

# LEGISLATURE AND GOVERNANCE

## FOR A NATIONAL DEMOCRATIC SOCIETY

### INTRODUCTION

1. The 52nd National Conference of the ANC, scheduled for December 2007, will once again provide an important platform for our movement to engage with matters relating to legislature and governance. The conference will adopt resolutions on amongst others the organisation of the state, system of electoral representation providing a broad framework for governance, giving our movement clear strategic direction for the last five years of the second decade of freedom. The resolutions should provide enduring and useful guidance for the ANC as a whole, but in particular for those cadres that we deploy to government and legislatures to implement policy and develop tactical responses to a dynamic and constantly evolving society.
2. The conclusions we reach in December must therefore be informed by the widest possible input from our people. Members of the ANC – through open discussion in their branches, regions and provinces – as well as the structures of the Alliance and the broad democratic movement must all make a contribution to this important debate. By building a broad consensus on the governing strategy we can confront the challenges we face over the next decade with confidence, as a united movement with a clear vision of the road ahead.
3. This document intends to provide a basis for these discussions. The first section touches on the proposed electoral system.

### ELECTORAL SYSTEM FOR SOUTH AFRICA

4. The debate was prompted by the establishment, at the behest of Cabinet, of the Electoral Task Team (ETT) under the chairpersonship of Dr Frederick Van Zyl Slabbert. The ETT was tasked with establishing an electoral system for post 1999 provincial and national elections. This was necessary because the constitutional arrangements in the Constitution (1996) did not provide for an electoral system beyond the 1999 elections. This created a vacuum that had to be filled by national legislation within the constitutional framework.

The terms of reference of the ETT were to:

- Identify the controlling constitutional parameters.
  - Identify the salient and relevant aspects of the South African context.
  - Identify the list of options available within our context.
  - Canvass the preferences and views of relevant role-players and stakeholders, with particular reference to political parties, in respect of the identified list of options.
  - Develop specific proposals identifying the preferable electoral system to be canvassed with the aforesaid role-players and stakeholders
  - Formulate a draft Bill for submission to the Minister of Home Affairs.
5. The ETT was initially composed of 13 members, of whom one resigned and was not replaced. Whilst the ETT was unanimous on the core values to be observed in the formulation of any electoral system, it was divided on the appropriate future electoral system for the country. Thus chapter 4 of the report reflects the views of the majority (8 members) while chapter 5 contains the views of the minority (4 members).
  6. The report of the ETT captures the summary and conclusion of the majority view in chapter 4 as follows (page 30):  
 “The nub of the majority view is that it is worthwhile to make legislative provision for an electoral system that can evolve to a larger multi-member constituency system with a compensatory national list. In order to facilitate voter accessibility and responsiveness between voter and representative, multi-member constituencies with between 3 and 7 members in the National Assembly are envisaged. This would require approximately 69 multi-member constituencies to provide 300 representatives for the National Assembly with 100 representatives allocated from national lists to restore overall proportionality. Both the constituency and national lists would be closed.”  
 The above system was envisaged in respect of post-2004 elections.
  7. It is worth noting that while they argue that you need the constituency system to free the

---

public representatives from party bosses, their proposals is for a party list!

8. Their proposal is also in conflict with the Constitutional Principles that states that:

“...and in general, proportional representation” in that the proposal is based on 300 seats constituency and only 100 proportional to top up!
9. The report captures the conclusions of the minority, without summarising the underpinning reasons, in chapter 5 (page 73) as follows:

“The present electoral system was introduced, primarily, to ensure the promotion of political diversity within our legislatures, and broad political representation. These are not short-term goals which can be attained overnight.”
10. These goals are the cornerstone of our transition to a truly integrated, non-racial and peaceful society. The deracialisation of our political landscape, also, is still a critical challenge. We therefore must stick to the tried and tested electoral system. We cannot afford to experiment at this critical stage with a system whose form, worth and implications have not been thoroughly thought through, debated, evaluated and publicly interrogated. (Judged against the mixed system currently being used at local government at present the statement can not be taken at face value to be correct).
11. We must also state that there is no ideal, universal electoral system. Every system has its advantages and disadvantages. In South Africa we have a system that our electorate has bought into, that cannot be improved on for fairness and inclusivity and which meets our current challenges as a country.
12. Finally, the proposals contained herein are in line with our terms of reference, particularly the one which urges us to “note that the electoral system described in the bill need not be different from the existing one but that this will depend on inputs received and the assessment of the overall interests of consolidation of democracy in our country”.
13. In essence the minority’s position is that ‘if it isn’t broken, don’t fix it’.

They state (para 5.18.11, page 72) that:  
“We do not believe that at this stage of our transition, South Africa should promote national political contestation on a regional basis. This would compromise nation building and racial and ethnic harmony. In any event Parliament deals with national issues and policies. Other matters are appropriately handled at provincial and local government level.
14. Accordingly, there is no need to cater for regional interests specifically in the manner envisaged by the proposals in Chapter 4.

15. In the paragraph following the above one, the minority make a further observation which is critical for us to consider in our debate. Their observation is captured in the following manner:

“Some of the proponents of the system proposed in Chapter 4 are simply satisfied by the fact that it is “evolutionary”. Others see an ideal system being one where the party lists are open and the electorate can decide which candidates on the lists should represent them. These suggest that by adopting legislation to implement the new system Parliament would allow itself space to evolve the system until an ideal one is achieved. We believe that Parliament as it is composed at any given time in the future will be best able to decide if and when the present system should be replaced by another one, taking into account the status of transition in our country. There is therefore no need for Parliament to bind itself at this time as to how it should conduct itself in the future.”

(According to this position we could at any time pending the level of transition decide on a different electoral system if we so wish). The approach taken by the minority position of the ETT coincides with the existing ANC position as captured in the policy conference discussion document (see Annexure A).

16. The National Policy Conference of the ANC, held from 27 –30 September 2002 at Ekurhuleni, adopted a position on the future electoral system – informed by ANC constitutional structures, as part of a comprehensive resolution on Transforming the State and Governance. The following is an extract of the relevant portions of this resolution:

“Noting:

- The challenge of nation building remains the primary task of the ANC for the full realisation of the NDR.
- The current electoral system contributes to nation building and the maintenance of stability by promoting inclusivity and national reconciliation; that the proportional representation system has facilitated representative institutions with a special focus on women, rural communities and other targeted groups such as people living with disabilities, the elderly, youth and that accountability is not dependent solely on an electoral system.
- That where people are not involved in the decisions that affect their lives, social policies and political interventions are less likely to succeed. Participatory democracy should therefore complement and enhance representative democracy.

