CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE

SUBMISSIONS

RECEIVED AS AT
15TH FEBRUARY 1996

VOLUME 16

PART 1

POLITICAL PARTIES

CONSTITUTIONAL ASSEMBLY

SUBMISSION RECEIVED FROM POLITICAL PARTIES AS AT 15TH FEBRUARY 1996

AFRICAN CHRISTIAN DEMOCRATIC PARTY
(ACDP)

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15th February 1996

The Executive Director
Constitutional Assembly
P O Box 15
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ATTENTION:MR HASSIEM EBRAHIM

Dear Sir

RE: ACDP SUBMISSION:
"THE PREAMBLE" OF THE NEW SOUTH AFRICAN CONSTITUTION

Please find enclosed our submission regarding the Preamble of the new South African Constitution.

Thank you for your consideration of this matter.

Yours faithfully

REV. K. R. MESHOE (MP)
African Christian Democratic Party

Preamble

As a starting point it needs to be pointed out that *"[p]reambles are included in Constitutions for symbolic and ideological purposes. One of the functions of Constitutions is to legitimise the state and government, and preambles, together with national symbols such as the flag, motto and anthem, are prominent in this objective. Reference is invariably made to the Almighty guidance bestowed on the state in the past, and to the benevolent principles by which it will be governed in the future."*

Thus, writes Boulle *et.al.* (**Constitutional and Administrative Law**) Cape Town: Juta 1989 on p58). He continues *". . .[W]hile Constitutions are a form of statute law, they do more than just define rights and prescribe procedures, but also, in their preambles, espouse values and principles. . ."*

It is thus clear that aspects such as the distribution, exercise and control of authority and accession to and succession of the power bearers, with which Constitutions are concerned, form as it were, the *skeleton* of the Constitutional body. The *lifeblood* that animates this body, namely values and principles, is partly to be found in the Preamble.

While this section of a Constitution may thus be of lesser legal importance where the interpretation of Constitutions is concerned, it is undoubtedly important to the inhabitants of a nation as it reflects the hopes, aspirations and value beliefs and it acknowledges the diverse nature of a national culture.

The *South African Law Commission* (**Report on Constitutional models,** Pretoria: 1991, from page 366) sums up this aspect as follows:

". . . the preamble, though of little value in juridical terms, nevertheless plays an important role as a practical reflection of the aspirations of a country's population."

The reflection mentioned undoubtedly includes a reference to a belief system for the vast majority of all South Africans and, as such, a reference to the guidance of the Almighty God is definitely not inappropriate while it will simultaneously reflect

the diverse aspects of religion that are so inherent in and inseparable from the national character.

The ACDP, therefore, desires that wording similar to the following be introduced into the Preamble of the new Constitution to form a focus point for the role that a belief system such as is adhered to by the vast majority of all South Africans has to play in the process of nation-building that takes due cognisance of the vital role that these aspects play in aspects of cultural and national life:

Option 1:

WHEREAS the People of South Africa

affirm that the Nation of South Africa shall be founded upon principles which acknowledge the supremacy of God, faith in human rights and fundamental freedoms, the position of the family in a society of free men and women, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator, including the right to enjoy and defend life and liberty, to acquire, possess, and protect property, and to pursue and obtain happiness and safety;

recognise that men and women remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.

While the abovementioned wording constitutes the most favoured wording for inclusion into the Preamble from the ACDP's perspective, we are prepared to discuss the following additional options in order of preference:

Option 2:

WHEREAS South Africa under the authority of God, is a sovereign and democratic constitutional state;

WHEREAS recognition of the inherent dignity of the individual, respect for fundamental human rights and freedoms, and the central position of the family as the bastion essential for a stable society, are enshrined within the constitution; and

WHEREAS such rights as constituted involve the individual responsibilities, and include the rights to life, freedom to pursue personal development and contentment, justice, faith and worship, equality of economic opportunity and unrestrained movement, regardless of colour, creed or race; and

WHEREAS the government is governed by the democratic principle of being a government for the people by the people by virtue of its service to the people and are elected representatives of the people, operating under a sovereign Constitution and a free and independent judiciary; and

We, therefore, adopt this constitution as the fundamental law of our sovereign, independent South Africa.

Option 3:

That the current phraseology of ***"In humble submission to Almighty God"***, as contained in the Interim Constitution be retained.

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27 September 1995

DRAFT COMPETENCIES

FURTHER SUBMISSION BY THE DEMOCRATIC PARTY

1. Legislative authority of the Republic

1.1 The legislative authority of the Republic vests in Parliament which shall have power to make laws for the Republic in accordance with the Constitution.

1.2 Parliament shall have the competence to legislate on any matter except those matters which, subject to section 2.2, legislative competence can be exercised exclusively by the provincial legislatures.

2. Legislative authority of the Provinces

2.1 The legislative authority of a province vests in its provincial legislature which shall have power to make laws in its province in accordance with this Constitution.

2.2 A provincial legislature shall have the exclusive competence to legislate on any matter which falls within the functional areas specified in Schedule 1 except and to the extent that Parliament makes laws that are necessary for:

- the establishment of essential national or minimum standards required for the rendering of services;
- the maintenance of economic unity;
- the maintenance of national security;
- the prevention of unreasonable action taken by one province which is materially prejudicial to the interests of another province or the nation as a whole;
- the attainment of the uniformity across the nation that is required for a particular function to be performed effectively.

3. Executive Authority of the Republic

The Executive Authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President and the Cabinet who shall perform his or her powers and functions subject to and in accordance with this Constitution.

4. Executive Authority of Provinces

4.1 The Executive Authority of a Province shall vest in the Premier of the Province who shall execute and perform his or her powers and functions subject to and in accordance with this Constitution.

4.2 A province shall have executive authority over all functional areas in respect of which it has legislative competence, matters assigned to it under section (x) or any law, and matters delegated to it by or under any law.

4. Notes

4.1 As so-called "residual" powers have been allocated to the national government, the need for "framework" legislation falls away.

4.2 A mechanism for phasing in of provincial legislative and executive competencies must be included in the constitution.

