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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

SUBMISSION

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MINISTRY OF PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT

FACSIMILE

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CONSTITUTIONAL ASSEMBLY

FROM: MS RENÉ BOTHA
OFFICE OF MINISTER ROELF MEYER

DATE: 26 SEPTEMBER 1995

FAX: 021-241 160/1/2/3

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SUBJECT: CONSTITUTIONAL PROVISION FOR INTERGOVERNMENTAL RELATIONS

1. Your telephone conversation with Mr Marius Steyn today in the above-mentioned regard refers.
2. Attached please find a copy of the document that was sent by post to the Co-Chairperson of Theme Committee 3 on 11 September 1995.
3. I trust that you find the above-mentioned in order.

Thank you for your attention.



MINISTRY OF PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT

Reference: 3-A5/8/40/1
HPS16/4/1

11 September 1995

Co-Chairperson
Theme Committee 3
Constitutional Assembly
P O Box 15
CAPE TOWN
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Dear Co-Chairperson

CONSTITUTIONAL PROVISION FOR INTERGOVERNMENTAL RELATIONS

Attached please find a document pertaining to constitutional provision for intergovernmental relations, for your attention.

The *Intergovernmental Forum* discussed the document on 21 August 1995 and resolved that:

- (a) paragraph 5 of the document be approved by the *Intergovernmental Forum* for submission by the *Forum* to the Constitutional Assembly; and
- (b) the rest of the document be submitted to the Constitutional Assembly as background.

It would be appreciated if the document could be submitted to Theme Committee 3, with paragraph 5 of the document as being the official position of the *Intergovernmental Forum*.

Kind regards

R P MEYER
MINISTER OF PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT

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CONSTITUTIONAL PROVISION FOR INTERGOVERNMENTAL RELATIONS

1. INTRODUCTION

1.1 Intergovernmental relations between all tiers of government are playing an increasingly important role in the governmental process in South Africa. The nature and scope of these relations, especially at the multilateral level, resulted in the question being raised whether specific provision for these relations should be made. In view of the fact that intergovernmental relations are the result of constitutional provisions with regard to the division of powers and responsibilities between the respective levels of government, it has also been suggested that the new Constitution represents the most appropriate legislative means through which this could be achieved.

1.2 The purpose of this document is to comply to a resolution of the Intergovernmental Forum, taken on 12 June 1995, that a document should be drafted on proposals with regard to intergovernmental relations, which could be considered for inclusion in the new Constitution. These proposals will, after consideration by the Forum, be submitted to the relevant Theme Committee of the Constitutional Assembly.

2. THE NATURE AND CONTENT OF INTERGOVERNMENTAL RELATIONS

2.1 Intergovernmental relations result from the division of powers and functions between levels of government and refer to the interaction between governments on matters of common or shared interest in a multitier governmental system. The objectives of Intergovernmental relations can broadly be described as to:

- i) **improve the information base and quality of analysis of information in order to contribute to better decision-making and to reconcile policy differences between governments;**
- ii) **promote cooperation and coordination between governmental policies in areas where jurisdiction is shared or complementary;**
- iii) **achieve national objectives; and**
- iv) **promote the management of the public sector.**

2.2 Intergovernmental relations deal with all spheres of governmental activity. In broad terms, these spheres include the spheres of policy management, programme management and resource management. The intergovernmental process, however, also differs from the governmental process in that the importance attached to certain activities associated with the governmental process, is emphasised at the expense of others. In this regard, the policy management process and the resource management process, play a dominant role in the intergovernmental process. The reason for this domination is to be found in the fact that the strategic functions of guidance and leadership of a jurisdictional or territorial arena associated with the policy management process and the resources employed in the implementation of policy, determine the results of the programme management process to a large extent. These functions are furthermore the responsibility of the elected officials of government which increase their relevance from an intergovernmental perspective.

2.3 Intergovernmental relations are an essential aspect of all multitier political systems including decentralised unitary systems, such as those found in Japan, Britain and France. The reason for this significance is to be found in the impossibility of compartmenting or avoiding overlaps of functions and the integrated nature of all government functions. Provision for intergovernmental relations has therefore been required whether the multilevel governmental system

has been established from the bottom up, as was the case in the USA and Australia, or top-down, such as in India and Belgium.

