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CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

24 March 1995

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY
SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION

OF

THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

As per the agreement of the Subtheme Committee of 20 March 1995 these are the details of the meeting of the Subtheme Committee:

Date: FRIDAY 24 MARCH 1995

Time: 9:00

Venue: E305

In addition there will also be a meeting of the Subtheme Committee on Monday to finalise the report on the Public Protector:

Date: MONDAY 27 MARCH 1995

Time: 18:00

Venue: E305

AGENDA

1. Opening and Welcome
2. Report on the Public Protector
3. Gender Workshop
4. Any other business
5. Closure

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SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION
OF
THEME COMMITTEE SIX
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20 MARCH 1995

PRESENT

Kgositsile B (Chairperson)

Camerer S
Cupido P W
Malan T J
Moatshe P
Mokoena L M
Mompoti R
Netshimbupfe M A
Ngubane H
Nkadimeng J K
Zitha D A

Apologies: Turok M and Inkosi B Luthuli

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

1. Opening and Welcome

Ms Kgositsile opened the meeting at 9:00 and welcomed members.

2. Minutes

2.1 The minutes of 27 February 1995 were adopted.

2.2 The minutes of 6 March 1995 were adopted.

2.3 The minutes of 13 March 1995 were adopted.

3. Report on the Public Protector

3.1 Report from Technical Experts on Public Hearings

Prof Erwee presented a report from the Public Hearings on the Public Protector held on 14 and 15 March 1995 (see annexure 'A').

3.2 Report from Political Parties on final submissions

3.2.1 Ms Kgositsile reported that the initial draft submission on the Public Protector submitted by the ANC needs to be taken as the ANC's final submission on the Public Protector.

3.2.2 Ms Malan reported that there was an amendment to the National Party submission on the Public Protector. The final submission would be submitted to the Secretariat.

3.2.3 Prof Ngubane spoke to the following issues in the Inkatha submission which she felt needed to be highlighted.

i) Provincial Public Protectors: they would need to take in to account individuals in other levels of government. The house of traditional leaders would need to be part of the selection process of provincial Public Protectors. The provincial Protectors would need to take in to account the interests and needs of traditional communities.

ii) Inkatha suggests that the Public Protector would also need to protect individuals with regards to the abuse by the environment. However this could be accommodated in the role of the Human Rights Commission as opposed to the Public Protector.

3.3 Discussion on reports

The following issues were isolated for discussion arising out of the reports

from political parties and the Public Hearings namely, a Commission of Public Protectors rather than an individual Public Protector, the traditional authorities role with regard to the Public Protector, and extension of powers to include disciplinary procedures.

3.3.1 With regard to the Commission as opposed to an individual Public Protector the following points were made:

- i) The national, provincial and deputy Public Protectors could be conceptualised as a Commission.
- ii) There is a need to assess the proposal of the Commission with regard to the debate of separate Public Protectors for different areas such as police and military. A Commission of Public Protectors could have responsibility for different areas.

3.3.2 With regard to the relationship between traditional authorities and the Public Protector the following points were made:

- i) In certain instances traditional authorities will play the role of the Public Protector, however in other instances the Public Protector will need to play a role in terms of protecting the community from a particular traditional authority.
- ii) The issue of checks for all levels of government is important. There is a need for a mechanism that ensures that the maladministration of government officials is dealt with. Traditional leaders are central to government and thus need to be subject to the jurisdiction of the Public Protector.
- iii) Traditional authorities need to be consulted in the appointment of the Public Protector. The incumbent Public Protector must be sensitive to the needs and interests of traditional communities.

3.3.3 With regard to the extension of powers to include disciplinary procedures the following points was made:

- i) This issue raises a broader question of whether the Public Protector has the power to litigate. Most political parties have argued that the Public Protector jurisdiction should not extend to litigation, the exception being

Inkatha.

- ii) The power to initiate disciplinary proceedings is a limited power of litigation. This suggestion arises from the view that the office of the Public Protector must have the power of ensuring that its findings are acted upon, through disciplinary hearings.

The traditional model maintains that the way to ensure that the findings of investigations are acted upon is through the publicity of recommendations. Parliament would also play an important role in pressurising the ministry concerned to take up the recommendations of the Public Protector.