Colin Eglin
for the Democratic Party

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FREEDOM FRONT: PROPOSAL FOR AFRIKANER SELF-DETERMINATION

JUSTIFICATION FOR AFRIKANER SELF-DETERMINATION

1. Several presentations have been made to the Constitutional Assembly regarding the international acceptability of and the justification for Afrikaner self-determination. Some of the important presentations are:

1.1 The papers read by prof. A. Venter, prof. John Dugard, prof. A. Raath and dr. T.Maluwa during the in-house workshop on self-determination on 26 June 1995.

1.2 The First Interim Report of the Volkstaat Council dated May, 1995 and

1.3 The Preliminary Freedom Front Submission on self-determination as presented to Theme Committee 4.

1.4 Submissions made to the ANC leadership from time to time.

2. The granting of self-determination to the Afrikaner people should be evaluated from the South African perspective and the Constitutional Assembly should be guided by:

2.1 agreements made before the April 1994 elections,

2.2 the Interim Constitution,

2.3 the submissions made to the ANC by the Freedom Front and

2.4 the reports of the Volkstaat Council (VSR). Naturally the FF may not agree with all the recommendations of the VSR.

AGREEMENTS REACHED BEFORE APRIL 1994 ELECTION

3. In order to achieve Afrikaner self-determination peacefully, general Viljoen, initially on behalf of the AVF and subsequently as leader of the FF, negotiated the following agreements with the ANC and the NP:

3.1 Constitutional Principle XXXIV as incorporated into the Interim Constitution.

3.2 the constitutional provisions for the Volkstaat Council (VSR). This was incorporated into the Interim Constitution as Chapter 11A, Section 184A and B.

3.3 The Accord of 23 April 1994, attached as Appendix A.

AFRIKANER SELF-DETERMINATION: CONDITIONS

4. The above mentioned agreements stipulate that the following conditions must be met before self-determination could be granted:

4.1 "Substantial proven support within the community concerned for such a form of self-determination." The ANC and the NP agreed that the Provincial vote in the April 1994 elections would determine support for self-determination (Accord of 23 April 1994, sub-paragraph 4.1). In this election, the FF gained the support of 640 000 voters. In is generally agreed that between 400 000 and 500

000 Afrikaners, mainly supporters of the CP who supported the concept of self-determination, did not participate in the elections. Out of a possible 1 800 000 Afrikaner voters, of which approx. 80% voted, at least 1 million voters supported the concept of a Volkstaat. This is not only "substantial support" but "majority support".

4.2 "The principles of democracy, non-racialism and fundamental rights must be adhered to." The FF accepted this condition and it is an integral part of the FF proposal.

4.3 "The solution agreed upon must promote peace and national reconciliation." The FF also accepted this condition. The FF is convinced that the self-determination is a basic requirement for peace and national reconciliation.

THE UNSIGNED AGREEMENT OF 21 DECEMBER 1993: FINDING A PEACEFUL SOLUTION

5. In order to find a peaceful solution, the ANC and the Afrikaner-Volksfront reached agreement on the way forward on 21 December 1993. The ANC and general Viljoen, (on behalf of the Afrikaner-Volksfront) agreed that:

5.1 "Both parties *are committed to the development of a non-racial democracy.*"

5.2 "Both parties accept that many Afrikaners also have a commitment to the ideal of self-determination in a Volkstaat and that this ideal should be addressed expeditiously, *without delaying the current process of transition.*"

5.3 "Both parties reject any political suggestion that would embody racism and failed apartheid policies. The AVF was also unambiguous in its rejection of communism as an acceptable political system."

5.4 "Both parties *seek constructive engagement in the political process.*"

5.5 "Both parties recognise the danger of serious conflict between members of the respective communities, and the destructive impact such conflict would have on future development ..... and agree that these matters, including the continuing spate of murders of farmers in rural areas, must be addressed collectively as a matter of urgency."

5.6 "The AVF, having accepted the ANC's good faith, *has undertaken to actively discourage any action calculated to destabilise the transitional process .....and to consider participation in the elections as scheduled to be held on 27 April 1994.*"

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6. ***The FF has not only met every agreement entered into with the ANC, as stipulated above, but did this in the true spirit of the Accord of 23 April 1994 and the Interim Constitution.*** The political direction taken by the FF in the past year has often been ridiculed and more serious political observers found FF politics and policies to be something of a enigma or a surprise. The fact is that the above agreements played an important part in determining the FF's political role. The direction taken by the FF was not a matter of convenience or a strategy with a hidden agenda. ***The concern of the FF is first and foremost the well-being and the recovery of the whole of South Africa and the reconciliation of all its peoples. The FF sees this in regional terms, even wider than South Africa.***

THE PRINCIPLE OF SELF-DETERMINATION AND GUIDELINES FOR THE VOLKSTAAT-COUNCIL

THE FIRST INTERIM REPORT OF THE VSR

7. In Chapter 4 to the Appendix of the Accord of 23 April 1994, guidelines for the deliberations of the Volkstaat-Council were given. The VSR produced a First Interim Report [May, 1995] but has not completed its mandate. The different modes of self-determination and demands for self-determination on a provincial basis have not yet been fully researched. Thus

the FF-proposals lacks these inputs and must be revised once the VSR has progressed with its research to the point where these questions are answered.

VSR REPORT: FF INPUTS

8. The FF will also have to revise its inputs to the VSR once agreement has been reached in the bi-lateral negotiations with the ANC, and possibly the NP and other parties/organisations.

THE WAY FORWARD ON THE ISSUE OF SELF-DETERMINATION

COMMITMENTS MADE BY THE ANC AND THE NP

9. The Accord of 23 April 1995, signed by both the ANC and the NP, commits these parties to the following agreements:

9.1 "The parties agree to address, through a process of negotiations, the idea of Afrikaner self-determination, including the concept of a Volkstaat." [Agreement 1].

9.2 "The parties further agree that in consideration of these matters, they shall not exclude the possibility of local and/or regional and other forms of expression of such self-determination." [Agreement 2].

9.3 "Both parties [ANC and AVF] accept that many Afrikaners also have a commitment to the ideal of self-determination in a Volkstaat and that this ideal should be addressed expeditiously." [Unsigned Agreement of 21 December 1993, paragraph. 1.1].

9.4 "The ANC, having accepted the bona fides of the AVF, gives its commitment to promote agreements entered into with the AVF." [Unsigned Agreement of 21 December 1993, paragraph. 2.7].

10. The FF now calls upon the ANC to continue the bi-lateral negotiations in accordance with the Accord of 23 April 1995.

