1995-05-29

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

1 . Preliminary recommendations on traditional leaders

2. Preliminary recommendations on local government

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

CHAIRPERSON
(SIGNATURE ILLEGIBLE)

18 May 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON TRADITIONAL AUTHORITIES (RECOMMENDATIONS DOCUMENT 8)

1. INTRODUCTION

1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 2).

1.2 Indigenous law and custom have for centuries ordered the lives and activities of indigenous communities in South Africa. Today, it is still the system of law which is closest, best known and most accessible to millions of citizens especially in the rural

areas. It is part of a culture which, while influenced to a certain extent by other cultures, continues to draw overwhelmingly on indigenous experience and serves as a strong communal bond. Even among many people who have since become urbanised, the link to their cultural heritage is still strong. The recognition and constructive use of this fact could assist any government not only in the maintenance of social stability but also in the execution of its obligation to deliver public goods and services to such communities.

1.3 Experience in South Africa as also in other African countries is that systems of indigenous law and custom are often abused for party-political purposes. There are numerous examples of such abuses. Unfortunately this has the effect of discrediting such systems. A system may become so contaminated by its abuse that it may ultimately be rejected by its adherents. If the system is to remain viable, it therefore needs to be protected from abuse for purposes which are not conducive to its retention and development.

1.4 It is also apparent that traditional leadership is inseparably interlinked with indigenous law and custom. If leaders are imposed on such a system in any other manner, it would amount to a contamination of the system. It is significant, therefore, that Constitutional Principle XIII entrenches the institution, status and role of traditional leadership <u>according to indigenous</u> <u>law</u>.

1.5 In order to ensure legal certainty, the body of indigenous law regarding the institution, status and role of traditional leadership in South Africa requires comprehensive codification.

1.6 It is recognised that indigenous law and custom have been adapting and will continue to adapt in accordance with changing circumstances. Voluntary or organic evolutionary changes are preferable. However, the interim Constitution contains guarantees in regard to certain basic human rights, which must also be incorporated in to the new Constitution, and which will take precedence over traditional law.

1.7 The constitutional protection of traditional leadership (CP XIII) must also be compatible with those other Constitutional Principles which prescribe that the system of government shall be democratic (CP VIII, XVII).

1.8 The Commission conducted a special workshop on traditional leadership in which relevant topics were discussed by local and foreign experts and representatives of a large number of organisations and bodies including the Constitutional Assembly and provincial governments and/or legislatures and Houses of Traditional Leaders (invitations were extended to all Houses through the provincial Speakers.). Available literature on the subject was also studied. A Think Tank consisting of persons with expertise in various academic and other fields assisted the Commission in the discussion and formulation of recommendations in regard to the issue. The

Commission's provisional recommendations contained in this document will be forwarded for comment to provincial governments, with a request to obtain also the comments of the Houses of Traditional Leaders and of traditional communities in so far as it may be practicable.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 The following Constitutional Principles relate to or have an effect on the application of indigenous laws and customs and traditional leaders:

II, III, IV, V, XI, XII, XIII, XVI, XVII.

The role of traditional leaders or traditional authorities in national, provincial and local government systems is not specifically addressed in the Principles.

2.2 Constitutional Principle XIII deals with the issue more specifically and provides that the institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

2.3 The interim Constitution contains a number of provisions relating to traditional authorities, inter alia the following -

Section 126 read with Schedule 6 and section 144 (2) allocates indigenous law and customary law as well as traditional authorities as provincial legislative and executive competencies, subject to parliamentary competence to make laws in regard to such matters under specific conditions (section 126 (2A) and (3)).

Section 181 provides for the continued recognition of previously recognised indigenous authorities and indigenous law, subject to amendment or repeal by a competent authority and regulation by law.

Section 182 provides for ex officio membership of local government for traditional leaders under certain circumstances.

Section 183 obliges a provincial legislature inter alia to establish a House of Traditional Leaders, where applicable, to advise and make proposals and to comment on Bills relating to traditional authorities and indigenous laws and customs.

Section 184 establishes a Council of Traditional Leaders with powers and functions inter alia to advise and make recommendations to the national government and the President and to comment on Bills relating to matters enumerated in the section.

3. DISCUSSION

3.1 There appears to be broad consensus in the documentation consulted by the Commission and the views expressed by participants in its workshop and think tank, that it would be politically and administratively prudent to involve traditional authorities in the system of government. However, the nature and extent of their involvement are at issue. In the Commission's view, the following questions need to be addressed:

(a) Should the Constitution provide a basis for determining who are to be recognised as traditional leaders?

(b) What should be the role of traditional authorities; how should this role be reconciled with other elements in the constitutional system; and how should the Constitution deal with these matters?

