

214/6/5/14

**CONSTITUTIONAL ASSEMBLY**

**SUBTHEME COMMITTEE 3 OF THEME COMMITTEE 6**

**SPECIALISED STRUCTURES OF GOVERNMENT**

**20 March 1995**

**DOCUMENTATION**



**CONSTITUTIONAL ASSEMBLY**  
**SUBTHEME COMMITTEE THREE**  
**TRANSFORMATION, MONITORING AND EVALUATION**  
  
**OF**  
  
**THEME COMMITTEE SIX**  
**SPECIALISED STRUCTURES**

**MEMORANDUM**

**TO:** All members of Subtheme Committee three  
**FROM:** Bronwen Levy  
**DATE:** 17 March 1995  
**RE:** Meeting of Subtheme Committee, 20 March 1995

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Please note the following details of the meeting of the Subtheme Committee:

**DATE:** 20 MARCH 1995  
**VENUE:** E305  
**TIME:** 9:00

**AGENDA**

1. Opening and Welcome
2. Adoption of minutes, 27 February, 6 March and 13 March 1995
3. Report from the Technical Experts re: Public Hearings on the Public Protector
  - 3.1 Discussion on report
4. Report from Political parties re: final submissions on the Public Protector
  - 4.1 Discussion



- 5. Gender Workshop**
  - 5.1 Participants**
  - 5.2 Speakers**
- 6. Human Rights Commission submissions**
  - 6.1 Party final submissions**
  - 6.2 Clarify stakeholders**
- 7. Any other business**
- 8. Closure**



**CONSTITUTIONAL ASSEMBLY**  
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**OF**  
**THEME COMMITTEE SIX**  
**SPECIALISED STRUCTURES OF GOVERNMENT**

**27 FEBRUARY 1995**

**PRESENT**

**Ms Mompoti R (Chairperson)**

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

**Apologies:** Ms Kgositsile B and Prof Erwee.

Ms B Levy and Dr C Albertyn were in attendance.

**1. Opening and Welcome**

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

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

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



Dr Albertyn maintained that there was a fair amount of consensus that was emerging. Differences emerged more in the detail which in turn may be left to legislation. She raised the following key questions that arose from the submissions:

- i) What should be included in the Constitution and what should be left to legislation ?
- ii) What is the scope of jurisdiction of the Public Protector ?
- iii) What is the relationship between the provincial and national Public Protector ?

## **2.1 Discussion on the Report**

- i) Ms Malan reported that the National Party was not fixed on the idea of the name being Ombudsman. Furthermore the question of tenure was also an issue for debate.
- ii) The Committee focused their discussion on the matter of tenure. What emerged was that all parties were concerned with the matter of quality and the best way to achieve it.

### ***The meeting agreed to the following:***

- iii) As many of the submissions were still drafts, members would need to take the report to parties for further clarity. Members would present reports to the next meeting of the Subtheme Committee.
- iv) Dr Albertyn would look at comparative evidence on the Public Protector with regard to areas of disagreement, in particular the length of tenure, the role of the Public Protector with regard to the courts and areas which historically are covered by legislation.

## **3. Adoption of minutes 21 February 1995**

The minutes were adopted.

## **4. Work Programme**

The Work Programme would be finalised for next weeks meeting.

## **5. Stakeholders for Public Hearings**



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

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

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

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

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

**7. Any other business**

**7.1 Public Participation Programme**

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

- i) Ms Turok would represent the Subtheme Committee at the event in the Western Cape.
- ii) Mr Louw would be asked to attend the event in Gauteng.

**7.2 Joint meeting of Theme Committees on Traditional Authorities**

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



***Subtheme Committee at the meeting on Traditional Authorities on 6 March.***

**7.3 Gender Commission**

***The meeting agreed that a letter isolating the key issues with regard to the Gender Commission needed to be sent off to the relevant stakeholders.***

**8. Closure**

The meeting rose at 20:00.



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**OF**  
**THEME COMMITTEE SIX**  
**SPECIALISED STRUCTURES OF GOVERNMENT**

**6 MARCH 1995**

**PRESENT**

**Kgositsile B (Chairperson)**

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

Apologies: Tshabalala M E

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

**1. Opening and Welcome**

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

**2. Minutes of 27 February 1995**

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



### **3. Submissions**

#### **3.1 Report by Dr C Albertyn on comparative perspectives**

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

- 3.1.1** Most countries deal with the Public Protector in legislation. There is a need to focus on broad principles with regard to the central issues to be constitutionalised, much of the detail would fall away as they would be located in legislation.
- 3.1.2** Developing and developed countries tend to differ with regard to the model of the Public Protector. The reason for this lies in the plethora of institutions that exists in many of the developed countries. In many developing countries there is only one institution, its either called the Human Rights Commission or its called the Public Protector and it plays both roles. Thus in South Africa where the Interim Constitution attempts to divide up the roles of the different specialised structures, in many African countries the role of these different structures is assumed by one structure.
- 3.1.3** In many of the developing countries examined, the Public Protector tends to be accountable to the executive rather than parliament. The one exception to this trend is Namibia.
- 3.1.4** With regard to the matter of the Public Protectors jurisdiction over the courts different approaches have been adopted. In two of the Scandinavian countries the Public Protector has jurisdiction over maladministration of judges. This application is a historical one which arises out of the origins of the establishment of the office, judges themselves support the above mentioned application. In South Africa, because of the tradition of the 'legal independence' of the judiciary, the jurisdiction of the Public Protector would extend to the maladministration of public officials in the Department of Justice. It does not apply to judicial functions of judges and of the courts.



