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DRAFT TRANSCRIPTION OF THE NEGOTIATING COUNCIL MEETING HELD ON 6 OCTOBER 1993 (CONSTITUTIONAL ISSUES)

Mr Moseneke presented the 14th report on the Ombudsman. What follows is the debate and agreements reached.

Chair: There is consensus that we go through the text itself and then cross reference with the report. So can we go through the text which is the Addendum, Chapter 8, the Ombudsman and Human Rights Commission and start with the first clause which is the establishment and appointment of this structure, and perhaps we can, before we start with the actual formulation and the text, deal with the issue of terminology which has been raised in the report. I would like to first take hands dealing with that particular issue.

Ms Smuts: I would like to express the strong support of the DP for the Technical Committees recommendation in respect of the use of the term Ombudsman. On a personal note when I first began to draft proposals for my party on women's rights, I used to use the term Ombudsperson or even Ombud. But because it sounded wrong I conducted informal investigations on Swedish usage. I was likewise advised, much as the Technical Committee has been, on a more formal and academic level, that Ombudsman is a sex neutral term and that in fact an Ombud is something other than an Ombudsman. Since then I have been using the word Ombudsman. On the subject of sounding wrong, I believe that language is a living instrument, it must adjust to changing reality and not the other way around and even more, language can be like a chisel chipping away at reality, at circumstances, in other words when it comes to the crunch any ...on grammar must yield to the new reality. But in the process one should retain some grammatical integrity. Language does have its own logic. It is bound in the end to be a matter of taste. Whereas, I would trust my own taste implicitly when it comes to English or Afrikaans, for example give me the word manpower versus person power, my guts will tell me that it cannot be person power, you have crossed certain boundaries. I do not feel confident about reinventing Scandinavian terminology and I would much prefer the prudent course of following international usage in this case and therefore a very strong plea for the retention of the word Ombudsman.

Mr Desai: I think that this office quite clearly is the appointment of an institution or a person that would be a shield against corrupt government and bad administration in the interest of the public generally. Why should we support a Swedish term to explain to 70% of our people, who are functionally literate, what it means, as opposed to using a term like public advocate, public defender, defender of the people. That lends

itself to easy translation. People will know what this office is about, instead of importing a term that they are not familiar with. This is a very elitist term. Therefore on behalf of the PAC I would propose that we consider either public defender or defender of the people as it is known in Italy or in Spain.

Mr Slovo: I remain completely unrepentant. If we are going to import the Swedish term Ombud it should not end with man. There is no difference between maan and man. The fact that you pronounce it Ombudsmaan doesn't alter the significance of it. It refers to a person of the male sex. Its true that the use of the term in Sweden is not intended to be derogatory of the female gender, but that is so with much of the language that we use and as Mrs Smuts said, language is a living instrument and what has happened in the last 15-20 years in relation to gender language as a living instrument, is that quite rightly there has been an attempt by the gender groupings within society to begin the process of bringing language up to date in accordance with new concepts of equality between men and women. So I am opposed to the use of the word Ombudsman and there is something in the contention by Mr Desai, that we perhaps ought to consider some other term altogether. Like public advocate or public defender.

Mrs Manzini: I have been covered by Slovo, because in my view reading through the literature dealing with decoding language to suit or to be gender sensitive, the term Ombudsman is one of them which in most literature of the people who have started dealing with the question of language, plays an important role in creating perception, in creating gender sensitivity in society and the term Ombudsman has been singled out as one of the terms which are not gender sensitive, thats why I am wondering where the Technical Committee got this. I think most of the literature looking into language have been advanced mostly by women who are dealing with the issue. If we only look at literature which is not written by women who are the ones confronting this issue of language and making society to be gender sensitive than we are going to get one side of the story. I would go along with those who are saying it would be easier for us, especially for women, for people who would be using this office, to use a concept which will be understandable and that will either be public defender or defender of the people rather than import a language which is not ours and not gender sensitive.

Prof Ripinga: I think as you have also noted in the survey by the Technical Committee that there is nothing wrong with the word Ombudsman. If one looks at the dictionary it means just that. But the issue under discussion, is the question of the relevance of the word in our own situation especially a new state that is in transition, which is beginning

to grapple with new terminology and concepts. If one takes into account the majority of the people in our country who are illiterate, whether the word Ombudsman would be meaningful, will convey a sense to the people on the ground, it is for this reason that I think Ombudsman, although adopted by other democracies, as being appropriate, for our South African situation I would recommend that we look for a laymans term, for example public advocate, public defender or defender of the people. That makes sense, its easy to understand what the role of the people is going to be.

Chair: Before I let the other speakers take the floor can I point out that out of the 5 people who spoke on this issue, 4 actually are saying that the terminology which has been imported is not appropriate or suitable for our purposes and that in that regard therefore there seems to be consensus. Only one person has suggested that we retain the word Ombudsman. While I would like to go to the two speakers I have on my list, I wanted to point this out and perhaps the speakers I have on my list could either forego their chance and we move onto the next point, unless they are going to come up with a different point that has not been raised.

Mr Saloogee: We should have a word other than Ombudsman. We don't have to be Eurocentric.. There might be words emerging from Europe that might be appropriate. What we want to do, especially in the light of our history, the kind of corruption that we have witnessed, we should have a term that makes sense to people and we would like to advocate public advocate. The word advocate is not confined only to advocates. In the field of social work there is the role of public advocacy on the part of social workers and in other professions. That would suggest more clearly what a person like this should be doing.We had toyed with the idea of public defender. But there is the possibility that people might confuse it with legal aid agencies. Those were the two names. But after thought, we felt we should go for public advocate. Ombudsman is not going to make sense to the ordinary people who want to use such an office.

Mr Landers: I am going to differ with the speakers who have already spoken and align myself with Ms Dene Smuts. My party agrees with the Technical Committee. The term Ombudsman is universally accepted. If the so called 70% of the illiterate of this country don't know this term than it is for us to teach them and explain to them what the term means. We have the term public defender, Mr Saloogee has shot that one down for the reasons he has put forward. We are not convinced that the term public advocate would be appropriate. So it would take us time to find an appropriate term while in fact we have such a term before us. The Technical Committee has already pointed to us that it has no gender connotation and we believe that we are being overly

sensitive about.....

Tape 1 ends (side A)

Mr Meyer: This is not something that we would have a strong feeling about this way or that. But what do we call this post, executing the functions in terms of the powers allocated in subclause 3. If one looks at that it becomes clear that we dealing here with a person who doesn't act only as a defender or an advocate but also as a mediator as an investigator, as one who can make recommendations and so forth and I think it would be appropriate to look at the functions and the powers of the person in that regard. I would argue that we have to deal with a post or person which is sui generis something that became known in terms of the international explanation as Ombudsman. That being the case I would like to associate myself with the points made by Mr Landers. For lack of any clear definotion in terms of the name of this post, Ombudsman should be appropriate in our circumstances as it is a post of a different nature to that of defender, advocate or whatever. For lack of anything else I would suggest Ombudsman should be acceptable.

Ms Sgau: I think that in giving an explanation the Technical Committee has given us the meaning for Ombudsman, without sounding international, why not use the simple meaning we have been given and talk in terms of a public representative, because they say that the meaning for that Swedish word is representative. So deriving from that meaning we use a straightforward word of public representative.

Mrs Jajula: Given the history of public administration and how this office was started it was briefly composed of all men and this word means nothing else but a group of men in this office. Therefore I do not agree that we should use this word Ombudsman.

Chair: Can I ask speakers to either support the proposals that have been put forward or come up with alternatives. We so far have had proposals for public defender, or defender of the people, public advocate and public representative.

Mrs Tshabalala: I would support Ombudsman. If we look into our dictionaries, the word man, means a human being not necessarily a male, or an individual person and if you read from the bible, time and again, they talk about man and man not necessarily meaning that they refer to the male person. So this word would have to remain because we would have to learn some of the terms.

Mr Hettasani: I would like to support the group which advocates public advocate because the word Ombudsman is so foreign that we are not sure that we are pronouncing it correctly. If you bear in mind that the people we have assembled here to make the laws for are mostly illiterate and people who struggle to pronounce words such as advocate. The word Ombudsman will be more difficult to pronounce. The word advocate as we know it, advocate in black society is a very educated and respected person, you see him through your attorney and associated with high expenses. It would be easier for people to know that they have a public advocate which .....whom you can see without going to an attorney and for whom you pay almost nothing. I feel that the word public advocate would be more suitable.

Mrs Giba: I am against the word Ombudsman and the alternatives that have been advanced, I discount the word public defender because it has a different connotation to the literal meaning of Ombudsman, its narrower. We should not have a name fixed now, why not tell the Technical Committee to come back to us with alternatives.

Mr Mothiba: The use of the word Ombudsman has been properly enunciated by Mr Landers as and Mr Roelf Meyer. I support the use of the word Ombudsman.

Ms Smuts: A possible solution from my colleague, a compromise which roots it in the South African reality unfortunately its sexist, Mr Andrew's suggests, Oom or oOmbudsman.

Chair: Perhaps having listened to the debate, there is no consensus, we should refer it back to the Technical Committee. There have been alternative proposals to the term Ombudsman, public defender, defender of the people, public advocate, public representative and those proposing that we stay with Ombudsman.

Mr Moosa: Its unfair to refer the matter back to the Technical Committee. If we aren't able to resolve it now, we as parties need to come up with another proposal. Lets drop the discussion and over tea try to come up with something that is acceptable.

Chair: Agreed?
Agreed.

Can we now go back to the text? I will now call upon questions of clarification and comments.

Dr Rajah: On Clause 1. Clarification which must be read in context with the intention to appoint an SPR office. When you suggested that we appoint an Ombudsman I presume you intend appointing a single person at the national level and there will be no Ombudsman at the regional level?

Mr Moseneke: We create the office of the Ombudsman in 1.1. That office could have any number of persons appointed by the Ombudsman, and this you can find in the text itself, if one looks at 4.1:The Ombudsman may appoint in a manner prescribed by law such persons as may be necessary for the discharge of the work of the office of the Ombudsman. So that law will clearly create a hierarchy within the office of the Ombudsman and these may be deputies, may be assistants. So this is the framework that will allow a law that will set up the details and the internal structure of the office. In regard to office of the regional Ombudsman that we find in 5, there we say that ...SPR ...may by law establish and regulate a office of the SPR Ombudsman. So every region would pass a law and establish an Ombudsman office and we say in 2 however that the Ombudsman created in terms of this constitution would still have powers to function at all levels of government, so it will be able to report to the national legislature as and when it becomes necessary despite the presence of regional or SPR Ombudsman offices.