- 
17. Therefore resolves on a Future electoral system
- To retain the current system and to review the constituency work of its public representatives to enhance accountability.”
18. The policy document discussion paper opens with the following quote from O.R. Tambo’s message to the fourth congress of Frelimo: “We conceive of our country as a single united, democratic and non-racial state, belonging to all who live in it, in which all shall enjoy equal rights, and in which sovereignty will come from the people as a whole, and not from a collection of Bantustans and racial and tribal groupings organized to perpetuate minority power”.
19. It goes on to among other things raise the following points for consideration by the membership:
- Any sober review of an electoral system should therefore include a detailed analysis of our objectives in the transition period, including the nature of the transition state and the policy objectives of government in the coming decade. We must approach these issues in a frank and open manner, with a view to develop the best system that meets the core objectives of the transition, namely building a united nation, enhancing and deepening democracy and advancing the developmental agenda to create a better life for all.
20. Our starting point is the strategic objective of the NDR, the creation of a non-racial, democratic, non-sexist and united South Africa. The Strategy and Tactics (1997) recognises that we are in a phase in which we have started to change society at the same time as we transform the instruments required to effect that change.
21. These twin objectives have to be pursued simultaneously. Social change cannot await the transformation of the state machinery and other instruments of power. But, as experience has taught us, we cannot expect to proceed with the desired pace without changing these instruments”
22. The 1996 final Constitution does not have detailed prescriptions about how elections for national and provincial legislatures should be run. The constitution provides only a number of broad principles for the election. It also contains transitional arrangements, which specified that the present system only applied until 1999 and that new legislation for new electoral systems could be made subsequent to the 1999 election.
23. The Electoral Task Team (ETT), chaired by Prof Van Zyl Slabbert, was appointed to make recommendations about a future electoral system. The ETT was established at a time when there was heightened debate in the media about whether a constituency or proportional representation system better served democracy.
24. The NEC discussed the ANC position at its regular meeting in July 2002 and decided that we should continue to support a PR system for national and provincial elections. We adopted this system during negotiations before 1994, because we wanted an inclusive system and the representation of minority views, in the interest of an inclusive transition. The movement believed then that eight years later, we still needed to harness our inclusive political system in the interest of nation-building and national unity.
25. The Electoral Task Team made recommendations about changing or improving the present system in their report of January 2003. We agreed that the NEC would have to consider the specific recommendations before we adopted a final position. Eventually we decided to retain the present system.
26. Taking into account the principles underlying the Interim Constitution and the final Constitution the ETT unanimously concluded that fairness, inclusiveness, simplicity and accountability are core principles that should underpin any electoral system. Members of the ETT were however divided on whether an electoral system within our constitutional framework could improve the accountability of elected representatives to the electorate. We ourselves identified the following 5 criteria for evaluating electoral systems:
- Does it deepen democracy and reflect the democratically expressed will of the people?
  - Will it contribute to nation-building and maintain political stability and peace?
  - Will voters feel effectively represented by the elected parliamentarians?
  - Simplicity in terms of voter understanding, and
  - Practicality in terms of implementation.
27. The principles and criteria reflected above are mutually inclusive. Our point of departure is however that an electoral system cannot create greater accountability than regular and constitutionally compliant elections. Internal party democracy and the recognition that voters can “make or break” a party at elections goes a much longer way to achieve the objective of accountability. In other words, the need for electoral support requires parties to be accountable and responsive to the electorate between elections. This cannot be achieved only by tinkering with the number or sizes of constituencies or the mixing of electoral models.
28. The debate about the need to establish an
-

---

## SUMMARY OF KEY POINTS

### 1. What should our position on the electoral system be in 2006?

There are three main systems that we must consider:

- a) **The present proportional representation system with possible improvements:** All MPs and MPLs are drawn from candidates lists selected by their parties. Each party gets a proportion of the seats according to their proportion of the votes. Presently each provincial legislature has one list. Parliament has two lists – 200 seats from a national list and 200 seats from provincial lists.
- b) **A pure constituency system:** Parties and independents nominate candidates for each of 400 constituencies. The candidate who gets the most votes, wins the seat. This is called the first-past-the-post system. If there are many candidates, the winner could be supported by a minority of the voters.
- c) **A mixed system:** Some MPs come from a national PR list and some come from multi-member constituencies. For example about 50 constituencies could be set up according to district and metro council boundaries. They would then be allocated a number of seats according to the number of voters. If a constituency has 5 seats and we win 60% of the vote, we will get 3 MPs for that area. Parties will get PR seats in the same way as in our local elections – a top-up system to restore overall proportionality.

### 2. Criteria for choosing an electoral system

We will briefly look at each of the criteria as they apply to each system, and then summarise conclusions:-

- Does it deepen democracy and reflect the democratically expressed will of the people? The PR system is the most democratic in that no votes are wasted or lost. In terms of capturing the will of the people, it is the most effective. It ensures that the urban poor and rural voters participate fully and have a powerful impact on results. Minority parties also get fair representation and can express their needs as part of the democratic process. It limits the ability of powerful and well-resourced interest groups to buy power through sponsoring individual's campaigns.
- The constituency or first past the post system is undemocratic, since the government can be formed by a party that received less than half the national vote – as has happened with the Conservative Party in Great Britain a number of times. Constituencies where four parties are standing, can sometimes be won by getting only 33% of the vote!
- A mixed system is democratic because the PR list is used to restore overall proportionality. It does however create two classes of public representatives and small parties will be unlikely to have any constituency MPs. If a constituency has 5 members, you would need 20% of the vote to get a seat. Constituencies will range from 3–20 members. Only large metro areas would have up to 20 seats. It is likely that only two parties will be able to nationally contest constituencies, with two other being successful only in KZN and Western Cape. This effectively means that most parties would not really participate in a constituency system and their voters would derive no benefit from it. (This is fine if your approach is to promote a bipartisan party system and not multi-party democracy).

### 3. Will it contribute to nation-building and maintain political stability and peace? The present PR system enables parties to draw up representative lists that include all elements of their constituencies. It also accommodates even the smallest party in a parliamentary democratic system since 0,25% of the vote will secure a seat. This accommodation contains some extremist political groups that could otherwise be a threat to stability. A pure first past the post system could lead to the ANC having 80% of the MPs with the DP, IFP and NNP sharing the rest. (1994, 1999 and 2004) All smaller parties could disappear or be limited to one or two seats. Voters in each constituency will be polarised when only the winners will be effectively represented. Instead of bringing our society together it could bring greater polarisation, with special interests supporting particular MPs who would reflect their interests only.