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3.1.5

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

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

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

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

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

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

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



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- v) **Functions** - Where the function of the Public Protector goes beyond its traditional functions of investigation of maladministration in government, such as a function of litigation. This is often as a result of the Public Protector assuming the role of additional structures such as the Human Rights Commission.
  - vi) **National and Regional** - no real solutions emerged with regard to this matter. The countries examined tended to be small with central and local government as opposed to central, local and regional government.

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

### **3.2 Discussion on Report**

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

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

### **3.3 Party Submissions on the Public Protector**

#### **3.3.1 Democratic Party Submission**

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

#### **3.3.2 Other Party Submissions**

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



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

**4. Progress report from the Secretariat on public hearings**

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

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

**5. Any other business**

**5.1 Public Participation Programme**

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

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

**5.2 Media Briefing**

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

**5.3 Commission on Gender Equality**

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

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

**5.4 Technical Experts**

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



*team.*

**6. Closure**

The meeting rose at 12:00.

Chairperson..... Date.....



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**TRANSFORMATION, MONITORING AND EVALUATION**

**OF**

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**SPECIALISED STRUCTURES OF GOVERNMENT**

**13 MARCH 1995**

**PRESENT**

**Ms M Turok (Chairperson)**

Kgosi Mokoena  
Mompoti R  
Ngubane H  
Van Wyk A

Apologies: Ms B Kgositsile, Ms T J Malan and Mr Moatshe

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

**1. Opening and Welcome**

Ms Turok opened the meeting at 18:00 and welcomed the members.



**2. Minutes**

2.1 The minutes of 27 February 1995 were noted.

2.2 The minutes of the 6 March 1995 were noted.

**3. Report from Technical Advisors on Commission for Gender Equality**

**3.1 Summary of submissions received on Commission for Gender Equality**

Prof Erwee presented a report which brings together both party and civil society submissions on the Commission for Gender Equality (see annexure 'A').

Prof Erwee reported that the submissions received from civil society, in particular, women's organisations were very clear with regard to the role of the commission.

There seems to be broad agreement with regard to the functions of the commission. However the functions of the commission as set out in the submissions are wider than what was initially conceived by the early discussions of the Subtheme Committee.

While the Subtheme Committee has been debating the issue of whether there is a need for a commission and how the commission fits into broader national machinery, the submissions from women's organisations assume that there will be a commission and are clear with regards to the commissions location.

The meeting noted the report.

**3.2 Proposal for workshop on National Machinery**

Dr Albertyn spoke to the proposal developed on the workshop on National Machinery (see annexure 'B'). The approach taken was to locate the Commission for Gender Equality within the broader context of national machinery.

Dr Albertyn suggested that since debates on National Machinery were not new, a reading pack be made for participants in preparation for the workshop.

Dr Albertyn proposed that overseas participants be kept to a minimum. In addition she argued that it was important to begin the



workshop with a conceptualisation of the South African issues and then to move on to international experience. This would ensure that the international inputs would relate their experience to the South African context.

### **3.2.1 Additions to the proposal**

Prof Erwee added that it was important to ensure that women's organisations that have been participating in the debates be invited to participate in the workshop.

### **3.2.2 Discussion on the proposal**

The following suggestions were made with regard to the programme:

Ms Mompoti suggested that a speaker from the Commonwealth would be important as they would be able to incorporate a broad range of experiences from both developed and developing countries.

Ms Turok suggested that there needed to be at least one speaker from Africa. This suggestion was made in the light of needing to learn from the problems experienced by women on the continent.

Prof Ngubane suggested that the international participants need to be people who have been involved in setting up the machinery.

*The meeting agreed that the Technical Advisors should submit a short list of speakers to tabled for discussion that would take in to account the above suggestions.*

### **3.3 Letter to stakeholders re: the Commission on Gender Equality**

Dr Albertyn spoke to the proposed letter to stakeholders with regard to National Machinery and the Commission on Gender Equality (see annexure 'C'). The technical advisors had developed questions to guide the stakeholders in terms of the issues that the committee had identified in the course of their discussions.

Prof Erwee added that she had developed a diagram which attempted to set out what had emerged from the debates and discussions. This diagram could be incorporated together with the letter in order to give



people a mental picture of the issues.

*The meeting agreed that the letter should be sent to organisations. There should however be an attempt to simplify the language.*

#### **4. Public Hearings**

The Secretariat reported that Public Hearings had been organised on the Public Protector as per the agreement of the Subtheme Committee. The organisations that would be presenting oral submissions include, the National Land Committee, General Council of the Bar, Legal Resources Centre, the Community Law Centre, the Association of Law Societies, Lawyers for Human Rights and the Human Rights Committee.

A written submission from the Black Lawyers Association (see annexure 'D') and the Centre for Applied Legal Studies (see annexure 'E') was distributed to members. These organisations were unable to attend the Public Hearings.

*The meeting agreed that all efforts should be made to ensure that members attend the hearings scheduled.*

#### **5 Parties' submissions**

The Secretariat reported that as per the agreement of the Subtheme Committee held on 6 March a letter had been written to political parties requesting the following:

**5.1** Final submissions on the Public Protector by 20 March 1995

**5.2** Final submissions on the Human Rights Commission by 27 March 1995.

#### **6. Any other business**

Kgosi Mokoena raised concern around the way in which the CPM's were organised.

*The meeting agreed that this would need to be taken up with the administration.*

#### **7. Closure**

The meeting rose at 20:00



Chairperson..... Date.....



