

## 2.4 CHAPTER 10 - LOCAL GOVERNMENT

*See Annexure 8*

**Clause 163** - The first line of the clause which stipulates that "Government at local level must be established as a distinct tier of government" is supported. However, the Commission recommends that the word "tier" should be replaced by "level" to ensure uniformity and consistency of usage throughout the draft. The rest of the clause is unclear, both as to its purpose and its meanings. The purpose and functions of local government are dealt with in clause 165 and need therefore not be repeated in clause 163. If it is deemed necessary to make a value statement in regard to local government in this clause, the Commission would recommend that the formulation of the desired values to which local government must conform be redrafted to make its clearer.

**Clauses 164 to 165** - Supported.

**Clause 166** - Except for clause 166(4) the draft provisions are supported. The stipulation in clause 166(4) that local governments *may* be entitled by legislation to a specifically allocated portion of national and provincial revenue, does not appear to meet the requirements of Constitutional Principle XXVI which confers a constitutional right on local governments to an equitable share of revenue collected nationally. The Commission recommends that the sub-clause be amended to read as follows:

***“166(4) A local government must be entitled by legislation an equitable portion of national revenue so as ensure that it is able to provide basic services and execute the functions allocated to it, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement, taking in account the different needs and categories of local government.”***

The Commission draws attention to the following comment and accompanying recommendation made in Paragraph 3.6.3 of Document 9:

“The local level of government must therefore be allocated equitable share of the various local governments, presumably also in an equitable manner. The process would probably require the determination of the percentage of national revenues to be allocated to local government, the equitable division of the percentage among the provinces, and the final equitable allocation to each local government within a province. The following recommendation in this regard is contained in the Commission's Preliminary Recommendations on Financial and Fiscal Affairs (Document 7):

As far as the further distribution of revenue to local governments is concerned, the CPG recommends that provinces should institute provincial negotiating forums, comprising representatives of the province and its local governments, to make recommendations on

allocations to each local government. It would be virtually impossible for one central body such as the FFC to deal with the detail of distribution among local authorities."

**Clause 166A (Added) - Integrity of local government** -The draft text does not include provisions similar to those contained in section 174(4) of the interim Constitution to prohibit other levels of government from encroaching on local government powers, functions and structures. There is indeed no obligation to provide against such encroachment in so far as local governments are concerned - see Constitutional Principle XXII which is applicable only to provincial governments and is provided for in clause 160. The Commission considers it proper that local government should also be protected from possible encroachment by the other tiers of government. It accordingly recommends that the following new clause be inserted in the working draft:

### ***INTEGRITY OF LOCAL GOVERNMENT***

***"166A. Parliament or a provincial legislature may not encroach on, or cause, enable or allow any encroachment on, the powers, functions and structures of local government except in matters and to the extent provided for in legislation referred to in section 164(1)."***

**Clause 167** - The draft provisions are supported, except for the following:

(i) The Commission is of the view that the new Constitution should prescribe that local government elections be held according to a system that includes both ward and proportional representation. The ward representatives should be in the majority . The Commission consequently recommends that the draft text of clause 167(3) be reformulated as follows:

***" 167(3) Members of a local government must be elected in accordance with a system of ward representation and proportional representation."***

(ii) The draft formulation of clause 167(7) provides for the possible eligibility of a local government employee to become a member of the local government who employs him/her. The Commission is of the view that it is quite unacceptable that any person could be both a member and an employee of a local government. It accordingly recommends that the relevant paragraph be reformulated as follows:

***"167(7)***

***(d) an employee of a local government, and"***

**Clause 168** - Supported.

# COMMISSION ON PROVINCIAL GOVERNMENT

## RECOMMENDATIONS REGARDING LOCAL GOVERNMENT

### 1 INTRODUCTION

The provisions in regard to local government contained in the draft constitutional text differ from those contained in Chapter 10 of the interim Constitution to an extent that makes comparison difficult. In order to focus the Commission's comments on the draft provisions which will be the basis on which the C A will structure its further deliberations, this document will analyse the draft text, compare it with the Commission's preliminary recommendations where applicable and provide comments thereon.

