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CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

13 March 1995

DOCUMENTATION

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SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES

MEMORANDUM

TO: All members of Subtheme Committee three

FROM: Bronwen Levy

DATE: 9 March 1995

RE: Meeting of Subtheme Committee, 13 March 1995

Please note that the meeting will commence at 18:00 in E 305 and will be followed by a Public Hearing at 19:00 from the Centre for Socio Legal Studies on the Public Protector.

AGENDA

1. Opening and Welcome

2. Adoption of minutes, 27 February and 6 March 1995

3. Report from the Technical Experts re: Gender Commission

3.1 Programme for Workshop on National Machinery

3.2 Questions to be sent to stakeholders for comment

3.3 Discussion

4. Report from Secretariat on Public Hearings

5. Party final submissions

6. Any other business

7. Closure

CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

MEMORANDUM

TO: All members of Subtheme Committee three

FROM: Bronwen Levy

DATE: 9 March 1995

RE: Meeting and Public Hearings

These are the details for the programme of meetings for next week:

1. Subtheme Committee meeting - 18:00 2. Public Hearing on the Public Protector - Centre for Socio Legal Studies - 19:00	Monday 13 March 1995	E 305
1. Public Hearing - General Council of the Bar - 10:00 - Legal Resources Centre - 11:00	Tuesday 14 March 1995	V 227
1. Public Hearing - Community Law Centre - 9:00 - Advocate Louis Van Zyl - 10:00 - Lawyers for Human Rights - 11:00 - Human Rights Committee - 12:00	Wednesday 15 March 1995	E 305

Please note that stakeholders are presently still confirming their attendance, thus this programme may still be subject to alteration as more stakeholders may still need to be accommodated on Tuesday and Wednesday. The Secretariat will however give an update to members at the Subtheme Committee meeting of the 13 March at 18:00.

CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

27 FEBRUARY 1995

PRESENT

Ms Mompati R (Chairperson)

Fenyane S L E
George M
Louw L
Malan T J
Moatshe P
Nkadimeng J K
Tshabalala M E
Turok M
Van Wyk A
Zitha D A

Apologies: Ms Kgositsile B and Prof Erwee.

Ms B Levy and Dr C Albertyn were in attendance.

1. **Opening and Welcome**

   Ms Mompati opened the meeting at 18:30 and welcomed the members.

2. **Report by Dr Cathy Albertyn on the Party submissions received on the Public Protector**

   Dr Albertyn presented a report on the Party submissions that had been received on the Public Protector (see annexure 'A'). The submissions from the PAC and the DP are still outstanding.

Ms Levy reported that a memorandum was sent to members asking them to clarify the stakeholders to be contacted with regard to the Public Hearings on the Public Protector.

The meeting agreed that the following additional stakeholders would be contacted:

* Centre for Human Rights
* Wits Business School
* Centre for Socio Legal Studies
* Centre for Applied Legal Studies
* Community Law Centre
* Legal Resources Centre
* Advocate L Van Zyl
* Prof G Barry

6. Report of the seminar programme on the Human Rights Commission

The report was adopted. The meeting agreed that it should be sent to stakeholders for comment.

7. Any other business

7.1 Public Participation Programme

The meeting agreed to the following with regard to the Public Participation events on 11 March 1995:

i) Ms Turok would represent the Subtheme Committee at the event in the Western Cape.

ii) Mr Louw would be asked to attend the event in Gauteng.

7.2 Joint meeting of Theme Committees on Traditional Authorities

The meeting agreed that Ms Malan and Mr Moatshe would represent the

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PUBLIC PROTECTOR
FIRST SUMMARY OF PARTY SUBMISSIONS

Theme Committee Six, Sub-group 4
27 February 1995

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1 **Introduction:**
This is a summary of the submissions of the following parties: the ACDP, the ANC (received in draft form); the Freedom Front; the Inkatha Freedom Party and the National Party (received in draft form). The submissions of the Democratic Party and the PAC remain outstanding.

2 **The office of the Public Protector:**
All parties support the creation of the office of the Public Protector in the final constitution. However it is not always clear to what extent the parties believe that the details of the office should be placed in the constitution and which details should be left to legislation. Parties are asked to consider this point more explicitly.

3 **The name:**
There is disagreement on the name of Public Protector or Ombudsman.
3.1 The ACDP, ANC and IFP support the retention of Public Protector.
3.2 The FF and NP support the term "ombudsman". The use of "protect" is seen to be inaccurate.

4 **Independence and impartiality:**
All parties agree that the Public Protector should be independent. Impartiality is also referred to or implied in all submissions. Some detail is provided in some party submissions.
4.1 The NP endorses the interim constitution re. privileges and immunities, non-interference and assistance by the state (section 111).
4.2 The FF requires indemnity for work done in good faith to be provided for in legislation.
4.3 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.
4.4 The FF also stresses the need for public reports.

5 **Accountability:**
There seems to be general agreement that the Public Protector should be accountable to, and report annually to, parliament. The FF adds that the Public Protector should be free to report as often as necessary.

6 **Appointment, tenure, qualifications and removal from office:**
6.1 Appointment:
6.1.1 There seems to be general agreement that the Public Protector should be appointed by the President on the nomination/

recommendation of Parliament, although the FF is silent on this point.

6.1.2 The NP and IFP add more details on appointment. The NP endorses the procedures set out in the interim constitution. The IFP suggests that names be submitted by the Judicial Service Commission.

6.2 Tenure:

6.2.1 Three parties (the ACDP, the ANC and IFP) agree on a fixed tenure. The IFP and ACDP state that this should be non-renewable.

6.2.2 The FF is silent of this point.

6.2.3 The NP states that a longer period (until retirement) should be debated.

6.3 Qualifications:

6.3.1 Although some parties are silent on this there seems to be agreement that the Public Protector should be a South African citizen.

6.3.2 The IFP and FF require similar legal qualifications. The IFP calls for judge, advocate or lawyer and the FF states that the Public Protector should be a former judge.

6.3.3 The NP endorses the interim constitution which allows legal qualifications of for a person with knowledge and experience of the administration of justice, public administration or public finance to qualify. The ACDP appears to be of the same view.

6.3.4 The ANC is silent - leaving it to legislation.

6.4 Removal from office:

6.4.1 By the President acting on recommendation of parliament (NP, ANC) or the Judicial Service Commission (IFP). FF silent.

6.4.2 Grounds: Misbehaviour, incapacity or incompetence (ANC and NP). The IFP require stronger grounds of mental incapacity or gross misconduct (IFP). The FF is silent on this.

7 **Remuneration, terms and conditions of employment:**

There seems to be implicit or explicit agreement that this is to be left to legislation.

8 **Functions - Initiating investigations and receiving complaints:**

Should the Public Protector conduct investigations on the receipt of complaints or on his or her own initiative:

8.1 The NP is the only party which expressly states that the Public Protector should not investigate "on own initiative".

8.2 The ANC and ACDP expressly state that the Public Protector should be able to act of his or her own initiative.

8.3 The ANC also makes provision for the receipt of group complaints.

9 **Functions - investigation:**

All parties appear generally to agree that the Public Protector should prote the citizen against maladministration by government as set out in the inter constitution with some differences as set out below.

9.1 Ambit of Jurisdiction:

9.1.1 The IFP calls for an extension of the jurisdiction of the Pub Protector to some centres of private power and express concern over the issues of environmental and consum protection.

9.1.2 The ANC calls for "government" to be widely defined.

9.1.3 The NP wants clarification on "public official".

9.1.4 The FF expressly states that the courts should be exclude from the jurisdiction of the Public Protector.

9.2 Systemic unfairness:

The ANC requires the Public Protector to investigate system unfairness in carrying out its functions. This appears to be implicit i the submission of the ACDP. Other parties are silent on the issue.

