

**THEME COMMITTEE 6.3**

**14 FEBRUARY 1995**

**TAPE 1 - 3**

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CHAIRPERSON:

Thank you for coming. Can we deal with item number one on the agenda while it's the confirmation of the minutes of the 7th and 8th February.

The minutes of the 7th are on pages 23-26. I hope ladies and gentlemen, you have had a brief look at those minutes and can indicate whatever amendments and whatever comments you would like to make. If there are no problems with those minutes... if I can have a proposal...[tape blank]...

Page 29, any problems? The minute we adopted has a correct reflection of what took place at that meeting...[tape blank]...

MEMBER:

I thought that as we discussed ama-Khosi, we wanted to know what happened ultimately to the traditional Leadership.

CHAIRPERSON:

Can I say that, that issue has been the subject of discussion both at core group level besides me and the executive director. It then went to the core group - from there it went to the constitutional committee and also to the meeting of the chairpersons of all theme committees with the chairperson of the Constitutional Assembly.

There it was actually raised by the chairperson that of the sub-theme group ONE who are the sub-theme where it had been put. It was agreed that the approach that had been taken by the administration as outlined to us by the executive director was the correct way of approaching this matter and that it be located to theme committee TWO which deals with the structure of Government. So, that was the agreement.

The sub-theme group ONE agreed that was fine with them, but they also had expressed the same unhappiness we had expressed, that we had informed them of the decision that have been taken on the 2nd of December.

SECRETARY:

Just to say that it's quite a bulky report and what essentially has been done is a summary of all papers. What the secretariat is still trying to do and...[tape blank]... so it requires time and energy as well... is trying to draw up a smaller version of that report that was drawn out for the debate of our agreement and also establish questions that can help guide the work of the Theme Committee and people can look at the updated one. We'll also be providing a work program - as well as a program in relation to public participation that can also be tabled and discussed by the Theme Committee. We're hoping that we'll have all this work done by Monday, so that we'll be able to distribute it to the Theme Committee before our meeting, so that people have the chance to go through it.

CHAIRPERSON:

Colleagues, that's the report from the Secretariat about this document. So, in the meantime, we do have it. The bulk as it is, but atleast to summarise all the issues to make it easier for us to be able to mull over them. Can we agree to move off this month?

MEMBER:

I would like to...[not clear]... that the secretary...[not clear]... because reading through all this submission took us enough time and to draw up a report like this must have taken a lot of time. Thank you very much indeed.

CHAIRPERSON:

Thank you! Can we then pass on to item number 3. That is the input by our expert Dr Albertine on the public protector. May I draw your attention... one other document that has to be circulated for purposes of this particular item. Comments on the public protector's alternative models and the relationship with the courts.

MEMBER:

Thank you Chairperson. I prepared the submission really because I was reading through the submission that have been received in respect of **information seminars** for this particular sub-group and I was concerned that the issue that unknown person on the public protector was a fairly no submission and that were really the issues that really needed to be brought to the attention of the Sub-Theme group or to be taken back to the parties or to invite further submissions specifically. So I prepared this very brief submission that summarises the points in respect of what I think are two import issues.

The first one that I'll deal with is what I call the alternative models of the public protector which is a conceptualization of the public protector. It's rather different to the one Judge van De Walt directed himself in his submission.

Secondly, I need just to raise a question for consideration, which relates to the ambit of the jurisdiction to the public protector. We all know the public protectors exist to ensure fair administration and to ensure freedom from corruption by the state to all in Government. But questions arise too, at which special tribunals that may have attached too? How far that goes with respect to the court? For an example, can judges be subject to complaints to the public protector? And not long ago to any course on tribunals that may be set up which will be like labour court or an offence to action agency and various sort of parastatal or semi-statal agencies, and I think that something ambit of the jurisdiction need to be considered. So, maybe we should briefly raise issues in respect of both of those.

Firstly, the question of alternative models. I think for all of us the traditional idea or the public protector are going to keep others to the public protector because it's a better name and obviously that's something for debate in this committee.

