COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS TO THE CONSTITUTIONAL ASSEMBLY IN TERMS OF SECTION 164 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

16 FEBRUARY 1996

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RECOMMENDATIONS TO THE CONSTITUTIONAL ASSEMBLY IN TERMS OF SECTION 164 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

RESPONSE TO THE WORKING DRAFT OF THE NEW CONSTITUTION DATED 22 NOVEMBER 1995

1 INTRODUCTION

1.1 Section 164(1) of the interim Constitution requires the Commission to facilitate the establishment of provincial government by, *inter alia*-

* advising the Constitutional Assembly on the development of a constitutional dispensation with regard to provincial systems of government, and
* advising the national government or a provincial government on the establishment and consolidation of administrative institutions and structures in a province.

The latter function has enabled the Commission to obtain a synoptic view of the new system of provincial government, and to acquire a particular understanding of the implementation of the interim Constitution in all provinces.

1.2 Section 164(2) stipulates that the Commission's advice to the Constitutional Assembly must include recommendations in the form of draft constitutional provisions regarding -

(a) the finalisation of the number and the boundaries of the provinces of the Republic;
(b) the constitutional dispensations of such provinces, including the constitutional structures within such provinces as well as the method of their election and their authority, functions and procedures;

(c) measures, including transitional measures, that provide for the phasing in of new provincial constitutional dispensations;
(d) the final delimitation of powers and functions between national and provincial institutions of government, with due regard to the criteria that are set out in subsection (3);
(e) fiscal arrangements between the institutions of national government and those of provincial governments;
(f) the powers and functions of local governments; and
(g) any matter which the Commission considers to be relevant or ancillary to its functions.

1.3 Section 161(1) stipulates that the development of a system of provincial government must receive the priority attention of the Constitutional Assembly, and that in this regard it must take into consideration any recommendation of the Commission on Provincial Government and any comments thereon by the respective provincial governments. The Constitutional Assembly may refer any recommended provisions back to the Commission for further consideration. Recommendations of the Commission lapse if they are not adopted by the Constitutional Assembly.

1.4 In order to facilitate the preparatory work of the Constitutional Assembly structures the Commission acceded to a request to provide them with provisional recommendations pending possible further submissions to the Commission from provincial and local governments and other interested institutions. Twelve documents containing provisional recommendations in respect of the following matters were submitted :

1 Provincial constitutions
2 Provincial legislative powers
3 Structures and procedures - provincial legislatures
4 A second chamber of Parliament
5 Provincial executive authority
6 Provincial staff matters
7 Provincial finance and fiscal affairs
8 Traditional authorities
9 Local government
10 Intergovernmental relations
11 Number and boundaries of provinces
12 Self-determination

1.5 After considering all further submissions together with the Working Draft for the proposed new Constitution, the Commission has decided to make the recommendations contained in the following

paragraphs. To facilitate the work of the Constitutional Assembly and its relevant committees, the Commission's recommendations are based on the text of the Working Draft. The body of this document contains comments and alternative draft text only in respect of matters which, in the Commission's view, have not been addressed adequately in the Working Draft, or where a choice has to be made among alternative provisions.

The Commission's general views in regard to provincial and local government matters as contained in the Working Draft , together with fuller reasons for its recommendations, are given in the annexures.

2 RECOMMENDATIONS BASED ON WORKING DRAFT OF THE NEW CONSTITUTION

2.1 CHAPTER 4 - COUNCIL OF PROVINCES/SENATE

See Annexure 1 (page 25)

In its preliminary recommendations (Document 4 dated 23 March 1955) the Commission recommended the retention of a second chamber of Parliament composed of an equal number of members nominated by each provincial legislature from amongst its members. The Commission also recommended the strengthening of the powers of the second chamber in regard to legislation affecting provinces. The Commission has carefully considered the options for a Council of Provinces or a Senate to represent provinces in legislative matters at the national level, taking into consideration, inter alia, its preliminary recommendations, and has come to the following conclusions :

(a) The proposal for a Senate as given in the working draft would not significantly improve the performance of the present Senate as a body representing provinces. If the CA decides to retain the Senate as a second chamber of Parliament, the Commission recommends that the proposals contained in its Preliminary Recommendations - Document 2 be incorporated into the new Constitution. For fuller details see Annexure 1, paragraph 4.1

(b) The concept of a Council of Provinces has merit and satisfies a number of the Commission's concerns regarding the present Senate and some of its preliminary recommendations. However, other concerns and recommendations are not addressed. The Commission is, moreover, of the opinion that the proposed Council

of Provinces would have great difficulty in undertaking a further role as promoter and co-ordinator of intergovernmental executive relations. For fuller details see Annexure 1, paragraph 4.2. If the CA decides to accept the proposal for a Council of Provinces as contained in the Working Draft, the Commission recommends that this be modified in line with its comments in paragraph 4.2 in Annexure 1.

(c) An additional option which combines aspects of the two options provided in the working draft should be considered. This would provide for a second chamber of Parliament, consisting of representatives nominated by provincial legislatures, whose attention will be focused primarily on legislation affecting provincial competences. In order to emphasise the role of such a chamber, it would be appropriate for it to be known as the Chamber of Provinces, and this designation should be considered. As its preferred option, the Commission recommends that the following draft provisions for a second chamber of Parliament representing provincial interests be considered :

PARLIAMENT

"40(2) Parliament consists of the National Assembly and the Chamber of Provinces."

"CHAMBER OF PROVINCES

Composition and election

57(1) The Chamber of Provinces consists of 54 members.

(2) Within 10 days of its election, a provincial legislature elects six persons from amongst its members to represent the province in the Chamber of Provinces. Parties in the legislature are entitled to nominate persons for election in accordance with the principle of proportional representation.

(3) A member of the Chamber of Provinces may at any time be recalled by the provincial legislature which elected him or her.

(4) A person elected as a member of the Chamber of Provinces remains a member for the duration of the term of the provincial legislature which

elected him or her, unless he or she is recalled.

(5) A Premier or a member of an Executive Council may address the Chamber and participate in its debates, but may not vote on any matter.

Powers and functions

58(1) The Chamber of Provinces represents the provinces at national legislative level.

(2) The Chamber of Provinces considers every Bill introduced in Parliament and deals with it as provided for in this Chapter.

President and Deputy President

59 Include provisions similar to section 49 of the interim Constitution.

Vacation of seats

60(1) A member of the Chamber of Provinces vacates his or her seat upon -

(a) being recalled by the provincial legislature which elected him or her; or

(b) vacating his or her seat in the provincial legislature which elected him or her.

(2) Any vacancy in the Chamber of Provinces is filled by the election of a member of the legislature concerned in accordance with the principle of proportional representation as provided for in section 57(2).

Sittings and meetings

61(1) The President of the Constitutional Court must convene the Chamber of Provinces as soon as practicable after the election of the National Assembly , but not later than 30 days after such election.

(2) The Chamber of Provinces may determine the time and duration of its sittings and the dates of its meetings.

(3) The President of the Chamber of Provinces may summon the Chamber of Provinces to an extraordinary meeting at any time to conduct urgent business.

(4) The seat of the Chamber of Provinces is the same as that of the National Assembly. Meetings at other places are permitted on the grounds of public

interest, security or convenience, and in a manner provided for in the rules and orders of the Chamber.

Quorum

62 ***A majority of the members of the Chamber of Provinces must be present before a vote may be taken on a Bill, and one third of the members must be present before a vote is taken on any other matter.***

Powers, privileges, immunities and benefits

63 ***The Chamber of Provinces and members of the Chamber have powers, privileges, immunities and benefits similar to those of the National Assembly and its members as prescribed by or in terms of the Constitution.***

Penalties, Joint Sittings, and Rules and orders

64 to 66. Provisions similar to those contained in sections 56 to 58 of the interim Constitution must be inserted.

Bills

67(1) ***Bills dealing with matters referred to in sections 120(2), 129(3), 134(1), 149, 150(2), 151, 152, 156(2), 164, 165(3), 167(1) and 187 may be introduced in the Chamber of Provinces only and, for their passing by Parliament, require adoption by the National Assembly and the Chamber of Provinces in separate sittings.***

(2) Bills other than those referred to in sub-section (1) must be referred to the Chamber of Provinces for comment within the time limits prescribed by the rules of the National Assembly before introduction in the National Assembly. Such Bills require adoption by the National Assembly only to be passed by Parliament.

(3)(a)A Bill referred to in sub-section (1) passed by one Chamber and rejected by the other must be referred to a joint committee consisting of an equal numer of members of both Chambers and of all the parties represented in Parliament and willing to participate in the joint committee, to consider and report on any proposed amendments to the Bill to both Chambers of Parliament.

(b) If the Bill with amendments proposed by the joint committee is rejected by any Chamber, it may be read again after six months at a joint sitting of both Chambers, and may be passed by a two thirds majority of the members of both Chambers present and voting."

2.2 CHAPTER 8 - PROVINCES

2.2.1 Establishment and Territory

See Annexure 2 (page 39)

Clause 117 - The Commission supports the draft formulation of this clause. It is of the opinion, however, that this clause is not the proper location for provisions relating to self-determination. It therefore recommends that the note included in the draft be deleted. Any provisions in regard to self-determination should properly be dealt with in a separate chapter. Amendment of the name of a province requires special constitutional provisions and this is dealt with in paragraph 2.7 below.

Clause 118 - The Commission recommends that option 2 be exercised. Clause 154(2) provides that provincial constitutions must be consistent with the Constitution and the inclusion of option 1 would amount to an unnecessary duplication.

Clause 118 (provincial homogeneity) - The Commission considers it inappropriate to include the homogeneity clause in Chapter 8. If such a clause is considered necessary, it should be included in a chapter which will make the provisions or sentiments expressed in the draft clause applicable to all levels of government, and not to provinces only. The Commission recommends accordingly.

2.2.2 Provincial Legislatures

See Annexure 3 (page 43)

Clause 119 - Supported.

Clause 120 - The Commission is of the opinion that the term "women and men elected as members" contains a number of superfluous words and

looks clumsy. It recommends that sub-clause (1) be reformulated as follows:

> "(1) *A provincial legislature consists of* ***members elected*** *in terms of an electoral system that is prescribed in national legislation , is based on a common voters roll, and results, in general, in proportional representation.*"

The Commission is of the opinion that the majority of members of a provincial legislature (60% or more) should be elected in constituencies and that the additional seats should be allocated to parties on a party list basis to effect proportional representation. This should be provided for in the relevant national legislation.

The text of sub-clause (2) is satisfactory. The Commission favours a maximum of 80 members in any provincial legislature.

Clause 121 - The Commission is of the opinion that only persons who are registered as voters in a particular province should qualify to be members of the legislature of that province. It accordingly recommends that the first line of clause 121 be reformulated as follows:

> *"Every citizen who is qualified to vote for the National Assembly* ***and who is registered as a voter in the relevant province*** *is eligible to be a member of the legislature of that province, except -"*

Clause 122 - The draft provisions are supported. Note, however, that the Commission' recommendation in regard to constituency representation under clause 120 above is also applicable to clause 122(2).

Clauses 123 to 132 - Supported. However, the Commission recommends that at clause 125(3) the option vesting the Premier with the power to proclaim an election be adopted.

Clause 132A - The draft text does not provide for provisions similar to those originally contained in section 143(2) of the interim Constitution in regard to the appointment of staff for a provincial legislature. In its preliminary recommendations the Commission expressed concern that the lack of provisions in the Constitution to ensure the co-ordination and rationalisation of staffing matters, including the determination of the grading and numbers of positions, salaries and other conditions of service of the staff of provincial legislatures, between provinces, the national Parliament and the Public Service, may lead to various personnel problems and may not satisfy the stipulations of Constitutional

Principle VI. The Commission therefore recommends that the following clause be added to the draft :

"STAFF OF PROVINCIAL LEGISLATURE

"132A. A provincial legislature may appoint a Secretary and such other staff as may be necessary for the discharge of its work and determine their remuneration and other conditions of service after consultation with the Commission for Public Administration."

2.2.3 **Provincial Executives**

See Annexure 4 (page 54)

Clauses 133 to 135 - Supported. This includes the optional sub-clause 134(g).

Clause 136 - The Commission previously made an interim recommendation that a Premier should be required to vacate his or her seat in the provincial legislature upon being elected. This would place Premiers in a position similar to that of the President who ceases to be a member of the National Assembly when elected (clause 80). Such a requirement would ensure compliance with the concept of the separation of powers. The Commission accordingly recommends that clause 136 be reformulated as follows:

"136. When elected Premier, a person ceases to be a member of the provincial legislature, and, within five days, must assume the office of Premier by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3."

Clauses 137 to 139 - Supported.

Clause 140 - Supported. However, the Commission recommends

(a) that the provisions of constitutional Principle XXXII be applied also to provincial executives until 30 April 1999; and furthermore

(b) that reasonable provision be made for minority parties in provincial legislatures to be represented also in executive structures of provincial governments, to allow them to participate in decision-making in the executive sphere, e.g. in executive (cabinet) committees, where matters could be considered jointly before being referred to the Executive Council for decision (see Annexure 4, paragraph 2.3.5(e)). The relevant text may be formulated as follows:

"PARTICIPATION IN EXECUTIVE PROCEDURES

140A. An Executive Council may establish procedures which allow for parties not represented in the Executive Council to participate in its decision-making processes to the extent provided for in such procedures."

Clauses 141 to 147 - Supported.

2.2.4 **Provincial Financial and Fiscal Matters**

See Annexure 5 (page 62)

Clause 148 - Supported.

Clause 149 - The multitude of factors which must be taken into consideration in terms of clause 149(2), before legislation providing for the determination of the provinces' equitable share of revenue collected nationally and other allocations from national revenue may be enacted, is regarded as being too onerous. The Commission recommends that the following alternative wording be considered :

"(2) Legislation referred to in subsection (1) may be enacted only after the provincial governments have been consulted and any recommendations of the Financial and Fiscal Commission have been considered, and with due regard to -

(a) the national interest; and
(b) the sufficiency of revenues of provincial governments to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

Clause 150 - Section 156(1B) of the interim Constitution vests provincial legislatures with the exclusive competence to impose taxes, levies and duties (excluding income tax or value-added or other sales tax.) This competence is not provided for in the Working Draft. Nor is the competence of provincial legislatures to authorise the imposition of user charges as provided for in section 156(3) of the interim Constitution explicitly incorporated in the draft text. These omissions could be regarded as diminishing the powers of provincial legislatures and contrary to Constitutional Principle XVIII.2. The Commission recommends that the following text be substituted for Clause 150 in the Working Draft:

"150. (1) Provincial legislatures may raise taxes, levies and duties, and surcharges on taxes, but may not raise-

(a) income tax, value-added tax or other sales tax, levies on the sale of fuel or customs and excise duties;

(b) any levies or surcharges on any taxes and duties collected nationally unless authorised to do so in national legislation or

(c) taxes, levies or surcharges that may detrimentally affect national economic policies, interprovincial commerce or the national mobility of goods, services, capital or labour.

(2) The authority to raise taxes, levies, duties and surcharges must be regulated by national legislation which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

(3) A provincial legislature shall notwithstanding subsection (2) have exclusive competence within its province to impose taxes, levies and duties (excluding income tax or value-added or other sales tax) on-

(a) casinos;

(b) gambling, wagering and lotteries; and

(c) betting.

(4) A provincial legislature may enact legislation authorising the imposition of user charges: Provided that-

(a) such legislation may only be enacted after consideration by the provincial legislature of any recommendations made by the Financial and Fiscal Commission concerning the criteria according to which such charges should be determined; and

(b) there is no discrimination against non-residents of the province who are South African citizens."

Clauses 151 to 153 - Supported.

2.2.5 **Provincial Constitutions**

See Annexure 6 (page 71)

Clause 154 - The Commission supports the formulation of this clause. However, it is of the opinion that provinces should not have exclusive power to prescribe titles for office bearers or names for structures which differ from those provided for in Chapter 8 as this could cause considerable confusion in usage (e.g. the use of "minister", "cabinet", "parliament", etc.). Provincial legislatures should also not be free to determine the number of members of their own legislatures. This should rather be provided for in the national Constitution and national legislation containing the further details of the electoral system. The Commission is of the opinion that these limitations will not amount to a substantial reduction of the powers of provincial legislatures as contemplated in Constitutional Principle XVIII.2. The Commission consequently recommends that the following sub-clause be inserted in clause 154:

"(2A) A provincial constitution may not provide for -

(a) titles for office-bearers or names for legislative or executive structures different from those used for corresponding offices or structures provided for in Chapter 8; or

(b) a number of members of the legislature or the Executive Council greater than that provided for in Chapter 8."

The Commission considers the possible alternative formulation for clause 154 contained in the working draft to be too restrictive and possibly contrary to Constitutional Principle XVIII. That formulation can consequently not be supported.

2.3 CHAPTER 9 - PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCES

See Annexure 7 (page 75)

Clause 155 - The Commission is of the opinion that the text in option 1 is generally satisfactory, but that the reference to Schedule 5 is unnecessary. It recommends that the clause be reformulated as follows:

> ***"155. The legislative authority of the Republic is vested in Parliament, which may make laws in terms of the Constitution on any matter."***

Clause 156 - Supported.

Clause 157 - The Commission is of the opinion that the Constitution need not contain special provisions relating to framework legislation. The proposed division of legislative competence between the National Assembly and provincial legislatures provides sufficient scope for national legislation to create frameworks which will allow a provincial legislature to make laws to suit the particular needs of its province. The Commission consequently recommends that clause 157 be deleted from the draft.

Clause 158 - Supported.

Clause 159 - The Commission is of the opinion that the draft text referred to as Option 1 most closely expresses its views contained in the preliminary recommendations. The Commission consequently recommends the adoption of Option 1. However, the Commission recommends the following amendments of the draft text :

(i) sub-clause (1) - the addition of a paragraph after (c) to make the clause read as follows :

> ***"159(1)*** *In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act where the elements of the Act of Parliament that are in conflict with the Provincial Act are necessary for -*
>
> *(a) the establishment of generally applicable standards regarding -*
>
> *(i) services rendered by the state;*
>
> *(ii) the maintenance of economic unity; or*

(iii) the determination of national economic policies; or

(b) the maintenance of the security of the Republic; or

(c) the prevention of prejudice to the Republic or any province caused by the activities of a province;

and the Act of Parliament applies uniformly in all parts of the Republic."

(ii) sub-clause (2) - the substitution of the word Chamber of Provinces for the term "second House" to conform with the Commission's recommendations under Chapter 4 above.

Clauses 160 to 162 - Supported. However, the use of the words "legislative competence" is preferable to the words "passed legislation" in clause 162(1)(a).

2.4 CHAPTER 10 - LOCAL GOVERNMENT

See Annexure 8 (page 91)

Clause 163 - The first line of the clause which stipulates that "Government at local level must be established as a distinct tier of government" is supported. However, the Commission recommends that the word "tier" should be replaced by "level" to ensure uniformity and consistency of usage throughout the draft. The rest of the clause is unclear, both as to its purpose and its meanings. The purpose and functions of local government are dealt with in clause 165 and need therefore not be repeated in clause 163. If it is deemed necessary to make a value statement in regard to local government in this clause, the Commission would recommend that the formulation of the desired values to which local government must conform be redrafted to make its meaning clearer.

Clauses 164 to 165 - Supported.

Clause 166 - Except for clause 166(4) the draft provisions are supported. The stipulation in clause 166(4) that local governments *may* be entitled by legislation to a specifically allocated portion of national and provincial revenue, does not appear to meet the requirements of Constitutional Principle XXVI which confers a constitutional right on local governments to an equitable share of revenue collected nationally. The Commission recommends that the sub-clause be amended to read as follows:

"166(4) A local government must be entitled by legislation to an equitable portion of national revenue so as to ensure that it is able to provide basic services and execute the functions allocated to it, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement, taking into account the different needs and categories of local government."

The Commission draws attention to the following comment and accompanying recommendation made in paragraph 3.6.3 of Document 9:

> "The local level of government must therefore be allocated an equitable share of the various local governments, presumably also in an equitable manner. The process would probably require the determination of the percentage of national revenues to be allocated to local government, the equitable division of that percentage among the provinces, and the final equitable allocation to each local government within a province. The following recommendation in this regard is contained in the Commission's Preliminary Recommendations on Financial and Fiscal Affairs (Document 7):
>
> As far as the further distribution of revenue to local governments is concerned, the CPG recommends that provinces should institute provincial negotiating forums, comprising representatives of the province and its local governments, to make recommendations on the allocations to each local government. It would be virtually impossible for one central body such as the FFC to deal with the detail of distribution among local authorities."

Clause 166A (Added) - Integrity of local government -The draft text does not include provisions similar to those contained in section 174(4) of the interim Constitution to prohibit other levels of government from encroaching on local government powers, functions and structures. There is indeed no obligation to provide against such encroachment in so far as local governments are concerned - see Constitutional Principle XXII which is applicable only to provincial governments and is provided for in clause 160. The Commission considers it proper that local government should also be protected from possible encroachment by the other tiers of government. It accordingly recommends that the following new clause be inserted in the working draft:

INTEGRITY OF LOCAL GOVERNMENT

"***166A. Parliament or a provincial legislature may not encroach on, or cause, enable or allow any encroachment on, the powers, functions and structures of local government except in matters and to the extent provided for in legislation referred to in section 164(1).***"

Clause 167 - The draft provisions are supported, except for the following:

(i) The Commission is of the view that the new Constitution should prescribe that local government elections be held according to a system that includes both ward and proportional representation. The ward representatives should be in the majority . The Commission consequently recommends that the draft text of clause 167(3) be reformulated as follows:

"***167(3) Members of a local government must be elected in accordance with a system of ward representation and proportional representation.***"

(ii) The draft formulation of clause 167(7) provides for the possible eligibility of a local government employee to become a member of the local government who employs him/her. The Commission is of the view that it is quite unacceptable that any person could be both a member and an employee of a local government. It accordingly recommends that the relevant paragraph be reformulated as follows:

"***167(7)***
(d) an employee of a local government; and "

Clause 168 - Supported.

2.5 CHAPTER 11 - TRADITIONAL AUTHORITIES

See Annexure 9 (page 100)

Clause 169 - Supported.

Clause 170 - The Commission recommends that the draft text be reformulated as follows to differentiate between the names of the structures accommodating traditional leaders at national and provincial levels respectively:

> ***"170. National legislation may provide for the establishment of a Council of Traditional Leaders and provincial legislation may provide for the establishment of houses of traditional leaders."***

NOTE: The Commission recommends that the new Constitution should make no additional provisions to accommodate traditional leaders. In particular, the Commission emphasises that traditional leaders should not be given *ex officio* membership of the legislatures at any level of government.