3. PROVISION FOR INTERGOVERNMENTAL RELATIONS

3.1 A number of issues should be considered when provision for intergovernmental relations is made. These issues include *inter alia* the following:

- i) characteristics of the governmental system;**
- ii) the accountability of the respective levels of government;**
- iii) how provision should be made; and**
- iv) what the provision should entail.**

i) Characteristics of the governmental system:

Intergovernmental relations are to a large extent determined by the characteristics and functioning of the system of government. In this regard, the following variables are of particular importance:

- **the constitutional jurisdiction allocated to each level of government, in particular the extent of concurrent jurisdiction, and the specific functional matters assigned;**
- **the form of executive and legislative institutions at each level of government;**

- the character of the central second chamber and whether it is constituted to serve as a forum for representatives of provincial governments;
- the political party system and particularly the character of the linkages between central and provincial branches of political parties;
- the courts and the extent to which intergovernmental conflict is resolved through appeal to the courts; and
- the financial situation of provincial and local government and in particular the degree to which they have autonomous resources to match their expenditure responsibilities or are dependent upon transfers from another level of government. Furthermore, the degree of disparity of financial resources among provinces or among local governments requiring arrangements for redistribution of resources.

Clarity on these variables, as well as the interactive functioning of the respective governmental structures, institutions and levels of government should be obtained, before specific provision for intergovernmental relations is made.

ii) **The accountability of the respective levels of government:**

The matter of accountable government is another very important determining factor of the institutionalisation of intergovernmental relations. Intergovernmental relations are often being referred to as the "fourth level of government", which tends to undermine the democratic accountability of elected representatives of the respective levels of government. The intergovernmental process in most coun-

tries is dominated by the executive branch, with the legislative branch of government to a large extent being excluded from the process. The exclusion of the elected representatives from the intergovernmental decision-making process, raises certain questions with regard to the accountable government. The establishment of intergovernmental structures through the Constitution may exacerbate the accountability problem, in that intergovernmental structures will be awarded a constitutional status more or less on par with that of the legislative structures.

iii) **How provision for intergovernmental relations should be made:**

Intergovernmental relations could be constitutionally prescribed, could be established by legislation or could be left to develop through practice and convention.

Intergovernmental relations in South Africa are still very much in a developing phase. The nature and extent of cooperation and interaction between the respective governments and levels of government, are expected to change and adapt significantly over the short, medium and long-term. Intergovernmental relations are therefore required to be adaptable and flexible. In view of this requirement, the establishment of intergovernmental relations through the Constitution should be carefully approached. Constitutions are by nature difficult to change, which may hamper the ability of intergovernmental relations to adapt to changing needs and may thus contribute to their inefficiency. This problem could be overcome by providing for intergovernmental relations through legislation. Legislation is easier to amend and thus to provide for the changing institutional requirements of the intergovernmental process.

The development of intergovernmental relations through practice and convention is an alternative to provision through either the Constitution or legislation. This is also the route adopted in the majority of older federations such as the USA and Canada. The question could, however, be asked whether this approach would be suitable to the situation in South Africa, where the need and importance of intergovernmental relations in terms of effective governance, are already widely accepted and where the important role of government in addressing a large number of pressing societal issues is comparable to any of the other countries with multitiered governmental systems.

iv) **What the provision should entail:**

Provision for intergovernmental relations focuses generally almost exclusively, on the establishment of intergovernmental structures. The importance of intergovernmental structures are, however, often over-emphasized at the expense of the purpose for which these structures are established, namely the facilitation of these relations. Intergovernmental relations constitute in broad terms a negotiation and consultation process between governments, aimed at harmonising governmental actions and decision-making. The process develops very specific requirements as far as its facilitation is concerned. These requirements have structural implications which have to be accommodated. Intergovernmental relations may, for example, at times be of a more conflicting and competitive nature, which may necessitate different structural and institutional provision for its facilitation. Seen from this perspective, intergovernmental structures are to a large extent determined by the process and not *visa versa*. Given the importance of the process, its fluidity in terms of its different structural requirements and the different forms it can take, it should be clear that constitutional provision which focus on the structural dimension of intergovernmental structures, may further contribute to the over-

emphasising of this dimension of intergovernmental relations, to the detriment of the more important process itself.

