

2.3 CHAPTER 9 - PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCES

See Annexure 7

Clause 155 - The Commission is of the opinion that the text in option 1 is generally satisfactory, but that the reference to Schedule 5 is unnecessary. It recommends that the clause be reformulated as follows:

"155. The legislative authority of the Republic is vested in Parliament, which may make laws in terms of the Constitution on any matter."

Clause 156 - Supported.

Clause 157 - The Commission is of the opinion that the Constitution need not contain special provisions relating to framework legislation. The proposed division of legislative competence between the National Assembly and provincial legislatures provides sufficient scope for national legislation to create frameworks which will allow a provincial legislature to make laws to suit the particular needs of its province. The Commission consequently recommends that clause 157 deleted from the draft.

Clause 158 - Supported.

Clause 159 - The Commission is of the opinion that the draft text referred to as Option 1 most closely expresses its views contained in the preliminary recommendations. The Commission consequently recommends the adoption of Option I. However, the Commission recommends the following amendments of draft text:

(i) sub-clause (1) - the addition of a paragraph after (c) to make the clause read as follows:

"159(1) In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act where the elements of the Act of Parliament that are in conflict with the Provincial Act are necessary for -

(a) *the establishment of generally applicable standards regarding -*

(i) *services rendered by the state;*

(ii) *the maintenance of economic unity. or*

(iii) *the determination of national economic policies, or*

(b) *the maintenance of the security of the Republic, or*

(c) *the prevention of prejudice to the Republic or any province caused by the activities of a province;*

and the Act of Parliament applies uniformly in all parts of the Republic."

(ii) sub-clause (2) - the substitution of the word Chamber of Provinces for the term "second House" to conform with the Commission's recommendations under Chapter 4 above.

Clauses 160 to 162 - Supported. However, the use of the words "legislative competence" is preferable to the words "passed legislation" in clause 162(1)(a)

ANNEXURE 7

COMMISSION ON PROVINCIAL GOVERNMENT

RECOMMENDATIONS REGARDING PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCES

INTRODUCTION

The following notes and comments on the draft constitutional text do not fully explore the four versions of Chapter 9 to which the various permutations of options give rise. The main focus is on the version resulting from the combination of option 1 in clause 155, and option 1 in clause 159, which accords most closely with the Commission's recommendations.

Among the major issues unresolved is the problem of exclusive provincial powers and how these might be accommodated in the constitution. Closely related to this is the question whether the concept of framework legislation should be explicitly incorporated in the text. This in turn feeds into the wider issue of the division of legislative competencies among Parliament and provincial and local legislatures, and problems relating to the conflict of laws.

It is suggested that the new Constitution should contain a statement of principles to give effect to CPXX and CP XXII, recognising the need for both national unity and provincial autonomy, and non-encroachment on the latter.

The provisions in the draft text relating to the executive authority of provinces are supported, but with the suggestion that the term "executive" should replace the term "government" where appropriate, to a void ambiguity.

DRAFT CONSTITUTIONAL TEXT AND COMMENTS

1. Legislative authority of the Republic

1.1 Draft provisions

“155 (Option 1) The legislative authority of the Republic is vested in Parliament, which may make laws in terms of this Constitution on any matter including matters failing within the functional areas specified in Schedule 5 (CP XVI, CP XVII (1), CP XIX) “

1.2 Commission’s preliminary recommendation (Document 2, 23 March 1995)

The Commission did not expressly deal with the legislative powers of Parliament. However, in its preliminary recommendations on page 17 of Document 2, it concluded that "in general the allocation of powers and functions contained in section 128 are at this stage appropriate to serve the interest of good government in South Africa”

1.3 Provincial views

1.3.1 **Western Cape** - Provinces should be given exclusive legislative powers in respect of certain functional areas (not identified) in terms of Constitutional Principle (CP XIX).

1.3.2 **Northern Cape** - Certain powers (not identified) need to be exclusively allocated to the provincial level (with certain standardisation provisions). All items not specifically listed in the new equivalent of Schedule 6 should be regarded potential exclusive provincial powers or as concurrent powers

1.3.3 **North West** - Opts for a say in national powers with concurrent powers at provincial level as is presently the case

1.4 Comments

1.4.1 The section should be read in context with the rest of the chapter which -

(i) confers legislative powers on provinces in respect the functional areas listed in Schedule 5;

(ii) empowers Parliament to make laws in respect of any matter including Schedule 5 functional areas; and

(iii) specifies which laws will prevail if there is a conflict between Acts of Parliament and provincial laws.