'A'

## COMMISSION ON GENDER EQUALITY

### FIRST SUMMARY OF SUBMISSIONS

Theme Committee Six, Subgroup 3  
8 March 1995

Prof Ronel Erwee  
University of Pretoria

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#### 1. Submissions Received

In contrast to the few submissions for the Public Protector and the Human Rights Commission, a significantly greater number of stakeholders consisting of women's groups, research centres and individuals have spontaneously made recommendations regarding the Commission on Gender Equality.

These inputs will be supplemented by the party submissions and information gained by public hearings, responses after advertisements and a possible conference.

Submissions were received from

1.1 Parties :Inkatha; ANC; NP women;

1.2 Groups: Black Housewives League; SA National Council for Child & Family Welfare; SACCAWU; Women's Lobby; GETNET; Oranje Vrouevereniging; OLIVE; WLSC; National Women's Resource centre; Women's Bureau

1.3 Individuals : Mundell; Dimba; Edendale Hospital; Stones; Terezakis; Tim, Holcombe, Nel, Brand, R Erwee & C Albertyn at information seminar, J E Grobler, Nina Romm; AG Holmsgard at information seminar.

The recommendations from women's groups differed from party submissions as the former contained much more detail on the functions of the Commission and clear guidelines regarding changes to legislation, handling complaints and investigations.

#### PART 1 - PARTY SUBMISSIONS

##### 1. Submissions were received from

1.1 Parties :7/2 Inkatha; ANC; 8/2 NP women;

##### 2. Establishment

###### 2.1 The necessity for a CGE - Agreement

The **ANC**, **Inkatha** and the **NP** support the establishment of a Commission on Gender Equality.

The **NP** women indicate that the CGE should be included in the final constitution and further details must be specified in legislation and **Inkatha's** submission seems to support this viewpoint.



## 2.2 Independence, impartiality and accountability - Disagreement

### 2.2.1 **ANC** position

The **ANC** addresses the issue of the CGE position relative to other institutions in national machinery which does not yet exist. They mention other institutions such as a Women's Ministry, women's desks in various ministries, a cabinet committee or a focal point in an appropriate ministry at national/provincial level.

In referring to national machinery as well as the HRC, the suggestion seems to be that the Commission is not independent but subservient to the HRC and an adjunct to potential national machinery.

It is noted that in national machinery the following accountability problems may occur

- a) Women's Ministry - inability to influence other ministries;
- b) women's desks - no clear lines of responsibility, no clarity on responsibility to cabinet and conflict in lines of authority;
- c) a cabinet committee - responsibility at the executive level with specific reference to policy and budget allocation, but problems with co-ordination with line ministries in Cabinet
- d) a focal point for women in an appropriate ministry - how could it influence other Ministries and departments at local and provincial level, conflict in lines of responsibility.

### 2.2.2 Other positions

**Inkatha** states that an independent CGE reports directly to Parliament (see functions), is consulted by national and provincial departments and coordinates activities of provincial governments. The **NP** women mention that submissions should be made to Parliament and that the CGE should be a statutory body.

## 3. Collaboration with PP and HRC.

**ANC** cautions that the CGE could result in the marginalisation of women's issues especially in respect of tasks that could be carried out by the HRC, unless such tasks could be properly located.

The **ANC** is not clear on the CGE's relationship with the HRC:

- a) the CGE is seen as a watchdog over the activities of the HRC as the CGE will ensure that the HRC develops and promotes gender equality; or
- b) the CGE may also be subservient or an adjunct to the HRC as it only monitors progress in gender equality



outside the ambit of the HRC or engages in public education where this does not conflict with the HRC.

**Inkatha** seems to suggest that the CGE will collaborate with other structures of government, but will act as the senior partner. NP is silent on this issue.

#### 4. Appointments, tenure and qualifications - disagreement

**Inkatha** proposes that women members of each of the provincial legislatures and of the national Parliament shall elect men and women members of each province and nationally to serve on the CGE. This will result in a Commission of 32 members of which at least two thirds must be women.

The **NP** women recommend that the CGE be composed of women and gender sensitive men from all political parties who are outside of Parliament. As statutory body, it must be headed by a person with experience in Human Relations and Gender Affairs.

ANC is silent on these issues.

#### 5. Powers and Functions

##### 5.1 Policy making - Agreement

**ANC** mentions that the CGE should inject gender concerns into policy and legislation.

**Inkatha** takes a stronger stand by insisting that "the Republic shall undertake constitutionally mandated proactive protection and promotion of women in all aspects of society" and refers to formulating specific policies.

##### 5.2 Legislation - agreement

Whereas the **ANC** only suggests advising on legislation affecting women but also mentions "implementation and enforcement of laws and policies", **Inkatha** states that the Commission may submit to Parliament framework legislation to be implemented by means of provincial legislation and administrative action. **Inkatha** further notes that the CGE may express recommendations on laws affecting women to both Parliament and provincial legislatures.

The **NP** women propose that the CGE examine existing and proposed legislation and have the right to make amendments to the legislation. It is suggested that tribal and customary laws should also be examined.

##### 5.3 Research

**Inkatha** states that the CGE may commission study, research into all matters affecting women. The **NP** supports a research function, ANC is silent.



#### 5.4 Development - agree in principle, differ on details

**ANC** supports public education and information flow within government and government and civil society.

**Inkatha** states that the CGE shall a) coordinate the activities of provincial governments which shall have the primary responsibility of developing and implementing programs to promote gender equality, and b) be consulted on national and provincial level with respect to the development of affirmative action and a range of other programmes.

The **NP** women note that the CGE will have to train special teams of rural women to assist in developmental activities in remote areas.

