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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.3

SPECIALISED STRUCTURES OF GOVERNMENT

8 May 1995

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**SUBMISSIONS TO THEME COMMITTEE 6
SUBTHEME COMMITTEE 6.3**

VOLUME 8

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**ANC Submission on Human Rights Commission
18 March 1995**

- 1 The Constitution should provide for an independent Human Rights Commission accountable to Parliament.
- 2 The HRC should have a broad mandate to protect and promote human rights, and its powers and functions should include:
 - 2.1 education and awareness raising about human rights;
 - 2.2 investigate violations of human rights;
 - 2.3 monitor and review legislation, administrative provisions, and policies to evaluate compliance with human rights;
 - 2.4 the power to advise parliament and the government and to make recommendations iro 2.3;
 - 2.5 the ability to act on request and on own initiative;
 - 2.6 the promotion of the harmonisation of national policies, laws and administrative practices with international human rights norms;
 - 2.7 the power to commission research;
 - 2.8 encouragement of ratification of international instruments and to measure compliance;
 - 2.9 contribute to national reports on international treaty obligations;
 - 2.10 powers of mediation, arbitration and referral of matters to court;
 - 2.11 such other powers as may be given to the HRC in legislation.
- 3 The constitution should refer to all human rights and should not exclude the HRC playing a role iro social and economic rights.
- 4 The constitution must state that the HRC may deal with both the vertical and horizontal application of rights.
- 5 The constitution should provide for parliament to appoint the commissioners, who should be independent and qualified persons.
- 6 All other matters should be dealt with by legislation.



**National Party
Nasionale Party**

**Federal Council
Federale Raad**

18 April 1995

Mr Hassen Ebrahim
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party submission to Theme Committee 6.3 in respect of the Work Programme, Block 3 on The Human Rights Commission.

Yours faithfully

PP Mrs Sheila Camerer MP

002

NATIONAL PARTY SUBMISSION ON

THE HUMAN RIGHTS COMMISSION

THEME COMMITTEE 6.3

1 General

The National Party supports the institution of a Human Rights Commission as envisaged in S115 to 118 of the transitional constitution and as constituted in terms of the relevant legislation, Act 54 of 1994 ("the Act"). The institution as established in South Africa compares well with similar bodies internationally.

2 Composition and Structure

We agree with the composition as set out in Section 115 and support the retention of this section. We also agree with the structure of the Commission as set out in the Act where it provides for the establishment of committees of the Commission under the chairmanship of a Commissioner. We believe that the structure and operation of the Commission must be kept as flexible as possible in order to cope with whatever tasks and problems arise. These are after all uncharted waters and the Commission will be doing pioneering work. It should not be pinned down further in its structure. If the Commission wishes to deal with any aspect of any category of rights or conduct an investigation, it can establish a committee to undertake the task.

3 Powers and Functions

The powers and functions of the Human Rights Commission should be to promote the protection of all fundamental rights and

their application as entrenched in the constitution - see the present section 116 (1). The National Party's position is that all the fundamental rights entrenched in the constitution should be justiciable.

The terms of the Commission's mandate to promote the protection of fundamental rights as set out in Section 116 of the constitution should be retained with possible additions and adjustments. Although we agree that these powers should be framed in broad terms, it may nevertheless be necessary to spell out some functions in the constitution in and if so, to do so greater detail, and to make some additions to the list of functions and powers set out in Section 116. For example:

- In terms of the needs and perceived needs of the South African community it should, perhaps be spelled out that the Commission has a function to "educate" as well as promote awareness of fundamental rights. The reference to an "educational" function does not appear in so many words in either the constitution or the Act. In fact, much of the Act is devoted to fleshing out Section 116(3) of the constitution and spelling out in detail the investigatory powers of the Commission.

- The other functions of the Commission should receive greater attention in the constitution. The lobbying, monitoring, research and advisory powers of the Commission could be fleshed out in the constitution.

- Although the constitution is silent on the mediation powers of the Commission, this receives attention in the Act and perhaps there should be specific reference to this in the constitution.

- Section 116(3) may need clarification. This section provides that "where it is necessary for that purpose to do so it [the Commission] may arrange for or provide for financial

assistance to enable proceedings to be taken to a competent court". The Act on the other hand goes further and provides that the Commission "may bring proceedings in a competent court in its own name or on behalf of a person or a group or class of persons". If this function is retained then the Constitution should be adjusted accordingly.

4 Administration

While it may not be necessary to include a reference to staffing of the Commission in the constitution itself (Section 117(1)), the National Party nevertheless believes that a reference to the accountability of the Commission to Parliament and parliamentary control over the Commission's expenditure should be retained in the constitution. The present section 117(2) and section 118 should therefore be retained.

DP SUBMISSION ON HUMAN RIGHTS COMMISSION
TO SUBTHEME COMMITTEE 6.3
19 April 1995

1. Constitutionalisation

The DP believes a HRC should be constitutionalised for the same reason an Ombudsman or Public Protector should be constitutionally required: no future government should be able to succumb to the temptation to avoid appointing watchdogs or guardians.

The Ombudsman protects the public against maladministration and corruption, dishonesty and discourteousness in government and the public service. A HRC is the guardian of the human rights enshrined in the chapter or charter of rights.

