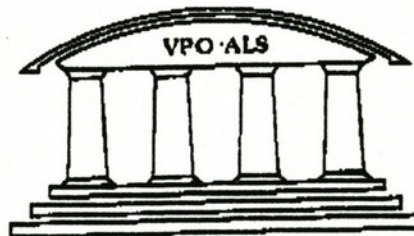


The Association of Law Societies of the RSA



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30 August 1993

The Chairperson
Technical Committee on Fundamental Rights
World Trade Centre
KEMPTON PARK

BY TELEFAX NO : 011 - 397-2211

ATTENTION : MS MIRIAM CLEARY

Dear Madam

I address you in my capacity as the chairman of the standing committee appointed by the Association of Law Societies of South Africa to advise it on all aspects pertaining to the office of Ombudsman. I have been given sight of your Eighth and Ninth Progress Reports dated 9 and 15 August 1993 respectively, and am taking the liberty of commenting on the following aspects thereof:

- 1 In this letter the male gender includes the female gender and vice versa.
- 2 The future appointment of the Ombudsman is of great importance and requires careful consideration. As the office to whom an ordinary citizen can turn if he feels aggrieved by any bureaucratic act or omission, the essence of that office is to be found in its complete independence. Therefore, if the Ombudsman had to be the product of an election process within the Legislative Assembly, and if such an election were to follow a simple majority of votes in that assembly, every vestige of independence would be lost. Conceivably, if such a system were to prevail, there would be room for canvassing, lobbying, electioneering and, ultimately, the effects of raw politics.

Ideally, the Ombudsman must not be regarded as having been elected on the grounds of his "politics" but solely because of his outstanding qualifications. For that office to be a success, the Ombudsman must be a person of known ability and outstanding integrity. Preferably he should be a Judge, a retired Judge, senior counsel or attorney with many years' experience in private practice. He should be widely respected and not identifiable with any political party. He must be seen to be an undoctinaire critic capable of attacking complex factual issues and finding solutions. The incumbent must have negotiatory, conciliatory, mediatory and analytical skills.

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- Because he is, in a manner of speaking, a representative of the people to whom he is accountable in the final analysis, he should be appointed by those who have been appointed by the people to represent them in the country's highest legislative body. His appointment should, however, be the product of all-party consensus, without even token opposition. My committee is in agreement that the authority which is to recommend the appointment of judges should be charged with the duty of submitting its recommendation to the National Assembly. If such recommendation should not find all-party agreement within that Assembly, the task to find a surrogate should again be referred back to the same authority so that the process of recommendation should be repeated, without voting being introduced at any stage, until a recommendation is put forward which finds the necessary consensus.
- 2 My committee has no difficulty with the ancillary tasks and suggested empowerment to be attributed to the office of Ombudsman. We had objected to the provisions contained in the current Statute regarding the form in which complaints should be lodged with the Ombudsman. My committee suggests that provision be made for the citizenry to lodge complaints informally and to leave it to the Ombudsman to determine, from his own observations and/or investigations, whether such complaints merit further investigation. The formalities prescribed by the current Statute and the draft chapter 8 would, in our view, tend to inhibit the lodging of complaints in certain instances.
- 3 My committee is in complete agreement with the suggestions that complaints of maladministration should include the abuse or unreasonable exercise of administrative power, unfair, unjust, capricious or discourteous conduct. The committee would welcome redirection of the office in this regard.
- 4 We are somewhat concerned about the proposal concerning the initiation of legal proceedings on behalf of a complainant as suggested in 2.2.2.3 of the Eighth Progress Report. Although the conferring of powers of that nature would constitute a departure from the functions traditionally conferred upon a classical Ombudsman, we would have no difficulty in accepting your proposals provided such proposals are limited to the initiation of criminal proceedings. This should include the right to initiate quasi-private prosecution where the State has refused to prosecute. We do, however, foresee substantial difficulty in the application of the law and problems of procedure if the Ombudsman were to be empowered to institute civil proceedings on behalf of a complainant. If a complainant is unable from own resources to exhaust legal remedies available to him, legal aid should be available and the Ombudsman should have the right to require the office providing legal aid to indigent persons to make funds available for the purposes of a specific civil action. (This committee is hopeful that under the new dispensation, the provision of legal aid to indigent persons will enjoy substantial priority.)