Chair: That was clause 1.1. Can we have comments on 1.2.

Prof Ripinga: I thought 1.1 is related to the proposals that are made by the Technical Committee which I thought you will direct us to debate on. The 6.1.1, 6.12 and 6.1.3, so that we agree on whether we have an office or whether offices. We would support the question of an office as proposed in 6.2. In the constitutional principles, we were talking about the question of the equitable distribution of money collected at national level to give it to regions. So if have an office of an Ombudsman at national level than this particular person would be the right person to supervise and monotor the monies, irrespective of the boundaries.So we must talk of an office.

Chair: The proposal by the professor is that as we go through the text we should be cross referencing with the report and the proposals contained in the report and he is now addressing himself to the question of the different models that have been put forward in the report and he is proposing that we go through the second model which will have office at the national level and each SPR may by law establish and regulate the office of the SPR Ombudsman and the powers and functions of such an SPR Ombudsman shall not derogate from the powers of the national Ombudsman at any level of government.

Mr Desai: Our first choice would be the first model envisaged. There be one national office of an Ombudsman. We feel this will bring about uniformity of approach and we also feel that cost factors must be taken into account. There needs to be a hierarchy that clearly has set parameters, goals and we don't want a situation where there could be problems between the various Ombudsman. One office with subordinate Ombudspersons in the different regions. If that is not acceptable we will reluctantly go by the second model.

Chair: Should we leave this discussion to section 5 or should we deal with it now under the first clause. Agreed that it be dealt with now.

Dr Rajah: I want to go back to the report itself. Where it discusses the three models. The three models appears to be independent models and to me they are not mutually exclusive because there are elements of the third model which can also be incorporated into the second model and to draw the distinction, while we agree that there must be a national Ombudsman, we also agree there must be a regional Ombudsman. If you look at page 7 it separates clearly the functions between the two offices. The one investigating matters relating to matters at the national level and the second one to the regional level. If we are going for the second model that clarification must also b introduced into model 2.So the third astrix of model 3 should be incorporated into model 2 because to say that each SPR may establish and regulate office of an SPR Ombudsman merely is setting up an administrative procedure, it is not functionally related.

MS Smuts: If one is serious about devolution as opposed to decentralization than the third model is the one that logically recommends itself. I refer specifically to the second last point. The national Ombudsman shall be appointed by and accountable to parliament and the regional Ombudsman by and be accountable to SPR legislatures. Its neat, its clean, its the way its supposed to work. If each legislature is a power unto itself, it ought to in fact appoint its own Ombudsman to keep an eye on its own executive and we like the last provision, that the national and the SPR Ombudsman should from time to time identify areas of common interest. There is no reason why they cant cooperate and enrich each others work.

Mr Moseneke: I want to point out to Dr Rajah you cant mix those models that readily. Its one thing to make an selection as Ms Smuts would have done, quite another to have a mixture of them because you have to make a fundamental decision whether your national Ombudsman would have unrestricted powers to investigate, administrations right across from the top to the bottom. In asmuch as there would be allocations of

money from the top to the bottom. The other choice is to separate these quite clearly and make them follow the lines of competence, so you cant have an Ombudsman who would have powers to investigate at any level of government and at the same time add the provision in the third model which will exclude the Ombudsman from enquiring into competencies which are SPR competencies. So you cant mix them.

Mrs Brink: According to the model favoured by the Technical Committee no real consultation or control will be exercised by the national Ombudsman with regard to the regional Ombudsman. Does the Technical Committee foresee the development of any channel of consultation and control between the national and regional Ombudsman as to prevent an overlapping of interests or even clashes between the two. We think it is important that the Ombudsman has a jurisdiction over all government agencies and officials throughout the country. Serious thought should be given to bring the regional Ombudsman at least under consultative control of the national Ombudsman. Consultation must be obligatory to endeavour to achieve uniformity and perhaps a regional Ombudsman should be appointed and perform functions under the control of the national Ombudsman. One does not want to diminish the exclusive powers of the SPRs but this aspect should be clearly and carefully worded. It must be borne in mind that Human Rights Commission and the appellate division of the supreme court will make rulings binding on the whole country. The question we would like to ask is should the Ombudsman not function in the same manner?

Dr Venter: The question is an important element that will have to be decided , to choose one of the models. The question of accountability and reporting must be seen also in conjunction with the appointing body. Ombudsmen almost invariably, are people who are appointed or elected by parliament or a legislature and if you have SPR ombudsmen by SPR legislatures, clearly they should also report primarily to that SPR legislature. On the question of general, national control, or control by a national Ombudsman over SPR Ombudsman, it may not be necessary to regulate such a thing. Ombudsmen across the world tend to like birds of feather, flock together. There are various international and localised associations of ombudsmen. If you also have overlapping jurisdictions as the second model would seem to imply than a natural process of cooperation would develop and if there are problems of the Ombudsmen at different levels cooperating with each other, there should be no loss,because then the job is done twice.

Mr Landers: We would accept the second model provided by the Technical Committee because we understand there may be occasions where the national or federal Ombudsman may well have to go into SPR legislatures or SPR departments and that provision must be allowed .

To simply block out the national Ombudsman and say that the SPR Ombudsman would do the necessary in a particular SPR and him alone with his staff is not adequate, we believe. I do have a particular problem in the second paragraph where it says that each SPR may... I am not sure whether this is an enabling, in section 5 it says may as well and where this is an enabling provision, if it is and whether it is not obligatory than I would have a difficulty because if we argue for the need for the creation of national Ombudsman than it is a logical extension of the argument that you should also have SPR Ombudsman as well. Therefore it should be obligatory for SPRs to create such offices rather than to leave it to their discretion as section 5 does at this stage.

Mr Chaskalson: I think that model 2 as developed in the text would require the national Ombudsman to establish offices around the country so there would be offices in each SPR as well and the national Ombudsman would have power to investigate at all levels of government. What it does do is to permit an SPR Ombudsman in an SPR legislature in addition to establish its own Ombudsman office. So the result would be that the national office would have access to all levels of government and would have offices at all parts of the country, but in addition the SPR could establish an office and local authorities could establish offices etc.

Mr Landers: My difficulty is that the provision does not make it obligatory. The provision is an enabling one. It says SPRs may establish... if we are saying there is a need for an Ombudsman then let us be logical and say there then must be Ombudsman at all levels of government.

Mr Ngoepe: Mr Landers will tell me if I don't understand him correctly, I understand him to say that if we were to eventually opt for a system where there would be only a national Ombudsman who would not have jurisdiction to inquire into the activities of the SPR executives, than in such a case we should make it obligatory for the SPRs to appoint Ombudsman. I think he is right in that respect because if you opt for a system whereby you have national Ombudsman who has no jurisdiction to oversee the SPR executives and you do not make it obligatory for the SPRs to have Ombudsman you may have a vacuum there.

Mr Moosa: We are in the process of drafting a constitution for the country and therefore we under obligation to make provision for an ombudsperson who would be independent and impartial and that is really the point. Whatever provisions we make, we must make it certain that the person that is appointed and the office that is created is completely independent and impartial. Once we make provision for that than there is no reason why and I would like Ms Smuts to listen to this, theres no

reason why we should then say thats such an office should not be competent to hear complaints and enquire into and investigate the activities of any government agency, any level of government anywhere in the country. Theres no reason why we should not say that. One cannot use the argument about decentralization and devolution to say that we created this office which is independent and impartial, person who is well respected but may not inquire into the activities of the management committee of the Johannesburg City Council It wouldn't make sense. Once we break up and fracture that office into all sorts of pieces where every region will have its own autonomous ombudsperson and the national government has it own Ombudsman that cannot inquire into regional departments. We are possibly creating a recipe for people getting away with a lot of corruption. We don't want that to happen. So whatever model we adopt, the office of the Ombudsperson must have competency to inquire into and hear complaints which apply to any level of government, any government agency, any state organ any where in the country. Thats a principle which we must accept. Unless someone can argue that this formula des not allow for the appointment of a person who would be independent and impartial. Than we need to do something about the appointments mechanism. Now, as to whether or not SPR should have their own Ombudspersons, apart from the need for administrative purposes for that office to have offices in each of the SPRs and perhaps offices in big cities, there seems to be no objective need for SPRs to appoint their own Ombudspersons. I have not heard any argument as to why you would want to do that. Unless you are saying a particular SPR is going to object to their finances or whatever, being investigated by the national Ombuds office. That can be the only reason why an SPR would want to appoint its own Ombudsperson. However, anybody, the Star newspaper has appointed its own Ombudsman, so that the ABC could appoint its Ombudsperson likewise the city council could appoint its own Ombudsperson, if it wants to and announce that it has such a person, it has. So that nothing stops anybody from appointing their own ombudsperson to do whatever they want such a person to do. What we are really trying to create here is a national office and we should be clear about not curtailing the competence of that national office in whatever way.

Mr Saloogee: A point of information, I see it says in 6.11, such an Ombudsman shall be obliged to appoint in every SPR at least one SPR Ombudsman. Why at least one, I thought that at the national level you would have your Ombudsman and at the SPR level you would have you will have your Ombudsman. But with offices and staff. So why do we talk of at least one. Is it suggestive that there would be more than one such office in an SPR?

Mr Moseneke: It is conceivable that in any province perhaps in a province as large as the Cape province, national Ombudsman may want to have three or

four offices. We make it obligatory to have at least one. In that first model there will be a national office and the national office will in turn create regional offices so that there will be no connection between those regional offices and SPR legislatures. If you will, it is wholly national. Because the lines of authority will run through the national Ombudsman who would be obliged to appoint at least one to make sure that every region will have the facilities of the office of the Ombudsman. And at least one means in some regions which are busy there may be more than one office.