The traditional ideas is a motion of the public protector being sort of the champion of the individual citizen. [tape not clear]... individual wrongs of individual complaints so that in other sense the person who sits in the office and receives complaints from individual citizens.

That's really the more conventional model. It's the model I think ... [tape not clear] that are thinking when we think about this particular office. But in some jurisdiction and certainly in the literature there is. It is not necessarily the alternative, it may just be on expensive models of the public protector that is beginning to emerge. That particular model says that, given the complicity of modern administration, given the proliferation of government departments. Its really unrealistic to expect that you gonna deal with the unfairness in administration through a complaints superior, which is essentially what the public protector is. It is the office that receives individual complaints from the public. We need actually to relook, revisit the idea of attending fairness in administration. Not only do we need to do that... it's just to recognise that maladministration, that corruption, that unfairness, administration is is not necessarily of individual official or individual incident or individual office. It's often the result of systematic unfairness, system of government, way of dealing with things, ways of dealing with the public that may exist in the particular department or maybe a cross-government department. It may be as the result of lack of policy. that the minimum or many reasons of unfairness that goes just beyond an individual grievance. The role of the public protector should begin to go beyond the motion and individual complaints to grapple with sustained frame of unfairness in maladministration. Now this debut narrows the debate that is happening in employment field about discrimination employment.

The old model of the way in which to deal with unfair discrimination in employments to say that you wait for the employer to bring the complaint to the employee about the way in which the employer has been treated. That is called the negative model of dealing with the issue.

Increasing in the last decade or so is being the positive model, that is not necessarily counted to the negative model, but is certainly complimentary to the negative model. Which says that instance of waiting of the individual to raise complaints of discrimination we should be placing an important duty of employers to actually look at the work places to identify in advance the course of discrimination in that work place and to address them.

So, as long as you understand what I am trying to say about public protector.

There is a model emerging in Canada, and I know Canada is a so-called first world country and I know it has resources we do not have and the system we do not have and will have to be careful in a way that we actually import models from other countries. But it's an interesting model because what this idea of the public protector is doing on its men in Canada is that... the way of showing that not only we need to ensure that individual concerns are fairly resolved. But we need to go beyond that to work with Government to identify the remedy that undermines systematic causes of recovering unfairness. It's really now adapting a much more expansive and proactive role for the public protector. A number of important assumptions underlined this proactive model but take it beyond the sort of champion of individualised model of the traditional public protector which I'm not saying it is not important. But I think... I think it's important. But I am saying that for transformation we do not need more than that. I am saying that in fact, what we normally do in this country is - we know how to extend the traditional role.

I compliment it with the more proactive role. The assumption that one of the alternative models on the literature are those that I have already touched on. The assumption is that when you talk of maladministration, corruption, unfairness, rudeness of official, we're not always talking about individual incidents. You're often talking about systems, half or complete system of unfairness and then you often relate to single official but management administration which sees which government department that's point 2.1 in my notes.

Secondly, the assumption is that instead of being normally reactive and critical, we would be receiving individual complaint, deal with them and criticising the government for its bad behaviour via the public protector can take up a proactive and constructive role. Where you actually of its own initiative, respond to a pattern of complaints that one is perceiving as coming from the public.

In respect of a particular area, you can actually go and investigate a particular government department or a particular system across government departments and in conjunction with those departments working in ways of... actually...when dealing with systems of unfairness and the ways in which that can be done. I think sadly what they're saying is that we shouldn't... I mean there's no point of not respecting other institutions. We can see the public protector in isolation. We have to understand the role of the public protector in the context of the other agencies, individual and tribunal that fail to deal with the questions of unfairness and administration. Now we have to look carefully at the system in South Africa, but certainly in Canada, for example in the province of British Columbia, each government department within provincial government have what they call a Public Accountability Officer. So each government department itself is trying to deal with the question of public accountability and fairness.

The idea of the public protector would actually work in conjunction and necessary with those departmental officials to come with constructive solutions rather than only negative and critical.

There will obviously be times when the public protector will have to respond to complaints and be critical in that way. But then there will also be times where the public protector will actually take a proactive role.

