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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1

CHARACTER OF DEMOCRATIC STATE

SUBMISSIONS FROM THE CPG & VOLKSTAATRAAD

11 MAY 1995

VOLUME 19 B

VOLKSTAATRAAD

SUBMISSIONS TO THEME COMMITTEE 1

LANGUAGE

(Hierdie dokument is ook in Afrikaans beskikbaar)

A. PRINCIPLES

1. It is proposed that section 3 of the interim Constitution be retained but that it be clearly stated that the status of the languages which are to be protected is that status which existed on 27 April 1994, namely the status as existing on the coming into operation of the interim Constitution.

2. Although the constituent states, and therefore also the volkstaat, have original power to enact legislation governing official languages, this power is subject to section 3 of the interim Constitution, and specifically to section 3(5).

3. From the above it appears that it is only the status of languages which qualified as official languages in a particular region, which may not be diminished. The Afrikaner Volkstaat will consequently maintain as official languages, those languages which enjoyed official status within its territory on the coming into operation of the interim Constitution.

4. The language provisions in section 3 must be read together with sections 31 and 32 and Constitutional Principle XI of the interim Constitution. Principle XI declares expressly that the circumstances for the promotion of the diversity of language shall be promoted. In terms of section 30 of the Indian Constitution, the state may not withhold any subsidies merely because a specific minority-controlled educational institution, bases its education on a language or religion specific to a particular people.

5. Should the principle in the Indian Constitution be accepted, it is clear that the Afrikaner would have a right to educational institutions of his own, in his own language and that state subsidies could not be withheld from such institutions if they fall under private rather than state management - even if they are exclusively Afrikaans and aimed solely at the maintenance of Christian Nation-specific Education (Christelike Volkseie Onderwys).

6. Language is an essential characteristic of a people. It is the means through which cultural realisation may be achieved and cultural norms passed on. It is inalienably linked to the right of a people to self-determination. The recognition of the right of peoples to self-determination, implies that this essential characteristic must also be

protected and promoted, and that it constitutes more than a mere individual right.

B. PROPOSALS FOR CONSTITUTIONAL WORDING

1. (1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.

(2) Rights relating to language and the status of languages existing on 27 April 1994 shall not be diminished, and provision shall be made by Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in sub-section 9.

(3) In his or her dealings with any public administration at the national level of government, a person shall, wherever practicable, have the right to use and to be addressed in any official South African language of his or her choice.

(4) Regional differentiation in relation to language policy and practice is permissible.

(5) A legislature of a constituent state may, by resolution of at least two-thirds of all its members, declare any language referred to in sub-section (1) to be an official language for the whole or any part of the constituent state and for any or all powers and functions within the competence of that legislature, save that neither the rights relating to language nor the status of an official language as existing in any area or in relation to any function on 27 April 1994, shall be diminished.

(6) In his or her dealings with any public administration at the constituent state level of government, a person shall, wherever practicable, have the right to use and to be addressed in any of the official South African language of his or her choice as contemplated in subsection (5).

(7) A member of Parliament may address Parliament in the official South African language of his or her choice.

(8) Parliament and any legislature of a constituent state may, subject to this section, provide by legislation for the use of official languages for the purposes of the functioning of government, taking into account questions of usage, practicality and expense.

(9) Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles:

(a) The creation of conditions for the development and promotion of the equal use and enjoyment of all official South African languages;
(b) The extension of those rights relating to language and the status of languages which were on 27 April 1994 restricted to certain regions;
(c) The prevention of the use of any language for purposes of exploitation, domination or division;
(d) The promotion of multilingualism and the provision of translation facilities;
(e) The fostering of respect for languages spoken in the Republic other than the official languages, and the encouragement of their use in appropriate circumstances; and
(f) The non-diminution of rights relating to language and the status of languages existing on 27 April 1994.

(10) (a) Provision shall be made by Act of Parliament for the establishment by the Senate of an independent Pan South African Language Board to promote respect for the principles enshrined in sub-section (9) and to further the development of the official South African languages.

(b) The Pan South African Language Board shall be consulted, and accorded the opportunity to make recommendations, in relation to any proposed legislation contemplated in this section.

(c) The Pan South African Language Board shall be responsible for promoting respect for the development of German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu and other languages used by communities in South Africa, as well as Arabic, Hebrew and Sanskrit and other languages used for religious purposes.

2. **No state subsidy or contribution to a private cultural, language or educational facility** shall be withheld solely on the ground that such an institution is under the control of, or offers a service to, a single language or cultural group or promotes only a specific language or culture.

CAVOORL.15E

VOLKSTAAT COUNCIL

SUBMISSIONS TO THEME COMMITTEE 1

CITIZENSHIP

(Hierdie dokument is ook in Afrikaans beskikbaar)

A. PRINCIPLES

1. Nationality relates to the relationship between a state and its citizens and determines the public international law bond between a state and its citizens. It is accepted that there is a single South African nationality which binds all citizens to the Republic in terms of public international law. As long as the volkstaat is a constituent state within the Republic, its citizens will also hold South African nationality.

2. South African citizenship is defined by legislation and determines the rights and duties of citizens within the Republic.

3. The fact that there is a single South African nationality and citizenship which accords all persons equal rights and duties within the Republic, does not preclude a specific volkstaat citizenship within an Afrikaner Volkstaat. Thus, for example, Aaland Island, which belongs to Finland and whose inhabitants are Finnish citizens, has a separate state citizenship which provides that only the Swedish speaking citizens of the island may own property on the island. (See Frowein, Hofmann & Oeter *Das Minderheitenrecht europäischer Staaten* Vol 1 (1993) Max Plank Institute for Foreign Public Law and Public International Law at 123.) German constitutional law, too, envisages the possibility of a constituent state citizenship alongside a federal citizenship. (See sections 73(2) and 74(8) of the German Constitution and Doehring *Staatsreg* 2ed 91-92.)

4. The fact that a state, whether dependant or independant, is irrevocably bound to its population and citizens, is a characteristic of statehood. This means that a constituent state must of necessity have a citizenship of its own.

5. As, in section 184B(1), the interim Constitution Act 200 of 1993 recognises the principle of a volkstaat as a form of self-determination, it of necessity also recognises the existence of the principle of an individual volkstaat citizenship.

6. Consequently, volkstaat citizenship determines who are, or may be, citizens of the volkstaat together with their rights and duties towards the volkstaat.

7. Volkstaat citizenship is related to the fact of the existence of the Afrikaner nation which is entitled to self-determination. Volkstaat citizenship, consequently, defines

who the "self" are which enjoy the right to self-determination: who the "self" are that must "be determined".

8. The principle of an own volkstaat citizenship is recognised in Principle XXXIV which rests on the understanding that there is a South African nation which has a right to be determined and therefore constitutes a self-determination entity. However, within this entity there is a smaller entity which enjoys its own right to self-determination.

9. Principle XXXIV already provides some indication of the "self" which may determine themselves, namely "any community sharing a common cultural and language heritage".

10. Section 184B(1) is based on the principle that the volkstaat may be established for "proponents of the idea of a volkstaat". The principle is therefore that the volkstaat can be established for those having the subjective desire to be part of a volkstaat. The provision gives an indication of who may be citizens of a volkstaat, namely persons wishing to be part of it.

11. It is clear that volkstaat citizenship vests in all within the greater whole who are "proponents of the idea of a volkstaat" and who share a "common cultural and language heritage" irrespective of whether or not they reside within the boundaries of the volkstaat. Of course, this also implies that the proponents subject themselves to the duties flowing from volkstaat citizenship.

12. Volkstaat citizenship does not detract from South African citizenship or the rights and duties flowing from such citizenship for those resident within the volkstaat.

A. CONSTITUTIONAL PROPOSALS

1. That section 5 of the present Constitution be retained, namely:

   (1) There is a South African citizenship.

   (2) South African citizenship and the acquisition, loss, and restoration of such citizenship, should, subject to the provisions of section 20 read together with section 33(1) of the interim Constitution, Act 200 of 1993, be regulated by Act of parliament.

   (3) Subject to this Constitution, every South African citizen is entitled to to enjoy all rights, privileges and benefits attaching to South African citizenship, and is subject to all duties, obligations and responsibilities attaching to South African citizenship granted to or imposed upon him or her in terms of this Constitution or an Act of parliament.

2. The constituent states and the volkstaat have the power to institute citizenship for their respective states and to define such citizenship legislatively.

3. Without detracting from par 2, citizenship is instituted for an Afrikaner Volkstaat.

4. (1) The following persons are entitled to citizenship of the Afrikaner Volkstaat:

(a) All South African citizens who actively share, practice, exercise and maintain the Afrikaans language, culture and traditions, or who identify therewith.

(b) who by descent belong to the Afrikaner people or have been assimilated into the Afrikaner people;

(c) who feel bound to the protection, exercise and maintenance of the Afrikaans language, culture and traditions;

(d) who actively propagate an Afrikaner Volkstaat; and

(e) who are accepted as Afrikaners by their fellow Afrikaners.

(2) All South African citizens permanently resident within the volkstaat at the time of its establishment, or who thereafter have resided within the volkstaat for a period of ten years, are entitled to citizenship of the Afrikaner Volkstaat, notwithstanding the fact that they do not meet the requirements of par 4.1.

(3) No individual shall enjoy citizenship of the volkstaat unless he/she freely accepts such citizenship by registering as a volkstaat citizen.

(4) An individual registering as a volkstaat citizen, accepts the duties flowing from such citizenship. Such duties may be imposed only by the volkstaat authorities.