2.6 CHAPTER 12 - PUBLIC ADMINISTRATION

See Annexure 10 (page 103)

The Commission is of the opinion that a clear distinction should be made between Public Administration, which is a generic term for the activities pertaining to the administrative arm of government, and the Public Service, which includes the body of persons employed by the national government and provincial governments and the structures in which they are employed. Such a distinction should help to give greater precision in the drafting of the relevant text. The Commission supports the inclusion of general guidelines for public administration at all levels of government in the Constitution, provided that the above-mentioned distinction is adhered to.

Clause 171 - The Commission supports the draft text of paragraphs (a) to (h), but recommends that paragraph (i) be reformulated as follows:

> " ***171.(1)...***
>
> ***(i) Institutions responsible for public administration must be broadly representative of the South African people, and pursue employment and management practices based on ability, objectivity, fairness, and the need to achieve broad representation.***"

Clause 171(2) - The Commission considers the inclusion of this sub-clause in the Constitution to be inappropriate . While the Commission finds no problem in the appointment of a limited number of persons in government institutions on the grounds of "policy considerations", such appointments should not be on a permanent basis nor on the fixed establishment of a public institution. Provisions to accommodate such a possibility should be made more appropriately in ordinary laws. The Commission recommends that this sub-clause be deleted from the draft.

Clause 171(3) - The use of the term "the public administration" (incorporating the definite article) in this sub-clause [as also in sub-clause (2)] conveys the impression that public administration is a structure of some sort in which persons can be appointed. In any case, the Commission is of the opinion that there is no need to include the sub-clause in the Constitution. The sub-clause itself does not confer any legislative power, while ordinary legislative powers dealt with elsewhere in the Constitution will suffice. The Commission consequently recommends that the sub-clause be deleted from the draft.

Clause 172 - Constitutional Principle XXIX stipulates that the independence and impartiality of, *inter alia*, a Public Service Commission shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service. The Commission is of the opinion that the Public Service Commission referred to in the Constitutional Principle, must bear some resemblance to the Commission provided for in Chapter 13 of the interim Constitution, i.e. be endowed with some powers in respect of the organisation of public service structures, the conditions of service of persons employed by those structures, the personnel practices and ethics applicable to these employees, and the promotion of efficiency and effectiveness in departments and the public service. The functions of such a Commission which must be provided for in the new Constitution need not be restricted to the public service, but should at least include those aspects of the current Commission's functions which are necessary to comply with the objectives described in the above-mentioned Constitutional Principle.

The Commission would prefer the name "Public Service Commission" to be retained. However, as the functions of the proposed Commission are to be extended beyond the public service, the name “Commission for Public Administration” would be acceptable, and is preferable to “Public Administration Commission”, where the acronym PAC could be confusing to the general public.

The Commission for Public Administration should be disinterested and impartial. It should not be a body on which particular interests are represented. The Commission (CPG) therefore is not in favour of such a Commission for Public Administration being composed of, *inter alia*, members nominated by each of the provinces. These members would inevitably be perceived as representing the provinces. To balance such interests, an equivalent number of members from the national level would probably have to be appointed. Since the Commission for Public Administration has a wider jurisdiction, this might also lead to pressure for representation of other interested public institutions. This would result in a bloated and unwieldy Commission.

In the view of the Commission (CPG), the Constitution should provide for only the institution and broad objectives of a single Commission for Public Administration whose independence and impartiality are safeguarded as required in Constitutional Principle XXIX. Further details should be provided for in national legislation. The constitutional provisions should be contained in Chapter 7 which provides for other institutions supporting constitutional democracy, such as the Public Protector and the Auditor-General, who also fall within the ambit of Constitutional Principle XXIX.

From its surveys regarding the functioning of provincial structures, the Commission has concluded that the present system which provides for provincial service commissions is generally not functioning optimally and should be re-examined. The purpose that such commissions may serve could be more efficiently and effectively accomplished by a less elaborate arrangement. This should be provided for in the national legislation referred to above. However, the institution of such commissions presently falls within the legislative power of provinces and it is doubtful whether the omission of this power in the new Constitution would be consistent with Constitutional Principle XVIII.2.

The Commission recommends that clause 172 be deleted from the working draft, and that the name of the Commission for Public Administration must be inserted in clause 106(1), and the following clause be included after clause 110 in Chapter 7 -

"COMMISSION FOR PUBLIC ADMINISTRATION

"110A. (1) The Commission for Public Administration must -

(a) promote the implementation of the basic values of public administration prescribed in section 171 of this Constitution in all relevant institutions;

(b) exercise the powers and perform all functions to promote efficient, effective and fair administration and a high standard of professional ethics in the public service prescribed by national legislation; and
(c) perform other functions entrusted to it by national legislation."

Clause 173 - Sub-clause (1) uses the confusing expression "the public administration" and creates the impression that the public service is part of such a structure. It is not clear why this syntax is considered necessary. The stipulation that the public service must loyally execute the lawful policies of the government of the day needs also to be qualified as the public service will include provincial employees and confusion may arise in regard to which government's policies should be so executed. The Commission recommends that the following text be substituted in clause 173(1):

"173.(1) There is a public service for the Republic, which must function and be structured in terms of national legislation. Persons in the public service at national and provincial level must loyally execute the lawful policies of the government of the day that employs them."

Clause 173(2) - Supported

Clause 173(3) - The use of the word "only" appears to be superfluous and misleading. As it stands, the wording of the clause could be taken to mean that supporting a political party or cause may be grounds for favourable or prejudicial treatment if there are other grounds as well. The Commission recommends that the word "only" be deleted from the draft text.

2.7 CHAPTER - AMENDMENTS TO THE CONSTITUTION

See Annexure 11 (page 112)

In view of the stipulations contained in Constitutional Principle XVIII.4, the Commission recommends that the following clause be inserted in the Chapter dealing with amendments to the new Constitution :

"...(1) Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces require, in addition to any other procedures specified in the Constitution, approval by a two-thirds majority of the Chamber of Provinces. If the amendment concerns specific provinces only, the approval of the legislature of each of such provinces will also be required.

(2) Before Parliament approves any constitutional amendment regarding the powers, boundaries and functions of any province, it must obtain and consider the views of the provincial legislature of that province.

(3) An amendment of the Constitution which alters the boundaries of a province may only be considered after a procedure prescribed by national legislation has been followed to determine the view of the inhabitants of any area affected by such an amendment.

(4) The name of a province may be amended only upon the request of a two-thirds majority of the members of the legislature of that province."

2.8 CHAPTER - INTERGOVERNMENTAL EXECUTIVE RELATIONS

No Annexure. See The Commission's Provisional Recommendations : Document 10 (dated 8 June 1995).

The Commission is of the opinion that intergovernmental executive relations are of such importance that provision should be made in the new Constitution to institutionalise these relations. If they are simply allowed to develop informally, or are governed by national legislation alone without any direction given by the Constitution, there is a strong likelihood that intergovernmental relations would be dominated by government at the national level. By and large, initiatives would have to come from that level, and would also be co-ordinated by administrative structures at national level. This might not be conducive to optimal co-operation among all levels of government.

The Commission is furthermore of the opinion that while a second chamber of Parliament or a house of provinces may deal adequately with relations among legislatures, they are not appropriate structures for dealing with executive relations. The Commission discussed this issue at length in its preliminary recommendations (Document 10 dated 8 June

1995) and has also commented on it in Annexure 1 of the present document, concerning the proposal for a Council of Provinces/Senate.

2.8.1 The Commission consequently recommends that the following statutory provisions be made to deal with intergovernmental executive relations :-

(a) Constitutional provisions :

"EXECUTIVE RELATIONS

162A. (1) There is a Council for Intergovernmental Executive Relations consisting of the nine Premiers of the provinces and not more than nine Ministers appointed by the President.

(2) The object of the Council is to facilitate effective co-operation, co-ordination and consultation in executive matters among all levels of government and between governments on the same level.

(3) The structures, functions and procedures of the Council must be determined in national legislation."

(b) National legislation :

See Annexure 13 (page 131)

Annexure 13 contains suggestions regarding draft national legislation dealing with the proposed Council for Intergovernmental Executive Relations.

2.8.2 Advisory Body on Intergovernmental Relations

The Commission has received comment from a number of internationally recognised authorities on intergovernmental relations to the effect that serious consideration should be given to the establishment of an independent, expert advisory body to investigate and make recommendations on a continuing basis on the functioning of the country's system of intergovernmental relations. This would include administrative matters which would not ordinarily be dealt with by the proposed Council for Intergovernmental Executive Relations.

Because of the Commission's own involvement in this sphere, the Commission wishes to remain neutral in this matter, but recommends that the establishment of such a body be investigated further, and be dealt with in national legislation if necessary.

2.9 GENERAL AND TRANSITIONAL MATTERS

The Commission will consider its recommendations in respect of general and transitional matters when the relevant draft text becomes available.

2.10 SCHEDULE 5 - PROVINCIAL FUNCTIONAL AREAS

See Annexure 12 (page 115)

NOTE - NEW FUNCTIONAL AREAS INCLUDED IN THE SCHEDULE AND AMENDMENTS OF PRESENT SCHEDULE 6 AREAS ARE HIGHLIGHTED. REASONS FOR THE INCLUSION OR AMENDMENT OF ITEMS ARE CONTAINED IN THE ANNEXURE.

The Commission recommends that functional areas as given below be included in Schedule 5 :

Abattoirs
Agriculture
Animal control and diseases
Airports, other than international and national airports
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
*** **Finance and fiscal matters**
*** **Forestry**
Health services
Housing
Indigenous law and customary law
Language policy and the regulation of the use of official languages within a province, subject to section 6.
*** Local government **matters**
Markets and pounds

Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 13
Provincial public media **(to be clearly defined)**
Public transport
*** **Public works**
*** Regional **land administration**, planning and development, **excluding land registration**
Road traffic regulation
*** Roads, **excluding national roads**
Soil conservation
Sport and recreation
*** Tourism, **excluding the international marketing of tourism**
Trade and industrial promotion
Traditional authorities
Urban and rural development
*** **Water affairs, subject to national regulation**
Welfare services

16 February 1996

ANNEXURE 1

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING A COUNCIL OF PROVINCES/SENATE.

1. INTRODUCTION

1.1 In its preliminary recommendations (Document 4 dated 23 March 1995), the Commission considered the need for a second chamber of Parliament in the light of the possible two main purposes for such a chamber, namely -

(a) to provide internal control over governmental actions, especially in the legislative process, and

(b) to broaden the system of representation, in particular of subnational units (regions, provinces or states).

It is widely recognised on the basis of international experience that the institutional value of a second chamber is likely to be enhanced if a government's continuation in office does not depend on its having to secure a vote of confidence in the second chamber.

1.2 In regard to (a) it was argued that a second chamber helps to prevent ill-considered or flawed legislation from being passed by a single chamber. The second chamber in fact provides a second opinion on matters dealt with by the first chamber. Even by exercising only a delaying power, it could compel a government or a first chamber to reconsider a matter or to amend its proposals. Such a delay would also focus the attention of the public on the matter and encourage public debate which could influence the final outcome. It therefore enhances the quality of democracy.

1.3 In regard to (b) it was argued that second chambers can represent interests and views that might otherwise be ignored or subordinated (for example, rural versus urban interests; or less populous regions versus those with large populations) and which should be given the opportunity to make their voices heard in the process of government; or where distinctive and significant interests (such as those of regions, provinces or states) cannot be adequately accommodated in the system of representation employed in the other chamber.

1.4 In the case of South Africa, where the national legislature has the power to override provincial legislation in certain circumstances in respect of all "Schedule 6" functional areas, the checks and balances that a second chamber could provide, might seem to be particularly appropriate.

1.5 The Commission expressed the opinion that provision for the representation of provincial interests is of particular importance in view of the discussion in paragraph 1.2, and that this should be the overriding consideration in determining the need for a second chamber. It recommended that a second chamber of Parliament be retained in the new Constitution, but that it should be structured as follows:

(a) the provision of an equal number of members for each province should be retained (paragraph 3.2.2 of Document 4);

(b) the provinces should be represented by elected members of the provincial legislatures nominated by the legislatures on a proportional basis (paragraph 3.2.4 and 3.2.5 of Document 4);

(c) provincial representatives should be made accountable to the provincial legislature which nominated them in regard to their activities to promote the interests of their province. The recall of representatives who perform unsatisfactorily should be provided for (paragraph 3.2.7 of Document 4);

(d) a member of the second chamber should be ordinarily resident in the province that he or she represents - the recommendation in paragraph (b) above would satisfy this requirement (paragraph 3.4 of Document 4);

(e) the membership of a representative should not be terminated automatically if he or she ceases to be a member of the party which nominated him or her (paragraph 3.5.2 of Document 4);

(f) when a provincial legislature is dissolved, the province's members in the second chamber should vacate their seats and the vacancies filled on the basis recommended in paragraph (b) above (paragraph 3.5.4 of Document 4);

(g) if a vacancy occurs before the expiry of the normal term of office, the person nominated to fill such vacancy should be appointed only for the balance of the unexpired period (paragraph 3.5.5 of Document 4);

(h) where a joint committee has reported on an ordinary Bill which has been rejected by one of the chambers and one of the chambers again rejects the Bill, it should be reconsidered by both chambers only after six months. If one of the chambers then again rejects the Bill, it should be considered at a joint

sitting of both chambers and may be passed by a simple majority of the total number of members of both chambers (paragraph 4.2.2 of Document 4);

(i) administrative processes should be developed to resolve as far as possible disputes in regard to money Bills before the parliamentary processes commence. The second chamber should not be given additional powers in respect of such Bills (paragraph 4.3.3 of Document 4);

(j) Bills dealing with Schedule 6 functional areas should be first introduced in the second chamber. In addition, any such Bill relating to a particular province should also require the approval of the majority of that province's representatives in the second chamber (paragraph 4.4.2 of Document 4); and

(k) provisions similar to those contained in the interim Constitution regarding amendments of the Constitution affecting the legislative competences and executive authority of provinces should be retained (paragraph 4.5.4 of Document 4).

2. DRAFT CONSTITUTIONAL PROVISIONS

2.1 Draft text prepared by the CA

The CA's working draft of the new Constitution provides for two options, namely for a Senate similar to the existing one and for a Council of Provinces. The draft text is annexed.

2.1.1 The proposal for a Senate - The proposal provides for a Senate to function as a second House of Parliament and to represent the provinces in national decision-making. In this regard the Senate must consider all legislation which comes before Parliament.

* The following draft provisions are in some respects similar to the Commission's preliminary recommendations:

(a) equal representation of the provinces (10 members each as at present (par 1.5(a) above and clause 66(2));

(b) members elected indirectly by each provincial legislature in accordance with the principle of proportional representation. However, the elected persons will not be elected members of the

provincial legislature as recommended by the Commission (par 1.5(b) above and clause 66(2));

(c) all Bills affecting the boundaries of provinces or the exercise or performance of the powers and functions of provinces or of a province, or Bills amending Chapter 9 of the Constitution (provincial and national legislative and executive competencies) must be introduced first in the Senate. However, this does not appear to include Bills dealing with Schedule 6 functional areas (par 1.5(j) above and clause 67(7) to (10)).

* The proposal does not provide for any qualification for members of the Senate, nor does it provide for their accountability, recall or replacement (see par 1.5(b) to (g) above).

* The proposal provides for a specific role for the Senate in matters relating to the appointment of ambassadors, judges and other officials and the ratification of international agreements (clause 67(11) and (12).

2.1.2 <u>The proposal for a Council of Provinces (COP)</u>

The proposal provides broadly as follows:

(a) the COP represents provinces. The possibility of local government representation on the Council is open for discussion.

(b) The Council will consist of delegates from the provincial legislatures (and possibly from local government). The number of delegates will be provided for in a Schedule. (In the proposal on which the text is based, representation on the basis of the number of inhabitants is suggested, with four to eight delegates per province.) No more than half of the delegates per province will serve as permanent members of the Council. Proportional representation of parties represented in a provincial legislature is provided for. A party may at any time recall its delegates.

(c) The COP functions at national legislative and executive level. It monitors the establishment and co-ordinates the functioning of inter-governmental institutions and promotes co-operative governance among the various levels of government.

(d) The COP must be consulted and is entitled to comment on and submit proposals in regard to national budgets and FFC recommendations.

(e) The COP may comment on and propose amendments to all Bills before the National Assembly. It may also initiate Bills in the National Assembly on any matter falling within the functional areas listed in Schedule 5 (presently Schedule 6).

(f) The COP may approve, propose amendments to or reject Bills on Schedule 5 matters. The National Assembly must consider COP proposals for amendments. A mediation committee is provided for to resolve the rejection of such a proposed amendment by the National Assembly or the rejection of a Bill by the COP. If the Mediation Committee agrees on the contents of the Bill, it refers the Bill to the National Assembly for adoption. If it does not so agree, the Bill lapses unless it is passed by the National Assembly by at least two thirds of its members.

(g) The Mediation Committee consists of an equal number of members of the COP and the National Assembly. Decisions are taken by a (simple) majority of its members.

(h) A chairperson is elected by the COP from among the permanent delegates to serve for a period of three years. The seat of the COP is the same as that of the National Assembly. A majority of the members of the COP must be present before a vote may be taken on a Bill and one third must be present before a vote may be taken on any other matter. All questions before the COP are decided by a majority of the votes cast. Other procedural matters are provided for in the draft.

2.2 DISCUSSION OF THE PROPOSED COP

2.2.1 The COP is obviously modelled on the German Bundesrat. The Bundesrat is a traditional German institution consisting of members of the state cabinets (*The German Bundesrat*, p 5). Its prestige as a second parliamentary body is exemplified by the fact that the President of the Bundesrat deputises for the Federal President when he is prevented from performing the duties of office or if the office becomes vacant prematurely. The Bundesrat has successfully stood the test of time as a government institution (Ibid). However, the concept is untested outside Germany. On the other hand, the success of senates or other second chambers in representing provinces or states at national level has in most instances been doubtful, except in

strongly federal systems (such as the USA, where the states have very real constitutional powers - and where the two senators per state have great prestige; and furthermore where the national political parties are relatively weak). In South Africa the Senate in the past has certainly not been very successful in such a representative role. There should consequently be no undue hesitation in introducing a new concept into the South African legislative and executive structures provided that the new institution is designed and structured to ensure meaningful participation for the provinces at national level, and is likely to promote co-operative governance at all levels of government.

2.2.2 The proposed COP seeks to combine the role of a second chamber with that of a body for intergovernmental executive relations of a kind envisaged in the Commission's preliminary recommendations (see Documents 4 and 10 respectively). However, it will not be a house or chamber of Parliament in the full sense. Consequently, for amendments of the Constitution which alter the powers, boundaries, functions or institutions of provinces, the approval of a special majority of the legislatures of the provinces will be necessary, instead of a parliamentary process, in terms of the Constitutional Principles. Amendments to the Constitution are not dealt with fully in the draft text (see clause 53) but CP XVIII will have to be taken into consideration when the final formulation is drafted.

2.2.3 The COP provisions appear to satisfy the following concerns expressed and recommendations made in the Commission's preliminary recommendations:

(a) Both of the two main purposes of a second chamber, namely to provide internal control over governmental actions, and to broaden the system of representation, are satisfied in the draft text to some extent (see paragraph 1.1 above).

(b) The COP will represent provinces at the national level (paragraph 1.5 above and clause 57 and 59(1)).

(c) Delegates will be elected from among the members of a provincial legislature on a proportional basis (paragraph 1.5(b) above and clause 58(2)).

(d) The COP must be consulted and is entitled to comment on and submit proposals in regard to national budgets and recommendations of the FFC (see paragraph 4.3.3 of Document 4 and clause 59(4)).

(e) The COP addresses the Commission's concern that there should be a body established to promote co-operative

governance among the various levels of government and to monitor the establishment of inter-governmental institutions and co-ordinate their functioning (see paragraphs 4.4.1 and 4.4.7 of Document 10).

2.2.4 The following draft provisions do not satisfy the Commission's recommendations, on the following points:

(a) It is envisaged that provinces will not have an equal number of representatives in the COP (see paragraph 1.5(a) above).

(b) A delegate may be recalled by the party of which he or she is a member (paragraph 1.5(e) above and clause 58(4)). The Commission contemplated a recall by the legislature, not by the nominating party.

(c) The procedures for dealing with Bills on which there are disagreements, differ from the Commission's recommendations, because the COP is not a second chamber of Parliament. However, it must be said that the end results of the different procedures are likely to be similar. If the National Assembly wants to pass a Bill in spite of disagreement with the provinces, it will eventually find a way to do so. A check is indeed provided in the draft, namely that a Bill on which the Mediation Committee cannot agree will require a two thirds majority of members of the National Assembly for adoption. If all provinces strongly disagree with a Bill regarding the new Schedule 5 functional areas, a majority similar to that required for a constitutional amendment will therefore be necessary for the Bill to be adopted by the National Assembly. However, it should be noted that the Bundesrat has absolute veto powers in the case of legislation that has a special bearing on state interests. This veto applies also if the Bundesrat refuses to approve a Bill after mediation. (*The German Bundesrat*, p 24). The Bundesrat also has additional powers in respect of certain types of Bills.

(d) As far as inter-governmental relations are concerned, the Commission recommended in Document 10 that Premiers should serve on the body for intergovernmental executive relations, *inter alia* to give it the necessary status. The COP proposal leaves the status of nominated representatives open. Should provincial legislatures nominate junior members to serve on the COP, this is bound to diminish its status and influence as an intergovernmental relations institution in both legislative and executive matters. The German Basic Law stipulates that the Bundesrat shall consist of members of the Land governments, i.e. their cabinets. The Constitution need

not specifically address this matter but it needs to be borne in mind that the COP will probably not live up to expectations unless it is composed of influential members of the provincial legislatures (see paragraph 4.4.5 of Document 10).

(e) For an institution to function successfully as a body to promote co-operation and intergovernmental relations, it normally requires representation of all the levels of government concerned. The Commission therefore recommended the representation of the national government by Ministers on the proposed Intergovernmental Executive Relations Council, as well as representation of local governments on a special committee of the Council (see paragraphs 4.4.5 and 4.4.9 of Document 10). The draft text does not provide for the national government to be represented in the COP. Consequently in practice it would be difficult, if not impossible, for the COP successfully to perform the functions entrusted to it in clauses 59(2) and (3). It is indeed difficult to imagine how a body consisting of members of provincial legislatures (who must promote the interests of provinces) could successfully function as an inter-governmental relations body for all levels of government. It is, moreover, difficult to see how a body composed of members of legislatures could successfully co-ordinate the functioning of inter-governmental institutions which are predominantly concerned with executive matters. In this respect, the proposed COP differs substantially from the Bundesrat, which consists of members of Land cabinets (supported by teams of officials), and which must allow members of the Federal Government to attend and address its meetings at any time. Indeed, members of the Federal Cabinet regularly attend plenary meetings of the Bundesrat where they are seated in prominent positions to the left and right of the President of the Bundesrat (*The German Bundesrat*, p 15).