(c) What should be the powers and functions of traditional leaders at each level of government? What provisions should be made for their accountability in regard to the exercising of such powers and functions? Should this be provided for in the Constitution?

(d) What should be the relationship between traditional authorities and elected structures at various levels?

(e) Should provinces have exclusive powers with regard to traditional matters? If not, which matters should be subject to national regulation?

(f) Should the Constitution provide a basis for determining the number and remuneration of traditional leaders, and the size of Houses of Traditional Leaders? What might that basis be?

3.2 The Commission takes, as its point of departure, the need to read Constitutional Principles XIII in conjunction with the principles and provisions concerning fundamental rights as set out in Constitutional Principles II and III and Chapter 3 of the interim Constitution, together with the provisions for democratic governance established by Constitutional Principles VIII and XVII. This is the basis for the Commission's recommendations regarding the provisions to be made in the new Constitution on the institution, status and role of traditional leaders. The CPG recognises that the accommodation of traditional leaders within the system of governance involves complex and delicate issues which will have to be resolved by processes and provisions other than those which need to be written into the new Constitution.

3.3 Recognition of traditional leaders

3.3.1 In terms of CP XIII the institution of traditional leadership according to indigenous law shall be recognised and protected in the new Constitution. The new Constitution therefore need not provide for recognition of leadership which is not in accordance with indigenous law. This is in itself a basis for determining who are and who are not to be recognized as traditional leaders. Leaders appointed by governments otherwise than in accordance with indigenous law need therefore not be recognized in terms of the Constitution. It also follows that the method or procedures for the vesting of traditional leadership will have to be in accordance with the laws of an indigenous community. It is apparent, however, that there could be a considerable degree of uncertainty about the content of such laws, where these have not been codified. The Commission recommends that provisions similar to CP XIII be incorporated into the new Constitution; and that the need to codify the body of indigenous law regarding the institution, status and role of traditional leadership in South Africa be addressed as a matter of urgency.

3.3.2 There is a possibility that the number of persons claiming to be traditional leaders could proliferate if left unregulated. This would not be of any official significance if their recognition does not incur state responsibility for providing for ex officio representation on official bodies or the payment of remuneration. However, limits should be placed on the number of leaders who will be recognized for official purposes. The detailed provisions for this should be dealt with in provincial laws. Some co-ordination or regulation is required to ensure that significant disparities (in e.g. remuneration) do not arise between provinces, otherwise this may lead to dissatisfaction amongst traditional leaders of the various provinces. The Commission consequently recommends that such co-ordination or regulation be provided for in an Act of Parliament in terms of provisions similar to that contained in section 1 26 (3)(b) of the interim Constitution.

3.3.3 Particular care needs to be exercised to ensure that the recognition and remuneration of traditional leaders cannot be exploited for their own political ends by political parties which are in power at any time, either at national or provincial level. This is an additional reason why officially recognised traditional leaders should manifestly be seen and treated as authorities without connection to political parties. If this distinction cannot be implemented successfully, the continued official recognition of traditional leaders will need to be re-examined to determine whether this is justified in the interest of the communities they purport to serve.

3.3.4 If a traditional leader is elected to any legislature, his/her recognition for official purposes should be terminated as it would be contrary to law to allow him/her to occupy two positions in government for which he/she is remunerated by the state.

3.4 Role of traditional leaders

3.4.1 It is apparent from CP XIII that the role of traditional leaders should be recognised according to indigenous law. The role assigned to traditional leaders by traditional

law has, as far as the Commission is aware, not been fully documented. It is clear, however, that traditional leaders are not entitled as of right to perform any official roles other than those assigned by indigenous law. However, this does not preclude governments from assigning additional roles to them.

3.4.2 Additional roles have indeed been conferred upon traditional authorities in the interim Constitution, e.g. ex officio membership of a local government as provided for in section 182 and advisory and recommendatory roles in the Houses and Council of Traditional Leaders. Despite this, the Commission is of the opinion that the new Constitution should not confer any official roles or Powers upon traditional leaders over and above those determined according to indigenous law. Such additional roles, powers or functions not vested in them according to indigenous law may be allocated more appropriately in parliamentary, provincial and local laws, particularly in regard to the provision of services to local communities, so as to adapt more easily to the changing nature of society and social needs.

3.5 Powers and functions

3.5.1 This question has to some extent been dealt with under paragraph 3.3 above. In view of the recommendations in that paragraph, only limited powers and functions should be provided in the new Constitution while more extensive provisions in regard to specific functions and the powers related to them, should be dealt with in national, provincial and local laws.

