2.2 CHAPTER 8 - PROVINCES

2.21 **Establishment and Territory**

See Annexure 2

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

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

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

ANNEXURE 2

RECOMMENDATIONS REGARDING THE ESTABLISHMENT AND TERRITORY OF PROVINCES

1 INTRODUCTION

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

1.2 The Commission's ability to advise the Constitutional Assembly (CA) as required by section 164(2)(a) as well as the CA's ability to alter the number and boundaries of provinces in the new Constitution, are limited by Constitutional Principle XVIII.3 which prescribes that

"The boundaries of the provinces shall be the same as those established in terms of this Constitution". The Commission consequently did not embark upon an investigation of possible changes to boundaries, nor was it called upon to do so. The Commission is, however, aware that investigations in regard to specific boundary issues were undertaken by provincial governments, a commission of enquiry and by national political office-bearers.

2 DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 Establishment of provinces

2.1.1 Draft text prepared by CA

117. (1) The Republic has the following provinces :
(a) Eastern Cape
(b) Free State
(c) Gauteng
(d) KwaZulu-Natal
(e) Mpumalanga
(f) Northern Cape
(g) Northern Province
(h) North-West Province
(i) Western Cape

2.1.2 Commission's preliminary recommendations

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

2.1.3 Provincial views

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

2.1.4 Comments

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

2.2 Provincial boundaries

2.2.1 Draft text prepared by CA

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

2.2.2 Commission's preliminary recommendations

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

2.2.3 Provincial views

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

2.2.4 Comments

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

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

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

2.2.2 **Provincial Legislatures**

See Annexure 3

Clause 119 - Supported.

Clause 120 - The Commission is of the opinion that the term "women and men elected as members" contains a number of superfluous words and looks clumsy. It recommends that sub-clause (1) be reformulated as follows:
"*(1)* A *provincial legislature consists of* ***members elected*** *in terms of an electoral system that is prescribed in national legislation, is based on a common voters roll, and results, in general, in proportional representation."*

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

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

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

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

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

Clause 123 to 132 - Supported. However, the Commission' recommendation- in regard to constituency representation under clause 120 above is also applicable to clause 122(2)

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

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

personnel problems and may not satisfy the stipulations of Constitutional Principle VI. The Commission therefore recommends that the following clause be added to the draft:

"STAFF OF PROVINCIAL LEGISLATURE

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

ANNEXURE 3

RECOMMENDATIONS REGARDING PROVINCIAL LEGISLATURES

1. INTRODUCTION

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

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

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

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

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

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

2. DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 **Provincial legislative authority**

2.1.1 Draft Provisions

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

2.1.2 Provisions of interim Constitution

"125. (1) There shall be a legislature for each province.
(2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution.

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

2.1.3 Preliminary recommendations (Document 3 of 23 March 1995) "3.4.3 It is the opinion of the Commission that the provisions in the interim Constitution are appropriate and do not require to be amended materially. No further provisions relating the matter appear to be required."

2.1.4 Comments

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

2.2 **Composition of provincial legislatures**

2.2.1 Draft Provincial

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

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

2.2.2 Provisions of interim Constitution

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

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

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

2.2.3 Preliminary recommendations

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

3.5.3 The interim Constitution provides for the election of members from provincial lists of party candidates for the province in question. This provision complies with the stipulation in CP VIII which entrenches proportional representation as a general rule. However, it has come to the Commission's attention through the media and otherwise, that there is significant support for an electoral system which includes representation both from party lists and constituencies. Such a "mixed" system has been introduced at local government level. Although constituency-based proportional representation alone would be preferable (see paragraph 3.11.3 below), it is the Commission's opinion that a system which includes representation of constituencies in provincial 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

2.2.4 Comments

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

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

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

2.3 **Qualification for membership**

2.3.1 Draft provisions

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

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

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

c) unrehabilitated insolvents;

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

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

2.3.2 Provisions of interim Constitution

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

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

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

2.3.3 Preliminary recommendations

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

2.3.4 Comments

2.3.4.1 The provisions of the draft constitutional text are similar to those contained in section 132 of the interim Constitution. However, the Commission's recommendation that residence in the province should be a requirement to become a member of the legislature of that province has not been met. While this matter can be addressed in the relevant legislation and may also be dealt with in provincial constitutions, the Commission is of the opinion that it should be a requirement stipulated in the national Constitution. It would be sufficient to require that a member be registered as a voter in the particular province. The Commission recommends that the words "and who is registered as a voter in the relevant province" be inserted after the word "Assembly in the first line of clause 121.

