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# **CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 6.3**

**SPECIALISED STRUCTURES OF GOVERNMENT**

**15 May 1995**

**E305**

***DOCUMENTATION***

Entire document embargoed until 9:00 on 15/5/95

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**CONSTITUTIONAL ASSEMBLY**

**SUBTHEME COMMITTEE THREE  
TRANSFORMATION, MONITORING AND EVALUATION**

**OF**

**THEME COMMITTEE SIX  
SPECIALISED STRUCTURES OF GOVERNMENT**

**MEMORANDUM**

**TO: ALL MEMBERS OF SUBTHEME COMMITTEE THREE**  
**FROM: Bronwen Levy (Secretariat)**  
**RE: Subtheme Committee 6.3 meeting**  
**DATE: 10 May 1995**

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Please be advised that there will be a meeting of Subtheme Committee 6.3, the details of the meeting are as follows:

**VENUE: E305**  
**TIME: 9:00**  
**DATE: 15 MAY 1995**

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Enquiries Ms B Levy 403 2182 or 245 031 ext 234

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

**15 May 1995**

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**AGENDA**

- 1. Opening and Welcome**
- 2. Adoption of minutes**
  - 2.1 Minutes of the meeting of 18 April 1995**
  - 2.2 Minutes of the meeting of 5 May 1995**
- 3. Draft constitutional text on the Public Protector**
  - 3.1 Discussion**
- 4. Draft report on the Human Rights Commission**
  - 4.1 Input by Technical Advisors**
  - 4.2 Discussion**
- 5. National Sector Public Hearings**
- 6. Constitutional Public Meetings**
- 7. Any other business**
- 8. Closure**

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**HASSEN EBRAHIM**  
**EXECUTIVE DIRECTOR**

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Enquiries Ms B Levy 245 031 ext 234 or 403 2182

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

**18 APRIL 1995**

**Kgositsile B (Chairperson)**

Balie A  
George M  
Louw L  
Malan TJ  
Moatshe P  
Mompoti R  
Netshimbupfe MA  
Nkadimeng JK  
Tshabalala ME  
Van Zyl ID

Apologies: Mokoena LM

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

**1. Opening and Welcome**

Ms Kgositsile opened the meeting at 14:00 and welcomed the members.

**2. Adoption of minutes**

The minutes of 5 April were adopted.

- 3. Input by technical advisors on the Human Rights Commission (HRC)**
- 3.1 Dr Albertyn presented an introductory paper to guide discussions on the HRC (see annexure 'A'). The following points emerged from her input:**
- 3.1.1** The concept of human rights embraces all political, civil, social, economic, cultural and developmental rights. Governments have a responsibility to protect and promote all human rights.
- 3.1.2** Human rights have been protected and promoted through policy, legislation, administrative procedures, an independent judiciary, enactment and enforcement of individual safeguards and remedies, and the establishment of democratic institutions.
- 3.1.3** However the enactment of law often is not sufficient to ensure realisation of rights. Thus national institutions have been established in order to promote and protect Human Rights.
- 3.1.4** Examples of national human rights institutions include Human Rights Commissions, Ombudsmen, and specialised institutions which deal with the needs of vulnerable and minority groups.
- 3.1.5** The United Nations (UN) has endorsed the following principles and guidelines with regard to these national institutions:
- i) to be vested with the necessary competence
  - ii) to be given a broad mandate
  - iii) to make recommendations on request or on own initiative
  - iv) to promote and ensure the harmonisation of national legislation, regulations and practices with international human rights instruments
  - v) to encourage the ratification of international human rights instruments
  - vi) to contribute to national reports
  - vii) to assist with education programmes
  - viii) to play a role in publicity
- 3.1.6** The UN has also developed a range of functions that governments are expected to perform in order to realise social and economic rights under the Covenant on Economic, Social, and Cultural Rights.
- 3.1.7** With regard to a comparative survey of human rights

institutions, they tend to have the following characteristics:

- i) they are administrative in nature
- ii) they have advisory authority
- iii) they are created by the constitution or by legislation
- iv) they are function independently
- v) their powers may be defined narrowly or broadly
- vi) it is not common for a HRC to have the power impose a legally bound outcome on parties.
- vii) they have the power to refer where cases remain unresolved
- viii) they review government human rights policy and make recommendations for improvement
- ix) they play a monitoring role
- x) they initiate enquiries
- xi) they play a role with regard to community awareness on human rights issues
- xii) they deal with the horizontal application of rights

**3.1.8** The following are the key issues for consideration:

- i) Do all universally accepted fundamental rights, freedoms and civil liberties include all human rights ?
- ii) Should the constitution provide for the protection of the above mentioned rights ?
- iii) Should the HRC concern itself with the horizontal application of human rights ?
- iv) Should the constitution define the broad mandate of the Commission and leave details to legislation or should these details ?
- v) Should the Commission be an enforcement agency ? And to what extent should this be determined in the constitution ?
- vi) Should social and economic rights fall within the ambit of the HRC ?

**3.1.9** In the discussion arising out of Dr Albertyn's input the following issues were raised by the Committee:

- i) **The role of the HRC with regard to group complaints:** Group complaints can be used as an effective way of ridding society of inequalities. This function allows the HRC to operate pro actively in dealing with discrimination at a systemic level rather than reacting

solely to individual complaints.

- ii) **The role of the HRC with regard to private discrimination:** Traditionally HRC's have dealt with the relationship between the state and the individual, however there is a debate with regard to where the state sphere ends and the private sphere begins. In addition in the South African context in particular there is discrimination within the private sphere and it would be important for a HRC to deal with this.
- iii) **The role of the HRC with regard to enforcement:** In instances where the HRC has the power to enforce its findings there needs to be a balance between enforcement and other functions such as reviewing legislation and making recommendations etc.
- iv) **The location of socio economic rights within the ambit of the HRC:** Socio economic rights fall within the ambit of Constitutional Principle II and thus would be located within the ambit of the HRC.

**3.2** Prof Erwee spoke to the draft report on the issues and debates emerging from the submissions received (see annexure 'B'). The committee noted the report.

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

Ms Kgositsile reminded members that they would be expected to attend the Public Hearings on the Human Rights Commission scheduled for 20/21 April 1995.

#### **5. Any other business**

There was no further business.

#### **6. Closure**

The meeting rose at 16:00.



**THEME COMMITTEE SIX, SUBTHEME THREE**  
**"Specialised structures of Government"**  
**HUMAN RIGHTS COMMISSIONS**  
**AN INTRODUCTION**

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**1**     **Introduction:**

This is an introductory paper to guide initial discussions on the issues surrounding the Human Rights Commission. Unfortunately, there has been insufficient time to engage in a detailed comparative description of Human Rights Commissions. However, the paper attempts to identify some of the key issues for debate. Further details can be given on request.

**2**     **What is a Human Rights Commission?**

**2.1**    **The concept of human rights**

The concept of human rights embraces what have been described as political, civil, social, economic, cultural and developmental rights. The initial compartmentalisation of these rights, caused by historical and political reasons, has increasingly broken down. The Vienna Declaration of 1993 has proclaimed that "all human rights are universal, indivisible, interdependent and interrelated". It calls on all in the international community to treat human rights "in a fair and equal manner, on the same footing and with the same emphasis".<sup>1</sup> Hence all governments have an equal responsibility to protect and promote all human rights.

**2.2**    **National institutions for the protection and promotion of human rights:**  
Human Rights involve relationships between individuals and between individuals and the state. The practical task of protecting and promoting human rights is primarily a national one for which each State is responsible. At a national level, human rights can best be protected through the formulation and implementation of adequate policies, legislation and administrative procedures; an independent judiciary; the enactment and enforcement of individual safeguards and remedies; and the establishment of democratic institutions.

The enactment of a law protecting certain rights is often not enough, unless these laws provide for all of the legal powers and institutions necessary to ensure the effective realisation of these rights. Internationally, it has become apparent that the effective enjoyment of human rights requires the establishment of national infrastructures for their protection and promotion. Official human rights institutions have been set up in many countries over the past few years. While the task of these institutions varies considerably from country to

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<sup>1</sup>     The Vienna Declaration and Programme of Action, Para 5.

country, they share a common purpose and are thus collectively referred to as national institutions for the protection and promotion of human rights.

Examples of national human rights institutions include: human rights commissions, ombudsmen and specialised institutions dealing with the needs of vulnerable and minority groups.