### 4. A mixed system will have some of the benefits of the PR system, but these may be watered down by the constituency element where parties will have very few seats to allocate and will find it more difficult to have a representative list. The ANC could win a disproportionate number of constituency seats and will therefore have a smaller part of the PR list to use for balancing its own representation.

### 5. Will voters feel effectively represented by the elected parliamentarians? The strongest argument advanced against a pure PR system is that voters feel removed from their elected representatives and feel that they are not accountable to them. This notion ignores the fact that alternative systems do not in practice remedy the problems. In a PR system voters vote for a party with a clear national programme. They tend to identify with the national and provincial leaders of that party. In local elections where the representatives are much closer to the people, there are still complaints of distance and lack of accountability. We have a ratio at local level of one ward councillor to about 5

000 voters. There may well be ways to improve accountability and communication and we should also look at our own selection and constituency deployment processes.

In a pure constituency system there would be about 1 MP to 50 000 voters. Constituencies would be geographically vast and in provinces like the Northern Cape which constitutes 30% of the land mass of the country, only about 8 MPs would be elected. Constituency candidates are still selected by and accountable to their parties. The belief that they will represent the interests of a vast and diverse population, with competing interests, rather than toe the party line, seems a little naive. It may be an appropriate model in a more homogenous society.

The mixed system will allow for more direct identification between MPs and a geographic area. It may be a slight improvement on a pure PR system in terms of this criterion. In reality most parties would not have any constituency MPs. The MPs elected will have vast area to cover and if there are, for example 200 elected this way, they would each relate to an average of 200 000 voters. In diverse and divided constituencies there is the danger that strong and well-resourced interest groups can become more influential than the democratic process itself.

6. Simplicity in terms of voter understanding. The PR and pure constituency system are both simple and familiar to voters because of the present systems for national and ward elections. The mixed PR and multi-member constituency system is more complicated and may hinder the full-scale participation of illiterate and marginalised voters.
7. Practicality in terms of implementation. The PR system is the simplest to implement since only two ballots will be used in each province. The nomination system, disqualification of candidates, printing of ballot papers and results can easily be centrally coordinated. Remaining with this system will need no re-demarcation or changes to the electoral legislation or system.

This will limit the preparation, training of officials and voter education that has to be done. Both the other systems would require extensive changes in law and procedures. (The high numbers of spoilt ballots at local government level where voters exercise such choice is a case in point).

8. The current system in place affords a great degree of stability. It allows for fair representation and gives a voice to all. It has certainly allowed for a greater degree of participation of women, people with disabilities and other targeted groups than any other system could. The system is also simple and familiar to voters. (*We are awaiting statistics of such representation from the department of Provincial and Local Government.*)

Our preference for this system in no way diminishes the need for constituency-based consultation and communication. We remain committed to deploying MPs/MPLs to constituencies. We should continue to find ways to improve this practice. We should also look at better ways for our elected representatives in all spheres of government to work together to serve a constituency effectively.

Modern parliaments are mostly directed by party positions rather than individual MPs views. Therefore political parties are the main vehicles for the representation of various interests. The trend is for voters to find a home in the ideology and policies of a particular party and to vote for the party or its candidate at all levels.

9. What should our position on the electoral system be in 2006? The conditions that informed our position in 2002 and during negotiations on the Interim Constitution through to the final Constitution have not changed in any material sense. Therefore, the integrity of our 2002 position remains valid and justifies the retention of the current electoral system. Complementary reasons for this position, as well as a summary of existing reasons, appear below.

### QUESTIONS FOR DISCUSSION

- a) The conditions that informed our position in 2002 and during negotiations on the Interim Constitution through to the final Constitution have not changed in any material sense. Therefore, the integrity of our 2002 position remains valid and justifies the retention of the current electoral system. Complementary reasons for this position, as well as a summary of existing reasons, appear below.
- b) The following five criteria were proposed for evaluating potential electoral systems:
  - Does it deepen democracy and reflect the democratically expressed will of the people?
  - Will it contribute to nation-building and maintain political stability and peace?
  - Will voters feel effectively represented by the elected parliamentarians?
  - Simplicity in terms of voter understanding and
  - Practicality in terms of implementation.

---

electoral system that provides for more accountability at national and provincial levels overlooks the fact that our municipal electoral system is mixed between proportional party list representatives and ward representatives. No commentator has observed that this mixed system provides for more accountability than proportional representation at national and provincial elections.

29. Complaints about the lack of accountability of councilors in general are well recorded. This phenomenon suggests that apart from regular elections, issues of ensuring accountability are determined by voter activism and advocacy about rights and obligations of citizens.
30. Our municipal elections are premised on the idea of creating proximity between citizens and elected politicians at the most accessible level. This is, however, not enough to achieve desirable levels of accountability. We can only do this by building our capacity to attract members and/or voters by intensifying our interactions with communities and ensuring a two-way communication and engagements with them.
31. The oft cited view that the current system lends itself to abuse by “party bosses” is ill-conceived. The very “party bosses” are elected through internal party processes that range from being democratic to being dictatorial. The choice of who party leaders are lies with those who are interested in the internal leadership contestations. This is the very stuff politics is made up of. If members of political parties get it wrong, the party will pay the price at the following national, provincial or municipal elections.
32. The factors that led us to go the proportional representation route for national and provincial elections remain valid. We are still a nation in transition and must ensure that we facilitate representivity across the various sectors of our communities through a credible, generally accepted and understood electoral system. Our current system can best help us reach the true objectives of the NDR within the framework of our founding constitutional principles. The imperatives to retain the current electoral system remain and call upon us to improve our responsiveness to the electorate within the ANC.

#### **THE FUTURE OF PROVINCES IN OUR GOVERNANCE MODEL – Assessing the options for institutional change in the current context**

33. It is increasingly obvious that well organized and highly effective state institutions are crucial if South Africa is to meet the goal of attaining a better life for all. Realizing the ob-

jectives of the Age of Hope requires that delivery and development programs reach the poor communities who must rely on an effective developmental state to create the possibility for personal and collective fulfillment, prosperity and human dignity to flourish. The state machinery must continually adapt so as to respond to the expectations of millions of people quicker, on a massive scale and in the most effective, efficient and accessible ways.