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

2.4 **Vacancies**

2.4.1 Draft provisions

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

(a) a member ceases to be eligible;

(b) a member resigns or dies;

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

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

2.4.2 Provisions of interim Constitution

"133.(1) - A member of a provincial legislature shall vacate his or her seat if he or she -
(a) ceases to be eligible to be a member of the provincial legislature in terms of section 132;
(b) ceases to be a member of the party which nominated him or her as a member of the provincial legislature;
(c) resigns his or her seat by submitting his or her resignation in writing to the Secretary of the provincial legislature;
(d) absents himself or herself voluntarily from sittings of the provincial legislature for 30 consecutive sitting days, without having obtained the leave of the provincial legislature, in accordance with the rules and orders; or
(e) becomes a member of the National Assembly or the Senate.

(2) The provisions of section 44(1) and (2) shall apply *mutatis mutandis* in respect of the filling of vacancies in a provincial legislature, and in any such application a reference to-
(a) the National Assembly shall be construed as a reference to a provincial legislature; and
(b) a list of party candidates shall be construed as a reference to a list referred to in section 127(3).

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

2.4.3 Preliminary recommendations

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

3.11.2 Paragraph (b) provides that a member shall vacate his or her seat if he or she ceases to be a member of the party which nominated that member. There appears to be some support for the deletion of this provision on the grounds that the clause could restrict freedom of speech, and desensitises members to significant shifts in public opinion. On the other hand it can be argued that a binding provision of this nature is the logical consequence of a system of proportional representation in which all members are elected from party lists. If some or all members are in future to be elected on a constituency basis, this may strengthen the call for the deletion of the provision on the grounds that members representing constituencies should be in a position to differ from their party's views if it is in the interest of their constituencies. It does seem unduly restrictive that, for the whole term of a legislature, members who are elected on a constituency basis should be obliged to follow their party's lead, even if they or a sector of the

electorate no longer support that lead. The position of members who are elected from party lists is somewhat different in that they are elected only because of their party affiliations. There may therefore not be such compelling reasons to allow them to remain as members of the legislature if they resign from the party or lose their membership. The Commission is of the opinion that democratic principles would be better served if the provision which terminates the membership of the provincial legislature if he or she ceases to be a member of the party which nominated him or her, is deleted in respect of members elected on a constituency basis.

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

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

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

2.4.4 Comments

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

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

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

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

2.6 **Assent to Bills**

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

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

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

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

2.8 **Staff of legislatures**

2.8.1 Draft provisions

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

2.8.2 Provisions of interim Constitution

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

2.8.3 Preliminary recommendations

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

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

3.15.3 However, CP VI also stipulates that appropriate checks and balances to ensure inter alia accountability shall accompany the separation of powers. The present section 143(2) requires the Executive Council to consult with the Commission on Provincial Government before appointing staff. While it is not considered appropriate that consultation with such a body should be obligatory in regard to the appointment of particular staff members, the Commission is of the opinion that consultation with an appropriate institution which has the required expertise to advise the legislature, should be obligatory in regard to the establishment, remuneration and other conditions of service of the staff of the legislatures. Significant disparities in salaries, gradings and posts among the provincial legislatures themselves and between the provincial legislatures and Parliament and the Public Service (including provincial public servants) could lead to dissatisfaction and industrial action by staff who are all paid from the same source. It is considered necessary that national norms and standards should apply in respect of the above-mentioned matters. The Public Service Commission is properly equipped to perform such a function. The Commission is consequently of the opinion that the provincial legislatures should determine their administrative establishments and staff salaries and other conditions of service after consultation with the Public Service Commission and that provision to this effect should be incorporated into the new Constitution.”

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

2.2.3 **Provincial Executives**

See Annexure 4

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

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

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

Clauses 137 to 139 - Supported.

Clause 140 - Supported. However, the Commission recommends

(a) that the provisions of constitutional Principle XXXII be applied also to provincial executives until 30 April 1999; and furthermore
(b) that reasonable provision be made for minority parts provincial legislatures to be represented also in executive structures of provincial governments, to allow them to participate in decision-making in the executive sphere, e.g. in executive (cabinet) committees, whwre matters could be considered jointly before being referred to the Executive Council for decision (see Annexure 4, paragraph 2.3.5(e)). The relevant text may be formulated as follows:

"PARTICIPATION IN EXECUTIVE PROCEDURES

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

Clauses 141 to 147 - Supported.

ANNEXURE 4

RECOMMENDATIONS REGARDING PROVINCIAL EXECUTIVES

1. INTRODUCTION

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

2. DRAFT CONSTITUTIONAL TEXT AND COMMENTS:

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

2.2 **Premiers :**

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

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

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

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

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

"3.4.1 In terms of CP VI there shall be a separation of powers between inter alia the legislature and the executive, with appropriate checks and balances to ensure accountability, responsiveness and openness.. This raises basic questions about the possible ways in which the executive authority should be constituted to comply with this principle - for example, whether a Premier of a province should be directly elected as in a presidential-style executive, or be elected by the legislature, i.e. a parliamentary-style executive.