### 2.3 United Nations Guidelines:

The UN Commission on Human Rights endorsed the following principles and guidelines with respect to national institutions for the promotion and protection of human rights (March 1992):

- 2.3.1 to be vested with competence to protect and promote human rights;
- 2.3.2 to be given as broad a mandate as possible;
- 2.3.3 to make recommendations on request or on own initiative on any matters concerning the protection and promotion of human rights in respect of the following areas:
  - 2.3.3.1 any legislative or administrative provisions;
  - 2.3.3.2 any provisions relating to judicial organisation;
  - 2.3.3.3 any situation of violation of human rights; and
  - 2.3.3.4 preparation of national reports in respect of human rights.
- 2.3.4 to promote and ensure the harmonisation of national legislation, regulations and practices with international human rights instruments;
- 2.3.5 to encourage ratification of the above-mentioned instruments;
- 2.3.6 to contribute to national reports in respect of international treaty obligations;
- 2.3.7 to cooperate with relevant UN, regional and national institutions concerning human rights;
- 2.3.8 to assist in the formulation of programmes for human rights education;
- 2.3.9 to publicise human rights and all efforts to combat all forms of discrimination.

In addition to these guidelines, the Human Rights Commission of the UN has developed a range of functions that governments are required to perform in relation to the progressive realisation of social and economic rights under the Covenant on Economic, Social and Cultural Rights (General Comment No. 1 Third session, 1989 UN doc E/1989/22). These include

- 2.3.10 a comprehensive review of national legislation, administrative rules and procedures and practices to ensure the fullest possible conformity with the Covenant;

- 2.3.11 the need to diagnose and then monitor the situation with respect to each right on a regular basis;
- 2.3.12 develop clearly stated and carefully targeted policies, including the establishment of priorities;
- 2.3.13 the need to facilitate public scrutiny of government policies about economic, social and cultural rights and to encourage the involvement of society in the formulation, implementation and review of the relevant policies;
- 2.3.14 to identify goals for measurement and evaluation of progress; and
- 2.3.15 to identify obstacles and problems hindering the progressive realisation of these rights.

**2.4 Summary of types of Human Rights Commissions: (from summary of UN Workshop held in Paris, October 1991).**

All human rights institutions are specifically defined in terms of the promotion and protection of human rights. The common characteristics tend to be the following:

- 2.4.1 All institutions are administrative in nature, rather than judicial or law-making.
- 2.4.2 All have advisory authority in respect of human rights at national and/or international level either through:
  - 2.4.2.1 *opinions and recommendations; and/or*
  - 2.4.2.2 *consideration and resolution of complaints submitted by individuals and groups.*
- 2.4.3 They are created by the Constitution or by legislation or decree (latter more common).
- 2.4.4 They function independently from other organs of government, but are often required to report to the legislature on a regular basis.
- 2.4.5 They are composed of a variety of members from diverse backgrounds.
- 2.4.6 They are concerned primarily with protection of nationals against discrimination and with the protection of other civil and political rights. The specific functions and powers are defined in act of parliament and may be narrowly or broadly defined.
- 2.4.7 The receipt and investigation of complaints from individuals and groups alleging human rights abuses requires effective powers of obtaining evidence. However these institutions tend to reach resolution by mediation and arbitration, rather than by adjudication. It is not common for a human rights commission to be granted the power to impose a legally binding outcome on parties.
- 2.4.8 Where cases remain unresolved, they may be referred to a specialised tribunal or the courts.

- 2.4.9 They engage in a systematic review of government's human rights policy to identify problems and suggest ways of improving it.
- 2.4.10 They monitor state's compliance with national and international human rights instruments.
- 2.4.11 They initiate enquiries on their own behalf. The ability to do this is seen as an important measure of the institution's overall strength and probable effectiveness.
- 2.4.12 They are entrusted with improving the community's awareness of human rights issues.
- 2.4.13 They almost always deal with the horizontal application of human rights.

Although social and economic rights have not typically been the focus of comparative institutions, the above powers and functions are broad enough to include these rights within the ambit of Human Rights Commissions.

### 3 *Examples from other countries:*

- 3.1 **Canada:** In Canada, the federal and regional Human Rights Commissions are primarily concerned with the enforcement of the federal and regional Human Rights Acts. Note that Canada only developed a justiciable bill of rights in the 1980s.
  - 3.1.1 The Canadian Human Rights Act is essentially an anti-discrimination act proscribing discrimination in the provision of goods and services, accommodation, employment, employee organisations, pay, hate speech and harassment. The Canadian Human Rights Commission has typical powers of such institutions. A significant part of its work is devoted to investigating complaints about discriminatory practices. These investigations result in a range of recommendations including conciliation and referral to a Human Rights Tribunal (established in terms of the same act) for a hearing. The HRC is able to make orders, but to be enforceable they must be made an order of the Federal Court.
  - 3.1.2 The Quebec Charter of Human Rights and Freedoms sets up a Human Rights Commission with jurisdiction to investigate complaints over a wider range of civil and political rights. A Human Rights Tribunal with power to make enforceable decisions is also established.
- 3.2 **Australia:** The Australian Human Rights and Equal Opportunities Commission was established by legislation in 1986. It is, again, primarily concerned with discrimination and has divisions to deal

with various aspects of discrimination (human rights, race, sex, disability). Its general functions include the enforcement of anti-discrimination laws as well as the typical range of competencies relating to advice, monitoring, education and awareness-raising, research etc.

**3.3 India:** Still attempting to find information.

#### **4 Issues for consideration in South Africa:**

##### **4.1 What does the interim constitution provide for?**

The interim constitution provides for the establishment of a Human Rights Commission in sections 115 to 118. These sections regulate the selection and appointment of commissioners, define its powers and functions, provide for a director and budget and for annual reports to Parliament. In particular, the powers defined in the interim constitution are the following:

- 4.1.1 promote the observance of, respect for and the protection of fundamental rights;
- 4.1.2 develop an awareness of fundamental rights among all people in South Africa;
- 4.1.3 make recommendations to government for the adoption of progressive measures to promote fundamental rights;
- 4.1.4 undertake studies on fundamental rights;
- 4.1.5 request information from the government about rights;
- 4.1.6 monitor legislation for compliance with bill of rights and the norms of international human rights law;
- 4.1.7 investigate complaints of violations of rights and assist the complainant to secure redress, including referral to the courts.

These do not constitute a complete lists of the powers and functions. Additional powers and functions may be assigned by legislation (116(1)).

##### **4.2 The Constitutional Principles:**

The following constitutional principle is relevant to the discussion:

- 4.2.1 Constitutional principle II: Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties which shall be provided for and protected by entrenched and justiciable provisions in the Constitution.

##### **4.3 What are the key issues?**

- 4.3.1 *Do "all universally accepted fundamental rights, freedoms and civil liberties" include all human rights?*

Yes, see the Vienna Declaration.

**4.3.2 *Is the Human Rights Commission mandated by the requirement in CP II that the Constitution provide for the "protection" of these rights?***

Yes, in so far as the Human Rights Commission falls within the international understanding of a national institution committed to the protection and promotion of human rights.

**4.3.3 *Will the Human Rights Commission concern itself with the horizontal application of human rights?***

This has typically been the task of Human Rights Commissions in other countries.

**4.3.4 *Should the constitution define the broad mandate of the Commission and leave the details of the powers to legislation? Or should all the powers and functions be contained in the constitution?***

Most countries have legislation to regulate the Commissions.  
If all in constitution: fixed and cannot be changed.  
If broad mandate: flexible.

**4.3.5 *To what extent should the Commission be an enforcement agency? And to what extent should this be determined in the constitution? Should this be done by an additional Tribunal?***

Important to establish parameters of existing debate, especially in relation to labour market policy and possible civil rights act.

**4.3.6 *Should social and economic rights fall within the ambit of the Human Rights Commission?***

This does fall within the ambit of Constitutional Principle II.

Dr Catherine Albertyn  
Technical Advisor  
Theme Committee Six  
Subtheme Three

12 April 1995

## CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3;  
THEME COMMITTEE 6

Prof R Erwee  
13 April 1995

### FIRST DRAFT REPORT OF SUBMISSIONS: HUMAN RIGHTS COMMISSION

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#### PART 1 - INTRODUCTION

##### 1. Submissions received

This report attempts to draw together the issues and debates emerging from submissions received from political parties, organisations of civil society, public debates during February 1995, and an information seminar. Further inputs from public hearings during April 18 to 21 1995 will be added.