34. The period of negotiations in the 1990’s defined the present form of Government in South Africa, in non-ideal conditions. A decade of practice raises the question whether the form of state is still appropriate to the conditions prevailing in South Africa today. Practice also shows that in response to the concrete challenge of developing the country the three sphere system of government is in fact undergoing an evolution, some aspects of which have begun to transcend the existing form of state. In particular the lessons of local government transformation have raised profound questions about the organization and performance of the other two spheres of government and for the ruling party:

- One of the key lessons from the first term of local government is that it has become evident that provinces by and large do not have the overall capacity to monitor and support municipalities, as the Constitution intended. This has meant that national government has increasingly had to assume these responsibilities, through Project Consolidate and other initiatives.
- A decade later critical questions arise about the value add of the provincial system in its own right. If actual service delivery is the measure then some provinces have not added much value in the last twelve years. The Northern Cape for example, which is the largest province is also losing economically productive capacity to other centers of economic development, has limited capacity relative to the size of its area, and contributes marginally to the overall national economy.
- The provincial system has also raised challenges for the ruling party and deployment, where in some provinces leadership of the provincial party and provincial government are different.
- Service delivery has also not happened at the pace that was wanted, even as the expectations of people for a better life for all has grown. Practice shows that national and provincial departments by and large are too remote operationally

---

and often disconnected from the realities of community need and development at local level, with long lines of communication between spheres of government, and overly complex planning, EIA and other decision-making processes.

- The cooperative government model, which was a product of the negotiation phase suited to that time and experimented with over more than a decade, has also not worked, if the measure of its effectiveness is service delivery efficiency and responsiveness. Some countries with similar models to cooperative government have begun to question whether it is still optimal for achieving responsiveness, public participation and efficiency. The fact is that the more layers of government there are, coupled with an unclear division of functional responsibilities, the greater the complexity that must be coordinated, with a retarding effect on service delivery.

35. Much has been achieved in the decade after democracy, and in the process important lessons have been learned in practice about the overall delivery capability of public institutions. It seems clear that some refinement of the three sphere system is required if South Africa is to attain Vision 2014, and that the system is already evolving in particular ways in response to those challenges. Any further institutional change must therefore take account of four realities present in the current context.
36. First disparities persist in service delivery, population density, urbanization, the distribution of income and economic opportunity by region and by locality, by gender and age, often according to spatial forms determined by colonial and apartheid spatial forms. In these areas access by the poor especially to essential basic services such as water, education, public health and social grants remains a challenge.
37. Second, the capacity of the state is unevenly distributed within the system, with those provinces and municipalities with largely rural characteristics or sparse settlements generally having less effective public institutions. There are also capacity challenges in particular sectors and national departments. There is thus a coincidence between weak state capacity and poverty in these areas, which hampers the possibility of achieving a sustained and total connection between the developmental state and the primary intended beneficiaries – the poor and previously disadvantaged.
38. Third, the three sphere system is a complex

system to operate, which results in inefficiency, overlapping roles, long decision-making processes, weak information flows, and the dispersal of public sector skills and experience within the state. To operate the system requires multiple layers of effective political leadership and highly skilled public servants, huge investments of time in coordination, and very strong intergovernmental processes.

39. The complexity of the system has also grown as the developmental state has had to confront complex development issues that cut across the boundaries of spheres and require all of government responses. Issues relating to ASGI-SA, poverty alleviation, gender, youth, disability, heritage and culture, social cohesion, climate change, and JIPSA all require all of government responses. Furthermore, different frameworks governing the public service prevents the deployment of this already limited capacity to where it is most needed, as well as the creation of a common service oriented culture in the public sector as a whole.
40. Fourthly, concrete plans and budgets are delivered by provinces and municipalities. This means that national government must depend on the capacity of these spheres to in effect translate the goals of the Age of Hope into practical and measurable social and economic outcomes. It also means that provinces and municipalities can take their own decisions, in some cases different to those of national government. Where these two spheres do not have the capacity to deliver these programs national policy goals are put at risk.
41. The possibilities, limitations and risks of any future institutional reforms to the three sphere system will be determined by these four factors amongst others. For example, the existence of provincial and local government creates the opportunity for deepening democratic participation and responsiveness – because it brings democratic government and basic service delivery functions closer to the people – weak capacity at these levels to perform their existing functions makes further decentralization a great risk in the short term. If the response to weak capacity is to remove functions to higher levels of government, the consequence is that democratic accountability moves further away from people, state responsiveness and accessibility are thus reduced, with no guarantee that national government could perform these functions any better.
42. As regards the provincial system of government, there is a view that provincial service

delivery is less effective than it needs to be and whilst the developmental roles of national government and local government within the developmental state are well defined and generally agreed, the developmental role of provinces is unclear, if not contested. Many provincial functions, it is often argued, could be better performed at national or local level. This would release massive public resources for reallocation to local government. In some ways this is borne out by the current Constitutional System in which although elected governments in their own right provinces raise little own revenue, depend on transfers from the national fiscus, and largely implement national policy. The largest portion of the national revenue goes to fund provincial functions.

43. Of the three spheres of government, provincial government is thus the only sphere whose actual need and existence is still contested ten years after democracy. It is also the sphere where the most significant institutional intergovernmental changes to its role are already taken place in practice.
44. Looking at the current political state of provinces, it is clear that provinces have very different capabilities as public institutions, may be evolving on different change trajectories, or present particular kinds of political challenges:
  - Certain provinces are struggling and in ten years have not made the value added contribution that was expected. Northern Cape and Eastern Cape fall into this category.
  - The majority of provinces are middling, in that they are by and large working, but their success rate is still below that expected of an entire sphere of government.
  - KZN and Western Cape. While they have relatively strong technical capacity, present special challenges for the ANC politically.
  - Gauteng is in its own category, because it is the smallest spatially, has the largest population and value add to the economy, is comparatively capacitated, and is evolving in a direction that puts a critical spotlight on the design parameters of the three sphere system
45. If further change to the provincial system is regarded as necessary to achieve greater democratic accountability, more effective public delivery, and more responsive government, then the following considerations must be borne in mind:
  - Changes to the provincial sphere will affect the other two spheres, existing

legislation, and established systems, it will not happen in isolation.