5. (1) Volkstaat citizens satisfying the requirements of par 4.1, are, in addition to their right to vote for national legislative and executive organs, also entitled to vote for the government structures of either the volkstaat, or of a specific autonomous unit. However, in the event of their exercising such a vote, they shall not be entitled to vote for constituent state authorities other than local authorities.

(2) Volkstaat citizens who acquire volkstaat citizenship by virtue of their residence within the volkstaat and do not meet the requirements of par 4.1. may vote only for volkstaat government institutions or the government institutions of some other constituent state, but not for the elected government institutions of an autonomous unit.

(3) Volkstaat citizens who are resident outside the volkstaat or a specific autonomous unit for longer than ten years after the establishment of the volkstaat, shall lose their right to vote in the volkstaat and the autonomous unit.

(4) South African citizens who do not hold volkstaat citizenship may not vote for the volkstaat government institutions.

(5) South African citizens resident within the volkstaat and who satisfy the requirements for volkstaat citizenship, but who elect not to register for such citizenship, may, in addition to voting for the national parliament, also vote for the government bodies of any other constituent state.

6. (1) In the Republic of South Africa, the franchise is restricted to any South African citizen over the age of 18 years who is not subject to any disqualification defined in legislation.

(2) The franchise accords a citizen the right, subject to the provisions set out above, to vote for the National Parliament, for the legislative body of a constituent state, for the volkstaat or an autonomous unit, for local government, and in referendums or plebiscites.

(3) An individual may vote only for the government institutions of a specific constituent state or of the volkstaat, but may not vote for the government institutions of more than one.

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COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

260 Walker Street Sunnyside Private Bag X887 Pretoria 0001
Telephone (012) 44-2297 Fax (012) 341 8452

1995-03-24

The Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Mr Ebrahim

PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

1. Preliminary recommendations in regard to provincial constitutions
2. Preliminary recommendations in regard to provincial legislative competence
3. Preliminary recommendations in regard to provincial legislatures

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully

CHAIRPERSON

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON PROVINCIAL CONSTITUTIONS
RECOMMENDATIONS - DOCUMENT 1

1. INTRODUCTION

See introductory notes under recommendations on provincial legislative powers (Recommendation 3).

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 Section 160 of the interim Constitution as amended provides as follows:

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.

2.2 Constitutional Principle XVIII stipulates that -

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. 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 this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. 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.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

2.3 The following Constitutional Principles inter alia must be taken into account in adopting provincial constitutions:

I, II, III, IV, V, VI, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, IXX, XX, XXI.

3. DISCUSSION

3.1 The questions to be answered regarding provincial constitutions are how much autonomy a provincial legislature should have to adopt such a constitution if it desires to do so; what binding provisions or guidelines, if any, the national Constitution should provide for such constitutions; and whether the national Constitution should contain provisions relating to provincial government structures and procedures in the event of any of the provinces not having devised its constitution.

3.2 Dr Bertus de Villiers (Federalism in South Africa: The Debate Unfolds, 1994, unpublished) makes the observation that "on the international level the right of states/provinces/cantons to draw up their own constitutions is generally associated with federations that come into being through aggregation or the integration of previously independent or autonomous territories. Federations that arise through decentralization, especially in the case of developing countries, normally have a standard provincial constitution that is contained in the national constitution. South Africa has to a certain extent followed the approach of Spain by providing for a uniform provincial constitution and simultaneously recognizing the right of the provinces to draw up their own constitutions." However, in Spain such provincial constitutions are subject to ratification by both chambers of the Cortes Generales (national parliament) before the King can sanction a provincial constitution and promulgate it as a law [Article 151(4)].

3.3 In South Africa, the right of provincial legislatures to adopt their own constitutions is guaranteed in the Constitutional Principles, subject to certification by the Constitutional Court. The issue is therefore not whether a province should have the right to adopt its own constitution, but whether changes to the provisions of section 160 can be justified, and what the scope of such changes might be. In view of CP XVIII, options for changing the provisions of section 160 of the interim Constitution are limited. Section 160 cannot be changed in any manner that will result in the new provisions being substantially less than or substantially inferior to those

provided for in the interim Constitution. As the terms "substantially less" and "substantially inferior" are imprecise, any proposal to reduce the present power to adopt a provincial constitution would need to be considered very carefully to ensure that it is not in conflict with the Constitutional Principles. The Commission itself is not aware of any cogent reason why a reduction in the constitution-making powers of provinces should be considered. However, it would be possible in terms of CP XVIII to increase the powers of provincial legislatures to adopt their own constitutions, if justified.

3.4 It should be noted that the constitution-making powers of provincial legislatures (including their powers to provide for legislative and executive structures and procedures different from those provided for in the national Constitution) are limited by the interim Constitution and the Constitutional Principles, and will continue to be so limited to the extent that these provisions and Principles are incorporated into the new Constitution.

3.5 The interim Constitution deals with the following aspects relating to provincial government -

3.5.1 **Provincial Legislative Authority**

(a) Provincial legislature (institution, legislative authority and applicability of its laws).

(b) Legislative competence of provinces

These provisions at (a) and (b) above do not appear to fall within the class of matters on which provincial constitutions may differ from the national constitution. In view of the Commission's considerations and recommendations in respect of provincial legislative competences, it follows that the CPG cannot support any change to the relevant provisions in the interim Constitution, which bind provincial constitutions to the national Constitution's provisions relating to these matters.

However, items (c) to (s) below appear to be matters relating to legislative structures and procedures, and therefore fall within the competence of the provincial legislatures to provide for different provisions in their provincial constitutions. Such provisions will, however, have to comply with the Constitutional Principles, in whatever form these are incorporated into the new Constitution.

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(c) Composition of provincial legislature

(d) Duration and dissolution of provincial legislatures

(e) Elections

(f) Sittings of provincial legislature

(g) Speaker and Deputy Speaker

(h) Qualification for membership of provincial legislature

(i) Vacation of seats and filling of vacancies

(j) Oath or affirmation by members

(k) Powers, privileges and immunities of provincial legislatures and benefits of members

(l) Penalty for sitting or voting when disqualified

(m) Rules and orders

(n) Quorum

(o) Requisite majorities

(p) Assent to Bills

(q) Signature and enrolment of provincial laws

(r) Public access to provincial legislatures

(s) Administration of provincial legislatures

3.5.2 **Provincial Executive Authority**

All matters dealt with in sections 144 to 154 in the interim Constitution appear to be of a structural or procedural nature. On these matters it is therefore within the competence of provincial

legislatures to provide for different provisions in their provincial constitutions. Such provisions will have to comply with the present Constitutional Principles in so far as these are incorporated into the new Constitution.

3.5.3 **Provincial Finance and Fiscal Affairs**

In terms of CP XXV the fiscal powers and functions of provincial governments will be defined in the Constitution. While provincial constitutions can therefore include provisions relating to provincial finance and fiscal matters, such provisions will have to be consistent with the relevant provisions in the Constitution, the latter being the supreme law of the land (CP IV).

3.5.4 **Traditional monarchs**

Section 160.4(b) provides that, where applicable, a provincial constitution may make provision for the institution, role, authority and status of a traditional monarch in the province. The CPG considers that this makes adequate provision for such matters as a general principle, and sees no compelling need for any specific provision relating to particular monarchs. It therefore recommends

that the inclusion of any specific provision in the new constitution, as is the case with the present Section 160.4(b), should be reconsidered.

3.6 It therefore appears that provincial legislatures have been given wide powers to adopt provincial constitutions to suit the needs of their particular provinces. However, in some areas, such as provincial legislative competence and financial and fiscal affairs, they cannot be granted powers to adopt provisions contrary to those in the interim Constitution or which will be contained in the new national Constitution.

3.7 The questions raised in paragraph 3.1 above can therefore be answered as follows:

3.7.1 The interim Constitution has conferred on provincial legislatures the power to adopt their own provincial constitutions if they decide to do so, subject generally to the provisions of the national Constitution, but with the power to deviate from legislative and executive structures and procedures provided for in that Constitution, and to provide for a traditional monarch. This competence must be included in substantially undiminished form in the legislative powers of provincial legislatures in the new Constitution in compliance with CP XVIII. On the other hand, it does not appear to be possible or feasible to provide for even

greater autonomy so as to include provisions which are contrary to the national Constitution.

3.7.2 The binding provision contained in CP IV that the national Constitution will be the supreme law of the land, appears to provide a sufficient guideline for the framing of provincial constitutions. The present provisions of section 160(3) allow sufficient autonomy for provincial legislatures to adopt their own provisions for legislative and executive structures, which, however, must not be inconsistent with the general spirit and provisions of the national Constitution.

3.7.3 The national Constitution should include provisions relating to provincial government structures and procedures, not only to provide the framework for provincial government in cases where provinces decide not to devise their own constitutions, but also to establish a broad general framework for government at all levels in South Africa.

4. CONCLUSION

The Commission is of the view that the provisions in section 160 of the interim Constitution provide adequately for the competence of provincial governments to

adopt unique provincial constitutions according to their needs, while ensuring that such constitutions will conform to national constitutional provisions and norms.

The Commission recommends 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.

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COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON PROVINCIAL LEGISLATIVE POWERS RECOMMENDATIONS - DOCUMENT 2

1. INTRODUCTION

1.1 In terms of section 164 of the interim Constitution, the Commission on Provincial Government (CPG) is competent inter alia to advise the Constitutional Assembly (CA) on the development of a constitutional dispensation with regard to provincial systems of government. Such advice shall include recommendations in the form of draft constitutional provisions regarding inter alia the final delimitation of powers and functions between national and provincial institutions of government, with due regard to the criteria set out in section 164(3), i.e.