### 2 DRAFT TEXT PREPARED BY THE C A

#### Clause 163 - Local government

2.1 Clause 163 stipulates that local government must be established as a distinct tier of government. This does not fully address the concern expressed by local government structures that the term "level" denotes a hierarchy of governments, and their consequent preference for the term "spheres of government". The Commission did not have any objection to the concept of a hierarchical structure of government for South Africa, particularly also because it is provided for in the Constitutional Principles (paragraph 2.3 of Document 9 dated 25 May 1995). The use of either the term "level" or "tier" of government is therefore acceptable. However, the use of the term "level" is preferred because of its use in Constitutional Principle XVI and to ensure uniform use of the term throughout the draft. While the importance of local government as a level of government is not disputed, the arguments for referring to it as a "sphere" of government, whatever that may mean, are purely semantic and the use of the term would have no real legal effect.

The clause goes on to stipulate a number of general objectives of local government which can be supported. The clause is unsatisfactorily drafted, however, and this requires attention. "Development" is given as a goal of local government twice over, at (a) and (d); and in (d) the terms 'economic viability, sustainability and self-supportiveness' are vague and have no clear reference in the sentence-structure. The reference to "development" should be removed in (a); and in (d) the words after "development" should be deleted. The draft clause is supported, but with the recommendation that it be more carefully phrased to avoid duplication and lack of clarity.

#### Clause 164 - Establishment

2.2 Clause 164 stipulates:-

(a) that the structures, powers and functions of government at the local level (tier) must be provided for in national or provincial legislation or in both, in accordance with the framework provided for in the relevant chapter;

(b) that local government structures must be established for the whole territory of the Republic and their territories demarcated. These provisions have indeed already been implemented under the interim Constitution and local government elections have been held in terms thereof. The Commission was of the opinion that the provisions of the present section 174 allowed the relevant legislatures some discretion to exclude areas which may prove to be problematical from local government jurisdiction (paragraph 3.2.1 of Document 9). In view of the present de facto position it may not be worthwhile to reopen the matter;

(c) Different categories of local governments with different powers, functions and structures may be provided for. This is in accordance with the Commission's recommendation that references to metropolitan, urban and rural local government should be omitted from the new Constitution (paragraph 3.2.2 of Document 9).

#### Clause 165 - General powers

2.3 (a) Clause 165 prescribes that local governments must have legislative power to make by-laws which are not inconsistent with national and provincial legislation {clause 165(1) and (2)}. They will also have executive power in respect of such laws and in respect of other matters assigned or delegated to them to allow them to function effectively {clause 165(3)}. In section 174(3) of the interim Constitution the term "autonomy" is used to denote the independence of local governments in both legislative and executive matters. Submissions to the Commission suggested that the use of this term conveys a notion of freedom in decision-making which local governments do not possess. The Commission did not have a real problem with the use of the term, but considered that an alternative formulation might be more appropriate (paragraph 3.2.3 of Document 9).

While the draft formulation does not follow the suggested wording, the granting of legislative and corresponding executive powers to local governments, as formulated, conveys an approach to local government powers similar to that which would have been conveyed by the Commission's suggested wording.

(b) A local government must provide services for the maintenance and promotion of the well-being and good government of all persons within its area of jurisdiction, provided that the services can be rendered in a sustainable manner and are financially and physically practicable. It must also promote local economic development within a safe and healthy environment {clause 165(4)}. Local governments may form or belong to associations for the protection and promotion of mutual interests and to cooperate with other local governments in this regard {clause 165(5)}.

In general the draft text avoids some of the unclear wording used in section 175 (3) of the interim Constitution (see paragraph 3.3.3 of Document 9) and, in conjunction with clause 168 (see below). provides for a much clearer description of local government powers and functions. The draft text is acceptable.

#### Clause 168 - Functional areas

2.4 Clause 168 complements the above provisions by providing that the legislative competencies, powers and functions of local government or different categories of local government must be prescribed by national or provincial legislation or both, and must include local or service development of the functional areas listed in the clause. Most of what are generally regarded as proper local functions are included in the list, which is not exhaustive. Indeed, these are the minimum functional areas in respect of which legislative and executive powers must be granted to local governments. Additional functional areas can be provided for in the enabling legislation. The Commission's preliminary recommendations based on the text of the interim Constitution are contained in paragraph 3.3 of Document 9. The provisions of clause 168 are generally acceptable.