3.5.2 As far as the Constitution is concerned, the Commission recommends that only the following provisions in regard to traditional authorities be incorporated:

(a) provisions for the protection of the institution, recognition and role of traditional leadership, as envisaged in CP XIII**;**

(b) provision for the establishment/continuation of Houses of Traditional Leaders in the relevant provinces to be dealt with in provincial laws; and

(c) provision for the establishment/continuation of a Council of Traditional Leaders to be dealt with in a law of Parliament.

3.5.3 The principle of accountability is as much a feature of indigenous law as it is of modern governance. In as much as the Constitutional Principles require accountability in respect of all functions of government this should also pertain to traditional leaders. Such accountability should not only be in relation to their communities in terms of indigenous law, but also to those levels of government from which they receive public monies, e.g. in the form of remuneration or for the

rendering of services. The Commission recommends that provision for such accounting should be made in ordinary laws dealing with traditional authorities.

3.6 Relationship with elected structures

3.6.1 It seems clear to the Commission that the primary role of traditional leaders is in regard to the maintenance and application of indigenous law. Specifically, traditional leaders also have traditional powers in respect of the use and allocation of traditional land. The relationship between those leaders and elected structures in regard to these matters is of such complexity and has such serious implications that it will require special investigations and negotiations in order to come to a generally acceptable solution. The Commission does not find itself in a position to make recommendation at this stage as to how such relationships should be dealt with.

3.6.2 In certain matters that do not fall within the category of indigenous law and land issues, traditional leaders will obviously be acting as agents for elected national, provincial and local governments in respect of functions or services entrusted to them for execution. The normal relationship as between principal and agent will therefore apply.

3.6.3 The question has been raised whether traditional leaders could be accommodated as ex officio members of elected structures of government, such as local government (including it's legislative aspect), provincial legislatures, the Senate or even of the National Assembly. CP's XVII and XIII indeed seem to suggest that traditional leaders may represent traditional communities at each level of government, notwithstanding the fact that this may not be considered to be democratic representation in constitutional terms. At local government level, such representation has indeed been provided for in section 182 of the interim Constitution. Such representation in other elected structures at provincial and national levels would provide for a more meaningful role in national and provincial government for traditional leaders than that provided for in the interim Constitution. It could also make redundant the structures designed specially to accommodate them, namely the Houses of Traditional Leaders and the Council of Traditional Leaders.

3.6.4 Perhaps a case can be made for the ex officio representation of communities by traditional leaders at local government level, provided that the geographical areas in question can be excluded from areas in which elections on the basis prescribed by CP VIII must be conducted. This proviso is necessary in order to avoid double representation of the areas in question, which would itself be undemocratic. Such ex officio representation would not be undemocratic if the institution of traditional leadership is demonstrably based on popular support in the communities concerned. The matter will be dealt with more specifically in recommendations regarding that level of government. However, the Commission would be hesitant

to recommend ex officio representation at national and provincial levels of government for the following reasons -

(a) it could be contrary to the principle of proportional representation (CP VIII);

(b) because of the large number of traditional leaders, it would be difficult to determine rationally how many representatives should be provided for and how they should be nominated or elected;

(c) the balance of power established by elections could be significantly changed by the introduction of persons who were not elected through the normal electoral process;

(d) if the communities who are represented by such leaders are permitted to vote in normal elections, it would amount to double representation which would be contrary to the democratic concept of "one person, one vote";

(e) because of their participation in political bodies (legislatures) the traditional leaders would themselves become politicised and this could give rise to the abuses which have tended to discredit the system in the past (par. 1.3 and 3.2.3 above).

3.6.5 The Commission draws attention to a view which has been expressed, that where traditional leaders are accommodated as ex officio members of any elected structure of government, this arrangement should be subject to periodic review.

3.6.6 The Commission recognises the need to accommodate traditional leaders in government and is of the opinion that the creation of provincial Houses and a Council of Traditional Leaders provides for this need. It is up to the respective governments and traditional leaders to ensure that these structures function effectively and that traditional leaders will consequently have a meaningful role in government.

3.7 Provincial powers

3.7.1 The interim Constitution empowers provinces to legislate and perform their executive powers in respect of indigenous law and customary law as well as in respect of traditional authorities. However, Parliament also has the power to legislate in respect of these functional areas, subject to conditions enumerated in section 126 (3). The powers of provinces in this respect can be enhanced in the new Constitution if the Constitutional Assembly so decides, but may not be substantially less or inferior to those provided for in interim Constitution.

3.7.2 A major portion of governmental powers and functions in regard to traditional authorities could be vested in the respective provincial governments. However, the

Commission is of the opinion that the issues concerned are of such national importance, that not all relevant powers and functions should be assigned to the provinces. The national government needs the powers to intervene where necessary in the national interest. The Commission therefore recommends that the national government retain its powers to legislate in regard to traditional authorities and indigenous law to the extent contained in section 126 (2A) and (3) of the interim Constitution.