#### 5.5 Initiating investigations and receiving complaints

5.5.1 Complaints: The **ANC**, **Inkatha** and the **NP** is silent on receiving complaints

#### 5.5.2 Initiative - disagreement

The **ANC** is silent on taking initiative to launch investigations, whereas **Inkatha** refers to commissioning investigations and establishing special monitoring and reporting mechanisms to follow progress, apparently on national and provincial level.

The **NP** women emphasise that the CGE must have powers of investigation, be able to research and gather evidence from institutions, make suggestions to Parliament to deal with these issues and must be able to take cases to court.

### **6. Provincial CGE's**

**ANC** suggests that a focal point in an appropriate Ministry could operate at national and provincial levels.

**Inkatha** seems to suggest that the CGE will be operating as a national commission but that it will have close cooperation with provincial governments, legislatures and other developmental agencies. **NP** is silent on this issue.

#### KEY QUESTIONS ARISING FROM PARTY SUBMISSIONS

1. Constitutionalisation : Should the final text of the Constitution have a provision on the CGE? If so how detailed should the provision be or should detail be left to legislation?

2. Power and functions of the CGE : Should the CGE form part of the National Machinery concerned with policy development, research, education and monitoring or should it form part of the mechanisms concerned with the enforcement of rights or should it incorporate both policy and limited enforcement aspects ? (see diagram)



3. Relationship with the Human Rights Commission: Should the CGE also monitor the activities of the HRC to ensure that the HRC assists in promoting gender equality or should the CGE form an integral part of the HRC or should the CGE only monitor progress in gender equality outside the ambit of the HRC ?

4. Appointments : Should the Commissioner be an expert with a detailed knowledge of gender-, equal opportunities, affirmative action and appropriate issues ?

5. Provincial offices : Should provincial offices be established to assist the Commission with its functions and to make it more accessible ? What should the functions be of the provincial offices eg. handling complaints versus policy functions and investigations on national level ?

## PART 2 WOMEN'S GROUPS AND INDIVIDUALS

### 1. Submissions received

The following groups contributed suggestions (see volume dates)

1/2 Black Housewives League; SA National Council for Child & Family Welfare, SA Commercial, Catering and Allied Workers Union; Women's Lobby;  
8/2 GETNET; Oranje Vroue; OLIVE; WLSC;  
21/2 National Women's Resource Centre; Women's Bureau

The following individuals contributed to the discussion (see volume date):

29/1 Information seminar : C Albertyn, R Erwee.  
1/2 Mundell; Dimba; Edendale Hospital;  
7/2 Mosiaii, Mnisi, Stones; Terezakis;  
8/2 Holcombe, Nel, Brand,  
    B Currin - information seminar  
    AG Holmsgard - Information seminar  
21/2 J E Grobler, Nina Romm.

### 2. Establishment

The following parties **agree** on the establishment of a CGE and its inclusion in the constitution:

Black Housewives League (BHL), SANCCFW, SACCAWU, Women's Lobby  
GETNET, Oranje Vrouevereniging, OLIVE, National Women's Resource and Service Centre; Women's Bureau.

Opposition to the constitutionalisation was received from :  
Mundell, Brand.

Romm cautions against the establishment of a "marginalised and ghettoized" Gender Commission, rather than ensuring that gender issues are intrinsic to the transformation



of society as a whole.

### 2.1 Independence, impartiality and accountability -

Women's Lobby recommends that the annual report of the CGE be submitted to the Minister Without Portfolio while its recommendations be debated in Parliament. Relevant recommendations should also be made to parliamentary standing committees. GETNET, Oranje Vrouevereniging, OLIVE support reports to Parliament.

OLIVE wishes the CGE to pressurise the Minister of Education to institutionalise a Gender Equity Unit in the Department of Education. The CGE should investigate a separate Gender Ministry.

The Women's Resource & Service Centre suggests that the CGE operate within the office of the President and be a interdepartmental co-ordinating mechanism on gender policy within ministries.

Albertyn discussed the structures and roles of National Machinery. Erwee noted that the CGE can be a state funded but independent advisory or consultative council reporting to the Minister of Justice. Currin suggested that the CGE may be an integral part of the HRC. Holmsgard noted that the Danish Equal Status Council was attached to the Prime Minister's office, that the Labour Ministry has gender co-ordinators on a regional basis and that the ESC regularly reported to Parliament.

### 2.2 Appointments, tenure and qualifications - disagreement

Women's Lobby requests that the CGE be drawn from the private sector (thus exclude parliamentarians) and be comprised of gender sensitive men and women. GETNET supports the latter recommendation and requests that the officials be South African citizens, representative of all communities.

The Women's Bureau states that the success of the Commission will depend to a large extent on the appointment of people with considerable expertise and credibility and these requirements should be included in statutory provisions relating to the appointments.

Support that selection should take place through public hearings, comes from the Women's Lobby and GETNET while the Women's Bureau notes that proper consultation with women's organisations is essential.

Its tenure and administration should be secured by a substantial budget (Women's Lobby).

Holmsgard indicated that the Danish ESC consists of representatives from trade unions, private industry, women's organisations, research organisations with the chairman appointed by the Prime Minister. It was recommended that the Commissioner be an independent person and not a member of Parliament or



representative of a specific party.

### **3. Powers and Functions**

#### 3.1 Policy making - Agreement

BHL and Women's Lobby argue that the CGE should lobby on various levels of government and society and be an advocate for women's rights.

SA Council for Child & Family Welfare (SANCCFW) and the Women's Bureau recommended that the CGE ensure that the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) be ratified and used as a general policy guideline.