#### Clause 166 - Administration and finance

2.5 Clause 166 deals with administrative and financial matters and provides as follows:-

(a) Legislation dealing with the establishment of local government must contain provisions aimed at ensuring that local government administration is based on sound principles of public administration (see Chapter 12 of the draft), good governance, transparency and public accountability {clause 166(1)}. These are commendable guidelines for the envisaged legislation and are in line with Commission's preliminary recommendations (paragraph 3.6.1 of Document 9).

(b) Clause 166(2) provides for the possible imposition of an enforceable code of conduct for local government councillors and officials. This is in line with the Commission's preliminary recommendations (paragraph 3.10 of Document 9).

(c) Local governments are empowered to impose and collect property rates, levies, fees, taxes and tariffs as may be necessary to exercise their powers and perform their functions, subject to conditions prescribed by national or provincial legislation after taking into consideration any recommendations of the FFC {clause 166(3)}. The FFC will not be required to make such recommendations in each individual instance as might have been the case if the provisions of the interim Constitution in this regard had been repeated in the new Constitution. These provisions accord with the Commission's preliminary recommendations (paragraph 3.6.2 of Document 9).

(d) Local governments may be entitled by legislation to a specifically allocated portion of national and provincial revenue, subject to certain recommendations by the FFC {clause 166(4)}. This provision does not appear to meet the requirements of C P XXVI which confers a constitutional right on local governments to an equitable share of revenue collected nationally. The Commission considered this matter in paragraph 3.6.3 of Document 9 and recommended alternative wording for section 178(3) of the interim Constitution. In order to comply with C P XXVI the Commission recommends that clause 166(4) be amended to read as follows:

*"166(4) A local government must be entitled by legislation to an equitable portion of national revenue so as to ensure that it is able to provide basic services and execute the functions allocated to it, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement, taking into account the different categories of local government."*

The Commission draws attention to the following comment and accompanying recommendation made in paragraph 3.6.3 of Document 9:

"The local level of government must therefore be allocated an equitable share of taxes collected nationally, which must be distributed to the various local governments, presumably also in an equitable manner. The process would probably require the determination of the percentage of national revenues to be allocated to local government, the equitable division of that percentage among the provinces, and the final equitable allocation to each local government within a province. The following recommendation in this regard is contained in the Commissions Preliminary Recommendations on Financial and Fiscal Affairs (Document 7):

*As far as the further distribution of revenue to local governments is concerned, the CPG recommends that provinces should institute provincial negotiating forums, comprising representatives of the province and its local governments, to make recommendations on the allocations to each local government. It would be virtually impossible for one central body such as the FFC to deal with the detail of distribution among local authorities."*

(e) Clause 166(5) provides that any transfer of responsibilities to a local government by another level (tier) of government (i.e. responsibilities which do not form part of the functional areas assigned to them as local government responsibilities in national and/or provincial legislation), must be accompanied by an allocation of the financial and other resources required for their fulfilment. This is in accordance with the Commission's preliminary recommendation contained in paragraph 3.6.4 of Document 9.

(f) Clause 166(6) compels local governments to conduct all their financial arrangements by way of publicised budgets and to construct such budgets in accordance with national or provincial legislation. Deficit budgets are not permitted {clause 166(7)}. The provisions are important to ensure responsible local government. They do not preclude local governments

from borrowing even in respect of current expenditure, but this will presumably be provided for in other legislation. The provisions of the two sub-clauses are acceptable.

(g) Clause 166(8) entitles local government to representation on the FFC, but does not determine the basis of that representation. It will allow for representation on a committee or a plenary chamber of the FFC and consequently does not conflict with the Commission's preliminary recommendations in this regard (paragraph 3.11.9 of Document 7 ). The provisions are acceptable.

### Clause 167 - Elections

2.6 Clause 167 provides as follows for local government elections (provisions combined):

(a) Local governments must be elected democratically in elections which must take place at intervals of not more than five years in terms of applicable legislation - 167(1) and (2).