3.8 Numbers

3.8.1 The last question to be addressed concerns the issue of establishing a basis for determining the number and remuneration of traditional leaders. The Commission has already recommended that a basis for the determination of the remuneration of traditional leaders should be provided for in an Act of Parliament, i.e. not in the Constitution. The Commission on Remuneration of Representatives provided for in Section 207 of the interim Constitution could perhaps also play a role in the determination of such remuneration. The Commission therefore recommends that no such basis be provided in the new Constitution.

3.8.2 The Commission has also recommended that the Constitution should contain only provisions providing that Houses of Traditional Leaders be established/continued in terms of provincial legislation. The interim Constitution does not limit the size of such Houses, nor should the new Constitution. If any problems are be experienced with the size of the Houses in future, the national Parliament could provide for norms on standards in terms of section 126 (3)(b). The Commission so recommends.

25 May 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON LOCAL GOVERNMENT

RECOMMENDATIONS - DOCUMENT 9

1. INTRODUCTION

See introductory notes under recommendations on provincial legislative powers (Recommendation 2).

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 The following Constitutional Principles prescribe the nature of the provisions relating to local government which must be contained in the new Constitution:

IV, VI, VIII, IX, X, XIV, XVI, XVII, XVIII, XX, XXIV, XXV, XXVI, XXVII.

These will be dealt with in the discussion below.

2.2 Chapter 10 of the interim Constitution (sections 174 - 180) provides a framework for local government, including the following matters -

* establishment and status
* powers and functions
* council resolutions
* executive committees
* administration and finance
* elections
* code of conduct

In view of the obligation on the Commission to consider the provisions of the interim Constitution in formulating its recommendations [section 164(3)(a)], each of the above matters will be dealt with in its recommendations.

2.3 The Constitutional Principles provide for a hierarchical structure of government for South Africa, with all levels of government in that structure subject to the Constitution which is the supreme law of the land and is binding on all organs of state at all levels of government (CP IV). A hierarchical conception of the levels of government is clearly indicated by the following Principles -

(a) Government shall be structured at national, provincial and local levels (CP XVI).

(b) In matters in which the national interests are important, the national government shall be vested with powers to make laws which will be binding on the provincial and local levels of government (CP XXI and XXIII).

(c) Provincial governments shall be vested with powers to make laws on local government matters, and other matters which will be binding upon local governments within their various provinces (CP XVIII.2 read with section 126 and Schedule 6 and CP XXIV).

2.4 At local government level, the Constitutional Principles allow for differentiation in the powers of different categories of local government (CP XXV), while the interim Constitution provides for "metropolitan, urban and rural local government" [section 174(2)1.

2.5 The hierarchical structure does not entail that a lower level of government is completely subservient to any higher level. The hierarchical conception recognizes a hierarchy of interests, with national interests as such being of overriding importance, with regional (provincial) interests being of overriding importance in the particular region, and with local interests being of primary importance within the locality. However, the Constitutional Principles entrench the legitimate autonomy of provincial governments (CP XX) and prohibit encroachment upon their geographical, functional or institutional integrity (CP XXII). These Principles should by extension also be applicable to the local level of government, as is indeed provided for in section 174(3) and (4) of the interim Constitution.

2.6 Principle XXI furthermore prescribes as a first criterion for the allocation of powers to national and provincial government (and by extension local government) that the level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so. The Commission is therefore of the opinion that the criterion of effectivity must determine at which level of government a service should be rendered, subject to overriding interests which may exist at national or provincial government level, as the case may be. If a decision in respect of a particular service can therefore be taken most effectively at local government level, the function to perform that service should be allocated to local governments which are able to accept responsibility and accountability for the quality and rendering of such service, subject to the possible existence of higher ranking interests at provincial or national government level. It appears therefore that the concept of "spheres of government", as contrasted with "levels of government", which has attracted considerable attention in debates about local government, has in effect also been provided for in the Constitutional Principles and the interim Constitution.

2.7 The autonomy of provincial and local governments, provided for in the Constitutional Principles and the interim Constitution respectively, should clearly not be interpreted as meaning that they enjoy absolute autonomy. Their autonomy should rather be regarded as a freedom of choice to be exercised in the sphere of the province or locality, but subject to higher ranking interests. The relevant

provisions provide a framework for a sound distribution of powers and functions, in principle, among three levels of government, in accordance with the concept of bringing government closer to people in respect of matters which affect them most at the various levels.

2.8 In view of the hierarchical nature of government described above, it is appropriate that provincial governments should be the main instrument for ordering and reviewing local government activities within their respective provinces [CP XXIV, XXI, XVIII.21, and that the power to legislate and execute such laws in respect of local government matters should be allocated to provincial governments. This will not exclude the power of the national government to pass laws dealing with local government in the circumstances provided for in CP XXI.