Romm argues that policies relating to education, freedom of speech, pro-choice legislation, quota systems, customary law, etc.

#### 3.2 Legislation - agreement

BHL, the Women's Lobby, GETNET, Oranje Vrouevereniging recommend that current legislation be examined and that gender inequalities created by traditional practices, political ideologies and social practices be eliminated.

SA Council for Child & Family Welfare (SANCCFW) listed the laws which need revision by the CGE eg. tax and family laws.

The SA Commercial, Catering and Allied Workers Union (SACCAWU) requested that the CGE enshrine certain parental rights in law and monitor companies compliance thereof.

Women's Lobby calls for a legal framework to introduce positive legislation and administrative action favouring women to redress inequalities.

Holsgard noted that the Danish ESC was instrumental in creating equal pay and - opportunity laws and monitors other laws.

#### 3.3 Research - agreement

BHL notes that the CGE should encourage research or surveys, build up a data-base which can be widely used by communities and disseminate information widely through various mediums.

SANCCFW submitted a survey among 33 of their centres on issues which need to be addressed by the CGE eg. discriminatory policies in education, employment, entertainment, societal practices, etc.

The Women's Bureau indicates that the CGE should liaise with the Central Statistical Services to solve the problem regarding to the absence of relevant statistics in gender research.



-Grobler suggests that research on issues such as reproductive freedom may be relevant.

#### 3.4 Development -agreement

BHL suggests that the CGE monitor, supervise and evaluate programmes designed to address gender inequalities.

Women's Lobby and GETNET suggest that the CGE encourage a debate on gender quotas, monitor government appointments for gender equity and educate the civil service to prepare their staff to change their mind-set. Both groups also recommend that the CGE influence educational policies.

GETNET, Oranje Vrouevereniging and OLIVE emphasise that CGE should ensure that mechanisms for the representation of women in decision making structures be created. Holmsgard noted that the Danish ESC was successful in establishing a gender balance in Commissions, Councils, government departments and trade unions.

Most groups encourage the CGE to ensure the upliftment of rural women and continuation of work in communities.

#### 3.5 Initiating investigations and receiving complaints

SANCCFW's survey contained specific complaints by women and men with regard to education, employment conditions, affirmative action, unique problems of rural women, family law, entertainment, sports, exploitation of women which could be heard by CGE.

The BHL indicates that the CGE can, through committees at all levels, initiate investigations and make recommendations after the information is discussed at workshops, seminars, etc.

GETNET also requests that the CGE be granted the power to intervene where there are omissions or transgressions.

The Women's Lobby recommend that the Commission investigate and take evidence on the entire field of customary law and practice as well as respond to women and men's groups to examine issues of concern. The National Women's Resource Centre asks that the CGE receive continuously submissions on specific gender issues.

Mosiaii listed the complaints of the nursing profession regarding working conditions and career development. Tim mentioned problems with the breadwinner concept, housing subsidies, medical aid in the educational profession

The Women's Bureau recommend that an adjudicative and also a mediation function for the Commission be considered. Erwee supports this view.

Holmsgard noted that when a complaint is filed, the Council can gather information



and can mediate between the two parties involved but does not have the power to take a case to court.

#### **4. Provincial CGE's - agreement**

The Black Housewives League argue that the CGE should operate on all levels ie. local, regional, provincial and national. A network of committees from each of these levels must be established to assist the commission in research and recommendations. The latter suggestion is supported by the Women's Lobby. GETNET supports accessibility by the public.

The Women's Lobby suggests that the CGE liaise with provincial parliaments and local governments to establish gender commissions on their levels. The National Women's Resource & Service Centre calls for similar structures in the offices of the Premiers and the Women's Bureau proposes regional advice offices. Erwee suggests provincial offices to carry out conciliation, educational and consulting functions.

#### **5. Relationship with other bodies.**

Most groups note that the CGE must regularly liaise with women's groups, NCO's in urban and rural areas; business and academic think tanks; appropriate university departments; UN;

GETNET recommend that an additional set of monitors be appointed that will monitor the CGE in the carrying out of its duties.

OLIVE notes that the Gender Equity Commissioner in the Department of Education should establish close working relationships with the CGE.

National Women's Resource & Service Centre notes that the CGE should develop working relationships with it's SADC counterparts and international structures.

Holmsgard stresses the need to network with all government departments, trade unions and employers, women's groups and similar Commissions or Councils in other countries.

\* See diagram regarding the CGE and National Machinery (R Erwee, 2/95)



# Government structures Civil society

PARLIAMENT  
\* P. Wo. Caucus

\* Select comm.

PRESIDENT  
\* Office: Status  
of women

CABINET  
\* Cab. comm.

ADMINISTRATION  
\* Women's ministry  
\* Women's desks  
in ministries

A

C

T

S

Constitution  
court  
Judicial auth.  
Supreme court

Public  
protect.

Advisory  
Councils  
NEDLAC

HRC  
(Pol &  
Enf)

CGE

PROVINCIAL LEVEL

9 prov. CGE's

Local level

COMMISSION FOR GENDER  
EQUALITY

R Erwee  
2/95



B

**PROPOSED WORKSHOP ON COMMISSION FOR GENDER EQUALITY  
THEME COMMITTEE IV, SUB-GROUP III**

**1 Alms**

- 1.1 To acquaint members of the Theme Committee with the necessary documentation, information, context and issues relating to the possible structure and functions of a Commission for Gender Equality.
- 1.2 To invite relevant sectors to participate by way of gaining information and making input (?) For example, labour, rural women, WNC, business, etc.
- 1.3 To identify the parameters of the debate and the options available to women within the existing political and economic constraints. Although not necessary for the Constitution itself, a fairly detailed proposal would be useful in motivating for the continued inclusion (or not) of a Commission for Gender Equality in the Constitution.