##### 1.1 Political parties

- 1.1.1 FF
- 1.1.2 IFP

##### 1.2 Organisations of Civil Society

- 1.2.1 Association of Law Societies (ALS) - written
- 1.2.2 Black Lawyers Association (BLA) - hearing
- 1.2.3 Black Sash (BS) - hearing
- 1.2.4 Centre for Applied Legal Studies (CALS) - hearing
- 1.2.5 Centre for Human Rights, University of Pretoria (CHR) - written
- 1.2.6 General Council of the Bar (GCB) - written
- 1.2.7 Human Rights Committee (HRC) - hearing
- 1.2.8 Lawyers for Human Rights - hearing
- 1.2.9 Legal Resources Centre (LRC) - hearing
- 1.2.10 National Association of Democratic Lawyers (NADEL) - hearing
- 1.2.11 National Land Committee (NLC) - hearing

##### 1.3 Information seminars (January 30 to February 8 1995; and Brian Currin).

Interim reports are prepared by the technical advisors:

- 1.4 First draft report of submissions
- 1.5 Comments on the Human Rights Commission

No information has been gathered from a meeting held under the public participation programme.

##### 2. Constitutional Principle

The Constitutional Principle applicable to this Commission is Principle II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable

provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

It can also be argued that Principle III (prohibition of racial, gender and all forms of discrimination) as well as Principle V (equality in the legal system) have a bearing on the roles and functions of this Commission.

## **PART II DISCUSSION OF MATERIAL PROCESSED BY THE COMMITTEE**

### **3. General overview**

During the initial seminar programme and debates in February the Theme Committee discussed the Human Rights Commission and raised a number of critical issues with regard to a) the Commission's role in relation to the other specialized structures of Government; b) consideration of human rights violations on both vertical and horizontal levels and c) the proposed roles, functions and structure of the Commission.

These issues gave rise to a list of questions that were sent to organisations in civil society. Some of the organisations provided written submissions prior to participation in public hearings.

There seems to be a considerable amount of agreement on broad issues in the written submissions, but the main issues of debate, which can be tested in public hearings, are:

3.1 the Commission's role in relation to the other specialized structures of Government;

3.2 the ambit of jurisdiction of the Commission ie consideration of human rights violations on both vertical and horizontal levels;

3.3 the composition and structure of the Commission

3.4 the proposed powers and functions of the Commission

3.5 allowing class actions or only assisting individuals

3.6 the relationship between the Bill of Rights and the Human Rights Commission with regard to Second Generation Rights

3.7 acting as an enforcement agency to implement anti-discrimination legislation

Some of the disagreement may refer to matters which do not need to be included in the constitution, but can be left to legislation like an Equality Act or Civil Rights Act.



#### 4. Areas of Agreement

##### 4.1 Constitutionalisation of the Commission

4.1.1 There was support among parties (FF, IFP) and stakeholders (ALS, CHR, LHR) for the constitutionalisation of a Human Rights Commission in the Constitution.

4.1.2 The constitution needs only deal with basic principles with regard to establishment and appointment, powers and functions, independence and accountability. Further details can be left to legislation. There is currently a lack of clarity about the amount of detail needed for constitutional entrenchment.

##### 4.2 Structure and composition

Most of the parties and stakeholders agree that the Commission needs to be an independent statutory body created by parliament. It must be subject to the law and not accountable to government, so that government is unable to dictate the Commission's programme.

The Commissioners that are appointed need to have knowledge of human rights issues both nationally and internationally, they need to be politically independent and be respected broadly.

While the Commission would be a national commission there is a need to examine how it will be decentralised. The Commission should be an active and powerful commission.

##### 4.3 Powers and functions

Parties and stakeholders generally agree on the powers and functions as stipulated in section 116 (1) (a) to (e).

Most parties and stakeholders mention that the present provisions in the Interim Constitution with regard to the Commission are limited in that they do not consider human rights violations which are considered horizontally i.e. between individuals. The main concern of the Interim Constitution is the violation of rights vertically i.e. between the state and the people.

##### 4.4 Relationship with other specialized structures of government

Parties and stakeholders see the Human Rights Commission as having responsibility for all human rights matters not directly dealt with by other more specialised organs of state.

## 5. Areas of disagreement and need for further clarity

### 5.1 Constitutionalisation of the Commission

- 5.1.1 The GCB argued that the Human Rights Commission should not be constitutionalised, but should operate within the parameters of a separate Civil Rights Act (reasons include the investigation of violations on vertical and horizontal rights and amendments to Constitution by Parliament rather than special procedures requiring special majorities).
- 5.1.2 The CHR (UP) notes that if the Commission's functions, powers and structure is described in detail in the Constitution then a) further legislation would not be necessary to establish the commission and the long waiting period for such legislation would be avoided but b) it might create a Commission that is too inflexible to adjust to changing needs and circumstances. The FF emphasises that all matters relating to the Commission should be regulated by the constitution and not by ordinary act of Parliament.
- 5.1.3 The CHR (UP) and LHR advocate a minimalist option which describes the powers, functions and structure in general terms in the Constitution, leaving the specifics to legislation and CHR (UP) recommends using the experiences of the interim Human Rights Commission to draft a comprehensive statute in 1999.

### 5.2 Horizontal versus vertical violation of rights

- 5.2.1 The GCB indicates that the ideal is to achieve a human rights culture and philosophy on all levels. Furthermore the Commission should operate within the ambit of a separate Civil Rights Act which would have a horizontal application, but the Commission in terms of the provisions of Chapter 3 in the Constitution, should also operate vertically.
- 5.2.2 During the initial debates it was suggested that the protection of vertical rights can be dealt with in the provisions relating to the Public Protector and the Judicial Authority and hence the central function of the Human Rights Commission is to consider violations that occur horizontally.
- 5.2.3 CHR (UP) notes that as it is difficult to distinguish conceptually between horizontal or vertical violations of human rights, the Commission should focus on both.
- 5.2.4 The IFP mentions that the Bill of Rights shall have horizontal application in addition to vertical application.

- 5.2.5 The FF insists that the Commission should not primarily deal with abuses that occur horizontally but have vertical operation.

### 5.3 Proposed Powers and Functions of South Africa's Human Rights Commission

#### 5.3.1 Promotion and Protection of human rights:

- 5.3.1.1 The FF, CHR (UP) and LHR indicate that this role is a central part of the Commissions functions terms of promoting human rights awareness. Promotion can include education, and information dissemination (see also GCB, LHR). This function can be executed together with non governmental organisations. LHR suggests that a human rights culture need to be cultivated in the courts.

#### 5.3.2 Participation in the drafting of legislation:

- 5.3.2.1 During the initial debates (and also by the GCB), it was suggested that National Commissions which are responsible for the administration of human rights legislation will be best placed to examine areas where legislation requires improvement.
- 5.3.2.2 LHR notes that the Commission should not only audit human rights legislation, but should also be involved in auditing legislation in any area affecting human rights. In addition it should recommend legislative reform on all levels of government. In contrast the FF insist that law reform should be confined to human rights law reform.
- 5.3.2.2 CHR (UP) suggests that the Commission should screen - from an international human rights perspective - the acceptability of pending legislation or other actions of government .

#### 5.3.3 Investigate breaches of fundamental rights

- 5.3.3.1 LHR recommends that the Commission should hold public enquiries to enable it to investigate and to report on socio-economic rights problems. Thus the power of public enquiry will also be important for the Commission especially for people who do not have access to financial or social resources to lodge complaints. The FF argues against the holding of public enquiries.
- 5.3.3.2 The Commission should be proactive and should investigate matters on its own initiative should the circumstances so require (LHR, Currin).

- 5.3.3.3 A national Commission might also have a special interest in investigating violations which the various decentralised structures of government, on a regional or local level, may engage in (CHR,UP) so that a high level of consistency in human rights practices countrywide can be obtained.
- 5.3.3.4 CHR(UP) believes that the Commission would require wide-ranging and extraordinary powers of search and seizure in order to function effectively.

5.3.2 Assisting parties to redress wrongs :

- 5.3.2.1 During the initial debates some participants noted that the Commission must have the power to receive complaints and endeavour to settle those complaints through mediation, negotiation and conciliation. Both the GCB, LHR, FF and CHR(UP) support a mediation function whereas the GCB mentions a conciliation function and LHR, as well as CHR(UP) an arbitration function (the FF argues against an arbitration function).
- 5.3.2.2 If the Commission is unable to reach a settlement it may, refer the dispute to a Court of Law (GCB), or refer it to another separate tribunal (Currin, LHR) or the Commission can be entitled to make it's own determination (LHR).
- 5.3.2.3 LHR's motivation for a specialist tribunal are : it would develop expertise in human rights and discrimination law which is an area of experience that the judiciary does not have, it could serve as an alternative to the Constitutional Court which will be primarily concerned with the vertical relationship whereas the Tribunal could be concerned with the horizontal relationship, hearings by Tribunals are less expensive, less formal and more accessible than court proceedings, and as opposed to the present judiciary a special tribunal could be made more representative in terms of class, race and gender.
- 5.3.2.4 ALS states that the Commission should not have judgemental powers and should therefore not have the powers of a court. CHR (UP) agree that the Commission should not play an adjudicative role.
- 5.3.2.5 GCB emphasises that subsection 116(2) contains a flaw in that it does not oblige the relevant legislature to react to the relevant report of the Commission. The GCB submits that this section be amended to make provision for a reference to the Constitutional Court, so that this Court may be given the power to interdict Parliament and a

provincial legislator from passing any legislation which would be contrary to the provisions of Chapter 3 of the Constitution (or to relevant norms of international law).