Mr Desai: I wanted to point out something to Mr Landers. He referred to the second model, that each SPR may by law establish and regulate the office of the SPR Ombudsman. By that inference he says that it is just an enabling measure. If I can refer him to merits of the first model. There the Ombudsman shall be obliged to appoint an SPR and further, those that feel that there will be little or no consultation with regional government, the appointment of such an SPR Ombudsman shall be subject to consultation with the legislature of each relevant SPR. I will therefore submit that the second model takes care of a lot of fears that have been expressed here.

Dr Rajah: The debate revolves around two questions of whether we have a national Ombudsman with offices at various regions or alternatively a national Ombudsman with regional Ombudsman. I think the preference here, for reasons also stated in the text and what Mr Moosa says, not to fragment the office, to go for a national Ombudsman with the facility of an office at the regional level. If you take it in that context, what is contained here is contradictory to the proposal if I read it literally, when you say that an SPR legislature may establish by law and regulate an office of an SPR of a regional Ombudsman. There is no really no regional Ombudsman, there is only an office of the Ombudsman at the regional level. So it could be read that it contradicts or it might intend to convey another meaning, because the SPRs have no authority to establish an office. Its a function of the national Ombudsman to appoint that office and the office at the regional level will also be accountable to parliament and accountable at the national level. What is contained in section 5 is not really what is intended by your committee because this implies in section 5 that the SPR may appoint its own regional Ombudsman.

Dr Venter: In response to at least two of these questions, one should point out one or two perspectives. An argument for having an SPR Ombudsman would be that as things are developing in this model of the constitution, SPRs will have legislature which will have functions to perform and therefore will also have administrations or even SPR public services. An Ombudsman operates on the basis of his parliamentary legitimacy, mostly within the administration or the

executive, to investigate and report to parliament whether things are going well or not. On a structural basis, some problem arises that if you only have a national Ombudsman, because it then crosses he lines appointment and reporting of the SPR legislatures potentially. What we are proposing in the text, in the second model, requires parliament to appoint a national Ombudsman with complete and full jurisdiction over the whole of the republic including what is gong on in the SPR administrations and then it goes on to say that if an SPR legislature requires further agency of investigation within its own administration than it may appoint such an SPR Ombudsman. Therefore you will have an overlap of jurisdiction which will probably not be a bad thing. One would also probably see the development of close cooperation between the national Ombudsman appointed by parliament and all the SPR Ombudsman appointed by the various SPR legislatures.

Dr Rajah: That explanation than gives a totally a different picture of what is contained in the legislatures. because what we saying is that in the second model you say a national Ombudsman shall have the functions at all levels and then you also allow for the regions to appoint an Ombudsman answerable to the regional legislature. If it so, it therefore overlaps to some extent with model 3 because somewhere along in the constitution you have go to separate those two powers. if the SPR legislature has the authority to appoint its own Ombudsman than somewhere in the text there should be clear distinction between the two powers and that goes contrary to what Mr Moosa says. that we should not fragment the office. This allows for the fragmentation of the office. If we are suggesting that the SPR should have that opportunoty than there has to be more details of the separation of the function between the national and the regional. That is not entirely a clean model as contained in model 2.

Prof Ripinga: I think the confusion is caused in model 1 and 2. If you look at the SPR Ombudsman , they are not the same. In fact in model 1, that Ombudsman, if we are talking of one national office, we have one Ombudsman in the country, at the regional level you don't have a Ombudsman but you have an Ombudsman representative, that is the position with regard to model 1 and 2. But in 6.1.3 you have a clear distinction, you have two offices, the national office and the SPR one. But at the other two models you have a representative. The confusion is caused by referring to those offices as Ombudsman. they are Ombudsman. The re standing in the place of the national Ombudsman. You cannot call them at that level Ombudsman too. They are representatives.

Mr Moosa: Dr Venter has not succeeded in giving a convincing argument as to why you need SPR appointed ombudspersons. He on the one hand says that because you would have an elected legislature and you want the ombudsperson to be accountable to that legislature..**tape ends** ...

to obligations that various levels of government will have. One of the obligations we want to say is that an ombudsperson should be appointed. As to whether or not any person/institution wants to appoint its ombudsperson, I have said earlier, that can be done by anybody. The minister of internal affairs could decide to appoint an ombudsperson in his or her office for example. There is nothing in the constitution that prevents anybody from doing such a thing. Thats a separate matter. What is important here, and we must take into account where we are coming from and we have to take into account the history of this country, I don't want to go into the gory details of the history of this country, except to say that we now want to establish a proper system of government and therefore model 1 provides precisely that. That you have an appointment system for an ombudsperson which is impartial and independent. That ombudsperson establishes regional offices. Everybody then knows who to go and complain to regardless of which region and which level of government that you want to make the complaint about. There is no reason why we should say in the constitution that you now want to give people a choice, I don't like that Ombudsperson so I would go and complain to another ombudsperson who is appointed by the regional legislature that may be well be one party dominated as we have presently in many instances and therefore I would get a better and more sympathetic hearing. It could induce an investigation more easier if I choose that ombudsperson and not this ombudsperson. We don't want any of that. Certainly not at this stage in the development of South African politics.

Mr Landers: When I read these provisions, my understanding of them was the same as that put to the council by MS Dene Smuts. Having listened now to the Technical Committee and the many questions and answers received, my understanding is different. I must now agree with Mr Moosa. I am now inclined to accept model one. I fail to understand the need for the overlapping. Why if the national Ombudsman is given the power to create regional offices for Ombudsman, why then create an additional office to do precisely the same thing which is investigating corruption and maladministration. It does not make sense. The other thing we need to consider, is financially, can we afford it? Can central government afford it and can regional government afford it? Even if the regional government says yes it can afford it should that money not be spent on something more worthwhile? There is already an office of the ombudsperson in the region. So I believe than the Technical Committee needs to reconsider this matter and I would urge Council to accept model 1 for the reasons that have been explained. We can accept overlapping people and offices doing precisely the same thing.

Dr Venter: As a matter of procedure I would like to point out that we came up with these three models, we formulated 1 in the constitutional text for the purposes of this council to make a decision, which model it

prefers. We cannot, if you refer it back to us, come up with something different or much different.

Mr Mothibe: If we are as council here are serious of the SPR legislation and the devolution of power, I find it difficult to appreciate why we feel that the SPR legislature should not have its own Ombudsman.That legislature should be competent to appoints its Ombudsman. I would find it difficult that the national Ombudsman should encroach upon the area of jurisdiction of an SPR Ombudsman. We have already indicated... of SPR powers, clause 118, when we were discussing the different competencies and which powers, how should the national government exercise its powers , concurrent powers than it is important for us to consider two separate Ombudsman offices, the national Ombudsman appointed by the national parliament, to be competent, to work within he offices of the national government and to provide for the SPR legislature to appoint its own Ombudsman to operate within the area of competence of that SPR legislature. I feel therefore that the third model is most appropriate.

Mr Eglin: I want to follow up on Mr Moosa's comments, but not following him right back into a unotary frame of mind. I want to try and see if there is a meeting of minds. We have indicated that we prefer the 3 model. That would be the appropriate model for a fully fledged federal system. We are not going to get that in the first constitution although we hope to get it in the final one. There is the case to be made for saying that there is an integration of the areas of investigation while the national Ombudsman, it would be very difficult if he were suddenly cut off and not allowed to investigate below national level issues. One acknowledges there is that problem of integration. If I look at model 1 , its incorrect to say that this involves a central Ombudsman with a number of regional offices. Thats not what it says. Obviously he can have regional offices where he wishes to but this says that such Ombudsman shall be obliged to appoint in every SPR one Ombudsman, not open an office, But an Ombudsman. This is a different concept from having regional offices, this is an official. I would argue that he is going to be an SPR Ombudsman, the third clause says that it should be subject to consultation with the legislature. if there is going to be that person who cooperates with the national Ombudsman in this context that he in fact should be appointed by the legislature of the SPR to perform that function, that for the SPR to nominate him. It doesn't detract from the concept of an integration of work. What it does mean is that SPR Ombudsman as a person is not appointed by the national government but as a person is appointed by the regional government. Provided one does that , that the two functions are interrelated its quite clearly that between them they work as a team in a sense and I would believe that in the end that when there are matters of national investigation, the report would go to the national parliament. When the matters related to SPRs it would go to

the SPR parliament. I would see that there is some merit in fleshing out model one, providing that its is clearly understood that the SPR Ombudsman working together with the national Ombudsman is appointed by the SPR to the extent that he does SPR investigations, to that extent he reports to the SPR parliament. So I am looking for a way of saying that functionally, you can operate as a single entity. But in terms of SPRs believing that they have a right to appoint someone, that should be an inherent right and not just the right to have an SPR Ombudsman nominated by the central Ombudsman.

Mr Slovo: We support model one. There is some substance in what Mr Eglin has said. One can address the question of how the appointment takes place and to whom reports are made. But what worries us is we go to some of the other models there is a danger that the office of the ombudsperson could be discredited if both at national and regional level there is competitiveness in relation to the investigations that relate to say level of government and relate to a region. One need merely refer a very topical example, if we had a national Ombudsman today, and we had regional ombudspersons in all the existing inherited apartheid regions, imagine what would happen in the case of recent events and reports that have been circulating about KwaZulu, Lebowa and so on. I think that the office of the Ombudsperson would be discredited as a result of the ombudsperson in the regions being responsible to the local legislature, the ombudsperson at national level being responsible to the national legislature. therefore we believe that the whole system should be integrated with some rights to SPR legislatures to nominate, have a say in the appointment to receive reports but in essence there must be an integration of the functions of the whole structure of the ombudsperson and therefore we support in essence model 1.

Chair: It would seem that there is a clash in the minds of people with regards to if you have ombudspersons at a regional level and yet you do have a national ombudsperson and by virtue of that person being a national office bearer, that person has the responsibility to see to it that their work covers the whole country, how do you avoid a clash of interest. How do you ensure that the work of this office is done in the best way possible, with regards to the impartiality and independence of that office and this relates specifically to the fact there is national parliament that would appoint the national ombudsperson and therefore when you talk about the SPR level you have got to bear in mind the question of to whom those people must report, would it be to the regional legislatures, to the national office which invariably reports to the national parliament and that we have got to try and bridge the gap. I think the proposal that has come from Mr Eglin begins to give us a possibility to look at a compromise position and I would like to direct the minds of the next speakers to towards attaining this kind of approach.