Although phrased differently than in the present Constitution, the effect is the same in so far as Parliament retains both exclusive and concurrent powers to make laws on any matter.

1.4.2 The position as far as Parliament is concerned is clear. It retains concurrent powers in respect of all matters listed in Schedule 5 or ancillary to them and exclusive powers in respect

of the rest. The position of provinces is less clear. If Parliament can make laws on any matter, including Schedule 5 functional areas, provinces on the face of it appear to have no exclusive legislative powers as required by CP XIX.

1.4.3 The CA Technical Advisors expressed the following opinion in respect of CP XIX :

"it is clear that both the national and provincial levels of government must have exclusive as well as concurrent powers. A possible argument is that the CP does not require both legislative and executive powers to be exclusive and that, for instance, granting merely exclusive executive powers to provinces would satisfy the requirements of the CP. There is precedent for this approach in, for example, Germany.

Another argument that may pass the test of the requirements of this CP is that this CP does not require legislative exclusivity with regard to certain defined functional areas. In other words, if provincial legislatures may pass legislation in certain defined (listed) functional areas concurrently with the national Parliament the provincial legislatures do not have exclusive jurisdiction with regard to these functional areas but these provincial legislatures DO have exclusive legislative powers where, for example, the national overrides do not apply or even where provincial overrides apply, as the case may be. The question arises as to whether provinces may be granted exclusive legislative powers by means of framework legislation, that is, whether provincial legislatures have exclusive powers with regard to the filling in within the parameters described by the framework Act of the national Parliament when the framework Act requires that the provincial legislatures make laws with regard to the detail within the norms of principles set out in such Act".

1.4.4 From clause 159 (*Option 1*) of the draft provisions (dealt with below) it would appear that the concurrent powers of Parliament in respect of Schedule 5 functional areas are not restricted. Parliament will be competent to make laws on any matter including those listed in Schedule 5. Parliamentary laws which are in conflict with provincial laws dealing with Schedule 5 functional areas will prevail where the elements that are in conflict are necessary for the reasons listed in clause 159 (*Option 1*) (1)(a) to (c) below. Nevertheless, it has been argued that provinces will have exclusive powers in respect of the listed functional areas in all matters which are *not* included in clause 159(1)(a) to (c). However, a Parliamentary law also dealing with any functional area will be valid and enforceable in so far as it does not conflict with the provincial law. If it does conflict, it will prevail over the provincial law if the conflicting elements deal with matters listed in clause 159 (*Option 1*). For example, it appears that Parliament will be able to make a law covering all aspects of regional planning and development. If there are provincial laws on regional planning and development, the Parliamentary law will apply except for those elements that are in conflict with the provincial laws, and which are not necessary for the reasons contained in clause 159(1)(a) to (c). In our opinion it is consequently not very persuasive to argue that the provinces have the *exclusive* power to make laws in respect of relevant planning and development matters while Parliament manifestly has the power to make laws on the same matters.

1.4.5 In our opinion therefore, clause 155 should state only that "The legislative authority of the Republic vests in Parliament, which shall have the power to make laws on any matter in accordance with the Constitution." (See section 37 of interim Constitution.)

Legislative authority of provinces

2.1 Draft provisions

"156 (1) The legislative authority of a province is vested in its provincial legislature, which shall be competent to make laws in and for its province terms of this Constitution (CP XVI, CP XVIII 1, CP XIX).

(2) A provincial legislature may make laws on any matter which falls within a functional area specified in Schedule 5."

2.2 Commission's preliminary recommendation (Document 2. 23 March 1995)

In general the allocation of powers and functions contained in Section 126 is appropriate (page 17 Document 2)

2.3 Provincial views

The particular provisions are not dealt with specifically in the provincial comments received.

2.4 Comments

The draft provisions do not differ materially from similar provisions contained in section 126(1) of the interim Constitution.

3. Framework legislation

3.1 Draft provisions

157. Option 1 : No provisions for framework legislation

Option 2: Provides for framework legislation

Option 3: Implemented by way of override (159 Option 3, (1)(f))

Note : Only the NP has submitted proposals regarding functional areas. In the submission it is proposed that the following matters be listed for framework legislation for discussion purposes agriculture, casinos, environment, forestry, general principles and standards of education, excluding universities and technikons, land matters, local government, nature conservation,

police, registration of persons, marriages and deaths, and the issue of ID's and passports, road traffic, soil conservation and water affairs.