The other assumption, the other thing that's obviously been important in the system which can bond in sort of negative and positive role of the public protector is the importance of the national federal and regional offices working together possibly a diversity of functions between national and regional that come from ... would have to be worked out. But it would be very important that they co-operated rather than work separately.

Finally that it gave me some points that I've covered ... that they rather support

public protector role which is traditional role of government and it should remain as such , again it's important that , that role is there. The no expense model is also to develop a constructive relation where necessary.

This kind of model is actually a much more complex model in the traditional model of public protector because it does force us to start looking at other systems and institutions and government. We do have to deal with unfairness and how the public protector will relate to them. For example there 's gonna be a special document for the policy, or not. And if this is how the public protector relates to that... will the policy be taken out of the jurisdiction of the public protector or would it be included?

There is really a whole range of issues that arise. Should the government departments for example have some kind of owners to develop their own systems of fairness and also that exist outside the public protector rather than rely on the public protector itself to do everything. I require a sense of fairly complex understanding of public administrations and the way in which government is actually divided up and made it accountable. I think it's important to try and get one's head around that because I think if we look at a country where resources are fairly scarce, then one would want to ensure that the resources are directed. And the eradication of unfairness in government are directed in the most economic in a way possible. I think that this model will be useful in the context of transformation which is the context which we in South Africa are going through now.



There's a monologue mode. That is the model that we will try and address. The need to transform the way in which the government works through the office of the public protector as well as other institutions. I think the number of issues that that I actually haven't touched on in this memorandum have become important around this. I mean the question as to trying to focus on a role of the public protector on the needs of the disadvantaged communities, for example, how is it going to deal with that.

But I have just raised it as an alternative model that really needs to be considered and need to be investigated further because I think it does raise important points and maybe it needs to be investigated further in the context of developing countries. What I really read so far, is that in respect of the concept ambit in Africa, has been quite limited. I mean what I really need to find out - I was reading something about the idea in respect of East Africa, was that? It seems as if the ombudsmen again, as it's called there.

It seems that these are most human rights commission type role. One of which deals with abuses of human rights and it may well be the ambits has a really expensive role in developing countries in the absence of the human rights commission. So we are normal to consider the experience of other countries in that respect as well because we suggest that shortage of resources actually mean to conflate the number of institutions that you have in the particular roles that the institution can fulfil. So that is really the first point that I really wanted to raise so that people could think about and if necessary call for more information about it.

The second point that I wanted to raise is a fairly controversial point but I think it is something that need to be considered if only re-dismissed. That is the ambit of jurisdiction of the public protector. I mean the merit of the public protectors there in a sense be the champion for citizen against mal-administration for government at all levels whether it is national, regional or local. The question that arises for discussion is what do you mean by government, I mean how far does government extend beyond about what we traditional knows government to mean.

Does government extend to sort of privatised institutions like Transnet and big parastatals like Eskom and that kind of thing. Now in terms of core and legislation, I think it does but I think we need to think about that. This we need to think about how far the role of the public protector will extend to, as I said before, any sort of ..... and judicial tribunal, which means any kind of tribunal that is not caught. OK! If any sort of labour tribunal are going to set be up. That the public protector extend to that and the reason I know there is a problem is because that all turn on the definition of what administration is, and often the administration has both been seen to include tribunals, so that is something that need to be considered.

But I wanted to know something in respect more directly of the legal system in South Africa and that is that in places like Sweden and Finland where the oddment were actually intended. The public protector even have jurisdiction over judges in those countries. In the Anglo American tradition in places like ..., in countries that follows that tradition, certain obvious places like America and the United Kingdom.

That has been resisted because it said to interfere with traditional independence. It is a question that we have to look at in this country to how far we want to be able to consider the mal-administration within the premium justice system, within the legal system through the office of the public protector, and if it extends as far as judges now, I do not have an opinion on that, but I suspect going to judges may be going too far. But I just want to read a quote that will atleast make people to think about it. It is a quotation from a Canadian scholar and is at the bottom of page three.