Dr Rajah: We do not want to confuse the debate by bringing in concepts of unitary and federalism into this structure, it might connotate different intentions as far as the introduction of the ombuds office is concerned. When the three models were suggested, we can bring in some variations as far as the bodies are concerned, so while the first model is accepted what we have to decide is the second astrix is whether we are going to make it an obligation that the national shall appoint the ombuds. What was suggested that at the national level they should make the facility of the office available at each of the SPRs. Because that is far as we should go because on page 4 of the text, it does make provision that the ombuds may appoint in a manner prescribed by law such persons as may be necessary for the discharge of the work of the office of the ombuds. So if he wishes to appoint a deputy in that office or at any other level than he is entitled in terms of section 4.1 to appoint any other person to man that office. The intention here is to have an integration of the entire function and the office and the administration of the ombud. If you start fragmenting it into regional etc at the is preliminary stage you are going to create unnecessary confusion and perhaps an elaboration of the... which we do not need at this stage. The intention here is to have a national Ombudsman and a facility of the office of the ombuds at each level. And it should be left to the discretion at the national level of the appointment, of the level of the staff, whether he wants to appoint an officer or a deputy etc. Rather than making it an obligation to appoint each Ombudsman. So there has to be not a clear choice of model 1,2 and 3 but an amendment to some of the suggestions contained.

Chief Gwadiso: Can I get clarity, Prof Ripinga tried to analyze the first model and suggested that those SPR Ombudsman that were to be appointed by the national ombudsperson are not Ombudsman but representatives. Can I get clarity as to whether that is the case or not.

Mr Moseneke: The first model, you would have one office of the national Ombudsman and that office would appoint every region a representative of its office if you want to use that terminology in every region and than we make allowances for the appointment of such representatives of Ombudsman offices to be subject to consultation with the legislature of each SPR ... a suggestion from Mr Eglin to develop that [articular point further that the nomination should emerge from the SPR itself. That is model one. You have only Ombudsman office which would ramify and there would be consultation at every level of appointment with the relevant SPR legislature. That is model 1. Model 2 again the Ombudsman would have investigative powers at any level of government, would be able to penetrate right across all administrations and you would see however constitutionally each SPR may create their own office if they so which. We create the competence there, we don't make it compulsory. Remember the national would penetrate right down. Then you will note that we say

that the powers of the national Ombudsman will not be curtailed by he fact that the SPR may create its own SPR structure. The third model separates the functions entirely along the competencies, regional Ombudsman would be appointed by regional legislature, national Ombudsman by national legislature and the reporting lines would follow the same line, they would report back to the respective legislatures for that purpose. those are the three models we have placed before you. You can create other variations out of all of these models. These are the more obvious and basic lines. To summarise the first two, national Ombudsman has powers right across all levels. In the one the SPR appoints the ombudsperson in the other national office appoints the regional representative of the ombudsperson. In the third one there is complete division.

Chief ?: It is the wish of this council to create a situation where the ombudsperson would have the powers right through the levels of government. I have a problem if we are going to have a regional ombudsperson appointed by the national ombudsperson with restricted powers, because in here I see a clash, I don't know whether we are .... with a political problem. On the other hand we have this government closer to the people and on the other federalism and on the other hand we have got this ... of a unotary set up. But like it has been said by Mr Moosa that we should have an ombudsperson . I would support an idea where we have an ombudsperson who is going to have powers right through the levels of government. I am worried about the consultation as to where the ombuds people or representatives at regional level, where are they going to report to, national or regional level. That is the only problem I have. I would support the idea that it is going to be national and the powers right through the levels of government.

Mrs Kruger: The symbolism that is connected with the Ombudsman. The idea of an Ombudsman from the AVU's perspective is that would be an acknowledgement both by he government that actually instates this person as well as the people that is governed by that government that we are going to have transparent free and fair, adequate, reasonable government. So what we are concerned about is in what way can we ensure that this symbolism will be best put to the people of the country. We want the message to go out that every single government that is going to be established in the country, national or regional government will have to be forced to say we are going to be transparent, therefore we are going to appoint an Ombudsman to monotor what we do, to report to us so that we can be accountable for that. That is our departure and in the light of this the only sensible thing to do is to have every government, regional and national, appoint an Ombudsman, thereby saying to the people we are prepared to be investigated if you want to put it that way. We are prepared to have the people make complaints about the way we administer in this

region. Therefore every level of government should be able to appoint their own Ombudsman and also because of this reason, that Ombudsman being appointed by that government should report back to that government so that government is held accountable by the very person it appointed himself. The proposal that MR Eglin has made seems to make sense. The only important issue for us is that we would have regional government appoint an Ombudsman and have the Ombudsman report to the regional government. We could establish , where you would have all the Ombudsman in the country, a council of Ombudsman or something to that effect where they can liaise with each other, but he symbolism of the Ombudsman should be retained and the only way to do that is to have every government to be accountable.

Mr Hettasani: We believe that the third model is the best and it fits well with the idea of devolution of power or the division of power between the national and the regional. the reason why we are going to provide for the national legislature and the regional legislature shows the division of power is meant to address the problems more adequately. We are aware of the fact that this office of Ombudsman shall have as its main function to act as a watchdog for the maladministration therefore it would be best addressed if at the national level there is an Ombudsman who would look at the maladministration which occurs at that higher level and therefore at the regional level there is an Ombudsman who would be able and best suited to address the maladministration which would surface at the regional level. there is no problem regarding the clashing of the spheres of interest for example in the national sphere we find that there this duties which are exclusive to the national body and those that are closest to the regional body and we also have the concurrent powers and this has been provided for in this model 3. It goes on to say that the national SPR Ombudsman shall from time to time identify areas of common interest and cooperation, in other words it is envisaged that at one time or another there will be conflict of interest and since there is provision when that occurs that the two Ombudsman will sit down and thrash out the matter. This is the best model. On page 7, the second star says that the national Ombudsman shall be appointed and be accountable to parliament whereas the regional Ombudsman by and be accountable to the SPR. This to us appears to be a very clear division of power which will not create problems since each power shall have its own field where it can exercise its own powers properly and this is in line with the idea that is in most of the bills where there is a division between powers at a higher level and at the SPR level. There is no reason why an Ombudsman at the regional level should be appointed by national Ombudsman .

Chair: It would seem that the house is getting restless. I have two more speakers after which I like us to see if we cant summarise the debate

and then break for tea.

Mr Schoeman: We would like to support Mr Eglin. We would not like to see the national Ombudsman have just officers in these regional as regional offices. We would like to see integration, we think thats necessary, so may I suggest that in the line last paragraph it says: the appointment of such SPR Ombudsman shall be subject to consultation. If we change that to say shall be in consultation with the legislature of each relevant SPR whether that would make it then more of a certainty that they cannot just appoint it but that thy should do it in consultation so that the SPR legislature has a special say in that.

Mr Moosa: Mr Schoemans suggestion would assist us a little more than Mr Eglins original suggestion I wanted to say about Mr Eglins suggestion, if you say that the SPR legislature appoints the Ombudsman and at the same time you then want to say that ombudsperson falls under the national ombudsperson, it doesn't make too much sense, that the regional legislature appoints the ombudsperson, it would want a say what that ombudsperson should do and it would want that ombudsperson to be accountable to regional legislature and not to the national ombudsperson. So its a contradiction in terms. I am surprised that Mr Eglin makes a suggestion which is purely ideologically motivated. There isn't any good reason as to why we should have such a system. You are saying that in line with federal principles this would be a good thing. What we really want SPRs to have the power to run their own affairs, to have the freedom to run their own affairs, not the freedom to be as corrupt as they want. Thats important and we should accept that principle. I would have no problem with SPRs playing a role in appointing the SPR ombudsperson which is referred to in the first option, As Mr Schoeman has suggested, but I think that we can find something around that.

Chair: **I think I have a fair sense of consensus that basically we agree with the first option, and the point about it being that there shall be the national ombudsperson office and there will be SPR ombudsperson appointed in consultation with the regional legislature or SPR legislatures, that we work out the detail how the reporting is done with regard to the regional legislature and the national office of the ombudsperson. I think that there is agreement on that. Is that agreed?**

Agreed.

Shall we then on that note...

Mrs Mangope: I would like the house to record our objection and I would like to say why. The draft interim constitution that we are presenting debating says in clause 118 (4) an SPR government shall have full legislative competence for SPR purposes as well as have concurrent legislative competencies. There is only one model in this report which is consistent with this provision and that is model 3. We therefore wish to record our objection on the grounds that the other two models encroach upon the competencies of the SPRs.

Mrs Kruger: I thought we had stated it clearly that the AVU's position is that we would like the Ombudsman on an SPR level to be appointed by the SPR legislatures and those Ombudsman would have to report back to the SPR legislature so we cannot be in agreement with your summary as you gave given it.

Prof Ripinga: We support model 1 and in view of the debate it seems model 2 is non existent. I think what should happen with model 2 is that the ideas there should be built in model 1, in fact we have two distinct models in this discussion.

Chair: I think that concludes this particular point and can we on that note break for tea and come back, and can I remind the house that we have the outstanding business of the terminology which is up for discussion in bilaterals and multilaterals over tea. Can we be seated at 4.15?

tea

Chair: I would like to propose that the approach that we should adopt for rest of our business given the fact that we have discussed and to a large extent thrashed out some sticky matters from the report, that we now concentrate on the actual text and we go through it paragraph by paragraph making comments, raising questions, but we try and limit the cross referencing so that we can make sure that we deal with one document and finish it. So Could we now go through the text.

Agreed.

Can I direct your attention to clause 1 on the establishment and appointment and have comments on **1.(1)**

Agreed

Thank you. **1.(2) (Agreed)**

???? Would you allow me to point out that although we think that the relevant mechanism is appropriate for the appointment of the ombudsperson we don't think for the record that its the appropriate

mechanism for the appointment of he judges in the constitutional court.

Chair: 1.(3)?

Mrs Giba: Could you allow me to go to 1.1? When you say that we agreed on it as far as the bilaterals for alternative names are concerned are we going to draft a list of names, hand it over to the chair or what.

Chair: We will come back to that issue.

Chair: 1.(3)?

