

**CONSTITUTIONAL  
ASSEMBLY**

**CONSTITUTIONAL  
COMMITTEE**

**FRIDAY  
4 AUGUST 1995  
09h00  
OLD ASSEMBLY  
CHAMBER**

***DOCUMENTATION  
PART 3***

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**\* NOTE:**

*For your convenience this pack contains:*

- 1. An explanatory memorandum from the Constitutional Committee dealing with the Public Protector;*
- 2. The sixth draft formulation of 21 July 1995 (which also appears in Part 2 of your documentation); and*
- 3. The Report on the Public Protector, originally tabled at the Constitutional Committee meeting on 26 May 1995.*

# MEMORANDUM

**TO :** Constitutional Committee  
**FROM :** Secretariat  
**DATE :** 13 July 1995  
**SUBJECT :** MATTERS REGARDING THE PUBLIC PROTECTOR DRAFT FORMULATIONS

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The following are some of the matters that have arisen out of the discussion on the Public Protector draft formulations in both the CC and subsequent subcommittee meetings.

**1. The name of the institution:**

*There was consensus that the name of the institution be referred to as Public Protector.*

**2. The matter of immunities and privileges:**

s1(3) " Organs of the state shall through legislative and other measures accord the Public Protector the necessary assistance and protection to ensure his or her independence, dignity and effectiveness "

2.1 Originally there was debate as to whether there was a necessity to include the matter of according the Public Protector immunities and privileges to ensure his/her independence, dignity and effectiveness.

*This matter was resolved through the inclusion of the words " assistance and protection ".*

**3. Powers and Functions**

s2(1) ....

3.1 There is no agreement as to the extent of detail that is necessary for the draft formulation on powers and functions, two views have emerged:

3.1.1 The ANC favours the general minimalist approach

3.1.2 The NP prefers the more detailed maximalist approach

3.2 At the discussion of the CC it appeared that consensus had emerged with regard to the more minimalist option. However certain additions needed to be incorporated in order to ensure that the said option accommodate the concerns of all parties.

*The Law Advisors were instructed to present a draft formulation on powers and functions that takes in to account the spirit of the discussion in the meeting of both the CC and the subsequent subcommittee meeting. This matter needs to be resolved.*

#### 4. Appointment Procedure:

s3(2) " Parliament shall only recommend a person for appointment as the Public Protector -

- a) who has been nominated by a committee of Parliament ...; and
- b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least ... per cent of the members present and voting at a meeting.

4.1 Two views were expressed with regard to the composition of the committee and the extent of the majority needed for Parliament to recommend a person for appointment as Public Protector:

4.1.1 The NP argued that the committee nominating the person needed to be composed of one person per party and that the person nominated needed to be approved by a resolution adopted by a majority of 75 %.

4.1.2 The ANC maintained that the appointment of the Public Protector would have to be approved by a resolution adopted by a two thirds majority as this is in accordance with international practice. The ANC would support a committee where parties would be represented proportionally.

*This matter needs to be resolved.*

#### 5. Qualifications:

s3(3) " The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with any other requirements

prescribed by law "

5.1 There is disagreement as to the type of qualifications and extent of detail to be prescribed for the Public Protector. Three views were expressed with regard to the matter of qualifications:

5.1.1 The National Party prefers the formulation as contained in s110(4)(a), (b) and (c) of the Interim Constitution.

5.1.2 The Freedom Front argues for the inclusion of legal qualifications.

5.1.3 The ANC argues that the matter of qualifications does not need to be constitutionalised.

*The matter has not yet been discussed by the subcommittee and needs to be resolved.*

6. Dismissal:

s3(5) " The President may remove the Public Protector from office only on the grounds of misbehaviour, incapacity or incompetence upon a finding to that effect by a committee of Parliament and the adoption by Parliament of a resolution calling for his or her removal from office "

6.1 There is a lack of clarity on the grounds for dismissal as well as the nature of the dismissal process.

6.1.1 Most parties agree that the Public Protector should be dismissed on the grounds of misbehaviour, incapacity and incompetence. The IFP suggests stronger grounds for dismissal such as mental incapacity, gross misconduct and impeachable conduct.

6.1.2 With regards to the nature of the dismissal process the ANC feels that it should follow the same course as the appointment process.

*The above matters were not yet discussed by the subcommittee and needs to be resolved.*

7. Tenure

s3(4) " The Public Protector shall be appointed for a period of seven years "

**7.1** There is no agreement on the matter of tenure, two views emerged:

**7.1.1** The NP maintained that they were not in favour of the term of office of the Public Protector being renewed.

**7.1.2** The ANC argued that there should be a provision for the term of office to be renewed for one term only.

***The above matter has not yet been discussed by the subcommittee and needs to be resolved.***

**8. Provincial Public Protectors and/or Deputy Public Protectors's**

**s4** " There shall be two Deputy Public Protectors ... apply to a Deputy Public Protector" and

**s5** " There shall be a Provincial Public Protector ... with the concurrence of the Public Protector "

**8.1** The ANC maintained that they would support a similar formulation as contained in the draft formulation on the Provincial Public Service Commission's as contained in the Public Administration draft. They would support a single national office of the Public Protector which would consist of provincial or alternatively deputy Public Protector's. These would be appointed in consultation with the provincial legislature.

With regard to the matter of jurisdiction, the ANC argued that the national Public Protector could delegate powers to the province as to ensure that there would be no overlapping in terms jurisdiction as well as to establish uniform rules and procedures that would guide the work of the Public Protector's.

**8.2** The National Party maintained that they supported the following:

**8.2.1** Provision for the establishment of deputy Public Protector's as contained in the Interim Constitution.

**8.2.2** The importance of Provincial Legislatures in the appointment of the Provincial Public Protector's. However they would also support that the National and Provincial Public Protector's should work in co-operation with one another.