2.9 In Schedule 6 of the interim Constitution local government is allocated as a "functional area" in regard to which provincial legislatures are competent to make laws, subject to the provisions of Chapter 10. There has been some criticism of the classification of local government as a "functional area" together with, e.g. agriculture and abattoirs, as this might appear to reflect negatively on the status of local government. The Commission is of the opinion that in the new Constitution it would be more appropriate to provide for provincial legislative powers in respect of local government in the chapter dealing with local government matters.

3. DISCUSSION OF CONSTITUTIONAL PROVISIONS

3.1 The provisions of CP XXIV are peremptory, specifying that a framework for local government powers, functions and structures shall be set out in the Constitution, while the comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation, or in both (subject to CP XVIII.2; see section 126). The Commission will discuss the issues and make recommendations on the basis of the framework provided in Chapter 10 of the interim Constitution.

3.2 Establishment and status of local government

3.2.1 Section 174(1) provides for the establishment of local government for the residents of areas demarcated by law of a competent authority (i.e. Parliament or provincial legislature). It was argued that the provisions should include all land in the Republic and that the power to demarcate localities should be vested in provincial legislatures. The Commission is of the opinion that the present provisions of section 174(1) are adequate, in allowing the legislatures some discretion in regard to areas which may prove to be problematical (e.g. tribal land), and allowing Parliament to provide for such uniformity or standards as may be considered to be in the

national interest. The Commission recommends that provisions similar to Section 174(1) be incorporated into the new Constitution.

3.2.2 Section 174(2) allows for the provision of categories of metropolitan, urban and rural government with powers, functions and structures differentiated according to a number of considerations. The definition of the given categories appears to be problematical. For example, pockets of "rural areas" in cities may wish to be categorized as "rural local government" to avoid being included in metropolitan local government. The view has also been advanced that only two categories can be distinguished, namely metropolitan and non-metropolitan local government. Another view is that primary local authorities should also be included as a category of local government. The diversity of opinions in regard to the categorization of local government seems to indicate that the naming of categories (even such as those contained in the interim Constitution) should best not be provided for in the new Constitution, but left to other laws to be dealt with in more detail. The Commission recommends that provisions similar to section 1 74(2) be incorporated into the new Constitution but that the words "metropolitan, urban and rural local government" be omitted.

There appears to be some confusion as to whether regional structures of local government should be considered as another (fourth) level of government. Constitutional Principle XVI prescribes that there shall be only three levels of government. A regional structure of local government therefore cannot constitute an extra level of government, but can be accommodated as a category of local government if provided for in either a Parliamentary or a provincial law.

3.2.3 Section 174(3) provides for limited autonomy of local governments and their entitlement to regulate their affairs. Submissions to the Commission suggested that the term "autonomy" should not be retained in the section, even in the qualified form, as it conveys a notion of freedom in decision-making at this level of government which it does not possess. The Commission does not have a real problem with the terminology of the present section. However, the following formulation drawn from the European Charter of Local self-government and submitted to the Commission, may be considered more appropriate -

" 1 74.(3) Local government shall, within the limits prescribed by or under law, have the right to exercise its powers and regulate its affairs".

3.2.4 Section 174(4) prohibits Parliament or a provincial legislature from encroaching on the powers, functions and structure of local government to such an extent as to compromise the fundamental status, purpose and character of local government. It does, however, allow for encroachment to

a degree that will not undermine such status, purpose and character. The interpretation of these provisions may lead to conflict among the three levels of government. The Commission is therefore of the opinion that the extent to which national and provincial legislatures may encroach on the terrain of local government should be clarified. Such clarification need not be provided in the Constitution itself, but should be contained in an Act of Parliament as envisaged in CP XXIV. The criteria contained in CP XXI and section 126(3) of the interim Constitution could serve as guidelines for determining when encroachment on the local government terrain would be justified. The corresponding section in the new Constitution could provide as follows -

" 1 74(4) 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 an Act of Parliament passed in terms of section 174(1)."