Mr Moosa: **Just on 1.(2), we have not as yet agreed on the section dealing with the appointment of judges. I just wanted to note that so that we therefore are not agreeing to anything here.**

Chair: 1.(3)?

Prof Ripinga: **Also (3)b with regards to 10 years , I think there is still no agreement,** when we discussed the appointment of judges. We still have a problem with that 10 years. **With (C) I wish to recommend that we add also administration of justice or public administration or public finance.**

Chair: Any opposition to that?

Agreed.

1.(4)?

No comment

Ms Smuts: Although the period of 7 years looks good to us, tentative agreement or approval, we wonder if one should think in terms of limited tenure. Tenure is clearly desirable for a person in this office and although we wouldn't plead for a life time appointment having looked at the arguments from the Technical Committee. In other words the implication would be that the person would not be eligible for reappointed.

Mr Moseneke: You will see from the remarks we made, we naturally would take instructions from you. If someone were to grow well into his or her job and become a good Ombudsman after 7 years it might be a waste to terminate that persons office rather than renew it. Than you need a new person to than get into the office. That is the one event. The

disadvantage is that if people were to stay long in office they might be less efficient later on in the passage of time. We will take any of the two. There are obvious advantages and disadvantages.

Mr Landers: We take note of Mr Mosekene's comments. But we are also in favour of limited tenure, perhaps it could be limited to two terms of office as opposed to strictly a single term of office which could accommodate his concerns in this regard where you might appoint a good Ombudsman and he is there after required to simply terminate his term of office and reappoint someone else. perhaps he Technical Committee could provide us with a draft that makes provision for a maximum of two terms of office but no more than that.

Mr Hettasani: If one looks at the first preference or the source from which the Ombudsman would be drawn, you would find that they would be judges of the Supreme court of SA.If you look at the average age of South African judges and to think that we have add 7 years thereto its almost impossible that there would be somebody who can serve more than two terms. It is for that reason that we want to align ourselves to what Mr Landers has already said. That at least two terms should be possible, because unless that person would have the life of a cat, 9 lives, he would not be able to make it.

Mrs Giba: In view of the fact that we are dealing with interim constitution, is it appropriate to be concerned with terms of office that go well beyond the life of this constitution.

Mr Moseneke: Provision has been made for just that, unless the constitution adopted in terms of chapter 5 provides other wise, the Ombudsman will hold office, ... clear due deference to provisions that might emerge from the constitution drafted under chapter 5.

Mr Schoeman: Does 3(c) stand as its worded here or has it been changed?

Chair: Has knowledge of or experience in the administration of justice or public administration. There was a proposal was the addition of public finance, and that was agreed to by the Council.

Mr Schoeman: Is that in addition to administration?

Tic/Nic: We would like to record our agreement with the views of the Technical Committee enunciated by Mr Moseneke, we do not believe that someone who has been doing his duty well and been acceptable should be put out to pasture.

Chair: Shall we pass on to 1.(5)?

Mrs Thabalala: The remuneration and other conditions of employment,... and such remuneration shall not be reduced during his/her term of office. My question is that is this reduction of salary not intended within those words:other conditions of employment. **tape ends**

What about the increment thereof? I thought the sentence will end up where it says :by an act of parliament, and we delete the sentence in front.

Mr Moseneke The words after act of parliament are very important and are likened to tenure of office, its a restriction that if you remove, you would on the one hand limit parliament, which may for good reasons reduce the... remuneration...attached to the post. But they may not do so during the currency of any particular office because it might be intended to influence particular incumbent.So you always would have a restriction. You might want to reduce the salary for good reason, but that should be done only after the completion of a term of a particular incumbent.

????: What about the conditions of employment? Can they be changed during the term of office?

Mr Moseneke: Clearly not, but in normal language you would not reduce conditions of employment, you may well reduce remuneration, I am not certain how you reduce conditions of employment. So the qualification is limited to remuneration.

????: My question is can conditions be changed?

Mr Moseneke: You can make them more favorable but not less, the purpose of that provision is that nothing is done that would be punotive against an incumbent and therefore you have to keep both the conditions of remuneration the same.

Chair: Can we move on to 1.(6)?

Mr Meyer: Could I come back to 1.3(c)? I would like to suggest that as far as 3(c) is concerned, that a ten year period also be linked to that as in 3(b), it is provided that experience of 10 years should be the minimum qualification, I would like to suggest that as far as 3c is concerned the 10 year also be added.

Dr Rajah While I agree that there be a need to say that you need years of experience, since we have not agreed to 10 years whatever we agree in 3b should also apply to 3c, so we should have the principle that there should be a limitation as far as experience is concerned, but the period has not yet been determined as discussed earlier;

Chair: **Is that agreed? Because we have not yet agreed on the 10 years, so what ever we agree in 3(b) will go for 3(c)? Can we agree?**

Mrs Kruger: I was wondering in 3(c) it says has knowledge of or experience in. Could we not have the word and there, because I take it that any person who has experience in also has knowledge of.

Chair: Not necessarily always. Because you can have knowledge of without necessarily the experience in.

Mrs Kruger: I would like the qualification to be that the person should not only have the experience, a clerk might have the experience of administration for 20 years but might not have the knowledge of how the whole thing fits together.

Chair: How do you qualify the knowledge of? Because you can get the knowledge by reading books or by actually practicing in an area.

Mrs Kruger: I am not a very good draftsman. It seems a bit vague, because its not linked to a time limit and if you look at the other qualifications that might qualify a person for an Ombudsman, they are strict, a judge or a person who has 10 years experience as an advocate.

Chair: The point will be noted for the final drafting.

Dr Rajah: The point is irrelevant because if you talk about people lecturing in law, many lecture in law for 10 years but have not practiced as advocates, so there is provision for those who lecture in law who have the knowledge in law but who don't have the experience in terms of practicing. So the same applies here without fragmenting the clause. So I don't think there is validity in that argument.

Chair: Can I take you back to page 2, can we agree on **(6)? (agreed)**

Point (7)?

Mr Landers: I want to refer the Technical Committee to the use of the word "incompetence" and I wonder if in a dispute in a court of law, whether this word would become subjective, how would you define incompetence, standing before a judge?

Dr Venter: I think the answer to that is that this is a well worn phrase, used especially in connection with impeachment procedures of presidents and ministers and the grounds on which such a person is removed from office is determined by parliament.

Chair: **Point (8)? No discussion.** Can we go to Clause 2 on independence and impartiality. **2.(1)? (no discussion) 2.2? 2.3?**

Mrs Brink: We favour the notion of no interference in the affairs of the Ombudsman. However if there is to be interference, logic is to be found in parliament interfering to a limited degree and not cabinet or any other person. If a legislature has to interfere when with this interference be regarded as improper? What does improper in this context mean? Shouldn't there be a more explicit provision in the text?

Mr Moseneke: You would, besides the constitution you will have an act that would often regulate for instance the manner of reporting of the Ombudsman to the legislature which also pints the Ombudsman. The clause is intended for any interference which would be outside the ambit of such ... relationship or if its directed of achieving improper results I would imagine particularly individual members of the legislature, you can see there it says no member of the cabinet or the legislature. Individual members, it is conceivable that may want to approach the Ombudsman and to influence the Ombudsman not to do certain things or to undermine the impartiality of the Ombudsman and we thought it should be made quite clear that not even them, no person would normally be sufficient, if you think of it again, but we go on to add that no member of the cabinet or the legislature of or of any organ of the state or any other person, so the whole idea was that MP's or cabinet ministers are not exempt at all from what might be a conduct which would undermine or be part of undermining the impartiality of the Ombudsman.

Chair: **Can we go on to 2.(4)?**

Agreed

Clause 3, powers, functions and duties? 3.(1) (a)

Dr King: How would a person complain to the Ombudsman. At the moment they have to produce an affidavit which seems to be a strong kind of way especially if a person illiterate, but at the same time one has to take into consideration that there at least must be some way of filtering these through.

Mr Moseneke: The detail of how to complain is left out of the constitution and would be regulated by statute. Our committee has the benefit of discretion around this matter. We are aware of the provisions of the present act which require a complaint to be made on affidavit or sworn affirmation. The limitations that would follow such a prescription are obvious. If you have 51% of the population being illiterate it might have serious difficulties for receiving certain complaints because such people may not be able to read or write and may for some reason be

reluctant to go on oath at a particular time. So we have left it to the office of the Ombudsman and they would develop a method for receiving complaints which might then be stated in the statute or some other directives by the Ombudsman. So we thought it would sufficient for us to create a framework of a complaint and leave the exact modis operandi to the development of the office or to statute.

Prof Devenish: I would like to add to that. With a certain amount of innovation and creativity the actual practice could be made user friendly, that considering the nature of our population and the enormous extent of illiteracy that the function of the Ombudsman would have to popularized and the processes would have to be simplified. But that can be left to the legislation.

Mr Pillay: How do the provisions of section 3d reconcile with the provisions of section 3a?It does seem that what was intended in subsection d was that the Ombudsman would not be empowered to interfere with the judicial process and the results if the judicial process but I cannot understand why the Ombudsman will not be empowered to interfere where there is evidence bribery and corruption in the judicial process. perhaps it needs to be made clear.

Mr Chaskalson: I think the acceptance of a bribe is not the performance of a judicial function and so it wouldn't be. So you will be entitled to investigate allegations of bribery or drunkenness and the like. Its really only on the execution of the judicial function itself that the Ombudsman should not be called in to say that the judge was rude on Monday and did not follow the law on Tuesday and was late in court on Wednesday.

Chair: That was 3(a).

Mrs Manzini: If under functions, powers and duties, does Ombudsman cover parastatal bodies.

Mr Moseneke: We debated that. Let me take you through the provisions. You will see that in the end its going to depend on how you define the function of parastatals and what are parastatals. theres a whole number of cooperations in the country which has been created by specific acts of parliament and which tend to be accountable to either ministers or to parliament on the other hand you have a whole number of other state cooperations which have a relative level of independence or autonomy, so somewhere along the line the formulation we have followed, in 3.1 firstly its any level of government, under 2. we refer to performing a public function, so if its an institution that has been created by a public instrument such a statute and it is therefore controlled as a public function 2, would cover that, public money, one would have to determine whether the parastatal uses public money, then again public function, so what we have done, we have gone for generic terms

rather than use the word parastatal but the council may want to have something more specific and say all those cooperations and or companies which have their origin in a state statute, shall be deemed to be handling public monies, for instance.