One might really ask how the ambits engaged the independence of the court by calling the attention of judges to irregularities and the behaviour or to arbitrary conduct in the court room and making the ombudsmen not allowed to question the court but he should be permitted to entertain complaints about mal-administration of the court and negligence of the court officials, unnecessary delays the personal conduct of the court officers, protectors and judges. This will no more bridge the dignity or intellectual independence of the judiciary but not go along and kerb and petty arbitraries of many court officials.

The practices of some crown council who should be start practices and even on ... practices of some magistrate towards party witness and council. Judicial independence is a corner stone of our democracy that it should not serve hide abuse. I think particularly of magistrate courts when I think of mal-administrations with no insult to any ex-magistrate men that may be here. So I think again it is something that can be thought about but I do think that the legal system is something that has been promised to many people, in this country, and the transformation of the legal system has been addressed and the question is, is the public prosecutor one of the officers that we can address too or not.

So just to end, I think this memorandum raises more questions than answers but I did want to put them in the table because I think they are important questions and I do think they need further research and further investigation either by myself or by other people who may be better doing that. I am certain, I think by expert in public administration. I sometimes wonder if we place too much interest and low.

Thanks

CHAIRPERSON

Thank you Cathy. Thereís a presentation ladies and gentlemen. I do not know if people want to ask some questions or make some comments and have some brief discussions on this matter.

MALE

I just heard lady Cathy as the judge van der Walt was here he was to persuade us more to accept the name Ombudsman, instead of public prosecutor. I've heard he seemed to be more committed to the word public protector. Can I just .... if he's got some motivation for that?

CHAIRPERSON

Let us see if there is any other question. Is there any other question at the moment? No. you can table that one.

FEMALE

I know of people who believe in sexist language, so I believe the Ombudsman is problematic, that would be one explanation. I know people thought about ombuds. I like the notion of public protector because I think it is catchy and I think it does actually put forward a concept of the role of the public protector that is an important one. I read through some of the submissions. You know, there are two points that I actually do not agree with. You said that ... with the public protector you do not have to advertise what the public protector does.

By doing and the way you going have to advertise is by saying that the public protector does perform the role of the ombudsman. The assumption that van der Walt have not respected that, is that people know what the ombudsman does anyway. And I don't think people know what the ombudsman does. So I think what you call it, I think that reasoning does not support calling it ombudsman, because I think that most people in this country have no idea what the ombudsman does and would need to be educated around the powers and the function and the duties, what ever the name was.

The only reason he gave us he said that the public protector suggested that the public protector sided too much with the public and it was very important that this person was impartial and that should be impartial also in the sense of not talking toward favours on relishes complaints from the public. I think he also have that reason. Clearly, you know the public protector should not allow favours on relishes to go forward from the public.

I have no quarrel with that, but I certainly think that the ombudsman or the public protector is pre-eminently somebody who does support the citizens against the power of the state, and does exist there to actually take up complaints on behalf of and more valuable citizen against the more powerful state. So therefore the motion of protecting the public from mal-administration. I think it fits, I do not think it is necessarily a logical .....

CHAIRPERSON

Thank you. Is there any other question or comment?

FEMALE

Yes I would just like to comment on what was said about the role, function of the public protector. As I read the report of the judge, to me it sounded rather not to say the role of the public protector would be the same as the ombudsman. I think what he meant was in describing the role and the function only would use the same set of whatever the task the job description whatever as he had for ombudsman not as to say is it the same as the ombudsmen, but to re-write those just heading it with the other name.

You know that is what I understood him to say and also on the report it sounded like that. It is not in saying the duties would be the same as the ombudsman. The duties would be re-written, whatever the ombudsman had to do under the heading of the public protector. That is the way I understood it.

CATHY

I think he was saying that. But I do not think that is an argument for saying that you should call in an ombudsman, and I think he was trying to suggest that it was.

FEMALE

I would agree with Cathy and making it clearer to some of us who are not good at various languages we really ignore what ombudsman is, where the term ombud comes from. Where as the public protector is clearer to identify with. Also, I think it is in line with the thinking of sub-theme three that she has in this presentation extended the activities of the public protector not on the individuals but also to look out for, perhaps communities and other groups of people and particularly places of work and so on.