3.4.2 It has been argued that a choice between these two alternatives for the election of Premiers depends on the main objectives of the executive system, and whether the executive should be based on its own inclusive constituency (the province; or the nation as a whole in the case of central government), or be more closely dependent on support within the legislature. Among the objectives, nation-building and economic development may be regarded as major alternatives, although they are not mutually exclusive. Because a presidential-style executive may be less closely tied to the formal party system, it can provide significant opportunities for nation-building, but does not guarantee this. On the other hand, a parliamentary-style executive is arguably more suitable for streamlined policy-making because it guarantees that both branches of government are controlled by the same party or coalition grouping. However, nation-building can be more difficult in a parliamentary system, particularly where a majority party controls government and excludes minority parties from participation.

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

3.4.4 Although the parliamentary-style executive tends to weaken the concept of separation of powers between the legislature and the executive, it has distinct advantages in ensuring uniformity of purpose on the pari 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. However, to ensure compliance with the concept of separation of powers the Premier required to vacate his seat in the provincial legislature upon being elected.. 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 be made for effective committees of to ensure proper accountability, openness and responsiveness on the part of the executive."

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

2.3 **Executive Councils :**

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

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

information entrusted to them to enrich themselves or improperly benefit any other person (clause 144).

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

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

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

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

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

b) Composition - The Commission recommended that the proportional method of composing provincial executives should not be imposed by the new Constitution (paragraph 3.7 of interim recommendations). The draft text does not provide for proportional representation of political parties in Executive Councils. The Commission's recommendation has therefore been accommodated. However, to ensure the uniform treatment of present members of executives at national and provincial levels, the Commission recommended that the provisions of CP XXXII be applied also to provincial executives until 30 April 1999 (paragraph 3.7.4). This has not been dealt with in the draft text, but should be accommodated

in the text dealing with transitional matters if the new constitution comes into effect before the above-mentioned date. The Commission recommends accordingly.

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

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

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

"3.7.6 The above recommendations raise the question whether an executive which does not contain representation of minority parties would comply with the Constitutional Principles which require, inter alia, representative government embracing multi-party democracy and proportional representation. The question may acquire a particular significance when the concept of separation of powers applies. CP XIV provides for participation of minority political parties in the legislative process in a manner consistent with democracy, but is silent on their participation in the executive process. Indeed, CP XXXII suggests that proportional representation in the various executive structures need not continue beyond 30 April 1999. It could, however, enhance transparency, national unity and perhaps also the concept of 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 pre-consider all matters referred to the executive and to make recommendations thereon to the executive. Through such a mechanism, the views of minority parties could be made known to the executive and might influence its decisions, without impinging on the prerogative of the executive to make such decisions and be held accountable for them".

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

3 NAMES, TITLES AND NUMBERS

3.1 The possibility is created in clause 154 (discussed in a separate document) for provincial legislatures to adopt legislative and executive structures for their provinces which differ from those provided for in the Constitution. This could lead to the introduction of various names and titles at provincial level, such as parliament, governor, cabinet, minister, etc. Some of these terms are indeed already used informally, and tend to confuse even the more informed members of the public. It would, in our opinion, not diminish the powers of provinces substantially if the names and titles used in the national Constitution should be designated for use also in provincial constitution. The Commission recommends accordingly. (Note : A new proposal in clause 154 addressed this issue, but may prove to be very controversial).

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

2.2.4 **Provincial Financial and Fiscal Matters**

See Annexure 5

Clause 148 - Supported.

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

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

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

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

"150. (1) Provincial legislatures may raise taxes, levies and duties, and surcharges on taxes, but may not raise-
(a) income tax, value-added tax or other sales levies on the sale of fuel or customs and excise duties;
(b) any levies or surcharges on any taxes and duties collected nationally unless authorised to do so national legislation or
(c) taxes, levies or surcharges that may detrimentally affect national economic policies, interprovincial commerce or the national mobility of goods, services, capital or labour.

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

(3) A provincial legislature shall notwithstanding subsection (2) have exclusive competence within its province to impose taxes, levies and duties (excluding income tax or value-added or other sales tax) on-
(a) casinos;
(b) gambling, wagering and lotteries; and
(c) betting.

(4) A provincial legislature may enact legislation authorising the imposition of user charges: Provided that-
(a) such legislation may only be enacted after consideration by the provincial legislature of any recommendations made by the Financial and Fiscal Commission concerning the criteria according to which such charges should be determined,. and
(b) there is no discrimination against non. residents of the province who are South African citizens."