- There is no one perfect solution to the problems of state performance. Effective leadership, capacity, skills, values, resources, and systems are as important, if not more important, that institutional change.
  - The larger the change the greater the risk of instability in governance and service provision, and often solutions to problems in turn bring with them their own problems.
  - Managing change takes will, time, careful sequencing and very effective central coordination.
46. More fundamental change must be principle-driven, and in the current political context, the following governance principles stand out:
    - Deepening democratic accountability, participation and responsiveness. The pressure on government is to locate its strongest capacity in the closest spatial proximity to people and communities in an accountability relationship that can lead to better responsiveness to communities.
    - Achieving more efficient and effective service delivery through better designed service delivery processes. Service delivery must be accelerated, and lines of decision-making must be more efficient and less complex. Delivery processes will increasingly require better information about households, gender, youth and population dynamics and a more coherent government-wide understanding of the South African household, and better ways to build a partnership between government, communities, civil society organizations and even families.
    - Enhancing social cohesion and equity. Integrated communities and accelerated and shared economic growth are the cornerstones of Vision 2014. The organization of government is a critical lever and catalyst for achieving social cohesion and equity, by redistributing resources and capacity to enable the poor to become less dependent on the state whilst catering efficiently for those in poverty that rely on social assistance and other assistance from the state.
    - Promoting public access to public services. Organizing government functions around the principle of making it easier for people to access those services is essential for poverty reduction. Poor organization of departments and service

---

delivery processes is a cost to the poor in particular who do not have the choice the rich have to select private services.

- Entrenching a culture and the practice of service to the public within the public sector. Practice in many other developing countries shows that one of the most critical levers of social transformation is a highly skilled, strongly incentivised public service having a strong institutional identity based on common values of service.
  - Greater clarity on the respective roles and functions of all three spheres in relation to each other. Cooperative government is a vague formula that in practice leads to confusion about which level of government is responsible for what. This confusion can paralyze decision-making efficiency in a state, and the practice in most countries in the twenty first century is to move towards much clearer role distinctions. The excessive coordination that cooperative government requires is not a virtue in itself, done poorly it reduces efficiency and effectiveness and increases the costs of governance. While it is irrelevant to the public which level of government is responsible for what service, the basis for public, and therefore democratic, accountability as a principle of state organization is the clear allocation of functional responsibilities to political authorities.
47. The central issue in South Africa that must be answered however whatever the degree of institutional reform is: What is the best way to organize and deploy on a massive scale the capacity of the developmental state to deliver the public goods and services that are needed to halve poverty and unemployment by 2014?
48. The three-sphere system will continually evolve to meet new challenges, whether or not fundamental change to the provincial system is envisaged. As regards the future of the provincial system of government there are basically three options:
49. The first option is to retain the system as it is. Provincial government would retain its legislative and executive roles. This has the advantage of continuity and stability. The provincial system has generated a decade of experience to build on and relative institutional stability. There are also changes within the system taking place in as much as certain provinces are already considering forms of organization with local government on a regional scale in order to integrate economic potential. The disadvantages
- are that uneven regional development and distribution of capacity will remain short term factors.
50. But it is clear that changes within the current framework of the Constitution would still be required in order to ensure the massive presence of the developmental state within community life in the country. The strategic focus for reform would then be on:
- Unifying the public service and recruiting, training and deploying capacity to weaker municipalities. This would provide the opportunity to spatially de-concentrate service delivery centers to community level and to organize public service management capability and service points at that level so as to achieve better integration and efficiency in delivery. The size of municipalities would still be a factor affecting improved access because of the sheer size of some municipal areas.
  - De-concentration will require a new role for districts and metros, which will then become key points for coordinating long term development. These two categories of local government are small enough to serve as a place for organizing state action in closest proximity to people and large enough to achieve economies of scale in economic development and public delivery. Districts and metros would work cooperatively with clusters of departments and service organs that are physically situated in their areas. De-concentration would allow for general managers to be deployed spatially with the responsibility to manage a cluster of service functions in that municipal area in conjunction with the local authority.
  - Progressively transferring certain national and provincial functions on a case by case basis to municipalities only once they have the capacity to perform those functions.
  - Continuously improving intergovernmental coordination in areas such as education, health, transport, and social services where national government and provinces have concurrent responsibilities.
  - Developing the development planning, integrative and coordination roles of provinces and improving provincial capacity to support and monitor municipal performance in particular.
  - Improving provincial legislative oversight
  - Strengthening central government's policy and monitoring capacity.
51. The second option is to remove the provin-

---

cial system altogether, leaving a two-sphere system of government consisting of national and local government. Greater decentralization to local government under the current system would in any event leave provinces with largely a marginal, or coordinating role, with strong lean policy capability at the center and service delivery taking place at local level.

52. This model has the potential advantage of releasing significant resources and capacity for local government. This must be balanced against disadvantages such as departments would still have to be spatially decentralized to regional level, new forms of coordination with local government would be required, legislation would have to be amended, local government capacity would still have to be developed to take on new functions. The question of timing, sequencing and managing change are critical considerations.
53. The third option is a hybrid – a three sphere system but with fewer provinces. What exactly this would entail is uncertain, but it would mean more than simply redrawing provincial boundaries. Even if redrawing provincial boundaries was done this would still require a principled and conceptually clear understanding of what the role of the new provincial system would be and how it would differ from the current system. Bringing the area of the country under fewer provincial boundaries would still leave the question what is the developmental role of provinces unanswered. If only some areas are to become provinces, then which areas? If these are drawn around economic regions, then how will spatial inequality be addressed in other regions?

#### **AN EVALUATION OF FLOOR CROSSING**

54. Since the floor crossing legislation came into effect in 2002, there have been two floor crossing windows in the National and Provincial Legislatures and in municipal councils.
55. The practical implementation of the legislation therefore gives us the opportunity to evaluate whether it is achieving the objectives envisaged when the laws were approved; whether there are aspects of the process of floor crossing that require some adjustment or whether the reasons that gave rise to its adoption are no longer as compelling as they were at that time.
56. The matter has also been raised in the National Assembly as a Private Members Bill has been tabled which proposes the scrapping of floor crossing. ANC comrades dealing with the matter need to be given

guidance on how to address the issues.

57. Floor crossing was considered but not provided for during the deliberations on the Interim Constitution in 1993.
58. The issue was again considered in the deliberations on the Final Constitution and although floor crossing was not provided for, an opening was made by the inclusion of a provision that allowed for ordinary legislation (as opposed to a Constitutional Amendment) to provide for floor crossing within a reasonable period after the new Constitution took effect.
59. The National Assembly duly established an ad hoc committee in February 1997 to consider whether such legislation should be passed. The Committee reported back to the House in June 1998.
60. The ad hoc committee considered three basic approaches to floor crossing viz. an absolute freedom to cross the floor; a prohibition on crossing the floor and a qualified freedom to cross the floor. The majority of the committee resolved that *“it would be neither fair nor democratic for the ban (on floor crossing) to be lifted at that stage”*. It did however recommend that the ban be reviewed after the 1999 elections and that the case for reviewing the ban would be strengthened if the new electoral system included constituency elections.
61. It is interesting to note that at that stage, the National Party, the Freedom Front, the PAC and the ACDP supported an absolute freedom to cross the floor, whilst the Democratic Party supported a qualified freedom. The ANC and IFP supported the ban on floor crossing. Of all the parties, only the IFP has maintained its position.
62. The issue was raised after the 1999 elections by the DP and NNP who had subsequently merged to form the Democratic Alliance. They approached the Deputy President requesting that legislation be passed allowing them to merge in the National Assembly. The 2000 local government elections were contested by both these parties as the Democratic Alliance.
63. When this marriage fell apart, the matter became more urgent at a local government level as NNP councillors wanted to leave the Democratic Alliance and return to the National Party. This could only be done if floor crossing was provided. It was at this stage that the ANC agreed to support floor crossing. Failure to have done so would have resulted in an untenable situation where a large number of NNP councillors would have been stuck in a party they did not support for the next 3 years or would have had to

---

resign their seats. It was felt at the time that provision should also be made for floor crossing in the legislatures in all spheres of government.