**8.2.3** They were concerned that the present ANC proposal with regard to the appointment of the Provincial Public Protector's would be in contravention of Constitutional Principle 18.2.

***The Law Advisors were instructed to draft formulations on both Provincial Public Protectors as well as Deputy Public Protectors. This issue needs to be resolved.***

## SIXTH DRAFT - 21 JULY 1995

**Status:** Prepared by CA law advisers as per instruction of the CC ad hoc subcommittee on the Public Protector.

### PUBLIC PROTECTOR

#### Establishment

1. (1) There shall be a Public Protector for the Republic.
- (2) The Public Protector shall be independent, impartial and subject only to the Constitution and the law. The Public Protector shall discharge his or her powers and functions without fear, favour or prejudice.
- (3) Organs of state shall through legislative and other measures accord the Public Protector the necessary assistance and protection to ensure his or her independence, dignity and effectiveness<sup>1</sup>.
- (4) No person and no organ of state shall interfere with the Public Protector in the discharge of his or her powers and functions.<sup>2</sup>
- (5) The Public Protector shall be accessible to all persons and communities.

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<sup>1</sup> As agreed to by the CC ad hoc subcommittee on the Public Protector.

<sup>2</sup> Subsection (4) redrafted as per discussion in the CC.



## Powers and functions

### 2. (1)<sup>3</sup> ...

<sup>3</sup> There is disagreement as to the amount of detail that is required for a provision in the new Constitution on powers and functions of the Public Protector. In this regard, we provide the following three options for consideration:

**Option 1:**

3.(1) The Public Protector shall have power as regulated by law to investigate and report on any alleged or suspected impropriety in the affairs of the State at all levels of government and to take such remedial action as is appropriate in the circumstances.

**Option 2:**

3.(1) The Public Protector shall have power as regulated by law to investigate and report on any conduct in the affairs of the State or the public administration at any level of government [or by a body or person performing a public function] which is alleged or suspected to be improper or to result in improper prejudice, and to take such remedial action as is appropriate in the circumstances. In addition, the Public Protector shall have such other powers and functions as may be prescribed by law.

**Option 3:**

3.(1) The powers and functions of the Public Protector shall be as prescribed by law. The powers and functions so prescribed shall empower the Public Protector at least -

- (a) to investigate, on receipt of a complaint or on his or her own initiative, and to report on, any alleged -
  - (i) maladministration, corruption or impropriety in the public administration at any level of government;
  - (ii) unfair, inconsistent or discourteous conduct or undue delay by a person performing a public function;
  - (iii) act or omission by a person performing a public function which results in unlawful or improper prejudice to any other person; or
  - (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function;
  
- (b) to decide in his or her discretion to resolve any dispute or redress any act of omission, by -
  - (i) mediation, conciliation or negotiation;
  - (ii) referring the matter, with or without recommendation, to an appropriate authority, body or person to deal with it;
  - (iii) giving advice on an appropriate course of action or remedy;
  - (iv) any other means that may be expedient in the circumstances; or
  
- (c) to report on systemic problems in the public administration at any level of government uncovered by him or her in the course of any investigation.

(2) The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.

(3) Reports issued by the Public Protector in connection with the discharge of his or her powers and functions shall in principle be open to the public.

(4) The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities at least once a year.

#### **Appointment, qualifications, tenure and dismissal**

3. — (1) The President shall appoint a person recommended by Parliament as the Public Protector.

(2) Parliament shall only recommend a person for appointment as the Public Protector -

- (a) who has been nominated by a committee of Parliament<sup>4</sup> ...;  
and
- (b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least ...<sup>5</sup> per cent of the members present and voting at a meeting.

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<sup>4</sup> The composition of such committee is an outstanding matter which still needs to be decided. The two options are a committee where the parties are represented proportionally and a committee composed of one member per party.

<sup>5</sup> The question of the percentage majority required is still to be decided. The options are a two-thirds or 75% majority.

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(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with any other requirements prescribed by law.<sup>6</sup>

(4) The Public Protector shall be appointed for a period of seven years.

(5) The President may remove the Public Protector from office only on the grounds of misbehaviour, incapacity or incompetence upon a finding to that effect by a committee of Parliament and the adoption by Parliament of a resolution calling for his or her removal from office.

(6) The President may suspend the Public Protector from office when his or her removal from office is under consideration.<sup>7</sup>

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<sup>6</sup> Concern was expressed in the CC that the words "fit and proper" are too vague and uncertain and that the qualifications of the PP should rather be defined in clearer terms. We suggest the following formulation as a basis for further discussion:

- "(3) The Public Protector shall be a South African citizen who -
- (a) has extensive experience in the administration of justice or public administration;
  - (b) is known to be an unbiased, objective and politically inactive person; and
  - (c) is in all other respects a fit and proper person to hold office as the Public Protector."

<sup>7</sup> This subsection has been redrafted to simplify the language.

**Provincial public protectors/Deputy Public Protectors<sup>8</sup>**

4. ....

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<sup>8</sup> The CC ad hoc subcommittee on the Public Protector requested the CA Law advisers to suggest draft formulations on deputy public protectors and provincial public protectors. We provide the following purely as a basis for discussion and further development:

**"Deputy Public Protectors**

The Public Protector shall/may appoint two deputy public protectors to assist him or her in the discharge of his or her powers and functions."

**"Provincial public protectors**

A province shall be entitled to appoint a provincial public protector. A provincial public protector may with regard to the affairs of his or her province and in consultation with the Public Protector exercise and perform such of the powers and functions of the Public Protector as prescribed by a national law."