FREEDOM FRONT PROPOSALS FOR AFRIKANER SELF-DETERMINATION

11. Within the framework of the above agreements, the FF proposal is guided by:

11.1 the fact that a substantial part of the Afrikaner people is committed to the concept of a Volkstaat in order to protect their identity,

11.2 the fact that the Afrikaner people have moved and settled in most parts of South Africa. Thus, there is no single geographic area, limited in size and acceptable to all parties, that can truly conform to the requirements of a Volkstaat in which all the aspirations of Afrikaners could be satisfied. Besides a small geographic area, the Volkstaat, institutions and mechanisms must therefor be created in most parts of South Africa in support of Afrikaner interests.

11.3 that those Afrikaners outside the Volkstaat should control their cultural and language rights at all three levels of government. This is provided for in the Constitution [Constitutional Principle XII], as well as in the Unsigned Agreement of 21 December 1993 [see paragraph 9.2 above].

11.4 Lastly, that the FF hopes that it can lead the Afrikaner community to a new vision of its role in South Africa as well as in Southern and Central Africa that could indeed make a significant contribution in the achievement of development, peace and progress for all the peoples of this region.

12. <u>Proposal 1: Cultural Self-determination - Local Level</u>

12.1 Self-determination of a cultural nature must be established as a consequence of elected civic or Community Councils (CC)

[Afrikaner- or Burgerraade] at local level. These CC must be the result of voluntary registration of voters within the Afrikaner community. Registration for the Community Councils by voters within the Afrikaner community will also be an indication of support for the concept of Cultural self-determination.

12.2 The CC should be directly elected councils. The most important functions of Community Councils will be to exercise control over:

12.2.1 The promotion of cultural matters such as language, its own language media, the performing and visual arts, literature, museums, monuments, libraries and other matters of cultural interest such as war graves.

12.2.2 Mother tongue education at all levels.

12.2.3 Basic health care, social welfare services and care for the elderly and

12.2.4 Community policing.

12.3 It is accepted that these CC would supplement Local Authorities which will be responsible for services such as:

12.3.1 The supply of Electricity,

12.3.2 The supply of water,

12.3.3 Refuse removal,

12.3.4 Roads and local transport.

12.4 The CC should be entitled to an reasonable share of national and local revenue and should have the power to raise income from members of that specific community.

12.5 This proposal is in accordance with both Constitutional Principles XXXIV and XI. Constitutional Principle XI stipulates that:
"The diversity of language and culture shall be acknowledged and protected, and *conditions for their promotion shall be encouraged*".

13. **PROPOSAL 2: Cultural Self-determination at National and Provincial Levels**

13.1 Representation at National and/or Provincial level would be determined by:

13.1.1 The establishment of a geographic territory (the Volkstaat).

13.1.2 The functions and composition of the Senate and

13.1.3 The functions and powers allocated to the Central Government and the Volkstaat.

13.2 With this in mind, the FF proposes that:

13.2.1 The voters registered on the CC voters rolls, elect one member for each province to represent the Afrikaner community in the Senate.

13.2.2 Other cultural and language groups, as defined by the constitution, should also be given the same representation if they so desire. This would mean that Traditional Leaders should be represented in the Senate to protect the cultural and language rights of their community groups and that other cultural and language groups also be given representation; should they so desire. The representation in the Senate could be on a proportional basis. The minimum number of members for a specific bona fide community within a province

required in order to be eligible for representation, should be stipulated.

13.2.3 Community representation at Provincial level could be considered but in the event of the Volkstaat being established on a territorial basis, provincial representation would not be required at this stage.

14. PROPOSAL 3: Territorial Self-determination - The Volkstaat

14.1 The FF accepts the fact that an sovereign Volkstaat cannot be achieved at this stage. Because of the nature of a Volkstaat, a large degree of political autonomy would however, be required.

14.2 The creation of a Volkstaat should be seen as a process and this process must be incorporated into the new constitution.

14.3 The process should contain of the following steps:

14.3.1 Step 1. Acceptance by the ANC and the VF of the concept of *territorial self-determination* and agreement on the process and the conditions/requirements for each successive step. The constitution would have to provide for a constitutional principle that would replace Constitutional Principle XXXIV and that would make provision for the self-determination.

14.3.2 Step 2. Negotiating agreement on the *initial functions and powers of the Volkstaat government*. It is accepted by the FF that the Volkstaat will initially be a constituent state and have at least the same powers as a Province but with the acceptance of the principle that some provinces could have more power that other provinces, i.e. asymmetric powers.

14.3.3 Step 3. Defining the *initial boundaries of the Volkstaat*. To define the geographic boundaries of the Volkstaat within the conditions for self-determination, set out in paragraph 4 above, the

Afrikaner community would ultimately have to constitute a majority of the population within the Volkstaat. As a result of this requirement, the VSR proposed an area with Pretoria as the core. [see page 31 to 35 of the First Interim Report of the VSR - May 1995]. Appendix B. **The VSR has not completed its report and the proposal on the sensitive issue of boundaries can only be finalised after extensive consultation and negotiations with provincial governments and political parties.**

14.3.4 Step 4. Deciding on the ultimate *future powers* of the Volkstaat and the *time frames* within which this will be achieved.

15. **Proposal 4: Areas of possible gradual modular augmentation of the Core Area.**

15.1 Additional conditionally designated areas, where the present and future potential demographic pattern is such that Afrikaners may in this way be expected to vote for their Volkstaat "with their feet" by voluntary migration, have been identified. The inclusion of some of these areas into a Volkstaat will finally be subjected to majority decision in a popular vote within these areas. Should the Afrikaners fail the test of a popular vote in any specific area, the area can simply revert back to the jurisdiction of the regional government where it is situated. These designated areas could in the mean time form sub-regions of the provinces.

15.2 This proposal is set out in detail in the First Interim Report of the VSR dated May 1995, page 36. [See Appendix C].

CONCLUSION

16. In the final years before the election, our people naturally looked for an escape from the inevitable reality of losing whatever control we had over our own destiny. The reaction was one of withdrawal, of moving into a laager,

of consolidating into a small but known reality, which was undefined and not articulated but which could be reconciled with our history of independence. A vital part of this history was the three years struggle against the most powerful colonial power on earth. Yes, our first reaction was an inverted one.