(f) The particular nature of the Bundersrat is intimately related to the distribution of powers in the German constitutional model. The Federation is responsible for most legislative matters, while the Länder are primarily concerned with the execution of the laws. It therefore stands to reason that the Länder should have a major say in the approval of laws which they have to administer.

2.3 CONCLUSION

2.3.1 After considering the alternative proposals regarding a Senate and a Council of Provinces, the Commission has come to the following conclusion:

(a) The proposal in regard to the Senate contains some improvements on the corresponding provisions in the interim Constitution but does not incorporate all the proposals contained in the Commission's preliminary recommendations which were designed to improve the functioning of the Senate as a body representing provincial interests (Document 2). The Commission is of the opinion that the proposals in the Working Draft would not significantly improve the performance of the Senate as a body representing provinces. If the CA decides to retain the Senate as a second chamber of Parliament, the Commission recommends that the proposals contained in its Preliminary Recommendations - Document 4 be incorporated into the new Constitution.

(b) The concept of a Council of Provinces has merit. However, the Commission has reservations about its powers and functions, and also about the possible inclusion of local government representatives among its members.

(c) Given its proposed composition, the Commission is of the opinion that it would be inappropriate to vest the COP with functions in regard to the promotion of intergovernmental executive relations. Such relations can hardly be promoted by a body whose primary concern should be the promotion of provincial interests and which contains no representatives of the national government. The Commission therefore recommends that intergovernmental executive relations be dealt with by a separate body as recommended in its Preliminary Recommendations - Document 10.

(d) The Commission is of the opinion that in legislative matters the proposed COP could probably represent provincial interest fairly effectively. If it were to be structured like the German Bundesrat and vested with similar powers, this would enhance its powers and status considerably. The Commission would indeed prefer to see the COP strengthened in some such way. However, the Commission is of the opinion that even the proposed Council, consisting of members of provincial legislatures, could play a useful, albeit limited, role in focusing on the consideration of legislation that affects provinces and the

functional areas allocated to them in the proposed Schedule 5.

(e) The proposed powers and functions of the COP in regard to national legislation militates against the inclusion of delegates of local governments in its composition. The inclusion of local government representation on such a body could only be justified if considerable time were to be allocated to the consideration of local government matters. This would shift the focus of the body away from national/provincial matters. The inclusion of local government delegates could also disturb the balance of representation in the COP.

The Commission is of the opinion that it would be more appropriate to accommodate representatives of local government on committees of the COP on an ad hoc basis to consider matters which affect local governments in all provinces in general.

(f) In view of the shortcomings in both of the options contained in the Working Draft, an alternative arrangement which combines their more positive elements may better serve the need to represent provincial interests at national level, as well as helping to promote co-operation governance.

An additional option which combines aspects of the two options provided in the working draft should be considered. This would provide for a second chamber of Parliament, consisting of representatives nominated by provincial legislatures, whose attention will be focused primarily on legislation affecting provincial competences. In order to emphasise the role of such a chamber, it would be appropriate for it to be known as the Chamber of Provinces, and this designation should be considered.

The details of this option are given more fully at paragraph 4.3 below.

3. RECOMMENDATIONS

The Commission recommends the following:

3.1 Senate

If a Senate is preferred, then the proposals contained in the Commission's Preliminary Recommendations (Document 4 dated 23

March 1995) should be incorporated in the provisions. This implies that the conditions set out at paragraph 1.5 (a) to (k) above should be met .

3.2 Council of Provinces

If a Council of Provinces is preferred, its composition, powers and functions should be as follows:

(a) The Council of Provinces should consists of an equal number of representatives from each province, elected by provincial legislatures from among their members in accordance with the principle of proportional representation of the parties represented in the provincial legislature. Provinces should have equal representation because they have an equal stake as provinces in matters affecting them.

(b) Six representatives per province should be appointed. This number should be sufficient to perform the functions of the COP. No more than half of a province's representatives should be appointed as permanent members of the Council.

(c) Delegates should be accountable to their respective provincial legislatures for the proper execution of their representative role in the interest of their province and subject to recall by its legislature.

(d) The COP must represent provincial government at national legislative level.

(e) The provisions of clause 59(2) and (3) must be deleted.

(f) The powers and functions of the COP and the procedures proposed in clause 60 must be retained.

(g) The Mediation Committee must have power of recommendation only. Such recommendations must be referred to the COP for consideration. If the COP, or subsequently the National Assembly, rejects the proposals of the Mediation Committee, the provisions of clause 60(3)(f) must apply, i.e. the Bill will require a two thirds majority in the National Assembly to be adopted.

(h) Meetings of the Mediation Committee must be confidential to allow for compromises to be considered (see *The Germnan Bundesrat*, p 18).

(i) Clauses 62 to 65 of the Working Draft are acceptable, provided that the rules of the COP will provide for committees, *inter alia* a committee in which local government interests can be accommodated.

(j) Intergovernmental executive relations should be dealt with in the manner proposed by the Commission in its Preliminary Recommendations - Document 10.

3.3 Chamber of Provinces

If a Chamber of Provinces is preferred, then the following draft text is proposed :

PARLIAMENT

"40(2) Parliament consists of the National Assembly and the Chamber of Provinces."

"CHAMBER OF PROVINCES

Composition and election

57(1) The Chamber of Provinces consists of 54 members.

(2) Within 10 days of its election, a provincial legislature elects six persons from amongst its members to represent the province in the Chamber of Provinces. Parties in the legislature are entitled to nominate persons for election in accordance with the principle of proportional representation.

(3) A member of the Chamber of Provinces may at any time be recalled by the provincial legislature which elected him or her.

(4) A person elected as a member of the Chamber of Provinces remains a member for the duration of the term of the provincial legislature which elected him or her, unless he or she is recalled.

(5) A Premier or a member of an Executive Council may address the Chamber and participate in its debates, but may not vote on any matter.

Powers and functions

58(1) The Chamber of Provinces represents the provinces at national legislative level.

(2) The Chamber of Provinces considers every Bill introduced in Parliament and deals with it as provided for in this Chapter.

President and Deputy President

59 Include provisions similar to section 49 of the interim Constitution.

Vacation of seats

60(1) A member of the Chamber of Provinces vacates his or her seat upon -

(a) being recalled by the provincial legislature which elected him or her; or

(b) vacating his or her seat in the provincial legislature which elected him or her.

(2) Any vacancy in the Chamber of Provinces is filled by the election of a member of the legislature concerned in accordance with the principle of proportional representation as provided for in section 57(2).

Sittings and meetings

61(1) The President of the Constitutional Court must convene the Chamber of Provinces as soon as practicable after the election of the National Assembly , but not later than 30 days after such election.

(2) The Chamber of Provinces may determine the time and duration of its sittings and the dates of its meetings.

(3) The President of the Chamber of Provinces may summon the Chamber of Provinces to an extraordinary meeting at any time to conduct urgent business.

(4) The seat of the Chamber of Provinces is the same as that of the National Assembly. Meetings at other places are permitted on the grounds of public interest, security or convenience, and in a manner provided for in the rules and orders of the Chamber.

Quorum

62 A majority of the members of the Chamber of Provinces must be present before a vote may be taken on a Bill, and one third of the members must be present before a vote is taken on any other matter.

Powers, privileges, immunities and benefits

63 The Chamber of Provinces and members of the Chamber have powers, privileges, immunities and benefits similar to those of the National Assembly and its members as prescribed by or in terms of the Constitution.

Penalties, Joint Sittings, and Rules and orders

64 to 66. Provisions similar to those contained in sections 56 to 58 of the interim Constitution must be inserted.

Bills

67(1) ***Bills dealing with matters referred to in sections 120(2), 129(3), 134(1), 149, 150(2), 151, 152, 156(2), 164, 165(3), 167(1) and 187 may be introduced in the Chamber of Provinces only and, for their passing by Parliament, require adoption by the National Assembly and the Chamber of Provinces in separate sittings.***

(2) Bills other than those referred to in sub-section (1) must be referred to the Chamber of Provinces for comment within the time limits prescribed by the rules of the National Assembly before introduction in the National Assembly. Such Bills require adoption by the National Assembly only to be passed by Parliament.

(3)(a) A Bill referred to in sub-section (1) passed by one Chamber and rejected by the other must be referred to a joint committee consisting of members of both Chambers and of all the parties represented in Parliament and willing to participate in the joint committee, to consider and report on any proposed amendments to the Bill to both Chambers of Parliament.

(b) If the Bill with amendments proposed by the joint committee is rejected by any Chamber, it may be read again after six months at a joint sitting of both Chambers, and may be passed by a two thirds majority of the members of both Chambers present and voting."

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ANNEXURE 2

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING THE ESTABLISHMENT AND TERRITORY OF PROVINCES

1 INTRODUCTION

1.1 The Commission is specifically required by section 164(2)(a) of the interim Constitution to advise the Constitutional Assembly regarding the finalisation of the number and the boundaries of the provinces. The present number and boundaries of provinces are established by section 124 and Part 1 of Schedule 1 of the Constitution. However, section 124 of the Constitution prescribes various mechanisms for the amendment of provincial boundaries, all of which have already lapsed because of the expiry of the time limits for their application. The only remaining mechanism is the amendment of the interim Constitution by Parliament in accordance with section 62. The Commission is or was not required to play a role in any of the mechanisms thus provided for.

1.2 The Commission's ability to advise the Constitutional Assembly (CA) as required by section 164(2)(a) as well as the CA's ability to alter the number and boundaries of provinces in the new Constitution, are limited by Constitutional Principle XVIII.3 which prescribes that "The boundaries of the provinces shall be the same as those established in terms of this Constitution". The Commission consequently did not embark upon an investigation of possible changes to boundaries, nor was it called upon to do so. The Commission is, however, aware that investigations in regard to specific boundary issues were undertaken by provincial governments, a commission of enquiry and by national political office-bearers.

2 DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 Establishment of provinces

2.1.1 Draft text prepared by CA

117. (1) The Republic has the following provinces :

(a) Eastern Cape
(b) Free State
(c) Gauteng
(d) KwaZulu-Natal
(e) Mpumalanga
(f) Northern Cape
(g) Northern Province
(h) North-West Province
(i) Western Cape

2.1.2 Commission's preliminary recommendations

Because of the limitation on its ability to make recommendations, the Commission made no recommendation in regard to the number or boundaries of provinces (paragraph 2.2, Document 11 of 29 June 1995).

2.1.3 Provincial views

No comments in regard to the establishment of provinces were received from provincial governments.

2.1.4 Comments

In view of the stipulation in CPXVIII.3, the number of provinces will remain the same in the new Constitution. The draft text satisfies this requirement. As far as the provisions relating to the change of the name of a province is concerned, provision should be made to prevent frivolous requests of this nature from provinces. A party winning a provincial election with for instance 51% of the votes, should not be permitted to vote by simple majority to change the name of a province. Names of provinces should remain stable. It should therefore be required that an adequate special majority of the members of a provincial legislature must vote their assent to the proposed change of name before such a request is submitted to Parliament. Amendments to the draft to achieve this are dealt with in the document dealing with amendments to the constitution.

2.2 Provincial boundaries

2.2.1 Draft text prepared by CA

" 117. (2) The territories of provinces are described in Schedule 1."

2.2.2 Commission's preliminary recommendations

Because of the limitations on its ability to make recommendations, the Commission made no preliminary recommendations regarding the boundaries of provinces (paragraph 2.2, Document 11 of 29 June 1995). The Commission did, however, recommend that the new Constitution provide for referendums before amendments to the Constitution altering boundaries of provinces are adopted on the basis set out in the Constitutional Principles (paragraph 2.3).

2.2.3 Provincial views

No comments in regard to this matter were received from provinces.

2.2.4 Comments

2.2.4.1 The draft text prepared by the Constitutional Assembly gives effect to Constitutional Principle XVIII.3 discussed in paragraph 1 above. However, the Commission is still of the opinion that the new Constitution should prescribe special procedures for future amendments of the number and boundaries of provinces as required by CP XVIII.4. Provision should be made in national legislation for a procedure to obtain the views of the inhabitants of affected areas before such amendments are affected as discussed below.

2.2.4.2 It would be in accordance with democratic principles to consult persons whose interests are affected most directly by a proposed alteration of provincial boundaries. However, a referendum should be held or other procedure followed to determine voters' views only after the relevant provincial governments have provisionally agreed to make such an alteration, but before the constitutional amendment is debated in Parliament. No referendum should take place before provincial governments have indicated a serious intention to alter their boundaries as it could otherwise lead to frivolous calls for referendums, and the abuse of the system. Furthermore, the outcome of a referendum or other procedure should not be binding upon Parliament because there may be other important national interests which should take precedence. This observation does not detract from the principle that persons whose interests are at stake should be consulted before such

important decisions are taken. The extent to which an alteration to the boundary is supported or rejected by the affected voters in such an area should weigh heavily among the various considerations to be taken into account by Parliament and the relevant provincial governments.

2.2.4.3 Amendments to the Constitution which alter the boundaries and names of provinces are dealt with in a separate document which incorporates the above views. See Annexure 11

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ANNEXURE 3

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PROVINCIAL LEGISLATURES

1. INTRODUCTION

1.1 The contents of the draft text dealing with the structures and procedures relating to provincial legislative do not deviate substantially from the text contained in the interim constitution. There are, however, differences in formulation. For ease of reference, this document deals with the matter as follows:

a) the draft text in respect of the structure or procedure is quoted;

b) the corresponding text of the interim Constitution is quoted;

c) the Commission's preliminary recommendations based on the text in the interim Constitution are quoted/summarised; and

d) comments in regard to the draft text are provided.

1.2 It must be mentioned that the draft text was acceptable to all parties present at the meeting of the Constitutional Committee when the text was discussed.

2. DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 **Provincial legislative authority**

2.1.1 Draft Provisions

"119. The legislative authority of a province is vested in its provincial legislature".

2.1.2 Provisions of interim Constitution

"125.(1) There shall be a legislature for each province.
(2) The legislative authority of a province shall, subject to this

Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution.

(3) Laws made by a provincial legislature shall, subject to any exceptions as may be provided for by an Act of Parliament, be applicable only within the territory of the province."

2.1.3 Preliminary recommendations (Document 3 of 23 March 1995)

"3.4.3 It is the opinion of the Commission that the provisions in the interim Constitution are appropriate and do not require to be amended materially. No further provisions relating the matter appear to be required."

2.1.4 Comments

The draft text is formulated much more concisely, leaving matters such as the applicability of laws to be dealt with in the relevant other clauses. It is proposed that the draft formulation be accepted.

2.2 Composition of provincial legislatures

2.2.1 Draft Provisions

"120. (1) A Provincial legislature consists of the women and men elected as members in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll, and (results), in general, (in) proportional representation.

(2) The number of members in a provincial legislature must be determined in terms of national legislation and must be no fewer than 30 and no more than 100/80."

2.2.2 Provisions of interim Constitution

"127. (1) A provincial legislature shall consist of not fewer than 30 and not more than 100 members elected in accordance with the system of proportional representation of voters provided for in Schedule 2 and the Electoral Act, 1993.

(2) The number of seats in a provincial legislature shall, subject to subsection (1). be determined in accordance with Schedule 2.

(3) The members of provincial legislature shall be elected from provincial lists of party candidates for the province in question."

2.2.3 Preliminary recommendations

"3.5.2 The Commission is of the opinion that there is no absolute or infallible formula for determining the ideal number of members for any legislative body. It appears to be justified for the Constitution to stipulate a minimum and maximum number of members in the Constitution in order to provide for adequate and appropriate representation. It also appears to be justified to prescribe a basis for the determination of the actual number of members between a minimum and maximum. For this purpose the number of voters in the province is obviously of great importance. What should be included, however, is a weighting of the number of members as determined on voter numbers, to provide for proper representation in provinces with large geographical areas but small populations. A generally accepted method to allow for this, is for an Act of Parliament to establish a national norm for the determination of the number of members for provincial legislatures and to provide for weighting by a certain percentage above or below the norm for sparsely populated and densely populated provinces respectively. The Commission recommends that weighting on this basis be introduced to provide for more effective representation.

3.5.3 The interim Constitution provides for the election of members from provincial lists of party candidates for the province in question. This provision complies with the stipulation in CP VIII which entrenches proportional representation as a general rule. However, it has come to the Commission's attention through the media and otherwise, that there is significant support for an electoral system which includes representation both from party lists and constituencies. Such a "mixed" system has been introduced at local government level. Although constituency-based proportional representation alone would be preferable (see paragraph 3.11.3 below), it is the Commission's opinion that a system which includes representation of constituencies in provincial legilsatures will be more in accordance with the principles of democracy and accountability to voters than the present system of election from party lists only. The Constitution should stipulate only that representation in provincial legislatures should be on such a basis. A system should be provided for in an Act of Parliament."

2.2.4 Comments

The draft text generally includes the Commission's recommendations insofar as they can be accommodated in the new Constitution. The number of members of a provincial legislature is restricted to either the present 100 or a reduced maximum of 80. The lower number seems preferable, but it needs to be borne in mind that provincial constitutions may provide for any (reasonable) number of legislators. If a province does not adopt its own constitution, it will be bound by this clause, according to which the number of members must be determined in terms of national legislation. Any weighting of norms for the determination of the actual number of members as recommended by the Commission will therefore have to be accommodated in such legislation.

The provisions of clause 110(1) which requires the electoral systems to result in general, in proportional representation accommodates the possibility of a mixed system of constituency and party representation as recommended by the Commission.

It is proposed that the Commission accept the draft formulation. However, the reference to "women and men" is clumsy and should be reformulated.

2.3 **Qualification for membership**

2.3.1 Draft provisions

"121. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of provincial legislature, except-

a) anyone holding office of profit under the Republic, other than the Premier and other members of the Executive Council of a province, and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of a provincial legislature;

b) members of the National Assembly [the second house] or a local government;

c) unrehabilitated insolvents;

d) anyone declared to be of unsound mind by a court of the Republic;

e) anyone who, after this section takes effect, has been convicted of an offence and sentenced to more than 12-months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed."

2.3.2 Provisions of interim Constitution

"132. (1) No person shall be qualified to become or remain a member of a provincial legislature unless he or she is qualified to become a member of the National Assembly.

(2) A member of a provincial legislature who is elected as the Premier or appointed as a member of the Executive Council of a province shall for the purpose of section 42(1)(*e*) be deemed not to hold an office of profit under the Republic.

(3) The provisions of section 40(2), (3), (4) and (5) shall *mutatis mutandis* apply to a person nominated as a candidate for election to a provincial legislature, and in any such application a reference in that section to a regional list shall be construed as a reference to a provincial list as contemplated in Schedule 2."

2.3.3 Preliminary recommendations

"3.10.4 The Commission is of the opinion that the provisions of section 132 should be incorporated into the new Constitution, but that the qualifications for membership of provincial legislatures should include the residential requirement of all members. Section 40(3) of the interim Constitution should therefore be deleted in so far as it relates to provincial legislatures".

2.3.4 Comments

2.3.4.1 The provisions of the draft constitutional text are similar to those contained in section 132 of the interim Constitution. However, the Commission's recommendation that residence in the province should be a requirement to become a member of the legislature of that province has not been met. While this matter can be addressed in the

relevant legislation and may also be dealt with in provincial constitutions, the Commission is of the opinion that it should be a requirement stipulated in the national Constitution. It would be sufficient to require that a member be registered as a voter in the particular province. The Commission recommends that the words "and who is registered as a voter in the relevant province" be inserted after the word "Assembly" in the first line of clause 121.

2.3.4.2 In regard to convicted persons the disqualification in clause 121(e) applies only to persons convicted after the section takes effect. This means that a person who was convicted say a day before the section takes effect, is qualified to become a member of the provincial legislature, but one convicted a day after is disqualified. The reason for this time specification appears to have elapsed. To be absolutely certain, however, it is recommended that the words "27 April 1994" be substituted for "this section takes effect" in clause 121(e).

2.4 **Vacancies**

2.4.1 Draft provisions

"122 (1) A vacancy exists in a provincial legislature when -

(a) a member ceases to be eligible;

(b) a member resigns or dies;

(c) a member is absent from the provincial legislature without permission in circumstances for which the rules and orders of the provincial legislature prescribe loss of membership.

(2) Vacancies in the provincial legislatures must be filled without delay, in terms of national legislation".

2.4.2 Provisions of interim Constitution

"133.(1) - A member of a provincial legislature shall vacate his or her seat if he or she -

(a) ceases to be eligible to be a member of the provincial legislature in terms of section 132;

(b) ceases to be a member of the party which nominated him or her as a member of the provincial legislature;

(c) resigns his or her seat by submitting his or her resignation in writing to the Secretary of the provincial legislature;

(d) absents homself or herself voluntarily from sittings of the provincial legislature for 30 consecutive sitting days, without having obtained the leave of the

provincial legislature, in accordance with the rules and orders; or

(e) becomes a member of the National Assembly or the Senate.

(2) The provisions of section 44(1) and (2) shall apply *mutatis mutandis* in respect of the filling of vacancies in a provincial legislature, and in any such application a reference to-

(a) the National Assembly shall be construed as a reference to a provincial legislature; and

(b) a list of party candidates shall be construed as a reference to a list referred to in section 127(3).

(3) A nomination in terms of this section shall be submitted in writing to the Speaker of the provincial legislature in question."

2.4.3 Preliminary recommendations

'3.11.1 Section 133(1) enumerates the circumstances under which a member of a provincial legislature shall vacate his or her seat. Paragraphs (a), (c), (d) and (e) which deal with eligibility, resignation, absenteeism and becoming a member of the National Assembly appear to be in accordance with generally accepted practice and the essence thereof could be incorporated in the new Constitution.

3.11.2 Paragraph (b) provides that a member shall vacate his or her seat if he or she ceases to be a member of the party which nominated that member. There appears to be some support for the deletion of this provision on the grounds that the clause could restrict freedom of speech, and desensitises members to significant shifts in public opinion. On the other hand it can be argued that a binding provision of this nature is the logical consequence of a system of proportional representation in which all members are elected from party lists. If some or all members are in future to be elected on a constituency basis, this may strengthen the call for the deletion of the provision on the grounds that members representing constituencies should be in a position to differ from their party's views if it is in the interest of their constituencies. It does seem unduly restrictive that, for the whole term of a legislature, members who are elected on a constituency basis should be obliged to follow their party's lead, even if they or a sector of the electorate no longer support that lead. The position of members who are elected from party lists is somewhat different in that they are elected only because of their party affiliations. There may therefore not be such compelling reasons to allow them to remain as members of the legislature if they resign from the party or lose their membership. The Commission is of the opinion that democratic principles would be better served if the provision which terminates the

membership of a member of the provincial legislature if he or she ceases to be a member of the party which nominated him or her, is deleted in respect of members elected on a constituency basis.