3.2.5 Section 174(5) provides for the publication, for comment, of proposed legislation which materially affects the status, powers or functions of local governments or their boundaries, and for giving a reasonable opportunity to make written representations in regard thereto. It has been suggested to the Commission that all legislation affecting local governments in any manner whatever should be negotiated and agreed with organised local government before it is published for comment, and that at least 30 days should be allowed for making written representations. The Commission is of the opinion that it would be unacceptably onerous to obtain the agreement of "organised local government", in every matter which affects local government. It would also be difficult to define the term "organised local government" as many bodies representing local governments could be formed over time. It appears to be a reasonable constitutional provision that proposed legislation affecting the status, powers, functions and boundaries of local governments be published for comment and that reasonable time be allowed for written representations. Consultation with representative local government bodies should in the Commission's opinion take place before such legislation is published for general comment. Such consultation should be through formally instituted forums which shall be provided for in national and provincial legislation. Because such forums would be structured differently for purposes of consultation at provincial and national levels, provision should be made in provincial and national laws regarding the composition of such forums and the recognition of representative local government bodies. It would be in the interest of national and provincial governments to facilitate the establishment of such forums.

The Commission will deal with this matter more fully in its Preliminary Recommendations on inter-governmental relations.

The Commission recommends that provisions requiring consultation with representative local government bodies in forums to be established in terms of national and provincial laws, as well as a provision requiring the publication of proposed legislation of the nature provided for in section 174(5) be incorporated into the new Constitution.

3.3 Powers and functions of local government

3.3.1 Section 1 75(1) stipulates that the powers, functions and structures of local government shall be determined by law of a competent authority, i.e. Parliament or the relevant provincial legislature. The nature of the powers, functions and structures are dealt with in further sub-sections or sections. Section 175(1) is only an introductory subsection authorising the competent authorities to determine these matters. The Commission is of the opinion that the provisions are in compliance with CP XXIV and recommends that similar provisions be incorporated into the new Constitution.

3.3.2 Section 175(2) compels the competent authority to assign such powers and functions to a local government as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction. It is in essence an introductory statement of the nature of the powers and functions which shall be allocated to local governments. More detail concerning the nature of the functions as envisaged by the Constitution is provided in section 175(3). The provision in section 175(2) is important in so far as it places an obligation on national and provincial legislatures to assign powers and functions of that nature to local governments. The Commission recommends that similar provisions be incorporated into the new constitution.

3.3.3 Section 175(3) assigns certain functions to local governments, namely to make provision for all persons residing within its area of jurisdiction to have access to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security "within a safe and healthy environment". Local governments therefore have to provide the safe and healthy environment in which residents can enjoy the services, as well as to ensure that residents have access to the relevant services. They are not compelled to deliver these services themselves. The constitutional responsibility is to ensure that the residents have access to such services. However, local governments can do so only to the extent determined by an applicable law (national or provincial) and provided that the services or amenities can be rendered in a sustainable manner and are financially and physically practicable. For example, they would not be entitled to provide for education unless authorised to do so by an applicable law and only if the

funding is available to make the service sustainable and financially and physically practicable.

It has been submitted to the Commission that a local government should have inherent powers to undertake any function in the interest of the residents within its area of jurisdiction, provided that undertaking the function is not expressly prohibited by legislation passed by other levels of government. The submission has a sound philosophical basis. However, the present section 175(3) does not prohibit local governments from exercising further powers and functions, provided that such powers and functions are determined by law of a competent authority [section 175(1)]. It is therefore competent for a national or provincial legislature to assign such powers as may be deemed inherent to local governments, provided that they include the obligation to provide the environment and access to the services stipulated in section 175(3). The purpose of section 175(4) is to comply with CP XXIV, but also to state the minimum role of a local government.

3.3.4 It has been suggested that functions such as town/rural planning, protection services, refuse and waste removal, recreation amenities, and cemeteries should be included in section 175(3). Most, if not all of these are by implication included in the stipulation regarding a safe and healthy environment. The Commission is of the opinion that the provisions of section 175(1) and (2) deal adequately with the assignment of powers and functions of local government and also comply with CP XXIV. However, subsection (2) should also provide for a development function in respect of the area of jurisdiction of a local government. The Commission therefore recommends that the words "and to facilitate development of such area." be added at the end of the subsection.

3.3.5 In view of Principle XXIV, leaving out section 175(3) altogether might be considered, as the obligation to provide for certain services could be contained in a national or provincial law. Section 175(2) would be sufficient to accommodate the notion of inherent powers for local governments.

The Commission therefore recommends that section 175(3) be omitted from the new Constitution.

The alternative would be to make provision for a general minimum area of responsibility for local governments, such as is contained in the present sub-section.

3.3.6 Sections 175(4) and (5) confer upon local governments the power to make by-laws, executive powers, and the power to assign specified functions to local bodies or sub-municipal entities. The Commission considers it

necessary that similar provisions should be incorporated into the new Constitution.