**2 Preparation**

- 2.1 *Advance reading* As the debate has been going on within the women's movement for some years, a reading pack can be made available to the participants of the workshop on the local and international thinking on the issue. This can include the reports of the Natal conference (Dec. 1992); WNC conference (May 1993), relevant section of the Beijing Report, key papers and summary of submissions already made to the Constitutional Assembly.
- 2.2 *Overseas guests* Should be kept to a minimum for reasons of cost and to obtain the maximum benefit from their expertise. As a result they should be carefully chosen. Criteria should include experience and its relation to South Africa.

**3 Time period**

The conference should take place, if possible, over two days, with sufficient time for small group discussion.

**4 Proposed programme**

*Note: This programme is premised on the assumption that more effective use of international participants could be made if we spent the first day discussing the situation in South Africa, and then used their expertise on the second day. We may want to rethink this model.*

**4.1 Day One - morning**

All plenary sessions to include time for questions and answers. Flip charts and overheads to be used. Handouts/diagrams to be available if possible.

**4.1.1 Introduction and recent history of women's struggle for equality**



Draft programme -Commission for Gender Equality

2

(Including discussion on the Commission for Gender Equality in the interim constitution and the status of National Machinery in South Africa - using the Beijing Report)

4.1.2 What is National Machinery - detailed explanation of all levels of government and civil society and possible structures

4.1.3 What is already in place? - identification and explanation of existing structures and how they will advance the rights of women, including:

- 4.1.3.1 Human Rights Commission
- 4.1.3.2 Public Protector
- 4.1.3.3 Gender in the RDP
- 4.1.3.4 Courts
- 4.1.3.5 Parliamentary caucus
- 4.1.3.6 Etc.

4.2 *Day one - afternoon*

Plenary or small group discussion with report back (depending on numbers). Facilitators should be carefully chosen and briefed beforehand.

4.2.1 What are the needs of South African women? This discussion should be an attempt to identify some of the needs that a Commission for Gender Equality or other structure could meet.

4.2.2 What structures (other than Commission for Gender Equality) are already meeting/could meet those needs?

4.2.3 What are the constraints facing us - economic, political, social.

4.3 *Day two - morning*

4.3.1 Presentations by International participants

4.3.1.1 Comparative survey of national machinery in commonwealth countries, including benefits, constraints, limitations.

4.3.1.2 One example of an enforcement model

4.3.1.3 One example of a policy/watchdog model

4.3.2 Time for discussion in small groups - Should we have a Commission for Gender Equality and what form would it take?

4.4 *Day two - afternoon*

4.4.1 Continuation of morning discussion:



Draft programme -Commission for Gender Equality3

- 4.4.1.1 Should we have a Commission for Gender Equality and what form would it take?
- 4.4.1.2 How should the Commission be constitutionalised, if at all?

4.4.2 Reportback to plenary and consensus or identification of options.

Cathi Albertyn  
Gender Research Project  
Centre for Applied Legal Studies  
11 March 1995



## **DRAFT LETTER TO WOMEN'S ORGANISATIONS AND STAKEHOLDERS CALL FOR SUBMISSIONS ON THE COMMISSION FOR GENDER EQUALITY**

*This is a fairly lengthy letter as it seems necessary to summarise the issues for the respondents and give some direction as to what is required. The report of the information seminars can and should be attached, but we must assume that it may not be read.*

### **Constitutional Assembly - Commission for Gender Equality**

Subgroup III of Theme Committee Six ... (general explanation of work of committee and deadlines). Explanation of accompanying documentation, if any.

In order to assist us in the task of deciding whether and how the Commission for Gender Equality should be entrenched in the final constitution, we have isolated the following issues and questions....

### **Should we have a Commission for Gender Equality ?**

There has been much discussion and debate on the need for national machinery to promote the advancement of women in South Africa. While there is general agreement that this is necessary, there is not necessarily agreement on the form that this will take.

#### ***What is national machinery?***

National machinery typically consists of a co-ordinated set of structures, policies, strategies and programmes that seek to enhance the status of women and advance gender equality. The overall goal of such machinery is to provide a political, administrative, legislative and judicial environment that enables women to enjoy, exercise and defend all their economic, social and political rights on an equal basis with men. National machinery involves, inter alia, positive changes to the structures, procedures, consultative processes, budgetary allocations and priorities of government. It therefore means that we should be concerned to have structures or programmes in every level of government and civil society.

#### ***What is already in place?***

Although no national machinery is in place, it is important to remember that the constitution already makes provision for a Human Rights Commission, a Public Protector and Courts. All of these institutions can and should advance the interests of women within the limits of their powers.

The Human Rights Commission will be involved in the following functions in relation to human rights - policy and legislative recommendations, education, monitoring, investigation and settlement of complaints through mediation etc, litigation.

The Public Protector will investigate maladministration in government.

The Courts will enforce existing rights. The Constitutional Court has the power to strike down legislation which contravenes women's human rights.



Draft letter to women's organisations

2

***What could the Commission for Gender Equality do?***

International models of Commissions for Gender Equality offer three alternative roles:

- 1 An independent advisory and consultative institution concerned with broad policy, strategic planning, research and monitoring issues. It forms part of a co-ordinated network of machinery that links with structures in the executive, administration and parliament.
- 2 An enforcement agency concerned with enforcing human rights or civil rights or anti-discrimination legislation.
- 3 A combination of 1 and 2.