- 5.3.2.6 CHR(UP) suggests that the Commission can be granted the power to assist victims by taking the case of the victim informally, out of court or by assisting in the preparation of a court case.
- 5.3.2.7 The FF argued that the provision for financial assistance is too ambitious and its limitation only to violations of human rights is not clear.

#### 5.4 Access:

- 5.4.1 There needs to be a provision that allows for an individual affected by discrimination to complain not only on his or her behalf but on behalf of others similarly affected. This would result in the form of a Class Action before the Commission (LHR, Currin). Access may also be facilitated through representation by third parties or non-governmental organisations.
- 5.4.2 In contrast to the above, the ALS argues that the Constitution should limit the powers of the Commission so that it could only bring class actions and not act on behalf of individuals.
- 5.4.3 LHR argues that a tribunal within the Commission will provide accessibility to ordinary people who could not afford the expense and formality of the courts.
- 5.4.4 The FF recommends that the remedy of financial assistance should be considered in the wider context of "assistance to justice" by indigent litigants.

#### 5.5 Proposed Structure of the Commission

- 5.5.1 The FF cautions that a more rigorous form of election or appointment than is provided by section 115(3) is required eg. near-unanimity of the joint committees of Parliament, to ensure that commissioners have substantial support.
- 5.5.1 Issues raised during the initial debates were that the Chair and Vice Chair of the Commission should be permanent while the other Commissioners should operate as trustees and play a full-time role.

- 5.5.2 In contrast to the above, CHR(UP), argues that commissioners should be appointed in an active capacity and not only as trustees. The Chairperson and a number of commissioners should be appointed in a full-time capacity, with a number appointed part-time. Their periods of appointment should be staggered to ensure continuity.
- 5.5.3 The commission should be a national, centralised body to ensure that uniform standards are maintained countrywide. Different commissioners can be allocated to different parts of the country as far as promotional and certain functions are concerned (CHR, UP) so that a familiarity with local conditions may be ensured.
- 5.5.4 During the debates and in a presentation by Currin it was suggested that there is a need to create four forums which would cover the work of the Commission:
- a) The law reform programme which would examine new and existing legislation;
  - b) The human rights education promotion programme;
  - c) Public enquiries which would be aimed primarily at addressing socio-economic problems and fed through to government departments and
  - d) Tribunal and dispute resolution forums.
- 5.5.3 The GCB suggests that the Commission would function more efficiently if it were composed of separate but interrelated structures. They suggest that the Commission could contain a Dispute Resolution Forum to achieve conciliation in cases of dispute.
- 5.6 Acting as an enforcement agency to implement anti-discrimination legislation**
- 5.6.1 The arguments in favour of the Commission to act as an enforcement agency is that due to scarce resources, it would be impractical to create a separate body to deal with discrimination complaints.
- 5.6.2 CHR(UP) argues that the Commission should not be burdened in this way as a) the legislation has not been drawn up to indicate whether the agency is an administrative, judicial or investigative body, b) the scope of the Civil Rights Act in terms of the horizontal protection of equality only or horizontal protection of all fundamental rights has not been clarified, c) the focus should be to create a human rights culture, d) the protection against discrimination in the private sphere and the adjudication of discrimination complaints will create an extremely high additional workload and e)

the allocation of resources will be diverted from its primary functions. Therefore the enforcement of a Civil Rights Act should not be entrusted to the Human Rights Commission.

## 5.7 International Human Rights

5.7.1 The discussion in initial debates noted that standards and objectives of a national Human Rights Commission need to be based on international human rights instruments. In this way the Commission will facilitate the development of experience and international human rights jurisprudence in the relevant country.

5.7.2 The CHR(UP) states that in exercising its functions the Commission should not be limited to the rights recognised in the Constitution, but aim to bring South Africa in line with those rights recognised by the rest of humanity.

5.7.3 The IFP states that all internationally recognised human rights also in international covenants or treaties must be recognised, protected and promoted.

5.7.4 The FF suggests that the words "which form part of South African law" (section 116-2) should apply not only to international human rights law but also to other relevant norms of international law mentioned in this subsection.

## 5.8 Relationship with specialized structures of government

5.8.1 The Human Rights Commission needs to be examined in the context of the roles of the Judicial Authority, the Public Protector and the Commission on Gender Equality. The nature of the Human Rights Commission depends on the how the constitution looks in it's entirety.

5.8.2 There is a debate as to whether the Gender Commission should fall under the ambit of the Human Rights Commission or whether the Gender Commission should be independent (LHR). This debate is dependent on how the role of the Gender Commission is envisaged. However it was suggested that the Human Rights Commission could have a specific forum that deals with gender issues so as to ensure that these matters are not marginalised from broader human rights issues (Currin), whereas the GCB and the FF did not see the necessity for a separate Gender Commission. LHR advises that if the Commission on Gender quality does not have the rights to resolve disputes or make determinations, that such issues be referred to the Human Rights Commission.

5.8.3 Several stakeholders felt that the relationship between the Public Protector, the Human Rights Commission and the Commission for Gender Equality should not be formalised in the constitution, but should be left to evolve and to develop their own methods of referral and liaison.

5.8.4 The FF noted that the Commission should not have any relationship with other specialised structures of government as this may prejudice its autonomy and independence. It should be able to refer a case or complainant to the Constitutional Court.

### 5.9 The relationship between the Bill of Rights and the Human Rights Commission with regard to Second Generation Rights.

5.9.1 There was an argument during initial discussions that maintained that the Bill of Rights should protect First Generation Rights only. However Second Generation Rights also require positive acts by the state. The question was raised whether second Generation Rights be justiciable or merely mentioned as directive principles of state policy which would place a moral obligation rather than legal obligation on the state.

5.9.2 The CHR (UP) recommended that a way of ensuring the protection of second generation human rights, is to require the submissions of reports by the different governmental departments on a regular basis to a central authority which could be the Commission. The Commission could evaluate the reports after a hearing and make recommendations on the performance of different departments. These are submitted to Parliament and are made public.

### 5.10 The relationship between the Human Rights Commission and Traditional Leaders

5.10.1 The following suggestions by stakeholders on the Commission may affect the relationship between Traditional Leaders and the Commission:

5.2 how Traditional leaders will be involved if the Commission also investigates a horizontal application of rights;

5.3 how customary law assists in the creation of a human rights culture and the drafting of civil rights legislation and how Traditional Leaders will assist in the investigation of breaches of fundamental rights or in assisting parties to redress wrongs;

5.4 and 5.5 how Traditional Leaders view class actions and the appointment of different commissioners for different parts of the country.



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

**8 MAY 1995**

**PRESENT**  
**Ms Malan TJ (Chairperson)**

Fenyane SLE  
Louw L  
Moatshe P  
Mokoena LM  
Mompoti R  
Nkadimeng JK  
Tshabalala ME  
Van Wyk A  
Van Zyl ID

Apologies: Kgositsile B

Levy B, Nyoka N, Albertyn C, Erwee R were in attendance.

**1. Opening and Welcome**

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

**2. Public Hearing on the Human Rights Commission**

**2.1 The National Land Commission (NLC)**

The NLC presented their submission on the Human Rights

Commission (see annexure 'A').

### **3. Draft text on the Public Protector**

The technical advisors presented comments on the draft text on the Public Protector (see annexure 'B').

#### **3.1 Establishment, independence and impartiality**

**3.1.1** The argument for the need to insert a clause (see footnote 1(2)) which describes the role, purpose, or object of the Public Protector is important with regard to the accessibility of the constitution, as it will provide an explanatory note on the role of the Public Protector. However capturing the role of the Public Protector in a few words in the introduction may in fact limit the role of the institution.

It was suggested that the drafters present a formulation on the role of the Public Protector to the committee so that they are able to assess whether it limits the role of the Public Protector.