17. But now we want to move out - but as a community that wants to retain its own culture, its own identity, its solidarity, its will to decide its own destiny. We will now lead in the outward move - even wider than our own poet Van Wyk Louw dreamed. But we cannot do this as individuals. We need the support and strength of the communal ties that have come to constitute us as a people. Our nationhood is a product of our history, a living organism that can serve a very useful purpose or cause a lot of trouble. It will be fatal to expect the Afrikaner to fit into a system based on individualistic liberal values. Meaningful allowance for their communal orientation will ensure not only their survival as group but their long-term co-option for the broader ideal of nationbuilding in South Africa.

18. We have a far better working relationship with the leadership of the ANC than with the leadership of the previous NP government. Some noises of populist origins still disturb us but the leadership of the Freedom Front has consciously decided for a policy of constructive co-operation in order to build a better future for all - including our own Afrikaner people.

19. The question which the leadership must now answer, is: "Do we try and force the Afrikaner into a meltingpot to create a new South Africa with no separate ethnic and cultural identity or do we give the Afrikaner the degree of self-determination which will not only allow him to decide his own future, but which will give him the self-respect and the motivation to not only be a part of the new South Africa but to actively participate in the building of this new state?"

20. If the first choice is made, the Afrikaner will not be a willing partner and conflict will be inevitable. If the second choice is made, the Afrikaner will become the one factor that could enable South Africa to be an example to the world of a country that turned hatred, conflict and destruction into peace, progress, freedom, prosperity and a country inhabited by people who fear only God but respect and assist each other.

National Party
Nasionale Party

Federal Council
Federale Raad

10 November 1995

The Secretary
Constitutional Committee
CAPE TOWN

Sir,

Re: Commission on Cultural Affairs : chapter 7

1. As was agreed yesterday, 9 November 1995, I enclose the National Party's proposal on Cultural Affairs to be included in the documentation on the constitution to be discussed in January 1996.

2. I also enclose our proposal made today by Senator Radue on Collective Selfdetermination to be treated in the same way (Bill of Rights).

Yours faithfully

Dr F J van Heerden MP

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Collective self-determination

Everyone shall have collective rights of self-determination in joining, forming and maintaining organs of civil society, including linguistic, cultural and religious associations which shall be exercised on the basis of non-discrimination and free association.

NP PROPOSAL : 10/11/1995

COMMISSION ON CULTURAL AFFAIRS

FUNCTIONS OF COMMISSION ON CULTURAL AFFAIRS

100 (1) The Commission on Cultural Affairs must promote:

(a) mutual respect for the diversity of cultures in South Africa

(b) protection for all cultures in South Africa

(c) conditions for the development of all cultures in South Africa.

(d) interaction between the different cultures in South Africa.

(2) The Commission on Cultural Affairs has the power to :

(a) establish Cultural Councils for those cultural societies/ communities which so desire and request the Commission accordingly, provided that these societies/communities must contribute to the establishment and maintenance of such Cultural Councils as regulated by national or provincial legislation.

(b) monitor, promote, investigate, advise and report on any issue concerning Cultural Affairs.

(3) The Commission on Cultural Affairs has the additional powers and functions prescribed by national legislation.

(4) The Commission on Cultural Affairs must be composed of at least one member representing each of the official language-groups and so many other members as may be required from time to time to represent other cultures which do not form part of the main cultural groups in South Africa.

National Party
Nasionale Party

Federal Council
Federale Raad

8 November 1995

Mr Hassen Ebrahim
Executive Director
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Dear mr Ebrahim

Enclosed please find the National Party proposal regarding Provincial and National Legislative and Executive Competencies.

Kind regards

pp Dr. T J KING MP

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CHAPTER 9

PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCIES

LEGISLATIVE AUTHORITY OF THE REPUBLIC

139. The legislative authority of the republic is vested in Parliament, which shall be competent to make laws in terms of this Constitution on any matter including matters falling within the functional areas specified in Schedule 4.

LEGISLATIVE AUTHORITY OF PROVINCES

140. (1) The legislative authority of a province vests in its provincial legislature which shall be competent to make laws in and for its province in terms of this Constitution.

(2) A provincial legislature shall be competent to legislate on any matter which falls within a functional area specified in Schedule 4.

FRAMEWORK LEGISLATION

141. *Option 1*

No provision for framework legislation.

Option 2

(1) Framework legislation comprises Acts of Parliament in terms of which principles or standards are laid down to ensure uniformity across the nation and shall apply equally in all provinces and shall empower provincial legislatures to make laws for the achievement of the objectives set out in the framework legislation.

(2) Parliament is competent to establish framework legislation only regarding the matters specified in Schedule 5.

(3) Framework legislation shall be binding upon all legislatures and shall be implemented in a province in accordance with the laws of the provincial legislature.

(4) Should a provincial legislature fail to implement framework legislation within a reasonable period of time, Parliament shall be competent to implement such legislation until the provincial legislature complies with its duty in this regard.

Option 3

Implemented by way of an override power (see option 3 - of clause 5(1)(f)).

NP Option

"(1) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 5.

(2) Parliament shall be competent to enact framework legislation only which sets out justifiable and necessary principles, and which shall be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule 5."

NECESSARY ANCILLARY POWERS

142. The legislative competence referred to in sections 1, 2 and 3 shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

CONFLICT OF LEGISLATION

143. *Option 1*

(1) In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 4, the Act of Parliament shall prevail over the provincial law where the elements of the Act that are in conflict with he provincial law are necessary for -

(a) the establishment of generally applicable standards regarding -
    (I) services rendered by the state;
    (ii) Thhe 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 thereof caused by the activities of another province.

(2) A Bill designed to become an Act of Parliament intended in subsection (1) shall be introduced in the second house and shall require the approval of both the second house and the National Assembly.

(3) The Constitutional Court shall, upon application by at least one fifth of the members of the second house, and prior to the promulgation of a Bill intended in subsection (1), expeditiously determine whether the Bill conforms with the objective criteria prescribed in subsection (1).

(4) In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 4, which cannot be resolved by a competent court on a construction of this Constitution, precedence shall be given to the Act of Parliament.

Option 2

(1)In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 4, the Act of Parliament shall prevail over the provincial law only to the extent that such Act applies uniformly in all parts of the country, and is necessary for -

(a) the establishment of essential national or minimum standards required for a service to be rendered; or

(b) the prevention of unreasonable action taken by a province which is materially and unjustifiably prejudicial to economic unity, or the health, environmental or security interests of another province or the country as a whole.