64. Arguments in favour and against  
Both the arguments for and against floor crossing have been thoroughly discussed. However it may be useful to summarise some of the key points:
65. *Arguments in favour of Floor Crossing*
- The main argument in favour of floor crossing derives from the notion that members of legislatures have a free mandate – the belief that irrespective of the electoral system, members are accountable to their constituencies or the nation as a whole and not to their parties. Supporters of this argument refer to the Constitution which states that the National Assembly is elected to represent the people and to ensure government by the people.
  - It is also argued that allowing MPs to cross the floor and keep their seats is consistent with the provisions of the Bill of Rights regarding freedom of opinion, expression, association and political choices.
  - Allowing MPs to cross the floor reduces the power of the party. If MPs are unhappy with a particular position that the party has adopted they can, in the last instance, escape party discipline by leaving the party and still keeping their seats.
  - Elected public representatives upon working with members of other parties may find that they identify more closely with another party to which they have now been exposed. Floor crossing enables them to join that party without losing their seat. For example white public representatives may as a result of apartheid propaganda have had negative and false perceptions of the ANC. The floor crossing provisions allows such people after having been exposed to the ANC, to change their viewpoints and join the ANC.
66. In addition to these general arguments in favour of floor crossing, floor crossing as we currently have it can only occur during limited periods.
67. Arguments in favour of a limited floor crossing are as follows:
- During the term of a legislature, there can be significant shifts in public opinion that do not warrant fresh elections, but which should be represented in the leg-

islature. By allowing groups of MPs to “cross the floor” these shifts of opinion can be reflected in the legislature. Also genuine differences of interpretation on what mandate the electorate gave a party and how to implement it can also lead to splits in a party and this should be allowed expression by way of “crossing the floor”. In short greater democracy and representation is made possible through a qualified freedom to “cross the floor”.

- It allows for parties to change their names or merge with other parties for example without the floor crossing provisions the NNP would have had to continue as a party in name only until 2009. The floor crossing provisions also allowed the Democratic Party to become the Democratic Alliance.

68. *Arguments Against Floor Crossing*

Arguments against floor crossing are largely premised on the belief that the voters are primarily voting for the party and not for the individual – even in the case of ward councillors at the local government level. Some of the arguments against floor crossing are:

- Allowing individual public representatives to cross the floor undermines the will of the electorate. Voters that support party A could elect as a ward councillor the person that party has nominated only to find that the councillor crosses the floor and joins another party. The majority of voters could vote for party A in an election and find that after floor crossing, Party B is now the majority party.
- Allowing MPs to defect serves to increase the distance between voters and public representatives.
- Crossing the floor could undermine the stability of our legislatures in our young democracy
- Public representatives can already leave their parties and join another party, provided they are prepared to lose their seats.
- Floor crossing can allow for cheque book politics where public representatives are persuaded to join another party because of inducements – these could be financial or promises of positions in that party.
- Floor crossing is particularly hard on smaller parties that cannot offer positions as incentives. Public representatives could leave a smaller party to join a larger one, not because they believe in the principles of that party but because of benefits that they believe they will

obtain from that party, particularly if that party is in power.

69. Issues that have arisen out of the practical implementation of the floor crossing legislation:

A. *The number of new parties in the National Assembly*

In the 2003 window period, five new parties were created in the National Assembly. Of these only one, the Independent Democrats survived the 2004 elections. Similarly in 2005, 5 more new parties were created. Of these only Nadeco gained any representation in the local government elections the following year.

The National Assembly rules provide for each party to speak in every debate should they so wish. Financial support is also given by Parliament to each party. Considerable time and resources are wasted on parties that do not have any real electoral support and in some cases consist of only 1 member.

B. *Difficulties in the NCOP*

Members of the NCOP may not cross the floor as they represent parties in the provincial legislatures. Should floor crossing take place in a legislature, that legislature has to be reconstituted. The legislature's delegation to the NCOP must also be reconstituted despite the fact that there may be no change to the actual composition. In practical terms this means that affected office bearers have to be re-elected. This happened when the Western Cape delegation was reconstituted and the then Chairperson of the NCOP, who was a Western Cape delegate, had to be re-elected.

A further impact for the NCOP is that a permanent delegate could lose their seat if the proportionalities change in the provincial legislature. This has happened in the case of NNP members. In one case the ANC got the extra seat and gave it to the NNP NCOP member who did not join the ANC. In another case, the seat was lost even though the ANC now had more members of the legislature but because of the proportionality calculations.

C. *Lack of electoral support?*

The DA has made an accusation that no ward councillor who crossed the floor was able to keep their ward in the 2006 elections. Although it would appear that a few councillors were able to do so, the 2006 local government elections showed that it was difficult for parties to hold onto wards gained through floor cross-

ing. However generally in KwaZulu Natal and in some municipalities in the Western Cape, the ANC was able to maintain the council seats it had gained during floor crossing.

As already stated all the new parties created in the National Assembly in the 2003 floor crossing bar one did not return members to parliament in 2005. If the 2006 local government elections are any indication of voter support it is likely that the same fate awaits in 2009, those parties formed in the 2006 floor crossing.

Opinion polls indicate public unhappiness with floor crossing.

D. *Opposition from other parties*

As reflected above all opposition parties with the exception of the IFP supported floor crossing. Currently it seems as if all opposition parties are now opposed to it. The DA is attempting to mobilize opposition parties to lobby for the scrapping of floor crossing. Although excluded from this the ID have indicated that they are not in favour of floor crossing. This is likely to be because they fear losing councillors in the next municipal floor crossing.

E. *Instability at local government level?*

A charge was made before the legislation took effect that floor crossing would cause instability if political control kept shifting due to floor crossing. Although this has not happened at provincial level it has happened in a number of municipal councils without adverse effect. The issue of the party achieving power wanting to change the leadership in the administration of that municipality is something that can be addressed in other ways.