**B. SCHEMATIC SUMMARY OF SUBMISSIONS AS AT 23 MAY 1995**

No	CP	Issue	Consensus	Contention	Remarks
1.	XXIX	A. Establishment and Constitutionalisation of Public Protector's(PP) office	<p>1. PP should be constitutionalised. Constitutional clause on PP should set out fundamental principles and detail must be left to legislation.</p> <p>2. Selection and Dismissal of PP should be by Parliamentary process.</p>	<p>1. Extent of detail on the constitutional provision on PP. Two views:            1.1 Detail should be minimum to allow for innovativeness, flexibility and adaptability; and            1.2 Need for specific detail to prevent overlap with other structures of govt, eg, HRC.</p> <p>2. <u>Selection and Dismissal.</u>            2.1 Precise manner of selection of PP.            Two views:            2.1.1 Selection of PP should be through Parliament.            2.1.2 Judicial Service Commission must recommend candidates to Parliament.</p> <p>2.2 <u>Grounds of Review.</u>            Two views:            2.2.1 Misbehaviour, incapacity and incompetence; and</p>	<p>1. It has been suggested, for CC's consideration, that the constitutional provision on PP should cover essential features, such as, the creation of the office, independence and impartiality, powers and functions and accountability.</p> <p>2. How should the PP be selected and dismissed?</p>

No	CP	Issue	Consensus	Contention	Remarks
2.	XXIX	A. Establishment and Constitutionalisation of PP's office.	<p>3. PP's tenure of office should be fixed at 7 years.</p> <p>4. PP should be accountable to, and report annually, to parliament.</p> <p>5. PP's office needs to be accessible.</p>	<p>2.2.2 Stronger grounds, such as, mental incapacity, gross misconduct and impeachable conduct.</p> <p>3. Nature of tenure of PP's office Three views: 3.1 Fixed term (7yr) and renewable; 3.2 Fixed term (7yr) and not renewable; and 3.3 Appointment until retirement.</p>	<p>3. Should PP's term of office be fixed or until retirement? If fixed, should it be renewable?</p>

No	CP	Issue	Consensus	Contention	Remarks
3.	XXIX	B. Independence and impartiality.	<p>1. Need for independence and impartiality of PP's office; and</p> <p>2. PP's findings need to be made public.</p>		<p>1. Further suggestions, for CC's consideration, for purposes of ensuring the independence and impartiality of PP:</p> <p>1.1 Assignment of privileges and immunities;</p> <p>1.2 Non interference by the state in work of PP;</p> <p>1.3 Reasonable assistance by the state to ensure effectiveness of PP's office; and</p> <p>1.4 Indemnification of PP for work done in good faith.</p>

No	CP	Issue	Consensus	Contention	Remarks
4.		C. Powers and Functions	<p>1. PP should have the following powers:</p> <p>1.1 Investigation of maladministration, corruption and impropriety;</p> <p>1.2 Investigation of systemic problems in administration;</p> <p>1.3 Power to refer; and</p> <p>1.4 Make recommendations.</p> <p>1.5 Conduct investigation on receipt of complaints and on own initiative.</p> <p>2. PP should receive and act on group complaints.</p>		<p>1. Additional suggestions, for consideration by the CC, on powers to be conferred to PP by way of a constitution:</p> <p>1.1 Extent of powers of investigation and nature of entrenchment of these in constitution;</p> <p>* Suggested approach: Define PP's power of investigation in general terms, eg, "the PP shall be given the powers necessary for the effective performance of his/her functions."</p> <p>1.2 Power to litigate;</p> <p>1.3 Wider power of referral, eg, referral to the HRC;</p> <p>1.4 Power to direct disciplinary hearings where there is refusal to discipline persons found guilty of maladministration.</p> <p>1.5 Power to request publication of reasons by an institution for declining to follow PP's recommendation. Power to review laws for constitutionality and make recommendations for legislative reform.</p>



No	CP	Issue	Consensus	Contention	Remarks
5.		C. Powers and functions			<p><b>2. Suggestions regarding wider powers for PP which can be considered for legislation:</b></p> <p><b>2.1 Power to suspend prescription and statutory notice periods;</b></p> <p><b>2.2 Power to protect complainants against victimisation;</b></p> <p><b>2.3 Referral of complaints by third parties.</b></p>

No	CP	Issue	Consensus	Contention	Remarks
6.		D. Jurisdiction	1. PP should have jurisdiction with regard to government, the Public Sector which would include the administrative functions of the department of justice. The judicial function of the courts should not be subject to the PP.		<p><b>1. Suggestions, for CC's consideration, on jurisdiction of the PP:</b></p> <p>1.1 On PP's jurisdiction in the courts the following suggestions were made;</p> <p>1.1.1 If the power of review and appeal has failed then provision should be made for the PP to draw the attention of the Chief Justice or Judge Presidents.</p> <p>1.1.2 The PP should be able to intervene where there are delayed judgements.</p> <p>1.2 On extension of PP's jurisdiction to the private sector two views were expressed :</p> <p>1.2.1 Important to extend the jurisdiction of the PP to private institutions performing a public function, eg, banks and the insurance industry.</p> <p>1.2.2 Not necessary to extend PP's jurisdiction to private sector as there are sufficient mechanisms in the private</p>

No	CP	Issue	Consensus	Contention	Remarks
7.		Jurisdiction			<p>1.3 Regarding the relationship between traditional authorities and the PP there was general agreement that these authorities should be subject to the jurisdiction of the PP in their administrative functions. However the following suggestions were made with regard to this relationship namely:</p> <p>1.3.1 The House of Traditional Leaders would need to be part of the selection process.</p> <p>1.3.2 The PP should work in co-operation with chiefs and traditional leaders where possible.</p>