Mrs Kruger: In the light of the earlier debate as to the function of SPR Ombudsman I take it that the reference in 3.(1) (a)(i) to any or the affairs of the government at any level might be subject to change in the light of the earlier debate.

Mr Moseneke: Our understanding was different. We are open to be persuaded otherwise. perhaps there should be elaboration so we can understand what our instructions are.

Chair: **I think that instructions are that we are having one Ombud office at a national level and also at an SPR level but that ombuds office at an SPR level is appointed in consultation with the SPR legislatures but it is one office throughout the country and therefore there is representation at an SPR level. We noted the disagreement of the AVU to the position of the house. We note still they are raising the same concern. Can we go on to ....**

Mrs Kruger: What I was trying to say that as far as the sorting out of what Ombudsman would be responsible for exactly what element of government between the national and SPR Ombudsman. I don't think we have clarity on that as yet.

Chair: The house has clarity on the office of the Ombudsman has jurisdiction throughout the country, at all levels of government, the other details will be sorted out within the office.

Can we go on to 3.(1) (b).

Mr Meyer: **As far as 3 (a) (ii) I would like to make a submission to the Technical Committee to look at the reformulation particularly of that subclause, and the submission I would like them to look at is to focus on the concept of improper prejudice as the concept to look at instead of the formulation that they have here.**

Chair: Agreed. **3 (a) (iii)? 3 (a) (iv)? 3 (b)? (i)? (ii)? (iii)? 3(c) (i)? 3(c)(ii)**

Mr Meyer: **Theres only reference to appropriate recommendation to be made in the case of maladministration. My question would be if appropriate recommendations should also not be made in**

connection with some of the other areas indicated in 3(a)?

Chair: **Agreed**. 3(d). (2)?

Dr Rajah: It only restricts the Ombudsman from investigating judicial functions would it also include such issues as investigating the police or security?

Mr Moseneke: No. My colleague Arthur Chaskalson earlier made this distinction which is of importance. This provision is directed at judicial functions and that is when a person appointed as a judicial officer performs those functions and more typical of this would be adjudication. You can imagine that every ... would have some dissatisfaction about how their case would have gone. And that would obviously impair the partiality and the independence of the judiciary if the Ombudsman were to inquire into the judicial function itself. So thats a fairly standard, well know exclusion. But if a judge were to accept a bribe, thats not a judicial function. Its an unlawful act which will be investigated. If her or she were to improperly seek to influence some other functions non of those would demand judicial functions. Similarly the functions done by police and other functionaries, all are not judiciary functions.

Chair: 3.(2)? (a)?

Dr Rajah: Its says here conduct an investigation, is it intended that the investigation will follow a procedure laid down by a court of law? id it going to be dealt with regulation?

De Venter: This will have to be dealt with elsewhere. We cant put all those details in the constitution.

Chair: 3 (b)?

Mr Smuts Is it the intention to prescribe any penalties for persons who interfere with these powers. At the moment there is the power to subpoena and enter and search. But it doesn't seem to have any teeth if something should obstruct the Ombudsman in the exercise of these powers.

Ms Smuts: Is there any reason why we could not introduce the word public in... to authorize another person to enter any public building or premises. There is no clash with clause 13 in the bills of rights which deals with privacy.

Mr Moseneke: I am not certain if it will always will be public. The provisions in the fundamental rights are open to clear derogation clauses. Where it is necessary, reasonable.... if appoint a person such as Ombudsman with powers of entry and you limit it to public premises and this official

keeps all the books at her home, it will mean that there will be no access to those books at all and there may be public books kept at a private home. So one should be slow at limiting it to public premises. There is an inherent tension between the two positions. But we leave it to you. There would be room for abuse if we limit it to public premises.

Mr Chaskalson: Could I add to that. You might have a complaint that A has been advantaged through bribing a public official and the complainant may say direct you to evidence in A's position. so to pursue that allegation of bribery you would not only have to go onto the public building but you would have to A's premises and since there are the people's defender or peoples representative or Ombudsman, is meant to cover all of those things, one would not want inhibit that person by saying that they may only move onto public premises.

Mr Moseneke: It is true that their are no punitive provisions in the constitution. We talked about this before. The question was whether we should at every corner create actual criminal sanctions in the constitution itself, or should have one clause at the end, to point to certain violations and to make these punishable. So we thought we will not be making provision each time. A provision like: any person interfering with the functions with the Ombudsman, we could create an offence immediately thereafter but at the end we will have a generic provision creating an offence in regard to all prohibitions which should be made criminally punishable.

Chair: 3.(3)?

Mr Desai: On page 5, clarification, the debate is whether Ombudsman should have discretion as to whether to testify by any information which comes to his/her knowledge in the course of a lawful investigation. if an Ombudsman is competent or compellable to so testify he may be rendered ineffective. It goes on to say that might be a breach of confidentiality. on the other hand if the Ombudsman is not competent to testify, valuable testimony may be kept away from the courts. Our view that the Ombudsman, should have the exercise of discretion, that the office of public defender should be competent but not compellable to testify in a court of law. In this way the fear that that office may breach confidentiality would be obviated because that office would not be compelled. Therefore would exercise discretion to weight up how the balance of privileged information with justice can be sought. An informant in that formula can also be given a reassurance by the public defender not to breach confidentiality.

Mr Moseneke: There is a clear distinction between competence and compellability. You may be competent as a witness and not compellable. In other words you may have... to decline to testify. It will for instance raise privilege or raise some other... It may on the other hand he may be competent and compellable and he cant refuse to testify. Thats the distinction. Mr Desai is suggesting that we should opt of the one and not the other. We have raised the question because we have debated it, if you make the Ombudsman compellable than obviously there would be a difficulty, he/she would be all the time be obliged to disclose what has reached he/him during the course of investigation. if he is competent but not compellable than the Ombudsman may exercise the discretion from time. Some example would be a cabinet minister who admits the Ombudsman that she has stolen money. The question is whether the Ombudsman can be called to testify to this before a court. So thats a decision we have got to make. In that way the court may lose that valuable confession. Whereas if the Ombudsman may use his her discretion and testify against that particular official. we leave it to you to make the choice.

Mr Landers: We want to share in the views of the PAC,. We believe that the Ombudsman must be provided with a discretion whereby if he or she chooses to answer questions in a court of law or chooses not to than that discretion must be left to him or her. rather than to say that the Ombudsman is compelled to answer which will not be appropriate. there may be occasions when the Ombudsman in his/her wisdom finds it appropriate to provide evidence. Then there may be occasions when he/she may find it inappropriate to do so. We stress that discretion must be provided for.

Mrs Giba: I want to support the view it would be better to make him/her competent but not compellable

Ms Smuts: We agree with the discretion. One doesn't want to put these people in a section 12 (5) situation.

Mr Moosa: We agree with all the previous speakers.

Chair: Can we move on to **3.(4)? (no discussion) 3.(5)? (agreed)** 4? 4.(1)?

Mr Schoeman: **We from time to time make use of secondment, will this paragraph cover that?**

Mr Moseneke: **It does not. I think we will make provision.**

Chair: **4.(2)? (Agreed) 4.(3)? (agreed) 5?**

Mr Landers: **In the light of the fact that we have debated this point can we agree that we will come back to it at a later stage and move on?**

Chair: Agreed? Agreed.

Can we move onto the Human Rights Commission? 6.(1)?

Mr Landers: We are creating in terms of the law a Human Rights Commission and there already exists a Human Rights Commission which is a voluntary based organization. Are we saying that they must wipe themselves off or close shop. I am in favor of this incidently.

Mr Moseneke: We debated this matter and at some stage we played around with fundamental rights commission for the reasons that Mr Landers raised. In the end we agreed that this was a more known term and therefore it would make the commission more accessible. People will know what it is generally speaking. The other NGO would still be there.... but this is a statutory body which would be quite distinct from it.

Mrs Manzini: On 6.1 on fit and proper, its broad for this discussion. We would like to have it stated that it should be broadly representative and consisting of people who have a standing in the communoty, people of integrity etc.

Mr Chaskalson: Its for the appointing body that would be in this instance, its really that subcommittee of parliament to decide whether the persons are suitable for holding office as Human Rights Commissioners. Its a broad term that doesn't prescribe requirements. We thought that fit and proper would be appropriate because people with a concern for human rights come from all walks of life. You don't have to have experience, any particular qualification, degree, it will come from your lifes work and your own interest and the appointing committee will therefore be at... without looking for any particular qualifications. The only requirement is that they should know that whom they appoint should be people who are proper to hold office as Human Rights Commissioners.

Prof Devenish: If one had to explain in other words what is meant by fit and proper, we could say that such persons would have to be people of integrity, of competence and that they should be suitable for appointment.

Dr Rajah: I have some concern about the number of people who comprise a commission. whether we should have a lower and upper limit and say shall consist of at least 7 but not more than 11.I think everytime you have a commission to sit and do some of its tasks and to have 11 people might be cumbersome.

Mr Desai: If you look at section 6.2 it says that the provision of section 88 dealing with the appointment of judges of the constitutional court shall apply mutatis mutandis to the appointment of members of the commission. Doesn't this restrict the kind of candidate , aren't to restricting it to judges and lawyers?

Mr Chaskalson: What we had in mind was that it should be procedural provisions. I don't have section 88 in front of me and I don't know whether section 88 is a procedural provision or whether it specifies standards. If it specifies standards than we would have to make an appropriate adjustment.

Mr Moseneke: The seven to but not more than 11, we note the suggestion but I wanted to, that 11 was included to deal with what Ms Manzini raised earlier on. The idea was to have 11 to allow a broad representation of the commission. there being so many NGOs and public interest law firms and people walking around with human rights issues. The smaller the commission the lesser the opportunoty therefore to have to make it representative as was suggested.

Ms Smuts: I would support Ms Manzini that there is room for more specific reference to the kind of people we are looking for and we are both, I think thinking of the gender dimension. If one looks at some of the work that the commission will be doing, c particularly, its going to be important for people to representing constituencies rather than NGOs. An NGO specialist is one kind of person. Are we not looking for people who are themselves also representative of constituencies.