(2) A Bill designed to become an Act of Parliament intended in subsection (1) shall be introduced in the second house and shall require the approval of both the second house and the National Assembly.

(3) The Constitutional Court shall, upon application by at least one fifth of the members of the second house, and prior to the promulgation of a Bill intended in subsection (1), expeditiously determine whether the Bill conforms with the requirements of subsection (1).

Option 3

(1) In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 4, the Act of Parliament shall prevail over the provincial law where the elements of the Act in conflict with the provincial law are necessary for -

(a) a function in respect of which uniformity across the nation is desirable;

(b) South Africa to speak with one voice or to act as a single entity, in particular in relation to other states;

(c) the maintenance of essential national standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province

which is prejudicial to the interests of another province or the country as a whole;

(d) the implementation of national economic policies or the promotion of equal living conditions, the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour;

(e) the provision of equality and opportunity or access to a government service, or

(f) the establishment of a national framework for the provision of public services or the management of institutions relating thereto.

(2) Where a provincial law deals specifically with matters other than those referred to in subparagraph (1) such law shall prevail over national legislation.

(3) In the event of a dispute concerning the legislative competencies on any matter which fall within the functional areas specified in Schedule 1 -

(a) Such legislation shall be deemed to be necessary or desirable in terms of the requirements set out in subparagraph (1) if such legislation has been consented to by the Council of Provinces, or by mediation or where Parliament, consisting of the National Assembly adopts the Bill with a majority of two thirds of those members present and voting.

(b) Subject to paragraph (a) the Constitutional Court, or other courts where applicable, shall have jurisdiction on the constitutionality of legislation in such desputes to decide whether the Acts of Parliament meets the requirements as set out in subparagraph (1).

(c) If such a dispute cannot be resolved by a court on a construction of the Constitution, precedence shall be given to national legislation.

NP Option

"(1) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter allocated to the provinces, except insofar as -

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards for the management or administration of that matter that apply generally throughout the Republic;
(c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of

the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the Republic.

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic.

(3) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(4) An Act of Parliament shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.

(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of any province.

(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively."

INTEGRITY OF PROVINCES

144. An Act of Parliament shall not empower an organ of state to encroach upon the geographical, functional or institutional integrity of a province.

EXECUTIVE AUTHORITY OF THE REPUBLIC

145. (1) The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament vests in the national government consisting of the President and other members of the Cabinet, which shall exercise and perform its powers and functions subject to and in accordance with this Constitution.

(2) The national government may, with the concurrence of the provincial government or of a local government, appoint such provincial government or local government as its agent to perform a specified function within its competence in terms of subsection (1).

(3) The national government may, with the concurrence of a provincial government or of a local government, delegate to such provincial government or local government the performance of a specified function within its competence in terms of subsection (1).

EXECUTIVE AUTHORITY OF PROVINCES

146. (1) A province shall have executive authority over -

(a) all matters in respect of which the provincial legislature has passed laws, and

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

(2) The executive authority of the province vests in the provincial government consisting of the Premier and the other members of the Executive Council.

(3) The provincial government may, with the concurrence of the national government or of a local government within the province, appoint the national government or such local government as its agent to perform any specified function within its competence in terms of this section.

(4) The provincial government may, with the concurrence of the national government or of a local government within the province, delegate to the national government or to such local government the performance of a specified function within its competence in terms of this section.

National Party
Nasionale Party

Federal Council
Federale Raad

8 November 1995

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear mr Ebrahim

Enclosed please find the National Party proposal regarding Senate / Council of Provinces.

Kind regards

pp Mr J A RABIE MP

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CHAPTER 4
SENATE/ COUNCIL OF PROVINCES

ESTABLISHMENT

57. There is a SENCOP consisting of members, who are women and men nominated in accordance with Schedule 3 to represent the provinces (and local governments).

Option

PARLIAMENT AND NATIONAL LEGISLATIVE AUTHORITY

AAA. (1) Parliament shall consist of the National Assembly and the Senate and shall subject to this Constitution be the national legislative authority of the of the Republic.

(2) Parliament shall have the power to make laws for the Republic in accordance with this Constitution.

COMPOSITION OF SENATE

BBB. (1) Every province shall subject to subsection (2) elect 10 persons who shall be members of the Senate.

(2) The persons referred to in subsection (1) shall be indirectly elected by their respective provincial legislatures on a proportional basis in accordance with the provisions of Schedule XXX.

(3) The persons elected by the provinces to be Senators shall ordinarily be resident in their designating province.

POWERS AND FUNCTIONS

58. The SENCOP -

(a) participates in the legislative process of Parliament as provided for in the Constitution;

(b) must be informed of, and may comment on, national budget proposals;

(c) must promote co-operative governance by overseeing and co-ordinating intergovernmental relations among all levels of government and among governments on the same level;

[(d) may ratify international agreements; and]

(e) approves appointments of ambassadors and high commissioners.)

Option

PURPOSE OF SENATE

CCC. The purpose of the Senate is -

(a) to represent the provinces in national decision-making; and

(b) to function as a second House of Parliament.

POWERS OF SENATE

DDD. (1) The Senate shall consider all bills introduced in Parliament.

(2) A Bill passed by the National Assembly but rejected by the Senate shall be referred to a joint committee consisting of members of both Houses 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, whereafter the Bill shall be referred to the two Houses, which at separate sittings may pass the Bill with or without amendment: Provided that where one House passes the Bill as amended and the other House rejects that amended Bill, that amended Bill shall be referred to a joint sitting of both Houses at which it may be passed by a majority of the total number of both Houses: Provided that a Bill referred to a joint sitting of both Houses which has been rejected may be introduced only twelve months after the date of such rejection.

(3) Bills appropriating revenue or moneys or imposing taxation other than bills pertaining to matters contemplated in sections .... [*dealing with the finances of provinces etc.*] shall be considered by the Senate within thirty days after having been passed by the National Assembly.

(4) Bills affecting the boundaries or the exercise or performance of the powers and functions of the provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses and, in the case of a Bill, other than a Bill referred to in subsection (5), affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, unless also approved by a majority of the senators of the province or provinces in question in the Senate.

(5) Subject to subsection (6), a Bill amending this Constitution shall, for its passing by Parliament, be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses.