**3.1.2** With regard to the independence of the Public Protector, there maybe a need only to incorporate 1(1) and 1(2) into the constitutional provision and leave 1(3) and 1(4) to legislation. However because the committee and stakeholders felt strongly about the matter of independence it may be important to leave 1(3) and 1(4) in the constitutional provision. This matter would be dependent on the nature of the constitutional text ie if the Parties agree that they want a lean constitution.

**3.1.3** There is a need to reflect that while there is disagreement on the name of Public Protector the majority of stakeholders and political parties supported the name Public Protector (see footnote 2).

#### **3.2 Accessibility**

**3.2.1** Depending on the nature of the constitutional text there maybe a case for limiting 2(1) to " the Public Protector shall be accessible to the public ".

**3.2.2** There is a need to clarify whether all reports issued by the Public Protector should be open to public scrutiny. While in principle all reports should be open to the public there are also always limitations on freedom of expression (see 2(1)).

### **3.3 Powers and Functions**

**3.3.1** The Committee agreed that Traditional Authorities should in fact be subject to the jurisdiction of the Public Protector. This needs to be reflected in footnote 9.

**3.3.2** With regard to the jurisdiction of the Public Protector in terms of private bodies that perform a public function, there was debate in the Committee. While there was not necessarily agreement on the jurisdiction of the PP on this matter it does need to be reflected in footnote 11.

**3.3.3** The way in which systemic problems have been reflected confines them to inefficiencies and wastage in the system (see 3(1)(c)). Whereas the Committee had a broader understanding of systemic discrimination. There maybe a case to state " to report on systemic problems ... " and remove " inefficiency, undue delays, wastage ".

**3.3.4** There is a need to substitute " capricious " conduct for a more accessible phrase (see 3(1)(a)(ii)).

### **3.4 Appointment, qualifications, tenure and dismissal**

**3.4.1** The question of a second House of Parliament, footnote 19, is not an issue which can be resolved by the Committee.

### **3.5 Provincial Public Protectors**

**3.5.1** Section 5 allows the space for provincial PP's to be created by law. However the relationship in terms of the powers and jurisdiction of the provincial PP's and the national PP is not something which can be decided by the committee as it relates to the broader debate on the relationship between different levels of government. Thus it needs to be made clear that this whole section is matter for debate.

### **3.6 *The Committee agreed to the following:***

**3.6.1** *That the above comments should be submitted to the drafters.*

**3.6.2** *That if parties had any additional comments they be submitted to the Secretariat by Thursday 11 May 1995.*

**3.6.3** *The draft would be finalised at the meeting of the Committee on the 15 May 1995.*

**4. Draft report on the Human Rights Commission**

**4.1** Prof Erwee spoke to the draft report on the summary of submissions on the Human Rights Commission (see annexure 'C'). The following issues were raised for parties to consider with regard to areas of agreement:

**4.1.1** Constitutionalisation of the HRC.

**4.1.2** The HRC must deal with both the horizontal and vertical application of human rights.

**4.1.3** The constitution should refer to all human rights including socio economic rights.

**4.1.4** The independence of the HRC.

**4.1.5** The composition and structure of the HRC.

**4.1.6** The HRC should be a national institution.

**4.1.7** The appointment procedure of commissioners.

**4.1.8** The powers and functions of the HRC.

**4.1.9** The relationship between the HRC and other specialised structures of government.

**4.2** *The Committee noted the report.*

**5. Gender Workshop**

*It was agreed that the gender workshop on National Machinery for the advancement of women would be postponed to the 2/3 June 1995. The workshop would be held at the World Trade Centre.*

**6. Land Workshop**

*It was agreed that the land workshop would be postponed to the 22/23 June 1995.*

**7. Any other business**

**7.1** The Secretariat reported that names of members who are able to attend the Public Hearings and Constitutional Public Meetings needed to be submitted to the Secretariat.

**8. Closure**

The meeting rose at 11:30.

**NATIONAL LAND COMMITTEE SUBMISSION : HUMAN RIGHTS COMMISSION**

**SUB-THEME COMMITTEE 6.3  
THEME COMMITTEE 6  
SPECIALISED STRUCTURES OF GOVERNMENT**

**1. INTRODUCTION**

The National Land Committee (NLC) is an independent umbrella body with nine affiliate organisations which deal with land and development issues. A national office based in Johannesburg coordinates national activities and campaigns, while the nine affiliates have similar but independent programmes to offer advice and services to rural and landless communities.

The nine affiliates are: Association for Rural Advancement, Border Rural Committee, East Cape Land Committee, Farmworkers Research and Resource Project, Orange Free State Rural Committee, Surplus People Project, Transvaal Rural Action Committee, Transkei Land Service Organisation.

As the broader South African community is busy deciding what rights will be included in the final text of the new Constitution, the National Land Committee agrees along with other interest groups that the establishment of a Human Rights Commission will ensure respect for and observance of these rights.

**2. THE STRUCTURE OF THE HUMAN RIGHTS COMMISSION**

The National Land Committee considers the establishment of a Human Rights Commission as critically important to promote the observance of, respect for and protection of fundamental rights of all South Africans.

While all South Africans are guaranteed political rights in terms of the interim constitution, the issue of social and economic rights needs to be included and effectively enforced in the final constitution so that those sections of our population who have been denied adequate social and economic rights in the past and in particular, rural and landless communities who have borne the brunt of neglect and abuse, can be assured of constitutional protection of their rights.

The National Land Committee further believes that the establishment of a Human Rights Commission should be constitutionalised and that the detail of its functions should be determined by legislation.

body should be composed of commissioners who have knowledge of human rights issues nationally and internationally and who also have a broad understanding of socio-economic issues.

Commissioners should be impartial and politically independent.

Procedures for selection of commissioners should be done in a transparent manner including for nominations from civil society.

National Land Committee supports the view that the Human Rights Commission should have the right to establish forums for addressing such needs as law reform, human rights and education programmes, socio-economic problems and tribunal and dispute resolution forums. Address some of these issues in more detail in the following section on Roles and Functions.

#### PROPOSED ROLES AND FUNCTIONS OF THE HUMAN RIGHTS COMMISSION

The primary function of the Human Rights Commission should be to assist in enforcing rights on non-discrimination and ensuring respect for and observance of fundamental rights as set in the constitution.

National Land Committee is of the view that fundamental rights not only regulates relationships between the state and individuals, but should also impact on the private sphere. In other words the Human Rights Commission should deal with both vertical and horizontal claims of rights.

People living on farms or in traditional areas are particularly vulnerable to the notion of private farmers or traditional leaders being perceived of as "the law".

These communities lack access to information and are in most instances powerless to defend their rights, have little organisation through which to channel complaints and little recourse to the law.

National Land Committee believes that the Human Rights Commission needs to play a vital role in these areas by proactively investigating human rights violations/issues.

Human Rights Commission should have the power to hold public enquiries which enables it to investigate and report on general socio-economic rights problems.

The establishment of forums to monitor progress in the materialisation of socio-economic rights and the power to hold public enquiries to enable the Human Rights Commission to investigate and report on socio-economic rights violations, will give rural communities who have long been the victims of abuses of power, special provisions in the reconstruction and development of the new South Africa.

The Human Rights Commission should, through the particular forums set up, have the power to receive and investigate complaints and reports of any malpractices and resolve them through mediation and arbitration. Failing conciliation being reached, disputes should be brought to the courts.

Rights which are established by the Constitution should be enforced by the courts, and the State or any individuals interfering with these rights may be restrained by the courts.

The Human Rights Commission should comment on and monitor legislation in so far as it impacts on the realisation of, as well as where it violates those fundamental rights as set out in the Constitution.

The Human Rights Commission should be responsible for developing a public awareness of fundamental rights as well as disseminating information, education and training of government officials.

#### **4. THE RELATIONSHIP BETWEEN THE HUMAN RIGHTS COMMISSION AND OTHER SPECIALISED STRUCTURES OF GOVERNMENT**

It is very difficult to formalise a relationship between these different structures of government. While issues of human rights, gender rights and others may merge and there will certainly emerge the need for cross referral of cases and issues, these relationships should remain informal in nature.

With reference to the Commission on Gender Equality, the National Land Committee believes that human rights and gender rights are not mutually exclusive but are instead interdependent. In these cases, dynamic and creative relationships need to emerge between the two commissions.

The major concern about the Gender Equality Commission is that it could end up as a dumping ground for gender issues.



The National Land Committee is of the opinion that the Human Rights Commission should have a gender component in all its programmes or forums and should work closely with women's organisations in the promotion of gender equality.

## 8. CONCLUSION

The National Land Committee would like to continue to feed into the process around establishing a Human Rights Commission.