No	CP	Issue	Consensus	Contention	Remarks
8.		E. Name		<p><b>1. Three views emerged on the appropriate name for the institution:</b></p> <p>1.1 Support for the name Public Protector;</p> <p>1.2 Support for the name Ombudsman; and</p> <p>1.3 Support for names such as Ombud or Ombudsperson.</p>	<p>1. What should be the appropriate name for the institution?</p>
9.		F. Qualifications		<p><b>1. Two views on the nature of the PP's qualifications:</b></p> <p>1.1 Necessity for legal qualifications;</p> <p>1.2 Qualifications, other than legal, are adequate.</p> <p><b>2. Views on inclusion or otherwise of qualifications in the constitution:</b></p> <p>2.1 Qualifications of PP should not be included in the constitution.</p> <p>2.2 Legal qualifications should be entrenched in the final text.</p>	<p>1. Should PP's qualifications be constitutionalised? If so, what should be the nature of these qualifications?</p>

No	CP	Issue	Consensus	Contention	Remarks
10		G. National and Regional PP's	1. Need for National and Provincial PP's.	<p>1. Relationship between, and the powers of, National and Provincial PP's. The disagreements are:</p> <p>1.1 National and Provincial PP's must have separate spheres of influence and jurisdiction.</p> <p>1.2 National PP may operate at all levels of government. Provincial PP's should be established by legislation and their function should not derogate from the powers of the National PP.</p> <p>1.3 There is a need to delineate areas of exclusive and concurrent responsibilities of the various offices.</p> <p>1.4 Stakeholders made additional suggestions with regard to this relationship:</p> <p>1.4.1 One national office with provincial branches due to concern with regard to national standards, costs and efficacy.</p>	1. What should be the relationship between, and the powers of, National and Provincial Public Protectors?

No	CP	Issue	Consensus	Contention	Remarks
11		;		<p>1.4.2 Separate offices along provincial and national lines with structures of co-operation.</p> <p>1.4.3 The relationship between national and provincial PP's should not be defined and should be allowed to evolve over time.</p>	
12		H. Nature of Office	1. No specialised PP's for areas such as Defence and Police.		

**THEME COMMITTEE 6.3  
SPECIALISED STRUCTURES OF GOVERNMENT  
REPORT ON THE PUBLIC PROTECTOR**

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***PART I - INTRODUCTION***

**1 Submissions received**

This report is drawn up on the basis of submissions received from the following political parties, organisations of civil society, individuals and an information seminar:

**1.1 Political Parties:**

1.1.1 ACDP

1.1.2 ANC

1.1.3 DP

1.1.4 FF

1.1.5 IFP

1.1.6 NP

No submission was received from the PAC.

**1.2 Organisations of Civil Society:**

1.2.1 Association of Law Societies (ALS)

1.2.2 Black Lawyers Association (BLA)

1.2.3 Centre for Applied Legal Studies (CALS)

1.2.4 Community Law Centre, University of the Western Cape (CLC)

1.2.5 General Council of the Bar (GCB)

1.2.6 Human Rights Committee (HRC)

1.2.7 Lawyers for Human Rights (LHR)

1.2.8 Legal Resources Centre (LRC)

1.2.9 National Land Committee (NLC)

Public hearings were also held in respect of these submissions.

**1.3 Individuals**

**1.3.1 Professor G M Barrie, Faculty of Law, Rand Afrikaans University**

**1.3.2 Professor Swart, The Netherlands**

**1.4 Information seminar**

An information seminar was given by the current ombudsman, Judge van der Walt. He also provided verbal submissions to the technical advisors.

Three interim reports were prepared by the technical advisors:

**1.5 Comments on the Public Protector - Alternative models and relationship with the Courts**

**1.6 First Summary of Party Positions**

**1.7 Summary of Public Hearings/Group Submissions**

No information was forthcoming from any meeting held under a public participation programme.

**2 Terminology**

Although there is disagreement as to the future name of the Public Protector, we have used the term Public Protector throughout this report as this is the term used under the interim constitution.



### 3 Constitutional Principles

The Constitutional Principle applicable to this agenda item is Principle XXIX:

The independence and impartiality of a Public Service Commission, a Reserve Bank, and Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

## ***PART II - DISCUSSION OF MATERIAL PROCESSED BY THE COMMITTEE***

### 4 General overview

The Theme Committee discussed the office of the Public Protector in some detail during its deliberations. An information seminar given by the incumbent Ombudsman, Judge van der Walt, together with inputs from the technical advisors and political party submissions, gave rise to a list of questions that were sent to organisations in civil society. These concerned the following issues:

- 4.1 To what extent should the office of the Public Protector be included in the final constitutional text?
- 4.2 What should be the title of the office?
- 4.3 What qualifications should the Public Protector have?
- 4.4 What should be the tenure of his or her office?
- 4.5 Should the Public Protector be complaints-drive or initiative-driven, or both?

- 4.6 Should the Public Protector have jurisdiction over the private sector?
- 4.7 Should the Public Protector have jurisdiction over the courts?
- 4.8 What should be the relationship between the national and provincial Public Protectors?
- 4.9 What should be the relationship with other constitutional structures?

Written submissions were made by the organisations on these points, followed by public hearings.

While there was a considerable amount of agreement on broad issues, the main issues of debate related to

- 4.10 name of the Public Protector;
- 4.11 the appointment and dismissal of the Public Protector;
- 4.12 the tenure of the Public Protector;
- 4.13 the qualifications of the Public Protector;
- 4.14 whether the Public Protector should have additional powers, over and above those already present in the interim constitution;
- 4.15 the ambit of jurisdiction of the Public Protector, whether this should include the private sphere, the courts and traditional leaders;
- 4.16 the relationship between national and provincial Public Protectors; and
- 4.17 the need for additional Public Protectors.

These points are dealt with in detail below. Some of the disagreement may refer to matters which do not need to be included in the constitution, but are better left to legislation. Further clarity is required from political parties on

the manner in which, and the extent to which, the office and powers of the Public Protector should be constitutionalised.

## 5 ***Areas of agreement:***

### 5.1 **The office of the Public Protector in the final constitution**

5.1.1 Constitutional Principle XXIX requires the final constitution to provide for the office of a Public Protector. There was unanimous support amongst all parties and stakeholders for this.