4. Gender Workshop

4.1 *The meeting agreed that international speakers would be kept to a minimum.*

4.2 *The meeting agreed that the experience of developing countries would be important with regard to international perspectives.*

4.2.1 The following suggestions were made with regard to international participants; Ms Thalele - Lesotho, Ms Mothuru - Zimbabwe, speakers from the workshop hosted by the national coalition, India, South America, Tanzania and Commonwealth.

4.3 *The meeting agreed that the Chairperson together with the technical advisors would finalise the agenda and speakers for the workshop based on the suggestions made in the Subtheme Committees deliberations.*

5. Stakeholders re: Human Rights Commission

The meeting agreed that members would forward the names of additional stakeholders to the Secretariat to be contacted with regard to submissions on the Human Rights Commission.

6. Any other business

It was agreed that the Subtheme Committee would meet on Friday 24 March to table the report from the technical advisors on the Public Protector and to finalise the speakers for the gender workshop.

7. Closure

**PUBLIC PROTECTOR
SUMMARY OF PUBLIC HEARING /GROUP SUBMISSIONS**

Theme Committee 6 : Subtheme 3
14 March 1995

Prof Ronel Erwee
University of Pretoria

Introduction: This is a summary of the submissions of the following stakeholders: the Legal Resources Centre (LRC); Black Lawyers Association; National Land Committee; CALS; General Council of the Bar (GCB); G N Barrie, Judge Van der Walt.

1. Constitutionalisation

All stakeholders support the creation of the office in the final Constitution, but GCB differ in what details of the office should be placed in the constitution and which details should be left to legislation. All agree with the GCB that basic principles especially the powers of the Public Protector, be enshrined in the Constitution.

The GCB recommend that the definition by the International Bar Association be adopted :

An office provided for by the Constitution or by action of the legislature or Parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.

PP is used in cases where the citizen cannot obtain adequate redress through the courts as the complaint is not susceptible to be dealt with through the courts or he/she cannot afford costly litigation.

2. The name:

There is disagreement on the name of the Public Protector or Ombudsman. The National Land Committee is not in favour of Ombudsman as they believe that "it does not have not a specific meaning in South Africa".

The GCB, Barrie and the LRC caution that the term, "Public Protector", is not accurate since the Ombudsman provides no protection and does not enter an arena as a champion or representative of an aggrieved citizen. The GCB points out that the Ombudsman acts as a mediator and objectively assess the viewpoints of both parties in a dispute.

The term Ombudsman is seen, by the GCB and the LRC, as internationally acceptable, has been in use in South Africa for a number of years and does not have sexist connotations, whereas the NLC and CALS hold the opposite view.

The meeting rose at 10:30.

3. Independence and impartiality:

There is agreement that the Ombudsman/PP should be independent and report annually to Parliament.

The GCB and Judge van der Walt emphasise that the perceived independence of the Ombudsman/Public Protector is extremely important. Both the GCB and the LRC agrees that access to records is crucial and that the office should have the power of search and seizure of documents; the findings should be made clear to the citizen and to the public.

4. Qualifications and tenure:

The GCB argues that security of tenure need to exist to gain the trust of citizens and to ensure that the office is not vulnerable to the whims of politicians. A seven years fixed term is preferable without the incumbent being eligible for re-appointment (GCB, NRC, NLC). Barrie recommends that the tenure be 5 to 7 years with a renewale option. The NLC requests that the nomination procedure be transparent and that "unsatisfactory" performance be addressed - the LRC states that only impeachable conduct should lead to removal from office.

The GCB, Van der Walt and Barrie are of the opinion that persons with legal qualifications are eminently suitable for the post as lawyers have investigative skills and is well versed in problem analysis. Both the GCB and the LRC note that the Ombudsman/PP can use co-option of persons with different skills in his/her office. The latter option will address the assumption of the NLC that the PP may be unable to "identify with the situations of rural people". CALS sees no need that the PP be drawn from lawyers or judges as the "PP does not investigate legal problems". The current incumbent, Judge van der Walt, however, confirmed that 90% of the cases that they deal with need legal background, but a staff member with knowledge of public administration is invaluable (CALS supports expertise in public administration).