The ANC is of the opinion that the power to make framework legislation should be a general power and not be limited by a list. The need for a clause dealing with framework legislation has also been questioned by certain ANC representatives in the Constitutional Sub-committee.

The PAC has stated that it does not see any need for framework legislation, and that there should be only one schedule detailing the powers allocated to the provinces.

3.2 Commission's preliminary recommendations (Document 10 , 8 June 1995

The concept of framework legislation is applied in Germany under circumstances significantly different from those envisaged for South Africa in terms of the Constitutional Principles. The concept could perhaps be applied in South Africa to provide for the assignment of powers in respect of additional functional areas to the provinces. (Paragraph 3.3 Document 10)

3.3 Provincial views

Western Cape - Demarcation of powers could include the creation of a list of functional areas on which the national government shall only be allowed to lay down principles and guidelines in framework legislation and on which the provinces would then enjoy exclusive jurisdiction to enact detail legislation.

3.4 Comments

3.4.1 The concept of framework legislation is applied only in Germany, in its particular federal legislative arrangements. For our purposes, it was consequently necessary to define the concept as contained in various drafts. According to the definition the frameworks will be contained in national laws which lay down principles and standards to ensure uniformity across the nation. Provinces are compelled to implement such laws by passing their own detailed laws complying with the principles and standards laid down by the framework laws. If any province fails to do so, Parliament may implement the framework law (by passing detailed legislation for the province) until the provincial legislature makes the required laws. Provinces appear to be vested with the power or obligation to make laws for the achievement of the objectives set out in the framework legislation only if such a law exists. In its absence, provinces will have no legislative competency with regard to the subject matter.

3.4.2 The Technical Advisors have pointed out that if Parliament is empowered to pass framework legislation in respect of a functional area listed in a schedule, it would be precluded from enacting detail legislation on the matter, except when and for as long as any province fails to implement the framework law. They also pointed out that it would serve no purpose

to provide for framework legislation in the Constitution without including a schedule listing the functional areas in regard to which such laws could be passed.

3.4.3 In our opinion the incorporation of a concept similar to framework legislation in the new Constitution can only be justified if it has the effect of limiting the legislative powers of Parliament in respect of listed functional areas, thereby giving the provincial legislatures exclusive powers to pass laws on the detail of implementing the principles and standards so prescribed. However, the question of framework legislation should not be dealt with in isolation, but considered in the context of a system of national and provincial legislative and executive authority.

4. Necessary Ancillary Powers

4.1 Draft Provisions

"158. The legislative competence of Parliament and provincial legislatures includes the competence to make laws which are reasonably necessary for, or incidental to, the effective exercise of such competence (CP XXI.8)"

4.2 Comments

The draft provisions are identical to the provisions of section 126(2) of the interim constitution and need to be incorporated in the new Constitution to comply with CP XXI.8.

5. CONFLICT OF LAWS

5.1 Draft Provisions

"159 (Option 1)

(1) In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act where the elements of the Act of Parliament that are in conflict with the Provincial Act are necessary for -

(a) the establishment of generally applicable standards regarding -

- (i) services rendered by the state;
- (ii) the maintenance of economic unity; or
- (iii) the determination of national economic policies; or

(b) the maintenance of the security of the Republic; or

(c) the prevention of prejudice to the Republic or any province caused by the activities of a province.

(2) A National Bill concerning a matter which falls within a functional area listed in Schedule 5 must be introduced in the Second House and requires the approval of both Houses. Upon application by at least one fifth of the members of the Second House, and prior to the promulgation of a Bill, the Constitutional Court must determine whether it conforms with the objective criteria prescribed in subsection (1).

(3) If a dispute concerning a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area specified in Schedule 5 cannot be resolved by a competent court on a construction of the Constitution, the Act of Parliament prevails." (CP XXIII).

Note : The draft text provides three further options under clause 159. These are not given in full here, as the Commission concluded that Option 1 accords most closely with its own recommendations (see paragraph 6.3 below).

5.2 Commission's preliminary recommendations (Document 2. 23 March 1995)

5.2.1 The provisional conclusion was that in general the allocation of powers and functions contained in section 126 of the interim Constitution are at this stage appropriate to serve the interests of good government in South Africa (page 17 of Document 2). However, section 126 (3) required tighter formulation (page 15).

