

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION
EIGHTH PROGRESS REPORT : 9 AUGUST 1993**

1. INTRODUCTION

This Eighth Progress Report deals with recommendations regarding mechanisms for the enforcement of the rights entrenched in the Chapter on Fundamental Rights (hereafter referred to as the Chapter). These do not include mechanisms at the level of the judicial authority, since a court structure for the transition will be proposed by the Technical Committee on Constitutional Issues, drawing on inputs made by this Committee.

The Committee requests the Council's approval in principle of the mechanisms proposed in this Report. Formulations of the provisions of the Constitution providing for these mechanisms will be proposed in a subsequent report.

2. ENFORCEMENT MECHANISMS

2.1 In order to facilitate the rapid, extensive and meaningful implementation of the Chapter, the Committee proposes that the office of Ombudsman, as it currently exists in South African law, be re-directed and further empowered along the lines set out below. In addition, the Committee proposes the immediate establishment of a Human Rights Commission to fulfil the type of functions envisaged for such a body as described below.

2.2 **The Ombud**

The Committee proposes that the powers and functions currently vested in the office of Ombudsman be expanded to embrace the following in order to focus her (reference to the feminine hereafter includes the masculine) attention on human rights matters:

2.2.1 the investigation, on own initiative or on receipt of complaints, of alleged violations of rights entrenched in the Chapter on Fundamental Rights by the executive branch of government at all levels as well as statutory bodies and functionaries (for example, maladministration and corruption, the abuse or

unreasonable exercise of administrative power, unfair, unjust, capricious or discourteous conduct and the failure to comply with any of the duties and responsibilities imposed by the Chapter);

- 2.2.2 the settlement of complaints as referred to in 2.2.1 or rectification of any action complained of by
 - 2.2.2.1 mediation, conciliation or negotiation;
 - 2.2.2.2 recommending to the appropriate (offending) administrative authority the taking of steps to achieve such settlement or rectification; or
 - 2.2.2.3 the initiation of legal proceedings on behalf of a complainant, in the event that the steps contemplated above do not achieve the desired effect;
- 2.2.3 the recommendation of steps to enhance respect for human rights within the public administration generally.

The Ombud shall be appointed by the National Assembly on the recommendation of the same authority which is to recommend the appointment of judges. She shall in the normal course of events be a lawyer of some experience and standing throughout the community, and shall hold office until retirement or until dismissed by a two-thirds majority of the total number of members of the National Assembly on the ground of misconduct or inability to perform the functions of her office. The Ombud shall be responsible to the National Assembly, to which she shall report on a regular basis, but at least annually.

Deputy Ombuds may be appointed in the same way to assist the Ombud to discharge her functions in regard to any particular sphere of her responsibilities, e.g. gender or disability discrimination or privacy. In addition, Assistant Ombuds may be appointed for each SPR. Where the exercise of exclusively regional powers is concerned, the SPR Legislature may appoint a Regional Ombud to perform the type of functions referred to above in respect of those powers.

Each Magistrate or local Police Commander shall be obliged to receive complaints from the public and to transmit these to the Ombud in areas where

the Ombud herself has set up no specific office to receive complaints. Those alleging misconduct or maladministration may also approach the Ombud (or her Deputies or Assistants) directly, in writing. In discharging her functions the Ombud shall have access to government offices to search for and obtain all relevant information in the possession of the State and to require the answering of questions by any official of the executive branch of government, including a Minister of State. The Ombud shall have all such powers as are necessary and convenient for the adequate and expeditious execution of her functions and duties, including the authority to delegate power.

2.3 Human Rights Commission (HRC)

The chief function of the HRC, a permanent commission, shall be to promote the general observance of human rights and democratic values. To this end the HRC shall

- 2.3.1 initiate educational programmes and information projects aimed at the protection and promotion of human rights and democratic values;
- 2.3.2 investigate patterns of the violation of human rights generally and the entrenched fundamental rights in particular;
- 2.3.3 advise the legislature and executive at all levels as regards the consistency of any governmental law, programme or action with the values contained in the rights entrenched in the Chapter;
- 2.3.4 attempt conciliation between disputing parties on issues with which the Ombud cannot deal, failing which, bring legal proceedings of its own volition for the curtailment of any conduct offensive to human rights;
- 2.3.5 mediate disputes between constitutional authorities;
- 2.3.6 establish agencies or offices to further the above goals; and
- 2.3.7 report annually to Parliament.

The number of members of the HRC shall be not more than [fifteen], appointed by the National Assembly on the recommendation of the same authority which is to recommend the appointment of judges. As a general guide, the HRC should be composed as follows:

- (a) five members of Parliament;
- (b) one each from the Supreme Court judiciary, the magistracy, advocates in private practice, attorneys in private practice and teachers of law; and
- (c) up to five members of the general public, chosen by the National Assembly on the basis of their knowledge of or experience in human rights matters.

The members referred to in (b) and (c) should serve for a period of office of seven years, but should be secure in their tenure for that period. The members of the HRC should meet as often as is required. The HRC should be empowered to appoint a Human Rights Commissioner, who shall be responsible for the overall supervision and administration of the work of the HRC. She shall be appointed on application and shall hold office for a fixed term of five years, but may be eligible for further terms of office at the discretion of the HRC.

The HRC shall be funded from the national budget, and shall be obliged to establish at least one permanent office in each of the SPRs. The HRC shall have its seat in the national legislative capital, and shall have all such powers as are necessary or expedient for the discharge of its functions.

- 2.4 The existence of these mechanisms will naturally complement the courts' role in the enforcement of the rights entrenched in the Chapter.

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