But what I would like to have clarity on a bit is: If the public protector is pro-active as she suggests, will that not be read as point theme or taking initiatives without the people having been requesting him to do it. Will it not be read as adversarial or unnecessary. I have another question which is not related to this but I will stop here.

CATHY

I mean I understand your question and it is a good question. The public protector does kindly within the constitution have the part to act on his own initiative as well as to receive complaints. So that powers actually does exist within the interim constitution, although one needs to spell out what one means by that.

I think that the public protector would be taking an initiative because the public protector saw a problem. So I don't think it would be a situation where it would be without taking people into account.

Let's assume for example that the public protector or the reason the public protector are receiving complaints in the federal or the national public protector reviews those complaints and I actually see it as a pattern of unfairness arising that is not clear from the individual complaints, but becomes a pattern from 20 or 30 complaints. He could or she could be taking initiative to address that pattern. That would have meant it came as a result of single request from people but it would certainly be coming from a problem that people as a whole were experiencing.

That may well be an example of that. I don't think the public protector would ever be active amongst groups or individuals or communities. I mean I think they almost have. What I am saying is that it does not have to be driven by the individual complaint. Sometimes we know their problem without us having to tell. But you know that women experience problems with collection of pension in rural areas. You don't have to wait for a complaint to that only. One could initiate an investigation to that and it would be addressing needs. I think one could make the public protector to be accountable by getting that person to report to parliament and parliament would hold the public protector accountable and ensuring that the work that he or she does actually is addressing needs, I wish. It's obviously the second form of accountability.

CHAIRPERSON

Mrs. Harriet do you want to pass on to your next question, Khosi did I give you a chance?

KHOSI

In fact just the matter of clarity to me. What is the relationship between the public protector and the Amakhosi in the rural areas. That's what I want to understand because I think sometime on this issue of the public protector most of Amakhosi are doing the very same thing. So what is the relationship?

CATHY

I mean so far as and obviously it's the relationship that has to be worked out in the context of South Africa. So far as Amakhosi or anyone else are dealing with this kind of issues. I suppose to one to some instance encourage that to continue. So far as Amakhosi acting as agents of the state in any of the functions they themselves may be a subject to accusation and complaints which the public protector could take up. So I guess the relationship is two-fold.

On the one hand it is complimentary.

It is possibly complimentary, and it may even be co-operative and particularly in respect of regional public protectors. On the other hand it is potentially adversarial as well because they may find themselves on the opposite side of the resolution of the complaint. That sensory obviously the practice of that would have to need to work out.

CHAIRPERSON

I am assuming we have finished this particular round. Then I would start with Khosi here and come to Sis Harriet and to Mfundisi.

KHOSI

Thanks chairperson. My question is covered by what was asked by Prof Ngubane. I want to get some clearance to item 2.4. I just want to understand exactly where do the chapter of distinction is between the one in the province and the other one in the National Assembly, because it seems the other one would be analysing problems, the other one would be just monitoring what's happening. Because really people are going to go straight to the national government.

CATHY

What happened on 2.4 is not a suggestion. It is an example. I am not trying to specify or mandate a particular relation between national and regional. I think the general point I'm trying to make is that in order to deal with this problem, within regions, across regions at national level, it would be important that there would be co-operation between national and regional. This particular suggestion comes out of a suggestion made by a Canadian writer.

When this Canadian writer was saying that, possibly, one of the ways which could relate would be that the regional public protectors would be more complaints driven. The national public protector would attend to the sustaining forms. In other words, it would be somebody who would review the pattern of complaints and would identify pattern unfairness. That is just one suggestion. It doesn't have to be a suggestion that is right for this country at all.

CHAIRPERSON

But I think this touches on a question that I think has been addressed also in relationship to theme committee three. I think which is dealing with the relationship between the different tiers of the government, because, I think we now are looking at all statutory bodies.