3.4 Council Resolutions

3.4.1 Section 1 76(a) requires that matters pertaining to the budget of a local government shall be adopted by a majority of at least two-thirds of all its members. Section 176(b) provides for the adoption of town planning decisions by a majority of all members. The provision in paragraph (a) is generally accepted. In regard to paragraph (b) it was suggested to the Commission that the term "town planning" does not convey the full planning responsibilities of local government, particularly in respect of rural areas which will now be included in local government areas. It is proposed that the term "land-use planning" should be substituted for the term "town planning". It was also brought to the Commission's attention that the delegation provided for in respect of "town planning" is too restrictive as it may not allow for further delegation to officials to deal with minor matters as has been the practice in many local governments.

3.4.2 However, the Commission is of the opinion that this matter should not be dealt with in the Constitution but rather in a law of a competent authority. The Commission therefore recommends that section 176 be omitted from the new Constitution.

3.5 Executive committees

Section 1 77 provides for the election of members of a local government council to serve as members of an executive committee. The Commission is of the opinion that this matter should be dealt with in a law of a competent authority, If it is considered necessary to include provisions relating to executive structures for local governments in the Constitution, such provisions should not be prescriptive in regard to executive committees, as many local governments function effectively under a system of multiple committees. The choice should be left to local governments themselves. The Commission recommends accordingly .

3.6 Administration and finance

3.6.1 Section 1 78(1) requires a local government to ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services and ensure effective administration of its affairs. This provides a firm foundation for local government operations. The Commission recommends that similar provisions be incorporated into the new Constitution.

3.6.2 Section 178(2) empowers a local government to levy and recover a range of rates, taxes, fees and levies, subject to conditions prescribed by laws of a competent authority and after taking into consideration any recommendations of the Financial and Fiscal Commission (FFC). The Commission recommends that similar provisions be incorporated into the new Constitution. However, the provisions should not be construed to mean that the FFC will need to make recommendations in each individual case. The FFC should issue general guidelines for the imposition of local taxes, levies, etc., which should then be considered by all local governments before making their decisions. If a local government wishes to deviate from such guidelines, a particular recommendation should then be obtained from the FFC. The Commission recommends that this matter be dealt with in a national law relating to the financial and fiscal powers of local governments.

3.6.3 Section 178(3) provides that a local government shall be entitled to an equitable allocation by the provincial government of funds, and that the FFC shall make recommendations regarding the criteria for such allocations, taking into account the different categories of local government. These provisions do not meet with the requirement of CP XVII that "each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them". The local level of government must therefore be allocated an equitable share of taxes collected nationally, which must be distributed amongst 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 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 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.

The Commission recommends that section 178(3) be amended to read as follows and with the addition of 178(4):

"178(3) Subject to subsection (4), a local government shall be entitled to an equitable share of revenue collected nationally so as to ensure that it is able to provide basic services and execute the functions allocated to it.'

"178(4) The Financial and Fiscal Commission shall make recommendations regarding -

(a) the percentage of revenue collected nationally to be allocated to local governments in each province; and

(b) the criteria for the allocation of an equitable portion of the percentage allocated to a province in terms of paragraph (a) to local governments within the province, taking into account the different categories of local government provided for in a law of a competent authority. "

It should be noted that recommendations by the Commission regarding the accommodation of local government interests in the Financial and Fiscal Commission are contained in the document (No 7) referred to above.

3.6.4 The Commission recognises that a local government could experience severe financial difficulties if a higher level of government requires it to perform functions which cannot be funded out of the normal local government revenue. The principle that the money follows the function should therefore be honoured whenever the performance of such functions is required.

3.9 Elections

3.9.1 Section 179 deals generally with elections for local governments, providing for democratically elected representatives and regular elections, and for both proportional and ward representation. The provisions are in accordance with relevant Constitutional Principles and are acceptable.

3.9.2 Section 79 5 disqualifies a member of the National Assembly or the Senate from becoming or remaining a member of a local government, but does not so disqualify a member of a provincial legislature. The Commission surmises that this is an oversight as it would likewise be undesirable to allow a member of a provincial legislature also to be a member of a local government. The Commission recommends that the provisions of section 179 be incorporated into the new Constitution but that the disqualification in subsection 5 (b) be extended to include members of a Provincial legislature.

The Commission also considers that employees of local governments should not be exempted from being disqualified to serve as elected members of a local government. This is clearly contrary to generally accepted practice and could constitute a conflict of interests. The Commission therefore recommends that all the words in this paragraph after the word "government" be deleted.

3.9.3 The provisions of section 182 are controversial. Section 182 entitles the traditional leader of a community observing a system of indigenous law and

residing within the area of jurisdiction of an elected local government to be a member of that local government ex officio and makes him/her eligible to be elected to any office of such local government. Such an arrangement appears to be permitted in terms of CP XVII. However, there are substantial arguments for and against the inclusion ex officio of traditional leaders at any level of government.