2. Mode of Constitutionalisation

Implicit in 1. above is the assumption that the HRC has a "vertical" role to play vis à vis the government of the day in both its executive and legislative functions.

For example: the way in which laws or action implement or interpret the rights to freedom of expression, information, culture are all bound to encounter controversy from time to time.

However, the HRC may need to perform a horizontal role at times; or roles that have yet to arise.

Clearly it would be undesirable to limit the scope of a HRC by being overspecific. Broad provision, leaving copious legislative leeway without sacrificing the essential role of guardian would appear to be the sensible course.

3. "Horizontal" role

If the thrust of the argument is that the HRC should be a forum for discrimination complaints as per the Canadian model, with its tribunals, then our answer is that such an institution is certainly necessary.

However, an Equal Opportunity Commission functioning specifically in the fields of employment, education and the like may be a more appropriate forum. We do not think (see 2 above) that so specific a function should be constitutionalised.

It would be advisable however to add to the present constitutional provision reference to, although not a peremptory requirement for, an enforcement function.

A HRC which keeps an eye on rights practice in our society, and which occasionally launches full scale investigations, will frequently refer any offences discovered to other authorities, or assist complainants to get relief from the courts.

To use an example of a possible area of investigation

suggested by Prof Dirk van Zyl Smit: problems associated with witchcraft. These will seldom be capable of resolution by a HRC. Rather, the HRC would be perfectly placed to consider the phenomenon in all its aspects - cultural, etc - and make recommendations to government. Nevertheless, we would support a broad enabling reference to tribunals or an enforcement/conciliation/adjudication role.

4. Composition and structures

We suggest the maximum leeway should be left. While a small HRC has obvious appeal, it must be pointed out that representivity by language, religion, provinces, race and sex in addition to the obvious requirement of impartiality are all desirable in our society - and this cannot be achieved by 3 people.

Provincial offices offer only a partial answer.

A phrasing like "not fewer than 3 and not more than 11" may be appropriate, or this matter may be left to legislation. In the same vein, we would caution against stipulation of structures. It is enough to refer to the broad functions:

- Education/promotion of observance
- Law reform and recommendation of progressive measures
- A possible enforcement role

On the fourth suggested function: public enquiries into socio-economic functions, we suggest the present provision for studies could be expanded to "and enquiries".

If socio-economic rights are included in the final chapter 3, it goes without saying that they fall within the scope of the HRC's work. Much depends of course on how they are included. Again, we would caution against casting in stone too detailed a role.

A final note: we believe the role and importance of the HRC in establishing a rights culture; and its role in relaying to government the researched views of the public on matters ranging from censorship to culture - the core rights in relation to the limitations clause - can be enormous.

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 6, SUB-THEME COMMITTEE 6.3**

HUMAN RIGHTS COMMISSION

Philosophical Perspective

While the ACDP fully understands the need for a human rights culture in this country, it will not simply accept terminology without looking to the driving philosophy behind the wording. In this regard, "human rights" is the concept used by people of differing viewpoints, but the understanding and even application of the practical aspects of the terminology will conform to their particular philosophical points of departure.

Either the foundation for human rights is internal, as with secular humanism, having the atheistic view that these rights evolve with mankind towards the perfect society, or they are, in a biblical sense, inalienable and immutable: granted by the triune God to Man, in order to provide the characteristics necessary to subdue and manage creation as His stewards. Two very important aspects appear that make a compromise between the two views impossible:

Firstly, man is either seen as ultimately good, because nature - the evolutionary well-spring for Man's existence - is predominantly good. Thus, society and the environment of Man are seen as the causes, humanistically speaking, for the aberrant and non-conformist tendencies that mankind sometimes have.

Biblical truth, in contrast, reveals that Mankind is born in sin, ever since Man, created in a perfect state, chose to disobey God's commands. Interpreting the principles from a Bible-believing, creationist perspective, brings about that only those attributes that God gave to man, can be considered 'universal' and worthy of protection. The choices that men and women make, that are in direct opposition to the Word of God, are called sin, and not rights, freedoms or civil liberties.

From this, the second point of divergence becomes clear: either mankind - every man and woman - takes responsibility for their actions and choices in life or they don't. Biblical principle states that Mankind receives the attending response abilities with every right that God gives: if a man transgresses the law of God and intentionally kills someone else, he did not take up the responsibility, the duty attendant to his own right to life and he, in turn, may lose his life. The responsibility of Man is, therefore, in compliance with God's law.

Seen in a human rights context, the above aspects dictate that either these rights are evolving with society and are capable of being granted or denied by the State according to the perceived needs of a particular society, or they are recognised as being granted through creation, and incapable of being alienated or changed, even though circumstances might change.

Composition of the Human Rights Commission

The ACDP and several million Bible-believing Christians, believe in human rights in the sense of a competency received from God with the attending responsibility to obey God's laws.

As the philosophies of the individuals comprising the singular body, controlling the transitional process, will dictate their understanding and application of the concept of human rights, it is submitted that the nomination be done by a joint committee of the houses of Parliament, composed of one member of each party represented in Parliament and willing to participate in the committee and to be approved by resolution in both homes with a majority of seventy-five percent. This will ensure an inclusionary approach and allow government to make decisions that can truly be said to have been decided by all the political parties that represent constituencies who have a voice in the national government.