That we would have to address whether you have one pattern, one way of relationships at different levels at those structures or we would have to pay special attention to each structure and find whether infact it is best to deal with it separately as a different structure in terms of its own mandate. So I just think it is an area that we need to apply our minds even on submission that we make. Mrs Harriet.

HARRIET

Thank you madamchair of taking out of my mouth what I was going to say. I think Amakhosi sometimes have a problem in presenting their case as people who are there doing all these things because its not easy in one sentence to state what they exactly do.

As my colleague here said, this is the activity or the job of Amakhosi to do this. One easily gets the impression that Inkosi does this alone, very often Inkosi is in council and is doing this with the advice of other people.

There is a democratic operation within it. I think the public protector is very well defined as to what its duties are, such as to protect the public from the bureaucratic nature of the government and various things of that order, where as in the operation of Amakhosi, it covers all sort of human rights, such things as the general human rights in relation to people among themselves how they operate, how they treat one another. It is not very easy to put across how people deal with the situation in the structure of Amakhosi itself.

It is seen by assessing people as needing someone to protect them from it. But as far as I know, is that in the traditional structure. African structure there was always a way of dealing with that, such as going to ....., because they have seniorityis even Amakhosi overlap. There are various seniority and so on and so forth, where they can go and discuss their problems at a higher level. But more importantly one should begin to define these things, one category fall on human rights, one category falls into public protector, another falls perhaps on gender issues and so on and so on.

It blames the functions of Amakhosi where as to all these things are supposed to be functioning in a special way where you need by custom. It is known that the women, for instance the gender issues must be protected by this and that. But because nobody is saying that we hadnít had literature or any research which really tells us what should be happening, what we are looking at? We are looking at a broken down system or system which has been abused by an apartheid system and when in fact in each philosophy practically all this thing exist, because unless the society is absolutely horrible to its own people, every society needs this function to be there.

So what I am trying to say, emphasising what the chairperson said, is that we really need to look at it very closely because is one of the blurred information or understanding on this area. Thank you.

CHAIRPERSON

Thank you Mrs. Harriet. I do actually, we have now come also onto another key issues in terms of the application of the structures or their ability to function in certain communities that fall under, perhaps as traditional system of life generally and I think as a result that the issue about each and every structures we are talking about, now they function, how they relate to those traditional system of government in the areas under Amakhosi and perhaps we should just table that as an issue. Mfundisi.

MFUNDISI

Madamchair, mine may be much more broader. For us coming from a culture of great unfairness where the unfairness was also enshrined in the laws of this country, we expected in the point and in time that their public protector per se would be the person who would be addressing the complaint forth coming. According to my mind it seems as if this is very, very enormous. Unless if we look broader than only the government bureaucracy.

It seems as if we are confined to the government and are alleging that this government should be a democratic government. I don't think the complaints are also confined to the bureaucracy but complaints are much more beyond the bureaucracy only. That is why I am saying my question and thinking is much more broader than the public protector. Whether should there be some ways and means in ....

## TAPE 2

..... which the government itself, in its process of legislation to try to protect its people much more so as to minimise as much complaints as possible.

The thinking, the notions of protection which was even not there in the education system in our country. The protection of greatest importance that we state to inculcate a culture where people would be responsible to one another or protect one another. We come out of a culture where people had to rise up to strikes and sit-ins because the ombudsmen were unknown, wouldn't even address the overwhelming level of complaints which were there.

This is my worry that we would come to a point where we normalise our situation where as its not normally wet. The amount of unfairness is still very, very great. We may say that this government of national unity which claims to be the democratic government is not complying with democratic rights. Why because there are still people who are perpetuating the old system of being very much unfair.

I must be unfair in order to enrich myself to impoverish the next person. Therefore this culture becomes extremely important, where we come up with the culture where we share a public protector per se cannot address the enormous challenge



facing this country, coming from this culture of unfairness.

CHAIRPERSON

Thank you Mfundisi. Khosi you want another round for ...

KHOSI

I wonder if Cathy put this as a question to ask or she was suggesting something. It slipped my mind. Where she was saying that the public protector's role be extended to cover even private institutions. She even gave an example of Eskom or Telkom or Transnet or what have you.