(a) the provisions of the Constitution;

(b) the Constitutional Principles set out in Schedule 4;

(c) historical boundaries, including those set out in Part 1 of Schedule 1, former provincial boundaries, magisterial district boundaries and infrastructures;

(d) administrative considerations, including the availability or non-availability of infrastructures and nodal points for service;

(e) the need to rationalise existing structures;

(f) cost-effectiveness of government, administration and the delivery of services;

(g) the need to minimise inconvenience;

(h) demographic considerations;

(i) economic viability;

(j) developmental potential; and

(k) cultural and language realities.

1.2 Section 161(1) provides that the Constitutional Assembly shall give priority attention to the development of a system of provincial government and in this regard shall take into consideration any recommendations of the CPG and any comments thereon by the respective provincial governments.

1.3 The CPG in practice consists of fourteen members appointed by the President, of whom nine are appointed from the provinces with the concurrence of the Premiers. Members are required by the Constitution to perform their functions fairly, impartially and independently.

1.4 The abovementioned provisions imply that the CPG should give careful attention to a large number of considerations relating to provincial governments and to come to fair, impartial, independent and informed decisions regarding the recommendations it makes to the CA. In this process, the provinces' views and experiences should command particular attention. To this end the Commission has invited submissions from the provinces, and has provided structured guidelines for the discussion of key issues. The Commission has also scheduled a series of workshops in which provinces would be involved, together with other interested parties (including members of the Constitutional Assembly). In addition, all draft recommendations by the CPG will be sent to the provinces for comment.

However, the CPG is also constrained in its investigations and deliberations by the time provisions for the adoption of a new constitution [Section 73(1)] and the constitutional process of the CA. Furthermore, the transition from the old systems of regional government to the new system created by the interim Constitution, has not yet been completed. It may be for this reason, amongst others, that the majority of provincial governments

have not yet responded to requests to make submissions to the CPG regarding their requirements for a system or systems of provincial government. The CPG has, however, been intimately involved in the transitional arrangements for the establishment of the new provinces and is aware of the many problems which have been or are still being experienced in that process.

1.5 In addressing the question of the appropriate legislative competence of provinces, the CPG has not drawn on abstract constitutional theory. Its starting point is the interim Constitution, the agreed Constitutional Principles, and its own practical experience of circumstances in the provinces during the transitional period since April 1994.

1.6 Wherever problems are experienced or identified in the allocation and exercise of powers and functions, the CPG wishes to stress the importance of distinguishing between teething problems, which the passage of time should resolve, and others of a more profound or intractable kind. It is equally important to establish whether a problem's essential nature, root cause, and possible solution is to be found in administrative processes and structures, or in constitutional arrangements, or in the terrain of political contestation.

1.7 In the new system of provincial government, some structures are in place while others are still being established. Provincial governments are functioning with varying degrees of effectiveness. The CPG has no reason to doubt that in time all the provinces will be able to carry out the functions allocated to them under the interim Constitution. However, at present not all provinces have developed to the point where they are able to handle all the powers and functions allocated to them in section 126, partly because of the complexities of the departmentalisation process.

1.8 The process of bringing provincial government to a fully operational point has been hampered inter alia by the need to rationalise the functions of former administrations; real or perceived delays in transferring functions from national to provincial level; personnel issues; budgeting processes; the establishment of sub-regions, and the provision of management infrastructure and support systems.

1.9 While the new system of provincial government is being implemented and consolidated, the provinces will need guidance in the performance of certain functions. This is so especially in the case of new functions (e.g. police) and expanded functional responsibilities (e.g. education, health, and housing). At this stage the provinces must draw on the expertise in national government departments in many instances. This is indeed one of the building blocks in an emerging system of intergovernmental cooperation.

1.10 The CPG considers intergovernmental cooperation to be in the best interests of South Africa. Indeed, the CPG believes that the emerging system of intergovernmental forums, functional committees and other vertical and horizontal intergovernmental mechanisms may need to be institutionalised even further. The new Constitution itself should perhaps make provision for additional structures intended to promote intergovernmental consultation and cooperation. This matter will be the subject of a memorandum to be submitted at a later stage.

1.11 In the meantime, however, the CPG wishes to draw attention to the need for sensitivity in the dealings between the national and provincial governments. For example, it is advisable to avoid creating perceptions that proceedings pertaining to provincial government and administration are dominated by the national government. Such perceptions could be remedied in part, for instance, by intergovernmental committees being chaired in rotation by national and provincial representatives. In developing a system of cooperative governance, attention to such details is perhaps as important as the larger structural and constitutional issues.

1.12 It is the CPG's view that the prudent approach would be to allow provinces to develop their present structures and capacities and to assist them to manage efficiently and effectively those functions already allocated to them.

1.13 If any province believes that there are additional functional areas not included in Schedule 6 for which it has the capacity and should be responsible, it is within the province's right to negotiate with the appropriate national government institutions to allow it to perform such function on an agency or delegation basis (See CP XIX and XXI.1). This could be the basis for an evolutionary process in which the formal transfer of such powers might be considered after the provinces have established the need and demonstrated the requisite capacity to deal with such matters.

2. GUIDELINES/CONSIDERATIONS

2.1 The freedom of the CPG to make recommendations in regard to provincial legislative powers is constrained by section 71(1)(a) which stipulates that a new constitutional text shall comply with the Constitutional Principles. Section 164(3)(a) furthermore requires it to take into consideration the provisions of the interim Constitution. The CPG consequently considers that the provisions of the interim Constitution should serve as the point of departure for its own deliberations in making its recommendations to the CA.

2.2 The allocation of powers between the different levels of government is required to be made on a basis which, inter alia, recognises the need for and promotes national unity and legitimate provincial autonomy (CP XX),

and complies with the criteria stipulated in CP XXI (see paragraph 3.1 below).

2.3 The process of gradually extending provincial competence over the functional areas listed in Schedule 6 by means of legislative, executive and administrative action, is at a relatively early stage, and the establishment and implementation of structures required for constructive co-operation between levels of government is incomplete.

It is consequently difficult to judge whether the allocation of powers and functions as provided for under the interim Constitution is adequate to ensure effective and efficient governance. However, an assessment of the experiences thus far in implementing the new governmental competences should be taken into account in making constitutional proposals.

2.4 The character of a state is determined not only by the provisions which are written into a constitution at any particular time, but also by the gradual development over time of a set of national values, legal provisions and formal and informal arrangements to regulate the interactions among the levels of government.

2.5 Constitutions can never be regarded as being final. Mechanisms for their amendment are necessary. The new Constitution should therefore also provide for such mechanisms. CP XVIII.4 indeed requires that provision be made for constitutional amendments inter alia in respect of the powers, boundaries, functions or institutions of provinces. The CPG intends to make recommendations in due course on ways in which the provinces should be involved in amendments to the Constitution affecting provinces.

2.6 <u>The CPG is of the view that the Constitution should not be unnecessarily detailed but rather should set out a broad framework (together with the requisite mechanisms) within which all levels of government should function and develop.</u>

3. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

3.1 <u>Constitutional Principles</u>:

The following Constitutional Principles have a bearing on the legislative powers of provinces -

XVIII, XIX, XX, XXI, XXII, XXIII

The text of these Constitutional Principles is given in an Appendix for easy reference.

3.2 <u>Legislative competence - Section 126</u>:

The interim Constitution provides as follows in relation to the legislative competence of provinces -

126.(1) A provincial legislature shall be competent, subject to subsections (3) and (4) to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far 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 that apply generally throughout the Republic;
(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial 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 country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) 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.

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

3.3 Functional areas - Schedule 6:

The current legislative competences of provinces are set out in Schedule 6 as amended by Act No. 22 of 1994.

Schedule 6: Legislative competence of Provinces

Agriculture
Abattoirs
Airports, other than international and national airports

Animal control and diseases
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
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 3
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 14
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services

4. DISCUSSION

4.1 The Commission is bound to adhere to the Constitutional Principles (CP) and must take into consideration the provisions of the interim Constitution when formulating its recommendations and draft constitutional provisions. It is therefore necessary to consider whether section 126 provides adequately for the allocation of powers to the national and provincial levels of government and, if not, what changes should be effected.

4.2 Section 126(1) empowers a provincial legislature to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

Section 126(2A) empowers Parliament also to make laws in respect of all the functional areas included in Schedule 6. However, a provincial law in respect of any such area shall prevail over an Act of Parliament, except in the circumstances enumerated in paragraphs (a) to (e) of subsection 3. To prevail over a provincial law, such an Act of Parliament must furthermore apply uniformly in all parts of the Republic. The Constitutional Court has the jurisdiction to interpret, protect and enforce these provisions [section 98(2)].

Subsection (2) also provides for provincial legislative competence to include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

4.3 The effect of the provisions of section 126 is that the national Parliament is vested with the exclusive power to legislate in respect of all functional areas not specified in Schedule 6 or covered in subsection (2), as well as with concurrent powers in respect of the provincial competences, subject to certain conditions. These provisions enable, but do not compel any province to make laws on the subject matters (functional areas) allocated to provinces. This therefore allows for a measure of functional asymmetry

to develop among provinces according to choices made by particular provinces.

4.4 The role that provinces can play in governing the country and protecting their interests could be enhanced by ensuring their effective representation in a second House (e.g. a Senate) capable of furthering the interests of provinces in the national legislature. This matter will be dealt with in a separate recommendation.

4..5 The Commission is of the view that in the new Constitution amendments to Schedule 6 may be necessary in the interests of good governance. It must be noted, however, that to date no provincial government has indicated to the Commission that the list of functional areas in Schedule 6 should be expanded; and also that reports from national departments on the division of activities in regard to Schedule 6 functions among the three levels of government have not all been completed. The Commission is nevertheless aware that amendments may be necessary, and intends to investigate and evaluate the need for further functional areas to be included in the Schedule. One such area which, in the Commission's view, appears to require inclusion in Schedule 6 is Finance, which is a provincial competence in terms of CP XXVI.