3.11.3 In discussions with members of various provincial legislatures, the Commission was often aware of a reluctance on their part to express any views not cleared by their political parties' central organisations. It would appear that some provincial legislators fear that they might lose their party membership if they adopt standpoints which may not be favoured by the party at national level. If attitudes of this kind become prevalent, this would result in provincial legislators giving primary attention to the views of their party's national organisation rather than to their province's interests. To the extent that the party list system encourages such an ordering of priorities it must raise serious questions whether the system is conducive to democratic decision-making and accountability at the provincial level. The Commission is of the opinion that the continued use of the party list system of proportional representation at the level of provincial government should be reappraised, and consideration given to its replacement by a system of proportional representation on a constituency basis. The greater accountability of members to their constituents, rather than to central party structures, would be enhanced by such a system, which would therefore better serve the purposes of provincial governments.

3.11.4 Section 133(2) deals with the filling of vacancies in a provincial legislature under the existing party-list system of proportional representation. If this system should be changed to provide for constituency representation as well, it follows that the provisions of section 44(1) and (2) will also have to be changed.

Section 133(3) deals only with procedures for the submission of nominations and could be incorporated in the new Constitution unchanged".

2.4.4 Comments

The Commission's concerns expressed in its preliminary recommendations have been addressed adequately in the draft provisions. A member of the legislature is no longer required by the constitution to vacate his or her seat on ceasing to be a member of the party which nominated him or her. However, as such requirements may again by stipulated in laws dealing with the electoral systems, the Commission's concerns remain valid and need also to be addressed when such legislation in considered.

The Commission recommends accordingly. This also applies to the Commission's view that the party list system of proportional representation should be reappraised and consideration given to its replacement by a system of proportional representation, based on both list and constituency principles.

2.5 **123. Oath or affirmation by members**
124. Sittings and recess periods
125. Elections and duration of provincial legislatures
126. Speakers
127. Decisions
128. Internal autonomy
129. Privileges and immunities of members

The provisions are mostly similar to the corresponding provisions in the interim Constitution which the Commission recommended for incorporation into the new Constitution (see paragraphs 3.12, 3.7, 3.8, 3.9 and 3.14 of provisional recommendations). There appears, therefore to be no need for further comment in regard to these clauses. It will be noted that the Constitutional Court is now designated to deal with certain matters relating to the functioning of the provincial legislature instead of the Supreme Court.

2.6 **Assent to Bills**

The draft constitutional text differs (clause 130) from the text relating to the assent to bills contained in the interim Constitution by prescribing procedures to be followed in the event of the Premier referring a bill back to the legislature. This brings the procedures in provinces in line with the procedures at national level when the President refers a bill back to Parliament. This is an improvement on the existing text and should require no further comment.

2.7 **131. Promulgation**
132. Safekeeping of Provincial Acts.

2.7.1 It is significant that the draft constitutional text requires provincial acts to be published in the national Government Gazette. This is important to ensure legal certainty, especially in view of the concurrency of legislative powers between Parliament and provincial legislatures. The national Government Gazette will in future contain all national and provincial laws, which will make reference to such laws much easier as users will be able to refer to one source only instead of having to keep track of laws in ten publications.

2.7.2 The responsibility for the safekeeping of provincial acts is conferred on the Constitutional Court instead of on the Appellate Division of the Supreme Court.

2.8 Staff of legislatures

2.8.1 Draft provisions

"128(1) A provincial legislature may determine and control its internal arrangements, and may make rules and orders regulating the establishment, composition, powers and functions, procedures and duration of committees."

2.8.2 Provisions of interim Constitution

"143 (2)(a) A provincial legislature shall appoint a Secretary and such other staff as may be necessary for the discharge of the work of such legislature".

2.8.3 Preliminary recommendations

2.8.3.1 The following recommendation was made on the basis of the original text of Section 143 (2) which required consultation with the Commission in regard to certain staff matters of the legislatures :

"3.15.2 Section 143(2) provides for the appointment by the Executive Council of a Secretary and other staff for the provincial legislature after consultation with the Commission on Provincial Government. In view of the status of a provincial legislature and the stipulation in CP VI that there shall be separation of powers between inter alia the legislature and executive, the Commission is of the opinion that the power to appoint a Secretary and staff of the legislature should be vested in the legislature itself, without being subject to any administrative action by the Executive Council.

3.15.3 However, CP VI also stipulates that appropriate checks and balances to ensure inter alia accountability shall accompany the separation of powers. The present section 143(2) requires the Executive Council to consult with the Commission on Provincial Government before appointing staff. While it is not considered appropriate that consultation with such a body should be obligatory in regard to the appointment

of particular staff members, the Commission is of the opinion that consultation with an appropriate institution which has the required expertise to advise the legislature, should be obligatory in regard to the establishment, remuneration and other conditions of service of the staff of the legislatures. Significant disparities in salaries, gradings and posts among the provincial legislatures themselves and between the provincial legislatures and Parliament and the Public Service (including provincial public servants) could lead to dissatisfaction and industrial action by staff who are all paid from the same source. It is considered necessary that national norms and standards should apply in respect of the above-mentioned matters. The Public Service Commission is properly equipped to perform such a function. The Commission is consequently of the opinion that the provincial legislatures should determine their administrative establishments and staff salaries and other conditions of service after consultation with the Public Service Commission and that provision to this effect should be incorporated into the new Constitution."

2.8.3.2 It is considered correct not to refer specifically to procedures in regard to legislatures' staff matters in the new Constitution. However, the Commission's comments in the preliminary recommendations remain valid. The functions of the Public Administration Commission (PAC) proposed in clause 153 of the draft text appear to include relevant matters in regard to provincial legislatures. It remains , therefore, to ensure that the envisaged national legislation regulating the PAC contains provisions which will ensure that the recommended consultation between the legislature and the PAC takes place in regard to relevant staff matters. The Commission recommends accordingly.

16 February 1996

ANNEXURE 4

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PROVINCIAL EXECUTIVES

1. INTRODUCTION

In terms of CP XVIII-2 a provincial legislature must be granted the competence to adopt a constitution for its province. Such competence in the new Constitution must not be substantially less than or substantially inferior to that provided for in the interim Constitution. In accordance with this Principle, clause 154 of the draft new Constitution provides that a provincial constitution may establish legislative and executive structures and procedures which differ from those provided for in the Constitution, provided that it does not deviate from the principles embodied in the Constitution. The draft text on executive structures in the national Constitution is intended to provide the framework within which provincial executives must function in the event of any province not adopting its own constitution or not providing for an executive in its constitution. Provinces are therefore not obliged to adopt the structures and functions for provincial executives provided for in the national constitution.

2. DRAFT CONSTITUTIONAL TEXT AND COMMENTS :

2.1 Only the main points of the text will be highlighted in the following paragraphs.

2.2 **Premiers :**

2.2.1 The executive authority of a province is vested in the Premier. The provincial executive consists of the Premier and other members of the Executive Council (clause 133). These provisions are similar to those establishing the executive powers at national level and require no comment.

2.2.2 A Premier must exercise his powers and functions in consultation with the other members of the Executive Council, except in the circumstances listed in clause 134(2) and (3).

2.2.3 A Premier is elected by the provincial legislature from among its members. A judge designated by the President of the Constitutional Court presides over such election (clause 135). A Premier-elect assumes office within five days of being elected and is sworn in (clause 136). No person may hold office as Premier for more than two terms of office (clause 137).

2.2.4 If the Premier dies or resigns, a new Premier must be elected within 30 days (clause 138). An acting Premier is designated in the order prescribed in clause 139 when the Premier is absent, unable to fulfil his duties or when the office is vacant.

2.2.5 The draft provisions do not require a Premier to vacate his seat in the legislature upon being elected as such. At national level, the President is required to vacate his seat in Parliament when elected (see clause 80). In its preliminary recommendations, the Commission responded as follows to this apparent disparity :

> *"3.4.1 In terms of CP VI there shall be a separation of powers between inter alia the legislature and the executive, with appropriate checks and balances to ensure accountability, responsiveness and openness. This raises basic questions about the possible ways in which the executive authority should be constituted to comply with this principle - for example, whether a Premier of a province should be directly elected as in a presidential-style executive, or be elected by the legislature, i.e. a parliamentary-style executive.*
>
> *3.4.2 It has been argued that a choice between these two alternatives for the election of Premiers depends on the main objectives of the executive system, and whether the executive should be based on its own inclusive constituency (the province; or the nation as a whole in the case of central government), or be more closely dependent on support within the legislature. Among the objectives, nation-building and economic development may be regarded as major alternatives, although they are not mutually exclusive. Because a presidential-style executive may be less closely tied to the formal party system, it can provide significant opportunities for nation-building, but does not guarantee this. On the other hand, a parliamentary-style executive is arguably more suitable for streamlined policy-making because it guarantees that*

both branches of government are controlled by the same party or coalition grouping. However, nation-building can be more difficult in a parliamentary system, particularly where a majority party controls government and excludes minority parties from participation.

3.4.3 The interim Constitution provides for a parliamentary-style executive at both national level and provincial level. This is a style which is well known in South Africa and which obviates the need for separate elections to be held to elect the chief executives at national and provincial levels. It also reduces possible public conflict between candidates wishing to win their parties' nominations for the election, which could be potentially divisive within the party ranks. The parliamentary-style executive avoids intra-party strife in the relatively volatile atmosphere created by election campaigns. It contains the election to party leadership within the party structures and procedures and, once the leader is elected, leaves no uncertainty as to whom the chief executive will be if the party should win the elections for the legislature. If no majority party emerges from a general election, a coalition executive is negotiated and the premiership is also decided through negotiation.

3.4.4 Although the parliamentary-style executive tends to weaken the concept of separation of powers between the legislature and the executive, it has distinct advantages in ensuring uniformity of purpose on the part of both structures and therefore also of the will to legislate for and execute the policies required to carry out that purpose. Provided that adequate checks and balances are in place and that accountability of the executive to the legislature is adequately provided for, particularly in combination with an effective parliamentary committee system, the parliamentary-style executive can be an effective instrument for good governance, and has proved itself so in many countries. In practice, absolute separation of powers is in any event hardly possible or desirable in the interest of effective government. <u>However, to ensure compliance with the concept of separation of powers the Premier should be required to vacate his seat in the provincial legislature upon being elected.</u> This would place provincial Premiers in a position similar to the President [section 77(4)]. The resultant vacancy could be filled by nomination of a member by the Premier's party. The Premier should remain accountable to the legislature. <u>Provisions need to be included in the new Constitution to ensure that such accountability is effective in practice and that responsiveness and openness are ensured.</u>

3.4.5 Although provinces may in terms of section 160 of the interim Constitution provide for different executive structures and procedures in their own constitutions, the Commission is of the opinion that the new Constitution should provide for parliamentary-style executives for the provinces which choose not to adopt their own constitutions. However, Premiers should be required to vacate their seats upon election, and in addition provision should be made for effective committees of the legislature to ensure proper accountability, openness and responsiveness on the part of the executive."

2.2.5 The Commission recommends that provisions similar to those contained in clause 80 in respect of the President, be included in clause 136 in respect of Premiers.

2.3 **Executive Councils :**

2.3.1 The Executive Council of a province consists of the Premier and no fewer than five and no more than ten members appointed by the President (clause 140). The Executive Council and its members remain competent to function until a new Premier elected after an election of a provincial legislature assumes office (clause 141). Members must swear or affirm their faithfulness to the Republic and obedience to the Constitution before performing their functions (clause 142). They are individually accountable to the Premier and the provincial legislature and collectively accountable to the legislature. In the performance of their functions members are bound by the policies of the Council (clause 143).

2.3.2 Members of the Executive Council must act in accordance with a code of ethics prescribed by national legislation, may not undertake any other paid work or act in any way that is inconsistent with their office or expose themselves to the risk of a conflict between their official responsibilities and private interests. They may also not use their position or any information entrusted to them to enrich themselves or improperly benefit any other person (clause 144).

2.3.3 Clauses 145 and 146 authorise the premier to temporarily re-assign powers and functions between members and to transfer to another member the administration of legislation or of any power and function entrusted by legislation to a particular member.

2.3.4 The consequences of votes of no-confidence in the Premier or the Executive council are dealt with in clause 147.

2.3.5 In its preliminary recommendations regarding Executive Councils, the Commission dealt with the following matters : -

a) Number of members : - The Commission recommended that the maximum number of members of an Executive Council as stipulated in the interim Constitution should be retained in the new Constitution's guidelines (paragraph 3.6.3 of document 5 dated 6 April 1995). The Commission was also not convinced that there is a need to provide for the appointment of deputy members in the new Constitution (paragraph 3.6.1). Both have been adhered to in the provisions of clause 140. However, these numbers may be exceeded in provincial constitutions. It is therefore recommended that the following factors should guide the legislators when considering corresponding provisions in provincial constitutions (see paragraph 3.6.2 of the interim recommendations):

> *"3.6.2 Before any increase in the number of MECs or the appointment of deputies is considered, careful consideration should be given to factors such as whether members administering portfolios/departments are utilising their time effectively, are not involving themselves too intensively in administrative matters which should be dealt with by officials, and have had the time to get sufficiently acquainted with the functional areas of their portfolios to be able to deal with matters expeditiously. The relationship between the number of members of an executive and the number of members of a legislature should also be taken into consideration in order not to reduce the responsibility and ability of the legislature to check and balance the activities of the executive. This would not be possible unless sufficient members are left in the legislate to compose the committees which should broadly oversee the activities of the various executive departments."*

b) Composition - The Commission recommended that the proportional method of composing provincial executives should not be imposed by the new Constitution (paragraph 3.7 of interim recommendations). The draft text does not provide for proportional representation of political parties in Executive Councils. The Commission's recommendation has therefore been accommodated. However, to ensure the uniform treatment of present members of executives at national and provincial levels, the Commission recommended that the provisions of CP XXXII be applied also to provincial executives until 30 April 1999 (paragraph

3.7.4). This has not been dealt with in the draft text, but should be accommodated in the text dealing with transitional matters if the new constitution comes into effect before the above-mentioned date. The Commission recommends accordingly.

c) Qualification for membership - Section 149(4)(b) of the interim Constitution requires a Premier to appoint only members of the provincial legislature as members of an Executive Council. The Commission recommended that provision should be made for the appointment also of persons who are not members of the legislature in order to bring expertise into the Council which may not be adequately provided for otherwise (paragraph 3.7.5). Chapter 8 of the draft constitution does not specify that members of the legislature should be appointed as members of Executive Councils. The only stipulation in regard to the appointment of such members is in clause 134(3)(a) and 140 which authorises the Premier to appoint members and to act alone when appointing or dismissing Executive Council members. It appears, therefore, that the Commission's recommendation has been met. However, the draft provisions in regard to the Cabinet have been altered and do not provide for the appointment of a non-member of the National Assembly (see clause 85). It is likely that corresponding provisions will be introduced in respect of provincial executive councils. Whatever the position may be, the Commission's recommendation that provision should be made for the appointment in an Executive Council of persons who are not members of a provincial legislature, is reaffirmed. This appears to be permissible in terms of clause 140 as presently formulated.

d) Vacation of seats in legislature - The Commission expressed an opinion, but did not recommend, that it may be necessary to provide for the appointment of all members of an Executive Council from outside the legislature or to require members of the legislature to vacate their seats if appointed to the Executive, in order to satisfy the concept of separation of powers (paragraph 3.7.5). The constitutional lawyers assisting the Constitutional Assembly are of the opinion that the appointment of members of the legislature to an executive body does not impinge upon the concept of separation of powers (see clause 118(7)). It is proposed, therefore, that this matter not be pursued.

e) Executive committees - In paragraph 3.7.6 of the interim recommendations, the Commission addressed the question of minority party participation in the executive decision-making process as follows : -

"3.7.6 The above recommendations raise the question whether an executive which does not contain representation of minority parties would comply with the Constitutional Principles which require, inter alia, representative government embracing multi-party democracy and proportional representation. The question may acquire a particular significance when the concept of separation of powers applies. CP XIV provides for participation of minority political parties in the legislative process in a manner consistent with democracy, but is silent on their participation in the executive process. Indeed, CP XXXII suggests that proportional representation in the various executive structures need not continue beyond 30 April 1999. It could, however, enhance transparency, national unity and perhaps also the concept of mutli-party democracy if minority parties were also included in some way as role-players in executive structures. The Commission has not received submissions suggesting any new mechanisms for participation by minority parties in the provincial executives, nor have all possible mechanisms been investigated as yet. One possibility which presents itself, is to make provision for executive (cabinet) committees in which political parties are represented on a proportional basis, to pre-consider all matters referred to the executive and to make recommendations thereon to the executive. Through such a mechanism, the views of minority parties could be made known to the executive and might influence its decisions, without impinging on the prerogative of the executive to make such decisions and be held accountable for them".

As committee structures cannot appropriately be dealt with in a constitution, and the Commission's proposal has been dealt with specifically by the relevant Theme Committee, it is proposed that the matter be dealt with further in the Commission's final general report and not in its response to the draft constitutional text.

3 NAMES, TITLES AND NUMBERS

3.1 The possibility is created in clause 154 (discussed in a separate document) for provincial legislatures to adopt legislative and executive structures for their provinces which differ from those provided for in the Constitution. This could lead to the introduction of various names and

titles at provincial level, such as parliament, governor, cabinet, minister, etc. Some of these terms are indeed already used informally, and tend to confuse even the more informed members of the public. It would, in our opinion, not diminish the powers of provinces substantially if the names and titles used in the national Constitution should be designated for use also in provincial constitution. The Commission recommends accordingly. (Note : A new proposal in clause 154 addressed this issue, but may prove to be very controversial).

3.2 A further cause for concern is that provincial legislatures may consider increasing the number of members of the legislatures and executive councils to an extent which may lead to serious discrepancies and problems between national and provincial governments and among provincial governments. If binding norms for the determination of such numbers are laid down by or in terms of the national Constitution, it should not result in a substantial diminution of provincial powers. The Commission consequently recommends that norms for determining the maximum number of members of legislative and executive councils be determined in or in terms of the national Constitution.

16 February 1996

ANNEXURE 5

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PROVINCIAL FINANCIAL AND FISCAL MATTERS

1 INTRODUCTION

1.1 In its preliminary recommendations (Document 7 dated 18 May 1995) the Commission emphasised the extreme importance of constitutional provisions on provincial finance and fiscal affairs in so far as they determine not only the measure of autonomy , but also the effectiveness of provincial governments in executing the powers and functions allocated to them.

1.2 The abovementioned document contains the following recommendations:-

(a) As far as the revenue sharing provisions (sections 155(1) to (3)) of the interim Constitution are concerned, the Commission recommended that similar provisions be incorporated in the new Constitution (paragraph 3.4.2).

(b) In view of the considerable number of factors which must presently be considered by Parliament when making conditional or unconditional allocations to provinces in terms of section 155(4) of the interim Constitution, the Commission recommended that the new Constitution should require only that such allocations be determined with due regard to the national interest, and after taking into account the recommendations of the FFC and the sufficiency of revenues of provincial governments to provide reasonably comparable levels of public services at reasonably comparable levels of taxation (paragraph 3.4.3).

(c) In view of CP XVIII.2, provincial legislatures must be empowered in the new Constitution to impose any tax other than income tax, value-added tax or other sales tax within their areas of jurisdiction, subject to authorisation by Parliament. However, such taxes

should not detrimentally affect national economic policies, inter-provincial commerce or the national mobility of goods, services, capital or labour (paragraph 3.5.1). Furthermore, in the light of CP XVIII.2, the power of provinces to impose surcharges on taxes (if authorised to do so by an Act of Parliament as provided for in section 156 of the interim Constitution) should be retained in the new Constitution, but this should not include the power to raise any surcharges on local government taxes (paragraph 3.5.1).

(d) The exclusive competence of provincial legislatures to impose taxes , levies and duties (excluding income tax, and value-added or other sales tax) on casinos, gambling, wagering, lotteries and betting provided for in section 156(1B) of the interim Constitution should be retained in the new Constitution (paragraph 3.5.2).

(e) The power of provinces to impose any tax, surcharge, levy or duty should be subject to the proviso that national economic policies, inter-provincial commerce or the national mobility of goods, services, capital or labour should not be detrimentally affected by the exercise of such powers (paragraph 3.5.3).

(f) Provinces should retain the power to impose user charges, subject to their not discriminating against non-resident South African citizens (section 156(3) of the interim Constitution). The FFC should recommend only general guidelines which will be applicable to all relevant enactments (paragraph 3.5.4).

(g) The competence of a province to raise loans for capital expenditure and short term bridging finance purposes only, subject to reasonable norms and conditions prescribed by an Act of Parliament after recommendation by the FFC, should be retained in the new Constitution . The FFC should provide only general guidelines for the guaranteeing of loans by provincial governments (paragraph 3.6). Provincial and local government loans should be guaranteed by the national government only if the guarantee complies with conditions set out in an Act of Parliament and the FFC has certified accordingly as prescribed in section 188 of the interim Constitution (paragraph 3.9).

(h) The new Constitution should provide for the establishment of provincial revenue funds (paragraph 3.7).

(i) The new Constitution needs to contain provisions providing for orderly procurement management at all levels of government (paragraph 3.8).

(j) The powers and functions of the Auditor-General contained in section 193 of the interim Constitution should be incorporated in the new Constitution (paragraph 3.10.2).

(k) The new Constitution should provide for the establishment /continuation of the FFC with the objects and functions assigned to it in section 199 of the interim Constitution (paragraph 3.11.3).

(l) CP XXVII requires that the representation of each province in , and hence the composition of, the FFC be addressed in the new Constitution. The method of the appointment of members of this institution should also be provided for in the Constitution in order to guarantee its continued independence , impartiality and acceptability. Members should be appointed by the President from nominations by national and provincial governments and a representative local government forum (paragraph 3.11.5).

(m) In view of the invidious position in which provincial nominees on the FFC find themselves and the expressed desire of provincial and local governments to argue their cases before the FFC and to enter into negotiations regarding the allocation of funds to them, the Commission recommended that the FFC be structured to consist of two chambers, viz a "core" FFC consisting of seven members appointed by the President, and a plenary chamber consisting of the core group and representatives of the three levels of government. The Constitution should only contain general provisions regarding the institution, role and functions and core composition of the FFC. The details regarding its functioning and composition of its substructures should be dealt with in an Act of Parliament. (paragraph 3.11).