10 **Functions - action after investigation:**

10.1 Submissions on this have only been received by the ACDP, ANC an IFP. The agreed actions that a Public Protector may take afte investigation include:

10.1.1 negotiation/mediation/compromise (not mentioned b ACDP);

10.1.2 refer for further investigation/prosecution by appropriat authority;

10.1.3 refer to other appropriate authority (eg. IFP: superior o offending party).

10.2 Additional actions are:

10.2.1 IFP:

10.2.1.1 bring proceedings to court;

10.2.1.2 bring matter to Constitutional Court;

10.2.1.3 review laws for constitutionality and mak recommendations for legislative change.

10.2.2 ANC and ACDP:

10.2.2.1 make recommendations to government fo changes in the administration of government.

There is agreement that the Public Protector should not be able to make a binding award. This is the role of the courts.

11 **Powers:**

11.1 Some party submissions set out details of powers (IFP), others state that power should be left to legislation (ANC). The others do not dea with powers in any detail, implying that these should be left tc legislation.

12 **Confidentiality/publicity:**

The FF requires confidential reports and public findings.

13 **National/regional 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 between the IFP and the ANC on the relationships between, and powers of, national and regional Public Protectors.

13.1 The IFP states that the national and regional Public Protectors should have separate spheres of influence. The national Public Protector should not act with respect to areas of regional autonomy. The National Constitution should not dictate the role and scope of the regional Public Protector. The IFP also raises the issue of the relationship between the Public Protector and traditional leaders at provincial level, suggesting a particular set of relationships.

13.2 The ANC states that the National Public Protector may operate at all levels of government. 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.

14 **Additional Structures:**
The IFP suggest two additional Commissions: an Environmental Commission and a Consumer Affairs Commission. The Committee should decide how to deal with these suggestions.

SOME KEY QUESTIONS ARISING FROM THE PARTY SUBMISSIONS:

The following are some of the key questions arise out of the party submissions. Further representations and discussion on them would be useful in determining the final report of the Theme Committee. Further key issues may be identified.

1 What should be included in the Constitution and what should be left to legislation? This will affect how much difference of detail in, for example, the powers of the Public Protector or methods of achieving independence etc., needs to be addressed at this stage.

2 What is the scope of the jurisdiction of the Public Protector?
- 2.1 Public vs. private power;
- 2.2 What is the scope of the definition of Government and "administration"?
- 2.3 How far should the courts be included?

3 What is the relationship between provincial and national Public Protectors? How do these relate to traditional leaders at provincial level.

Dr Catherine Albertyn
Technical Expert
Theme Committee VI, sub-group IV

CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

6 MARCH 1995

PRESENT

Kgositsile B (Chairperson)

Camerer S
Malan T J
Moatshe P
Mompati R
Nkadimeng J K
Selfe J
Turok M

Apologies: Tshabalala M E

Ms B Levy, Mr N Nyoka, Dr C Albertyn and Prof R Erwee were in attendance.

1. Opening and Welcome

Ms Kgositile opened the meeting at 10:00 and welcomed the members.

2. Minutes of 27 February 1995

The minutes were noted. They will be adopted at the next meeting of the Subtheme Committee.

3. Submissions

3.1 Report by Dr C Albertyn on comparative perspectives

As per the agreement of the meeting of 27 February 1995, Dr Albertyn reported on the comparative study she had conducted on the Public Protector with regard to a number of key issues that had emerged from the Party submissions. The countries Dr Albertyn examined include, the Scandinavian countries, New Zealand, Namibia, Zimbabwe and Ghana. The following matters arose from the study:

3.1.1 Most countries deal with the Public Protector in legislation. There is a need to focus on broad principles with regard to the central issues to be constitutionalised, much of the detail would fall away as they would be located in legislation.

3.1.2 Developing and developed countries tend to differ with regard to the model of the Public Protector. The reason for this lies in the plethora of institutions that exists in many of the developed countries. In many developing countries there is only one institution, its either called the Human Rights Commission or its called the Public Protector and it plays both roles. Thus in South Africa where the Interim Constitution attempts to divide up the roles of the different specialised structures, in many African countries the role of these different structures is assumed by one structure.

3.1.3 In many of the developing countries examined, the Public Protector tends to be accountable to the executive rather than parliament. The one exception to this trend is Namibia.

3.1.4 With regard to the matter of the Public Protectors jurisdiction over the courts different approaches have been adopted. In two of the Scandinavian countries the Public Protector has jurisdiction over maladministration of judges. This application is a historical one which arises out of the origins of the establishment of the office, judges themselves support the above mentioned application. In South Africa, because of the tradition of the 'legal independence' of the judiciary, the jurisdiction of the Public Protector would extend to the maladministration of public officials in the Department of Justice. It does not apply to judicial functions of judges and of the courts.

3.1.5 Dr Albertyn also considered the matters of accountability, tenure, jurisdiction, functions and the national, regional issue. Dr Albertyn pointed out that it must be borne in mind that many of the issues raised in these areas are concerned with detail which would likely be located in legislation rather than the constitution.

i) **Accountability** - this tends generally to be located with parliament not with government. The Public Protector makes reports to parliament.

While the Public Protector is often appointed by president, this appointment will be made on the advice of the committees of parliament. Parliament often has the role to dismiss the Public Protector and the grounds for dismissal vary in different context.

ii) **Tenure** - two models of tenure have been adopted. One model allows for a fixed tenure of 5 or 7 years. In certain instances this period coincides with parliament. Many countries allow for re-election, thus combining both of tenure and permanence. Where the appointment of the Public Protector tends to be a permanent one the office plays additional roles such as that of the Human Rights Commission.

iii) **Qualifications** - almost all countries require that the Public Protector should have legal qualifications, however some countries don't deal with the issue of qualifications, such as New Zealand.

iv) **Jurisdiction** - the Public Protectors role generally looks at maladministration at all levels of government, national, regional and local as well as all public officials in various departments. Some countries however have maintained that the Public Protector should not oversee ministers. Some argue that the Public Protector should not enter in to policy questions while others are silent on this issue.

While different approaches have been adopted in this regard, the ambit of jurisdiction is however important. There is a need to disaggregate what is meant by government at a broad level of principle.

v) **Functions** - Where the function of the Public Protector goes beyond its traditional functions of investigation of maladministration in government, such as a function of litigation. This is often as a result of the Public Protector assuming the role of additional structures such as the Human Rights Commission.

vi) **National and Regional** - no real solutions emerged with regard to this matter. The countries examined tended to be small with central and local government as opposed to central, local and regional government.

3.1.6 Dr Albertyn maintained that there was a need to identify a list of broad principles that can be put in to the final constitution.

3.2 Discussion on Report

3.2.1 The issue of the relationship between the Public Protector and traditional authorities in terms of a comparative study was raised as matter for discussion.

Dr Albertyn reported that in her study of Ghana the Public Protector is in fact a commoner who speaks for the people. The role of the Public Protector in this instance is to protect the interests of the people against the government and royalty. Thus the role Public Protector is seen as distinct from that of the traditional authorities.

3.3 Party Submissions on the Public Protector

3.3.1 Democratic Party Submission

Mr Selfe spoke to the DP submission on the Public Protector (see annexure 'A').

3.3.2 Other Party Submissions

The meeting noted that no submission had come forward from the PAC on the Public Protector. The Secretariat reported that a letter requesting the PAC to forward a submission together with the seminar report had been given to Ms De Lille of the PAC (see annexure 'B'). In addition the Secretariat left telephonic messages at the PAC office requesting them to forward their submission.

The meeting agreed that parties needed to present their final submissions on the Public Protector by next week so that the processing of Party submissions could be finalised.

4. Progress report from the Secretariat on public hearings

Ms Levy reported that letters together with the seminar report had been faxed to the stakeholders identified. Thus far only one confirmation had been received namely advocate Louis Van Zyl who is scheduled to speak to the committee on Wednesday morning 15 March.