4.6 Criticism has been directed against the provisions of section 126 on three major points. These are given below, followed by the CPG's responses.

(i) *"Exclusive powers have on the face of it not been granted to provinces."*

Section 126(2A) empowers Parliament to make laws in regard to all matters within the legislative competence of provinces, subject to certain conditions. This section appears, in effect, to reduce the legislative power of provinces to the extent that they cannot be said to have exclusive powers in respect of any functional area. However, CP XIX stipulates that the powers and functions at the provincial level of government shall include exclusive and concurrent powers. It could therefore be argued that the present legislative powers of provinces are less than those which they are entitled to in terms of the Constitutional Principles.

A second argument is that provinces indeed have qualified exclusive competence to legislate on Schedule 6 functional areas in respect of matters in which Acts of Parliament will not prevail in terms of section 126(3). The possible legal uncertainty is not in the interest of good governance. The Commission therefore intends to investigate this matter further with a view to possible amendment of the relevant provisions of section 126.

(ii) *"The seat of residual powers has not been clarified."*

Section 126 empowers provincial legislatures to make laws for the province in regard to all matters which fall within the functional areas specified in Schedule 6, as well as in regard to matters which are reasonably necessary for or incidental to the effective exercise of such legislative competence. This power is subject to the power of Parliament to make laws on all such matters, which will, however, prevail over provincial laws only under specified circumstances. In terms of Section 37 the legislative power in respect of all other functional areas therefore is vested in Parliament. Thus all powers have been allocated in the Constitution.

(iii) *"The functional areas listed in Schedule 6 are not precise and therefore provincial legislatures cannot readily determine the borderlines of their legitimate field of legislative powers."*

It is correct that Schedule 6 does not give precise descriptions of the functions allocated to the provinces. To do so could be unnecessarily cumbersome, restrictive and inappropriate in a constitution if this is supposed to provide a framework within which governments can function, rather than spelling out the details. It appears to be more appropriate in cases of doubt or contention for the two levels of government to negotiate agreements on which

parts of the functional areas fall within the legislative and executive powers of the national and provincial governments, with due regard to the provisions of section 126(3). This has indeed already been done in respect of a number of functional areas on the basis of negotiation and consensus, e.g in the case of housing. This exemplifies the concept of intergovernmental cooperation. Cooperation and negotiation should be encouraged and required where appropriate by mechanisms provided for in the Constitution. For example, where the national government establishes policies, norms and standards in respect of Schedule 6 functions, it could be constitutionally required that such establishment should be in consultation with or after consultation with the provinces.

Structures, in addition to the Constitutional Court, for resolving disputes which may arise should also be provided for in the Constitution. This matter will be dealt with in a later memorandum.

In addition to the establishment of mechanisms for political negotiation and the resolution of disputes, Section 126(3) itself requires tighter formulation. The Constitutional Court rightly has final interpretative competence in constitutional matters, but the CPG considers it undesirable that the Court should be required to decide many matters which might more properly be resolved through

a political process, or else could be obviated by greater precision in the writing of the Constitution. The CPG therefore also intends to give attention to the possible reformulation of Section 126, which will be the subject of a later memorandum.

4.7 Subsections (5) and (6) of Section 126 do not appear to be contentious and the Commission can see no reason why the provisions should be changed in the new Constitution.

4.8 In view of CP XIX, a specific constitutional provision may be required to empower national and provincial governments to perform functions for other levels of government on an agency or delegation basis.

5. CONCLUSION

The provisions in Section 126 give the provinces the opportunity to exercise a measure of autonomy, and allow for functional asymmetry to develop. At the same time the present system allows for the provinces to have a say in policy-making and the determination of norms and standards at the national level through the evolving system of intergovernmental relations. Such arrangements could be formalised in the new Constitution. If a second House (a Senate) is provided for in the new Constitution, this could provide a further means of giving provinces an effective voice in the national legislature.

The provisional conclusion of the Commission is that in general the allocation of powers and functions contained in Section 126 are at this stage appropriate to serve the interests of good government in South Africa. However, further consideration needs to be given to the formulation of Section 126, as well as to the functional areas listed in Schedule 6, in order to ensure greater legal certainty and compliance with the applicable Constitutional Principles.

APPENDIX: PROVINCIAL LEGISLATIVE POWERS: APPLICABLE CONSTITUTIONAL PRINCIPLES

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. 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 this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. 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.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum 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, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity 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.

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

5. 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.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia -

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

(b) 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.

7. 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.

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

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

23 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON THE STRUCTURES AND PROCEDURES RELATING TO PROVINCIAL LEGISLATURES RECOMMENDATIONS - DOCUMENT 3

1. INTRODUCTION

1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 31.

1.2 Provinces have the right to adopt unique legislative structures and procedures for themselves. The Commission is nevertheless of the opinion that the new national Constitution should include provisions or generally provide for legislative structures and procedures which will enable provinces which do not adopt their own constitutions or which omit such matters from their constitutions, to function effectively. This will not affect the right of provinces to adopt their own legislative structures and procedures at any time if they wish to do so, different from those provided for in the national Constitution. The fact that provincial legislatures are entitled to adopt constitutional provisions dealing with their own structures and procedures, naturally limits the scope for the Commission to make recommendations about such matters for incorporation in the national Constitution.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 Section 160 of the interim Constitution confers on provincial legislatures the power to pass constitutions for their respective provinces which, in terms of subsection 3(a) may provide for legislative and executive structures and procedures different from those provided for in the Constitution. Apart from such differences, the provincial constitution shall not be inconsistent with the provisions of the Constitution.

2.2 Constitutional Principle XVIII.2 in effect entrenches the right of provincial legislatures to adopt constitutions for their provinces and to provide for legislative and executive structures and procedures different from those provided for in the national Constitution.

2.3 While provision in regard to legislative structures and procedures in provincial constitutions may differ from those provided for in the national Constitution, they will nevertheless have to comply with the relevant Constitutional Principles, in whatever form they are included in the new Constitution and other applicable constitutional provisions. The provisions relating to provincial legislative structures and procedures in the new Constitution must, of course, also comply with the Principles.

2.4 The relevant Constitutional Principles are IV, VI, VIII, X, XIV, XVI and XVII. The text of the Principles is appended for easy reference.

3. DISCUSSION

3.1 The views in this document are the collective views of members of the Commission, formulated with the assistance of a task group consisting of persons with various backgrounds and expertise.

3.2 The present constitutional provisions relating to provincial legislative authority formed the basis for the Commission's deliberations. (See section 164(3)(a) of the interim Constitution). Each section was considered to determine whether its subject matter should be included in the new Constitution in order to provide for efficient and effective legislatures in provinces which have not adopted their own constitutional provisions in this respect; whether the provisions are appropriate; what amendments should be recommended if the provisions are not appropriate; and which further provisions, if any, need be incorporated in the new Constitution.

3.3 The present constitutional text is attached and will be referred to in the discussion below. Section 126 and Schedule 6 will not be discussed in this document as these are dealt with in the recommendations relating to provincial legislative competence (Recommendation 1).

3.4 Section 125 - Provincial Legislature

3.4.1 Section 125 institutes a legislature for each province, vests it with legislative powers for the province in accordance with the Constitution and restricts the applicability of its laws to the territory of the province unless otherwise provided for in an Act of Parliament.

3.4.2 The subject matter of section 125 needs to be included in the new Constitution because it is a function of a national constitution to vest provinces with legislative powers and determine their jurisdictions. This is provided for in CP XVI, XVIII.1 and XX.

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 to the matter appear to be required.

3.5 Section 127 - Composition of provincial legislatures

3.5.1 Section 127 stipulates that a provincial legislature shall consist of not fewer than 30 and not more than 100 members elected in accordance with a system of proportional representation of voters as provided for in the Electoral Act, 1993. The actual

number of seats is determined in accordance with Schedule 2 (also attached). The section also provides that members of a provincial legislature shall be elected from provincial lists of party candidates for the province in question.

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. The interim Constitution delegates the task of determining the number of seats for each province to the Independent Electoral Commission, but stipulates that data in respect of voters, representations by interested parties and a proposed determination in the Schedule should be taken into account. 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. Representations by "interested parties" appear to be so imprecise that it should not be included as a basis for such determination. 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 legislatures 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.

3.6 Section 128 - Duration and dissolution of provincial legislatures

3.6.1 Section 128 provides for a five year term for provincial legislatures. However, if a legislature is dissolved in terms of other constitutional provisions before the expiry of that term, it shall continue for a period up to the day immediately preceding the commencement of polling for the election of a new legislature. Section 128 also provides for certain ancillary matters.

3.6.2 There is no absolute method by which the ideal duration of a legislature can be determined, nor have reasons to change the stipulations contained in section 128 come to the Commission's attention. Consequently the Commission is of the view that the subject matter of Section 128 should be included in the new Constitution without any substantive amendments.

3.6.3 The Commission also considered whether there should be constitutional provisions providing for general elections for provincial legislatures to be held on the same day in all provinces so as not to disrupt other national and provincial activities unnecessarily. However, the Commission is of the opinion this may be difficult to achieve in view of the powers already assigned to the Premiers of provinces by the interim Constitution.