2 DRAFT TEXT PREPARED BY CA

2.1 The draft text prepared by the C A provides for the following in relation to provincial finance:-

(a) A province is entitled to an equitable share of revenue collected nationally to enable it to provide services at affordable standards and to exercise its powers and perform its functions (clause 148). This must be transferred expeditiously and without deductions except in the circumstances provided for in clause 188 (clause

149). It may also receive other conditional or unconditional allocations and may raise additional revenues from taxes and loans as provided for in clause 150 and 151 (clause 148). The equitable shares of revenue and allocations must be determined according to national legislation, which may only be enacted after consultation with provincial governments and after consideration of recommendations by the FFC. Due regard must be given to the national interest, provision for the national debt, the needs and interests of the national government based on objective criteria, fiscal capacity, performance and a number of additional criteria. Additional revenue raised by provinces may not be deducted from their equitable share of revenue or other allocations made out of national revenue. The national government need not compensate provinces who fail to raise revenues commensurate with their fiscal capacity and tax base(clause 149).

(b) Provinces may raise taxes, levies, duties and surcharges subject to regulation by national legislation enacted after recommendations by the FFC. However, provinces may not raise income tax, VAT or other sales tax, levies on the sale of fuel, customs and excise duties or any levies or surcharges on any taxes and duties collected nationally in terms of national legislation (clause 150).

(c) A province may raise loans for capital expenditure subject to nationally determined norms and conditions. Loans may be raised for the bridging of current expenditure during a fiscal year, subject to redemption within 12 months and any reasonable conditions prescribed by national legislation. The national legislation may be enacted only after recommendations by the FFC have been considered. A province may not guarantee a loan unless the FFC has verified the need for and recommended the guarantee (clause 151).

(d) Allocations by the national government to provincial and local governments must be appropriated by an Act of Parliament. The local government allocations must ordinarily be made through the relevant provincial governments (clause 152).

(e) Provincial revenue funds for the provinces are established by clause 153.

2.2 The following provisions in regard to national financial matters are relevant also to provincial finance:-

(a) The equitable share of national revenue to which provinces (but not local governments) are entitled is a direct charge against the National Revenue Fund to be paid to the Provincial Revenue Fund concerned (clause 186).

(b) The format of national and provincial budgets and the procedure which must be followed when drawing them up must be prescribed in national legislation. Such budgets must contain estimates of revenue and current and capital expenditure for the relevant period, and must promote transparency, accountability and effective financial management of the public sector as a whole (clause 187).

(c) National legislation must prescribe effective measures to ensure transparency , uniform and generally accepted accounting practices and expenditure classifications, expenditure control, and uniform treasury norms and standards at all levels of government. The national treasury must have the power to stop the transfer of funds to any organ of state in the event of serious or persistent maladministration. Any action by the national treasury to stop the transfer of funds to a province must be ratified by Parliament within 30 days (clause 188).

(d) Procurement of goods and services by organs of state at any level of government must be regulated by national legislation, which must provide for independent and impartial tender boards. Interference with a tender board is prohibited. The decisions of tender boards must be recorded and open to public inspection . Reasons for decisions must be given if requested by an interested party (clause 189).

(e) The national government may guarantee a provincial or local government loan only if the guarantee complies with the norms and conditions set out in national legislation and the FFC has made a recommendation in this regard (clause 190).

(f) The salaries and other conditions of service of inter alia members of provincial legislatures and Executive Councils, members of local governments, and of traditional authorities must be as determined in national legislation. A Commission on Remuneration must be established to make recommendations to Parliament in regard to

such legislation, and to the three levels of government in regard to the implementation of that legislation (clause 192).

(g) No one may hold more than one office of profit under the Republic (clause 193).

(h) An independent FFC, which is subject only to the Constitution and must be impartial, is established by clause 194. It may give advice and make recommendations to Parliament, provincial legislatures and any other authorities determined by national legislation regarding the financial and fiscal requirements of the national, provincial and local governments. The FFC must consider all relevant information, including the national interest, economic disparities between the provinces, and their population and development needs, administrative responsibilities and other legitimate interests (clause 195). The appointment, qualifications and tenure and dismissal of members is still under discussion (clause 196). The FFC must report regularly both to Parliament and to provincial legislatures as prescribed by national legislation (clause 197).

3 DISCUSSION

The draft constitutional text satisfies a number of the Commission's preliminary recommendations in the following respects :-

(a) Revenue sharing is provided for in clause 148, with a new provision that this must enable provinces to provide services at "affordable standards". The additional requirement can be regarded as reasonable. The national revenue items which were listed in section 155(2) of the interim Constitution as the basis for the determination of a province's equitable share are not incorporated in the draft - it is merely stated that provinces have an entitlement to an equitable share of revenue collected nationally (clause 148). This broadens the base for the determination of such shares. However, a province will not be entitled to the transfer duty collected in respect of property situated in the province as at present (section 155(2)(d). The draft provisions should simplify the calculation of equitable shares and provinces should not be worse

off as a result. The draft provisions consequently appear to be acceptable.

(b) Clause 149(2) of the draft reproduces the multitude of factors which the interim Constitution stipulates must be taken into consideration before legislation providing for the determination of allocations to provincial and local governments may be enacted. The Commission was of the opinion that these were too onerous and that the new Constitution should require only that such allocations be determined with due regard to the factors mentioned in paragraph 1.2(b) above.

(c) Although provinces will retain the power to raise taxes, levies, duties and surcharges subject to regulation by national legislation, the imposition of surcharges on taxes and duties collected nationally will be prohibited in terms of clause 150(1). Although provinces are presently allowed to impose surcharges on taxes (section 156(1)), they may do so only if it is authorised by an Act of Parliament. In effect, they do not possess the power to impose the surcharges until an Act of Parliament authorises it. The proposed prohibition will therefore not affect any present powers to impose such surcharges significantly.

(d) The **exclusive** power of provincial legislatures to tax casinos and other forms of gambling within a province provided for in section 156(1B) of the interim Constitution is not included in the powers provided for in clause 150 of the draft. This could be regarded as a substantial removal of what is presently one of the few exclusive competences of provinces, and probably contrary to CP XVIII.2.

(e) Clause 150(2) stipulates that the provincial governments may not raise taxes, levies or surcharges, that may detrimentally affect national economic policies, interprovincial commerce or the national mobility of goods, services, capital or labour. This is in line with the Commission's recommendation (see paragraph 1.2(e) above).

(f) The present power of provinces to impose user charges is not explicitly provided for in the draft. However, this power may be implicitly provided for in clause 150, in which case it would be subject to regulation by national legislation (clause 150(2). Whatever the case may be, it appears to lead to the omission of an exclusive provincial power conferred by section 156(3) of the interim Constitution and to be contrary to the spirit of CP XVIII.2

(g) The provisions of clause 151 of the working draft relating to the competence of a province to raise loans for capital expenditure and the bridging of current expenditure, and to guarantee loans, are similar to the provisions contained in section 157 of the interim Constitution. This is in line with the Commission's recommendation (paragraph 1.2(g) above).

(h) Clause 153 establishes a Provincial Revenue Fund for each province as recommended by the Commission (paragraph 1.2(h) above.

(i) The working draft contains adequate provisions for the regular, orderly and open procurement of goods and services by organs of government at any level (clause 189). This is an improvement on the present provisions of section 187 of the interim Constitution insofar as all organs of government at all levels are included in the provisions. The present provisions also allow for provincial laws to deal with procurement matters. The making of such laws is not excluded by the draft provisions, but these will of course have to comply with the provisions of a national law in this regard as is presently also the case. The draft provisions are supported (see paragraph 1.2(i) above)

(j) The powers and functions of the Auditor-General in regard to national and provincial state departments as well as local governments are dealt with adequately in clause 111 of the draft text. Details regarding the auditing function will be contained in a national law (paragraph 1.2(j) above).

(k) The working draft provides for the continuation of the Financial and Fiscal Commission. However, the appointment, qualifications and tenure and dismissal of its members have not been finalised. The draft does not contain all the provisions recommended by the Commission, most of which would in any case not normally be included in a constitution. At this stage the Commission supports the draft provisions but would urge that further consideration be given to its proposals regarding the functioning of the FFC contained in its Recommendations Document 7 dated 18 May 1995.

4 RECOMMENDATIONS

The Commission recommends that the draft text relating to provincial finance and fiscal matters be adopted, except in respect of the following aspects :-

4.1 The multitude of factors which must be taken into consideration in terms of clause 149(2), before legislation providing for the determination of the provinces' equitable share of revenue collected nationally and other allocations from national revenue may be enacted, is regarded as being too onerous. The Commission recommends that the following alternative wording be considered :

"(2) Legislation referred to in subsection (1) may be enacted only after the provincial governments have been consulted and any recommendations of the Financial and Fiscal Commission have been considered, and with due regard to -

(a) the national interest; and
(b) the sufficiency of revenues of provincial governments to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

4.2 Section 156(1B) of the interim Constitution vests provincial legislatures with the exclusive competence to impose taxes, levies and duties (excluding income tax or value-added or other sales tax). This competence is not provided for in the working draft . Nor is the competence of provincial legislatures to authorise the imposition of user charges as provided for in section 156(3) of the interim Constitution, explicitly incorporated in the draft text. These omissions could be regarded as diminishing the powers of provincial legislatures and contrary to C P XVIII.2. The Commission recommends that provisions similar to those contained in sections 156(1B) and (3) be incorporated in the new Constitution.

4.3 At this stage the Commission supports the draft provisions relating to the Financial and Fiscal Commission contained in clauses 194 to 197 of the working draft, but would urge that further consideration be given to its proposals regarding the functioning of the FFC as contained in paragraph 3.11 of its Recommendations Document 7 dated 18 May 1995.

16 February 1996

ANNEXURE 6

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PROVINCIAL CONSTITUTIONS

1 INTRODUCTION

1.1 Constitutional Principle XVIII.2 stipulates *inter alia* that the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to that provided for in the interim Constitution.

1.2 The interim Constitution contains the following provisions in respect of provincial constitutions:

"160 (1) The provincial legislature shall be entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members.

(2) A provincial legislature may make such arrangements as it deems appropriate in connection with its proceedings relating to the drafting and consideration of a provincial constitution.

(3) A provincial constitution shall not be inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4: Provided that a provincial constitution may

(a) provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and

(b) where applicable, provide for the institution, role, authority and status of a traditional monarch in the

province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal.

(4) The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection 3, subject to the proviso to that subsection.

(5) A decision of the Constitutional Court in terms of subsection (4) certifying that the text of a provincial constitution is not inconsistent with the said provisions, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."

2 DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 Draft text prepared by the CA

154. See text and possible alternative formulation as per working draft.

2.2 Commission's preliminary recommendations

In paragraph 4 of Document 1 dated 23 March 1995, the Commission recommended that provisions similar to those contained in section 160 be incorporated in the new Constitution, together with such amendments as will ensure conformity with the criteria established by the Constitutional Principles. The Commission also recommended that the specific reference to a Zulu Monarch should be reconsidered (paragraph 3.5.4 of Document 1).

2.3 Provincial views

Northern Cape - Agrees with the Commission's views expressed in paragraph 3.7 of the abovementioned Document 1 and with the conclusion and recommendations reported in paragraph 2.2 above.

Western Cape - Agrees with the conclusion in paragraph 4 of Document 1. The new Constitution should prohibit the national government from reducing the powers and functions of provinces in future. Provinces are not prohibited from dealing with the judiciary as a separate leg of provincial

powers. They should be involved in the appointment and removal of judges in a provincial or local division.

2.4 Comments

2.4.1 The draft text deals adequately with most of the provisions contained in section 160 of the interim Constitution. Four matters are not dealt with explicitly, namely:

(a) the subjection of provincial constitutions to any constitutional principles which may be included in the new Constitution. However, such principles would then be part of the Constitution and be binding also in respect of provincial constitutions;

(b) the power to provide for a traditional monarch as presently contained in section 160(3) of the interim Constitution. On the face of it, the draft text does not preclude a provincial legislature from dealing with a traditional monarch in its provincial constitution as it would not be inconsistent with the proposed new Constitution, which recognises traditional leaders in accordance with indigenous laws. The Commission has already recommended that specific reference to a Zulu monarch should be reconsidered (see paragraph 2.2 above);

(c) whether provinces will be permitted to give different names and titles to legislative and executive structures, e.g. by using terms such as parliament, governor, cabinet, etc. Unless some uniformity is achieved in the use of names, a considerable amount of confusion might be created ; and

(d) whether provinces will be permitted to determine the number of members of their legislatures and executive councils and their election, remuneration and other benefits independently from what is laid down in national laws, (e.g. election laws). This might lead to serious discrepancies and problems between national and provincial governments and between provincial governments.

2.4.2 The Commission considers the alternative draft text to be too restrictive and possibly contrary to Constitutional Principle XVIII

3 RECOMMENDATIONS

The Commission recommends that the draft text contained in clause 154 be adopted. However, the power to establish different legislative and executive structures should not include the power to determine names, titles, numbers of members and remuneration and other benefits or methods of election different from those determined by or in terms of the Constitution.

16 February 1996

ANNEXURE 7

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCES

INTRODUCTION

The following notes and comments on the draft constitutional text do not fully explore the four versions of Chapter 9 to which the various permutations of options give rise. The main focus is on the version resulting from the combination of option 1 in clause 155, and option 1 in clause 159, which accords most closely with the Commission's recommendations.

Among the major issues unresolved is the problem of exclusive provincial powers and how these might be accommodated in the constitution. Closely related to this is the question whether the concept of framework legislation should be explicitly incorporated in the text. This in turn feeds into the wider issue of the division of legislative competencies among Parliament and provincial and local legislatures, and problems relating to the conflict of laws.

It is suggested that the new Constitution should contain a statement of principles to give effect to CPXX and CP XXII, recognising the need for both national unity and provincial autonomy, and non-encroachment on the latter.

The provisions in the draft text relating to the executive authority of provinces are supported, but with the suggestion that the term "executive" should replace the term "government" where appropriate, to avoid ambiguity.

DRAFT CONSTITUTIONAL TEXT AND COMMENTS

1. Legislative authority of the Republic

1.1 Draft provisions

" **155** *(Option 1)* **The legislative authority of the Republic is vested in Parliament, which may make laws in terms of this Constitution on any matter including matters falling within the functional areas specified in Schedule 5 (CP XVI, CP XVII (1), CP XIX)"**

1.2 Commission's preliminary recommendation (Document 2, 23 March 1995)

The Commission did not expressly deal with the legislative powers of Parliament. However, in its preliminary recommendations on page 17 of Document 2, it concluded that "in general the allocation of powers and functions contained in section 128 are at this stage appropriate to serve the interest of good government in South Africa".

1.3 Provincial views

1.3.1 **Western Cape -** Provinces should be given exclusive legislative powers in respect of certain functional areas (not identified) in terms of Constitutional Principle (CP XIX).

1.3.2 **Northern Cape -** Certain powers (not identified) need to be exclusively allocated to the provincial level (with certain standardisation provisions). All items not specifically listed in the new equivalent of Schedule 6 should be regarded as potential exclusive provincial powers or as concurrent powers.

1.3.3 **North West -** Opts for a say in national powers with concurrent powers at provincial level as is presently the case.

1.4 Comments

1.4.1 The section should be read in context with the rest of the chapter which -

(i) confers legislative powers on provinces in respect of the functional areas listed in Schedule 5;

(ii) empowers Parliament to make laws in respect of any matter including Schedule 5 functional areas; and

(iii) specifies which laws will prevail if there is a conflict between Acts of Parliament and provincial laws.

Although phrased differently than in the present Constitution, the effect is the same in so far as Parliament retains both exclusive and concurrent powers to make laws on any matter.

1.4.2 The position as far as Parliament is concerned is clear. It retains concurrent powers in respect of all matters listed in Schedule 5 or ancillary to them and exclusive powers in respect of the rest. The position of provinces is less clear. If Parliament can make laws on any matter, including Schedule 5 functional areas, provinces on the face of it appear to have no exclusive legislative powers as required by CP XIX.

1.4.3 The CA Technical Advisors expressed the following opinion in respect of CP XIX :

"It is clear that both the national and provincial levels of government must have exclusive as well as concurrent powers. A possible argument is that the CP does not require both legislative and executive powers to be exclusive and that, for instance, granting merely exclusive executive powers to provinces would satisfy the requirements of the CP. There is precedent for this approach in, for example, Germany.

Another argument that may pass the test of the requirements of this CP is that this CP does not require legislative exclusivity with regard to certain defined functional areas. In other words, if provincial legislatures may pass legislation in certain defined (listed) functional areas concurrently with the national Parliament the provincial legislatures do not have exclusive jurisdiction with regard to these functional areas but these provincial legislatures DO have exclusive legislative powers where, for example, the national overrides do not apply or even where provincial overrides apply, as the case may be. The question arises as to whether provinces may be granted exclusive legislative powers by means of framework legislation, that is, whether provincial legislatures have exclusive powers with regard to the filling in within the parameters described by the framework Act of the national Parliament when the framework Act requires that the provincial legislatures make laws with regard to the detail within the norms of principles set out in such Act".

1.4.4 From clause 159 *(Option 1)* of the draft provisions (dealt with below) it would appear that the concurrent powers of

Parliament in respect of Schedule 5 functional areas are not restricted. Parliament will be competent to make laws on any matter including those listed in Schedule 5. Parliamentary laws which are in conflict with provincial laws dealing with Schedule 5 functional areas will prevail where the elements that are in conflict are necessary for the reasons listed in clause 159 *(Option 1)* (1)(a) to (c) below. Nevertheless, it has been argued that provinces will have exclusive powers in respect of the listed functional areas in all matters which are *not* included in clause 159(1)(a) to (c). However, a Parliamentary law also dealing with any functional area will be valid and enforceable in so far as it does not conflict with the provincial law. If it does conflict, it will prevail over the provincial law if the conflicting elements deal with matters listed in clause 159 *(Option 1)*. For example, it appears that Parliament will be able to make a law covering all aspects of regional planning and development. If there are provincial laws on regional planning and development, the Parliamentary law will apply except for those elements that are in conflict with the provincial laws, and which are not necessary for the reasons contained in clause 159(1)(a) to (c). In our opinion it is consequently not very persuasive to argue that the provinces have the *exclusive* power to make laws in respect of relevant planning and development matters while Parliament manifestly has the power to make laws on the same matters.

1.4.5 In our opinion therefore, clause 155 should state only that "The legislative authority of the Republic vests in Parliament, which shall have the power to make laws on any matter in accordance with the Constitution". (See section 37 of interim Constitution).

2 Legislative authority of provinces

2.1 Draft provisions

"156 (1) The legislative authority of a province is vested in its provincial legislature, which shall be competent to make laws in and for its province in terms of this Constitution (CP XVI, CP XVIII 1, CP XIX).

(2) A provincial legislature may make laws on any matter which falls within a functional area specified in Schedule 5."

2.2 Commission's preliminary recommendation (Document 2, 23 March 1995)

In general the allocation of powers and functions contained in Section 126 is appropriate (page 17 Document 2)

2.3 Provincial views

The particular provisions are not dealt with specifically in the provincial comments received.

2.4 Comments

The draft provisions do not differ materially from similar provisions contained in section 126(1) of the interim Constitution.

3. Framework legislation

3.1 Draft provisions

157. *Option 1 :* No provisions for framework legislation
Option 2 : Provides for framework legislation
Option 3 : Implemented by way of override (159 Option 3, (1)(f))

Note : Only the NP has submitted proposals regarding functional areas. In the submission it is proposed that the following matters be listed for framework legislation for discussion purposes : agriculture, casinos, environment, forestry, general principles and standards of education, excluding universities and technikons, land matters, local government, nature conservation, police, registration of persons, marriages and deaths, and the issue of ID's and passports, road traffic, soil conservation and water affairs.

The ANC is of the opinion that the power to make framework legislation should be a general power and not be limited by a list. The need for a clause dealing with framework legislation has also been questioned by certain ANC representatives in the Constitutional Sub-committee.

The PAC has stated that it does not see any need for framework legislation, and that there should be only one schedule detailing the powers allocated to the provinces.

3.2 Commission's preliminary recommendations (Document 10, 8 June 1995)

The concept of framework legislation is applied in Germany under circumstances significantly different from those envisaged for South Africa in terms of the Constitutional Principles. The concept could perhaps be applied in South Africa to provide for the assignment of powers in respect of additional functional areas to the provinces. (Paragraph 3.3 Document 10)

3.3 Provincial views

Western Cape - Demarcation of powers could include the creation of a list of functional areas on which the national government shall only be allowed to lay down principles and guidelines in framework legislation and on which the provinces would ten enjoy exclusive jurisdiction to enact detail legislation.

3.4 Comments

3.4.1 The concept of framework legislation is applied only in Germany, in its particular federal legislative arrangements. For our purposes, it was consequently necessary to define the concept as contained in various drafts. According to the definition the frameworks will be contained in national laws which lay down principles and standards to ensure uniformity across the nation. Provinces are compelled to implement such laws by passing their own detailed laws complying with the principles and standards laid down by the framework laws. If any province fails to do so, Parliament may implement the framework law (by passing detailed legislation for the province) until the provincial legislature makes the required laws. Provinces appear to be vested with the power or obligation to make laws for the achievement of the objectives set out in the framework legislation only if such a law exists. In its absence, provinces will have no legislative competency with regard to the subject matter.

3.4.2 The Technical Advisors have pointed out that if Parliament is empowered to pass framework legislation in respect of a functional area listed in a schedule, it would be precluded from enacting detail legislation on the matter, except when and for as long as any province fails to implement the framework law. They also pointed out that it would serve no purpose to provide for framework legislation in the Constitution without including a schedule listing the functional areas in regard to which such laws could be passed.

3.4.3 In our opinion the incorporation of a concept similar to framework legislation in the new Constitution can only be justified if it has the effect of limiting the legislative powers of Parliament in respect of listed functional areas, thereby giving the provincial legislatures exclusive powers to pass laws on the detail of implementing the principles and standards so prescribed. However, the question of framework legislation should not be dealt with in isolation, but considered in the context of a system of national and provincial legislative and executive authority.

4. Necessary Ancillary Powers

4.1 Draft Provisions

"158. The legislative competence of Parliament and provincial legislatures includes the competence to make laws which are reasonably necessary for, or incidental to, the effective exercise of such competence (CP XXI.8)"

4.2 Comments

The draft provisions are identical to the provisions of section 126(2) of the interim constitution and need to be incorporated in the new Constitution to comply with CP XXI.8.

5 CONFLICT OF LAWS

5.1 Draft Provisions

"159 *(Option 1)*

(1) In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act where the elements of the Act of Parliament that are in conflict with the Provincial Act are necessary for -

(a) the establishment of generally applicable standards regarding -

(i) services rendered by the state;
(ii) the maintenance of economic unity; or
(iii) the determination of national economic policies; or

(b) the maintenance of the security of the Republic; or

(c) the prevention of prejudice to the Republic or any province caused by the activities of a province.

(2) A National Bill concerning a matter which falls within a functional area listed in Schedule 5 must be introduced in the Second House and requires the approval of both Houses. Upon application by at least one fifth of the members of the Second House, and prior to the promulgation of a Bill, the Constitutional Court must determine whether it conforms with the objective criteria prescribed in subsection (1).