5.1.2 The constitution need only deal with broad issues relating to the Public Protector. Many of the details of the office of the Public Protector should be left to legislation. However, there was disagreement and a lack of clarity as to where to draw the line between constitutional entrenchment and legislation (see 6.1 below).

### 5.2 **Independence and impartiality:**

5.2.1 All parties and submissions agree on the need for independence and impartiality as set out in Constitutional Principle XXIX.

5.2.2 All parties and submissions agree that the Public Protector should be accountable to, and report annually to, parliament.

5.2.3 Appointment and dismissal

The Public Protector should be selected and dismissed by parliamentary process, with formal appointment by the President. (however see the position of the IFP set out in 6.3.2 in respect of the JSC).

**5.2.4 Tenure:**

5.2.4.1 All parties and a majority of stakeholders agreed on a fixed term of office for the Public Protector. This was felt to be important to gain the trust of citizens and ensure that the office was not vulnerable to the whim of politicians (ACDP, ANC, DP, IFP, NP, FF. Also BLA, GCB, NLC, LRC, HRC).

5.2.4.2 All parties agreed on a seven year term of office (but see 6.3.3 below).

**5.2.5 Public findings and openness**

There is agreement on the fact that the findings of the Public Protector should be public, although many parties were silent on the issue. The FF was the only party to mention this in submissions. Agreement on the need for openness was expressed in the deliberations of the sub-theme committee. The NP states that the interim constitution and Public Protector Bill (B16D-94) should be the guideline.

### 5.3 Powers and Functions

#### 5.3.1 Powers set out in the interim constitution:

There seems to be general agreement among all submissions that the Public Protector should have the type of powers contained in section 112 of the interim constitution. The concern is that the government and public administration should be clean, incorruptible and responsive to the Public it serves. In other words, all agree that the office should be able to

5.3.1.1 investigate maladministration, corruption and impropriety in government and public administration;

5.3.1.2 refer any matter to the appropriate authority, person or institution.

5.3.1.3 make recommendations to the appropriate authority, person or institution.

(see further 6.5 below).

#### 5.3.2 "On receipt of a complaint and on his or her own initiative":

There was general agreement that the Public Protector should act on the receipt of complaints and on his or her own initiative. The latter point was stressed by organisations of civil society who said that the fact that people were not used to being able to lay a complaint or felt extremely vulnerable in

doing so, meant that investigation "of own initiative" would be an important part of the Public Protector's function (LRC, NLC, CLC). The CLC provided the example of Tanzania where the Public Protector had travelled the country to establish what the problems of the public were.

### 5.3.3 Group complaints

There was agreement that the Public Protector should be able to receive complaints from a group, although the ANC and IFP were the only parties to make reference to this in their submissions. Agreement was reached in the deliberations of the sub-theme committee. The National Land Committee stressed that this was important in rural areas as the problems in rural communities were often problems of the group rather than the individual.

## 5.4 Jurisdiction

There was general agreement that the Public Protector should act as a watchdog on government and the public sector, including the administrative functions of the department of justice. It was also agreed that the judicial function of the courts (the individual decisions produced by the courts) should not be subject to the Public Protector (all parties and submissions) as it would interfere with the independence of the courts. Section 112(2) of the interim constitution

was generally approved.

#### 5.5 Accessibility:

There seemed to be implicit agreement that the Public Protector should be accessible. (DP, IFP, GCB, NLC, Van der Walt, Barrie).

### 6 *Areas of Disagreement and need for further clarity:*

#### 6.1 The Office of the Public Protector in the final constitution

There was both disagreement and/or a need for further clarity about the extent to which the office, powers and functions etc. of the Public Protector should be included in the constitutional text and which details should be left to legislation. This needs to be considered by the Constitutional Committee.

Political parties did not give clear guidance on this issue. The implicit division is that some parties support the view that less detail should be included in the final constitution than is found in the interim constitution (ANC) and others believe that the amount of detail in the interim constitution is necessary (IFP, NP). The NP states that the final constitutional text should not contain less than appears in the interim constitution. The DP was of the opinion that the roles and functions of the Public Protector need to be clearly defined to prevent overlap between the various constitutional structures and institutions,

including the Human Rights Commission and the Commission for Gender Equality. Further clarification is needed on these issues.

Stakeholders, questioned on this issue, generally agreed that only the broad principles and clearly indispensable features of the office of the Public Protector should be included in the constitution (CALS, HRC, LRC & GCB). These included:

- 6.1.1 the creation of the office;
- 6.1.2 the independence/impartiality of the office;
- 6.1.3 its accountability to the legislature (including manner of appointment and dismissal); and
- 6.1.4 its powers in broad outline, namely, those which were essential to its independence and effectiveness and which should not be able to be removed by ordinary parliamentary majorities.

Additional issues which some stakeholders felt should be included were:

- 6.1.5 Qualifications (Van der Walt, CLC).
- 6.1.6 Definition of the Public Protector to be derived from that of the International Bar Association (GCB):

"An office provided for by the Constitution or by action of the legislature or parliament and headed by an independent, high level public official who is responsible to the legislature or parliament, who receives complaints



from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports".

The CALS submission warned that if the powers of the Public Protector and its relationship with other institutions of government were too rigidly regulated in the constitution, it may prevent easy amendment and hence restrain subsequent developments of the office.

## 6.2 The name:

There is disagreement over the name of the Public Protector, with the majority supporting "Public Protector" and a minority preferring "ombudsman".