3.7 Section 129 - Elections

3.7.1 Section 129 provides for the Premier of a province to call an election for a provincial legislature upon its dissolution in terms of the interim Constitution. Such an election shall take place within 90 days after the dissolution. The elections shall be conducted in accordance with the Electoral Act, 1993. In the opinion of the Commission these provisions presuppose that elections for provincial legislature need not be held on the same day(s) as elections for Parliament If provision is to be made for general elections as discussed in paragraph 3.6.3, section 129 would have to be amended by the addition of provisions in regard to the determination of the duration or dissolution of the newly elected legislature to make it possible to hold provincial elections on the same date.

3.7.2 The Commission is of the opinion that the provisions of section 129 are necessary and in accordance with generally accepted procedures for such elections and that the provisions should be incorporated into the new Constitution.

3.8 Section 130 - Sitting of provincial legislature

3.8.1 Section 130 provides for the convening of a provincial legislature within seven days after an election of such legislature. The legislature may determine its own periods, days and hours for sittings. The Premier of a province may summon the provincial legislature to an extraordinary sitting for the despatch of urgent business.

3.8.2 The Commission is of the opinion that the provisions of section 130 are necessary and in accordance with generally accepted procedures for sittings of legislatures. There is also a need for Premiers to have the power to summon the legislature to extraordinary sittings in the interest of efficient government. The provisions should be incorporated into the new Constitution without substantial amendments.

3.9 Section 131 - Speaker and Deputy Speaker of provincial legislature

Section 131 provides procedures for the election of a Speaker and Deputy Speaker of a provincial legislature. The provisions are in accordance with the generally accepted practice for such elections. The Commission is of the opinion that the provisions should be incorporated into the new Constitution without substantial amendment.

3.10 Section 132 - Qualifications for membership of provincial legislatures

3.10.1 Section 132 provides for qualifications similar to those pertaining to members of the National Assembly. It also provides that a Premier shall not be disqualified from being a member of the legislature because of his holding that office.

3.10.2 Section 132(3) applies the provisions of section 40(2), (3), (4) and (5) pertaining to the National Assembly mutatis mutandis to a person nominated as a candidate for election to a provincial legislature. This section provides that candidates nominated for a provincial legislature shall at the time of nomination be ordinarily resident in the particular province, but allows for at least one candidate or not more than 10 per cent of the total number of candidates which a party is entitled to nominate to be nominated while they are nor ordinarily resident in the province concerned.

3.10.3 The Commission is of the opinion that only persons who are ordinarily resident in a particular province at the time of their nominations should be entitled to become members of the legislature for that province. The provisions of section 40(3) of the interim Constitution do not serve the interests of provincial voters and opens the way for political parties to make nominations for elections to provincial legislatures, which may not be in the interest of that particular province. No compelling reasons have come to the Commission's attention that would justify the continued existence of this provision

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 for all members. Section 40(3) of the interim Constitution should therefore be deleted in so far as it relates to provincial legislatures.

3.11 **Section 133 - Vacation of seats and filling of vacancies**

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.

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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 procedure for the submission of nominations and could be incorporated in the new Constitution unchanged.

3.12 **Section 134 - Oath or affirmation by members**

The section prescribes the oath or solemn affirmation which every member of a provincial legislature shall make before taking his or her seat. The Commission is of the opinion that the provision should be incorporated into the new Constitution.

3.13 **Section 135 - Powers, privileges and immunities of provincial legislatures and benefits of members**

3.13.1 Section 135(1) empowers a provincial legislature to control, regulate and dispose of its internal affairs and provides that it shall have all such other powers, privileges and immunities as may, subject to the national Constitution, be prescribed by a law of such legislature.

3.13.2 Section 135(2) provides for freedom of speech and debate in or before such legislature and any committee thereof, and that such freedom shall not be impeached or questioned in any court.

3.13.3 Section 135(3) protects a member from civil or criminal proceedings, arrest, imprisonment or damages for anything that he or she has said, produced or submitted in or before the legislature or a committee thereof or for anything that may have been revealed as a result thereof.

3.13.4 Section 135(4) deals with the payment of salaries and allowances and pension benefits to members and surviving spouses.

3.13.5 All the above provisions are necessary for the functioning of a provincial legislature and the Commission is of the opinion that similar provisions should be incorporated into the new Constitution.

3.14 **Sections 136 to 142**

Sections 136 to 142 provides for matters which are necessary for the orderly functioning of the legislature, viz:

- Penalty for sitting or voting when disqualified
- Rules and orders
- Quorum
- Requisite majorities
- Assent to Bills
- Signature and enrolment of provincial laws and
- Public access to provincial legislatures.

Similar provisions should be incorporated into the new Constitution.

3.15 **Section 143 - Administration of provincial legislatures**

3.15.1 Section 143(1) provides for the appointment of a provisional secretary for a legislature until a permanent secretary can be appointed. This provision will not be required in the new Constitution and can therefore be omitted.

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 an 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 establishments, remuneration and other conditions of service of the staff of the legislatures. Significant disparities in salaries, grading 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 abovementioned 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.

3.15.4 The provisions of section 143(3) that the legislature's staff shall be remunerated out of the Provincial Revenue Fund of the province should be incorporated into the new Constitution.

3.16 **Local Government**

The interim Constitution does not provide for any formal arrangements in regard to consultation between provincial governments and local government representatives in relation to legislation affecting local governments (provision is made in respect of traditional authorities). There may be a need to provide for such consultation or representation and the Commission will consider the matter in a recommendation dealing with local government matters.

APPENDIX: APPLICABLE CONSTITUTIONAL PRINCIPLES

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

260 Walker Street Sunnyside Private Bag X887 Pretoria 0001
Telephone (012) 44-2297 Fax (012) 341 8452

Ref 6/1/1

1995-04-18

The Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Mr Ebrahim

PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

1. Preliminary recommendations in regard to a second chamber

2. Preliminary recommendations on provincial executive authorities

3. Preliminary recommendations on provincial staff matters

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully

CHAIRPERSON

23 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON A SECOND CHAMBER RECOMMENDATIONS - DOCUMENT 4

1. INTRODUCTION

1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 2).

1.2 The Constitutional Principles do not provide for the continued existence of the Senate in the new Constitution. The only reference to a possible second chamber of Parliament is contained in CP XVIII.4 dealing with an alternative in respect of majorities required for amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces. The relevant wording is: ".... if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives ...". It is significant that while there is no certainty in regard to the continuation of the Senate as such, there is reference to the possibility of a second chamber being composed of provincial representatives.

1.3 From the documentation relating to a second chamber of Parliament before the Commission, it appears that there is considerable support for the continued existence of a second chamber. However, there are divergent views on its role, powers and composition, as well as other aspects.

2. INTERIM CONSTITUTIONAL PROVISIONS

Sections 48 to 54 of the interim Constitution deal specifically with the Senate, and sections 55 to 67 relate to matters affecting both the National Assembly and the Senate. The text of these sections is appended for easy reference.

3. DISCUSSION

3.1 Purpose of a second chamber

3.1.1 It is necessary to clarify the purposes a second chamber might fulfil in order to justify its institution and continued existence. Agreement in regard to such purposes is necessary for the formulation of other provisions required to give effect to these, such as the composition, powers and role of the second chamber. The specification of purposes also provides a measure for determining whether a second chamber is in fact functioning effectively.

3.1.2 It is generally accepted that in a national legislature a second chamber can serve either one or both of two main purposes, in both unitary and federal states, namely

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

(b) to broaden the system of representation, for example to provide specifically for the representation of subnational units (regions, provinces, or states), or to include other significant interests in the society.

In regard to (a) it is argued that a second chamber helps to prevent flawed legislation from being passed by a single chamber. Nor does the first chamber have unchecked power that could threaten the freedom of individuals or minorities. The second chamber in fact provides a second opinion on matters dealt with by the first chamber. Even by exercising 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.

In regard to (b) it is 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.

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.

3.1.3 The Commission is of the view that the provision of a second chamber in the South African Parliament would be justified if it is composed and empowered in such a way that it could effectively fulfil the purposes discussed in paragraph 3.1.2.

The Commission is of the opinion that the representation of provincial interests is of particular importance in view of the discussion in paragraph 3.1.2, and that this should be the overriding consideration in determining the need for a second chamber. It

therefore recommends that a second chamber of Parliament be retained, but that it be structured as discussed below.

To accommodate the obligation on the Commission to consider the provisions of the interim Constitution, and to facilitate the drafting of provisions for the new Constitution, the discussion will be based on the present constitutional text relating to the Senate.

3.2 Composition of the second chamber

3.2.1 Section 48(1) provides that the Senate shall be composed of 10 Senators for each province, nominated by the parties represented in a provincial legislature. Section 48(2) stipulates that the nominations shall be in accordance with the principle of proportional representation as determined by the formula described in the section.

3.2.2 The provision of an equal number of members for each province is in accordance with general international practice for the representation of states/provinces in a second chamber and is also regarded as suitable for South African circumstances. No cogent reasons have been brought to the Commission's attention why this allocation should change in the new Constitution.

The possibility of reducing the number of members in the second chamber has been raised, but the Commission must caution that this could result in there being insufficient members to participate effectively in the various structures of Parliament, especially if the role of the second chamber itself is to be enhanced.

3.2.3 The Commission does not regard it as being within its jurisdiction to express a view in regard to the representation of other interest groups in the second chamber, but draws this to the attention of the Constitutional Assembly, which may wish to pursue the matter. It should be borne in mind, however, that the determination of interest groups qualifying for representation could be a controversial matter. In addition, such representation could pose serious problems in satisfying criteria for democratic accountability.