5.2.2 In a legal opinion, the Chief State Law Adviser summarised the implication of section 126(3) as follows :

(a) *Subsection (3) of section 126 of the Constitution does not preclude Parliament from exercising its "concurrent" legislative competence, but only resolves the situation where a provincial law and an Act of Parliament deal with the same subject matter. In such case the provincial law shall prevail over the Act of Parliament except in so far as the Act of Parliament relates to any of the matters referred to in paragraph (a) to (e) of the said subsection (3)*

(b) *Parliament can legislate on all matters pertaining or incidental to the functional areas specified in Schedule 6 to the Constitution, even though such legislation may not relate to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution.*

(c) *When an Act of Parliament deals with a matter falling within the said functional or incidental areas where no corresponding provincial legislation exists and the said Act does not relate to matters referred to in the said paragraphs (a) to (e), the situation may arise in*

future that such an Act (or some provisions thereof) will cease to apply in a particular province if the provincial legislature concerned makes a law which deals with the same subject matter, and the provincial law and the Act of Parliament are inconsistent with each other (see section 126(5) of the Constitution and the discussion thereof below)

(d) An Act of Parliament which deals with a matter falling within the said functional or incidental areas shall prevail over a provincial law whenever, and in so far as, that Act relates to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution."

5.2.3 The Commission came to the conclusion that section 126(3) reduces the legislative powers of provinces to the extent that they cannot be said to have exclusive powers in respect of any functional area, except for those granted to them elsewhere in the Constitution (page 13 Document 2).

5.3 Provincial views

5.3.1 **Western Cape:** The Principle of subsidiarity, in accordance with CP XXI.1, in terms of which functions should be allocated to the lowest level of Government where it can be exercised effectively, should be contained in the new Constitution. The national Parliament has extensive overriding powers in terms of section 126(3) over concurrent matters and it can thus not be argued that a qualified exclusive competence is created *inter alia* by a narrower definition and by inclusion of CP XXII as a limitation to overrides. Specific functional areas could *inter alia* be dissected and provinces given exclusive jurisdiction in respect of identified parts of a particular functional area. Asymmetry should be provided for in the new Constitution. It should also contain provisions to allow for delegation and agency functions between all levels of government.

5.3.2 **Northern Cape:** Agrees with the Commission's conclusion as set out in paragraph 5.2.1 above.

5.3.3 **North West:** Section 126 and Schedule 6 are satisfactory as a point of departure but greater clarity is needed on a number of matters.

5.4 Comments

5.4.1 The division of legislative competence between Parliament and the provincial and local legislatures should be dealt with clearly in the new Constitution in order to avoid unnecessary problems with interpretation in future. The principles which must govern such division are provided in the Constitutional Principles, namely -

(a) The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers (CP XIX)

(b) Each level of government (including local government) shall have appropriate and adequate legislative powers and functions, that will enable each level to function effectively. The allocation of powers between different levels shall be made on a basis which is conducive to -

(i) financial viability at each level of government,
(ii) effective public administration, and which recognises the need for and provides national unity and legitimate provincial autonomy and acknowledges cultural diversity (CP XX)

(c) The national government shall be empowered to intervene through legislation where it is necessary for-

(i) the maintenance of essential national standards;
(ii) the establishment of minimum standards required for the rendering of services;
(iii) the maintenance of economic unity;
(iv) the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole (CP XXI.2)

(d) Where it is necessary for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government (CP XXI.3)

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

(f) The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government (CP XXI.5)

(g) Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -

(i) for the purpose of provincial planning and development and the rendering of services; and
(ii) in respect of aspects of government dealing with specific socioeconomic and cultural needs and the general well-being of the inhabitants of the province (CP XXI.6)

(h) Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments (CP XXI.7)

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

(j) The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in the (interim) Constitution (CP XVIII.2)

(k) A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both (CP XXIV)

5.4.2 In the interim Constitution, Parliament and provincial legislatures have concurrent legislative powers in respect of all the functional areas listed in Schedule 6. Section 126(3) only resolves the situation where a provincial law and an Act of Parliament deal with the same subject matter. In such case the provincial law shall prevail over the Act of Parliament except in so far as the Act of Parliament relates to any of the matters referred to in paragraph (a) to (e) of section 126(3). (See legal opinion in paragraph 5.2.2 above).

In the draft provisions (clause 159 - Option 1) Parliament and provincial legislatures retain their concurrent legislative powers in respect of the functional areas listed in Schedule 5. In the event of a conflict between an Act of Parliament and a law of a provincial legislature dealing with any of the functional areas, the Act of Parliament shall prevail over the provincial law if the conflicting elements are necessary for the purposes referred to in Clause 159(1) paragraphs (a) to (c). The end result of the two formulations are therefore identical - the Parliamentary law prevails if it deals with matters listed in the relevant sections. If not, the provincial law prevails in respect of the conflicting elements.