Clauses 151 to 153 - Supported.

ANNEXURE 5

RECOMMENDATIONS REGARDING PROVINCIAL FINANCIAL AND FISCAL MATTERS

1 INTRODUCTION

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

1.2 The abovementioned document contains the following recommendations:-

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

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

(c) In view of CP XVIII.2, provincial legislatures must be empowered in the new Constitution to impose any tax other than income tax, value-added tax or other sales tax within their areas of jurisdiction, subject to authorisation by Parliament. However, such taxes should not detrimentally affect national economic policies, interprovincial commerce or the national mobility of goods, services, capital or labour (paragraph 3.5.1). Furthermore, in the

light of CP XVIII.2, the power of provinces to impose surcharges on taxes (if authorised to do so by an Act of Parliament as provided for in section 156 of the interim Constitution) should be retained in the new Constitution, but this should not include the power to raise any surcharges on local government taxes (paragraph 3.5.1).

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

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

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

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

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

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

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

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

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

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

2 DRAFT TEXT PREPARED BY CA

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

(a) A province is entitled to an equitable share of revenue collected nationally to enable it to provide services at affordable standards and to exercise its powers and perform its functions (clause 148). This must be transferred expeditiously and without deductions except in the circumstances provided for in clause 188 (clause 149). It may also receive other conditional or unconditional allocations and may raise additional revenues from taxes and loans as provided for in clause 150 and 151 (clause 148). The equitable shares of revenue and allocations must be determined according to national legislation, which may only be enacted after consultation with provincial governments and after consideration of recommendations by the FFC. Due regard must be given to the national interest, provision for the national debt, the needs and interests of the national government based on objective criteria, fiscal capacity, performance and a number of additional criteria. Additional revenue raised by provinces may not be deducted from their equitable share of revenue or other allocations made out of national revenue. The national government need not compensate provinces who fail to raise revenues commensurate with their fiscal capacity and tax base(clause 149).

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

or any levies or surcharges on any taxes and duties collected nationally in terms of national legislation (clause 150).

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

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

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

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

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

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

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

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

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

(f) The salaries and other conditions of service of inter alia members of provincial legislatures and Executive Councils, members of local governments, and of traditional authorities must be as determined in national legislation. A Commission on Remuneration must be established to make recommendations to Parliament in regard to such legislation, and to the three levels of government in regard to the implementation of that legislation (clause 192).

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

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

3 DISCUSSION

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

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

(b) Clause 149(2) of the draft reproduces the multitude of factors which the interim Constitution stipulates must be taken into consideration before legislation providing for the

determination of allocations to provincial and local governments may be enacted. The Commission was of the opinion that these were too onerous and that the new Constitution should require only that such allocations be determined with due regard to the factors mentioned paragraph 1.2(b) above.

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

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

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

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

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

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

(i) The working draft contains adequate provisions for the regular, orderly and open procurement of goods and services by organs of government at any level (clause 189). This is an improvement on the present provisions of section 187 of the interim Constitution insofar as all organs of government at all levels are included in the provisions. The present provisions also allow for provincial laws to deal with procurement matters. The making of such laws is

not excluded by the draft provisions, but these will of course have to comply with the provisions of a national law in this regard as is presently also the case. The draft provisions are supported (see paragraph 1.2(i) above)

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

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

4 RECOMMENDATIONS

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

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

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

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

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

contrary to C P XVIII.2. The Commission recommends that provisions similar to those contained in sections 156(1 B) and (3) be incorporated in the new Constitution.

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

2.2.5 **Provincial Constitution**

See Annexure 6

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

"(2A) A provincial constitution may not provide for-
(a) titles for office-bearers or names for legislative or executive structures different from those used for corresponding offices or structures provided for in Chapter 8; or
(b) a number of members of the legislature or the Executive Council greater than that provided for in Chapter 8."

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

ANNEXURE 6

RECOMMENDATIONS REGARDING PROVINCIAL CONSTITUTIONS

1 INTRODUCTION

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

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

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

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

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

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

(b) where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal.

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

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

2 DRAFT CONSTITUTIONAL TEXT AND COMMENTS

2.1 Draft text prepared by the CA

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

2.2 Commission's preliminary recommendations

In paragraph 4 of Document 1 dated 23 March 1995, the Commission recommended that provisions similar to those contained in section 160 be incorporated in the new Constitution, together with such amendments as will ensure conformity with the criteria established by the

Constitutional Principles. The Commission also recommended that the specific reference to a Zulu Monarch should be reconsidered (paragraph 3.5.4 of Document 1).

2.3 Provincial views

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

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

2.4 Comments

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

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

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

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

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

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

3 RECOMMENDATIONS

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