3.2.4 In terms of the interim Constitution, members of the Senate have to be nominated by political parties. This could have the effect that senators regard themselves as party representatives, and are also regarded in this light by the public. In a Parliament where the representation of political parties in the first chamber is largely replicated by the representation of parties in the Senate, a situation could be created in which senators are obliged to follow the directions given by their party caucuses. The Senate therefore becomes no more than a rubber stamp for the first chamber. In such circumstances the Senate would obviously not be fulfilling any distinctive purpose and would become superfluous.

The Commission is consequently of the opinion that the new Constitution should contain provisions that clearly provide for provincial representation in the second chamber (CP XVIII.4) and for its members to have sufficient independence so as to enable them to represent their provinces effectively. This is discussed below.

3.2.5 More independent and effective representation of the provinces could possible be provided by -

(i) direct election in each province of members of the second chamber. This would probably be the most democratic way to ensure representation of the provinces in the second chamber. The feasibility of such a procedure requires further investigation; or

(ii) representation of the provinces by elected members of the provincial legislatures nominated by the legislatures on a proportional basis. This method would create a much closer relationship between members of the second chamber and their province's legislature, and could also allow for the interchangeability of members of the second chamber in Parliament and members of the provincial legislature; or

(iii) requiring parties to submit lists of candidates for nomination to the second chamber together with their lists of candidates for election to the provincial legislatures. This would at least identify the candidates for the second chamber beforehand, but would not directly influence their appointment as this would still be by proportional representation according to the number of votes registered for each political party; or

(iv) nomination of members of the second chamber by the provincial legislature on the basis of proportional representation instead of by the parties. This method would not differ materially from the present method provided in section 48, but may serve to strengthen their identity as the selected representatives of the province and its legislature and less as representatives of political parties; or

(v) representation of the province in the second chamber by the requisite number of members drawn from the province's Executive Council. The feasibility of this method would require careful investigation, however, in the light of demands likely to be made on members of provincial Executive Councils simultaneously attending to parliamentary duties.

3.2.6 The Commission is of the view that, at this point in our constitutional history, the method described in paragraph 3.2.5 (ii) above could provide an effective form of representation for the provinces in the second chamber. In effect this system combines elements of the other methods described.

The Commission therefore recommends that this method be considered by the Constitutional Assembly.

3.2.7 Whatever the system adopted for appointment to the second chamber, the members' relationship with the provincial legislatures would be strengthened if they were required to report to the provincial legislature from time to time in regard to their activities and efforts to promote the interests of their provinces at national level. This would make their role as provincial representatives much more meaningful and accountable. Accountability could be strengthened further by making provision for the recall of members by their provinces if deemed to be performing unsatisfactorily. The Commission recommends that provisions to this effect be incorporated into the new Constitution.

3.3 President and Deputy President of the second chamber

Section 49 of the interim Constitution provides for the election of the President and Deputy President of the Senate and deals with other non-contentious matters relating to these offices. Similar provisions will have to be incorporated into the new Constitution if a second chamber is retained.

3.4 Qualification for membership of the second chamber

Section 50 specifies that no person shall be qualified to become or remain a senator unless he or she is or remains qualified to become a member of the National Assembly. These qualifications are prescribed in section 42 which should be retained. However, the section does not provide for residential qualifications. Nor does section 48 require that a senator should be ordinarily resident in the province that he or she represents. The CPG considers it essential that a member of the second chamber should be ordinarily resident in the province that he she represents. A similar opinion has been expressed by the Commission in respect of members of the provincial legislatures (paragraph 3.10.3 of Recommendation 3). The Commission recommends that provisions similar to those contained in section 50 should be incorporated into the new Constitution. However, if the recommendation in paragraph 3.2.6 above is adopted, the section may be omitted. If not, it should be amended to provide for residential requirements for members of the second chamber similar to those provided for members of provincial legislatures.

3.5 Vacation of seats by members and filling of vacancies

3.5.1 Section 51(1) stipulates that a senator shall vacate his or her seat if he or she ceases to qualify, resigns or is absent without leave for 15 consecutive days. This provision should be retained.

3.5.2 The Section [paragraph (b)] also provides for the vacation of a seat if a senator ceases to be a member of the party which nominated him or her as a senator. The issue is similar to that relating to members of the provincial legislatures dealt with in paragraph 3.11.2 of Recommendation 3. The Commission is of the opinion that democratic principles would be better served by the deletion of the provision which terminates membership of the second chamber if the member ceases to be a member of the party which nominated him or her. This recommendation will fall away if members of the second chamber are nominated by provincial legislatures instead of by parties, as recommended in paragraph 3.2.6.

3.5.3 Section 51(2) provides for the filling of vacancies in the Senate by nomination by the party which nominated the vacating senator. The provision will have to be amended if the recommendation in paragraph 3.2.6 above is adopted.

3.5.4 Section 51(3) provides that if a provincial legislature is dissolved, the senators from the province in question shall vacate their seats and that the vacancies shall be filled in terms of section 48(1)(a). The Commission is of the view that, in the event of a provincial legislature being dissolved, the province's members in the second chamber should vacate their seats. The vacancies should then be filled on the basis recommended in 3.2.6.

3.5.5 In the event of any other vacancies occurring in the second chamber before the expiry of the normal term of office, persons nominated to fill such vacancies should be appointed only for the balance of the unexpired period.

3.6 Oath and affirmation by members of the second chamber
Sittings of the second chamber
Quorum

These matters of a procedural nature are provided for in sections 52 to 54. The new Constitution should provide for similar provisions.

4. DISCUSSION - THE NATIONAL ASSEMBLY AND THE SECOND CHAMBER

4.1 Powers, privileges and immunities of Parliament and benefits of members
Parliament and benefits of members
Penalty for sitting or voting when disqualified by law
Joint sitting of Houses
Rules and orders

These are procedural matters dealt with in sections 55 to 58 of the interim Constitution. The new Constitution should contain similar provisions.

4.2 Ordinary Bills

4.2.1 Section 59(1) provides for the introduction of ordinary Bills in either the National Assembly or the Senate and for their adoption in each House in order to be passed by Parliament. Similar provisions should be incorporated into the new Constitution.

4.2.2 Section 59(2) provides that an ordinary Bill passed by one House and rejected by the other 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. After consideration and report on any proposed amendments to the Bill, it shall be referred to a joint sitting of both Houses, at which it may be passed with or without amendments by a majority of the total number of members of both Houses.

This procedure is fair up to the majority requirement at the joint sitting. The Senate is at a disadvantage in joint sittings requiring a simple majority to pass a Bill because of the relative smallness of its membership, namely 90 out of a total of 490 members. It could be argued that as half of the 400 members of the National Assembly have been elected from provincial lists of the political parties, this accommodates the interests of provinces. However, they are members of the National Assembly and their election from provincial lists instead of from national lists is of no practical significance. Moreover, political parties may not be obliged to present provincial lists in future elections.

On the other hand, deadlock-breaking mechanisms should be available in order not to bring government to a complete halt. Investigations of the deadlock-breaking procedures employed in other countries indicate that no absolute procedure has as yet been devised, except for referral of the matter to a constitutional court for judgement. The most effective political mechanism available is to provide for a cooling-off period which may persuade the government to reconsider or amend the Bill.

The Commission is consequently of the opinion that a Bill which has been referred to a joint committee as contemplated in section 59(2) should be reported on to both Houses and if still rejected by one House, should be reconsidered by both Houses after a period of six months. If the Bill is again passed by one House and rejected by the other, it should be referred to a joint sitting of both Houses, at which it may be passed with or without amendments by a majority of the total number of members of both Houses.

4.3 Money Bills

4.3.1 Section 60(1) provides that Bills appropriating revenue or moneys or imposing taxation shall be introduced in the National Assembly only. However, section 60(4) provides that the National Assembly shall not pass such a Bill unless it has been considered and reported on by a joint committee of both Houses. The Senate may not amend any Bill in so far as it appropriates revenue or moneys or imposes taxation [60(6)]. Section 60(7) stipulates that if the National Assembly passes a Bill imposing taxation or dealing with the appropriation of revenue or moneys and the Senate rejects it or proposes amendments to it, or fails to pass it within 30 days after it has been passed by the National Assembly, the Bill shall be referred back to the National Assembly for reconsideration. It may then pass the Bill with or without amendment, and if so passed it shall be deemed to have been passed by Parliament.

4.3.2 While the provisions of this section illustrate the dominance of the National Assembly in respect of money Bills, there are important reasons why such Bills should not be delayed unreasonably. As matters are, the Senate can delay such a Bill for 30 days if it wishes to do so. Further unreasonable delay may be harmful to good government if it should impair the ability to collect revenues or expend moneys.

A problematical situation arises in regard to the ability of the Senate to influence discretionary appropriation of revenues or moneys for provincial activities, and even the determination by law of the share of national revenues to be allocated to the provinces and local governments. In theory the second chamber should protect the interests of the provinces in these matters by using all mechanisms at its disposal. As indicated under paragraph 4.2.2 the interests of good governance dictate that it can at most use delaying mechanisms to achieve reconsideration of a relevant Bill. However, such delays could also be harmful to the activities of the provinces.

4.3.3 It is evident that the distribution of national revenues between the three levels of government will remain an issue for the foreseeable future. The Financial and Fiscal Commission may play an important role in resolving many of the disputes which could arise over money matters. As far as the parliamentary process for money Bills and the role of the second chamber in that process are concerned, no further solutions for breaking deadlocks have presented themselves to the Commission. It is a known fact that the need for money for government activities at all levels is almost infinite, while the sources of revenue are finite. All that could be achieved by any mechanism is to ensure a fair distribution of the available revenue. To this end, the administrative processes preceding the introduction of money Bills should be developed to the extent that as far as possible disputes are resolved before the parliamentary processes commence. Once such a Bill has been introduced, in the National Assembly, the views of the National Government can only be influenced to a certain extent during the procedures prescribed in Section 60. It does not appear to the Commission that the second chamber could be given more powers in respect of such Bills without increasing the possibility that the process may adversely affect efficient and effective governance.

