

6 April 1995

## **COMMISSION ON PROVINCIAL GOVERNMENT**

### **PRELIMINARY RECOMMENDATIONS ON PROVINCIAL EXECUTIVE AUTHORITIES RECOMMENDATIONS - DOCUMENT 5**

#### **1. INTRODUCTION**

- 1.1 See introductory notes under recommendations on provincial legislative competence (Recommendation 2).
- 1.2 Notwithstanding the right of provinces to adopt unique legislative and executive structures and procedures for their provinces, the Commission is of the opinion that the new national Constitution should include guideline provisions or generally provide for executive structures and procedures that will enable provinces which do not adopt their own constitutions or which omit such matters from their constitution, to function effectively. This will not affect the right of provinces to adopt their own executive structures and procedures at any time if they wish to do so, even if they are different from those provided for in the national Constitution. The fact that provincial legislatures are entitled to adopt constitutional provisions dealing with executive structures and procedures, naturally limits the scope for the Commission to make recommendations about such matters for incorporation in the national Constitution.

#### **2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS**

- 2.1 Section 160 of the interim Constitution confers on provincial legislatures the power to pass a constitution for their provinces which, in terms of subsection 3(a) may provide for legislative and executive structures and procedures different from those provided for in the Constitution. Apart from such differences, the provincial constitutions shall not be inconsistent with the provisions of the Constitution.

2.2 Constitutional Principle XVIII.2 in effect entrenches the right of provincial legislatures to adopt constitutions for their provinces and to provide for legislative and executive structures and procedures different from those provided for in the national Constitution.

2.3 While provisions in regard to executive structures and procedures in provincial constitutions may differ from those provided for in the national Constitution, they will nevertheless have to comply with the relevant Constitutional Principles (in whatever form those are included in the new Constitution) and other applicable constitutional provisions. The provisions relating to provincial executive structures and procedures in the new Constitution must, of course, also comply with the Principles. The relevant Constitutional Principles (CP) are -

vi, xvi, xix, xx, xxii

2.4 It should be noted that CP XXXII provides that the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of the interim Constitution, which provides inter alia for proportional representation in the government of national unity. No such extension to 1999 has been provided for in respect of provincial executives.

### 3. DISCUSSION

3.1 The views in this document are the collective views of members of the Commission, formulated with the assistance of a task group consisting of persons with various backgrounds and expertise.

3.2 The present constitutional provisions relating to provincial executive authority formed the basis for the Commission's deliberations. (See section 164(3)(a) of the interim Constitution.) Each section was considered to determine whether its subject matter should be included in the new Constitution in order to provide for efficient and effective executives in provinces which have not adopted their own constitutional provisions in this respect; whether the provisions are appropriate; what amendments should be recommended if the provisions are not appropriate; and which further provisions, if any, need be incorporated in the new Constitution.

3.3 The present constitutional text is attached and will be referred to in the discussion below.

#### 3.4 Provincial executives - Premiers

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

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

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

general election, a coalition executive is negotiated and the premiership is also decided through negotiation.

3.4.4 Although the parliamentary-style executive tends to weaken the concept of separation of powers between the legislature and the executive, it has distinct advantages in ensuring uniformity of purpose on the part of both structures and therefore also of the will to legislate for and execute the policies required to carry out that purpose. Provided that adequate checks and balances are in place and that accountability of the executive to the legislature is adequately provided for, particularly in combination with an effective parliamentary committee system, the parliamentary-style executive can be an effective instrument for good governance, and has proved itself so in many countries. In practice, absolute separation of powers is in any event hardly possible or desirable in the interest of effective government. However, to ensure compliance with the concept of separation of powers the Premier should be required to vacate his seat in the provincial legislature upon being elected. This would place provincial Premiers in a position similar to the President [section 77(4)1. The resultant vacancy could be filled by nomination of a member by the Premier's party. The Premier should remain accountable to the legislature. Provisions need to be included in the new Constitution to ensure that such accountability is effective in practice and that responsiveness and openness are ensured,

3.4.5 Although provinces may in terms of section 160 of the interim Constitution provide for different executive structures and procedures in their own constitutions, the Commission is of the opinion that the new Constitution should provide for parliamentary-style executives for the provinces which choose not to adopt their own constitutions. However, Premiers should be required to vacate their seats upon election, and in addition Provision should be made for effective committees of the legislature to ensure proper accountability, openness and responsiveness on the part of the executive.

### 3.5 Provisions relating to Premiers

3.5.1 The interim Constitution contains the following provisions relating to Premiers:

Section	144	Executive authority of provinces
	145 -	Election of Premiers

- 146 - Tenure of and removal from office of  
Premiers
- 147 - Responsibilities, powers and functions of  
Premiers
- 148 - Acting Premiers

3.5.2 In the Commission's opinion the matters dealt with in the abovementioned sections are necessary for the proper functioning of a provincial executive. However, provision should be made for the Premier to vacate his seat upon election as recommended in paragraph 3.4.4 above. No evidence has come to the Commission's attention to suggest that the other provisions are inadequate. The Commission consequently recommends that similar provisions, duly amended in the light of the preceding comments, be incorporated into the new Constitution.

### 3.6 Executive Councils - Number of members

3.6.1 Section 149(1) provides that the Executive Council of a province shall consist of the Premier and not more than 10 members appointed by the Premier in accordance with the section. The Commission has become aware that some provinces are of the opinion that the prescribed maximum number of members is inadequate to cope with the variety of functional areas and the work load. It has also been mooted that provision should be made for the appointment of deputies for members of the Executive Council. The Commission is not convinced that there is a need to provide for a general increase in the maximum number of members or for the appointment of deputies in the new Constitution. Such needs, if they exist, may differ from province to province. It is to be expected that the burden on members of executive councils will be particularly onerous during the transitional period, but it should become less so as provinces proceed to function in more normal circumstances.