F. *Practical difficulties with the existing legislation*

■ The law provides a separate list of candidates for those seats affected by floor crossing. This list remains separate for the duration of a Parliament and cannot be reviewed or supplemented by a party. Parliamentary staff recommend that this floor crossing list be brought in line with the candidates list in terms of the Electoral Act.

■ Problems with determining the 10% threshold. The Cape High Court has held that the 10% is calculated at the beginning of the window period. Parliamentary staff have raised concerns with the obligations of the Speaker in

---

## SUMMARY OF KEY ISSUES

Some comrades have been uncomfortable with some of the new ANC Public representatives particularly in the light of the historical role they may have played against the ANC and have questioned whether their conversion to the ANC is as the result of a genuine shift in belief or because of political expediency.

Sometimes in order to make up the required 10% threshold, we may take public representatives that we would not normally accept.

The ANC should develop a policy on what type of public representative should be accepted during floor-crossing. A more systematic training policy should be adopted to better integrate public representatives who have crossed the floor to the ANC into the structures of the ANC and the party caucus.

### A. **Maintain the status quo**

The ANC can decide that the reasons that gave rise to providing for floor crossing remain as they were and that the status quo should continue.

This would mean that there would be 2 floor crossing windows during the 5 year term of a legislature or municipal council and that an elected representative could join another party and keep their seat, provided the requisite threshold had been reached.

In the light of opposition to floor crossing in the media and from almost all political parties, if this option is followed we will have to go on the offensive in continuing to explain to our members and the public, the reasons for floor crossing.

The ANC is likely to be the only political party supporting floor crossing when the matter is debated in the National Assembly.

### B. **Keep floor crossing but make some adjustments:**

Changes that could be considered are:

- a) Place restrictions to minimize the formation of new parties with no electoral support base. Currently the requirements for floor crossers who want to form a new party to register the party with the IEC are less onerous than normal - they only have to draft a constitution and draw up a logo. The additional requirements of the collection of 50 signatures of SA Citizens who state that they know of the existence of this party and a registration fee of R500 which normally applies to the registration of a new party do not apply to new parties formed by floor crossers. Requiring new parties created by floor crossers to comply with these requirements may reduce the number of one member parties. The member(s) founding the new party could have a specified time in which to do this failing which they lose their seat(s) then would revert back to the party from which they had come.
- b) Abolish the 10% threshold as it favours the larger parties in the bigger legislatures and causes practical problems particularly for the Speaker where members of a party do not know if they make up the 10%.
- c) Abolish the separate list for vacancies created by the resignation of MPs who have previously crossed the floor.

### C. **Abolish floor crossing**

- Abolishing floor crossing would mean we revert to the position we were in prior to 2002. Members of a party who wish to join another party would have to resign from the legislature/council and it would be up to their new party to decide if a place should be found for them. This was the situation for example with Walter Felgate who resigned from the IFP and consequently lost his seat in the National Assembly. The ANC however gave him a seat in the KZN Provincial Legislature.
- If floor crossing is abolished parties will not be able to merge or split in the event of a substantial reconsideration of their policies. They will also not be able to change the name of the party in the legislature until after the next election.

this regard. Must the members who want to cross approach the Speaker en masse once they have achieved the 10%? If individual members of a party want to join another party but do not know whether there are enough members to make up the 10% requirement, can they approach the Speaker individually who would then have to advise them whether

the threshold has been met? If the threshold has not been met the fact that the Speaker knows who wanted to leave a party but could not make them vulnerable.

- Floor Crossing also causes practical problems in Parliament regarding constituency and party support allowances.

## CRITICAL ISSUES

The following are some critical issues that must be considered:

1. What criteria or bases should be used to inform us what length the “cooling off” period should be. Equally, is it not discriminatory to implement a twelve-month period for elected public representatives, whilst the intention or proposal is to implement a two-year (24 month) period for public servants;
2. Should our system of post tenure rules be extended to include elected public representatives (Councillors) and officials in the local government sphere, where the relationship and inter-action between Councillors, public servants (officials) and the private sector is much more intimate or close than in other spheres of government;
3. Indeed, regulations for the recently gazetted the Municipal Finance Management Act (MFMA), in essence, are post employment restrictions applicable to Councillors and local government officials. In addition to precluding Councillors and officials from tendering for government contracts whilst in office, for one year after a Councillor or official has left office, he/she is precluded or barred from tendering for any government contracts. However, does the MFMA adequately provide for a Post Tenure regime at the local government sphere, or can it be improved to also ensure that Councillors and local government officials do not also gain an unfair advantage by leaving office and joining private sector companies or organizations with which they have had close dealings;
4. Is it not a logical consequence, also, that those regulations gazetted by the Minister of Finance in terms of the MFMA, that are applicable to local government councillors, also be extended to include Members of Parliament, government officials and their spouses, partners at the provincial and national spheres of government, so that they too are precluded from tendering for government contracts and projects in terms of the Public Finance Management Act (PFMA), or any other law;
5. At what level, both of elected public representatives and public servants, should our post employment restrictions regime, particularly the “cooling off” period, be targeted? At the provincial and national government level it is envisaged that, in the case of elected public representatives, this should be pegged at the level of Chairpersons of Committees, up to and including the Deputy-President of the country, whilst in the case of public servants it is envisaged that this should be pegged at the level of procurement managers and/or those officials responsible for the awarding of contracts (and their equivalents), up to and including Directors-General or heads of departments.

The situation at the local government sphere, however, presents a particular challenge, because even ordinary Councillors enjoy access to officials responsible for awarding contracts. Indeed, in many municipalities Councillors themselves do the awarding on the basis that they best understand black economic empowerment and affirmative action, and

6. The government agency that will be responsible for reviewing, monitoring and implementing our post tenure regime presents an important challenge, after some consideration, discussion and consultation it is proposed that a tribunal or Committee be appointed to carry out this task. This Tribunal or Committee would comprise:
  - a) the Chairperson of the Commission on the Remuneration of Public Office Bearers;
  - b) the Chairperson of the Public Service Commission; and
  - c) an eminent South African drawn from civil society.

Two of the three members of the Tribunal already review and consider matters of either a remunerative nature or related to the declaration of interests of senior managers. Moreover, it is also important that we do not end up creating a whole new large bureaucracy.

7. It has been suggested, both by certain Members of Parliament and in a written submission by IDASA that a “gardening allowance” form an integral part of our post tenure Regulations. Effectively, what this means is that the affected persons (MP, Councillor, official, etc. be paid his/her full salary and benefits while serving out the “cooling off” period.