Dr Rajah: Section 88 deals with the appointment of judges and I don't the procedural matters would apply to the appointment if Human Rights Commission. So the Technical Committee must relook at it. Section 88 is more or less the same as section 1 subsection 3. Its not relevant here.**tape ends.**

Mr Chaskalson: .... suitable candidates or may be suitable candidates for this sort of office and then we started to think about a whole range of people and we thought that in the circumstances we could leave it to the good sense of the appointing committee which would be a multi party committee of the senate to choose suitable people but if criteria are to be specified and if they are to have any meaning than we would welcome suggestion as to the criteria that should be written in.

Mrs Giba: **In that case section 6.2 has to be altered.**

Chair: Is there any specific recommendation as to how it should be formulated or shall we leave it to the Technical Committee to take into consideration the points that have been raised.

Ms Olivier: We need further input in this regard to facilitate our further progress.

Mrs Giba: For starters if we can take the description that was done by Prof Devenish in response to the question of fit and proper.

Prof Devenish: I suggested that in selecting these people one would have to consider the issues of integrity, competence and suitability. the multiparty committee of the senate would represent many parties who would have constituencies and one would hope for instance that they would be able to address the gender issue and the issue of children both of which are important constituencies as far as human rights are concerned so that those issues will be addressed because of the nature of the multi[party committee. I wonder whether its necessary to take it any further than that. I tend to think no.

Chair: **Are there any additions to that kind of framework to this issue. Or shall we say can parties if they have anything further, that they would like to put forward give submissions to the Technical Committee in writing?**

Agreed. Paragraph 6.3?

Nic/Tic: I am looking at the paragraph 3a, b, c, and d. Its talking about the powers , duties and functions but all I read is promote the observance, develop and awareness, make recommendations, prepare such studies and if I look further and I look at section 5, it says that if the commission after due investigation is of the opinion that there is substance in any complaint made to it may assist the compliant. This leave us with a powerless commission. If there can be clarity.

Mr Moseneke: A commission such as this is an enforcement mechanism and each of those powers functions and duties have a specific role in relation o fundamental rights and the observance. It must be remembered that its primary function is to ensure that there is an observance of fundamental rights. The first step in this regard is to promote the observance thereof. We don't prescribe how that will be done. Any number of things can be done in that regard. In the defence of fundamental rights, that is a duty for them to perform and therefore within the framework of the legislation that will come out, you may want to specify the specific things that you want to see them doing. We do not do so in a constitution such as the present. Develop an awareness, thats an education function obviously, this function may be more important than most of these measures, because once people are aware of their rights than their will be greater levels of defense, respect and observance. To government their function is not an executive one, its not a judicial, legislative function. They have to make recommendations to all organs of state at all levels of

observance. They cannot make laws or direct them on what to do or not to do. their function is to identity breaches and to bring them to the attention of all those organs of government and to advise them on progressive measures in favour of fundamental rights within the framework of the constitution as well as appropriate measures for further observance of those rights but they cannot take over the functions of other organs of state. In 4, they are charged with the duty to prepare for those statutes. There is no such statutory duty presently in this country. If you look at ... it may request any organ to supply them with information on any legislative or executive measure adopted by it relating to matters of fundamental rights. In 4 its function is to examine legislation and to draw attention to any provisions that may be contrary to the constitution, to international human rights law and relevant norms of international law. So clearly it has a strong persuasive and moral role to play in enforcing compliance. In 5 which is more important, it is given powers, we said may, if your state hasn't got the money, even if you can tell the commission that it has the duty to litigate on behalf of people, that may not be impossible on account of the state budget and therefore we create a discretion otherwise there will be a constitutional duty on the part of the commission to litigate on behalf of every single person who may feel that rights have been breached. And the state will not have the money.

Prof Devenish: To add, to put it in a nutshell the fundamental motivational activity of the Human Rights Commission will be to create a Human Rights Commission culture and awareness throughout society. Then at its discretion, if necessary it could be involved in certain test cases. But we must be clear that human rights are going to so important in the new South Africa that many other government institutions and individuals are going to be involved in the promotion of human rights. The courts most certainly in protecting human rights are also going to be involved. So with the legislature and the executive. So the Human Rights Commission will be only part of the whole mechanism that will promote human rights. In addition there will have to be individuals who have consciences and who will also make their contributions. The Human Rights Commission is not a panacea to put everything right. Its going to be a part of an overall mechanism that can make a contribution.

Dr Rajah: This commission will not be involved with the investigation of infringement of human rights because that is the function of the constitutional court? may I also know that it would appear to be that this whole set up of the Human Rights Commission is merely an academic exercise. Will these people be fulltime or part time. Because they have largely an educational and promotional function.

Mr Moseneke: In 7 they will be fulltime and there is nothing academic with respect to the Human Rights Commission. 5, gives it powers to actually

litigate on their complaints. They have the power to investigate. So they investigate violations from time to time. They will churn out reports which will end up with the president and the national assembly of the senate about violations. They would examine legislation that comes out to point out violations of human rights. They can litigate, they will have an educational function an investigative function and they will generally check on the observance of compliance with human rights to be found in the constitution. You cant make or execute laws or to have a judicial function because there are specific organs of state charged with those functions. Theres is a watchdog function as well as a litigating function if funds are available.

Prof Devenish: I want to stress that they are going to fulfill a fundamental function not purely and academic function because education is going to be essential to human rights without an education relating to human rights, human rights are not going to successful. So at every level people will have to be educated and particularly in our country where we have such high levels of illiteracy. People have to be thought that they have got tights which are enforceable and only if the educational function is successful will the whole human rights program be successful.

Dr Rajah: If the Human Rights Commission is a watch dog of fundamental rights than that function is given to the constitutional court. if there is an opinion that there is substance in a complaint. Any complaint of fundamental rights will be referred to the constitutional court and not to the Human Rights Commission. So what kind of complaints that this commission will address that is not addressed by the constitutional court.

Mrs Kruger: I have a question relating to that. Adv Moseneke has said clearly that they would be able to litigate on behalf of a complainant. Will the commission will have local standing, could it litigate in its own name when it finds with regard to 6.3 when it finds that legislation is not in accordance with human rights. Can they on their own inotiative litigate and will they litigating in the name of the complainants or just give them financial assistance. Or is it the commission itself that will be involved in the litigation

Mr Chaskalson: The difference between the Human Rights Commission and the court is that the court deals with matters on a formal basis where the litigants have to formulate their case, put the issues before the court and address arguments to the court. The court does not conduct investigations on its own and waits for matters to be brought to it. What happens where the public is given human rights protection is that any number of people who believe that their rights have been infringed do not know the law or are not sure how to take it further can therefore lodge complaints. In germany for instance there is a whole infrastructure to the German constitutional court which deals

specifically with complaints addressed to the court. It doesn't get to the court itself but there is an administrative infrastructure which looks at individual complaints and assess whether or not there is substance and if there are then help it to come to the court. What we have done here is to create a special commission not as part of the court but an independent commission with other functions, but one of its functions will be to open its doors to people who believe that their rights have been infringed try to establish when those people come to it whether there is a complaint of substance, if there is see if there are means according to which that complaint can be resolved.. If litigation is necessary, than where appropriate to assist that person with the litigation. On the question of whether the Human Rights Commission will have local standi to go to court, there are two issues. In the first instance the individuals coming and asking for assistance will be told by the commission that they think that there is substance in the complaint and the commission will advise them to go to court and if they need financial assistance they can ask the commission for it and in appropriate case the commission can give it. But its may well be that the Human Rights Commission would have local standi itself in particular cases to go to court . That will be a matter for the court, in the formulation in which rules ... and in settling whom it will hear. In some parts of the world, NGO;s and statutory commissions are specifically given rights of audience by the court and our constitutional court will over a period of time formulate its own rules as to local; standi, Its always a judge made provision.Its an absolutely fundamental structure which will make chapter of our constitution meaningful to ordinary people. Without it chapter 3 might be a piece of paper rather than a substantial provision.

Prof Devenish: We must see the constitutional court and the Human Rights Commission as complimentary. They are going to fulfill different roles but they will compliment one another. The Human Rights Commission will be concerned with the propagation of the human rights culture. Its also going to have an investigative role and it will monotor human rights throughout the communoty whereas the constitutional court role will in a sense be remedial matters will have to be taken to it and it will have to decide where there disputes as to how those disputes are going to be resolved. Its important to see their functions as being complimentary. Its also important to realize the Human Rights Commission is not going to be merely and appendix. Its going to be fundamental to the success of human rights in the new SA.

Mr Pillay: **Mr Chaskalson has made extensive reference to the hearing of complaints. I do not see any enabling provision in 3. To give effect to the provisions of section 5. So the Technical Committee should consider an additional paragraph f.**

Mr Moseneke: **We acknowledge the omission. Its a point well taken. Whereas 5 makes reference to after due investigation the point is that 3 has no enabling provision with regard to investigation.**

Ms Smuts: The adjective academic was used earlier. It doesn't seem to be all that inappropriate. But nor do I think its bad thing. I think would be an excellent thing to have a commission whose job it is to think, to do the studies that are referred to in d, the recommendations in c, it doesn't worry me too much that this particular commission wont be doing a lot of the hearing the consideration of complaints under penalty of fine and so forth which are classically the job of equally opportunoty conditions .. The minute you start expanding your definotion in sub 5 you are going to get into a legal aid situation. You will end up with infrastructure similar to the German situation. Thats wonderful. What I am arguing is that simply here we are creating an enormously invaluable commission and that in no way should we underestimate the role that it can play.

Prof Devenish: When I spoke about academic, I was trying to get across was that it must not stop there. the human rights must be taken to people on the street. The investigation and research is going to be important.

Mrs Kruger: Would it be possible for the commission where a compliant may not have local standi and because of the fact that they could prove injury as yet or you have class actions where the local standi is in dispute. Could the commission in such instance intervene and litigate in its own name to save those kinds of cases.