(b) Members must be elected in accordance with a system of proportional representation, ward representation or both and discrimination against independent candidates is prohibited where ward representation applies - 167(3) and (4). Section 179(2) of the interim Constitution provides for both ward and proportional representation and this was supported by the Commission (paragraph 3.9.1 of Document 9). Although the draft provisions are in accordance with C P VIII and XIV, it is considered more appropriate to incorporate the existing provision for ward and proportional representation in the new Constitution. The Commission recommends that the relevant draft provisions should read as follows:

*"167(3) Members of a local government must be elected in accordance with a system of ward representation and proportional representation. "*

(c) Clauses 167(5) to (6) provide for the qualifications for voters in a local government election. These correspond with provisions in the interim Constitution and are acceptable.

(d) Clause 167(7) prescribes the qualifications for members of a local government. It extends the disqualifications to include members of a provincial legislature as recommended by the Commission (paragraph 3.9.2 of Document 9). However, it still provides for the possibility that employees of a local government may be eligible for such membership {clause 167(7)(d)}. It is quite unacceptable that any person could be both a member and an employee of a local government (paragraph 3.9.2 of Document 9). It is accordingly recommended that the relevant paragraph should read as follows:

*"167(7) ...*

*(d) an employee of a local government; and "*

### 3 PROVISIONS OMITTED

The draft text does not provide for -

(a) *The prohibition of encroachment on local government powers, functions and structures to such an extent as to compromise its fundamental status , purpose and character {section 174(4) of the interim Constitution}. There is no obligation to provide against such encroachment in so far as local governments are concerned - see C P XXII which is applicable to provincial governments only. Nevertheless, the Commission recommended that the new Constitution should contain the following provisions in this regard :-*

*"165(6) Parliament or a provincial legislature shall not encroach on the powers, functions and structures of local government except in matters and to the extent provided for in legislation referred to in section 164(1)".*

The Commission recommends that the above sub-clause be included in the final constitutional text.

(b) *The publication, for comment, of proposed legislation which materially affects the status, powers or functions of local governments or their boundaries, and for giving reasonable opportunity to make written representations in regard thereto. It is debatable whether provisions of this nature should be made in a national constitution. It would perhaps be more appropriate to provide for such consultation in other legislation. However, the Commission recommended (at paragraph 3.2.5 in Document 9) that the Constitution may provide for consultation with representative local government bodies in forums to be established in terms of national and provincial laws, and also for the publication of proposed legislation as provided for in section 174(5) of the interim Constitution.*

(c) *Procedures regarding Council resolutions and executive committees. This is in accordance with the Commission's recommendation that such matters should be dealt with in other legislation (paragraphs 3.4.2 and 3.5 of Document 9).*

(d) *The ex officio representation of traditional leaders on local government councils (section 182 of the interim Constitution). However, this may still be provided for at a later stage of the constitution-making process. It should therefore be noted that the Commission recommended that traditional leaders should not have ex officio membership on any elected government structure (paragraph 3.9.5 of Document 9).*

(e) *A Local Government Commission to represent local government interests at all levels of government as requested by local government interest groups. The Commission was of the opinion that a special commission for local government matters should not be created at national level. It recommended representation for local government in appropriate committees*



of the FFC and the proposed Council for Intergovernmental Executive relations (paragraph 3.13 of Document 9 and paragraph 4.4.9 of Document 10). The Commission does not propose any further constitutional provisions in this regard. (see also clause 166(8)).

(f) *Removal of local government as a Schedule 6 (now Schedule 5) functional area as requested by local government interest groups.* Although it has been argued before the Commission that local government should remain as an item in Schedule 5 of the draft text, the matter has not been finalised. The concurrent powers of national and provincial governments in regard to such matters are covered in Chapter 10 and other draft text. However, it may still be necessary to include the item in Schedule 5 to clarify the respective powers of these two levels of government (paragraph 3.15 of Document 9).

(g) *Auditing of local government accounts and financial statements by their own auditors as requested by local government interest groups has not been provided for.* In terms of clause 111 (1)(b) the Auditor-General must audit and report on local government accounts and financial statements. This is in accordance with the Commission's recommendations (paragraph 3.14 of Document 9).