4. CONSTITUTIONAL PROVISION FOR INTERGOVERNMENTAL RELATIONS

4.1 The important role of intergovernmental relations in the governmental process at the respective levels of government makes it imperative that sufficient provision for these relations will have to be made. A balanced approach is however required, if the provision is to serve the required purpose, namely relations between governments which will contribute to good governance. Constitutional as well as legislative provision could play an important role in this regard, while sufficient room should also be left for the further development of intergovernmental relations through practice and convention. This approach has important advantages in that it:

- promotes the relevance of the provision in terms of the establishment of efficient and effective intergovernmental relations;
- provides intergovernmental relations their due recognition and status;
- emphasises the importance of the process dimension of intergovernmental relations;
- provides for the flexibility and adaptability required from intergovernmental relations;
- brings the structures and institutions responsible for facilitating intergovernmental relations, within direct parliamentary supervision and therefore enhances accountability and transparency; and
- promotes good governance through coordination and co-operation between governments and levels of government.

4.2 The purpose of the constitutional provision for intergovernmental relations should be to lay a foundation for these relations, which could serve as framework for their further development. This could be achieved through the inclusion of certain principles which governments at all levels should adhere to in the performance of their powers and functions and in their interaction with each other. These principles lie at the heart of intergovernmental relations and represent the philosophical and legal basis from which to view, conduct and evaluate the activities of government in a multitier governmental system. It is also the application of these principles which serves as framework for intergovernmental relations and gives rise to a network of intergovernmental relationships, structures and institutions which characterise modern multitiered constitutional systems. Provision for the establishment of intergovernmental structures could be made through providing in the Constitution for the promulgation of legislation in this regard.

4.3 Constitutional principles for intergovernmental relations:

4.3.1 Principles for intergovernmental relations which could be included in the new Constitution should refer to the nature of the relationship between governments, as well as the specific obligations on the part of governments in conducting their affairs. As far as the nature of the relationship between governments is concerned, governments should be required to conduct their affairs towards each other in a spirit of trust, good faith, friendship, and mutual respect. Due cognisance should be paid by governments to the interests of the country as a whole, as well as to the specific interests of other governments. The national government must treat provincial governments equally and refrain from encroaching on their rights, while provincial governments should act in a similar manner towards local governments.

4.3.2 In the conduct of their affairs, governments should be required to assist and support each other and to inform and consult with each other. Governments should also cooperate and coordinate their activities and adhere to procedural matters:

- **The duty to assist and support each other, requires that a government is obliged to take the necessary steps to enable another government or level of government, to reach its objectives or to fulfil its responsibilities, providing that it does not adversely affect the interests of that government;**
- **The duty to inform and consult requires that governments inform each other on matters of common concern and that they consult with each other on the handling of these matters. If differences do occur, acceptable compromises should be reached through negotiation;**
- **The duty to cooperate and coordinate refers to the obligation on the part of governments to cooperate with each other in the realisation of their objectives and to harmonise their decision-making and actions in an effort to promote the realisation of their objectives;**
- **The duty to adhere to procedural matters refers to the obligation to comply to requirements with regard to the way in which interaction occurs, in an effort to create a culture of partnership and mutual trust.**

4.4 Constitutional provision for legislation with regard to intergovernmental relations:

4.4.1 Provision could also be made in the new Constitution for further legislation to make more extensive provision for intergovernmental relations. The legislation should provide specifically for the establishment

and functioning of intergovernmental structures and institutions responsible for the facilitation of intergovernmental relations. This provision could *inter alia* also refer to the following:

- whether there should only be one national law to regulate intergovernmental relations or whether each province should adopt its own legislation;
- measures to harmonise legislation on intergovernmental relations;
- whether the passing of legislation should be mandatory or voluntary;
- the time-frame within which the legislation has to be promulgated;
- specific requirements and procedures that have to be met in the drafting, passing and amendment of the legislation; and
- specific intergovernmental structures and/or institutions which have to be established.

5. RECOMMENDATIONS

5.1 It is recommended that the Intergovernmental Forum agree that provision for intergovernmental relations should be made in the new Constitution and in this regard that:

- Theme Committee 3 of the Constitutional Assembly should be requested to include principles for intergovernmental relations in the new Constitution;
- the principles should refer to both the nature of the relationship between governments and the obligations on the part of governments in the conduct of their affairs; and

- provision should also be made in the new Constitution for legislation with regard to the establishment of intergovernmental structures and institutions to facilitate intergovernmental relations.

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