5. Powers and Functions

GCB, LRC, Barrie and Van der Walt emphasise that the mediating role that the Ombudsman/PP plays, should permeate all functions. All parties appear generally to agree that the Public Protector should protect citizens against maladministration by government.

5.1 Initiating Investigations and receiving complaints

All the stakeholders agree that he/she should be empowered to investigate matters both upon the receipt of a complaint (by individuals or groups) and act on own initiative to investigate underlying trends. The NLC indicate that systemic problems occur in rural areas and it is rare for an individual to come forward - but an entire community can complain.

5.2 Power to refer any matter to an appropriate person, institution or entity :
The LRC and the GCB caution that the Ombudsman/PP should not be given the power to litigate directly but refer the matter to the relevant authorities (eg. Advocate General, HRC, CGE, Legal Aid Board).

5.3 Power to recommend action and to acquire any person, institution or entity to give reasons for its actions:

Both the LRC and the GCB indicate that this power is in keeping with a mediating function. The Black Lawyers Association wishes to extend these powers to include the issue of search warrants and to subpoena persons for interrogation at threat of criminal sanction, whereas the GCB and LRC only support search and seizure actions. The GCB notes that the Ombudsman/PP could use the power to file report to parliament and then use publicity to get reaction from recalcitrant department in terms of the steps that the department will take to correct the situation.

5.4 The power to protect against victimisation:

Both the GCB and the LRC support the power to protect a complainant

5.5 Power to direct the initiation of disciplinary proceedings:

The LRC adds this new recommendation as cases occurred where unfair conduct of an official was condoned by a superior. This power will allow the Ombudsman/PP to override decisions where the power to effect discipline was abused in furtherance of a practice within a department. The LRC cautions that this power needs to be used circumspectly and with the approval or in conjunction with the HRC.

6. Relationship to courts and other institutions.

The GCB, Barrie and the LRC argue that the jurisdiction of Ombudsman/PP primarily be restricted to investigations in public sphere. Judge van der Walt suggest that the Ombudsman should have the widest possible ambit.

The LRC recommend that bodies which perform public functions or functions that are essential to the public interest such as deposit-taking institutions, provident or pension fund, medical scheme or unit trust scheme ; insurance companies; bodies with control over any profession. The NLC thinks that white farmers, which play certain "private sector functions", can also be investigated. The LRC argues that in this case the investigation can be referred to the HRC. The GCB noted that unfair actions by farmers in many cases fall under labour law; if labourers' rights as tenants are affected it should be referred to the HRC.

The GCB, the LRC and the NLC believe that administrative actions by traditional leaders can also be investigated. The present incumbent, Judge van der Walt indicates that the office is an office of last resort and traditional communities has used kgotlas to solve problems with the result that such complaints have not reached his office. The GCB recommended that when an individual or group appeals to the Ombudsman/PP, that he approaches the traditional leader and plays a mediating role; the traditional leaders should also have regular access to the Ombudsman/PP so that he may appreciate regional differences; and chiefs may

raise systemic problems for the Ombudsman/PP to investigate. If a practice is regarded as part of traditional culture, the Ombudsman/PP cannot compel a change - this applies to all cases eg even general issues in a department who acts with own discretion and the courts can also not act in certain spheres of discretion. The Ombudsman may recommend to Parliament to contemplate new legislation.

The general view is that the independence of the judicial system should not be compromised and that the Ombudsman/PP should only deal with maladministration on an administrative level.

The GCB and CALS recommend that there should be flexibility regarding the relationships with other parties and that it not specifically be legislated. The Ombudsman should have an extensive network and refer specific issues to other structures such as HRC and GEC.

7. National/regional public protectors:

The GCB, Judge van der Walt and LRC caution that both national and provincial offices could result in an increase in bureaucracy and high costs. Autonomous provincial Ombudsman/PP may also take a particular view of a perceived injustice which is not shared by the national office.

The GCB recommends that the national Ombudsman co-opt deputies whose offices can be situated in various provinces. The deputies are empowered to investigate complaints, refer the results of such investigations to the national office for adoption of the recommendations and the institution of action. The NLC notes that accessibility to provincial and national offices should be taken into account.

Judge van der Walt and Barrie argues that provincial Ombudsman can act as representatives of the national Ombudsman, act under his (sic) supervision and concentrate more on provincial and local government.