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OMBUDSMAN

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MEMORANDUM BY THE OMBUDSMAN OF THE REPUBLIC OF SOUTH AFRICA ON THE NINTH PROGRESS REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

I have been asked by Mr Grove of the Technical Committee on behalf of the Technical Committee to place on record any suggestions and submissions I might want to make in regard to this ninth progress report and the formulation of chapter eight.

For the sake of convenience I would deal with the clauses as they appear in chapter eight. By way of introduction I must place on record that although I am appreciative of the fact that gender has become a major issue in the deliberations, the word Ombudsman is international and was adopted in this country in preference to the former description Advocate-General because of the very fact of its international acceptability and known content. As far as I am aware the word Ombud is in no other country used to describe the office of Ombudsman. I would prefer to retain the word Ombudsman. That is the accepted term and accepted concept. In my view the

term is so well known and descriptive of the office that it can be used irrespective of the gender of the particular functionary. Should gender remain an issue I would prefer a South African term to be coined to describe the office in either Afrikaans or English lacking gender connotation.

1.3 May I suggest that judges and the Ombudsman be appointed in exactly the same manner. This could also hold for the dismissal of the Ombudsman. Should it be desirable or thought desirable that the national assembly should appoint the Ombudsman it should be done at a joint sitting and more importantly by consensus.

If a majority vote is to be taken to appoint an Ombudsman the office becomes politicised, which would be highly undesirable.

1.5 Is unnecessary as there is already an Ombudsman in existence.

2. The present wording of the powers and duties in the Ombudsman Act is all-encompassing and the concept of improper prejudice covers every possible transgression of human rights or laws or abuse of power or unfair, capricious or discourteous or other improper conduct. It is undesirable to enumerate types of conduct which would be improperly prejudicial. One need only think of the application of the maxim *inclusio unius exclusio alterius*. If the need be felt to enumerate then the phrase "improper prejudice" should be contained in sub clause 2(1)(a)(vi).

2.1(b) If the present Ombudsman Act and the powers thereunder are studied it is unnecessary to prescribe how the Ombudsman should conduct an investigation or in what manner he should try and resolve the dispute. That should be left to his own discretion. The present act contains a clause dealing with the interim recommendation during the course of an investigation to the appropriate authority.

Sub clause (iii) It is undesirable that the Ombudsman assist or take an active role in legal steps. Who is going to bear the costs? In what manner will he assist? Must he appoint an attorney? Instruct counsel? The whole suggestion is fraught with administrative and procedural difficulties. If it is a matter dealing with human rights or fundamental rights it could be referred to the Fundamental Rights Commission. Perhaps a clause should be included elsewhere entitling any citizen whose fundamental rights are alleged to have been breached, to legal assistance at state expense, if necessary, to place his case before the appropriate court.

2.1(c) Is not necessary and inadvisable. This would make the Ombudsman an adviser to the Government which may again draw him into the arena as a protagonist for the Government. Under his normal powers of recommendation and reporting the same function could be fulfilled and is in fact fulfilled without spelling it out.

2.2 The present Act contains sufficient powers of investigation and an investigation and the manner of the investigation should be left to the Ombudsman. As regards 2(a) I do not understand what is meant by having the powers of a judge of the Supreme Court.

3.1 Perhaps it is advisable that the Deputy Ombudsman or Assistant Ombudsman as the office is termed in the act be appointed as it is stipulated at present, in the same manner as the Ombudsman.

3.2 This clause would appear to be in order save that the last portion of the last sentence of sub-clause (2) should be omitted. The words "including conditions circumscribing the area or sphere of jurisdiction" are unnecessarily prescriptive and interfere with the manner in which the Ombudsman may wish to organize his administration and office. That should be left to his sole discretion.

4.2 I have already made a comment that the appointment and dismissal of the Ombudsman should take place in the same manner as that of a judge.

4.3 The Ombudsman is not a public servant and is outside a public service. It is inadvisable therefore that the Deputy Ombudsman or Assistant Ombudsman be appointed in terms and subject to the laws applicable to the public service. At present legal assistants and other personnel may be seconded from the public service to the service of the Ombudsman. That provision should be retained and in my view the present Act is sufficient to deal with all these matters.

5. Although it may be advisable to decentralise the Office in due course, that should be left to the discretion of the Ombudsman. As in the case of the Human Rights Commission and the Human Rights Commissioner the jurisdiction of the Ombudsman and his deputies should cover the whole of the Republic encompassing all the regions. Should he wish to appoint an Ombudsman in a particular region that Ombudsman should be subject to his control and direction. It is unnecessary to have a competing Ombudsman dealing only with the functions of a particular region. It is also possible that there could be an overlapping in the jurisdictions and the transgressions. That would make investigation by the Ombudsman difficult.

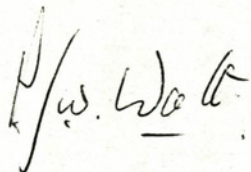
6. Dealing with complaints the present Act requires the complaint to be made in affidavit form. This is in practice hardly ever required except as a filtering mechanism. Perhaps clause 6.1 should have the addition after the words affirmed declaration, of the following words "or in such manner as the Ombudsman may require".

6(2) This is again unnecessarily prescriptive. The Ombudsman can indicate and in terms of the present act request and require the assistance of any person in the public service and it is unnecessary to prescribe and fetter his discretion in relation to the manner in which the complaint should be submitted. In practice there is a toll-free number which any complainant can utilize and

in the telephone call he can be given directions as to the manner in which he should submit his complaint.

It would be useful to look once again at the Ombudsman Act No 7 of 1990 of the Republic of Namibia and chapter 10 of the Namibian Constitution. These Acts have useful clauses although once again I am of the view that they are unnecessarily detailed and the South-African Act with its term "improper prejudice" as describing the jurisdiction of the Ombudsman is all-encompassing.

I am grateful for having this opportunity to present certain views to the Technical Committee for consideration. I would have liked to have presented my views orally. After all, you have approached this office. However, if that cannot be done this short memorandum must suffice and I can only wish you well in your deliberations.



MR JUSTICE P J VAN DER WALT

OMBUDSMAN

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