Mr Chaskalson: Theres going to be act of parliament which will deal with some of the more specific powers and no doubt a provision could specifically be made that the Human Rights Commission shall have loca standi to approach the constitutional court in any matter concerning the breach of human rights. Whether or not the Human Rights Commission short of such a specific provision in the enabling statute would have loca standi would be a matter which the court would decide . In many parts of the world the courts have expanded the concept of loca standi to getaway from the narrow special interest which is recognized in private law and to recognize that the individuals or state bodies or commissions or even NGOs have a special standing in human rights cases and they have allowed them to approach the courts on any matter. So it could either come as a result of development through the court itself or provision could be made for it in the statute. But if you are suggesting that we should in the constitution, specifically provide the Human Rights Commission should have loca standi to approach the constitutional court in any matter concerning an alleged breach of human rights, it could go into the constitution, if that were the wish of the council.

Mr Smuts: Section 7.4 (b) of the chapter dealing with fundamental rights specifically makes provision for representative actions. It provides for associations acting in their own names or on behalf of their members to bring constitutional rights cases before the court. So if there is any dispute about it that may be the appropriate place in which to insert such a clause.

Mr Moseneke: We would take note of the debate. Mr Chaskalson has pointed out that the right to approach the court is a procedural matter not a substantive matter and the courts will develop those rights guided by the provisions in the fundamental rights section. The only question that comes up is how far do you want the commission to go. The provision as it stands says it may assist the complainant to secure redress - that may be anything from arbitration , conciliation right through to actual litigation. We see the commission helping people to get redress from violation around fundamental rights and litigation is abut one of those methods of redress. The constitutional court will recognize class action. But ideally perhaps the commission should itself not litigate. Should assist other and help provide finance without itself litigating.

Chair: Can I take the council back to subpar 6.(3) can we quickly look at subpar **(a):(no discussion. (B)? (No discussion) (C)? (agreed) (D)?(Agreed) (E)(Agreed) 6.4?**

Dr Rajah: Does this function overlap with the constitutional court because the constitutional court is given precisely the function to look at any legislation that infringes on human rights.

Mr Moseneke: No. ....the constitutional court has power to adjudicate upon a piece of legislation by testing it against the principles or against the constitution. In the constitution making process it may be referred by a certain percentage of law makers or it may be referred in other circumstances and that would be abjudicated upon... here its no more than to report that fact to the legislature which may not have its own facilities to do the research around question of international human rights law or norms of international law. So its additional aid to the law givers who would have the benefit of a specialized commission.

Dr Rajah: Is it implied that every legislation has to be subject to the ratification by the council?

Adv Chaskalson: The council will have a watchdog role.

Chair: 6.(5)?

Mr Wessels: Money may be provided if it has been found that a complainant has substance. After it has been established that a particular issue is a

matter of substance to only than discover that fiances are not available. Its a matter of concern Is there not another route to ensure that once you have taken the matter that far, there will be resources.

Mr Moseneke: The lawgivers among other things should make a law that will appropriate money to the commission and if the commission is to mean anything it will have to have money to litigate. We said it may provide, we were careful to not to say it must provide. Than you have a constitutional duty to pay and I don't see why people will go and consult lawyers and advocates if the Human Rights Commission can pay. All I am saying is that the state may not have the money, so there must be a discretion from case to case to pay when they can

Mr Chaskalson: Under 6.3 the constitution provides that the Human Rights Commission shall have the powers duties and functions vested in it by an act of parliament which shall include the duty to. Its contemplated therefore parliamentary will pass a statute which can vest a series of duties and functions and also vest powers in the Human Rights Commission. If we develop to the stage where it is possible to provide legal defence to everyone who needs it. Nothing could be better. the only question is whether you write that in the constitution or whether you leave it to parliament in the light of the financial demands on the state from time to time to develop until a stage is reached when everybody who needs the legal assistance gets it. But you may feel that in the case of human rights abuses, that there should be a specific provision in the constitution that indigent people who are the subject of human rights abuses should be given assistance. That is a matter which you might want to debate. All of us would like to see our law reach the stage where everybody who is financially unable to pursue litigation and who needs legal assistance should get it.

Mr Wessels: The point I am trying to make is that one should inform such a complainant that you do not have the resources prior to discovering that there is a breach of a particular human rights.

Mr Chaskalson: I don't think so because there are all sorts of remedies which you could take. You could publicise, you can bring it to the attention of the offender, you can see that it is raised in parliament, you can bring it to the attention of the press. All of those things can be done without necessarily involving the Human Rights Commission and the expenditure of substantial sums of money and there may cases where the consequences of human rights abuse are not as serious as there may be in other cases. So the commission is given a discretion to deal with it and parliament is given the power to extend the powers as far as it wants to.

Mr Pillay: I share Mr Wessels concern about the discretionary provisions as far

as finance is concerned. What I cannot understand is why the discretionary provision that it may assist should that not be consideration that the commission shall assist and the question of financial assistance is discretionary.

Mr Moseneke: The solution lies with council members. if you instruct us to make it mandatory, we do so. I hope the state will have the money.

Mr Pillay: If the commission after due investigation is of the opinion that there is substance in any complaint made to it **shall** assist the complainant. And leave the provision about financial assistance as discretionary.

Mr Landers: We support Mr Pillay.The first half must be a duty and the second half in relation to finances can be discretionary.

Chair: **Is that agreed to? So we should change that to shall.(Agreed)**

Mrs Kruger: I would ask that if not in this constitution that it be kept in mind that the criteria for the discretion of the commission should be clearly stipulated. I would not like to see a situation where a person comes with a valid case of an infringement of human rights but because it is the end of the month and the budget is the key to it we cannot be helped without case and another person would come with a case of less merit in the beginning of the month, so if there could some criteria as far as the way the criteria is to be used.

Mrs Giba: If you say that the commission shall be obliged to assist the person with a complaint meanwhile it has financial constraints, that where my problem comes.

Mr Desai: Assistance can take many form, it can be advise and so we should not belabor this point.

Chair: Can we go onto **7.(1) (agreed)** 7.2?

Ximoko: I would like clarification on 7.1 where they say the commission shall appoint a director who shall be a principal executive of his... is this director going to be appointed out of the people in 6.1 if not what criteria is going to be used to appoint these people.

Mr Chaskalson: It is contemplated that the Human Rights Commission will appoint the director who will than have the responsibility for running of the office and of course the 11 people are appointed by parliament will be the people who are charged with setting up the infrastructure and seeing that a director is appointed and it may well be that when the act comes to be passed that the 11 people who are commissioners are not full

time commissioners that they meet at regular intervals an d that the day to day running of the office is left to the director and the directors staff. But the 11 people chosen by parliament will be the body which will choose the incumbent of the office.

Prof Ripinga: **I suggest that we substitute principal with chief executive officer.**

Chair: **Agreed? (agreed) 7.(2)? 7.(3)**

Mr Landers: Is there any reason why in the case of the Ombudsman they provided for a report to parliament and in the case of the commission it provides for a report to the president Our own experience has shown over the years that institutions and organs of this nature being made to report to the president is never workable. Far better for it to report to parliament. There are currently several reports gathering dust in the state presidents report which he has received and which he refuses to make public or table. so on the one hand we should it be report to parliament and secondly that report should be published as soon as it is made known. there is a difficulty when it comes to tabling of these reports. If parliament is not in session than that report cannot be tabled until the next session of parliament , so you may find yourself with an import report that is gathering dust waiting for the next session of parliament. We would request that the Technical Committee reformulate this provision to provide for that.

Chair: Is that agreed?

Mr Chaskalson: I am not sure what we have been asked to do. The draft says that the president shall table it promptly which would mean that if the president allows it to gather dust the president is in breach of the constitution and to be dealt with by parliament but if parliament is in recess than it doesn't help to send it directly to parliament if its not sitting whereas if its sent to the president he can receive it and give some attention to it before parliament is next assembled and then table it , so there is something to be said about the report going directly to the president with an obligation to table it promptly rather than to wait for parliament to be in session. As far as publicizing is concerned, as part of the general provisions of the Human Rights Commission clearly enable it to publicise matters when it considers it appropriate to do so. I am not sure what is meant, the Ombudsman is appointed is really a parliamentary representative and thats why the Ombudsman reports to parliament but the Human Rights Commission is not a parliamentary representative its a particular function which is ordinarily is a presidential appointment which is carried out in a particular fashion. But its still not clear what the instruction is. Is the instruction that we should now say that the Human Rights Commission should report to parliament and is the requirement the Human Rights Commission shall publish its reports in a particular manner and if so how. Does it put

out a booklet.

Ms Smuts: Could we not ask parties to sent submissions and quickly because this hangs together with how one thinks it ought to be appointed and so forth and the Technical Committee deserves better from us.

Chair: But wouldn't it be true that after the explanation from Mr Chaskalson that it explains this formulation or does mr Landers still have problems.

Mr Landers: I do have problems, but I will make a submission.

Chair: **Can we leave it at that, that any other parties who have any other points to make, sent submission to the committee so that they can incorporate in the next draft our concerns.**

Prof Ripinga: **I wish to propose that the subheading for seven reads: Staff and expenditure. tape ends.**
...on the tenure of office of commissioners, the termination of appointments, remuneration, I hope this will be addressed further, I don't see them in the text.

Chair: I believe some of those issues were raised in the report.

Mr Moseneke: In the end its a matter of choice. How much detail you want. We have made provision for an act of parliament which would provide details. What we have done in 7 is to provide for a principal executive officer commission of service, expenditure.. so clearly you can see that the power to appoint staff is there. An act of parliament must set out depending on the size and how much money there is and what it wants to spend etc, all of that perhaps should not be made constitutional provisions, they should be made provisions to be found in an act of parliament.

Chair: **Could we have some reaction to the proposal that it be staff and expenditure of the Human Rights Commission. (agreed)**

That takes care of the text. Can I now take you back to the one outstanding matter from the report because most of the other issues that were raised in paragraph 1.2 of the 14th report have been dealt with in the process of discussing the text. **However the question of the terminology was shelved and after the break and bilaterals we conducted some investigation and unfortunately there is still no consensus.** So we would like to propose that we do one of the following things, either we say that the Technical Committee consider the matter again taking into account the views that have been expressed or we take the matter to the Planning Committee or that it goes to bilaterals or a combination of the above.

Mrs Jajula: I propose that we take the matter to the PC

Mrs Giba: Over and above that we request the Technical Committee to come up with alternative names.

Chair: **Shall we agree that we take the matter to the Planning Committee (agreed)**

Thank you

meeting ends.