To not have this system in all appointments made by the president or cabinet of this country will mean that the same procedure employed by the Apartheid government - namely to let only a part of the community have it's say in Parliament - will be policy for the new South African Governmental structure: surely a tendency that cannot be allowed to remain.

Furthermore, the ACDP submits that the only true way to ensure human rights not being capable of being violated, is to recognize it as originating outside of mankind - of a higher hierarchy and not capable of being explained away with the situational ethics that form the basis of the unwanted and unwarranted system of legal positivism.

The individuals that form part of this body is proposed to have to be morally strong and principled men and women, holding the ethics of God's biblical law in high regard. Thus, it will be ensured that justice and equity triumph over of building power concentrates, unbalanced authority pursuits and other personal agendae.

The ACDP supports the goal of having one body to control the process of change from an ethical and equity perspective, rather than separate commissions to look at separate areas of discrimination. this will ensure that national resources be distributed for the national good. The ACDP agrees with Dr Mamphela Ramphele in her lucid presentation to theme committee one, that the core value should be **equity** (for the whole period of transition), rather than egalitarian equality. Equity denotes the just and fair treatment of all, based upon a fair share in the national resources in accordance with their needs and responsibilities in society. This approach will address the hurts of Apartheid in a way as to minimize conflict and the perpetuation of injustice. No doubt, the concept of Affirmative Action will be instrumental in the work of the proposed body to oversee the transitional aspects of human rights issues.

No doubt, a single organisation with a united vision will be much more effective than several smaller bodies , whose frames of reference could easily overlap - leading to expensive duplicity and superfluous work being done.

This body, having an equity focus, will ensure the following clear advantages as shown by Dr. Ramphela in her very helpful contribution:

- a. The ACDP agrees that an equity focus would benefit the most disadvantaged communities as well as giving equal opportunities to individuals with a disadvantaged history, thus redressing the past and benefiting the new South Africa in an esteem-building process towards a prosperous future for all.

Conflict will inevitably arise if a simple black empowerment drive is introduced that will benefit individuals without flowing down in the form of a benefit to the disadvantaged community as a whole.

Individuals must not be required to perform tasks impossible to them, because of educational handicaps in the name of empowerment or distributive justice. The emphasis should be on an approach where the skilled can teach the unskilled to become skilful.

- b) South Africa will go a long way towards ensuring it's own failure should a balance not be drawn between responsibilities.

On one hand, society has the responsibility to create the equitable framework that will provide individuals with equal opportunities to realise their potential in the form of talent received from the Creator.

Individuals will, however, have to take the responsibility to ensure the outcome of the process of equal opportunity. To give a right to equal outcome will be to the detriment of South Africa and all South Africans.

- c) Care will have to be taken to not focus on short term goals with a program of redress, but to ensure long-term benefits of the process. Affirmative Action should not be seen as a Band-Aid to heal the apartheid-legacy.

Finally, the ACDP stresses that the notion must not be to force justice on the people, but to give God a chance to complete the healing that He has started in this nation with the election process. After all, He always finishes any project in His mind before He starts creating the circumstances to give birth to His intent.

18th April 1995

[HRC.WPS]

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

8th Floor, City Centre
71 Loop Street
CAPE TOWN
8001

P O Box 15803
VLAEBERG
8018

Tel: (021) 23 6309
Fax: (021) 24 3561

The Executive Director,
The Constitutional Assembly,
P.O. Box 15,
Cape Town,
8000.

BY FAX NO. 241 161:
For the attention of Ms B Levy

19th April 1995


Dear Madam,

RE: PUBLIC HEARING ON HUMAN RIGHTS COMMISSION
Thursday 20 April 1995; 17.00 -18.00

Thank you for your fax inviting Nadel to present an oral submission to Subtheme Committee 6.3 of the Constitutional Assembly.

Nadel welcomes the opportunity to make submissions to the Subtheme Committee. Please find enclosed written copies of our submissions.

Yours faithfully,


Vincent Saldanha
National General-Secretary
National Association of Democratic Lawyers

**THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 6: SUBTHEME COMMITTEE 6.3
HUMAN RIGHTS COMMISSION**

SUBMISSIONS BY NADEL

These are the Nadel responses to the questions for discussion by the Subtheme Committee.

2. THE STRUCTURE OF THE HUMAN RIGHTS COMMISSION

2.1 Does S.A. need a HRC? Should it be constitutionalised? What should be the content of such provision? Should it be detailed or detail left to legislation?

Nadel believes that we do need a Human Rights Commission. The broad principles and statement of functions and powers should appear in the constitution. Details should be in legislation. These could include incidental powers that may need to be spelt out. Procedural matters should be dealt with by way of regulations.

2.2 How should the HRC be composed?

This should be broadly along the lines of section 115 of the Interim Constitution. The criteria for appointment of "fit and proper persons, South African citizens and broadly representative of the South African community," should continue. The Final Constitution should define "fit and proper person" for this purpose. This should include a commitment to the values of the constitution and the fundamental rights and to the principles and values of an open and democratic society.

2.3 Should any structures be created under the auspices of the HRC to address needs such as law reform, human rights & education programmes, socio-economic problems and tribunal and dispute resolution forums?