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5 In the last paragraph of 2.2 of the Eighth Progress Report it is suggested that the magistrate or local police commander shall be obliged to receive complaints from the public and to transmit these to the Ombudsman in areas where an office of the Ombudsman does not exist. We have no problem with this proposal. Our difficulty lies in the provisions of the present Statute which enables the Ombudsman to require servants of the State to investigate complaints. If those provisions were to be carried to their natural conclusion, it would mean that in many communities and in instances where aggrieved citizens have complaints about the conduct of the magistrate and/or the police commander, those who are the cause of the complaint could become the investigators. There is also something fundamentally wrong in having the State involved in investigations concerning maladministration. To achieve the objectives of the office there should be independent investigation of each complaint without the involvement of the State.

6 It is noticed that the proposals concerning the powers to be vested in the Ombudsman do not include the right to publish the results of investigations of alleged violations of rights. We believe that the Ombudsman should have the right, in his discretion, to decide whether any report requires urgent publication, e g to allay the fears or suspicion of the public at the earliest possible moment in cases of ostensible violations of rights, and that right should become a statutory power vested in the Ombudsman.

7 The Report implies a change of name for the Ombudsman. We challenge the use of the word "Ombud" and its origin. Ombudsman is a neutral Scandinavian word meaning officer or commissioner and most certainly not a word which signifies that only males are capable of fulfilling that function. My committee would welcome the appointment of a woman as Ombudsman and does not see the name of the office as detracting from the rights of women in any way. Moreover, research reveals that in the Swedish language there is no such word as "Ombud".

During 1980 the Act on Equality between Men and Women at Work came into effect in Sweden. To ensure that the Act is observed the office of the Equal Opportunities Ombudsman was established during the same year.

Because the office of Ombudsman has been widely publicised, particularly after November 1991, its role as a source of independent investigation at every level where it operates, has already become an accepted fact in the minds of the public. We fought a torrid battle to persuade the present Government to change the name of the office from Advocate General to Ombudsman. We are very much afraid that there is a very real risk of confusion being created in the mind of the public. For the office to operate successfully it is essential that there be absolute confidence in every action and/or report emanating from that office. Confusion as to its identity or origin would defeat the very objective which is sought through the establishment of the office.

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8 I am concerned about the possible interpretation of the phrase "involved in the administration ... of the law" where it appears in para 4(b) of the draft Chapter 8. Narrowly interpreted, this could mean that practising lawyers could be excluded from appointment. I also assume that the qualification requirement in 4(b) is meant to limit appointment to those who are in possession of the LLB degree. With that I would have no quarrel but I might point out that one of the most respected Ombudsmen ever (the late Dr Randall Ivory) was a minister of religion and not a lawyer! Whether he had prior legal training is not known to me. I would, however, accept the LLB degree as the minimum academic qualification.

With due respect to the teachers of law, I do entertain severe doubts whether the teaching of law qualifies a person to investigate and probe the dark corners of government. In that sense someone who has had experience of administration of the law is certainly in a much better position to address enquiries and to unravel the complexities of bureaucratic action or inaction.

If I or the members of my committee could be of any assistance to your committee in its deliberations, please do not hesitate to let us know. As indicated above, we are dedicated to the institution of an independent office of which the touchstone must be the ability to gain access to the records pertaining to bureaucratic acts, omissions and decisions.

Yours faithfully


L S VAN ZYL
CHAIRMAN
ALS OMBUDSMAN STANDING COMMITTEE

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