The meeting agreed that in future while all stakeholders needed to be invited to comment, those who put forward controversial positions or put forward issues that the committee needed to clarify would be asked to attend a public hearing.

5. Any other business

5.1 Public Participation Programme

Members were unable to attend the additional CPM's scheduled for the 11 March.

It was agreed that a roster would be circulated to the committee so that they could indicate when they would be available.

5.2 Media Briefing

It was agreed that Ms Kgositsile together with a member which would rotate each week would represent the Subtheme Committee at the media briefing.

5.3 Commission on Gender Equality

Prof Erwee reported that she had sent a letter to women's organisations with regard to their participation in the committees discussion on the Gender Commission.

It was agreed that the experts would draw up a report to be sent to the stakeholders for comment.

5.4 Technical Experts

It was agreed that there was a need to relate to both experts as a

team.

6. Closure

The meeting rose at 12:00.

Chairperson ..... Date 8.3.95

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DEMOCRATIC PARTY

SUBMISSION ON THE PUBLIC PROTECTOR

Introduction

The Democratic Party is committed to the institution of a Public Protector, or more than one Public Protector, if the office is also to be structured on a provincial basis. The Party believes that the name of the institution is relatively unimportant; it accepts that the term "Ombudsman" may contain sexist connotations, but whether called "ombudsman", "ombudsperson", "ombud", or "public protector" (or indeed any other name), what should be concentrated on is the essence of competences, functions and duties, rather than the name of the office.

In turn, these competences, functions and duties have to be seen within the context of other, similar or complementary offices provided for in the interim Constitution, such as the Constitutional Court, the Human Rights Commission, the Commission on Gender Equality and the Commission on Restitution of Land Rights. With the exception of the Constitutional Court, these institutions have not yet been constituted, far less started to map out their areas of speciality, and how they must relate to other protective agencies. On the face of it, the powers and functions given by the Constitution contain some areas of overlap; moreover, in the debates on the Public Protector and Human Rights Commission Bills, it became clear that some people have a wider, rather than narrower, interpretation of the responsibilities which the various bodies should undertake.

It is therefore the DP's view that the roles and functions of the various protective institutions should be provided for in the Constitution, but very much more clearly defined in the final constitution in such a way as to ensure that all South Africans enjoy the rights provided for in the Constitution and are protected from the abuse of power, while at the same time preventing overlap, with attendant dangers of bureaucratic wrangling between the various institutions.

Our preliminary view is that the Constitutional Court and the Human Rights Commission should primarily be seized with protecting and advancing human rights and the culture of human rights, while the Public Protector should in the first instance be charged with ensuring that public administration is clean, incorruptible and responsive to the public it serves.

2. Appointment and Tenure

It flows from this, that certain skills are necessary for the discharge of the Public Protector's tasks. While lawyers, auditors and public accountants are perhaps best suited to perform the investigative functions implied by the office, persons with other skills might be able to perform other functions, such as ensuring that the public service is accessible, responsive and courteous. What is, however, absolutely essential is that

the Public Protector should enjoy the trust and confidence of the public.

The DP believes that the current provisions contained in section 110(4) of the interim Constitution, and particularly section 110(4)(c), provide sufficient scope for the appointment of a person who is not a lawyer as Public Protector, at the same time as ensuring that that person's skills levels are such to inspire the confidence of the public.

The trust of the public will also be enhanced by the degree to which the Public Protector is perceived to be independent and impartial. Therefore we agree with the appointment and dismissal procedure, as well as the tenure, laid down in the interim Constitution. Provision may be considered in the final constitution for the reappointment of the Public Protector, in the interests of continuity, with the unanimous concurrence of Parliament.

3. The Functions of the Public Protector

As was argued above, we believe that the functions of the Public Protector should be much more clearly defined in relation to the other protective offices established by the Constitution.

We hold the view that the Public Protector's role should be primarily directed to the investigation and monitoring of government and the public service, as laid down in section 112 of the interim constitution. Clearly, in the interaction between the public and private sectors, the Public Protector's investigations may lead him/her to investigate the private sector, but the police and the Office of Serious Economic Offences, as well as the various professional bodies established to regulate sectors of the organized private sector, are the institutions which should be charged with investigations into abuse or corruption on the part of the private sector.

We certainly believe that the Public Protector should be able to investigate matters on his/her own initiative, and that the Public Protector should organize his/her office so as to make it as accessible as possible to the public. Some countries, such as Canada, provide examples in this respect which we can follow, but it would seem unnecessary to spell these out in detail in the Constitution.

4. The Public Protector and the Courts

We subscribe to the provisions of section 112(2) of the Constitution, which prohibits the Public Protector from investigating the exercise of judicial functions by any court of law. We believe that the investigation by the Public Protector into the administration of justice would impinge on the independence of the courts. In addition, we believe that the system of appeals and reviews provided by our judiciary provides adequate checks against capriciousness on the part of judicial officers. Moreover, any abuse of power, amounting to maladministration in the system of justice, would be committed by officials of the Departments of Justice, Correctional Services and/or the Police, which would fall within the ambit of the competence of the Public Protector at present.

If all these safeguards fail, provision could be considered in the final Constitution for the Public Protector to draw the attention of the Chief Justice or the President of a

provincial division of the Supreme Court to matters which, in the opinion of the Public Protector, constituted maladministration within the system of justice.

5. The Relationship with the Provincial Public Protectors

We believe that, as South Africa is a large country, structured on three levels of government, and with numerous other structures of government, it is justified to have provincial public protectors in addition to the (national) Public Protector. However, as has already emerged in the debate on the Public Protector Bill, the relationship between the Public Protector and his/her provincial counterparts has proved problematic and controversial.

One way of resolving some of these issues would be to delineate areas of exclusive and concurrent responsibilities of the various public protectors. In this way, provincial public protectors would have responsibility to investigate and monitor the public service in so far as this is structured on provincial or local government level, leaving the Public Protector the responsibility to investigate and monitor central government public administration. To the extent that the final Constitution provides for the concurrent exercise of powers by the centre and the provinces, the public protectors would be guided by these areas of concurrency. At the moment, section 112 of the Constitution is phrased in a way which allows the Public Protector to investigate maladministration, abuse, dishonesty, improper enrichment, discourtesy or unfairness at any level of government. This would probably have to be correspondingly amended.

The resolution of areas of controversy, as these relate to the relationship between the Public Protector and his/her provincial counterparts, will in part depend on the guidelines provided for in section 12 of the Public Protector Act. It might be wise to defer further consideration of this matter until such guidelines have been negotiated and laid down.

5th March 1995

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CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

MEMORANDUM

22 FEBRUARY 1995

TO: **ACDP, DP AND PAC**

FROM: **Bronwen Levy (Secretariat Subtheme Committee three)**

RE: **Submission on the Public Protector**

Subtheme Committee three is presently engaged in discussions on the Public Protector. We have scheduled a discussion on Party submissions on the Public Protector for Monday 27 February 1995. Unfortunately your Party has not been present in the deliberations of the Subtheme Committee, we would thus like to request the following:

i) A submission from your Party on the Public Protector. We would appreciate it if you could send your submission to us by Friday morning (24 February 1995) so that the members are able to examine it before the meeting on Monday. Your submission can be sent to Ms B Levy, Constitutional Assembly, Subtheme Committee 3 of Theme Committee 6, 10th floor, Regis House, Adderly street.

ii) A representative from your Party to speak to your submission for the meeting of Monday 27 February.

The details of the meeting are as follows:

DATE: **27 FEBRUARY 1995**

VENUE: **E305**

TIME: **19:00**

Enclosed is a draft report of the Subtheme's discussions on the Public Protector which have arisen out of the information seminars run by the Subtheme Committee in Block 1 and 2.