The Human Rights Commission should have the authority to create such structures. It has power to develop an awareness of fundamental rights [Interim Constitution, section 116 (1)(b)] and undertake studies relating to fundamental rights [section 116 (1)(d)]. It has additional power to develop information programmes and carry out studies referred to it by the President [section 7 (1)(a) and (d) respectively of Act No. 54 of 1994]. These powers should be continued. There should also be a general power for the Commission to consider any other means of furthering fundamental rights awareness. It should certainly be able to address those mentioned in this question.

3. PROPOSED ROLES AND FUNCTIONS OF THE HUMAN RIGHTS COMMISSION

3.1 What should be the role and function of the HRC?

We would suggest that these be broadly as set out in section 116 of the Interim Constitution and section 7 of the Act, plus the general power referred to in our answer to question 2.3.

3.2 Should the HRC primarily deal with abuses that occur horizontally?

The Commission's task is to investigate any alleged violation of human rights. We believe that whether a person's rights have been violated by the state or by another individual or juristic person, those rights should be protected.

3.3 Are Public Enquiries the most appropriate way of dealing with the matter of socio-economic rights?

We do not believe that they are. The question of socio-economic rights is a very important matter. The proper place for them to be spelt out is in the Final Constitution under chapter 3.

3.4 Should the HRC have the power to mediate, arbitrate and make determinations?

The Commission has power in section 8 of the Act to resolve disputes or rectify acts or omissions by means of mediation, conciliation or negotiation. We believe that these powers should continue. We believe that its proper role is to ensure that breaches of fundamental rights are dealt with and that victims are not left without redress. This is best achieved through the assistance provided to complainants as provided for in the Interim Constitution. The Commission itself should not make determinations. These lie best within the province of the Constitutional Court.

4. THE RELATIONSHIP BETWEEN THE HRC AND OTHER SPECIALISED STRUCTURES OF GOVERNMENT

4.1 What should the nature of the relationship be between the HRC and other structures, such as the Gender Commission?

There should be close liaison with such bodies, as provided in section 7(1)(b) of the Act. There should be open channels of communication between them. If, on receipt of a complaint, the Commission forms the view that it would be dealt with more appropriately by another structure, then it should be able to refer the complaint on. This should take place in a swift and efficient manner.

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

8th Floor, City Centre
71 Loop Street
CAPE TOWN
8001

P O Box 15803
VLAEBERG
8018

Tel: (021) 23 6309
Fax: (021) 24 3561

A

The Executive Director
The Constitutional Assembly
P.O. Box 15
Cape Town
8000.

For the attention of Ms B.Levy: Fax No. 241161

28th April 1995

Dear Madam,

**Theme Committee 6: Subtheme Committee 6.3
Human Rights Commission and Public Protector**

A During the course of our presentation to the Subtheme Committee on the 20th April, the Chair suggested that we should put our comments on the appointments procedures for the posts of Human Rights Commissioner in writing. Will you please convey the contents of this letter to her and the other members of the Subtheme Committee.

Members of our organisation observed the interviews for both the Commissioner and Public Protector posts. We concluded that the current procedures carried serious limitations.

While we agree that the members of the Houses of Parliament have an important role in the appointments process, we do not believe that such a task should vest in them alone. We observed that candidates were asked questions about their political affiliations. We believe that for appointment as a Commissioner, a candidate should show a proven record in promoting and upholding human rights. The interviewing panel should probe candidates thoroughly on this aspect. Party political affiliation may be of incidental relevance, but should not be overly emphasised.

Keeping the interviews in the hands of representatives from the Parliamentary parties also imposes additional pressures on the members of the panel. We observed that not all the members of the panel

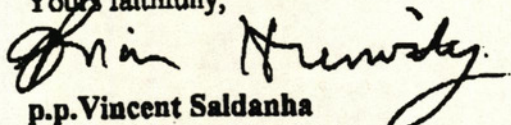
A

were present throughout the interviews. We accept that, with all their other responsibilities, it may have been difficult to ensure that each panellist could be present at all times, but this apparent change of personalities can only lead to a lack of consistency.

As we mentioned to the Subtheme Committee, we consider that civil society should also play a role in these appointments. The final constitution should make provision for an appointing body to be set up in accordance with an Act of Parliament. The latter should contain the details on the proposed composition of this body.

We also enclose our written response to the questions posed on the Public Protector. Our comments on the appointing body apply equally to that office and you will note that we have made specific reference to this in response to question 2.

Yours faithfully,



p.p. Vincent Saldanha
National General-Secretary

National Association of Democratic Lawyers

**CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 6: SPECIALISED STRUCTURES OF GOVERNMENT
SUB-THEME COMMITTEE 6.3: PUBLIC PROTECTOR**

Submissions by the National Association of Democratic Lawyers

1. The Public Protector/ Ombudsman as an institution

1.1 Nadel welcomes the creation of the office of Public Protector. This is an important post. As such, the final constitution should provide for the institution of the Public Protector. The broad outline of this position should appear in the constitution, but with detailed provisions left to legislation.

1.2 We believe that the title of the office should be " Public Protector." That is the expression that we use in these submissions.

The term " Ombudsman " has a sexist connotation and is foreign. We do not believe that, in the South African context, the term " Ombudsman " is so widely understood that it should be retained. The term Public Protector sends a clear message about the nature of this office that will be easily understood by all.