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

unless sufficient members are left in the legislature to compose the committees which should broadly oversee the activities of the various executive departments.

- 3.6.3 The Commission is of the opinion that the maximum number of members of an executive council as stipulated In the interim Constitution should be retained in the new Constitution's guidelines. The responsibility and accountability for the appointment of a larger executive should vest in provincial governments and not be shifted to the national government, and should therefore be provided for in provincial constitutions if necessary. Such constitutional provisions will need to comply with the Constitutional Principles and remain within limits stipulated in the national constitution.

### 3.7 Composition

- 3.7.1 Section 149(2) provides for the allocation of Executive Council portfolios on a proportional basis to political parties represented in the provincial legislature. As noted above, this provisions is not entrenched until 1999 as in the case of the composition of the national Cabinet. However, the retention or scrapping of provisions providing for proportional allocation of membership of executive councils in the new Constitution should be considered and finalised in respect of both levels of government.
- 3.7.2 Documentation before the Constitutional Assembly indicates that there is some support for the retention in general of the provisions relating to the proportional allocations provided for in section 149(2). The Commission believes that this method for allocating membership in provincial executives serves a useful purpose in ensuring a measure of public/minority trust in the new provincial government system for the interim period. No evidence has come to the Commission's attention that the proportional representation of parties in provincial executives as such is in any way impeding effective government. Indeed, the collective experience of members of executives gained in diverse former structures, could be beneficial during the process of establishing new provincial government systems. However, the Commission is of the opinion that the proportional method of composing provincial executives should not be imposed by the new Constitution as a permanent feature of provincial government. Compulsory provisions for including minority parties in government are unlikely to be politically acceptable in the longer term, and it can be foreseen that constitutional amendments would be called for.

- 3.7.3 A provincial government which has the support of the majority of the electorate and is accountable to it for executing the policies on which it contested the election, should be permitted to compose its executive authority in a manner which will best allow it to carry out its mandate effectively. If a coalition of parties is required to achieve this purpose or if the majority party for any purpose wishes to include members of other parties in the executive, this should be done on a voluntary basis or as a result of negotiations between parties, as the case may be.
- 3.7.4 The Commission therefore recommends that the new constitution should not include provisions that will impose the proportional allocation of membership of provincial executive councils as contained in the interim Constitution. However, to ensure the uniform treatment of present members of executives at national and provincial levels, and to continue the interim benefits mentioned above for the unexpired part of the transitional period, the Commission recommends that the provision of CP XXXII be applied also to provincial executives until 30 April 1999.
- 3.7.5 Section 149(4)(b) requires a Premier to appoint only members of the provincial legislature as members of the Executive Council. This effectively prevents the appointment of persons with expertise which may be required in the Council if such persons are not members of the legislature. Provision has been made for such appointments to the executive at national level and similar provisions should be included in the new Constitution in respect of Provincial executive councils, including the right of such appointees to speak. but not to vote in the legislature.

In order to satisfy the concept of separation of powers. it may indeed be necessary to provide for the appointment of all members of the Executive from outside the legislature or to require members of the legislature to vacate their seats if appointed to the Executive, This would have the additional benefit of freeing members of the Executive from legislative duties, avoiding an increase in their numbers as discussed under paragraph 3.6 above and leaving a sufficient number of members of the legislature to serve in the structures required for effective checks and balances and for proper reporting to their constituents. If members of the legislature are to represent their province in a second chamber as recommended in Document 4, the benefit would be even greater.

3.7.6 The above recommendations raise the question whether an executive which does not contain representation of minority parties would comply with the Constitutional Principles which require, inter alia, representative government embracing multi-party democracy and proportional representation. The question may acquire a particular significance when the concept of separation of powers applies. CP XIV provides for participation of minority political parties in the legislative process in a manner consistent with democracy, but is silent on their participation in the executive process. Indeed, CP XXXII suggests that proportional representation in the various executive structures need not continue beyond 30 April 1999. It could, however, enhance transparency, national unity and perhaps also the concept of multi-party democracy if minority parties were also included in some way as role-players in executive structures. The Commission has not received submissions suggesting any new mechanisms for participation by minority parties in the provincial executives, nor have all possible mechanisms been investigated as yet. One possibility which presents itself, is to make provision for executive (cabinet) committees in which political parties are represented on a proportional basis, to preconsider all matters referred to the executive and to make recommendations thereon to the executive. Through such a mechanism, the views of minority parties could be made known to the executive and might influence its decisions, without impinging on the prerogative of the executive to make such decisions and be held accountable for them.

3.7.7 The above recommendations will materially affect the provisions of subsections (4) to (6) and they will have to be reformulated completely. The Commission will submit new draft text in due course.

3.7.8 Subsections (7) to (10) provide for the oath, certain ethical provisions and remuneration and pension benefits for members of executive councils which should materially be incorporated into the new Constitution.

### 3.8 Procedural and other matters

3.8.1 The interim Constitution contains the following provisions -



151 - Temporary assignment of powers and functions to Executive Council members

152 - Transfer of powers and functions from one member to another member

153- Accountability of members

154- votes of no confidence

3.8.2 Section 153(4) requires a Premier to consult with the leader of a participating party before removing a member of that party from Executive Council office. This provision should be omitted from the new Constitution if the recommendation in paragraph 3.7.4 above is adopted. Provisions similar to the rest of sections 150 to 154 should be incorporated into the new Constitution.