Many thanks for your assistance in this regard.

Enquiries Ms B Levy 403 2182 or 245 031 ext 234

COMMISSION ON GENDER EQUALITY

The following is a summary of the areas of agreement and contention on the inclusion in the constitution of a Commission on Gender Equality.

1. Should there be a special mechanism in the constitution to address the need for gender equality or could this need be better catered for by legislation?

There is general agreement with the need expressed by the UN Commission on the Status of Women for a national machinery to promote the advancement of women. The Commission on Gender Equality has come to be seen, at least by some women, as one such mechanism to promote their advancement

Many countries have established such national machinery in the past decade, some entrenched in a constitution, some not.Entrenchment would seem to offer greater security and make it more difficult to disband these bodies.

Submissions by the National Party Gender Advisory Committee and IFP support the inclusion of the GCE in the constitution.

There was not full agreement within the sub-theme group over whether this or other machinery with the same objective has a place in the Constitution. Those in favour argued that it did, and this would make it more difficult to change or remove and would also reassure women, the majority of whom had been excluded from the legal process until now. Those opposed argued that the functions of a Commission on Gender Equality could be carried out by machinery set up by legislation. This would be more flexible and better able to respond to the changing needs of women.

The Black Housewives League however argues for the GCE be given "the seriousness it deserves" by being included in the final constitution.

"Women have for a long time suffered and were oppressed by traditional, cultural, political practices, and the laws of the country compounded this problem. Now that most or all of the residents are aware of this they talk about this and are expecting that it's one of the crucial ares to be addressed by the government."

2. Should the Commission on Gender Equality be solely concerned with policy, planning, education and monitoring or should it have other powers?

The powers and functions of the GCE have to be determined by legislation. The only power mentioned in the Interim Constitution is "to advise and make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women". There is agreement with this as well as with the additional functions of research, monitoring and public education in the submissions from the ANC, the Gender Advisory Committee of the National Party and the IFP, although there are differences in detail and formulation. Related functions include promoting equal opportunity legislation, consulting organisations on how to improve conditions and services, investigating requests for exemptions from gender equality legislation, formulating a code of conduct to ensure implementation of legislation and ensuring ratification of UN conventions and preparing reports for the UN.

An area of contention concerns the powers to investigate and take cases to court. The GAC of the NP proposes that the GCE has this power. There are commissions which fulfil both policy and enforcement roles. Their powers include inquiring into complaints and affecting conciliation, investigating contravention of legislation.

Some members of the sub-theme argued that with such a power the operations of the GCE could become complaints-driven, particularly in the light of the huge backlog of discriminatory practices inherited from apartheid, and that its service could be restricted to the more privileged. The costs of operating an effective enforcement agency would be high and this function would be better carried out by the Human Rights Commission.

Others have argued that the Commission have a mandate to give priority to certain issues including combating violence to women, promoting women's land tenure and home ownership, spouse equality within the family, women's conditions in the workplace and the preservation of the protections of traditional law as related to women.

The GAC of the National Party wants the GCE to investigate and make recommendations on "undesirable practices under Tribal, customary and Black Laws". It wants special teams to be sent to the rural areas to inform people of their rights and investigate their needs.

The SA Commercial, Catering and Allied Workers Union proposes that one of the central tasks of the GCE be legal provision for parental rights in the workplace and the monitoring thereof.

Oranje Vroueverenigingwants the Commission to initiate programmes with the aim of educating communities , women in particular, eliminating illiteracy and ill health and raising their awareness of their human rights .

3. Could the functions of the Gender Commission be performed by the Human Rights Commission?

Some argue that the Human Rights Commission should address gender as well as other human rights and that a Commission on Gender would tend to remove gender issues from the mainstream and marginalise women: and that there is a danger of all gender-related issues being be referred to the Commission on Gender Equality . The GCE would become overloaded and be unable to meet the demand.

The ANC submission argues that, while the HRC should promote gender equality, this need not conflict with the GCE.

Others argue that. while it is now widely accepted that women's rights are human rights, women's subordination is more than a human rights issue and is deeply embedded in convention and tradition. It therefore needs to be addressed at many levels and across society. Close liaison between the GCE and the HRC could ensure gender issues remained a concern of the HRC.

A related issue is the establishment of an Equal Opportunities Commission which could also perform this function.

4. If the GCE is entrenched in the constitution how much detail of its composition, powers and functions should be laid down?

Some argue that only a broad outline should be contained in the constitution and that the detail should be in enabling legislation which goes through Parliament at the same time as the constitution is adopted. This would make the Commission more flexible in its operations and better able to respond to changing needs, as it is easier to change the law than the constitution.

On the other hand, some want the constitution to spell out the composition, functions and powers of the GCE for the sake of clarity and consistency, and argue that chopping and changing the law will create confusion. For example, they argue that the new constitution should include provisions for the establishment of provincial and local CGEs. The IFP submission proposes that the composition of the GCE be spelt out in detail in terms of provincial and women's representation.

It seems that this issue has been raised in other Theme Committees where it has been argued that the particular heritage in South Africa requires more detailed constitutional provisions.

5. What should be the status of the GCE?

The Interim Constitution provides for a Commission for Gender Equality which does not appear to be a structure of government although it is apparently funded by government and its object is to advise and make recommendations to Parliament (not the Cabinet) and other legislatures.

The following questions need to be addressed:
Can a commission which is funded by government remain independent ? A submission from GETNET proposes that the Commission and Government should be monitored (an operation which would also be funded by government).

Another mechanism they propose is that the Commissioners to be selected publicly so that their awareness of gender issues and their commitment can be tested.

6. Would another mechanism or other mechanisms be preferable to a Commission for Gender Equality?

This provision in the Interim constitution was a last minute addition, although it arose out of a three year debate on "national machinery" . It is argued by OLIVE (OD and Training) that the Commission could serve to relieve the government of a"gender conscience" or act as a dumping ground into which all gender issues can be loaded.

The ANC proposes that in the new constitution the GCE should be complemented or substituted by other mechanisms. They argue that the issue of gender equality cannot be addressed in isolation but needs to be integrated in all government policies. There need to be structures which cross a range of ministries . These could take the form of a Women's Ministry, women's desks or focal points in various Ministries or a Cabinet committee, convened by the President and chaired by a gender-sensitive Minister, which would decide on policy , negotiate funds and priorities and monitor implementation by the various ministries.

7. If there is a Gender Commission should there not also be Commissions for the disabled, for children and for other disadvantaged groups?

While it can be argued that, in the case of children, their minor, dependent status requires that the state take responsibility for their care and protection. In the case of the disabled and other minority groups , as far as is known, they have not requested such a commission but should the bill of rights and coming legislation fail to satisfy their demands there is the possibility of the Gender Commission being seen as a precedent.

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1995-03-09

Ms Bronwyn Levy
Constitutional Assembly
CAPE TOWN

Fax: (021) 241 161/2/3

Dear Ms Levy

PUBLIC HEARINGS ON PUBLIC PROTECTOR

1 I refer to your letter dated 1 March 1995, as well as our telephone conversations on Wednesday 8 March 1995. I am sorry that we have not responded earlier, but the original fax did not reach us. Furthermore, I was in Cape Town, at Parliament and the Constitutional Assembly, between Friday 3 and Wednesday 8 March.

2 Thank you very much for the invitation and opportunity to make submissions to the relevant subcommittee of Theme Committee 6, on the office of the Public Protector, on behalf of the Centre for Human Rights. We sincerely appreciate this invitation.