6.2.1 Support for "Public Protector": ACDP, ANC, IFP, NLC, CALS, HRC. ALS stated that this was a second choice.

6.2.2 No preference shown: DP, LRC.

6.2.3 The NP believes that "the debate on the name should be reopened".

6.2.4 Support for "Ombudsman": FF, GCB, Barrie, Van der Walt. ALS stated that this was a first choice.

6.2.5 Additional names: "Ombudsperson" - BLA; "Ombud" - LHR.

Those who support "Public Protector" cite the following reasons:

- \* The sexist connotations of "ombudsman" in the context of a commitment to gender equality. These exist regardless of the Swedish meaning of the term.
- \* The term "ombudsman" is a foreign term with little meaning to the general public so that there is no need to maintain a known term and concept.
- \* The fact that the Public Protector will exist in terms of the interim constitution and a later change of name will be confusing.
- \* The Public Protector will "protect" the public against maladministration and corruption by the government, especially in the context of the past. It conveys the view that the office will look after the interests of the public. The public will come to understand and accept the inherent limitations of the office.

Those who support "ombudsman" cite the following reasons:

- \* "Ombudsman" is not sexist as its Swedish translation means "officer" or "commissioner".
- \* It is an internationally recognised term
- \* "Public Protector" is misleading as it suggests that the office will "protect" the public, whereas the function is essentially one of impartial mediator.
- \* "Public Protector" is easily confused with "Public Defender".

- \* Translations can be confusing. Ombudsman need not be translated.

### 6.3 Independence:

6.3.1 Party submission contained further suggestions on independence that would need to be debated by all parties:

- \* The NP endorses the interim constitution re. privileges and immunities, non-interference and assistance by the state.
- \* The FF suggests that an indemnity be included for work done in good faith.

### 6.3.2 Appointment and dismissal

There is disagreement and a lack of clarity on the precise manner of selection.

6.3.2.1 The majority supports the procedure laid down in the interim constitution (ANC, DP and NP. ACDP & FF silent on the issue).

6.3.2.2 The IFP suggests that the Judicial Services Commission (JSC) should play a role in the selection and dismissal process by compiling a short list of candidates for Parliament. The JSC would also conduct the initial investigation into grounds for dismissal and report findings to

parliament and the President. Actual removal would be by the President acting on the recommendation of the JSC. The different roles of Parliament and the JSC are not always clear.

In addition, the National Land Committee emphasised that the procedure for selection should be transparent and IFP stressed that where Provincial Public Protectors have jurisdiction over Traditional Leaders, there should be mechanisms to ensure that traditional leaders have confidence in the person selected (see below under Traditional leaders - 6.6.3).

There was also disagreement and a lack of clarity on the grounds for dismissal, although some parties were silent on the issue.

- 6.3.2.3 The ANC and NP supported the grounds currently found in the interim constitution, namely misbehaviour, incapacity or incompetence.
- 6.3.2.4 The IFP supported stronger grounds of mental incapacity or gross misconduct.
- 6.3.2.5 The LRC called for dismissal on grounds of impeachable conduct.

### 6.3.3 Tenure

There was some disagreement on the nature of tenure of the Public Protector.

6.3.3.1 Among the stakeholders who supported a fixed term tenure (BLA, GCB, NLC, LRC, HRC), the majority appear to support a term of seven years. Barrie suggested five years.

6.3.3.2 There is disagreement or a lack of clarity on whether the term should be renewable:

6.3.3.2.1 The majority felt that the term should not be renewable: Reappointment will encourage actions aimed at ensuring such reappointment and compromise independence. ACDP, IFP, GCB (but see 6.3.3.2), LRC, BLA, HRC.

6.3.3.2.2 Some thought that the term should be renewable (ALS, LHR, Barrie). The DP supported a renewable term, with the unanimous concurrence of parliament, in the interests of continuity.

6.3.3.2.3 The ANC and FF were silent of this issue.

6.3.3.3 Some stakeholders called for the option of

appointment for a longer term until retirement. The GCB also felt that the appointment until retirement age was an option that should be considered. The ALS felt strongly about the issue, concerned that good candidates would not stand for office as a seven year term would effectively damage their careers and leave them unable to find a new job/go back to practice after their tenure expired. Hence the seven year term should be renewable until retirement or the tenure should extend until retirement.

#### 6.3.4 Budget

6.3.4.1 The IFP suggests that the Public Protector draft and propose to parliament its own budget. The ANC requires that the Public Protector be given sufficient funds to carry out its functions. The importance of an independent budget was also mentioned by the LRC which suggested that the Financial and Fiscal Commission be empowered to address the equitable allocation of resources to the Public Protector.

## 6.4 Qualifications

**Is this a constitutional issue?** It is unclear whether the qualifications should be included in the constitution. The ANC seems to support the view that they should not be; the NP believes that they should be (also Van der Walt). CALS suggested that qualifications should not be included as experience with the office may change the way in which the legislature perceives the required qualifications.

**What is the debate?** There were two views on the type of qualifications necessary for the position of Public Protector: Those who believed that legal qualifications were necessary and those who felt that alternative qualifications could be sufficient.

6.4.1 Legal qualification only: Some of the submissions stated that legal qualifications were necessary to the nature of the job: investigative skills, problem analysis independence etc. (IFP, FF, Van der Walt, GCB, Barrie).

6.4.2 Qualifications required in the interim constitution: The ACDP, DP NP, LHR and HRC agree with the qualifications as set out in the interim constitution. This provides for legal qualifications or experience in public administration or finance.

6.4.3 Additional qualifications.

6.4.3.1 CALS also mentioned that experience in managing large institutions may be a sufficient qualification.

6.4.3.2 The BLA, CLC and LRC felt that candidacy should

not be drawn from lawyers only. The ALS shared this view, stating that the person should be a lawyer, but that this should not exclude candidates from other disciplines.

6.4.3.3 The LRC felt that the person should have a sound understanding of the underlying social and administrative consequences of actions in the public administration.

6.4.3.4 The NLC stated that the person should have a broad understanding of rural issues.

6.4.3.5 All felt that the personal qualities of the person were crucial. the person should be respected, independent, with integrity etc.

Some submissions suggested that additional skills can be obtained through the employment or co-option of appropriate persons (FF, CALS, GCB, LRC).