If she has some suggestions, I am pleased to hear that, because I think I am having a serious problem as to where private institutions are going to allow whether him or her to interfere in their institutions. For example, yesterday I saw one guy who is working in the security company. That guy said he has been working for twelve years.

He said I was working for twelve years and I was working from Sunday to Sunday and I only get women increment after four years so on and so on. That guy you can see that there is no way he can go and complaining. As I am saying I wonder if she was having some suggestions as to whether this office can cover private institutions like Telkom, Eskom and what have you.

CATHY

I think those two questions actually goes together in the same way. I absolutely agree that the public protector alone can not address the culture of unfairness alone in this country. I think that without question, and I think you made the points very well that I only touched on and that is that we again as the public protector as sudden institution that we are looking at, one has to see as a part of a range of methods and strategies and people and institutions who are going to deal with abuses of human rights and unfairness by government gender equality or what ever.

I think that what we need to be doing in respect of the public protector, is to show the public protector as well a place within that set or system of individuals and policies and programs to be able to carry out his or her own job to his or her best ability. I have no doubt that they should be in some government or each government department to ensure fairness within its department and they in which department deals with people for example. I think that need to be looked at quite carefully. I think the constraint of time and resources mean that one just often set up an institution like the public protector without thinking of the board of context.

That person tend to work in isolation and is not effective as that person could be.

If it had been more tough about how the institution would fit in the board of context. I think what needs to be done need to be done on that. I think again itís something that need to stuff around the public and sub-theme group two or what ever it is. Yes I agree with you, and I think to at look what is wrong and obviously what one is to give is a constructive and co-operative role, but one doesnít want to overburden this public protector and say you know you are responsible itís too much.

I was throwing out the point of the ombuds of the jurisdiction of the public protector as the question to the group. My personal view for what itís worth, is that the public protector should not cover the private institutions but there should be other institutions in tribunals that do that. The example that you go over is really on employment issue which should be dealt with in the department of labour and the labour court and whatever institution that arise on that, and unfairness in the area of housing and education or prevention of services to private citizen can be dealt with in the discrimination court by the human rights commission or whatever.

What I was saying though is that there is a big debate in legislation terms and I think in political terms about where does the state and the private sector begin. Recently in this country we had a series of privatisation or so called by shares we issued to companies like Transnet and the single shareholder was the state.

So does that make now the Transnet a public sector or the state. So itís those kind of institutions that I was talking about and the kind of public protector act ... actually does allow the public protector to look at those kind of institutions which effectively state institutions where appeared to be private. There is another example of course, and that is the example of university in Canada. There was a big debate as to whether the universities are part of the government or not.

Therefore the Canadian Bill of Rights could be enforced against universities. The court there found the universities were not part of the state. But and ... judgement by the progressive women judge found that they were part of the state because they received huge amounts of funds. There is a very blurred line between the state and the private sector beginning and it may be just that one wants to identify certain major larger powerful institutions, that get enormous amounts of state funding that no one is to induce in the ombud of the public protector.

HARRIET

Probably it may sound as repeating my brotherís comments which were very well put. But I think actually in South Africa we have a very special problem in addition to what he put across. We have a problem of, weíve had a problem for instance of criticism. For instance for a long time we know, who are on the other side of gather line.

We know that anyone in the privileged colours situation could commit murder.

People on the farm could kill their farm workers and they would get only three months or very small type of sentence.

The point I'm driving to is, are we going to suddenly come out of elitism protection our group which we support. I'm now not talking of colour but of privilege. If we all belong as we sit here we are enjoying fruits of life. What are we really going to do about injustices which are met toward ordinary people in the rural areas and in the country side. How are we going to really make sure that such a thing doesn't really happen. We've seen a lot of it happening at one point.

The second point is we are stacked in a very difficult situation here where as South Africa as a country we inherited the colonial system of having around as people who we bond to SA in terms of labour such as Lesotho, Swaziland, even Botswana. Therefore we have excessive labour resources here in this country and as a result, so far we don't look at that, we don't even begin to think of what is the correct thing to be done in this country to protect our working people and the apart from the recent thing of people coming in from all over in SA or African.