3.9.4 On the one hand it is argued that traditional leaders are being imposed upon a democratically based system of government while not being democratically elected themselves in the sense recognised in CP VIII. There is also a strong sentiment that traditional leaders should be above party politics and that their participation in elected structures of government tends to politicise them. On the other hand, the positive role that traditional leaders can play in providing public goods and services to traditional communities is recognised. Their existence and influence on traditional communities cannot be ignored and it may therefore be in the interest of all to have them participating in government structures, rather than being left out and possibly resisting the activities of such structures.

3.9.5 The Commission is of the opinion that the Constitution should not guarantee that traditional leaders shall have ex officio membership in any elected Government structure. Such representation of communities by their traditional leaders, in addition to their representation through the normal election process, would amount to double representation and would in itself be undemocratic. If ex officio representation of traditional leaders is nevertheless considered in the national, provincial or local interest, it should rather be provided for in national or provincial laws and be subject to periodic review or perhaps to expiry after a prescribed period of time. It would also be important to ensure that traditional leaders are not officially remunerated for occupying two different positions in government i.e. both as traditional leaders and as members of a local government.

3.9.6 An alternative would be to exclude tribal land from the geographic areas of local government for election purposes only. If the election of traditional leaders within such areas is considered to be democratic in terms of codified indigenous law, the relevant traditional leaders could be deemed to be elected to the local government in whose general geographic area that tribal land is located. Through this method the requirements of democratically elected government and prevention of double representation could be met. However, if acceptable, this method should not be provided for in the Constitution but in national or provincial legislation. The Commission recommends accordingly.

3.10 Code of conduct

Section 180 prescribes an enforceable code of conduct for members and officials of local governments, which must be provided for by law. Presumably this will have to be an Act of Parliament to ensure uniform conduct throughout South Africa. It is to be noted that similar provisions are not provided in respect of other elected representatives. The Commission is of the opinion that provisions relating to a code of conduct should not be incorporated into the new Constitution. Codes of conduct could more appropriately be developed in a process of self-regulation, or provided for in local government by-laws. The possibility of introducing recall measures or appropriate intervention by voters by means of referendums or other actions should preferably be dealt with in national or provincial laws, if deemed desirable.

3.11 Procurement administration

Section 1 87 provides for the regulation of the procurement of goods and services for any level of government by an Act of Parliament and provincial laws. These laws will therefore apply also to local governments. The Commission is of the opinion that these provisions should be retained in the new Constitution.

3.12 Borrowing powers

The borrowing powers of local governments are not dealt with explicitly in the interim Constitution. However, section 188 implicitly recognises such a right, but prohibits the national government from guaranteeing a local government loan unless it complies with norms and conditions set out in an Act of Parliament, and the FFC has made a recommendation concerning compliance with such norms and conditions. Section 157(3) also prohibits the guarantee of local government loans by a provincial government unless the need for the guarantee has been verified by the FFC and recommended. The Commission recommends the retention of similar provisions in the new Constitution.

3.13 Local Government Commission

It has been suggested that the new Constitution should provide for a Local Government Commission. Its purpose would be to consider legislation which materially affects the status, powers and functions of local government and, presumably, to comment on such legislation and generally to represent the interests of local government in forums involving intergovernmental relations with national and provincial governments. The Commission is sympathetic to such representation of local government interests and has, indeed, recommended strong local government representation in the FFC. In regard to other local government matters, however, the Commission is of the opinion that intergovernmental relations would best be dealt with through structures negotiated with the provincial and national levels of government as the need arises. The Commission recommends accordingly. The Commission will be preparing recommendations in regard to intergovernmental relations in general in a separate document.

3.14 Auditing

Section 193(2) of the interim Constitution empowers the Auditor-General to audit and report on all the accounts and financial statements of any local government. He may do so either personally or by delegation to or authorisation of appointed persons. He may also conduct performance audits at the request of the President.

It has been suggested that local governments should arrange for the auditing of their own accounts. However, the Commission is of the opinion that an independent body is needed to protect the interests of taxpayers at all levels of government. Furthermore, as local governments will be receiving a portion of revenue collected nationally and may also receive other grants or allocations from national or provincial governments, it is advisable to empower the Auditor-General to do the auditing at all government levels. The Commission recommends that the provisions of section 193(2) be incorporated into the new Constitution in respect of local governments also.

3.15 Competent authority

In view of the conclusion of the Commission in paragraph 2.8 above, it recommends that the term "competent authority" as applied in Chapter 10 of the interim Constitution should be defined in order to differentiate between the legislative powers of Parliament and provincial legislatures in respect of local government matters. This could be done by reference to the powers conferred upon each of the legislatures in section 126 of the interim Constitution, i.e. by stating that the relevant legislatures will have similar powers to those contained in section 126 in respect of local government matters.