## 6.5 Powers and Functions

Several submissions suggested that additional powers be given to the Public Protector. This section lists those powers and provides some guidance as to whether the parties believe that these are issues to be included in the constitutional text or in legislation.



**6.5.1 Systemic problems - *Inclusion in the constitution should be considered***

Although not explicit in most of the submissions, there seems to be agreement on the need for the Public Protector to investigate systemic problems in the administration. Some felt that this would lead naturally from the investigation of complaints (Ombudsman, GCB). Clarification on consensus on this is required from the NP.

Both the ANC and CALS made direct reference to this in their submissions. The ANC stated that the Public Protector should endeavour to identify the systemic causes to the act or omission complained of. CALS made reference to the need to investigate systemic problems arising from individual complaints. The NLC commented that problems in rural areas are often problems of entire communities.

**6.5.2 Powers of investigation - *to be considered for the constitution***

While there is agreement on the need for effective powers of investigation, there is some disagreement and lack of clarity on the extent of the Public Protector's powers of investigation and the nature of their entrenchment in the constitution. It was suggested by the sub-theme committee that these powers be included in the constitution in general terms only. For example:

"the Public protector shall be given the powers necessary for the effective performance of his or her functions".

Specific recommendations, although not necessarily for the constitutional text, included:

- 6.5.2.1 The IFP supported the power to compel the appearance of witnesses and the production of documents through a sub-poena which could be enforced by referral to a competent court.
- 6.5.2.2 The GCB - powers to search and obtain documents essential to carrying out functions.

**6.5.3 The power to litigate - *to be considered for the constitutional text***

There was some support for the Public Protector being able to take matters to court.

- 6.5.3.1 The IFP felt that he or she should be able to bring proceedings to ordinary courts for remedy of the wrong, compensation for victims or modification of offending procedures, as well as to the Constitutional Court to challenge the validity of a law or regulation.
- 6.5.3.2 The HRC and CLC felt that the Public Protector should be able to take matters to court if

necessary. The CLC felt that mediation was insufficient to set authoritative, normative standards.

6.5.3.3 The LRC said that the Public Protector should be able to go to court to enforce the performance of his or her own powers. This was seen to be particularly important with respect to 6.5.6 below.

Other organisations were specifically opposed to litigation (GCB).

#### **6.5.4 The Power to Refer - *to be considered for the constitutional text***

Several submissions called for wider powers of referral than are contained in the interim constitution (GCB, LRC). For example, the power to refer to the Human Rights Commission should be expressly stated.

#### **6.5.5 The power to direct disciplinary hearing - *to be considered for the constitutional text***

The LRC suggested the Public Protector should have the power to override decisions where the power to effect discipline is abused. In other words, where there is a consistent refusal to discipline persons found "guilty" of maladministration in a particular department or office, the Public Protector should be

able to direct a hearing in that office or department. This power should be exercised in consultation with the Human Rights Commission and with the approval of the Public Service Commission. It should be enforced through litigation. See 6.5.4.3.

**6.5.6 The power to request publication of reasons by a person, entity or institution - *to be considered for the constitution or legislation***

The GCB suggests that the Public Protector should be empowered to require written reasons as to why a particular department, person or institution declines to follow his or her recommendation. These reasons should then be tabled in parliament or published in the press. The LRC supports this view.

**6.5.7 The power to review laws for constitutionality and make recommendations for legislative change - *to be considered for the constitution or legislation***

The IFP calls for this power in respect of laws in force before the commencement of the constitution. Recommendations should be made to parliament or the President.

**6.5.8 The Power to suspend prescription and statutory notice periods**

*- legislation only*

The LRC suggests that the Public Protector should have this power of suspension pending his investigation.

**6.5.9 The power to protect against victimisation - *for legislation only***

Both the GCB and LRC suggest that the Public Protector should be empowered to protect complainants or any affected person (including the alleged transgressor) from victimisation.

**6.5.10 Complaints by a third party - *for legislation only***

The GCB suggested that provision should be made for the referral of complaints by a third party such as a member of parliament or any responsible person acting on behalf of an aggrieved party.

**6.6 Jurisdiction**

**6.6.1 The private sector:**

There was some support for the jurisdiction of the Public Protector being extended to the Private Sector. However it was generally felt by the sub-theme-committee that this was a matter for legislation.

**6.6.1.1** The IFP indicated some support for private sector jurisdiction.

6.6.1.2 The NP said that the definition of "public function" in the text of the interim constitution needed to be clarified.

6.6.1.3 The LRC called for the extension of jurisdiction to bodies performing public functions on the basis of four criteria:

- \* whether the body fulfilled a public purpose;
- \* whether the laws of privilege or institutional independence mitigated against this;
- \* the effect that the Public Protector would have on the body; and
- \* where no other remedy was available.

Institutions which fell under these criteria would include deposit-taking institutions, provident or pension funds; medical scheme or unit trust schemes; insurance companies; and bodies with control over professions.

Other submissions felt that there were sufficient mechanisms in the private sector. (GCB, BLA, CLC, LHR, Barrie).

6.6.2 **The Courts:** There was general agreement that the jurisdiction of the Public Protector should not extend to the judicial function of the courts. However the DP suggested that if the

usual safeguards of Appeal and Review failed then provision could be made for the Public Protector to draw the attention of the Chief Justice or the Judge Presidents of the Provincial Divisions of the Supreme Court to matters which, in his or her opinion, constituted maladministration within the system of justice. Moreover the ALS stated that the Public Protector should be able to intervene in such matters as unnecessarily delayed judgements. The LRC felt that the jurisdiction of the Public Protector should extend to Rules of Court and practice rulings by judges as these were matters did not address the merits of an individual case, and the LHR suggested that the jurisdiction include such matters as the allocation of cases to judges, guidelines on bail and the disbursement of legal aid.