(3) If a dispute concerning a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area specified in Schedule 5 cannot be resolved by a competent court on a construction of the Constitution, the Act of Parliament prevails." (CP XXIII).

Note : The draft text provides three further options under clause 159. These are not given in full here, as the Commission concluded that Option 1 accords most closely with its own recommendations (see paragraph 6.3 below).

5.2 Commission's preliminary recommendations (Document 2, 23 March 1995)

5.2.1 The provisional conclusion was that in general the allocation of powers and functions contained in section 126 of the interim Constitution are at this stage appropriate to serve the interests of good government in South Africa (page 17 of Document 2). However, section 126 (3) required tighter formulation (page 15).

5.2.2 In a legal opinion, the Chief State Law Adviser summarised the implication of section 126(3) as follows :

"(a) Subsection (3) of section 126 of the Constitution does not preclude Parliament from exercising its "concurrent" legislative competence, but only resolves the situation where a provincial law and an Act of Parliament deal with the same subject matter. In such case the provincial law shall prevail over the Act of Parliament except in so far as the Act of Parliament relates to any of the matters referred to in paragraph (a) to (e) of the said subsection (3).

(b) Parliament can legislate on all matters pertaining or incidental to the functional areas specified in Schedule 6 to the Constitution, even though such legislation may not relate to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution.

(c) When an Act of Parliament deals with a matter falling within the said functional or incidental areas where no corresponding provincial legislation exists and the said Act does not relate to matters referred to in the said paragraphs (a) to (e), the situation may arise in future that such an Act (or some provisions thereof) will cease to apply in a particular province if the provincial legislature concerned makes a law which deals with the same subject matter, and the provincial

law and the Act of Parliament are inconsistent with each other (see section 126(5) of the Constitution and the discussion thereof below)

(d) An Act of Parliament which deals with a matter falling within the said functional or incidental areas shall prevail over a provincial law whenever, and in so far as, that Act relates to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution."

5.2.3 The Commission came to the conclusion that section 126(3) reduces the legislative powers of provinces to the extent that they cannot be said to have exclusive powers in respect of any functional area, except for those granted to them elsewhere in the Constitution (page 13 Document 2).

5.3 Provincial views

5.3.1 **Western Cape :** The Principle of subsidiarity, in accordance with CP XXI.1, in terms of which functions should be allocated to the lowest level of Government where it can be exercised effectively, should be contained in the new Constitution. The national Parliament has extensive overriding powers in terms of section 126(3) over concurrent matters and it can thus not be argued that a qualified exclusive competence is created *inter alia* by a narrower definition and by inclusion of CP XXII as a limitation to overrides. Specific functional areas could *inter alia* be dissected and provinces given exclusive jurisdiction in respect of identified parts of a particular functional area. Asymmetry should be provided for in the new Constitution. It should also contain provisions to allow for delegation and agency functions between all levels of government.

5.3.2 **Northern Cape :** Agrees with the Commission's conclusion as set out in paragraph 5.2.1 above.

5.3.3 **North West :** Section 126 and Schedule 6 are satisfactory as a point of departure but greater clarity is needed on a number of matters.

5.4 Comments

5.4.1 The division of legislative competence between Parliament and the provincial and local legislatures should be dealt with clearly in the new Constitution in order to avoid unnecessary problems with interpretation in future. The principles which must govern such division are provided in the Constitutional Principles, namely -

(a) The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers (CP XIX)

(b) Each level of government (including local government) shall have appropriate and adequate legislative powers and functions, that will enable each level to function effectively. The allocation of powers between different levels shall be made on a basis which is conducive to -

(i) financial viability at each level of government,
(ii) effective public administration, and which recognises the need for and provides national unity and legitimate provincial autonomy and acknowledges cultural diversity (CP XX)

(c) The national government shall be empowered to intervene through legislation where it is necessary for-

(i) the maintenance of essential national standards;
(ii) the establishment of minimum standards required for the rendering of services;
(iii) the maintenance of economic unity;
(iv) the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole (CP XXI.2)

(d) Where it is necessary for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government (CP XXI.3)

(e) Where uniformity across the nation is required for a particular function the legislative power over the function should be allocated predominantly, if not wholly, to the national government (CP XXI.4)

(f) The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government (CP XXI.5)

(g) Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -

(i) for the purpose of provincial planning and development and the rendering of services; and

(ii) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province (CP XXI.6)

(h) Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments (CP XXI.7)

(i) The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial government (CP XXI.8)

(j) The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in the (interim) Constitution (CP XVIII.2)

(k) A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in

parliamentary statutes or in provincial legislation or in both (CP XXIV)

5.4.2 In the interim Constitution, Parliament and provincial legislatures have concurrent legislative powers in respect of all the functional areas listed in Schedule 6. Section 126(3) only resolves the situation where a provincial law and an Act of Parliament deal with the same subject matter. In such case the provincial law shall prevail over the Act of Parliament except in so far as the Act of Parliament relates to any of the matters referred to in paragraph (a) to (e) of section 126(3). (See legal opinion in paragraph 5.2.2 above).

In the draft provisions (clause 159 - Option 1) Parliament and provincial legislatures retain their concurrent legislative powers in respect of the functional areas listed in Schedule 5. In the event of a conflict between an Act of Parliament and a law of a provincial legislature dealing with any of the functional areas, the Act of Parliament shall prevail over the provincial law if the conflicting elements <u>are necessary</u> for the purposes referred to in Clause 159(1) paragraphs (a) to (c). The end result of the two formulations are therefore identical - the Parliamentary law prevails if it deals with matters listed in the relevant sections. If not, the provincial law prevails in respect of the conflicting elements.

5.4.3 The criteria for Acts of Parliament to prevail over a provincial law set out in Clause 159(1) paragraphs (a) to (c) appear to accord with the criteria prescribed by CP XXI as enumerated above (paragraph 5.4.1) The draft provisions also appear to accord with CP XVIII.2.

5.4.4 Sub-clause (2) of Clause 159 requires Bill dealing with matters in Schedule 5 to be introduced in the Second House and to be approved in both the Second House and the National Assembly. This is accordance with the Commission's preliminary recommendation in paragraph 4.4.2 of Document 4.

5.4.5 Sub-clause (2) of Clause 159 requires the Constitutional Court, upon application by at least one fifth of the members of the Second House to determine whether a Bill conforms with the criteria prescribed in sub-clause 1(a) to (c). A more general provision is contained in section 98(9) of the interim

Constitution. It is not certain what this sub-clause intends to achieve. Parliament has the power to legislate on any matter and an Act will not prevail only if it is in conflict with certain segments of provincial laws.

5.4.6 Sub-clause (3) is in accordance with CP XXIII.

6 Exclusive provincial legislative powers.

6.1 It should be noted that clause 159 (Option 1) does not provide for any exclusive legislative powers for provinces as required by CP XXVIII. However, clause 157 (Option 2) dealing with framework legislation does provide for the discretionary allocation of exclusive powers to provinces within the principles and standards prescribed in such a framework Act of Parliament. The problem is that provinces will not obtain any such exclusive powers unless, and until, Parliament exercises its discretionary powers to establish framework legislation.

6.2 The functional areas to be included in the proposed Schedule 5 are dealt with in a separate memorandum (see Annexure 12).

6.3 The Commission considered the four options for clause 159 given in the draft text, but came to the conclusion that Option 1 most closely reflects the Commission's preliminary and current recommendations. However, the qualification that the relevant Acts of Parliament must apply uniformly in all parts of the Republic, should be added to clause 159 (1).

7. Integrity of provinces

7.1 Draft provisions

"160 Parliament may not encroach on, or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of a province (CP XXII)."

7.2 Commission's preliminary recommendations (Document 2, 23 March 1995).

The Commission noted, but did not specifically address, the principle of non-encroachment in its recommendations regarding provincial powers.

7.3 Provincial views

No comments on this matter were received from the provinces.

7.4 Comments

7.4.1 The draft purports to include a provision in the new constitution to give effect to CP XXII. This CP prohibits the exercise of the (legislative and executive) powers of the national government so as to encroach upon the geographical, functional or institutional integrity of the provinces. It requires to be read with CP XX which recognises the need for, and promotes, legitimate provincial autonomy in so far as it does not prejudice national unity.

7.4.2 The Commission considers it appropriate that the new Constitution should contain a provision to give effect to CP XXII.

8. National executive authority and the provinces

8.1 Draft provisions

"161. With the agreement of a provincial executive or a local government, the national executive may -

(a) appoint that provincial executive or a local government as its agent to perform any of the functions of the national executive; or

(b) delegate to that provincial executive or local government the authority to perform any of the functions of the national executive."

8.2 Comments

The provisions are included in the clause to comply with the requirements of CP XIX.

9. Executive authority of the provinces

9.1 Draft provisions

"162. (1) A province has executive authority over -

(a) all matters in respect of which the provincial legislature has passed legislation [legislative competence] and

(b) matters entrusted to the provincial executive in accordance with the Constitution.

(2) With the agreement of the national executive or a local government within the province, a provincial executive may -

(a) appoint the national executive or that local government as its agent to perform any of the functions of the provincial executive; or

(b) delegate to the national executive or that local government the authority to perform any of the functions of the provincial executive."

9.2 Commission's preliminary recommendations (Document 5, 6 April 1995).

The Commission recommended that provisions similar to those contained in section 144 of the interim Constitution be incorporated into the new Constitution in an amended form (paragraph 3.5.2 Document 5). As far as provincial executive structures are concerned, the Commission pointed out that these may be provided for in provincial constitutions (paragraph 2.2 Document 5)

9.3 Provincial views

Northern Cape and **Western Cape** supported the Commission's preliminary recommendations.

9.4 Comments

The draft provisions confirm the Commission's preliminary recommendations, and are consequently supported. However, the use of the word "legislative competence" is preferable to the words " passed legislation" in clause 162(1)(a).

16 February 1996

ANNEXURE 8

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING LOCAL GOVERNMENT

1 INTRODUCTION

The provisions in regard to local government contained in the draft constitutional text differ from those contained in Chapter 10 of the interim Constitution to an extent that makes comparison difficult. In order to focus the Commission's comments on the draft provisions which will be the basis on which the C A will structure its further deliberations, this document will analyse the draft text, compare it with the Commission's preliminary recommendations where applicable and provide comments thereon.

2 DRAFT TEXT PREPARED BY THE C A

Clause 163 - Local government

2.1 Clause 163 stipulates that local government must be established as a distinct tier of government. This does not fully address the concern expressed by local government structures that the term "level" denotes a hierarchy of governments, and their consequent preference for the term "spheres of government". The Commission did not have any objection to the concept of a hierarchical structure of government for South Africa, particularly also because it is provided for in the Constitutional Principles (paragraph 2.3 of Document 9 dated 25 May 1995). The use of either the term "level" or "tier" of government is therefore acceptable. However, the use of the term “level” is preferred because of its use in Constitutional Principle XVI and to ensure uniform use of the term throughout the draft. While the importance of local government as a level of government is not disputed, the arguments for referring to it as a "sphere" of government, whatever that may mean, are purely semantic and the use of the term would have no real legal effect.

The clause goes on to stipulate a number of general objectives of local government which can be supported. The clause is unsatisfactorily drafted, however, and this requires attention. "Development" is given as a goal of local government twice over, at (a) and (d); and in (d) the terms "economic viability, sustainability and self-supportiveness" are vague and have no clear reference in the sentence-structure. The reference to "development" should be removed in (a); and in (d) the words after "development" should be deleted. The draft clause is supported, but with the recommendation that it be more carefully phrased to avoid duplication and lack of clarity.

Clause 164 - Establishment

2.2 Clause 164 stipulates:-

(a) that the structures, powers and functions of government at the local level (tier) must be provided for in national or provincial legislation or in both, in accordance with the framework provided for in the relevant chapter;

(b) that local government structures must be established for the whole territory of the Republic and their territories demarcated. These provisions have indeed already been implemented under the interim Constitution and local government elections have been held in terms thereof. The Commission was of the opinion that the provisions of the present section 174 allowed the relevant legislatures some discretion to exclude areas which may prove to be problematical from local government jurisdiction (paragraph 3.2.1 of Document 9). In view of the present de facto position it may not be worthwhile to reopen the matter;

(c) Different categories of local governments with different powers, functions and structures may be provided for. This provision is in accordance with the Commission's recommendation that references to metropolitan, urban and rural local government should be omitted from the new Constitution (paragraph 3.2.2 of Document 9).

Clause 165 - General powers

2.3 (a) Clause 165 prescribes that local governments must have legislative power to make by-laws which are not inconsistent with national and provincial legislation {clause 165(1) and (2)}. They will also have executive power in respect of such laws and in respect of other matters assigned or delegated to them to allow them to function effectively {clause 165(3)}.

In section 174(3) of the interim Constitution the term "autonomy" is used to denote the independence of local governments in both legislative and executive matters. Submissions to the Commission suggested that the use of this term conveys a notion of freedom in decision-making which local governments do not possess. The Commission did not have a real problem with the use of the term, but considered that an alternative formulation might be more appropriate (paragraph 3.2.3 of Document 9).

While the draft formulation does not follow the suggested wording, the granting of legislative and corresponding executive powers to local governments, as formulated, conveys an approach to local government powers similar to that which would have been conveyed by the Commission's suggested wording.

(b) A local government must provide services for the maintenance and promotion of the well-being and good government of all persons within its area of jurisdiction, provided that the services can be rendered in a sustainable manner and are financially and physically practicable. It must also promote local economic development within a safe and healthy environment {clause 165(4)}. Local governments may form or belong to associations for the protection and promotion of mutual interests and to co-operate with other local governments in this regard {clause 165(5)}.

In general the draft text avoids some of the unclear wording used in section 175 (3) of the interim Constitution (see paragraph 3.3.3 of Document 9) and, in conjunction with clause 168 (see below), provides for a much clearer description of local government powers and functions. The draft text is acceptable.

Clause 168 - Functional areas

2.4 Clause 168 complements the above provisions by providing that the legislative competencies, powers and functions of local government or different categories of local government must be prescribed by national or provincial legislation or both, and must include local or service development of the functional areas listed in the clause. Most of what are generally regarded as proper local functions are included in the list, which is not exhaustive. Indeed, these are the minimum functional areas in respect of which legislative and executive powers must be granted to local governments. Additional functional areas can be provided for in the enabling legislation. The Commission's preliminary recommendations based on the text of the interim Constitution are contained in paragraph 3.3 of Document 9. The provisions of clause 168 are generally acceptable.

Clause 166 - Administration and finance

2.5 Clause 166 deals with administrative and financial matters and provides as follows:-

(a) Legislation dealing with the establishment of local government must contain provisions aimed at ensuring that local government administration is based on sound principles of public administration (see Chapter 12 of the draft), good governance, transparency and public accountability {clause 166(1)}. These are commendable guidelines for the envisaged legislation and are in line with the Commission's preliminary recommendations (paragraph 3.6.1 of Document 9).

(b) Clause 166(2) provides for the possible imposition of an enforceable code of conduct for local government councillors and officials. This is in line with the Commission's preliminary recommendations (paragraph 3.10 of Document 9).

(c) Local governments are empowered to impose and collect property rates, levies, fees, taxes and tariffs as may be necessary to exercise their powers and perform their functions, subject to conditions prescribed by national or

provincial legislation after taking into consideration any recommendations of the FFC {clause 166(3)}. The FFC will not be required to make such recommendations in each individual instance as might have been the case if the provisions of the interim Constitution in this regard had been repeated in the new Constitution. These provisions accord with the Commission's preliminary recommendations (paragraph 3.6.2 of Document 9).

(d) Local governments may be entitled by legislation to a specifically allocated portion of national and provincial revenue, subject to certain recommendations by the FFC {clause 166(4)}. This provision does not appear to meet the requirements of C P XXVI which confers a constitutional right on local governments to an equitable share of revenue collected nationally. The Commission considered this matter in paragraph 3.6.3 of Document 9 and recommended alternative wording for section 178(3) of the interim Constitution. In order to comply with C P XXVI the Commission recommends that clause 166(4) be amended to read as follows:

"166(4) A local government must be entitled by legislation to an equitable portion of national revenue so as to ensure that it is able to provide basic services and execute the functions allocated to it, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement, taking into account the different categories of local government."

The Commission draws attention to the following comment and accompanying recommendation made in paragraph 3.6.3 of Document 9:

> "The local level of government must therefore be allocated an equitable share of taxes collected nationally, which must be distributed to the various local governments, presumably also in an equitable manner. The process would probably require the determination of the percentage of national revenues to be allocated to local government, the equitable division of that percentage among the provinces, and the final equitable allocation to each local government within a province. The following recommendation in this regard is contained

in the Commission's Preliminary Recommendations on Financial and Fiscal Affairs (Document 7):

As far as the further distribution of revenue to local governments is concerned, the CPG recommends that provinces should institute provincial negotiating forums, comprising representatives of the province and its local governments, to make recommendations on the allocations to each local government. It would be virtually impossible for one central body such as the FFC to deal with the detail of distribution among local authorities."

(e) Clause 166(5) provides that any transfer of responsibilities to a local government by another level (tier) of government (i.e. responsibilities which do not form part of the functional areas assigned to them as local government responsibilities in national and/or provincial legislation), must be accompanied by an allocation of the financial and other resources required for their fulfilment. This is in accordance with the Commission's preliminary recommendation contained in paragraph 3.6.4 of Document 9.

(f) Clause 166(6) compels local governments to conduct all their financial arrangements by way of publicised budgets and to construct such budgets in accordance with national or provincial legislation. Deficit budgets are not permitted {clause 166(7)}. The provisions are important to ensure responsible local government. They do not preclude local governments from borrowing even in respect of current expenditure, but this will presumably be provided for in other legislation. The provisions of the two sub-clauses are acceptable.

(g) Clause 166(8) entitles local government to representation on the FFC, but does not determine the basis of that representation. It will allow for representation on a committee or a plenary chamber of the FFC and consequently does not conflict with the Commission's preliminary recommendations in this regard (paragraph 3.11.9 of Document 7). The provisions are acceptable.

Clause 167 - Elections

2.6 Clause 167 provides as follows for local government elections (provisions combined):

(a) Local governments must be elected democratically in elections which must take place at intervals of not more than five years in terms of applicable legislation - 167(1) and (2).

(b) Members must be elected in accordance with a system of proportional representation, ward representation or both and discrimination against independent candidates is prohibited where ward representation applies - 167(3) and (4). Section 179(2) of the interim Constitution provides for both ward and proportional representation and this was supported by the Commission (paragraph 3.9.1 of Document 9). Although the draft provisions are in accordance with C P VIII and XIV, it is considered more appropriate to incorporate the existing provision for ward and proportional representation in the new Constitution. The Commission recommends that the relevant draft provisions should read as follows:

"167(3) Members of a local government must be elected in accordance with a system of ward representation and proportional representation."

(c) Clauses 167(5) to (6) provide for the qualifications for voters in a local government election. These correspond with provisions in the interim Constitution and are acceptable.

(d) Clause 167(7) prescribes the qualifications for members of a local government. It extends the disqualifications to include members of a provincial legislature as recommended by the Commission (paragraph 3.9.2 of Document 9). However, it still provides for the possibility that employees of a local government may be eligible for such membership {clause 167(7)(d)}. It is quite unacceptable that any person could be both a member and an employee of a local government (paragraph 3.9.2 of Document 9). It is accordingly recommended that the relevant paragraph should read as follows:

"167(7)...

(d) an employee of a local government; and "

3 PROVISIONS OMITTED

The draft text does not provide for -

(a) *The prohibition of encroachment on local government powers, functions and structures to such an extent as to compromise its fundamental status , purpose and character {section 174(4) of the interim Constitution}*. There is no obligation to provide against such encroachment in so far as local governments are concerned - see C P XXII which is applicable to provincial governments only. Nevertheless, the Commission recommended that the new Constitution should contain the following provisions in this regard :-

"165(6) Parliament or a provincial legislature shall not encroach on the powers, functions and structures of local government except in matters and to the extent provided for in legislation referred to in section 164(1)".

The Commission recommends that the above sub-clause be included in the final constitutional text.

(b) *The publication, for comment, of proposed legislation which materially affects the status, powers or functions of local governments or their boundaries, and for giving reasonable opportunity to make written representations in regard thereto*. It is debatable whether provisions of this nature should be made in a national constitution. It would perhaps be more appropriate to provide for such consultation in other legislation. However, the Commission recommended (at paragraph 3.2.5 in Document 9) that the Constitution may provide for consultation with representative local government bodies in forums to be established in terms of national and provincial laws, and also for the publication of proposed legislation as provided for in section 174(5) of the interim Constitution.

(c) *Procedures regarding Council resolutions and executive committees*. This is in accordance with the Commission's recommendation that such matters should be dealt with in other legislation (paragraphs 3.4.2 and 3.5 of Document 9).

(d) *The ex officio representation of traditional leaders on local government councils (section 182 of the interim Constitution).* However, this may still be provided for at a later stage of the

constitution-making process. It should therefore be noted that the Commission recommended that traditional leaders should not have *ex officio* membership on any elected government structure (paragraph 3.9.5 of Document 9).

(e) *A Local Government Commission to represent local government interests at all levels of government as requested by local government interest groups.* The Commission was of the opinion that a special commission for local government matters should not be created at national level. It recommended representation for local government in appropriate committees of the FFC and the proposed Council for Intergovernmental Executive relations (paragraph 3.13 of Document 9 and paragraph 4.4.9 of Document 10). The Commission does not propose any further constitutional provisions in this regard. (see also clause 166(8)).

(f) *Removal of local government as a Schedule 6 (now Schedule 5) functional area as requested by local government interest groups.* Although it has been argued before the Commission that local government should remain as an item in Schedule 5 of the draft text, the matter has not been finalised. The concurrent powers of national and provincial governments in regard to such matters are covered in Chapter 10 and other draft text. However, it may still be necessary to include the item in Schedule 5 to clarify the respective powers of these two levels of government (paragraph 3.15 of Document 9)..

(g) *Auditing of local government accounts and financial statements by their own auditors as requested by local government interest groups has not been provided for.* In terms of clause 111(1)(b) the Auditor-General must audit and report on local government accounts and financial statements. This is in accordance with the Commission's preliminary recommendations (paragraph 3.14 of Document 9).

16 February 1996

ANNEXURE 9

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING TRADITIONAL AUTHORITIES

1. INTRODUCTION

1.1 The Commission made the following preliminary recommendations in regard to constitutional or other statutory provisions to provide for the role of traditional authorities in government (Document 8 dated 18 May 1995):

(a) Provisions to give effect to Constitutional Principle XIII (recognition of the institution, status and role of traditional leadership, according to indigenous law) should be incorporated in the Constitution (paragraph 3.3.1).