3 Unfortunately it does not seem possible for us at this stage to make formal oral submissions to your committee. I myself am indeed planning to be in Cape Town again from Monday 13 March, but I am not sure that I will be in a position to talk to the subcommittee for various reasons. Firstly, I am currently a member of the independent panel of recognised constitutional experts, and I am not sure that it will be appropriate for me to make submissions to subcommittees, and then later to advise on the product that comes out of that particular subcommittee. However, I shall discuss this aspect with the executive director of the Constitutional Assembly, as well as with my fellow panel members, at our next meeting early next week, for future reference. I personally furthermore have another problem, namely that I am theoretically still on the list of candidates to be considered for appointment as Public Protector. So it may be difficult, if not impossible, for me to make representations.

4 It does not seem as if other members of the Centre at this stage are in a position to present comprehensive submissions on the Public Protector to this particular theme committee early next week. Therefore I wish to reluctantly decline your invitation to make oral submissions. Should we be able to put something together in writing, we shall certainly submit this to you as soon as possible.

5 With regard to the last mentioned point, I specifically wish to make a suggestion: The former Swedish Chief Parliamentary Ombudsman, Mr Per Erik Nilsson, is in South Africa as a guest of the Centre for Human Rights and the Raoul Wallenberg Institute. Unfortunately he will be out of the country again early next week.

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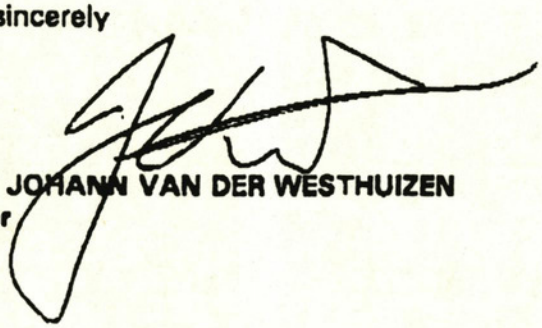
However, if you are interested, we could ask him to respond to the questions you posed, and we shall submit his written response to the Constitutional Assembly. Please let us know.

6 Allow me to once again express the appreciation of our Centre for being invited. Please keep us in mind in future, because we would like to make an input into this process.

Yours sincerely



(PROF) JOHANN VAN DER WESTHUIZEN
Director

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6 - SPECIALISED STRUCTURES OF GOVERNMENT

SUB-THEME COMMITTEE 6.3 - PUBLIC PROTECTOR

WRITTEN SUBMISSIONS ON BEHALF OF

THE GENERAL COUNCIL OF THE BAR

THE OFFICE OF PUBLIC PROTECTOR/OMBUDSMAN : WRITTEN SUBMISSIONS TO SUB-THEME COMMITTEE 6.3 FILED ON BEHALF OF THE GENERAL COUNCIL OF THE BAR

1. **INTRODUCTION:**

Pursuant to the invitation from the Executive Director of the Constitutional Assembly, the following written submissions are made on behalf of the General Council of the Bar in relation to the questions posed in the report relating to the Public Protector/Ombudsman which has been circulated by the Sub-theme Committee.

2. **GENERAL:**

2.1 For reasons which appear hereunder we intend, in this submission, to refer to the office concerned as the office of Ombudsman.

2.2 We are of the opinion that there exists a need for the perpetuation of the office of Ombudsman in South Africa. It is an office which has been introduced in many countries to redress injustices as between the citizen and the public administration and undoubtedly serves a useful function in this regard. The office was initially introduced in Sweden and was adopted in other European countries as also in New Zealand. Various

African countries, such as Tanzania, Zambia and Zimbabwe have also introduced the office. It is not always possible for an aggrieved citizen to obtain adequate redress through the courts of law, either because the complaint concerned is not susceptible of being dealt with through the ordinary judicial process, or because the citizen concerned is not able to embark upon a potentially costly process of litigation.

2.3 The office of Ombudsman in the various jurisdictions reveals the following broad common characteristics:

2.3.1 The Ombudsman is appointed by the legislature but functions independently thereof;

2.3.2 The Ombudsman has extensive rights of access to official records;

2.3.3 The Ombudsman is able to comment on any actions taken by public officials of the executive, either of his own accord or upon a complaint made to him;

2.3.4 The Ombudsman should endeavour to make clear findings, understandable by both the officials whose conduct is investigated and by the citizens filing a complaint.

2.4 The need for a mechanism to deal with complaints of this nature has been recognised in South Africa for some years. Act No. 118 of 1979 created the office of Advocate General to perform this task, the name of the office being changed by Act 104 of 1991 to that of Ombudsman. Although initially instituted purely to deal with the misappropriation of public monies as defined in the Act (probably prompted by the Information Scandal), the powers of the Ombudsman were extended by Act 104 of 1991 to enable the Ombudsman to investigate complaints that the State or public were being prejudiced by mal-administration in connection with the affairs of State.

2.5 The continuing need for an office of this nature is recognised in Sections 110 and following of the Constitution, where provision is made for the institution of an office to be known as the Public Protector.

2.6 We support the continued existence of an office of this nature.

2.7 We proceed to deal with the questions raised in the report in the order in which they appear.

3. **CONSTITUTIONAL ENTRENCHMENT:**

3.1 We are of the opinion that the principle that there should be an

Ombudsman to deal with complaints relating to the public administration should be entrenched in the Constitution.

3.2 We consider that it may be appropriate, however, for the details relating to the appointment of an Ombudsman, the powers and functioning of his office, to be regulated by way of ordinary legislation.

3.3 We consider that this would enable the legislation to be amended more conveniently to meet changing needs of the office and of society without the necessity of making frequent amendments to the Constitution.

4. THE TITLE OF THE OFFICE:

4.1 We are of the opinion that the title Ombudsman should be retained in respect of the office.

4.2 While it may well be that persons particularly concerned at the sexist connotation of the word could be offended, we are of the opinion that the term is well understood and ought to be retained. It is a term which is in common usage in a number of other countries where it has an accepted content and in respect of which jurisdictions there is a body of learning which could usefully be applied in this country. It may be noted that in the United Kingdom, although the title of the holder of the office is

the Parliamentary Commissioner, the statute is entitled "The Parliamentary Commissioner (Ombudsman) Act.

4.3 We consider that the term Public Protector may well be inappropriate, as it has connotations which imply that the holder of the office will enter the arena on behalf of the aggrieved citizen as his champion or representative. As more fully set out hereunder, we do not see this to be a function of the Ombudsman, whose role would be more that of mediator than of a protector.

5. QUALIFICATIONS FOR APPOINTMENT AS OMBUDSMAN:

5.1 We consider that the qualifications for appointment as Ombudsman ought to be those set forth in Section 110(4) of the Constitution.

5.2 The qualifications concerned are governed by the overriding requirement that the holder of the office should be a fit and proper person. The provisions of sub-section (c) expand the source of candidates for the office beyond persons primarily qualified in the legal field. While we are of the view that persons holding legal qualifications would, primarily, be persons suitable to hold the office of Ombudsman, we accept that there is a wider category of persons who may be equally competent.

5.3 We consider that persons with legal qualifications would, however, be pre-eminently suitable to the post. The holder of the office will be required to exercise impartial investigative skills and to examine persons in the course of an investigation in order to arrive at a conclusion. The training and experience of lawyers does, we believe, suit them to this sort of work. In addition, the Ombudsman would be required to take impartial decisions in balancing the interests of the administration and the individual. Again, we perceive the training of lawyers to make them pre-eminently suitable to carry out this function.

5.4 We do not perceive that qualifications in areas such as sociology, social work or psychology would necessarily be suited to the office.

5.5 However, we recognise that the Ombudsman may well find it necessary to obtain advice and/or assistance from persons having skills in other fields in order to perform his functions properly. For this reason, we would recommend that provision by made in the legislation for the Ombudsman to co-opt persons having skills relevant to the issue under investigation to assist him in conducting a particular enquiry.

6. THE TENURE OF OFFICE OF THE OMBUDSMAN:

6.1 It is recognised that there is a strong need for the office of

Ombudsman not only to be but also to be perceived as being entirely independent of the public administration. A failure to achieve this object could well serve to emasculate the office. Aggrieved citizens must be assured that a complaint made to the Ombudsman will be dealt with independently of the administration against which the complaint is directed.