**6.6.3 Traditional Leaders:** During the course of the discussions, the issue of the relationship between traditional leaders and the Public Protector was raised. While there seemed to be general agreement in the various submissions and public hearings that traditional leaders could and should be subject to the Public Protector in the carrying out their public and administrative functions, the concern was raised by the IFP that traditional leaders may perceive the Public Protector as a threat to their traditional roles as mediators within the community, and hence to the institution of traditional rule. It was felt that Public

Protectors would not necessarily understand the institution of traditional law.

To resolve this all parties agreed that the matter should be treated with sensitivity and understanding. The IFP suggested that the provincial House of Traditional Leaders be included in the selection process of a provincial Public Protector having jurisdiction in respect of traditional communities. The IFP suggested that this may be an additional provincial Public Protector with special jurisdiction over traditional communities. In general, Public Protectors should work in co-operation with the chiefs and traditional leaders where possible.

A further question that was raised was whether the traditional leaders fulfilled the role of Public Protector in their communities. Traditional leaders are seen as "protectors" of their communities. This was disputed in so far as Public Protectors are not part of the system of administration or government, whereas many traditional leaders are. An example was given of Ghana where the traditional "ombudsman" was a commoner who interceded with the rulers on behalf of the people. Nevertheless, the IFP suggested that there was a twofold need in South Africa:

6.6.3.1 to "protect" traditional communities against the



- onslaught of the "modern world"; and
- 6.6.3.2 to protect the community and the individual from maladministration and abuse of power by traditional leaders.

All other verbal submissions felt that traditional leaders were in the same position as any government official, insofar as a negotiated/mediated settlement would always be a first option. If opposition was met, the Public Protector would proceed to investigate any complaint fearlessly and independently.

The LRC and GCB stated that the text of constitution would have to be carefully worded to include traditional leaders. The LRC said that they would not necessarily fall within the definition of "level of government" of section 112(1)(a)(i) and the GCB said that the jurisdiction and powers of the Public Protector should be defined broadly enough to include bodies whose existence is recognised in customary law.

## 6.7 National and Provincial Public Protectors

All parties appear to agree that there should be national and regional Public Protectors, and that the latter may be established by provincial legislation to act as watchdogs over the administrative system of provincial government. The ACDP calls for local Public Protectors,

stressing the need for accessibility of the office. However there is a major division on the relationships between, and the powers of, national and regional Public Protectors.

6.7.1 The IFP states that the national and regional Public Protectors should have separate spheres of influence and jurisdiction. The national Public Protector should not act with respect to areas of regional autonomy, except in consultation with the Public protector of the Province concerned. The National Constitution should not dictate the role and scope of the regional Public Protector.

6.7.2 The ANC states that the National Public Protector may operate at all levels of government. Provincial laws could establish provincial Public Protectors, but provincial legislation should not derogate from the powers of the national Public Protector and the national and regional Public Protectors shall work in a consultative manner.

6.7.3 The DP suggests that a way of resolving the potential conflict between national and regional Public Protectors would be to delineate areas of exclusive and concurrent responsibilities of the various offices. The provincial Public Protectors will operate on a provincial and local level, with the national Public Protector concerned with the administration of the central government. The work of Public Protectors should be guided by the areas of concurrent exercise of powers.

This matter was also discussed in public hearings and submissions from organisations of civil society. There was a majority and a minority view:

6.7.4 Most submissions supported one national office with provincial/ regional branches. They were concerned with national standards, costs and efficacy, as well as the ability of the national office to function authoritatively in the provinces. (CLC, GCB, LRC, Van der Walt).

6.7.5 Others felt may be divisions of the office along lines of regional and national powers was acceptable with structures of co-operation and liaison (LHR, BLA, HRC).

CALS felt that the relationship between national and provincial Public protectors should not be defined, and should be allowed to develop over time. If there was a need to define in the Constitution, the present sections 114(1) and (2) were sufficient.

## 6.8 The Nature of the Office - One or many Public Protectors

6.8.1 A important issue raised in the public hearings was that of whether there should be separate Public Protectors for the police, military etc. There was unanimous opposition to this. Reasons cited included:

6.8.1.1 The independence of these Public Protectors would be quickly compromised as they became

- immersed in the culture of the police of military;
- 6.8.1.2 An outside perspective on fairness was required;
- 6.8.1.3 An overall view of the public sector with the setting of national standards and national principles was important;
- 6.8.1.4 It would involve unnecessary duplication of cost; and
- 6.8.1.5 The argument that outsiders did not "understand" the police of military merely amounted to a mystification of the institutions.

6.8.2 A second issue raised by the HRC was the suggestion that the office of the Public Protector be established not as an individual, but as a team or commission allowing for specialisation and diversification. This was supported by the IFP who were particularly concerned that provincial Public Protectors be appointed with specialist knowledge of traditional communities. However this was thought not to be an issue for the constitutional text.

**6.9 Relationship with other structures: - *not a constitutional issue***

Several stakeholders felt that the relationship between the Public protector, the Human Rights Commission and the Commission for Gender Equality should not be formalised in the constitution, but

should be left to evolve and to develop their own methods of referral and liaison.

**7 *Suggestions for the way forward:***

The areas of agreement are clearly listed above. In respect of the areas of disagreement, it appears that some of these are obviously issues that need only be dealt with in legislation. These should be identified and discarded. The remaining issues can then be settled.

The most compelling issues which remain for negotiation and debate within the Constitutional Committee appear to be:

- 7.1 A decision on principles of inclusion in the constitutional text;
- 7.2 The name;
- 7.3 The details of appointment and dismissal;
- 7.4 The details of tenure;
- 7.5 Whether qualification go into the constitutional text and how;
- 7.6 Which additional powers and functions go into the text;
- 7.7 Jurisdiction, especially with respect to traditional leaders;
- 7.8 The relationship between national and provincial Public Protectors;  
and
- 7.9 Whether additional Public Protectors are required in the text.