4.4 Bills affecting certain provincial matters

4.4.1 Section 61 stipulates that Bills affecting the boundaries or the exercise or performance of the powers and functions of provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses. Such Bills can be passed by an simple majority in each House. The section further stipulates that a Bill, other than a Bill amending the Constitution, which affects the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, must also be approved by a majority of the senators of the province or provinces in question.

4.4.2 The provisions in Section 61 are not very clear. However, what is relevant is that Bills dealing with the exercise of concurrent powers in respect of Schedule 6 functional areas should enjoy the special attention of the second chamber. In effect, in terms of the interim Constitution Parliament can pass Bills in respect of such matters with ordinary majorities in both Houses. Additional protection of provincial interests could be provided by requiring a special majority for such Bills in the second chamber. However, this may be too onerous and in effect elevate every such matter to the level of constitutional changes for which such special majorities are required. The power of the second chamber in regard to provincial matters could be enhanced be requiring Bills of this nature to be introduced in the second chamber only, as the equivalent of the case with money Bills in the National Assembly. The Commission is consequently of the opinion that provision should be made for Bills

dealing with Schedule 6 functional areas to be first introduced in the second chamber. In addition, any such Bills relating to a particular province should also require the approval of the majority of that province's representatives in the second chamber. These requirements would open the way for discussions between the national government and the provinces to address issues and resolve differences before such Bills are considered in the first chamber.

4.5 Bills amending the Constitution

4.5.1 Constitutional Principle XVIII.4 provides 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.

4.5.2 Section 62(1) provides generally that a Bill amending the Constitution shall require a two-thirds majority at a joint sitting of the National Assembly and the Senate. Section 62(2) further provides that amendments of section 126 (legislative competence of provinces) and section 144 (executive authority of provinces) shall require a two-thirds majority of each House sitting separately. It further provides that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature.

4.5.3 The provisions of section 62 therefore appear to be in accordance with the stipulations of CP XVIII.4 and similar provisions could be incorporated into the new Constitution.

4.5.4 The Commission is of the opinion that certain constitutional principles should be incorporated into the new Constitution to further entrench the constitutional position of the provinces. The following principles are relevant:

CP XVI, CP XX, CP XXI, CP XXII, CP XXIII, CP XXVI

4.6 **Requisite majorities**
Assent to Bills
Signature and enrolment of Acts
Rights and duties of President, etc, in Houses
Public access to Parliament

The above matters are procedural in nature and similar provisions need to be incorporated into the new Constitution.

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6 April 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON PROVINCIAL EXECUTIVE AUTHORITIES RECOMMENDATIONS - DOCUMENT 5

1. INTRODUCTION

1.1 See introductory notes under recommendations on provincial legislative competence (Recommendation 2).

1.2 Notwithstanding the right of provinces to adopt unique legislative and executive structures and procedures for their provinces, the Commission is of the opinion that the new national Constitution should include guideline provisions or generally provide for executive structures and procedures that will enable provinces which do not adopt their own constitutions or which omit such matters from their constitution, to function effectively. This will not affect the right of provinces to adopt their own executive structures and procedures at any time if they wish to do so, even if they are different from those provided for in the national Constitution. The fact that provincial legislatures are entitled to adopt constitutional provisions dealing with executive structures and procedures, naturally limits the scope for the Commission to make recommendations about such matters for incorporation in the national Constitution.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 Section 160 of the interim Constitution confers on provincial legislatures the power to pass a constitution for their provinces which, in terms of subsection 3(a) may provide for legislative and executive structures and procedures different from those provided for in the Constitution. Apart from such differences, the provincial constitutions shall not be inconsistent with the provisions of the Constitution.

2.2 Constitutional Principle XVIII.2 in effect entrenches the right of provincial legislatures to adopt constitutions for their provinces and to provide for legislative and executive structures and procedures different from those provided for in the national Constitution.

2.3 While provisions in regard to executive structures and procedures in provincial constitutions may differ from those provided for in the national Constitution, they will nevertheless have to comply with the relevant Constitutional Principles (in whatever form those are included in the new Constitution) and other applicable constitutional provisions. The provisions relating to provincial executive structures and procedures in the new

Constitution must, of course, also comply with the Principles. The relevant Constitutional Principles (CP) are -

VI, XVI, XIX, XX, XXII

2.4 It should be noted that CP XXXII provides that the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of the interim Constitution, which provides inter alia for proportional representation in the government of national unity. No such extension to 1999 has been provided for in respect of provincial executives.

3. DISCUSSION

3.1 The views in this document are the collective views of members of the Commission, formulated with the assistance of a task group consisting of persons with various backgrounds and expertise.

3.2 The present constitutional provisions relating to provincial executive authority formed the basis for the Commission's deliberations. (See section 164(3)(a) of the interim Constitution.) Each section was considered to determine whether its subject matter should be included in the new Constitution in order to provide for efficient and effective executives in provinces which have not adopted their own constitutional provisions in this respect; whether the provisions are appropriate; what amendments should be recommended if the provisions are not appropriate; and which further provisions, if any, need be incorporated in the new Constitution.

3.3 The present constitutional text is attached and will be referred to in the discussion below.

3.4 **Provincial executives - Premiers**

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. 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.

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.

3.5 Provisions relating to Premiers

3.5.1 The interim Constitution contains the following provisions relating to Premiers:

Section	144 -	Executive authority of provinces
	145 -	Election of Premiers
	146 -	Tenure of and removal from office of Premiers
	147 -	Responsibilities, powers and functions of Premiers
	148 -	Acting Premiers

3.5.2 In the Commission's opinion the matters dealt with in the above-mentioned sections are necessary for the proper functioning of a provincial executive. However, provision should be made for the Premier to vacate his seat upon election as recommended in paragraph 3.4.4 above. No evidence has come to the Commission's attention to suggest that the other provisions are inadequate. The Commission consequently recommends that similar provisions, duly amended in the light of the preceding comments, be incorporated into the new Constitution.

3.6 Executive Councils - Number of members

3.6.1 Section 149(1) provides that the Executive Council of a province shall consist of the Premier and not more than 10 members appointed by the Premier in accordance with the section. The Commission has become aware that some provinces are of the opinion that the prescribed maximum number of members is inadequate to cope with the variety of functional areas and the work load. It has also been mooted that provision should be made for the appointment of deputies for members of the Executive Council. The Commission is not convinced that there is a need to

provide for a general increase in the maximum number of members or for the appointment of deputies in the new Constitution. Such needs, if they exist, may differ from province to province. It is to be expected that the burden on members of executive councils will be particularly onerous during the transitional period, but it should become less so as provinces proceed to function in more normal circumstances.

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 legislature to compose the committees which should broadly oversee the activities of the various executive departments.

3.6.3 The Commission is of the opinion 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. The responsibility and accountability for the appointment of a larger executive should vest in provincial governments and not be shifted to the national government, and should therefore be provided for in provincial constitutions if necessary. Such constitutional provisions will need to comply with the Constitutional Principles and remain within limits stipulated in the national constitution.

3.7 Composition

3.7.1 Section 149(2) provides for the allocation of Executive Council portfolios on a proportional basis to political parties represented in the provincial legislature. As noted above, this provisions is not entrenched until 1999 as in the case of the composition of the national Cabinet. However, the retention or scrapping of provisions providing for proportional allocation of membership of executive councils in the new Constitution should be considered and finalised in respect of both levels of government.

3.7.2 Documentation before the Constitutional Assembly indicates that there is some support for the retention in general of the provisions relating to the proportional allocations provided for in section 149(2). The Commission believes that this method for allocating membership in provincial executives serves a useful purpose in ensuring a measure of public/minority trust in the new provincial government system for the interim period. No evidence has come to the Commission's attention that the proportional representation of parties in provincial executives as such is in any way impeding effective government. Indeed, the collective experience of members of executives gained in diverse former structures, could be beneficial during the process of establishing new provincial government systems. However, the Commission is of the opinion that the proportional method of composing provincial executives should not be imposed by the new Constitution as a permanent feature of provincial government. Compulsory provisions for including minority parties in government are unlikely to be politically acceptable in the longer term, and it can be foreseen that constitutional amendments would be called for.

3.7.3 A provincial government which has the support of the majority of the electorate and is accountable to it for executing the policies on which it contested the election, should be permitted to compose its executive authority in a manner which will best allow it to carry out its mandate effectively. If a coalition of parties is required to achieve this purpose or if the majority party for any purpose wishes to include members of other parties in the executive, this should be done on a voluntary basis or as a result of negotiations between parties, as the case may be.

3.7.4 The Commission therefore recommends that the new Constitution should not include provisions that will impose the proportional allocation of membership of provincial executive councils as contained in the interim Constitution. However, to ensure the uniform treatment of present members of executives at national and provincial levels, and to continue the interim benefits mentioned above for the unexpired part of the transitional period, the Commission recommends that the provision of CP XXXII be applied also to provincial executives until 30 April 1999.

3.7.5 Section 149(4)(b) requires a Premier to appoint only members of the provincial legislature as members of the Executive Council. This effectively prevents the appointment of persons with expertise which may be required in the Council if such persons are not members of the legislature. Provision has been made for such appointments to the executive at national level and similar provisions should be included in the new Constitution in respect of provincial executive councils, including the right of such appointees to speak, but not to vote in the legislature.