***What are your views on the need for a Commission for Gender Equality?***

***What kind of structure do we want? What should its powers and functions be?***

Can you tell us what kind of powers and functions the Commission for Gender Equality should have. Would you support any of the models set out above? Why? What else should the Commission for Gender Equality do?

***What functions should be performed by other structures?***

Many people are concerned that the establishment of a Commission for Gender Equality will mean that institutions such as the Human Rights Commission will not concern themselves with gender issues. Everything will be left to the Commission for Gender equality. Do you share this concern? What do you think should be done by other structures such as the Human Rights Commission?

***Should the Commission for Gender Equality be entrenched in the Constitution?***

Although many countries have established national machinery in the past decade, the structures of this machinery have not always been included in their constitutions. One reason for this is that the constitutions of these countries had already been written. Another reason was that machinery can be created by executive decision or legislation. The advantage/disadvantage of including a Commission for Gender Equality in the constitution is that it gives a greater degree of protection to the institution. It cannot be changed as easily as ordinary legislation.

Do you think that the Commission for Gender Equality should be included in the constitution? Why?



***If the Commission for Gender Equality is entrenched in the Constitution, how much of the detail of its powers, functions and composition should be included?***

Some argue that only a broad outline of the Commission for Gender Equality should be contained in the constitution and the detail should be left to legislation. This would make the Commission more flexible in its operations and better able to respond to changing needs. It is easier to change the law than the constitution.

Others argue that it is necessary to spell out the detail of the powers, functions etc. in the constitution so that they cannot be changed very easily.

What do you think?

***What should be the relationship between national and provincial Commissions for Gender Equality?***

Some think that there should be separate provincial Commissions for Gender Equality, others think that the national and provincial Commissions should work together?

What do you think? How would national and provincial structures relate to each?

***Any other issues that you want to raise?***

Is there anything else that you want to say about the Commission for Gender Equality?

Details re deadlines (again) and public hearings.

Who to speak to with queries.

Yours etc.

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Cathi Albertyn  
Centre for Applied Legal Studies  
11 March 1995



# Black Lawyers Association

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OUR REF/ONS VERW:

TVDI/MS

YOUR REF/OU VERW:

## CONSTITUTIONAL ASSEMBLY

13 MAR 1995

13/03/95

**MR. HASSET EBRAHIM**

**FOR ATTENTION: MS B LEVY**

**FAX NO: 021-241-161**

### WRITTEN SUBMISSIONS TO THE SUB-THEME COMMITTEE ON THE PUBLIC PROTECTOR INSTITUTIONS

4.1 The Public Protector should investigate matters on his own initiative as well:

For example; should he in the course of investigating a complaint on one aspect in a specific department, stumble across maladministration and corruption in another department, he should have the discretion to open that investigation.

4.2 Powers to:

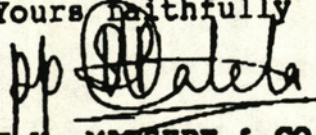
1. Issue search warrants
2. To Supoena persons for interrogation at the threat of criminal sanction



3. The power not to be subject to the limitations set out in the Official Secrets Act.

4.3 The powers should be extended beyond the investigation of problems of unfairness caused by government to include those emanating from the private Sector if such Private Sector has dealings with the government or has a direct working relationship with government (often allegations of corruption involving a government official are done through private institutions; thus the protector must have access to investigate such private institutions.

Yours faithfully

pp   
T.V. MATSEPE & CO

per: T.V. MATSEPE





Centre for Applied Legal Studies

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Tel (011) 403 6918 or 403 6933  
Fax (011) 403 2341 or 339 6932Ms Bronwen Levy  
Constitutional Assembly

Fax No 021 461 4339

10 MAR 1995

9 March 1995

Dear Bronwen

**PUBLIC HEARINGS ON THE PUBLIC PROTECTOR**

Further to you fax dated 2 March 1995, I enclose our submission on the Public Protector.

I confirm that the Centre for Applied Legal Studies will not be presenting oral submissions on this issue.

I trust that the enclosed written submission, compiled by Matthew Chaskalson with the support of the Centre for Applied Legal Studies, will be of use to subtheme committee 3 of Theme Committee Six.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'L. Angus'.

LAUREL ANGUS  
Acting Director

No of pages 6.



## **COMMENTS OF CENTRE FOR APPLIED LEGAL STUDIES ON REPORT OF SUB-THEME COMMITTEE 6.3 ON THE PUBLIC PROTECTOR**

### **1 STATUS AND NAME OF THE PUBLIC PROTECTOR**

**As a result of constitutional principle XXIX some provision for a Public Protector will have to be made in the new Constitution and the issue cannot be dealt with exclusively at the level of legislation. It is our submission that the constitutional provision should set out only the essential features of the office of Public Protector which can provide a framework to be filled in by subsequent legislation. To this end, the constitutional provision should be framed in an open ended manner.**

**We believe that it is important to protect constitutionally the institution of the Public Protector and the essential features of this institution, but that the new Constitutional provisions relating to the Public Protector should not contain the level of detail provided in sections 110 - 114 of the Interim Constitution. Unlike the Interim Constitution, the new Constitution will not have a limited life-span. If it rigidly regulates the powers of the Public Protector and its relationships with other institutions of government, it might restrain subsequent developments in these areas which would emerge as desirable in the course of future experience. It must be borne in mind that there is likely to be a culture of restraint relating to amendments of the new Constitution. Unlike the Interim Constitution, it will have been drawn up by a body with unquestionable legitimacy and will have been designed to be a long lasting document. For these reasons it should not contain inflexible provisions which might be shown by experience to be inappropriate. It should provide only a framework which entrenches the clearly indispensable features of the office of the Public Protector and leaves the detail to legislation which can be amended if the need arises.**