6.2 We would accordingly support the proposition that the tenure of office of the Ombudsman should be assured for a substantial period of time and be subject to early termination only with the consent of both the State President and of Parliament.

6.3 Ideally, the period of appointment should be until a specified retirement age or, alternatively, for a fixed period of not less than 7 years. If a fixed term of office should be settled upon, it is our opinion that the incumbent should not be eligible for reappointment, so as to avoid any possible perception that the incumbent might be motivated not to uphold strenuously the rights of the citizen against the administration in order to be re-appointed.

7. COMPLAINT-DRIVEN OR INITIATIVE-DRIVEN?:

7.1 We are of the opinion that the Ombudsman should be empowered to investigate matters both upon the receipt of a complaint and on his own initiative. To limit the jurisdiction of

the Ombudsman to complaints received from the public would, we believe, unduly curtail his activities. It may well be that persons aggrieved by the actions of the administration would be reluctant to file a formal complaint by reason of a fear of victimisation. It is certainly possible that the existence of such victimisation might come to the attention of the Ombudsman as a result of circumstances other than a formal complaint. The Ombudsman should be entitled to institute his own investigation in such circumstances.

7.2 Consideration should also be given, in our submission, to making provision for persons other than the aggrieved citizen concerned to refer matters to the Ombudsman. Consideration might be given to the system adopted in the United Kingdom, where complaints may be referred to the Ombudsman by Members of Parliament. In Scotland it was found that a large sector of the population experience difficulty in formulating complaints in writing and were accordingly discouraged from making complaints to the Ombudsman. The same considerations apply, in our opinion, in South Africa. For this reason, too, we consider that the requirement that complaints should be made on affidavit or solemn declaration should be dispensed with. It is a provision which, we believe, tends to discourage complaints which may be fully justified.

7.3 We consider therefore that any legislation should make provision for complaints to be made to the Ombudsman not only by the citizen concerned but also by a Member of Parliament (or, for that matter, any other responsible citizen) acting on behalf of the aggrieved party.

8. THE POWERS OF THE OMBUDSMAN:

8.1 We consider that the Ombudsman should be given powers to investigate and report on any complaint received or any matter which he elects to investigate on his own initiative.

8.2 We do not consider that the Ombudsman should be given the power to take direct action in a court of law in relation to any complaint received or investigation made on his own initiative. He should, however, be given the power to refer the matter to the appropriate authorities. If the matter concerned appears to involve any criminal activity, he should be empowered to refer the complaint to the Attorney General for investigation and, if deemed appropriate, prosecution. If the matter relates more properly to a civil complaint, the Ombudsman should have the power to refer the matter to the Legal Aid Board with a recommendation that the aggrieved citizen be given legal assistance to prosecute his or her rights in a court of law.

8.3 In addition to these powers, the Ombudsman should be entitled (on completion of his investigation) to refer the matter to the department of State concerned with a recommendation as to the action which should be taken. In this regard, we would recommend that the Ombudsman be entitled to require the department concerned, should it not take such action, to publish the reasons why it declines to follow the recommendation. This would, we believe, add to the requirement that the public administration be conducted in a transparent fashion and for it to be accountable to the citizens of the country. It has been found in other countries (notably New Zealand) that the publicity attendant upon the investigation, the result of which must be tabled in Parliament, is the most effective means of ensuring that the recommendation of the Ombudsman is followed.

8.4 We consider that the power to search and obtain documents should be given to the Ombudsman, so that offending members of the administration would not be able to conceal potential wrongdoing from his gaze.

8.5 The Ombudsman should further have the power to refer complaints which more properly fall within the ambit of the powers of the Commission on Human Rights or the Gender Commission to such authorities for investigation and for action by them.

8.6 We further consider that it is important to make provision in the legislation for the protection of persons who make complaints to the Ombudsman lest they be discouraged from making such complaints by fear of victimisation. We have in mind in this regard, for example, the possibility that prisoners may wish to make a complaint against their treatment by members of the Department of Correctional Services. It may well be that such prisoners may be reluctant to make a complaint if they fear that their identity will be disclosed and that they will be further victimised.

9. INVESTIGATION OF PUBLIC SECTOR AND/OR PRIVATE SECTOR:

9.1 We consider that the office of the Ombudsman should be entitled to investigate only matters relating to the unfair treatment of citizens by the public sector.

9.2 In our opinion, it would be inadvisable to extend the powers of the Ombudsman to the private sector. Sufficient mechanisms exist to deal with abuses within the private sector. In this regard, we have in mind the Labour Relations legislation which deals with complaints as between employees and their employers. We also have in mind the powers vested in the Competitions Board to deal with the formation of cartels which might be oppressive of the rights of the individual.

9.3 It is generally accepted in other jurisdictions that the function of the Ombudsman should be to create a means of redressing grievances of citizens against the public administration rather than the private sector.

10. THE OMBUDSMAN AND THE COURTS:

10.1 We are of the opinion that the Ombudsman should not be vested with the power to supervise the judicial system *per se*. The checks and balances within the judicial system provided for by way of the rights of appeal and review are, in our opinion, sufficient to deal with injustices emanating from the administration of justice within our courts.

10.2 The Ombudsman would, however, be entitled to deal with mal-administration on an administrative level within the Department of Justice. This department would be treated, insofar as its administrative actions impinged upon the citizens, as any other State department.

11. NATIONAL/PROVINCIAL OMBUDSMAN:

11.1 It is submitted that the creation of both a national and provincial office of Ombudsman would result in an increase in the bureaucracy and a concomitant increase in public expenditure which is not warranted.

11.2 The creation of 9 provincial Ombudsmen and a national office would simply multiply personnel and costs without, in our opinion, achieving any substantial efficiency in the administration of the office. Indeed, in our opinion, the creation of such offices may well lead to anomalies and confusion. One can well envisage a situation where a provincial Ombudsman may take a particular view of a perceived injustice at provincial level which would not be shared by the national Ombudsman who would (presumably) have a concurrent jurisdiction. This would be the case particularly in situations where both national and provincial legislation apply to a particular field.

11.3 We see no reason why the national Ombudsman should not be empowered to investigate mal-administration within the provincial government administration as well as within the national government administration.

11.4 It may well transpire that a single Ombudsman would be unable to cope with the volume of complaints. We would therefore propose that consideration be given to empowering the Ombudsman to co-opt deputies whose offices would be situated within the different provinces where such deputies would be empowered to receive and investigate complaints and refer the results of such investigations to the national Ombudsman who

would adopt or modify such recommendations and institute such action thereon as may be appropriate and within his power.

12. **THE OVERLAPPING BETWEEN THE OFFICE OF OMBUDSMAN AND OTHER SPECIALISED STRUCTURES OF GOVERNMENT:**

12.1 We recognise that the office of Ombudsman may well overlap with other structures of government such as the Human Rights Commission and the Gender Commission. For this reason we have proposed, in paragraph 8.5 above, that the Ombudsman should be empowered to refer complaints which fall within the jurisdiction of such other structures to the structure concerned for investigation and action.

12.2 We would envisage that if such other government structure is unwilling or unable to take appropriate action, then the matter may again be taken up by the Ombudsman.

12.3 It is noted in particular that the Human Rights Commission is empowered, in terms of the provisions of Section 116(3) of the Constitution, to make funds available for litigation in relation to human rights violations. This is a power which we do not consider should be vested in the Ombudsman. It is for this reason that it would be appropriate to empower the Ombudsman to refer complaints falling within the jurisdiction of the Human Rights Commission to that commission for action.

The alternative would be to provide a funding for the Ombudsman to institute such legal proceedings. We do not consider this to be advisable, as it will overlap not only with the powers of the Human Rights Commission but also with the functions of the Legal Aid Board.