In order to satisfy the concept of separation of powers, it may indeed be necessary to provide for the appointment of all members of the Executive from outside the legislature or to require members of the legislature to vacate their seats if appointed to the Executive. This would have the additional benefit of freeing members of the Executive from legislative duties, avoiding an increase in their numbers as discussed under paragraph 3.6 above and leaving a sufficient number of members of the legislature to serve in the structures required for effective checks and balances and for proper reporting to their constituents. If members of the legislature are to represent their province in a second chamber as recommended in Document 4, the benefit would be even greater.

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 multi-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 preconsider 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.

3.7.7 The above recommendations will materially affect the provisions of subsections (4) to (6) and they will have to be reformulated completely. The Commission will submit new draft text in due course.

3.7.8 Subsections (7) to (10) provide for the oath, certain ethical provisions and remuneration and pension benefits for members of executive councils which should materially be incorporated into the new Constitution.

3.8 Procedural and other matters

3.8.1 The interim Constitution contains the following provisions -

Section	150 -	Executive Council procedure
	151 -	Temporary assignment of powers and functions to Executive Council members
	152 -	Transfer of powers and functions from one member to another member
	153 -	Accountability of members
	154 -	Votes of no confidence

3.8.2 Section 153(4) requires a Premier to consult with the leader of a participating party before removing a member of that party from Executive Council office. This provision should be omitted from the new Constitution if the recommendation in paragraph 3.7.4 above is adopted. Provisions similar to the rest of sections 150 to 154 should be incorporated into the new Constitution.

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30 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

DRAFT PRELIMINARY RECOMMENDATIONS ON PROVINCIAL STAFF MATTERS
RECOMMENDATIONS - DOCUMENT 6

1. INTRODUCTION

1.1 This memorandum deals with staff matters relating only to provincial executive structures. Recommendations in regard to staff of provincial legislatures are contained in Recommendation 3 of 23 March 1995.

1.2 The consideration of provincial staff matters is subject to Constitutional Principle XXX.1 which provides that there shall be an effective, non-partisan career-orientated public service broadly representative of the South African community, functioning on a basis of fairness, and which shall serve all members of the public in an unbiased and impartial manner and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. It further provides that the structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

1.3 Constitutional Principle XXIX stipulates that the independence and impartiality of a Public Service Commission shall be provided for and safeguarded by the Constitution in the interest of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

1.4 No mention is made in the Constitutional Principles of provincial staff matters as such.

1.5 In terms of section 164(3) the Commission shall take into consideration the provisions of the interim Constitution and the Constitutional Principles in carrying out any or all of its functions. The Commission therefore had to note the fact that the interim Constitution does not provide for a separate public service for each province. Section 212 indeed provides for a single Public Service structure in terms of a law to provide effective public administration and to conform with criteria almost wholly identical to those contained in CP XXX.1. Provision is made in section 213 for provincial service commissions whose role is in many respects subservient to that of the Public Service Commission established by section 269, and whose independence and impartiality is entrenched in CP XXIX. However, the Public Service Commission's powers and functions are not explicitly entrenched in the Principles and could therefore be defined differently in the new Constitution, if necessary.

1.6 Two major questions arise in regard to how provincial staff matters should be dealt with in the new Constitution.

2. DISCUSSION

One public service

2.1 The first question which presents itself is whether each province shall be empowered to create its own unique personnel system, including independent personnel administration standards for all categories of personnel, separate structures for remuneration and other conditions of service, including collective bargaining structures, independent personnel practices in regard to appointments, promotions, transfers, discharge, retirement and other career incidents, etc. The duplication, disparities, dissatisfaction among staff and financial consequences likely to result from such fragmented personnel systems for employees who are largely remunerated from the same source, would be untenable and unjustifiable. 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 mentioned above.

2.2 The Commission is of the opinion that it was clearly the intention of the interim Constitution and CP XXX that there shall be only one public service, which should include staff of provincial administrations, to avoid the possible result of fragmented personnel systems. This is also manifestly a function which needs to be dealt with nationally in terms of the criteria enumerated in CP XXI. The Commission consequently recommends that the new Constitution should expressly include provincial staff as part of the Public Service.

2.3 The interim Constitution prescribes that the public service shall be structured in terms of a law to provide effective public administration and specifies certain criteria for such service. In view of the importance of a public service in the system of government, the Commission is of the opinion that similar broad specifications for the South African public service should be incorporated into the Constitution.

Public Service Commission

2.4 The second question, which arises from the existence of a single public service for the Republic, is which institution should be responsible for the formulation and application of norms and standards for personnel practices within such service. The required norms and standards for a public service/ public administration can be formulated and administered either by a department or office for the public service under direct control of a Cabinet Minister or by a relatively independent public service commission as provided for in the interim Constitution. If administered by a state department or office, the Minister, and indirectly the Cabinet, assumes

responsibility for a function which may, and usually does create a considerable amount of friction between public servants and the government of the day. The government becomes directly involved in the numerous areas of real or perceived dissatisfaction over remuneration and other conditions of service which usually exist among various personnel groups in a public service. As such a department would also have to exercise a measure of control over the organisations, establishments and personnel practices of other national departments, there is a real potential for undesirable conflict between the Minister responsible for the department and other ministers. On the other hand, if an independent Commission is made responsible for the determination and administration of these matters, it tends to a certain extent to buffer the government of the day against having to get directly involved in or assume direct responsibility for whatever causes such dissatisfaction or conflict. It allows the government to intervene when it considers this justified or at least to appease the dissatisfaction by undertaking to investigate the causes of the dissatisfaction for which, of course, it need not accept direct responsibility as that is within the Commission's domain. However, a public service commission should also be responsive to the needs of the government of the day, taking these into account in its decisions without prejudicing its independence and responsibilities towards the members of the public service.

2.5 From the viewpoint of public servants, a public service commission could serve to protect them from nepotism or other undue interference on the part of governments or politicians, especially in regard to appointments and promotions, provided that the commission has earned the trust of public servants and manifests the ability to ensure independent, fair and unbiased treatment in all personnel matters. The individuals appointed as members of a public service commission and the manner of their appointment are therefore extremely important considerations, as is public accountability of both the commission and its individual members.

2.6 A department of public administration functioning under a Cabinet Minister, could probably be more immediately responsive to the needs of a government of the day and would be more inclined to incorporate those needs in its decision-making. However, it will probably be mistrusted by other departments as well as by public servants and its decisions could be even more open to criticism levelled directly at the government of the day by dissatisfied public servants. If such a department were to be involved in matters such as appointments and promotions it could be perceived by public servants to be biased in favour of the government of the day and even in favour of the governing party and be mistrusted to a degree which could cause severe dissatisfaction and disruption in the public service.

2.7 Constitutional Principle XXIX appears to entrench the continued existence of a Public Service Commission in the new Constitution and provides for the safeguarding of its independence and impartiality in the interest of the maintenance of effective public administration and a high standard of

professional ethics in the public service. The Commission on Provincial Government is of the opinion that the Public Service Commission 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 However, arrangements will be necessary to ensure that the provinces will also play a significant role in the determination of norms and standards for the Public Service and are consulted by the Public Service Commission in the process. Such arrangements already exist in respect of consultation with employee organisations in the bargaining councils for the Public Service.

2.8 Section 211(1) of the interim Constitution provides for the appointment of members of the Public Service Commission by the State President. However, section 211(3) stipulates that the composition, appointment and various other matters relating to that Commission shall be determined by an Act of Parliament. The Commission is of the opinion that similar provisions should be incorporated into the new Constitution, but that the Act referred to should particularly ensure that the persons appointed to the Public Service Commission are also acceptable to the broad body of public servants. The ratification of their appointments by Parliament should be considered (see e.g. section 191 dealing with the appointment of the Auditor-General). The Commission should account for the execution of its functions and report thereon to Parliament by way of personal appearances before relevant committees.

2.9 If the above recommendations are accepted, the need for a Ministry whose sole responsibility is related to the Public Service and public administration, falls away. Indeed, it would be frustrating for such a Minister to occupy a portfolio in which he would not be able to exercise sufficient normal ministerial powers. The President should ideally be the responsible functionary for the Public Service, but may delegate his functions to one of his Ministers in addition to other portfolio responsibilities.

Provincial Service Commission

2.10 Section 213 of the interim Constitution stipulates that a provincial legislature may provide for a provincial service commission in respect of public servants employed by the province. In view of CP XVIII this power cannot be substantially less in the new Constitution. The provincial legislatures must therefore retain the general power to provide for such commissions, which may function subject to norms and standards applying nationally, i.e. formulated by the Public Service Commission. However, the Commission is of the opinion that 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.

2.11 While the Commission strongly advocates the existence of structures to ensure compliance with CP XXIX, it has doubts regarding the need for provincial service commissions. Their limited functions do not justify the appointment of a special full-time independent body as in the case of the Public Service Commission. Most of the functions enumerated in section 213(1) can be performed by the office of the Premier without requiring the services of an independent commission. Even appointments, promotions, etc, could be dealt with efficiently and effectively by properly constituted committees consisting of provincial officials and staff representatives. The Commission therefore recommends that provincial legislatures reconsider their decisions to create provincial service commissions for the provinces. If provincial service commissions are to be retained, consideration should be given to establishing these as part-time bodies, and reducing the number of commissioners.

However, the powers and functions of the Public Service Commission contained in section 210 of the interim Constitution, should be retained and exercised in respect of the entire Public Service to ensure uniform fair treatment of all public servants. It needs to be stressed that the ultimate power to make decisions in regard to all such matters dealt with by the Public Service Commission is vested in Ministers, Premiers or other persons or institutions (section 210(3) and not in the Public Service Commission per se.

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