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TO: The Technical Committee on Constitutional Issues
FROM: The Democratic Party
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**FURTHER COMMENTS BY DEMOCRATIC PARTY
ON THIRD REPORT OF TECHNICAL COMMITTEE
ON CONSTITUTIONAL AFFAIRS**

During the discussion on 17 June 1993 by the Negotiating Council on "Principles dealing with the allocation of powers to different levels of Government" a number of issues were raised on behalf of the Democratic Party.

We would like to comment further on ^{of the S.A. Government} some of these issues more particularly, as the first draft text of a Proposed Constitution of the Republic of South Africa 1993 has come to hand.

References are to the paragraphs in the Third Report of the Technical Committee.

Para 3.3

The Democratic Party proposed that 'fiscal' powers referred to in para 3.6 should be included in para 3.3.

The South African Government's Draft Constitution on page 41, para (c) states the following Constitutional Principle:

"Each level of government shall have appropriate and adequate legislative, executive and fiscal powers and functions that will enable each level to function effectively; such powers and functions to be entrenched in the constitution."

Paras 3.7 and 3.8

The Democratic Party proposed that the SPRs should have a constitutional right to a share of certain nationally collected revenues and not be dependent on the national level government for any such allocations.



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The South African Government's Draft Constitution contains two references to this concept on page 17, para (c):

The regional governments shall be entitled to a share of the income tax on individuals, on mining companies, on other companies and of VAT."

On page 18, para (f):

All taxes (except purely local taxes) shall be collected by an independent national institution."

Para 3.9.1.4

The Democratic Party argued that the national government should not have overriding powers in respect of matters which were designated in the constitution as the exclusive powers of SPRs.

The South African Government's Draft Constitution refers to this matter on page 42, para (i):

"The national government shall have overriding power only in such matters that are not allocated exclusively in the Constitution to the regional or local levels of government."

The Technical Committee as a footnote on page 5 says:

"In dealing with this issue we have made extensive use of the report on Constitutional Options and their Implications for Good Government and a Sound Economy prepared by a group of experts which consisted largely of South Africans of different political persuasions, published in March 1993 by the Consultative Business Movement."

The Consultative Business Movement response in dealing with overriding powers says:

"As these broad guidelines may be too vague, some constitutional security could be afforded by providing for justiciable legal principles to govern the allocation and coordination of powers. It is precisely in this way that the German Constitution allows for the courts to determine whether the German Parliament is entitled to override state legislation.

It might, for instance, be possible to establish the principle that the centre would have the right to override when, and only when such action:

- * Was necessary for the maintenance of national standards in the provision of public services;

- * Was necessary to maintain the legal and economic unity of the country; or
- * Taken by a particular region was prejudicial to the interests of another region or to the country as a whole.

The regions would naturally have the right to challenge the overriding action of the centre if they considered that it did not meet the criteria established. The principle that primary responsibility should be given to the level at which the most effective control can be exercised over the quality and the delivery of public services, could be written into the National Constitution in regard to specific areas of jurisdiction."

The Democratic Party has pointed out that this statement in the Report is factually incorrect.

The German Basic Law denies the National Government overriding powers except in respect of:

- 1) Catalogued Concurrent Legislation (Article 72), and
- 2) Catalogued General Provisions of the Federation (Article 75)

** (Articles 72 and 75 are attached).

Yours sincerely



C W EGLIN
on behalf of DEMOCRATIC PARTY