5.4.3 The criteria for Acts of Parliament to prevail over a provincial law set out in Clause 159(1) paragraphs (a) to (c) appear to accord with the criteria prescribed by CP XXI as enumerated above (paragraph 5.4.1) The draft provisions also appear to accord with CP XVIII.2.

5.4.4 Sub-clause (2) of Clause 159 requires Bill dealing with matters in Schedule 5 to be introduced in the Second House and to be approved in both the Second House and the National Assembly. This is accordance with the Commission's preliminary recommendation in paragraph 4.4.2 of Document 4.

5.4.5 Sub-clause (2) of Clause 159 requires the Constitutional Court, upon application by at least one fifth of the members of the Second House to determine whether a Bill conforms with the criteria prescribed in sub-clause 1 (a) to (c). A more general provision is contained in section 98(9) of the interim Constitution. It is not certain what this sub-clause intends to achieve. Parliament has the power to legislate on any matter and an Act will not prevail only if it is in conflict with certain segments of provincial laws.

5.4.6 Sub-clause (3) is in accordance with CP XXIII.

6 Exclusive provincial legislative powers

6.1 It should be noted that clause 159 (Option 1) does not provide for any exclusive legislative powers for provinces as required by CP XXVIII. However, clause 157 (Option 2) dealing with framework legislation does provide for the discretionary allocation of exclusive powers to provinces within the principles and standards prescribed in such a framework Act of Parliament. The problem is that provinces will not obtain any such exclusive powers unless, and until, Parliament exercises its discretionary powers to establish framework legislation.

6.2 The functional areas to be included in the proposed Schedule 5 are dealt with in a separate memorandum (see Annexure 12).

6.3 The Commission considered the four options for clause 159 given in the draft text, but came to the conclusion that Option 1 most closely reflects the Commission's preliminary and current recommendations. However, the qualification that the relevant Acts of Parliament must apply uniformly in all parts of the Republic, should be added to clause 159 (1).

7. Integrity of provinces

7.1 Draft provisions

"160 Parliament may not encroach on, or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of a province (CP XXII)."

7.2 Commission's preliminary recommendations (Document 2, 23 March 1995).

The Commission noted, but did not specifically address, the principle of non-encroachment in its recommendations regarding provincial powers.

7.3 Provincial views

No comments on this matter were received from the provinces.

7.4 Comments

7.4.1 The draft purports to include a provision in the new constitution to give effect to CP XXII. This CP prohibits the exercise of the (legislative and executive) powers of the national government so as to encroach upon the geographical, functional or institutional integrity of the provinces. It requires to be read with CP XX which recognises the need for, and promotes, legitimate provincial autonomy in so far as it does not prejudice national unity.

7.4.2 The Commission considers it appropriate that the new Constitution should contain a provision to give effect to CP XXII.

8. National executive authority and the provinces

8.1 Draft provisions

"161. With the agreement of a provincial executive or a local government, the national executive may -

(a) appoint that provincial executive or a local government as its agent to perform any of the functions of the national executive; or

(b) delegate to that provincial executive or local government the authority to perform any of the functions of the national executive."

8.2 Comments

The provisions are included in the clause to comply with the requirements of CP XIX.

9. Executive authority of the provinces

9.1 Draft provisions

"162. (1) A province has executive authority over -

(a) all matters in respect of which the provincial legislature has passed legislation [legislative competence] and

(b) matters entrusted to the provincial executive in accordance with the Constitution.

(2) With the agreement of the national executive or a local government within the province, a provincial executive may -

- (a) appoint the national executive or that local government as its agent to perform any of the functions of the provincial executive; or**
- (b) delegate to the national executive or that local government the authority to perform any of the functions of the provincial executive."**

9.2 Commission's preliminary recommendations (Document 5,6 April 1995)

The Commission recommended that provisions similar to those contained in section 144 of the interim Constitution be incorporated into the new Constitution in an amended form (paragraph 3.5.2 Document 5). As far as provincial executive structures are concerned, the Commission pointed out that these may be provided for in provincial constitutions (paragraph 2.2 Document 5)

9.3 Provincial views

Northern Cape and **Western Cape** supported the Commission's preliminary recommendations.

9.4 Comments

The draft provisions confirm the Commission's preliminary recommendations, and are consequently supported. However, the use of the word "legislative competence" is preferable to the words "passed legislation" in clause 162(1) (a).