We believe that this institution has the potential to effectively become the key mechanism to realise as well as to protect the rights of rural people.

Yours Sincerely,

*Janie Gibson*

PP Mr Brendan Pearce  
Director  
National Land Committee

## THE PUBLIC PROTECTOR

### **Establishment<sup>1</sup>, independence and impartiality**

1. (1) There shall be a Public Protector<sup>2</sup> for the Republic.

(2) The Public Protector shall be independent and subject only to this Constitution and the law. The Public Protector shall discharge his or her powers and functions impartially and without fear, favour or prejudice.<sup>3</sup>

(3) Organs of state shall give the Public Protector the necessary assistance to protect and ensure his or her independence, impartiality, dignity and effectiveness. In particular the Public Protector shall be accorded by law all such immunities and privileges as are necessary for this purpose.<sup>4</sup>

(4) Interference with the Public Protector in the discharge of his or her powers and functions is prohibited.<sup>5</sup>

#### [Foot notes

1. Although this is a matter that has not been raised in the report of the Theme Committee, it is suggested that in furtherance of the widely shared sentiment among Constitutional Assembly members that the new Constitution should be a 'people's document' (i.e. it must be accessible to the ordinary person reading it), there should perhaps be included a provision which describes the role of the Public Protector, and that this provision must be contained under an Establishment Clause which is an entirely separate clause standing on its own.

E.g.:

#### **Establishment**

1. (1) There shall be a Public Protector for the Republic.

(2) (A clause which describes the role, purpose, or object of the Public Protector could then be inserted.)

Furthermore, splitting establishment and the principle of independence and impartiality in the heading of the section might serve to affirm even further, the principle of independence and impartiality.

2. The term "public protector" is used for the sake of convenience only. There is disagreement over the name of this institution. See par. 6.2 of the Report.
3. Section 1(2) is based on the agreed position in paragraph 5.2.1 of the report and is a redraft of section 111(1) of the Interim Constitution.
4. Section 1(3) although not contentious *per se* needs to be debated as outlined in paragraph 6.3.1 of the Report as it is matter which requires further clarity. The formulation is based on section 111(2) and (4) of the Interim Constitution.
5. Section 1(4) embodies the principle of non-interference which is a corollary of the principle of independence in section 1(2). See also section 111(3) of the Interim Constitution.]

#### Accessibility

2. (1) The Public Protector shall be accessible to the public. The office of the Public Protector shall be organised in such a way as to facilitate access to the Public Protector by persons and communities in all categories of society.<sup>6</sup>
- (2) All reports issued by the Public Protector shall be open to the public.<sup>7</sup>

#### [Foot notes

6. As per agreement in par. 5.5 of the Report. Accessibility relates to the manner in which the broad constitutional duty of accessibility is given effect to through legislation. In particular it relates also to the organisation of the office of the Public Protector to give access to persons and communities in all categories of society.

7. As per agreement in par. 5.2.5 of the Report.]

**Powers and functions**

3. (1)<sup>8</sup> The powers and functions of the Public Protector shall be as prescribed by law. The powers and functions so prescribed shall empower the Public Protector at least -

- (a) to investigate, on receipt of a complaint or on his or her own initiative, and to report on, any alleged -
  - (i) maladministration, corruption or impropriety in the public administration at any level of government;<sup>9</sup>
  - (ii) unfair, capricious or discourteous conduct or undue delay by a person performing a public function;<sup>10</sup> or
  - (iii) act or omission by a person performing a public function which results in unlawful or improper prejudice to any other person;<sup>11</sup>
- (b) to decide in his or her discretion to resolve any dispute or redress any act or omission, by -
  - (i) referring the matter, with or without recommendation, to an appropriate authority, body or person to deal with it;<sup>12</sup>
  - (ii) giving advice on an appropriate course of action or remedy;<sup>13</sup>
  - (iii) any other means that may be expedient in the circumstances;<sup>14</sup> or

(c) to report on any inefficiency, undue delays, wastage and other systemic problems in the public administration at any level of government uncovered by him or her in the course of any investigation.<sup>15</sup>

(2) The Public Protector shall not be competent to investigate the performance of judicial functions by the courts of the Republic.<sup>16</sup>

(3) The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities annually.<sup>17</sup>

**[Foot notes**

8. The suggested formulation for section 3(1) is in accordance with the agreed position as stated in par. 5.3.1 of the Report, namely that the Public Protector should have the type of powers contained in section 112 of the Interim Constitution. It allows for the powers and functions to be prescribed by ordinary legislation on condition that the powers and functions so prescribed shall at least contain those enumerated in paragraphs (a), (b) and (c).

However, there is still uncertainty as to the amount of detail that should be included in the text. If the above provision is considered to be too specific for the Constitution the following alternatives could be considered:

**Option 1:** "(1) The powers and functions of the Public Protector shall be as prescribed by law. The powers and functions so prescribed shall be at least substantially the same as those vested in the Public protector immediately before the commencement of this Constitution, and shall in particular include all such powers and functions as to effectively empower the Public Protector to investigate and to report on any alleged improper and prejudicial conduct of whatever nature in the affairs of

government or the public administration at any level."

**Option 2:** "(1) The powers and functions of the Public Protector shall be as prescribed by law. The powers and functions so prescribed shall at least include all such powers and functions as to effectively empower the Public Protector to investigate and to report on any alleged improper and prejudicial conduct of whatever nature in the affairs of government or the public administration at any level."

9. This provision is based on the agreed position in paragraph 5.3.1.1 of the report. The provisions of subparagraphs (iii) and (iv) of section 112(1)(a) of the Interim Constitution are instances of maladministration, corruption or improper conduct which, together with subparagraph (i) of the same section, are all covered in this draft provision. The question of whether or not Traditional Authorities are structures of government, and hence covered by this provision, is a matter which is still under discussion in the work of the Theme Committees.
10. This provision is based on section 112(1)(a)(ii) of the Interim Constitution. It has been included as a separate provision because some of the categories of conduct it describes might be at the outlimits of conduct which conduct may be called improper conduct.
11. This provision is based on section 112(1)(a)(v) of the Interim Constitution. This provision covers instances where the conduct of the public official while itself not improper, has consequences which unlawfully or improperly prejudice another person.
12. This provision is based on the agreed positions in paragraphs 5.3.1.2 and 5.3.1.3 of the report.
13. This provision is a redraft of section 112(1)(b)(ii) of the Interim Constitution.
14. This provision is based on section 112(1)(b)(iii) of the Interim Constitution.
15. This provision is based on an apparent agreed position in paragraph 6.5.1 of the report in terms of which the Public Protector should have the power to report on systemic

problems in the administration.

16. This provision is based on the agreed position in paragraph 5.4 of the report. This provision is a redraft of section 112(2) of the Interim Constitution.
17. Based on the agreement in par. 5.2.2 of the report.]

#### **Appointment, qualifications, tenure and dismissal**

4. (1) The President shall appoint a person recommended by Parliament as the Public Protector.<sup>18</sup>

(2) Parliament shall only recommend a person for appointment as the Public Protector -

- (a) who is qualified in terms of this Constitution to be appointed as the Public protector;
- (b) who has been nominated by a joint committee of the Houses<sup>19</sup> of Parliament composed of one member of each party represented in Parliament and willing to participate in the committee; and
- (c) ~~whose nomination has been approved by the National Assembly and the Senate by a resolution adopted by a majority of at least 75 per cent of the members present and voting at a joint meeting.~~<sup>20</sup>

(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with such requirement as may be prescribed by law.<sup>21</sup>

(4) The Public Protector shall be appointed for a period of seven

years.<sup>22</sup>

(5) The Public Protector may be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by a joint committee of the Houses of Parliament and upon receipt of an address from both the National Assembly and the Senate praying for such removal. The joint committee shall be composed of one member of each party represented in Parliament and willing to participate in the committee.<sup>23</sup>

(6) A Public Protector who is the subject of an investigation by a joint committee of Parliament, may be temporarily suspended from office by the President.<sup>23</sup>

[Foot notes

18. As per agreement in par. 5.2.3 of the Report. The legal effect of section 4(1) is that the President only formalises the appointment as recommended by Parliament.

19. The question of a second House of Parliament must still be debated.

20. Section 4(2) is based on the agreement in par. 5.2.3 of the Report and section 110(2) of the Interim Constitution. However, there is still disagreement and lack of clarity on the precise manner of selection. The ANC, DP and NP support the procedure laid down in the said section 110(2), with the IFP favouring a role for the JSC. See par. 6.3.2 of the Report.