(6) No amendment of sections ... *[of the Constitution dealing with concurrent legislative competences or the provincial executive authorities]* shall be of any force and effect unless passed separately by both Houses by a majority of at least two-thirds of all the members in each House: Provided that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a

relevant provincial legislature.

(7) All Bills contemplated in subsections (4) and (6) shall first be introduced in the Senate.

(8) The Senate shall subject to this Constitution assent to or if provided for otherwise in this Constitution be involved in the nomination or appointment, as the case may be, of ambassadors, high commissioners or other heads of mission, judges of the Constitutional Court, the Supreme Court of Appeal, the High Court and the Land Claims Court and any other judicial body other than courts referred to in section 86(e) *[of the Refined Working Draft Second Edition]* , the Public Protector, the Auditor-General and members of any commissions or other similar bodies established under this Constitution.

(9) No international agreement shall be deemed to have been ratified or acceded to unless the Senate has also by resolution agreed to such ratification or accession.

(10) The Senate may notwithstanding the provisions of this subsections (2), (3), (4) or (5) or any other provision of this Constitution at any time refer a Bill to the Constitutional or any other competent court of law, as the case may be, to determine the constitutionality of that Bill.

QUALIFICATIONS

59. Anyone qualified to be an member of a provincial legislature may be a member of the SENCOP.

Option

QUALIFICATION FOR MEMBERSHIP OF SENATE

EEE. Any person who is eligible for membership of the National Assembly as contemplated in section 42 [*of the Refined Working Draft Second Edition*] is subject to section BBB.(3) *[see above]* eligible for membership of the Senate.

OATHS OR AFFIRMATIONS BY MEMBERS

60. Before members of the SENCOP begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Option

OATH OR AFFIRMATION BY SENATORS

FFF. Every member of the Senate shall before taking up his or her seat in the Senate swear an oath or make a solemn affirmation to be faithful to the Republic and this Constitution, as prescribed in Schedule 2.

SITTINGS/MEETINGS

61. (1) The SENCOP may determine the time and duration of its sittings and recess periods/the dates of its meetings.

(2) The President may summon the SENCOP to an extraordinary sitting/meeting at any time to conduct urgent business.

(3) The seat of the SENCOP is..... Sittings/meetings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the SENCOP.

(4) The President of the Senate/Chairperson of the Council of provinces must convene the SENCOP if the majority of the members from at least two provinces so demand.

Option

SITTINGS OF SENATE

GGG. (1) The President of the Senate, or in the event of his or her incapacity or unavailability, the Deputy President of the Senate, shall after consultation with the Speaker and the chief whips of all political parties represented in the Senate and in accordance with the rules and orders of the Senate determine the time and duration of sittings of the Senate: Provided that when a majority of Senators representing at least two provinces or one fifth of Senators representing at least five provinces so request, the President or his or her deputy, as the case may be, shall forthwith convene a sitting of the Senate.

(2) The State President may request the President of the Senate to summon members of the Senate for an extraordinary sitting in accordance with its rules and orders to conduct urgent business.

(3) The seat of the Senate is ... : Provided that the President of the Senate may in consultation with the Speaker in the interests of security or because of extraordinary circumstances by proclamation in the *Gazette* and in accordance with the rules and orders of the Senate determine another location as the Senate's temporary seat.

PRESIDENT/CHAIRPERSON

62. (1) The SENCOP must elect from among its members a President/Chairperson to serve for three years.

(2) The procedure set out in Schedule 3 applies to the election of the President/Chairperson.

(3) The SENCOP may remove the President/Chairperson form office by resolution.

Option

PRESIDENT AND DEPUTY PRESIDENT OF SENATE

The NP proposes the retention of section 49 of the Interim Constitution amended to reflect consequential changes.

DECISIONS

63. (1) The majority of the members of the SENCOP must be present before a vote may be taken on a matter when the SENCOP participated in the legislative process of Parliament, and one-third of the members must be present before a vote may be taken on any other matter.

(2) All questions before the SENCOP must be decided by a majority of the votes cast.

(3) The president member of the SENCOP has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

Option

QUORUM IN SENATE

The NP proposes the retention of section 54 of the Interim Constitution.

RIGHTS OF MEMBERS OF CABINET AND EXECUTIVE COUNCILS

64. Cabinet members, and Executive Council members who are not members of the SENCOP, may attend, and may speak in the SENCOP, but may not vote.

Option

RIGHTS OF NATIONAL AND PROVINCIAL OFFICE BEARERS OF EXECUTIVE AUTHORITIES IN SENATE

JJJ. (1) The State President, the Deputy State Presidents, Ministers, Deputy Ministers, Premiers of provinces and members of executive councils of provinces are entitled to sit in the Senate.

(2) The State President, the Deputy State Presidents, Ministers and Deputy Ministers may speak in the Senate.

(3) Premiers of Provinces may speak in the Senate when business is conducted concerning the affairs of that particular Province.

(4) Members of executive councils of Provinces may speak in the Senate with the permission of the President of the Senate or in his or her absence, the permission of the Deputy President of the Senate.

(5) No person who is not a Senator may vote in the Senate.

INTERNAL AUTONOMY

65. The SENCOP may make its internal arrangements, rules and orders.

Option

RULES AND ORDERS

The NP favours the retention of section 58 of the Interim Constitution amended to reflect consequential changes.

PRIVILEGES AND IMMUNITIES

66. The members of the SENCOP have the same privileges an immunities as members of the National Assembly

SENCOP AND THE LEGISLATIVE PROCESS

Option 1

SENCOP functions as a second house of the national legislature. All Bills, except money Bills, must be discussed and passed by it. It may have special role with respect to legislation affecting provinces and their functional areas.

Option 2

SENCOP may comment on all Bills, may submit to the National assembly, and, with respect to Bills concerning the functional areas of the Provinces, may, in addition, propose amendments to or the withdrawal of a Bill, and the National Assembly does not agree, the Assembly must refer the Bill to a mediation body. A decision by the mediation body to adopt a Bill is equivalent to adoption by the National Assembly with a two-thirds majority.

Option

See the NP proposals above on the powers of the Senate as well as the provisions relating to provincial competences as well as framework legislation.