2. Appointment of Public Protector

The holder of this office should not be restricted to the legal profession, nor to any other particular specialist. S/he should be able to demonstrate an ability to inspire confidence and be aware of the potentially conflicting dynamics between the state and other large institutions and the individual. S/he should be prepared to act decisively. Experience in any of the fields mentioned in section 110 (4) of the Interim Constitution could be useful, but should not be essential. The requirement to be a South African citizen who is a fit and proper person to hold such office, is sufficient. The Final Constitution should contain a definition of "fit and proper person " for this purpose. This should include a commitment to the values of the constitution and the fundamental rights and to the upholding of fair and accountable governance.

While looking at the question of appointments, we also believe it is important to address the method by which the Public Protector is appointed. In this regard, we call for a change to the present arrangement contained in the interim constitution. It is our view that those appointing the Public Protector should not be confined to representatives of Parliament. There is an important role here for members of civil society. Party political affiliation should not be the sole determinant of who appoints the Public Protector.

3. Tenure of office

We believe that the tenure should be for a defined period. A period of 7 years would appear to be

appropriate, with no provision for renewal. We are in agreement with the means of appointment and the grounds for removal from office that are contained in section 110 of the Interim Constitution.

4. The functions and powers of the Public Protector

4.1 We believe that the Public Protector should be able to investigate matters both at the instance of complaints received and on her/his own initiative. This would make the role of Public Protector more meaningful and also provide a more thorough way of ensuring that maladministration, abuse of power and other improper conduct by state and other institutions are properly investigated.

It is also important for the offices of the Public Protector to be widely available to the public. The procedures contained in section 6 (1)(a) of the Public Protector Act (Act 23 of 1994) are unnecessarily restrictive. It should be possible for someone wishing to lodge a complaint to do so in whatever way they choose. This could include affidavits or declarations, as well as letters. Verbal complaints should also be possible, provided that the office of the Public Protector records the complaint in writing and has it signed by the complainant to ensure that the nature of the complaint has been properly understood and correctly recorded. These matters could be dealt with by way of regulations.

It should be possible for complaints to be made by individuals on behalf of others, such as organisations and community interest groups. Similarly, members of national, provincial or local legislatures should be able to complain on behalf of their constituents. The restrictions contained in section 6 (3) should continue.

4.2 The powers of the Public Protector should be broadly those set out in section 112 of the Interim Constitution and section 6(4) of the Act. In addition, the Public Protector should be able to exercise any other powers that are reasonably incidental, where this is required for carrying out his/her functions. We have seen the list of further powers suggested by the Legal Resources Centre in their submissions and agree that such powers could be included. We would suggest that further legislation should spell out such provisions.

4.3 We believe that the Public Protector's office must be able to investigate a broad range of matters. These would include maladministration or any of the other mentioned acts and omissions by government departments, whether at national, provincial or local level. It should also include institutions mentioned in section 6 (4) of the Act, as well as other bodies engaged in work on behalf of government departments or institutions. Similarly, it should cover activities of statutory bodies.

5. The Public Protector and the Courts

The Public Protector should not be able to interfere with the independence of the Judiciary. We however agree with those submissions suggesting that the Public Protector should have a role in the administration of the system of justice. The Department of Justice, like all other government departments, should be subject to the investigations of the Public Protector.

6. Provincial Public Protector

6.1. We would also support those submissions calling for there to be a single, national office of Public Protector. The staff of the Public Protector's office should include provincial and local Public Protectors. Each of their responsibilities should be clearly defined in statute. It is likely that in most provinces, it would be sufficient for the same officer to consider complaints about provincial as well as local government. In the more heavily populated provinces, it might be necessary to appoint separate officers. This should lie in the Public Protector's discretion, but on the principle that provincial and local officers should be responsible to the Public Protector of South Africa.

6.2. The relationship between the national and provincial Public Protectors is covered in our response to question 6.1.

7. The relationship between the Public Protector and other specialised structures of government

There will clearly be occasions when the Public Protector's investigations reveal other complaints. It could also happen that a complaint about the actions of a government department raise gender or human rights issues. There should be open channels of communication and referral between the Public Protector and the other specialised office-holders of Commissioners for Human Rights and Commissioners on Gender Equality. It is not necessary for a specific statutory provision to deal with this relationship.

The Public Protector should have general rights of referral to other public bodies where necessary. This could be done through extending the scope of section 112(1) (c) of the interim constitution. This would enable the Public Protector to conclude that even where a complaint appears not to fall within her/his jurisdiction, it could fall within the concern of another body, for instance the Commission on Restitution of Land Rights.



THE BLACK SASH

5 LONG STREET · MOWBRAY · 7700 · TEL. 685-3513 · 9 a.m. - 1 p.m. MONDAY - FRIDAY

at/mi/hrc

Ms Bronwyn Levy
FAX: 24-1161

24 April 1995


Dear Ms Levy,

re: SUBMISSION TO THEME COMMITTEE SIX SUB THEME COMMITTEE
THREE

Please find enclosed the Submissions made by the Black Sash to the Justice Committee when it was considering the Human Rights Commission Bill.

This Submission may be of use to Theme Committee Six Sub Theme Committee Three and as such we wish to place these documents before them for their consideration.