Adoption of the IFP's proposal would require the insertion of the following paragraph between paragraphs (a) and (b) above, the existing paragraphs (b) and (c) becoming paragraphs (c) and (d), respectively:

"(b) whose name appears on a short list of candidates compiled by the Judicial Service Commission;"

21. There is disagreement as to the type of qualifications to be prescribed for the Public Protector. See par. 6.4 of the Report. Although the above formulation provides for further



qualifications to be prescribed by law, consideration should be given to the addition of further specific qualifications in the Constitution itself, for instance that the Public Protector should be a person who -

- (a) is widely respected and recognised as a person of integrity;
  - (b) is not a member of a political party and does not hold any office of trust or profit, other than his or her office as Public Protector, or engage in any occupation for reward outside the duties of his or her office.
22. There is agreement on a fixed term of office for 7 years, but disagreement as to whether the term should be renewable. See par. 6.3.3 of the Report.
23. Section 2(5) and (6) is based on the agreed position in paragraph 5.2.3 of the Report and section 110(8) and (9) of the Interim Constitution. However, there is still lack of clarity on the grounds for dismissal as is reflected in par. 6.3.2 of the Report.]

#### **Provincial public protectors**

5. A provincial legislature may by law provide for the establishment, appointment and powers and functions of a provincial public protector.<sup>24</sup>

#### **[Foot note**

24. This provision is based on the agreed position in paragraph 6.7 of the Report and follows the formulation contained in section 114(1) of the Interim Constitution. There are, however, major disagreements on the powers and functions of the provincial public protectors and also their relationship with the national Public Protector. These issues require further debate.]

# CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3;  
THEME COMMITTEE 6

Prof R Erwee  
27 April 1995

## REPORT OF SUBMISSIONS: HUMAN RIGHTS COMMISSION AREAS OF AGREEMENT AND DISAGREEMENT

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### PART 1 - INTRODUCTION

#### 1. Submissions received

This report attempts to draw together the issues and debates emerging from submissions received from political parties, organisations of civil society, public debates during February 1995, public hearings during April 1995 and an information seminar.

##### 1.1 Political parties

- 1.1.1 ACDP
- 1.1.2 ANC
- 1.1.3 DP
- 1.1.4 FF
- 1.1.5 IFP
- 1.1.6 NP

##### 1.2 Organisations of Civil Society

- 1.2.1 Association of Law Societies (ALS)
- 1.2.2 Black Lawyers Association (BLA)
- 1.2.3 Black Sash (BS)
- 1.2.4 Centre for Human Rights, University of Pretoria (CHR)
- 1.2.5 General Council of the Bar (GCB)
- 1.2.6 Human Rights Committee (HRC)
- 1.2.7 Lawyers for Human Rights (LHR)
- 1.2.8 Legal Resources Centre (LRC)
- 1.2.9 National Association of Democratic Lawyers (NADEL)
- 1.2.10 National Land Committee (NLC)

##### 1.3 Information seminars (January 30 to February 8 1995; and Brian Currin).

Interim reports are prepared by the technical advisors:

- 1.4 First draft report of submissions (13 April - R Erwee)

- 1.5 Comments on the Human Rights Commission (C Albertyn)  
 1.6 Report ; Areas of Agreement in Submissions (28 April - R Erwee)

No information has been gathered from a meeting held under the public participation programme.

## 2. Constitutional Principle

The Constitutional Principle applicable to this Commission is Principle II  
 Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

It can also be argued that Principle III (prohibition of racial, gender and all forms of discrimination) as well as Principle V (equality in the legal system) have a bearing on the roles and functions of this Commission.

## PART II DISCUSSION OF MATERIAL PROCESSED BY THE COMMITTEE

### 3. General overview

During the initial seminar programme and debates in February the Theme Committee discussed the Human Rights Commission and raised a number of critical issues with regard to a) the Commission's role in relation to the other specialized structures of Government; b) consideration of human rights violations on both vertical and horizontal levels and c) the proposed roles, functions and structure of the Commission.

These issues gave rise to a list of questions that were sent to organisations in civil society. Some of the organisations provided written submissions prior to participation in public hearings.

There was a considerable amount of agreement on broad issues in the written submissions and the main issues of debate, which were tested in public hearings, were:

- 3.1 the Commission's role in relation to the other specialized structures of Government;
- 3.2 the ambit of jurisdiction of the Commission ie consideration of human rights violations on both vertical and horizontal levels;
- 3.3 the composition and structure of the Commission

3.4 the proposed powers and functions of the Commission

3.5 allowing class actions or only assisting individuals

3.6 the relationship between the Bill of Rights and the Human Rights Commission with regard to socio-economic Rights

3.7 acting as an enforcement agency to implement anti-discrimination legislation

Some of the disagreement may refer to matters which do not need to be included in the constitution, but can be left to legislation like an Equality Act or Civil Rights Act.

#### 4. Areas of Agreement

##### 4.1 Constitutionalisation of the Commission

- 4.1.1 There was support among parties (ACDP, ANC, DP, FF,IFP) and stakeholders (ALS, BLA, BS, CHR, HRC, LHR, LRC, NADEL) for the constitutionalisation of a Human Rights Commission in the Constitution.
- 4.1.2 The constitution needs only deal with broad principles with regard to establishment and appointment, powers and functions, independence and accountability and structure. Further details can be left to legislation.
- 4.1.3 The ANC,DP, IPF, CHR (UP), HRC, LHR, LHR, NADEL and BLA recommend that the Human Rights Commission must deal with both the vertical and horizontal application of rights.
- 4.1.4 The parties and stakeholders state that the constitution should refer to all human rights and should not exclude the Human Rights Commission playing a role in monitoring, protecting and promoting social and economic rights.

##### 4.2 Structure and composition

- 4.2.1 Most of the parties and stakeholders agree that the Commission needs to be an independent statutory body created by Parliament. It must be subject to the law and not accountable to government, so that government is unable to dictate the Commission's programme.

- 4.2.2** The Commissioners that are appointed need to have knowledge of human rights issues both nationally and internationally, they need to be politically independent and be respected broadly.
- 4.2.3** While the Commission would be a national commission to ensure that uniform standards are maintained countrywide, different commissioners can be allocated to different parts of the country.
- 4.2.4** The parties and stakeholders caution that a more rigorous form of election or appointment than is provided by section 115(3) is required to ensure that commissioners have substantial support. The nominations procedure must not encourage nominations to be based on political alignments, but a panel comprised of human rights experts should make nominations to parliament.
- 4.2.5** Commissioners should be appointed in an active capacity and not only as trustees. The Chairperson and a number of commissioners should be appointed in a full-time capacity, with a number appointed part-time. Their periods of appointment should be staggered to ensure continuity.

#### **4.3 Powers and functions**

Parties and stakeholders generally agree on the powers and functions as stipulated in section 116 (1) (a) to (e).

Most parties and stakeholders mention that the present provisions in the Interim Constitution with regard to the Commission are limited in that they do not consider human rights violations which are considered horizontally i.e between individuals.

##### **4.3.1 Promotion and protection of human rights:**

- 4.3.1.1** The ANC, DP, FF, ALS, BLA, BS, CHR (UPI), HRC, NADEL and LHR indicate that this role is a central part of the Commission's functions in terms of promoting human rights awareness. Promotion can include education, and information dissemination in conjunction with non-governmental organisations to create a human rights culture.
- 4.3.1.2** Stakeholders and parties support a research function identifying the needs of specific communities, and especially the harmonisation of national policies, administrative practices and local religious and customary laws or practices with international human rights norms, - instruments and - treaty obligations.

#### 4.3.2 Monitoring the drafting of legislation:

- 4.3.2.1 The parties and stakeholders note that the Commission should not only monitor the drafting of human rights legislation, but should also be involved in monitoring legislation in any area affecting human rights. In addition it should monitor legislation, administrative provisions, and policies on all levels of government to ensure compliance with human rights.

#### 4.3.3 Investigate breaches of fundamental rights

- 4.3.3.1 The Commission should be proactive and should investigate matters on its own initiative should the circumstances so require. Systemic problems should also be investigated on own initiative.
- 4.3.3.2 All stakeholders support a research function identifying the needs of specific communities, and especially the harmonisation of national policies, administrative practices and local religious and customary laws or practices with international human rights norms, - instruments and - treaty obligations.