## POST-TENURE/EMPLOYMENT RULES FOR PUBLIC OFFICIALS

70. The issue is not that post-employment rules will prevent corruption. The principle issue is that people in privileged positions or person with access to privileged information should not use this to obtain benefits (shares, partnerships, jobs) which would not be available to others with similar qualifications or 'suitability' for the benefits conferred.
71. The appearance of impropriety in a closely-knit business society is the governing approach. For example, a chair of a portfolio committee investigates various options for the purchase of a major contract or makes oversight visits to an industry and then obtains share or obtain employment in that industry; Ministers determining policy in a particular area and then being recruited by the beneficiaries of that policy. We are talking about the perceived "unfairness" of what is considered abuse of office regardless of whether there is any element of corruption.
72. In the recent past there has been public debate on the measures required to curb or manage conflict of interest that may occur when elected public representatives and government officials leave office or receive offers of employment from the private sector. Such measures should ensure the protection of the public interest such that no elected public representative or government official gains an unfair advantage as a result of his/her previous position, for a stipulated period.
73. At its National General Council (NGC) meeting in June/July 2005, the African National Congress adopted resolutions which seek to provide clarity on the regulation and participation of ANC members in business.
74. These resolutions state:
19. *Participation of ANC members in business*
1. The NEC should develop protocols to regulate the conduct of ANC members in respect of their participation in business;
  2. The NEC should also develop protocols to regulate the participation of public representatives and government officials leaving office, in business.
- Such a protocol should include, among others, a "cooling off period", and a review by an appropriate government agency in order to eliminate the basis of suspicion and insinuation.
75. What purpose do post tenure rules serve?

They seek to prevent office bearers and government officials conducting themselves in a manner designed to unfairly secure benefits for themselves or for the organization they will be moving to. It has been argued that former officials and office bearers usually accept employment or positions in organizations with which they were associated whilst in office. It is this situation that the NGC Resolution seeks to regulate. Indeed, in 2001 the Joint Investigating Teams recommended that: "Parliament should take urgent steps to ensure that high-ranking officials and office bearers, such as ministers and deputy-ministers, are not allowed to be involved, whether personally or as part of a private enterprise, for a reasonable period of time after they leave public office, in contracts that are concluded with the state".

The purpose of this document, therefore, is to attempt to address some of the issues raised in the NGC resolution.

## CHALLENGES & CONFLICTS

76. This document seeks to develop an ethics regime wherein conflicts of interest, perceived or real, can be effectively managed. Perhaps it would be wise to begin by addressing certain false perceptions that may have already gained ground. This Section seeks to set out some of the challenges and conflicts faced in setting up such an ethics regime.
77. It is not the intention (nor has it ever been) to deny or prevent either elected public representatives or public servants from being gainfully employed once they leave office. It is also not the intention to infringe on their right to freely choose their occupation, trade or profession once they have left office. This is a right provided for in Section 22 of our country's Constitution. In an effort to address this matter, legal opinions have been sought from three different sources, viz.:
- a) Parliament's Legal Services Office;
  - b) Renet van Wyk at the University of Pretoria in an opinion titled "**Restraints of Trade: Case Law and the Constitution**"; and
  - c) The Office of the Chief State Law Advisor
78. Briefly, their opinions can be summarized as follows:
- a) Parliament's Legal Services Office: the purpose of the Post Tenure Regulations would be to ensure that ethical conduct prevails since Members of Parliament and Councillors often hold very influential positions with access to officials in key and strategic positions. Therefore, the public interest must be protected,

---

provided that the restraint is reasonable and is provided for in legislation;

- b) Renet van Wyk: there is no indication in Section 22 or our country's Constitution that Post Tenure Regulations would be unconstitutional, provided that the restriction / restraint is reasonable; and
- c) Office of the Chief State Law Advisor: the proposed Post Tenure Regulations can be compared to restraint of trade agreements found in the private sector. Again, reasonableness is one of the factors to be taken into consideration. It is clearly in the public's interest that post-public service employment be regulated to curb corruption, switching of sides, bribery of officials, etc. Moreover, the rights contained in our country's Constitution are not absolute, and are subject to limitation. Finally, in their view, Post Tenure Regulations would not be in conflict with the Constitution.

79. Another significant challenge that requires consideration is how the ANC's own deployment policy will be adjusted to suit the post tenure rules, such that the deployment policy does not conflict with the rules. In addition, Parliament has seen the development of a considerable skills pool. This is probably also true of elected public representatives in the provincial and local government spheres, as well as in our pool public servants. There is a need to ensure the retention of these skills.

#### **PROPOSALS ON THE REGULATIONS:**

80. Limitation period for Members of Parliament and Councillors.

Former members of Parliament who have held the position of Chairperson of a Committee, Deputy-Minister, Cabinet Minister or Deputy-President shall not for a period of one year (12 months) after leaving office, accept appointment to a board of directors of, or employment in, or make representations for any entity with which they had direct significant official dealings during the period of one year immediately prior to the termination of their service in public office. A similar provision would apply to Members of Executive Councils (MEC's), Premiers and local government Councillors.

81. Where an elected public representative or

official or advisors acted for or advised the government with regard to any proceedings, projects, transactions or negotiations, such individual shall not depart his/her public office in order to become a director, employee, consultant or advisor for any person, entity, association or union which is/was party to, or had an interest in such proceedings, project, transaction or negotiations. This is called "switching sides" and must be prevented. (There is a need to also consider a time limit for "switching sides.")

- 82. After leaving public office, Members and government officials shall not act in a manner that serves to take improper advantage of the position they held whilst in public office. This includes:
  - a) allowing the prospects of outside employment to create a real or perceived conflict of interest;
  - b) obtaining preferential treatment or privileged access to government officials and/or departments after leaving public office;
  - c) taking personal advantage of information obtained in the course of official duties and responsibilities, and which has not become generally available to the public; and
  - d) using their previous positions and contacts in public office in order to gain an unfair advantage in obtaining opportunities for outside employment.

83. Given that this regime would apply to members who have left public office it makes sense for this new system to be brought about either through amending legislation (i.e. Powers and Privileges, Executive Members Ethics Act, the relevant public service statute, etc.) or through the introduction of new legislation. Consideration would also have to be given as to whether appropriate sanctions and penalties should be provided in the event of contraventions.

84. Financial sanctions may be difficult to be identified.

People leaving public office should act in good faith or else criminal sanctions should be considered. The United States, for example, prosecutes individuals for a range of public office violations.