Yours faithfully


ALISON TILLEY



THE BLACK SASH

5 LONG STREET · MOWBRAY · 7700 · TEL. 685-3513 · 9 a.m. - 1 p.m. MONDAY - FRIDAY

30 August 1994

The Select Committee on Justice
The National Assembly
Cape Town
c/o The Director of Legislation
fax 461-4426

Re: THE HUMAN RIGHTS COMMISSION BILL (B 8D-94)

Dear Chairperson and members

We have considered the above bill and wish to register our concerns in its regard.

Most importantly, the envisioned investigative powers of the Commission are dangerously far reaching. We are particularly alarmed by the power of the Commission to compel any witness before it to answer all questions put to him or her, "...notwithstanding that the answer may incriminate him or her" (section 3(3)(a)). No provision is made for the Commission to grant that witness indemnity, as is provided for in the Criminal Procedure Act.

Further, even if the power to compel self-incriminatory evidence were removed, the Commission would be entitled to extract evidence of a non-incriminatory nature from witnesses. The Commission may subsequently charge those witnesses with violating another person's fundamental rights; a witness would become the accused in proceedings where the Commission may be either plaintiff or acting on behalf of the plaintiff. Such an accused person's right to silence has then been compromised.

The proposed legislation lacks any limitation on investigation into past state violations of fundamental rights, which could lead to unnecessary overlap with the Commission on Truth and Reconciliation.

The draft bill does not appear to make specific provision for activities that the Human Rights Commission might undertake with regard to future civil rights legislation. The Commission is mandated to investigate infringements by the state of the fundamental rights contained in chapter three of the constitution, but may lack the power to investigate any infringement of a civil rights act, which would involve private entities. We suggest that horizontal

as well as vertical application of fundamental rights be catered for either in this or subsequent legislation. Consideration should also be given to other functions that the Commission may need to undertake in the interests of effective civil rights legislation. For example, the Commission may be the appropriate body to exempt private organisations from the equality clause on grounds of affirmative action.

The Commission does not seem to be required to report to anyone on its activities. Regular reports to parliament to ensure public accountability are surely a minimum.

The Black Sash suggests that the powers of the Commission be reconsidered in the light of the above, especially in view of the key role the Human Rights Commission will play in developing South Africa's human rights culture. A constitutional court decision finding this legislation to be unconstitutional (with regard to our first point above) would only undermine that important process.

Faithfully yours,

PP Alison Tilley

Alison Tilley
for the Legislation Watch Group



THE BLACK SASH

5 LONG STREET · MOWBRAY · 7700 · TEL 685-3513 · 9 a.m. - 1 p.m. MONDAY - FRIDAY

MEMORANDUM ON SUBMISSIONS MADE TO THE JUSTICE SELECT COMMITTEE ON
THE 14TH OF SEPTEMBER 1994

We wish to summarize our submissions as follows:

1. The Human Rights Commission Bill (the Bill) does not reflect the vision of the drafters of the Constitution, in that it focuses on the investigative powers of the Commission, rather than its task of fostering a human rights culture.
2. Our vision of the Commission is one of a less formal body than is envisaged in the bill, designed so that people can bring complaints on a local level to the Commission, which complaints are referred to the appropriate forum for adjudication. This would require the Commission to have branches in the Provinces. Human rights education work could to an extent be delegated to NGO's, but the main purpose of the Commission should be to create a human rights culture.
3. The bill does not adequately consider the role of other Commissions, such as the Commission on Gender Equality.
4. The bill does not deal with rights other than fundamental rights contained in the constitution. We believe that cognisance should be taken of the proposed anti-discrimination legislation, and the powers of the Commission extended to deal with rights created in that legislation.
5. We believe that the powers contained in section 3(3) are arguably unconstitutional. They are also unnecessary, as no criminal charges are envisaged for rights violations, and therefor no self-incriminatory evidence will be called for.
6. The provisions of section 3(4) do not make the self incriminatory evidence inadmissible, and it would remain admissible in terms of section 34 of the Civil Proceedings Act No 25 Of 1965.
7. We believe that the evidence lead before the Commission should be clearly admissible in a court. We would suggest that the Commission should however not have the power to compel evidence of a nature which exposes the witness to civil liability, bearing in mind that could include punitive damages.
8. Further, if the Commission had such powers, those on the Commission would have to have legal training in order to ensure the correct functioning of the Commission. This would

limit the selection of the Commissioners. We believe the Commission should be drawn from as wide a range of persons as possible.

9. One way of resolving this problem is to give the Commissioners no powers to compel evidence, but only the power to call people before them and require documents from them. The courts would have the power to compel evidence during court proceedings, and could provide warrants for searches.

We believe that the Commission should create a sense of empowerment and community rather than fear. We believe that many people live in fear of courts and court structures and feel that the Commission should not be elevated to a level where it is not real in people's lives.

We thank you for the opportunity of putting our views to you and wish you every success in the difficult task before you.