(b) Limits should be placed on the number of traditional leaders who will be recognised for official purposes - to be dealt with in a co-ordinating Act of Parliament and provincial laws (paragraph 3.3.2).

(c) If a traditional leader is elected to any legislature (or occupies any other official position) his/her recognition for official purposes should be terminated (as long as he/she remains so elected or holds such office) as it would be contrary to law to allow him/her to occupy two remunerated positions in government (paragraph 3.34 with words added in brackets). This matter has been adequately addressed in clauses 192(f)(f), 192(2) and 193 of the draft text.

(d) The new Constitution should not confer any official roles or powers upon traditional leaders over and above those determined according to indigenous law (paragraph 3.4.2).

(e) Only the following provisions dealing specifically with traditional authorities should be incorporated in the Constitution -

(i) provisions to accommodate CP XIII (see (a) above);

(ii) provision for the establishment/continuation of Houses of Traditional Leaders in the relevant provinces, to be further dealt with in provincial laws; and

(iii) provision for the establishment/continuation of a Council of Traditional Leaders to be further dealt with in an Act of Parliament.

(f) Parliament must retain its power to legislate in regard to traditional authorities and indigenous law to the extent contained in section 126 (2A) and (3) of the interim Constitution (paragraph 3.7.2).

(g) The Commission on the Remuneration of Representatives provided for in section 207 of the interim Constitution should play a role in the determination of remuneration of recognised traditional leaders (paragraph 3.8.1.

(h) The body of indigenous law regarding the institution, status and role of traditional leadership in South Africa needs to be codified as a matter of urgency.

1.2 The role of traditional authorities in local government is dealt with in Recommendations Document 9.

2. DRAFT CONSTITUTIONAL PROVISIONS

2.1 The draft text deals only briefly with traditional authorities and notes that the subject is still under discussion. (A statement in this regard published in the official newsletter of the CA is annexed for your information).

2.2 Because it is so concise, the relevant draft text is quoted in full below:

"RECOGNITION

169. (1) The institution, status and role of traditional authorities, according to indigenous law, are recognised.

(2) A traditional authority which observes a system of indigenous law and which was recognised in terms of legislation immediately before the Constitution took effect, may continue to function subject to any applicable legislation and customs.

(3) The courts must apply indigenous law when that law is applicable, subject to the Constitution and any relevant legislation.

COUNCILS OF TRADITIONAL AUTHORITIES

170. National or provincial legislation may provide for the establishment of councils of traditional authorities to deal with matters of common interest.

(Note: Traditional authorities are still under discussion.)"

3. COMMENTS AND RECOMMENDATIONS

The draft provisions satisfy the Commission's preliminary recommendations in regard to the matters relating to traditional authorities specifically which should be dealt with in the Constitution (see paragraph 1.1(a) above). The Commission is therefore of the opinion that the formulation contained in Chapter 11 of the working draft should be incorporated in the new Constitution. However, to distinguish the institutions representing traditional authorities at national level and at provincial level, the designations used in the interim Constitution should be retained, namely a Council at national level and Houses at provincial level. This can be achieved by adding the words "or houses" after the word "councils" in clause 170. The Commission recommends accordingly.

jv/2/md
96-01-05

16 February 1995

ANNEXURE 10

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PUBLIC ADMINISTRATION

1. INTRODUCTION

1.1 Section 212 (1) of the interim Constitution establishes a single public service for the Republic. The National Defence Force is explicitly excluded from the public service (section 212 (8)). Local government staff are by implication excluded from the public service. Sections 209 and 210 respectively create and stipulate the powers and functions of the Public Service Commission. Section 213 empowers a provincial legislature to provide for a provincial service commission for its province to perform certain functions in respect of public servants employed by the province, subject to the powers of the national Public Service Commission. All provinces have exercised this power to create provincial service commissions.

1.2 The evidence collected regarding the functioning of the public service and the commissions created in terms of the interim Constitution, as well as the occurrence of industrial unrest caused inter alia by dissatisfaction with differences in remuneration between the public service and local government employees, and the lack of local competence to deal effectively with certain urgent staff matters at provincial level, indicate that the continuation of the present dispensation in respect of control over staff matters must be reconsidered.

2. DRAFT CONSTITUTIONAL PROVISIONS AND COMMENTS

2.1 <u>DRAFT TEXT PREPARED BY CA :</u>

BASIC VALUES AND PRINCIPLES GOVERNING PUBLIC ADMINISTRATION :

171. (1) Public administration at all levels of government, including the administration of institutions that are dependent on government

funds or other sources of public money, must be governed by the democratic values and principles enshrined in the Constitution, and the following principles apply :

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human resource management and career-development practices , to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The appointment in the public administration of a number of persons on policy considerations as regulated by national legislation is not precluded.

(3) Legislation regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.

PUBLIC ADMINISTRATION COMMISSION

172. (1) There is a single Public Administration Commission for the Republic, which is independent and must be impartial and regulated by national legislation. Each of the provinces may nominate a representative to be appointed to the Commission.

(2) The object of the Public Administration Commission is to promote the basic values and principles of public administration as prescribed by national legislation.

(3) Provincial representatives in the Public Administration Commission may exercise the powers and perform the functions of the Commission within the provinces, as prescribed by national legislation.

(4) The Public Administration Commission must account to Parliament.

PUBLIC SERVICE

173. (1) Within the public administration there is a public service for the Republic, which must function, and be structured, in terms of (national) legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee or prospective employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

2. COMMISSION'S PRELIMINARY RECOMMENDATIONS

The Commission's preliminary recommendations (Document 6 dated 30 March 1995) include the following:

(a) In order to ensure the fair and equal treatment of all categories of personnel who are paid largely from nationally collected revenues, national norms and standards should be applied in respect of all relevant practices (paragraph 2.1).

(b) The new Constitution should expressly include provincial staff as part of the Public Service (paragraph 2.2).

(c) Broad criteria for the public service should be incorporated into the new Constitution (paragraph 2.3).

(d) The Public Service Commission (PSC) should continue to exercise the powers and functions enumerated in section 210 of the interim Constitution, also in respect of employees of the provincial administrations. Arrangements are necessary to ensure that provinces will also play a significant role in the determination of norms and standards for the public service and are consulted by the PSC in the process (paragraph 2.7).

(e) Persons appointed as members of the PSC must also be acceptable to the broad body of public servants. The ratification of their appointments by Parliament should be considered. The PSC should be accountable to Parliament. (Paragraph 2.8)

(f) The power to legislate on a provincial service commission is ancillary to the general powers in respect of Schedule 6 functional areas and need not be specifically repeated in the new Constitution. (Paragraph 2.10)

(g) The need for provincial service commissions is doubted. Provincial legislatures should reconsider their decisions to create such commissions. If they are to be retained, consideration should be given to establishing these as part-time bodies, and to reducing the number of commissioners. (Paragraph 2.11)

(h) The powers and functions of the PSC contained in section 210 should be retained and exercised in respect of the entire public service to ensure uniform fair treatment of all public servants (Paragraph 2.11)

2.3 PROVINCIAL VIEWS

2.3.1 **Western Cape** - Provincial service commissions should be retained and the new Constitution should make provision for the creation of such a commission by a provincial legislature. As functions are devolved to provinces, the need to deliver services at provincial level increases and consequently the need for a provincial staff commission also increases. The suggestion that the Director General's office could perform the functions for which a provincial service commission is responsible is not supported.

2.3.2 **Northern Cape** - There is a need for a provincial service commission for each province.

2.4 COMMENTS

2.4.1 The draft constitutional text provides for certain principles which will be applicable in public administration at all levels of government, including the administration of institutions that are dependent on government funds or other sources of public money. The text also provides for an independent and impartial Public Administration Commission (PAC), regulated by national legislation, and including a representative of each province, whose object is to promote the basic values and principles as prescribed by national legislation. A public service for the Republic is created within the public administration which must function and be structured in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

2.4.2 The draft text is not altogether clear, nor is the role of the PAC. "Public administration" is a collective term encompassing all the activities performed by public institutions in carrying out government policies. Statements such as contained in 171 and 173, that public administration must be broadly representative of the South African people, that the appointment of certain persons in the public administration is not precluded, and that there is a public service within the public administration are confusing. The differences in meaning between the terms "public administration" and "the public administration" must be

clarified, preferably by using the former to signify the activities/processes of pubic institutions (compare with "management") and using " public administration institutions" instead of " the public administration".

2.4.3 The draft text does not give a clear indication of what the role of the PAC will be in personnel administration in the public service nor what the requirements for appointments as commissioners should be. It is therefore not clear whether the requirements of CP XXIX read with CP XXX.1 in respect of a public service commission have been met in the draft text. The provisions obviously are intended to cover a broader spectrum of public institutions than the public service, but need tighter formulation. The ordinary legislation required by the draft text to give content to the relevant provisions is likely to clarify the uncertainties, but the new Constitution should stipulate more precisely what it intends to establish. The PAC should not be regarded as a body of lesser status and importance than, for instance, the institutions provided for in Chapter 7, e.g. the Auditor-General for whose appointment due regard must be given to specialised knowledge of or experience in auditing, state finances and public administration.

2.4.4 <u>The Commission recommends that -</u>

(a) the Public Administration Commission be dealt with in Chapter 7 and that knowledge of or experience in public administration should be a requirement in the appointment of all members;

(b) section 171 should contain only the basic values and principles governing public administration which will regulate the functioning and activities of public institutions. The term "the public administration" should not be used as it conveys the incorrect impression that there is an institution which can be identified by that name. Clause 171(1)(i) should read "Public administration institutions ....". In sub-clause (3) the word "the" should be deleted where it appears before "public administration". The public service should be provided for as in clause 173, but the words "within the public administration" should be deleted as this phrase once again creates the impression that there is an institution called "the

public administration" and that the public service is part of such an institution; and

(c) Clause 171(2) should be deleted as there is no need to provide for the appointment of such persons in the Constitution. Such appointments should be on a temporary basis and not on the fixed establishment of public institutions.

2.4.5 The position of provincial service commissions needs to be clarified in view of their omission from the draft text and the constitution of the PAC as set out in clause 172. Although the new provisions accord with the CPG's recommendation mentioned in paragraph 2.2(f) above, in terms of CP XVIII.2 the legislative power conferred upon provincial legislatures in section 213 of the interim Constitution may not be substantially diminished. It appears, therefore, that the provincial legislatures may retain their power to create or maintain provincial service commissions, even if it is conferred on them as an ancillary power in terms of clause 158 of the draft text. This may lead to even more confusion and overlapping of functions and powers than exist presently in the provincial administrations in regard to organisational, post establishment and personnel matters. As provincial representatives in the PAC may (in terms of the proposed text) exercise the powers and perform the functions of the PAC within the provinces, they may be responsible for promoting, inter alia, the efficient, economic and effective use of resources, good human resource management and personnel management practices in respect of all public administration institutions in the province (171 (1) (a), (h) and (i)). In order to carry out this task, they may require the assistance of provincial institutions, but it should make the continued existence of provincial service commissions even less necessary than in the present dispensation.

2.4.6 In view of the serious implications that the proposed arrangements for public administration may have for the efficient and effective administration of public institutions, it appears that further investigation may

be required in regard to a control system for public administration that would be practicable, cost-effective and accountable and which could be more clearly described in the new Constitution in order to avoid confusion in the implementation stage. The Commission recommends accordingly.

2.4.7 Further matters in the draft text that need to be noted are :

a) The PAC must account to Parliament (clause 172(4)). Accounting or reporting to other levels of government is not dealt with in the draft text, nor is the accountability of provincial representatives on the PAC clarified.

b) The object of the PAC described in clause 172 (2) refers to the promotion of basic values and principles of public administration as prescribed by national legislation, but does not refer to those prescribed in clause 171 (1). Could this be an oversight?

c) The public service is required by clause 173(1) to "loyally execute the lawful policies of the government of the day". If the public service is to include provincial administrations, some clarity should be given as to which "government of the day's" lawful policies must be executed. It would be intolerable to require provincial employees to execute policies of a national government of the day where they may be in conflict with policies of a particular provincial government.

d) The significance of the word "single" in clause 172(1) is unclear. If its intended significance is to convey that provincial legislatures may not create or maintain provincial service commissions, it may be construed as being in conflict with CP XVIII.2 (see paragraph 2.4.5 above).

e) Clause 172 leaves the constitution of the PAC to be determined by national legislation, except in so far as the provincial representatives are concerned. It also leaves open the question of who will appoint the members of the Commission at national level and

the provincial "representatives". No mention is made of inputs in such appointments by staff associations. While it is appreciated that the Constitution should not deal with too much detail in regard to institutions such as the PAC, the Constitution needs to contain some principles to serve as guidelines for the drafting of the national legislation which will deal with the detail of the constitution of the PAC and its powers and functions. Such principles should at least deal with -

i) the size of the Commission;

ii) the qualifications required for membership;

iii) the method of selection of members, which should vest in Parliament, and in the case of provincial representatives with provincial legislatures, with inputs from recognised staff associations/unions or bargaining councils.

f) The propriety of the inclusion of "provincial representatives" on an independent commission is questionable. If the PAC is to be a representative body, it will also require national "representatives" and perhaps representation of other interested bodies. The PAC should be a highly skilled technical body which is independent of, and not representative of, provincial or national governments or any other interested party.

16 February 1996

ANNEXURE 11

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING AMENDMENTS TO THE CONSTITUTION

1 INTRODUCTION

The Constitutional Principles require that the new Constitution contain specific provisions in regard to amendments which alter the powers, boundaries, functions or institutions of provinces. CP XVIII.4 stipulates as follows: -

"Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed."

The only variable that will affect the procedures for such amendments, is whether the new Constitution will provide for a chamber of Parliament composed of provincial representatives or not. The final wording of the appropriate text will dependant, therefore, on the composition and role of the Senate (second chamber) if it is included in the new Constitution.

2 DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 Draft text prepared by CA

53. The Constitution may be amended by a Bill passed by Parliament if it is adopted by at least two thirds of the members of [both Houses of] Parliament.

The following were identified as issues still to be addressed by the CA:

"What are the conditions for amending the Constitution, if at all? CP XVIII(4) requires that there be no amendment which alters the powers, boundaries, functions or institutions of provinces without the approval of the affected province. There are two views -

(a) A two-thirds majority of Parliament;

(b) A two-thirds majority of Parliament in respect of the general provisions. Absolute entrenchment of the commitment to a democratic form of state and democratic mechanisms. Specific entrenchment of provincial matters by requiring that provinces consent. Judicial entrenchment of the most basic fundamentals of a democratic state by including these in a separate schedule to the Constitution - the Constitutional Court would have to certify whether any amendment is in accordance with these principles."

2.2 Commission's preliminary recommendations

The Commission recommended that provisions similar to section 62 of the interim Constitution, which appears to be in accordance with CP XVIII.4, be incorporated into the new Constitution. (Document 4 of 23 March 1995, paragraph 4.5)

2.3 Provincial views

Western Cape - CP XVIII.4 and sections 61 and 62 of the Constitution should be retained in the new Constitution.

2.4 Comments

2.4.1 It is clear that amendments of the Constitution which alter the powers, boundaries, functions or institutions of provinces require procedures additional to those required for other amendments. The draft provisions in paragraph 2.1 above should therefore be expanded to provide for the additional procedures required.

2.4.2 It should be noted that the passing of Bills affecting the boundaries or the exercise or performance of the powers and functions of provinces should also require special procedures. These should be dealt with in the provisions relating to the passage of Bills in Parliament.

3 RECOMMENDATIONS

3.1 The Commission recommends that the following provisions regarding amendments of the Constitution affecting provincial powers, etc., be incorporated into the new Constitution in addition to the general requirements for constitutional amendments. These recommendations will need to be revisited if the composition and role of a second chamber in the new Constitution differ substantially from the Commission's recommendations regarding a Chamber of Provinces.

3.2 Proposed text:

"...(1) Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces require, in addition to any other procedures specified in the Constitution, approval by a two-thirds majority of the Chamber of Provinces. If the amendment concerns specific provinces only, the approval of the legislature of each of such provinces will also be required.

(2) Before Parliament approves any constitutional amendment regarding the powers, boundaries and functions of any province, it must obtain and consider the views of the provincial legislature of the province.

(3) An amendment of the Constitution which alters the boundaries of a province may only be considered after a procedure prescribed by national legislation has been followed to determine the view of the inhabitants of any area affected by such an amendment.

(4) The name of a province may be amended only upon the request of a two-thirds majority of the members of the legislature of that province."

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ANNEXURE 12

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING SCHEDULE 5: PROVINCIAL FUNCTIONAL AREAS

1 INTRODUCTION

1.1 The allocation of functional areas to provinces goes hand in hand with the allocation of legislative powers or competencies. In the interim Constitution, the allocation of powers is governed by section 126 which requires only one Schedule to list the functional areas in respect of which the provincial legislatures may exercise concurrent legislative powers, viz Schedule 6. The new Constitution may require two schedules, one for the allocation of legislative powers to the provinces concurrently with Parliament in respect of listed functional areas, and another for legislative powers within parameters laid down in so-called framework legislation if adopted. In various versions of the draft constitutional text a single list (Schedule 5), which corresponds to the present Schedule 6, has been annexed for discussion purposes. A list for framework legislation has not been included as the need for it is disputed by some political parties.

1.2 The listing of functional areas can be either specific or general. The assignment of specific functions can provide greater legal certainty in regard to the vesting of legislative powers than the listing of general functional areas. In this regard, the Public Service Commission (PSC) made the following submission:

"The assignment of powers and functions to various levels of government is of fundamental importance in the drafting of the Constitution. The delimitation of powers and functions provides the foundation upon which legislative and executive institutions will rest, and determines the effectiveness and credibility of such institutions. It also determines the relationship, and thus the balance, between levels of government:

Some basic considerations:

(a) Functions differ from one another; assignment cannot be done according to a set pattern.

(b) Many functions encompass more than one level of government. The key to a sound assignment of powers and functions is to determine which aspects of a function belong on each level of government.

(c) When considering the assignment of powers and functions, all three levels of government should be looked at simultaneously.

(d) Powers and functions (or aspects thereof) to be exercised and performed at the various levels of government, should be defined as clearly as possible. Grey areas should be kept to a minimum."

1.3 The PSC's suggestions for the allocation of functions to the national and provincial levels of government are contained in Theme Committee 3 document dated 2 June 1994. While such an assignment of functions would provide greater clarity in regard to the respective powers of the two levels of government, problems might nevertheless arise, particularly in respect of any functions which may inadvertently have been left out or come into existence after the adoption of the Constitution. The tendency in constitutions is therefore to list only general functional areas. This has indeed been the case in South Africa, at and after the adoption of the South Africa Act, 1909. The Commission is consequently of the opinion that the listing of functional areas in the Schedules should be in general terms and not as specific as proposed by the PSC. The PSC document is, however, a useful guide for determining the matters within a broad functional area which could be dealt with by national or provincial governments.

2 ALLOCATION OF FUNCTIONAL AREAS

2.1 The Commission proposes that the following functional areas be listed in Schedule 5. The reasons for the allocations are discussed in the following paragraphs.

NOTE - NEW FUNCTIONAL AREAS INCLUDED IN THE SCHEDULE AND AMENDMENTS OF PRESENT SCHEDULE 6 AREAS ARE HIGHLIGHTED. REASONS FOR THE INCLUSION OR AMENDMENT OF ITEMS ARE DISCUSSED AT 2.2 BELOW.

Abattoirs
Agriculture
Animal control and diseases
Airports, other than international and national airports
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
*** **Finance and fiscal matters**
*** **Forestry**
Health services
Housing
Indigenous law and customary law
Language policy and the regulation of the use of official languages within a province, subject to section 6.
*** Local government **matters**
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 13
Provincial public media (**to be clearly defined**)
Public transport
*** **Public works**
*** Regional **land administration**, planning and development, **excluding land registration**
Road traffic regulation
*** Roads, excluding national roads
Soil conservation
Sport and recreation
*** Tourism, **excluding the international marketing of tourism**
Trade and industrial promotion
Traditional authorities
Urban and rural development
*** Water affairs, subject to national regulation
Welfare services

ADDITIONAL FUNCTIONAL AREAS REQUESTED BY PROVINCES

Conservation
Economic Affairs
Justice
Mineral rights

Prisons
Publications control
Reconstruction and development
Tertiary education

2.2 Discussion of functional areas

2.2.1 **Abattoirs** - This functional area could be included under the general functional area of Agriculture but is sufficiently important to warrant separate mention. The regulation of abattoirs is necessary to ensure that practices are observed and inspections carried out to prevent the spread of diseases carried by slaughter animals to humans and other animals. Norms and standards thus need to be uniformly imposed and controlled. The national legislature must therefore retain its power to determine applicable norms and standards, while provincial legislatures may in their provinces regulate the application of such norms and standards. This relationship between national and provincial legislative powers would satisfy concerns previously expressed by the national Department of Agriculture. The Commission consequently recommends that abattoirs be included in Schedule 5.

2.2.2 **Agriculture** - The word has a wide meaning, encompassing all matters relating to the cultivating of the soil, including the gathering in of the crops and the rearing of livestock (*Shorter Oxford English Dictionary*). In administrative practice the meaning includes a number of related matters, e.g. marketing of agricultural products, international agreements on agriculture, etc. It is obvious from the PSC submission that the national government needs to deal with a variety of agricultural matters in the national interest (TC 3 document of 2 June 1994, page 1), and that the provincial functions in this area need to be subject to norms and standards and regulations prescribed by the national government (TC 3 document page 15). This functional area should therefore be included in Schedule 5.

2.2.3 **Airports, other than international and national airports** - This functional area encompasses the regulation of provincial and local government airports. The regulation of safety aspects relating to air travel will remain a national government function. It is considered appropriate that the regulation of the relevant airports be allocated as a provincial legislative power, subject only to

general principles and standards provided for in national legislation. The Commission consequently recommends that the functional area be listed in Schedule 5.

2.2.4 **Animal control and diseases** - The same arguments advanced under abattoirs above apply to this functional area. Animals move or are moved across provincial and international boundaries and may spread some of the most highly infectious or erosive diseases known. Norms and standards for the control of animal movements and diseases therefore need to be dealt with at national level, while provinces may be responsible for the application of such norms and standards. The Commission therefore recommends that the item "animal control and diseases" be included in the list of provincial legislative powers.

2.2.5 **Casinos, racing, gambling and wagering** - The regulation of gambling has been a provincial competence for a considerable period of time. It is appropriate that provinces be empowered to perform this function subject only to general principles and standards which the national government may wish to prescribe in order to establish uniformity in all provinces. The Commission recommends that this functional area be listed in Schedule 5.