#### 4.3.4 Assisting parties to redress wrongs :

- 4.3.4.1 The Commission must have the power to receive complaints and endeavour to settle those complaints through mediation, negotiation and conciliation.
- 4.3.4.2 All agree that the Commission should not have judgemental powers and should therefore not have the powers of a court.
- 4.3.4.3 If the Commission is unable to reach a settlement it may, refer the dispute to a Court of Law or refer it to another separate tribunal or bring proceedings in its own name.
- 4.3.4.4 There needs to be a provision that allows for an individual affected by discrimination to complain not only on his or her behalf but on behalf of others similarly affected. This would result in the form of a Class Action before the Commission. Access may also be facilitated through representation by third parties or non-governmental organisations
- 4.3.4.5 The stakeholders and parties argue that the Commission should not be burdened to act as an enforcement agency to implement anti-discrimination legislation.

#### 4.4 Relationship with other specialized structures of government

- 4.4.1 Most stakeholders felt that the relationship between the Public Protector, the Human Rights Commission and the Commission for Gender Equality should not be formalised in the constitution, but should be left to evolve and to develop their own methods of referral and liaison.
- 4.4.2 The majority of stakeholders agreed that there should be an Independent Commission for Gender Equality.

#### 5. Areas of disagreement and need for further clarity:

##### 5.1 Constitutionalisation of the Commission

- 5.1.1 The GCB argued that the Human Rights Commission should not be constitutionalised, but should operate within the parameters of a separate Civil Rights Act (reasons include the investigation of violations on vertical and horizontal rights and amendments to Constitution by Parliament rather than special procedures requiring special majorities).

##### 5.2 Horizontal versus vertical violation of rights

- 5.2.1 The GCB indicates that the ideal is to achieve a human rights culture and philosophy on all levels. Furthermore the Commission should operate within the ambit of a separate Civil Rights Act which would have a horizontal application, but the Commission in terms of the provisions of Chapter 3 in the Constitution, should also operate vertically.

- 5.2.2 The FF notes that the chapter on fundamental rights in the Constitution have vertical operation and suggests that the Commission should not primarily deal with abuses that occur horizontally.

##### 5.3 Proposed Powers and Functions of South Africa's Human Rights Commission

###### 5.3.1 Promotion and Protection of human rights:

- 5.3.1.1 BLA supports a research function identifying the needs of specific communities, and the harmonisation between cultures practices and human rights principles.

### 5.3.2 Monitoring the drafting of legislation:

- 5.3.2.1 The FF argues that law reform should be confined to human rights law reform.
- 5.3.2.2 CHR (UP) suggests that the Commission should screen - from an international human rights perspective - the acceptability of pending legislation or other actions of government

### 5.3.3 Investigate breaches of fundamental rights

- 5.3.3.1 LHR recommends that the Commission should hold public enquiries to enable it to investigate and to report on socio-economic rights problems. Thus the power of public enquiry will also be important for the Commission especially for people who do not have access to financial or social resources to lodge complaints. The FF argues against the holding of public enquiries.
- 5.3.3.2 A national Commission might also have a special interest in investigating violations which the various decentralised structures of government, on a regional or local level, may engage in (CHR,UP) so that a high level of consistency in human rights practices countrywide can be obtained. The DP cautions that provincial offices offer only a partial answer to the representation that is necessary.
- 5.3.3.4 CHR(UP) believes that the Commission would require wide-ranging and extraordinary powers of search and seizure in order to function effectively.

### 5.3.4 Assisting parties to redress wrongs:

- 5.3.4.1 LHR's reasons for a specialist tribunal are : it would develop expertise in human rights and discrimination law which is an area of experience that the judiciary does not have, it could serve as an alternative to the Constitutional Court which will be primarily concerned with the vertical relationship whereas the Tribunal could be concerned with the horizontal relationship, hearings by Tribunals are less expensive, less formal and more accessible than court proceedings, and as opposed to the present judiciary a special tribunal could be made more representative in terms of class, race and gender. The DP states that if the HRC is a forum for discrimination complaints (as per the Canadian model, with its tribunals) then a tribunal may be acceptable. However an Equal Opportunity Commission functioning specifically in the fields of employment,



education and the like may be more appropriate, but it need not be constitutionalised. NADEL views a tribunal as an interim measure, as a body separate from the HRC and created by legislation.

**5.3.4.2** GCB emphasises that subsection 116(2) contains a flaw in that it does not oblige the relevant legislature to react to the relevant report of the Commission. The GCB submits that this section be amended to make provision for a reference to the Constitutional Court, so that this Court may be given the power to interdict Parliament and a provincial legislator from passing any legislation which would be contrary to the provisions of Chapter 3 of the Constitution (or to relevant norms of international law).

**5.3.4.3** CHR(UP) suggests that the Commission can be granted the power to assist victims by taking the case of the victim informally, out of court or by assisting in the preparation of a court case.

**5.3.4.4** The FF argues that the provision for financial assistance is too ambitious and its limitation only to violations of human rights is not clear. HRC supports financial assistance to a party to bring proceedings.

#### **5.4 Access:**

**5.4.1** The ALS argues that the Constitution should limit the powers of the Commission so that it could only bring class actions and not act on behalf of individuals.

**5.4.2** LHR argues that a tribunal within the Commission will provide accessibility to ordinary people who could not afford the expense and formality of the courts.

#### **5.5 Proposed Structure of the Commission**

**5.5.1** BLA recommends that every local authority should have an organ whose function would be to identify sources of disintegration and involve the community itself in solving the problems, with the personnel of the HRC convening and presiding over such meetings. LHR emphasises that the Commission should have a high visibility in each region or province.

**5.5.2** During the debates and in a presentation by Currin it was suggested that there is a need to create four forums which would cover the work of the Commission:

a) The law reform programme which would examine new and existing legislation;

- b) The human rights education promotion programme;
- c) Public enquiries which would be aimed primarily at addressing socio-economic problems and fed through to government departments and
- d) Tribunal and dispute resolution forums.

5.5.3 The GCB suggests that the Commission would function more efficiently if it were composed of separate but interrelated structures. They suggest that the Commission could contain a Dispute Resolution Forum to achieve conciliation in cases of disputes.

#### 5.6 Acting as an enforcement agency to implement anti-discrimination legislation

5.6.1 The arguments in favour of the Commission to act as an enforcement agency is that due to scarce resources, it would be impractical to create a separate body to deal with discrimination complaints. The DP suggests that it would be advisable to add a reference to, although not a peremptory requirement for, an enforcement function. The ANC cautions that this function may evolve over time, but that it should not be constitutionalised.

#### 5.7 International Human Rights

5.7.1 The discussion in initial debates noted that standards and objectives of a national Human Rights Commission need to be based on international human rights instruments. In this way the Commission will facilitate the development of experience and international human rights jurisprudence in the relevant country.

5.7.2 The CHR(UP) states that in exercising its functions the Commission should not be limited to the rights recognised in the Constitution, but aim to bring South Africa in line with those rights recognised by the rest of humanity.

5.7.3 The FF suggests that the words "which form part of South African law" (section 116-2) should apply not only to international human rights law but also to other relevant norms of international law mentioned in this subsection.

#### 5.8 Relationship with specialized structures of government

5.8.1 It was suggested that the Human Rights Commission could have a specific forum that deals with gender issues so as to ensure that these matters are not marginalised from broader human rights issues (Currin, BLA), whereas the GCB and the FF did not see the necessity

for a separate Gender Commission. LHR advises that if the Commission on Gender equality does not have the rights to resolve disputes or make determinations, that such issues be referred to the Human Rights Commission. HRC recommends that the Human Rights Commission could focus on the enforcement function so that sufficient resources is available to the Commission on Gender Equality to deal with all gender issues.

5.8.2 The FF noted that the Commission should not have any relationship with other specialised structures of government as this may prejudice its autonomy and independence. It should be able to refer a case or complainant to the Constitutional Court.

5.9 The relationship between the Bill of Rights and the Human Rights Commission with regard to Second Generation Rights (socio-economic rights).

5.9.1 The CHR (UP) recommended that a way of ensuring the protection of second generation human rights, is to require the submissions of reports by the different governmental departments on a regular basis to a central authority which could be the Commission. The Commission could evaluate the reports after a hearing and make recommendations on the performance of different departments. These are submitted to Parliament and are made public.

5.10 The relationship between the Human Rights Commission and Traditional Leaders

5.10.1 The following suggestions by stakeholders on the Commission may affect the relationship between Traditional Leaders and the Commission:

5.2 how Traditional leaders will be involved if the Commission also investigates a horizontal application of rights;

5.3 how customary law assists in the creation of a human rights culture and the drafting of civil rights legislation and how Traditional Leaders will assist in the investigation of breaches of fundamental rights or in assisting parties to redress wrongs;

5.4 and 5.5 how Traditional Leaders view class actions and the appointment of different commissioners for different parts of the country.