13. **GENERAL AND SUPPLEMENTARY:**

13.1 We consider that specific provision should be made in any legislation for the Ombudsman to publicise the existence and powers of his office. The usefulness of the office is severely diminished if few people know of its existence and functioning.

13.2 We consider that provision should be made in the legislation for the power to publicise the office through the media to ensure that all citizens become aware of the existence of the office and their rights to address complaints either directly or through their Members of Parliament to the Ombudsman for investigation.

Derek Mitchell.

DEREK MITCHELL SC

FIONA J GORDON-TURNER

Warren F Young

W F YOUNG

8th March 1995

(Constitu)

APPENDIX : SOURCES CONSULTED

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Memorandum

R A U

Aan: MS M LEVY

Van: PROF GN BARRIE

Vir Aandag:

Datum: 8/3/95 Verw. no.

ONDERWERP: PUBLIC PROTECTOR

EIGHT PAGES FOLLOW

GN Barrie

Prof GN Barrie
Deputy Dean
Faculty of Law
Rand Afrikaans Univ
7 March 1995

Ms B Levy
Constitutional Assembly

Dear ms Levy

PUBLIC PROTECTER : Your fax dated 28/ 2 / 95 refers.

Due to an accident I have difficulty in travelling and cannot attend your hearings. I am faxing to you a recent address of mine to a conference on the topic of the Public Protector. The institution has fascinated me for many years and the new government must be congratulated on constitutionalizing the institution.

My succinct answers to the questions are as follows:

1.1 The institution of the Public Protector must be written in stone in the Constitution.

1.2 The name must be *OMBUDSMAN*. This word means ombudsperson in the original and has no sexist connotations. It is an universal concept.

2.1 Preferably a judge, senior advocate, senior attorney or senior legal academic - all with no political baggage. The latter is most important..

3.1 Tenure 5 - 7 years renewable.

4.1 Complaints AND own initiative

4.2 His basic function must be to investigate *maladministration*. Do not define *maladministration* - the term will develop itself.

4.3 He must stick to the public sector.

5.1 *NO* interference with the judiciary.

6.1 Provincial Public Protectors should act as representatives of the Public Protector and act under his supervision. They must concentrate more on provincial and local government.

6.2 See 6.1

7.1 If the Public Protector comes across maladministration pertaining to human rights violations or which is gender related he informs these two bodies - as he would inform the Attorney- General should he come upon criminal conduct in his investigations.

I sincerely hope your deliberations are a great success.

Yours sincerely,

George N Barrie

THE PUBLIC PROTECTOR: *FIAT OMBUDSMAN!* *

GEORGE N BARRIE **

Introduction

The South African transitional constitution 200 of 1993 institutes the office of the public protector. This office replaces the existing office of ombudsman. It is appropriate thus to first consider the concept of the ombudsman before taking specific cognisanze of the public protector.

The ombudsman concept is a classical one and has many historical antecedents and many contemporary variations. These antecedents and variations are well documented[1] and need not be repeated here except to say that the direct predecessor of the modern ombudsman was the Swedish *Högste Ombudsmannen* appointed in 1713. This is the institution that has been so widely copied in other countries. The prime object of the early ombudsmen was to police the administration on behalf of the monarch in order to detect illegal administrative behaviour. It then on an evolutionary basis developed into an institution which served as a means of protecting individuals from bureaucratic excesses. The emphasis has thus gradually shifted from bureaucratic policeman to public protector.

The success of the institution gave rise to the widespread transplantation of the institution into many countries. Examples are Finland, Norway, Denmark, Germany, New Zealand (the first English speaking country), certain Canadian provinces, in Atistralian states initially and in 1976 a federal commonwealth ombudsman, France, Zimbabwe, Swaziland and Britain (in the guise of the parliamentary commissioner).The decade of the 70's saw a flood of ombudsman offices emerging throughout the world at all levels of government ranging from general to specialist. Various variations on the initial concept were introduced too with some officials responsible to parliament and others to the executive.[2]

Many reasons can be put forward for the rapid spread of the concept of the ombudsman. It is notable that there has been a rapid transplantation to democratic countries. Partly responsible for the spread of the concept has been the activities of the International Commission of Jurists and the United Nations Organisation. Both have taken an active interest in the concept and have organised conferences on human rights in various parts

of the world where the ombudsman has been discussed and propagated. Special mention must be made of the International Bar Association which has a special Ombudsman Forum and the International Ombudsman Institute of the university of Alberta.

In South Africa special mention must be made of the efforts of the Association of Law Societies who for many years unceasingly propagated the introduction of the ombudsman concept in South Africa as did a group of academics.[3] An important event on the road of getting an ombudsman for this country was the staging of the Ombudsman Seminar by the Association of Law Societies in Stellenbosch in 1982. Pressure also came from the general council of the South African Bar. In the the early 80's there was also tacit government support discernible. In 1983 the chief justice of South Africa came out strongly in support of the introduction of an ombudsman for this country when he declared that his experience had taught him that there was a great need for the existence of a person of authority to whom ordinary citizens could go if they felt that they had suffered an injustice at the hands of the administration.[4]

Principal characteristics

What are the principal characteristics of the ombudsman? It is an official office; the official is independent and responsible to the legislature; he receives and investigates complaints against the government and he investigates suspected cases of maladministration; his investigations are done under official sanction and are enforceable; he takes no remedial action himself but makes recommendations and reports.[5]

This brief exposition may need some elucidation. The ombudsman is distinguishable from other organisations or individuals who monitor government activities in that he is part of the *constitutional mechanism* of governmental control. He is *independent* because only independence will attract the credibility the office must enjoy. Most ombudsmen in the classical mould are empowered to investigate *maladministration*. This does not mean that he is a super-administrator but rather a check on abberant administrative behaviour in his capacity as representative of parliament.

No matter how efficient the courts and other institutions of control may be, the obvious utility of the office of the ombudsman has proved itself beyond all doubt and he is often

able to procure a settlement between the aggrieved complainant and the administration. In many instances he has obtained a reversal of official decisions or even a reversal of policy. The institution provides the individual with a mechanism by which to air and often to vindicate his complaints against the administration. Most ombudsman believe that their most useful work lies in the investigation of cases acting on their own initiative. An essential factor is that free access to the ombudsman by members of the the public must be readily available. Without such access the effectiveness of the institution is obviously diminished. As important is the publicity given to his functions. Publicity is the natural ally of the ombudsman and it brings his activities to the attention of the public and marshalls support behind his recommendations.

It has proved to be an important element of the success of the ombudsman that he takes no remedial action himself. He only *recommends* remedial action and criticises. Here his *objectivity, independence* and *prestige* come into play and the fact that he presents no direct threat enhances cooperation between him and the administration. In many instances a thorough investigation and explanation is a remedy in itself.

The advocate-general

In the wake of the information scandal in the late 70's the Advocate-General Act[6] was passed ostensibly to create an ombudsman for South Africa. It was by no means an ombudsman in the classical sense but more of a 'special purpose' ombudsman[7] with limited jurisdiction. The first incumbent was judge PJ van der Walt (at present the ombudsman) who did much to enhance the prestige of the office when it was initiated (as he has done with the office of the ombudsman). The restricted nature of the advocate-general's office related both to his jurisdiction and methods of access. His jurisdiction extended to the dishonest, unlawful or improper handling of money or personal enrichment. As seen by most commentators not even negligent administration nor maladministration fell within his jurisdiction.[8] A further possible restriction was seen to be the fact that while he could act on his own initiative, individuals could only invoke his jurisdiction by placing their suspicions on affidavit. This was seen by some to restrict access.[9] As a highly specialised ombudsman the advocate-general proved to be an important and valuable institution who frequently criticised government departments and

recommended improved procedures.[10] In 1991 the office of the advocate-general was renamed the *ombudsman* and his powers were extended to include the investigation of *maladministration* as well as *fraud* and *corruption.*[11] He reported to the leader of the house of assembly and his reports were tabled.