2.2.6 **Consumer protection** - This function forms part of the economic development functional area which has been assigned to provinces in a fragmented way. Other components will be dealt with below. Consumer protection is a function which could be undertaken by provinces with a minimum of oversight from national government. It is therefore appropriate that it be listed in Schedule 5 and the Commission recommends accordingly.

2.2.7 **Cultural affairs** - The contents of the function are listed on page 16 of TC 3 document dated 2 June 1994. The national government needs to have no more powers in regard to these function than, if necessary, to state general principles and/or standards. The Commission therefore recommends that cultural affairs be listed as a functional area in Schedule 5.

2.2.8 **Education at all levels, excluding university and technikon education** - Education, excluding tertiary education, has been a provincial function since Unification. The requirement of CP XI that diversity of language and culture should be promoted, as well as of

CP XXI.1 in regard to the empowerment of the level of government where decisions in regard to the rendering of services can be taken most effectively, underscores the allocation of this function to the provincial level. The national government needs only to prescribe the general principles which should guide provinces in the execution of their powers, and the minimum standards which should apply in order to ensure that a uniform quality and standard of education is provided in all provinces. The Commission is consequently of the opinion that this functional area should be listed in Schedule 5.

2.2.9 **Environment** - The *Shorter Oxford English Dictionary* describes the word "environment" as meaning "that which environs; especially the conditions or influences under which any person or thing lives or is developed". In administrative terms the functional area probably includes generally the institution and application of measures to prevent the impairment and promote the enhancement of the conditions or influences under which persons or things live. The Ministry of Environmental Affairs and Tourism has made a submission in which the matters falling within the functional areas are classified as -

* matters of global impact

* matters of continental importance

* matters of national importance

* matters of regional importance

* matters of local importance

It is clear, therefore, that the national government should be vested with the power to legislate in respect of at least matters of national or higher levels of importance. The PSC's submission supports this view (TC 3 document of 2 June 1994, page 5). However, provincial governments should, within their provinces, be able to deal with environmental matters that are of regional importance (TC 3 document, page 17). The Commission consequently recommends that "environment" be listed as a functional area in Schedule 5.

2.2.10 **Finance and fiscal matters** - Powers to deal with finance and fiscal matters at provincial level are provided for in the Constitution. For the sake of completeness, however, the functional area should be included Schedule 5.

2.2.11 **Forestry** - This is a new functional area recommended for inclusion in Schedule 5. Forests are territorially linked to provinces and need not be completely regulated or managed by a national department. However, it should be noted that the Ministry of Water Affairs and Forestry has argued that the legislative powers in regard to forestry should remain exclusively at national government level (TC 3 document of 21 June 1995, pages 136-143). The reasons advanced are mainly that -

* the long term nature of the exploitation of commercial and indigenous forests necessitates a national policy to ensure stability in the sector;

* training in silviculture on a national basis and a national approach to research and disease and pest control are indicated, and

* the impact of forestry on water and on the catchment areas requires that exclusive jurisdiction over forestry is exercised at national level.

The arguments are not persuasive. If concurrent legislative powers in respect of forestry are vested in provinces, the national government would still be able to make laws as provided for in Chapter 9 of the draft text. The Ministry would also be able to control afforestation which might negatively affect water supply or catchment areas by exercising either the concurrent legislative powers in respect of forestry, or the exclusive powers in respect of water affairs. The present situation therefore cannot be equated with shortcomings which may have existed under the old dispensation with the TBVC and self-governing territories. It is illogical that provinces should be denied a role in the management and regulation of an industry or resource which is territorially based and which could be effectively managed at provincial level, subject to overall policy and norms and standards contained in national laws. The Commission recommends that forestry be listed as a functional area in Schedule 5.

2.2.12 **Health services** - This function relates to services only, such as the rendering of health services in hospitals and clinics, district surgeon services, etc. (See list of functions in TC 3 document of 2 June 1994, page 17). Provinces may therefore legislate only in respect of such services. There appears to be no need for the national government to have full concurrent legislative powers in respect of the rendering of those services. National laws should, where necessary, provide only general guidelines in respect thereof and prescribe minimum standards for the rendering of the services. The Commission consequently recommends that health services be listed as a functional area in Schedule 5.

2.2.13 **Housing** - The contents of this function at national level and provincial level are listed at pages 8 and 18 respectively of the TC 3 document dated 2 June 1994. There appears to be no reason why the national government should be involved in the actual provision of housing at provincial level, other than to lay down the general principles which should be applied when formulating provincial housing laws and the standard of housing which should be provided by the State or with State aid. The Commission recommends that housing be included in Schedule 5.

2.2.14 **Indigenous law and customary law** - CP XIII stipulates that indigenous law shall be recognised and applied by the courts subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith. By its nature, indigenous law is localised and does not normally apply beyond the boundaries of traditional land of the affected communities. However, some ethnic groups, such as the Zulu, have codified indigenous laws which are applicable to all communities living on tribal land, e.g. in KwaZulu/Natal. In a few cases tribal land is situated in more than one province. Indigenous matters may therefore in most cases require legislation which affects a single province only, but in some cases a national law which will be applicable in more than one province or in all provinces may be required. The interim Constitution offers a guide as to how the powers to legislate in regard to indigenous law should be allocated. Section 183 provides for the creation of provincial Houses of Traditional leaders which will comment on any provincial Bill pertaining to *inter alia* traditional authorities and indigenous law. However, a Council of Traditional leaders is created by section 184 to advise the national government in regard to any matter pertaining *inter alia* to traditional authorities and indigenous law. It

is clearly intended that Parliament should be vested with concurrent powers to legislate on such matters subject to the limitations prescribed in Section 126(3). No reasons have been presented to the Commission why the present allocation should be changed in the new Constitution. The Commission consequently recommends that indigenous law and customary law be included in Schedule 5.

2.2.15 **Language policy and the regulation of the use of official language within a province, subject to section 6** - Section 3 of the interim Constitution deals fairly extensively with the use, status and protection of languages. This leaves limited scope for provincial legislatures when making laws regarding languages as their legislative powers are subject to that section. Section 6 of the new Constitution will also contain provisions relating to languages. The powers of provincial legislatures would therefore remain subject to those provisions in the new Constitution. There appears to be no further need for the national government to legislate in respect of language matters at provincial level. The Commission consequently recommends that this functional area be listed in Schedule 5.

2.2.16 **Local government matters** - It has been suggested that "local government" should not be listed as a functional area because it is a level of government and should not be regarded as a function of any other level of government. This is probably more of an emotional argument than a practical one as the listing of local government as a functional area is no more than an authorisation of provincial governments to legislate in respect of local government matters. There are no practical reasons for its removal from a Schedule of functional areas for legislative purposes. The Commission dealt with the matter in paragraph 2.9 of its preliminary recommendations in Document 9 of 25 May 1995. While it was of the opinion that it would be more appropriate to provide for the relevant provincial and national powers in the chapter of the new Constitution dealing with local government, this would add to the bulk of the Constitution as it would have to repeat appropriate measures for the allocation of powers to national and provincial levels. After further consideration, the Commission recommends that the functional area be described as "Local government matters" and included in Schedule 5. The suggested contents of the functional area are contained in TC 3 document of 2 June 1994 at page 18.

2.2.17 **Markets and pounds** - These are functions which are normally executed by local governments. Whereas provinces may legitimately require the power to legislate in regard to such matters, this is an area in which national government intervention should at most be very limited. The listing of markets and pounds as a Schedule 5 functional area is recommended.

2.2.18 **Nature conservation, excluding national parks, national botanical gardens and marine resources** - This functional area emphasises the conservation aspects of that which is natural in the environment as contrasted with the features and products of human civilisation. It is therefore a distinct part of the environmental protection functional area. It has been a provincial function for a considerable time and requires very little general oversight by the national government except in the form of pronouncements of general principles and standards, where required. (See Ministry of Environmental Affairs and Tourism's comments on pages 17-20 Theme Committee 3 document dated 21 June 1995). The Commission accordingly recommends that nature conservation be listed as a functional area in Schedule 5.

The exclusion from provincial control of national parks, national botanical gardens and marine resources which are situated within the geographical areas of the provinces, has been a source of dispute over a long period of time. It is not considered prudent to try to resolve the disputes before the finalisation of the new Constitution. As proposed by the Ministry, the resolution of these disputes should preferably be negotiated by the parties concerned.

2.2.19 **Police (subject to the provisions of Chapter 13)** - Powers and functions in respect of policing are obviously of significant importance to the provinces. The allocation of powers and functions to the provinces in the new Constitution shall, in compliance with CP XVIII.2, not be substantially less than or substantially inferior to those provided for in the interim Constitution. Their present powers and functions are limited by the provisions contained in Chapter 14 of the interim Constitution. Section 217(3) specifically permits provincial legislatures to pass laws in regard to police matters which are not to be inconsistent with national legislation regarding the functions of the Police Service. Provincial laws may not permit lower standards of

performance of the functions than those provided for in an Act of Parliament or detract from the rights which citizens have under an Act of Parliament. The Commission has not received any comments from provinces which would justify an increase of the present powers and functions in respect of the Police Service. Chapter 13 of the draft constitutional text provides for police matters. It is therefore considered appropriate to include the police functional area in Schedule 5, subject to the relevant provisions contained in the Constitution. This will ensure that the status quo in respect of the allocation of the relevant powers and functions of the national government and the provincial governments is maintained in compliance with CP XVIII.2. The Commission recommends accordingly.

2.2.20 **Provincial public media** - It is not clear whether the interim Constitution grants the power to a province to regulate all public media (newspapers and other publications, radio and television broadcasting etc.) within the province (see also PSC comment in TC 3 document of 2 June 1994, page 7). In view of the difficulty of confining access to media to the geographical area of a particular province, and the problems which may arise in respect of the distribution and possession of publications and licensing of publications, and of television and radio broadcasting stations by provinces, the Commission has doubts whether this matter should remain in the list of provincial functional areas as it is presently formulated. The Commission is also of the opinion that provinces should not be in a position to exercise any powers of censorship or publications control. The Commission consequently recommends that while this functional area should be retained in Schedule 5, it must be defined more clearly.

2.2.21 **Public transport** - This functional area relates to the conveyance of persons and goods within the provincial boundaries only. Conveyance across provincial and national boundaries requires national regulation. Various aspects of the functional area are too interdependent to be regulated only by provinces, even in respect of public transport within a province. The Commission recommends that this functional area be included in Schedule 5.

2.2.22 **Public Works** - This is an ancillary function of provinces. However, the Commission is of the opinion that it should be included in Schedule 5 for the sake of completeness.

2.2.23 **Regional land administration planning and development, excluding land registration** - This formulation of the functional area includes the element of regional land administration which is not included in the description in Schedule 6 of the interim Constitution. The PSC has included relevant aspects of the land administration function in its suggested allocation of functions to provincial governments (TC 3 document of 2 June 1994, page 18). However, the Department of Land Affairs is of the opinion that all land-related legislative powers as well as policy allocation, disposal and administrative powers should be retained at national level, and that administrative powers and functions be delegated to provincial (and local) level (TC 3 document of 21 June 1995, page 70). This appears to be an over-centralising of control over those land matters which could be dealt with effectively at provincial level. It is inconceivable that provinces should have no more power over land matters than those delegated to them by a national department, even though the national government will have a strong interest in matters such as the allocation of state land to ensure that land reform measures are successfully implemented. The Commission recommends that this functional area be included in Schedule 5.

2.2.24 **Road traffic regulation** - While it is considered appropriate that provincial governments together with local governments should be responsible for the enforcement of *inter alia* road traffic measures, there is a need for uniformity across the nation in those regulations because of the constant flow of traffic across provincial boundaries. The inclusion of this functional area in Schedule 5 is recommended.

2.2.25 **Roads, excluding national roads** - The provincial roads function is obviously primarily a provincial concern and needs to be exercised by provincial governments at their discretion. The national government should not be involved in this matter, except if necessary to lay down general principles and standards. The functional area is therefore suitable for inclusion in Schedule 5 and the Commission recommends accordingly.

2.2.26 **Soil conservation** - The Ministry of Agriculture submits that soil conservation has national implications that are often more important than provincial ones. No reasons or facts supporting this statement have been provided. It is well known that bad farming methods, overstocking, erection of structures, etc. can cause

serious problems such as soil erosion, desert encroachment, weed infestation, etc. They can also have a negative effect on water resources. There is certainly a need for principles and standards for preventing and remedying soil erosion to be established nationally and to be applied uniformly in all provinces. However, that should not preclude provinces from dealing with the problem within their own geographical areas. The centralisation of this function, which is intimately connected with other agricultural functions such as extension services, would be confusing. The Commission consequently recommends that soil conservation remains a functional area on which provinces may legislate and that it be listed in Schedule 5.

2.2.27 **Sport and recreation** - The promotion of sport and physical recreation at provincial level requires very little national government intervention, and then only to ensure co-ordination of the activities of the two levels of government. The functional area should therefore be included in Schedule 5 and the Commission recommends accordingly.

2.2.28 **Tourism** - The views regarding the allocation of the tourism function to the various levels of government expressed by the SA Tourism Board and the Southern Africa Tourism and Safari Association are contained in pages 112 to 117 of TC 3 document dated 21 June 1995. The concern expressed is that the present description of the functional area may prompt provinces to also undertake international tourism marketing. This could lead to duplication nine times over of what is essentially a national responsibility requiring special skills and should not be fragmented. Domestic marketing, on the other hand, could be dealt with effectively by provincial and local governments.

The arguments are persuasive and the present description of the functional area needs to be adapted but without substantially reducing the powers and functions of provinces. The Commission consequently recommends that the description of the functional area should read "Tourism, excluding the international marketing of tourism" and that it be included in Schedule 5.

2.2.29 **Trade and industrial promotion** - This is a functional area which could be carried out by provinces with a minimum of oversight by the national government. The Commission recommends that it be included in Schedule 5.

2.2.30 **Traditional authorities** - This functional area is closely related to the functions pertaining to indigenous law discussed in paragraph 2.2.4 above and similar reasons exist for its inclusion in Schedule 5. The Commission recommends accordingly.

2.2.31 **Urban and rural development** - This functional area will allow provinces to give the necessary attention to infrastructure and socio-economic development in both urban and rural areas. However, the national government will, in the national interest, have to guide and monitor the relevant activities of the various provinces. It will therefore be appropriate to include the functional area in Schedule 5 where it may be subject to principles and standards laid down by national laws. The Commission recommends accordingly.

2.2.32 **Welfare services** - Similar considerations to those dealt with under health services in paragraph 2.2.10 above apply. The suggested allocation of functions to the national and provincial governments is listed on pages 14 and 21 respectively of TC 3 document dated 2 June 1994. The Commission recommends that welfare services be listed as a functional area in Schedule 5.

2.2.33 **Water Affairs** - While provincial governments need to exercise certain competencies in regard to the provision of water to communities and industries within their provinces, the Commission agrees with the view of the Department of Water Affairs (TC 3 document of 21 June 1995, pages 118 to 135) that the conservation of water resources and the management and utilisation of this scarce resource need to be regulated at national government level in the national interest. This can be achieved by using the concurrent legislative power of the national government. However, an alternative would be for national legislation on water affairs to delegate certain functions to the provincial governments to enable them to carry out their responsibilities effectively. The Commission recommends the inclusion of this functional area in

Schedule 5 to emphasise the need for the assignment of some real powers in respect of Water Affairs to provinces.

2.3 Discussion of further functional areas requested by certain provincial governments

2.3.1 **Economic Affairs** - It is not clear what the term "economic affairs" is intended to cover. The proposed Schedule contains a number of functions with economic dimensions such as airports, casinos, consumer protection, markets and pounds, tourism, trade and industrial promotion, etc. In the absence of clarity as to which further economic functions are desired by the particular province which requested "economic affairs" as a functional area, the Commission cannot support the inclusion of such an imprecise area in the Schedule.

2.3.2 **Conservation** - Nature conservation and the conservation of objects of cultural value have been dealt with under the appropriate headings above. There appears to be no reasons for the inclusion of such a general and imprecise functional area in the Schedule.

2.3.3 **Justice** - The Commission cannot support suggestions that the legislative powers in respect of justice be fragmented to allow provinces to establish their own courts or even their own systems of justice, as this will not be in the national interest.

2.3.4 **Mineral Rights** - The reasons advanced by the Department of Mineral and Energy Affairs (TC 3 document of 21 June 1995, pages 82 to 86) why mineral rights should remain a national functional area are unconvincing, being based on the establishment of national norms and standards (which would in any case remain a national function in terms of section 126(3)), and on the utilisation of scarce and specialised manpower (which applies equally to many other functional areas). It could, nevertheless, be argued that minerals are important national assets which need to be regulated nationally in order to benefit the Republic as a whole. The exploitation and development of such rights inevitably benefits the province in whose territory the minerals are located, by way of the resulting economic development. However, the income generated directly by the rights should benefit the country as a

whole. The Commission therefore recommends that the regulation of mineral rights remain an exclusive national competence.

2.3.5 **Prisons (Correctional services)** - Prisons are integral parts of the system of justice. As it will not be in the national interest to fragment the justice system, it follows that the prisons functions should not be fragmented either.

2.3.6 **Publications control** - The Commission is of the opinion that it would be inappropriate to empower provinces to legislate in regard to the control of publications. Because publications are constantly transported across provincial boundaries, it would be almost impossible to enforce different publication control measures. Publications control may furthermore infringe upon the constitutional right of freedom of speech and therefore needs to be dealt with in a uniform manner at national government level. The Commission does not support the inclusion of publications control in any Schedule.

2.3.7 **Reconstruction and development programme at provincial level** - The programme itself is not a separate functional area. As the name indicates, it is a programme which may include activities encompassing a number of functional areas. It should therefore not be listed as a functional area as such.

2.3.8 **Tertiary education** - In the absence of cogent reasons being advanced in support of this being a provincial competence, the Commission is of the opinion that tertiary education should continue to be a national functional area because of the need for national human resource development, the maintenance of norms and standards, the rationalisation of scarce resources and the better maintenance of academic freedom in relation to a single level of government. Tertiary institutions generally draw their clients from areas wider than the provinces in which they are located and therefore cannot be regarded as exclusively provincial institutions. The Commission recommends that tertiary education remain an exclusive national functional area.

16 February 1996

ANNEXURE 13

COMMISSION ON PROVINCIAL GOVERNMENT

INTERGOVERNMENTAL EXECUTIVE RELATIONS: SUGGESTED DRAFT LEGISLATION FOR A COUNCIL FOR INTERGOVERNMENTAL EXECUTIVE RELATIONS

If the Commission's recommendation (see 2.8) concerning the establishment of a Council for Intergovernmental Relations is accepted, it offers the following suggested draft text as a basis for the national legislation needed to amplify the constitutional provision :

"Establishment of Council for Intergovernmental Executive Relations

1.(1) There is a Council for Intergovernmental Executive Relations consisting of

(a) the nine Premiers of the provinces and
(b) not more than nine Ministers appointed by the President.

(2) When it is not possible for a Premier or Minister appointed in terms of subsection (1)(b) to attend any meeting of the Council-

(a) the Premier may nominate a member of the Executive Council of the Province;

(b) the President may nominate another Minister

to represent his or /her at such meeting.

(3) The membership of a member of the Council shall terminate when he or she vacates the office which entitles him or her to such membership or, in the case of a Minister, if the President revokes his or her nomination.

(4) The Council must appoint one of its members to be the Chairperson and one member to be the Deputy Chairperson for a period determined by the Council.

(5) (a) If the Chairperson is absent or unable to perform his or her functions as Chairperson, the Deputy Chairperson must act as Chairperson, and if both the Chairperson and the Deputy Chairperson are absent or unable to perform the functions of the Chairperson, the Council must elect another member to act as Chairperson.

(b) While acting as Chairperson the Deputy Chairperson or such member may exercise the powers and must perform the functions of the Chairperson.

Objects and functions of the Council

2.(1) The object of the Council is to facilitate effective co-operation, co-ordination and consultation in executive matters among all levels of government and between governments on the same level.

(2) The Council shall be competent -

(a) to monitor the operation of intergovernmental executive relations among all levels of government and between government at the same level;

(b) to issue directives regarding the establishment, maintenance and improvement of a system of intergovernmental executive relations;

(c) to facilitate the development and co-ordination of policy in matters of mutual interest;

(d) to mediate or to facilitate mediation in disputes between national and provincial and between provincial executive institutions in regard to their executive powers and functions;

(e) to provide assistance in regard to any matter relating to intergovernmental relations between a provincial government and local governments or between local governments in a province at the request of any such government;

(f) to monitor and facilitate the development of the capacity of the provinces' administrative structures to exercise their powers and perform their functions efficiently and effectively;

(g) to perform any function which it considers to be relevant or ancillary to its functions; and

(h) to publish reports from time to time on its activities and matters which have engaged its attention and to table an Annual Report in Parliament and the provincial legislatures.

Meetings of Council

3.(1) The first meeting of the Council must be held within 30 days of establishment at a time and place to be determined by the President. Subsequent meetings shall be held at a time and place determined by the Council or, if authorised thereto by the Council, by the Chairperson.

(2) A quorum for a meeting of the Council shall be not less than two-thirds of all its members.

(3) All the decisions of the Council must be recorded.

Committees

4.(1) The Council must from among its members or from persons appointed in terms of section 4(2) establish a Committee to deal with local government relations and may establish such other committees as it may deem necessary for the execution of its functions.

(2) The Council may appoint persons to serve as members of a committee established in terms of subsection (1) and such members are entitled to take part in the proceedings and to vote at any meeting of such committee. At the invitation of the Council a representative local government institution for each province is entitled to nominate one person for appointment as a member of a committee established to deal with local government matters.

(3) The Council must designate one of the members of a committee as chairperson thereof, and if any such chairperson is absent from a meeting of the committee the members present must elect one from among their number to act as chairperson.

(4) The Council may, subject to such directions as it may issue from time to time, delegate any power granted to it by or under section 2 to such a committee.

(5) The Council may not be divested of a power so delegated and the performance of a function so authorised, and may amend or rescind any decision of a committee.

Co-option of persons to committees

5.(1) A committee may co-opt any person to serve on it or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with such matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

Remuneration of members of Committees and other persons

6. Members of committees established in terms of section 4 and persons referred to in section 5 who are not in the employment of the state or a local government, shall be paid such remuneration and allowances as the Minister responsible for national financial affairs may determine.

Power to appoint staff and manage its affairs

7.(1) The Council may appoint such staff as it may deem necessary for the efficient performance of its functions and administration, and may, after consultation with the Public Service Commission, determine the remuneration and conditions of service of staff members who are not public servant seconded to the service of the Council.

(2) The Council shall be entitled to incur expenditure during the exercise of its functions which shall be paid from money set aside by Parliament.

Rules and procedures

8. The Council may determine rules and procedures for the conduct of its meetings and activities and for the conduct of the meetings and activities of committees established in terms of section 4."