SENCOP AND INTERGOVERNMENTAL RELATIONS

According to Option 2, SENCOP plays a role in the legislative process but a primary function is to facilitate cooperative governance by facilitating cooperation, coordination and consultation in executive matters among all levels of government and among government on the same level. This could include monitoring the operation of intergovernmental al executive actions and relations, facilitating the development of policy in matters of manual interests, and mediating in disputes executive institutions.

Option

INTERGOVERNMENTAL RELATIONS

JJJ. (1) An Act of Parliament shall be introduced in Parliament within six months of the commencement of this Constitution providing for the establishment of structures, mechanisms, processes and procedures aimed at establishing and promoting intergovernmental relations at both the legislative and executive levels of government and in respect of national, provincial and local government, including but not limited to the Intergovernmental Forum and Ministerial Forums, as well as an Advisory Committee on Intergovernmental Relations and a Commission on Provincial Government.

(2) The Senate shall within six months of the commencement of this Constitution establish a Senate Consultative Forum which shall establish mechanisms and structures to establish and promote liaison with and amongst the provinces.

(3) The Senate shall within one month of its first meeting on a proportional basis elect the Senators to serve on the Financial and Fiscal Commission as contemplated in section 175 [*of the Refined Working Draft Second Edition*].

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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NATIONAL ASSEMBLY
PO BOX 15
CAPE TOWN
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12 February 1996

PRELIMINARY SUBMISSION OF THE PAC ON THE SECOND HOUSE

Preliminary Observations

Current proposals on the second house mainly see it as a house of review or as a house of provinces.

The PAC is convinced that we neither need a senate to carry out these tasks nor can it be said that the senate is the only institution that can effectively do such work.

Our experience with the present senate is that it is a mirror image of the National Assembly. The strong party system ensures that, in most instances, the same positions taken at the lower house will be maintained at the upper house.

Provinces are an artificial creation of the Interim Constitution and still need to be nurtured and developed. As of now therefore, it is not correct to say that our Senators are representatives of provinces. They are representatives of political parties.

We humbly submit that the present Senate cannot be said to be doing a better job in reviewing legislation than the National Assembly and its standing committees. We need to strengthen the standing committees of the National Assembly and enhance the participation of the public in the law making process.

In addition, the PAC would support the Constitutionalisation of the Inter-governmental forum. This would create a far cheaper and more useful constitutional forum where MECS and National Ministers could meet to discuss policy formulation, legislation and matters of common concern.

Equally, the PAC has already indicated in an earlier submission that it is in favour of the retention of the Fiscal and Financial Commission. This commission can advise national government about the financial needs of provinces and the allocation of resources to them.

The PAC therefore, submits that looking at the current proposals and on the strength of the performance of the present Senate, a case for the establishment of the second house has not been made or proved.

Alternative Proposal of a Second House

If it is felt that there is a need for a second house, probably consideration should be given to the viability of the establishment of an unelected second house.

This house could be drawn from persons who have made outstanding contributions in various fields, such as, business, sports, religion, academic, gender, labour and could have a significant representation from traditional leaders. It should consist of about 90 senators.

This house could be called the National Council as it will be representative of various sectors of society.

One of its functions should be to make evaluative comments on all bills passed by the National Assembly. In this regard, it could raise reasoned objections to any legislation and the National Assembly can either, accommodate those objections or pass the bill as it is. This does not imply a power to veto the decisions of the National Assembly.

However, it may be necessary in certain matters, to provide for a possibility of allowing, where a significant number of Senators are opposed to a measure, a cooling off period of a month or two before the National Assembly passes such a measure. An example, could be a case where a significant number of traditional leaders are opposed to a bill affecting traditional land, law and institutions or where

a significant number of all the Senators are opposed to a measure. This of course, should not apply to money bills.

Equally, the National Council should be given a meaningful role in nation building which could include mediating in certain disputes which may undermine national unity and stability.

Senators should be appointed for a period of five years. Some could be appointed by the President either, on the recommendation of an independent commission or, on the recommendation of that particular group or body.

It may be necessary in dealing with eligibility to place an age restriction of 35 years and above.

Conclusion

One of the merits of this proposal is that such an unelected house will not be subject to political party loyalties or fear of electoral retribution. It can discuss and reflect on all national issues and give a valuable and an objective second opinion without fear or favour. This National Council could therefore be a house of "truth" or a true conscience of the nation and government.

In addition, the accommodation of traditional leaders in an essentially Western liberal institution, may result in the creation of a truly hybrid African institution. This in our opinion, will give traditional leaders a more meaningful role than being isolated and marginalised in a toothless Council of Traditional Leaders.

It must also be said that this proposal does not cover all the aspects of this issue. However, should it merit consideration, which we think it should, we are prepared to work with others in developing it.

R K Sizani - MP

COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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1 February 1996

Ref 6/1/4

The Executive Director
Constitutional Assembly
P O Box 1192
CAPE TOWN
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Dear Mr Ebrahim

COMMENTS ON WORKING DRAFT - WESTERN CAPE

I enclose a copy of the comments on the working draft submitted to the Commission by the Premier of the Western Cape. Would you please submit these comments to the CA structures for consideration.

Yours sincerely

M Titus
Chairperson

WLR16

Kantoor van die Premier Wes-Kaap
Office of the Premier Western Cape
I-ofisi yeNkulumbuso Ntshona Koloni

REFERENCE
VERWYSING
ISINGQINISISO 1/4/2

DATE
DATUM
UMHLA 22 JAN 1996

Mr M Titus
Chairperson
Commission on Provincial Government
Private Bag X887
PRETORIA
0001

Dear Mr Titus

NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCES

Your faxed letter *[6/1/7/7]* dated 29 November 1995 refers.

Attached please find my comments on the Working Draft of the New Constitution.

With kind regards

H J KRIEL
PREMIER

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NATIONAL AND PROVINCIAL COMPETENCES

COMMENTARY ON THE WORKING DRAFT OF THE CONSTITUTION

INTRODUCTION

The Working Draft of the New Constitution (hereafter referred to as the Working Draft) covers the main areas that should be coverred in the constitution. It is however incomplete insofar as it gives different options on a number of issues, particularly on certain issues relating to provinces. In this document it will be indicated where necessary which options would be preferred. Although a number of important issues are not finalised and must still be negotiated, it already appears that the Working Draft will have the effect of reducing the powers and functions of provinces substantially, contrary to Constitutional Principle XVIII.2.