The public protector

The transitional constitution institutes the office of the public protector.[12] This office replaces the existing office of the ombudsman. The public protector is nominated by a joint committee of both houses of parliament that consists of a member of each party represented in parliament. The nomination must be approved by at least 75% of the members of the national assembly and the senate.present at a joint meeting of both houses. He or she is formally appointed by the president. Regarding qualifications he or she must be a South African citizen who is fit and proper to hold such a position. In addition the public protector must either be a judge of the supreme court, or be qualified to be admitted as an advocate and has, for a period of ten years, practised as an advocate or lectured in law at a university, or has specialised knowledge in the administration of justice, public administration or public finance or at least ten years experience in these fields. The term of office of the public protector is seven years. No other remunerative work may be performed. Dismissal is by the state president on grounds of misbehaviour, incapacity or incompetence determined by a joint committee of both houses of parliament and after the request of both the national assembly and the senate.

Powers of the public protector

The public protector *resolves, investigates* and *reports.* He or she may *investigate* a wide range of matters concerning affairs of government at any level on his or her own initiative or after having received a complaint. These matters include *maladministration, abuse of power, unfair and capricious conduct, improper or dishonest acts, corruption with respect to public funds, unlawful enrichment or advantage* and unlawful *or improper prejudice to any person.* The public protector may direct persons to give evidence or to produce documents and may enter buildings and premises and seize anything that has a bearing on the purposes of the investigation.

The public protector endeavours to *resolve* disputes and to rectify acts. He or she may at any time prior, during or after an investigation *report the commission of an offence*, or refer any matter which has a bearing on the investigation to the appropriate body or make recommendations regarding the redress of prejudice. The public protector *reports anually* on his or her activities to *parliament*. The public protector does *not* investigate the proceedings of a court of law.

The public protector shall be *independent and impartial subject only to the constitution and the law*. Immunities and privileges shall be assigned to the public protector and staff by an act of parliament so as to perform their duties effectively. Nobody may interfere with the public protector or staff in the exercise of their powers and all organs of state shall provide reasonable assistance.

A provincial legislature may adopt a law to provide for the appointment of a *provincial public protector*. The powers of the provincial public protector must be exercised in consultation with the national public protector who *retains all his powers* with regard to the provinces.

Bill on the Objects of the Public Protector

The constitution envisages an act of parliament which prescribes the remuneration and the terms of employment of the public protector, assigns immunities, privileges, powers and functions to him or her and regulates the appointment of staff. As a consequence a Bill on the Objects of the Public Protector has recently been introduced.[13] According to this bill the public protector shall not be liable for anything done by him in good faith.[14] Matters laid before the public protector are done by means of an affidavit specifying the nature of the matter, the grounds on which it is felt the investigation is necessary, and all relevant information known to the person making the affidavit. Alternatively by any other means the public protector may allow with a view to making his or her office more accessible to the public. The public protector *may* refuse to investigate a matter laid before him or her if the person ostensibly prejudiced has not exhausted other available remedies.

The procedure to be followed in conducting an investigation shall be determined by the public protector with due regard to the circumstances of each case. The public protector

may direct any person to submit an affidavit or affirmed declaration or to appear before him or to give evidence or to produce any document in his possession or under his control which has a bearing on the matter being investigated. The public protector may at any time enter any building without prior notice and make the necessary investigations. He or she may seize anything which has a bearing on the investigation and require any person to give an explanation of anything contained in such a document. No person shall insult the public protector, wilfully interrupt the proceedings at an investigation or do anything to improperly influence him or her.

Why ombudsmania?

When one reads the reports of ombudsmen worldwide one is struck by the role of ombudsmen in *humanizing* the administration. Not only are grievances remedied but the likelihood of their recurrence lessened. This ombudsmen accomplish by acting as conduits of communication not only between the citizen and the government but also between civil servants and departments. One should however keep the warning of Stanley F Anderson in mind that not too much must be expected from ombudsmen.[15] They can encourage a basically sound and honest administration, but they cannot correct basic injustices overnight - even though they can protest against them. Ombudsmen are not Don Quixotes who will solve problems of poverty, prejudice and ignorance. They cannot change the very climate of society.

What then does an ombudsman accomplish? At the level of resolution of individual complaints the ombudsman is a fail-safe device, whose need has been demonstrated by the frequency of his use. For the equal protection of the laws there should be someone to whom everyone can turn. The lawyer's fee often makes him inaccessible. Substitution of an ombudsman means that an evil imposed by government *is rectified by government*, and rectified *as a primary responsibility* rather as a haphazard favour. We all have a right to intervene, the ombudsman has a *duty* to do so in cases which he believes merit it. Citizens' complaints are symptoms of government malaise which must be examined by a specialist. Not only is symptomatic relief sought but also prevention. This the ombudsman achieves. While dispensing quinine to dampen the fevers of malaria, the ombudsman also swats a few mosquitoes. But it is still up to the government to drain the

swamps. Seen in this perspective, the ombudsman makes a significant contribution to the improvement of the administration. As seen by Stanley F Anderson, the ombudsman can free the legisator from the harassment of trivia, while turning minute complaints into a mosaic which the legislator should find helpful in supervising bureaucracy. No other complaint-handling mechanism has this potential.[16]

*Address to Government Policy Conference 24-25 October 1994, Gallagher Estate Midrand.

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[1] Baxter *Administrative Law* (1984) 279; Lundvik " A Brief Survey of the History of the Ombudsman" 1982 *Ombudsman Journal* 85.

[2] Baxter 282.

[3] Barrie 'The Ombudsman, Governor of the Government" 1970 *SALJ* 224;" 'n Ombudsman vir Suid-Afrika" 1984 *TSAR* 17; "The Ombudsman, Making Good Government Better" 1982 *De Rebus* 258; Kachelhoffer "Die Ombudsman: 'n Nuwe Konstitusionele Ontwikkeling" 1967 *THRHR* 339; "First Four Reports of the Parliamentary Commissioner" 1968 *SALJ* 289; Rudolph "The Ombudsman and South Africa" 1983 *SALJ* 92; Dean "Whither the Constitution?" 1976 *THRHR* 266; Wiechers "Die Legaliteitsbeginsel in die Administratiefreg" 1967 *THRHR* 309; Gering "Legal Institutions and Human Needs" 1984 *THRHR* 274; Baxter 287.

[4] Barrie 1984 *TSAR* 18.

[5] These are the general characteristics and variations will be found.

[6] Act 118 of 1979.

[7] Baxter 289.

[8] Rudolph 103. In all fairness it must be said that advocate-general did give a very wide interpretation to article 4(1) of Act 118 of 1979 and investigated complaints not strictly within his jurisdiction.

[9] It is debatable if this is really a restriction as it does prevent frivolous claims. This requirement was relaxed by the Advocate-General Amendment Act 55 of 1983 in that a complainant need only swear to the facts in so far as they are known to him.

[10] Van der Walt "Advocate-General" 1981 *JPA* 1; *House of Assembly Debates* 1983 cols 5443-9 and the various *Reports* of the advocate-general.

[11] Advocate-General Amendment Act 104 of 1991.

[12] Act 200 of 1993, chapter 8.

[13] The Ombudsman Act 118 of 1979 has become redundant as a result of the establishment of the office of the public protector. The bill consequently proposes to repeal the Ombudsman Act of 1979 as well as the two acts which amended it, viz Act 55 of 1983 and Act 104 of 1991.

[14] Articles 5-11 set out his or her basic immunities and determine the procedures to be followed by the public protector.

[15] Stanley F Anderson *Ombudsmen for American Government* (1968) 155.

[16] Ibid.