Legal Resources Centre National Office

8th Floor
Elizabeth House
18 Pritchard Street
2001 Johannesburg

Your Reference:

Tel. (011) 836-7901/
836-8071

Our Reference:

Telefax 833-1747
Docex No. 278

Postal Address
P O Box 305
2113 Newtown

SUMMARY OF SUBMISSIONS TO SUBTHEME COMMITTEE 6.3

THE HUMAN RIGHTS COMMISSION

Geoff Budlender

Introduction

- 1 The experience with the interim Constitution suggests that there is a risk of "over-constitutionalising" some matters. It is simply not possible to anticipate now the needs which will arise in changing circumstances. It is also not possible to plan for detailed structures and processes during the constitution-making process. If the constitution deals with structures and processes in detail, it is inevitable that some of those structures and processes will turn out to be cumbersome or inappropriate. The result will be a need for frequent constitutional amendments. This is both slow and undesirable in principle.
- 2 There is advantage in creating the Human Rights Commission (HRC) as a constitutional structure. That gives the institution both status and permanence. However, it is submitted that the Constitution should provide only a very basic framework or skeleton for the HRC, with the detail to be supplied by legislation.

Structure of the Commission

- 3 There should be a national HRC which is directed by Commissioners. The Commissioners should not be involved on a full-time basis, with the possible exception of the Chairperson.
- 4 The HRC should have a staff headed by a Director appointed by, and accountable to, the Commissioners.

National Office: GM Budlender (National Director), YS Meer (Deputy National Director), C Cilliers (Consultant), FN Kentridge, DB Reid
CLU: WH Trengove SC (Director), M S Navsa SC, CR Nicholson SC (Dbn)
Cape Town: WR Kerfoot (Director), A Andrews, SP Kahanovitz, WA Mgoqi, VC Seldanha, HJ Smith, ML Walton
Durban: RM Lyster (Director), MR Chetty, MA Mdhladzha, RJ Purahotam, P Rutsch
Grahamstown: CM Plesket (Director), G Bloem, JC Coltman, L Mpati, BT Septhon
Johannesburg: NDB Orleyn (Director), N Abraham, TA Bailey, G Bizos SC, EJ Francis, MH Hathorn, N Moodie, DR Terblanche
Port Elizabeth: DF Mias (Director), VJ Brereton, JND Mhlaba, S Moodliar, JW Pienaar
Pretoria: HM Vally (Director), NH de Villiers, D Giffilan, MJ Meake, MB Monama, The Hon JJ Trengove QC (Consultant)

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- 5 The HRC should be an independent body in the sense that it does not form part a government department, and manages its own budget from funds allocated by Parliament or derived from any other source.
- 6 The internal structure of the Commission (eg programmes, departments, etc) should not be dealt with in the Constitution. An Act of Parliament should authorise the Commissioners to deal with these matters.
- 7 The Commissioners should be politically independent. This does not mean that they have to be people without any political views. On the contrary, it should be a constitutional requirement of membership that the person concerned has demonstrated a commitment to the promotion of human rights.
- 8 Parliament ought to play a role in the appointment of Commissioners, but this ought to be an indirect role. Where Parliament plays a direct role, this will tend to result in "horse-trading" of candidates, or middle-of-the-road appointments to ensure that no-one is appointed who might be unacceptable to any of the selectors.
- 9 It is proposed that:
 - 9.1 Parliament (or a committee of Parliament) should appoint a group of selectors, at least a majority of whom should not be Members of Parliament; and
 - 9.2 the selectors should then appoint the Commissioners.

Role and functions of the Human Rights Commission

- 10 It is submitted that the provisions of the Interim Constitution provide a good basis for defining the role and functions of the HRC.
- 11 It is important to attempt to avoid duplication of the roles of various institutions of government. Our country has limited resources in terms of both people and the means to create and run new institutions. It is costly and confusing to duplicate structures.
- 12 In particular, it should be accepted that the courts will generally be the most appropriate institution to deal with individual complaints of violations of fundamental rights. Although there are great problems of access to justice, at least courts exist in every area of the country; there is a body of people employed and trained to adjudicate disputes or complaints; there is an extensive body of other staff employed to manage the courts; there is a body of people trained to bring complaints before the courts; there is a now growing

legal aid system to facilitate access by those who can not afford legal services; and there are NGOs which extend the services which are otherwise not available.

- 13 This is not to underestimate the major problem of access to justice; rather it is to emphasise how much better equipped the courts are, and how much more capacity they have, than will be the case with a new institution.
- 14 The HRC should therefore be focused on issues which it can handle more effectively than the courts. There are three clear examples of these issues:
 - 14.1 The courts do not deal effectively with **systemic issues**. They deal best with individual complaints, rather than with complaints about a system. For example, if there are allegations of persistent assaults on prisoners at a particular police station, the courts will manage (better than the HRC) a claim for damages by someone who was assaulted; but they will be very poor at dealing with the broader questions of proving that there is systematic abuse, and then devising measures to end it.
 - 14.2 The courts will in some cases not deal very effectively with issues of **social and economic rights**. There are many instances in which the courts can deal with social and economic rights; and it is in any event impossible to draw a clear line between "civil and political" and "social and economic" rights. This is therefore not an argument for excluding social and economic rights from the chapter on fundamental rights. But it is undoubtedly true that some complaints based on social and economic rights call for fact-finding processes, progressive implementation, and continuing supervision of a kind which are unusual for a court.
 - 14.3 There is a good deal of debate about whether the fundamental rights should have **horizontal application**, ie in cases not involving government. Whatever is decided on this issue, there will undoubtedly be cases where the courts will not intervene, but some other investigation and appropriate relief are necessary.
- 15 The powers and functions of the HRC should therefore be focused on these issues.
- 16 The HRC should be able to intervene in litigation where it has an interest in the matter being litigated. This will help to ensure that human rights issues do not go by default either because neither of the parties to a case raises them, or because the parties are not able to argue the issue effectively.
- 17 It is vital that the Constitution should make it clear that:

- 17.1 The HRC is not obliged to take on every complaint made to it; otherwise it will drown in complaints which prevent it from carrying out its main functions; and
- 17.2 The HRC should not have to wait for a complaint before it acts. It should not be purely reactive, and should be able to institute enquiries of its own accord.
- 18 A possible draft of the powers and functions of the Commission is attached as an Annexure.

