection is traceable. These are, in order of precedence:—

A. the senior division, with three sections:—

bazaMalele.
bazaMašezo.
bazaNonyana.

B. the junior division

bazaThšilwana.

All of the above are further divided into branches, some of which are independent. In several cases the senior branch has lost the chieftainship to a junior branch, which rules to-day, but rank is not lost sight of, since it determines the order in which the heads of groups may perform the first-fruit rite of *xo loma maruku*. For this reason *Toile*, who is of no account otherwise, is stated by *Kabiše* to be the first of all the chiefs of division A to perform this rite. Whether division B, the *bazaThšilwana*, take any notice of this I cannot say.

Annexure V

SAP 51

G.P.-S. 002-0026

SUID-AFRIKAANSE POLISIE

SOUTH AFRICAN POLICE

Privaatsak X94 / Private Bag
Telegramadres / Telegraphic address KOMPOL / COMPOL

Verwysing / Reference 6/23/1
Navrae / Enquiries maj F Mostert
Telefoon / Telephone (012) (012) 3101083
Faksnommer / Fax number (012) (012)

HOOFKANTOOR
HEAD OFFICE

PRETORIA

0001

1993-10-19

A. ALL DIVISIONAL CHIEFS

B. All Chiefs
HEAD OFFICE

C. ALL REGIONAL COMMISSIONERS

D. Alle Commanders
SAP COLLEGES AND SAP TRAINING CENTRES

E. The District Commissioner
WALVIS BAY

MINUTE OF SILENCE: FRIDAY, 29 OCTOBER 1993 AT 12:00

A-E 1. To date 507, members of the South African Police have died during the past year. What makes this alarming figure even more tragic is the fact that 192 of these members were brutally murdered.

2. In memory of all our colleagues who have died this year and in sympathy with their next of kin, a minute of silence will be observed on 29 October 1993 at 12:00.

4. By expressing our sympathy and sorrow in this manner we will be showing that we, as members of the South African Police, have the greatest respect for our colleagues who have paid the highest sacrifice in the interest of the safety of the community.

5. An appeal is made to members to, wherever possible, observe the minute of silence.

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6. Distribute to station level.

GENERAL
COMMISSIONER: SOUTH AFRICAN POLICE
J V VAN DER MERWE

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