It is necessary to stress the importance of the Constitutional Principles in the constitution drafting process. It form the legal framework for the drafting of the new constitution and require extensive arrangements dealing with the relationship between the different levels of government. The issue of provincial legislative and executive powers forms an integral part of this relationship. It is furthermore important that a strong, viable and entrenched system of provincial government as part of the new constitutional order shall, in accordance with the Constitutional Principles, be developed.

In terms of section 71 of the Constitution, 1993 (the current Constitution), the new Constitution **must** comply with the Constitutional Principles (CP) and the Constitutional Court must certify that all the provisions of the new Constitution comply with those Principles. It is therefore important that every suggested provision be tested against the Constitutional Principles.

CHAPTER 4
COUNCIL OF PROVINCES/SENATE

Of the two given options Option 2 is preferred, subject to the following submissions.

Ad sec 66:

This section is supported.

Ad sec 67:

Subsec (1) and (2) is supported.

Subsec (3) and (4) does not support the role of the Senate as a second House that represent provincial interests at national level. It is however suggested that a deadlock-breaking mechanism should be included in the Constitution. A mediation committee where all the political parties represented in Parliament and all the provinces are represented, can possibly play that role.

Subsec (5) to (13) is supported.

Ad sec 68:

This section is supported, but it is submitted that a proviso should be added that a person cannot be a member of both the Senate and the National Assembly at the same time.

Ad sec 69:

This section is supported.

Ad sec 70:

This section is supported with the addition that the seat of the Senate is Cape Town.

Ad sec 71 to 73:

These provisions are supported.

Ad sec 75:

This section should be deleted. It is submitted that it should not be compulsory in terms of the Constitution to pass a Bill as stated in sec 75(1) that governs allmost everything in respect of inter-governmental relations. It is suggested that an overall objective which requires that all levels of government shall strive towards co-operation, consultation and co-ordination in the exercise of their responsibilities with the aim of serving the people of South Africa in an optional manner shall be included in the Constitution. Existing intergovernmental structures such as the Inter-governmental Forum and Ministerial Forums as well as an Advisory Committee on Inter-governmental Relations, as is suggested in sec 75, can be recognised by the Constitution. Inter-governmental relations is however an area where there should be enough room for spontaneous and informal developments and structures.

Ad sec 157:

Option 2 is preferred. It is clearly stated in subsec (2) that the legislative function of Parliament in this case is limited to the formulation of "justifiable and necessary principles", while the provinces are empowered to legislate exclusively on the detail of the matters covered by framework legislation. This *inter alia* recognises the principle of assymetry, by allowing provinces to accommodate regional differences and needs in their legislation. No overrides, as in the case of concurrent legislation, should apply to framework legislation.

Ad sec 158:

This section is supported.

Ad sec 159:

Option 4 is preferred. It should be noted that there is no subsec (2) in Option 4. It is submitted that the following subsections should be added to the draft text:

(6) A parliamentary Bill concerning a matter which falls within a functional area listed in Schedule 5 must be introduced in the second House Senate and requires the approval of both the Senate and the National Assembly seperately.

(7) The Constitutional Court shall, upon application by at least one fifth of the members of the Senate or any provincial government, and prior to the promulgation of the Bill, determine without delay whether the Bill conforms with the objective criteria prescribed in subsection (1).

According to CP XX the allocation of powers to the different levels of government must *inter alia* recognise and promote legitimate provincial autonomy. It is suggested that in the interest of strong and viable provincial government the overriding powers of Parliament in the concurrent legislative field should be restricted and that the interests of provinces should be recognised and protected as far as possible. Subsec (6) and (7) must be added in an attempt to achieve this.

Ad sec 160:

CP XXII relating to the integrity of provinces is a very important corner stone of the system of intergovernmental relations envisaged by the current Constitution. It is therefore essential that sec 160 be included in the new Constitution.

Ad sec 161:

This section is supported.

Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 13
Public transport
Roads
Soil conservation
Welfare services

It is noted that no specific provision is made in the draft text for exclusive legislative powers for the provinces. CP XIX requires that the powers and functions of both the national and provincial levels of government shall include exclusive and concurrent powers. It is thus suggested that explicit provision should accordingly be made in the new constitution for exclusive legislative powers for the provinces. The following draft text is suggested:

A provincial legislature shall have exclusive competence to legislate on any matter which falls within a functional area specified in Schedule 7.

Schedule 7
Housing
Land affairs
Provincial public media
Provincial sport and recreation
Regional planning and development
Traditional authorities
Urban and rural development

If no provision is made for exclusive provincial legislative powers, an alternative submission will be that the above functional areas be included in Schedule 5 relating to framework legislation.

CHAPTER 10
LOCAL GOVERNMENT

The provisions in this chapter ~~is~~ are supported in general, with the addition of the following comments.

Ad sec 164:

It is submitted that the structures, powers and functions of government at local level referred to in subsec (1) must be provided by provincial legislation in accordance with the framework provided by the Constitution.

Ad sec 162:

Sec 162 appears to be in compliance with CP XIX and XX.

SCHEDULES

Ad Schedule 5:

Although Schedule 5 is titled "Provincial functional areas", it is in fact a list of functional areas that falls within the concurrent legislative sphere. In view of the fact that provision is made for different options regarding framework legislation in sec 157 of the Working Draft, the following submissions are made relating to the different schedules of functional legislative areas.

(i) If no provision is made for framework legislation, Schedule 5 is supported as a list of concurrent functional areas. One area should however be added to the list, viz "Finance and taxes, excluding the national budget". Currently the provinces have limited legislative power over financial and tax matters (see sec 155 to 159 of the present Constitution). The residue of legislative authority over finance and taxes, including the national budget rests with Parliament. It is thus an area where both levels of government have a certain amount of legislative authority and it is submitted that it should be reflected as such in the new Constitution.

(ii) If provision is made for framework legislation, it is suggested that Schedule 5 be devided into two lists, viz a new Schedule 5 (concurrent functional areas) and Schedule 6 (framework legislation). The two schedules should consist of the following:

Schedule 5
Agriculture
Airports, other than international and national airports
Animal control and diseases
Consumer protection
Education at all levels
Finance and taxes, excluding the national budget
Forestry and water affairs
Tourism
Trade and industrial promotion

Schedule 6

Abattoirs
Casino's, racing, gambling and wagering
Cultural affairs
Environment
Health services
Language policy and the regulation of official languages within a province