21 April 1995

ANNEXURE: Powers and functions of the Commission

- (1) The Commission shall, in addition to any powers and functions assigned to it by law -
- (a) promote the protection of, respect for and fulfilment of fundamental human rights ;
 - (b) develop an awareness of fundamental human rights among all people of the Republic;
 - (c) make recommendations to organs of state at all levels of government where it considers such action or measures advisable for the adoption of progressive measures for the protection of, respect for and fulfilment of fundamental human rights;
 - (d) undertake such studies for report on or relating to fundamental human rights as it considers advisable in the performance of its functions; and
 - (e) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental human rights.
- (2) In undertaking its activities, the Commission shall have regard to internationally accepted human rights.
- (3) If the Commission is of the opinion that any proposed legislation might be contrary to fundamental human rights which form part of South African law, or to norms of international human rights law, or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.
- (4) The Commission shall be competent to investigate on its own initiative, or on receipt of a complaint, any alleged violation of fundamental human rights: Provided that the Commission shall not be obliged to investigate any complaint which is made to it; and provided further that the Commission shall, within the exercise of its discretion, give priority to matters where a systematic or systemic violation of fundamental human rights is alleged.
- (5) If after due investigation the Commission is of the view that there is substance in the allegation of violation of fundamental human rights, it shall take such steps as it considers feasible to assist the complainant (if any) and other persons adversely affected thereby to secure redress, and where it considers it necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief.

11th April 1995.

The Executive Director,
Constitutional Assembly,
P.O. Box 15,
CAPE TOWN, 8000.

Dear Sir,

RE: THEME COMMITTEE 1 AND 6.

I refer to this week's advertisement inviting citizens' opinions of the issues now being dealt with by the above two committees.

My opinion on the general principles to be applied:-

1. The state exists for the good of the individual and not the reverse.
2. Desirable communal ends cannot justify means which offend inalienable human rights.
3. Since all power corrupts and absolute power corrupts absolutely, checks on executive power are vital to democracy.

MY COMMENTS FOR THEME COMMITTEE 1

1. South Africa should be a unitary state but with substantial devolution of powers to regional and local governments. As in the United States, Australia and Canada, the Constitution should vest the specific or enumerated powers in the National Parliament and the general or reserve powers in the Parliaments of the Regions (States). The critical issue is the limitations to the raising of taxes and loans.
2. The advertisement asks what mechanisms are needed to establish, entrench and protect Constitutionalism.
To establish:
Passage by two thirds majority of the Constitutional Assembly, the "no objection" ruling of the Constitutional Court and perhaps a 50% vote in favour of all eligible voters in a National Referendum.
To entrench:
Amendments to be made only:
(a) by a simple majority of each Regional Parliament
(b) by a 60% majority of both Houses of the National Parliament sitting first separately, then together.
To protect:
(a) All officers of the state, including the NDF and Police take an oath of allegiance to the Constitution.
(b) the rulings of the Constitutional Court, the reports of the Human Rights Commission and the Public Protector.

MY COMMENTS ON THEME COMMITTEE 6

Sub-theme Committee 6.2

The provisions of Section 199 of the present Constitution should also provide that all recommendations of the Financial and Fiscal Commission

should be made public simultaneously with its report to the relevant legislative authorities.

Parastatals, or state enterprises, should be subject to the twice-yearly reports to Parliament and to regular inspection by the Auditor General. As far as possible, state enterprises should try to become self-supporting.

Sub-theme Committee 6.3

The Human Rights Commission will only have credibility if it is divorced from political organisations, present or in the past. I disagree with party politicians being appointed, but perhaps any nominee could be disallowed by a 25% vote being recorded against such person by Parliament, (i.e. power of veto).

Present Clause 116(3) - the report should be made to the public simultaneously with its report to the relevant legislature.

Present Clause 118. The reports should be made public - every complaint should be recorded and the complainant advised of the outcome without too much delay.

Sub-theme Committee 6.4

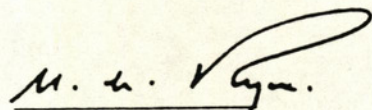
Section 227(1)(f): some limit should be imposed so that the National Defence Force is not used against legitimate strike action, or as a "labour batallion" to the prejudice of the unemployed.

Section 227 (1)(b): perhaps some approval of Parliament should first be obtained.

"Other states": We should not be called upon to intervene in the internal affairs of other states even at the request of the UN, OAU or the Commonwealth without debate and Parliamentary approval.

My apologies for the late submission of these opinions.

Yours faithfully,



H.L. RYAN