**The institution should continue to be called the Public Protector and should not be called an Ombudsman. It is our belief that issues of sexist language need to**



**Centre for Applied Legal Studies: Comments on Report of Subtheme  
Committee 6.3 on the Public Protector**

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be taken seriously by the Theme Committees and by the Constituent Assembly. It would not be acceptable for the new Constitution to create an institution called the Ombudsman. The international practice in this regard is irrelevant. Quite aside from this, it will be important to emphasise continuity between the existing Public Protector and the new Public Protector. By the time the new Public Protector is in office the public will have been exposed to the institution of the Public Protector for several years. Changing the name of the institution to an Ombudsman (or even to an Ombudsperson) would fail to take advantage of whatever recognition and goodwill has been created by the efforts of the existing Public Protector.

## **2 APPOINTMENT AND TENURE OF OFFICE OF THE PUBLIC PROTECTOR**

We do not believe that this is an issue which needs to be covered by the constitutional provisions relating to the Public Protector. Experience in the Public Protector's office might change the way in which the legislature perceives what qualifications are necessary for the Public Protector. It should be free to give legislative effect to those changed perceptions.

Whether qualifications for office are to be dealt with at the level of the constitution or in legislation, we can see no need for the Public Protector to be drawn from the ranks of lawyers, still less for the Public Protector to be a judge. It is not clear that the experience of lawyers and judges qualifies them better than other people for the functions of the Public Protector. The Public Protector does not investigate legal problems. He or she investigates problems relating to unfairness and maladministration. Legal skills are not indispensable to this process. In fact, if the Public Protector is to play a pro-active role and to make recommendations relating to the solution of systemic problems, other



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qualifications are likely to be much more important. These would include expertise in public administration or practical experience in the administration of large institutions. It should also be borne in mind that the Public Protector will not act single handedly but will be the head of an office with a substantial complement of staff. In so far as there will be occasional investigations which require legal skills, these can be dealt with by persons with the appropriate skills who are employed in the office of the Public Protector.

One rationale that has traditionally been offered for the appointment of a judge to the office of Public Protector is that it serves to enhance the prestige of the office and emphasises its independence. This rationale has limited weight in contemporary South Africa. It is by no means clear that the appointment of a judge would, in the eyes of the broader South African public, bring prestige or a reputation for independence to the office of Public Protector. In any event, the prestige and independence of the Public Protector will stand or fall by his or her actions in the office and not by the reputation he or she brings into the office.

### **3 FUNCTIONS OF THE PUBLIC PROTECTOR**

We believe that there is no tension between the pro-active and responsive functions of the Public Protector as set out in section 112(1)(a) of the Interim Constitution. If the office of the Public Protector has sufficient staff it should be possible to deal with individual complaints as well as to conduct investigations *mero motu*. In fact, the two functions should complement one another. Thus the principal role of the Public Protector and his or her senior staff might be to investigate systemic problems that emerge from the individual complaints handled by the office and to recommend systemic solutions to these problems.



**Centre for Applied Legal Studies: Comments on Report of Subtheme  
Committee 6.3 on the Public Protector**

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In our submission the functions of the Public Protector should include the power to investigate abuses relating to administrative problems in the justice system. A clear distinction needs to be drawn between complaints relating to individual decisions produced by the justice system and complaints relating to maladministration in the justice system. The former cannot be within the jurisdiction of the Public Protector. The Public Protector does not have the skills, the institutional capacity or the legitimacy to involve itself in reviewing judicial decisions. To do so would clearly amount to an interference with the independence of the courts. However, there is no reason for the Public Protector to refrain from investigating complaints that relate to systemic problems in the administration of justice. Such problems are not of a different nature to those which the Public Protector will be investigating elsewhere in the public sector. Their investigation does not compromise the independence of the judiciary but may be crucial to the effective operation of the justice system which is, after all, the principle enforcement arm of the constitution.

**4 THE RELATIONSHIPS OF THE PUBLIC PROTECTOR TO OTHER  
INSTITUTIONS**

It is our submission that no attempt should be made in the Constitution to regulate the relationships of the Public Protector with other specialised structures of government. Relationships of this nature are precisely the sort which cannot be rigidly defined in a constitution because they need to change with time. In fact, there may be merit in refraining from attempting to regulate these relationships even with legislation. The Public Protector, the Human Rights Commission, the Gender Commission and other specialised structures of government are, of necessity, going to find themselves interacting over a wide range of issues. It may be better to allow these bodies to regulate their own



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Committee 6.3 on the Public Protector**

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relationships on an ongoing basis than to attempt to define these relationships in legislation.

Similarly, we do not believe that the Constitution should attempt to define the role of Provincial Public Protectors or their relationship with the National Public Protector. If any provision dealing with Provincial Public Protectors is to be included in the new Constitution we believe that a provision modelled on sections 114(1) and (2) of the Interim Constitution should suffice. Definition of the precise role of Provincial Public Protectors should be left to Provincial Legislatures, as the level of government which will be most obviously concerned with the activities of a Provincial Public Protector. So too should questions relating to the appointment and tenure of Provincial Public Protectors. The relationship between the National Public Protector and Provincial Public Protectors, if they are established, should be left to the institutions concerned to work out in much the same way as the National Public Protector will have to establish its own relationship with other "public protectors" with jurisdiction over institutions of the state (like a police complaints commission, local government ombuds etc).