But we have had that situation even before that of having people coming in as migrant labourers the expense of our people in the country. So I'm thinking of the two examples, but there is a list of them and they are quite tremendous actually. I do not know how we can handle that process.

MALE

Comradechair, I don't know maybe I may have read the question of the public protector wrongly. I sense that we think that the public protector is going to solve the problems of this country where as far as I understood it, the public protector is one of the methods of solving our problem. The injustices of the past is not something that is going to be a process to solve the problem. So I thought in my mind that the public protector is just but one of those methods to solve the problems. Then also of course there are certain things which we need to look at realistically.

We have talked about the chiefs doing some of the public protector in certain cases they do but in certain cases they don't need the public protector. The people need to be protected by chiefs, for example we know where the chiefs themselves are abusing or taking an advantage of the ordinary people. So what I am saying is that we do need the question. The only thing that I do probably, I don't know whether I am taking this to the board that would be debated by us here is a question as, what happens now when the public protector himself become contaminated with corruption instead of allowing or helping people? It becomes now the one like for instance Cathy talked about the judges in SA and magistrates.

Under normal circumstance, those are the people who are supposed to uphold the justices and all those things.

But if what they are doing is what they are doing, in the past, they will all now be perpetuating justice, that's all.

CATHY

I think the last contribution was more a comment than a question. Yes of course, the public protector is a good thing. But I think what is coming out of this discussion is the need to look at a range of institutions and agencies in this country and to look at the broad system that we put in place to deal with everything, the problems in rural areas and the problems in the work places, problems with government, with mal-administration, with human rights abuses and that kind of things.

I think that this committee should be very much seeing its role as identifying the sources of injustice in the kind of institutions and individuals that can actually be dealing with those and yes not putting it all to one. I don't think we should be doing that at all. Injustice in the rural areas can be multicourse. It could be something that arises out of corruption and mal-administration and by government officials. It could be as a result of developed decisions that are taken on account of the need of the people. It could be human rights abuses by some of the chief or somebody else.

There is a whole range of sources of injustices. We just have to make sure that they are the institution where they are traditional institutions or not but there are institutions where people can use and all those institutions are accountable and the public protector is also accountable.

It is accountable to parliament, it's appointed by parliament, it can be kicked out or she can be kicked out by parliament on the basis of not carrying out his or her functions. So corruption by the public protector would mean that, that person no longer has a job. There is a way of moving a person. Obviously it has to be independent order to prove corruption, but yes, it can be removed.

CHAIRPERSON

Thank you Cathy. I don't know if there are any more comments or questions for discussion.

MALE

Comrade if you allow me on the issue of farm workers. I have not heard how they are going to be protected for the mere fact that they never had any protection in the past. You know we are now discussing the issue of the public protector confined to government bureaucracy. In fact to protect the already privileged people and the most unprivileged people there is, what kind of protection do we talk about. Does it mean they are still ignored like sister Harriet said. This is my worry. She said we might be seated here privileged talking about the public protectors. We are now talking the legal language.

It becomes so important that we become divorced from the real problems of this country. Those who are living preferably in a marginalised every respondent time the farm workers. The producers of food in this country, how are they going to be protected. This becomes my worry and that is why I don't think we can allow ourselves to be confined to discuss the issue of the public protector not looking abroad that confines. This is my worry. Farm workers in this country, rural people, it seems that they are still going to be marginalised within the confines of the so called democratic process.

Unless we become critical in the law making process to accommodate everybody otherwise we would find ourselves caught up in that missionary of operation in isolation. Discriminating other people unaware. A privileged person, if that person does not apply introspective continuously, could tend to forget other people. I think this is a very crucial point to be looked into. How are these people going to be protected.

CATHY

Can I just respond to that very briefly. One of the most important set of protectors of the public are members of the parliament. You spoke about how are we going to be including those people in the law making process. I mean issues of farm workers, is the issue of parking an issue of saying that farm workers, are important people who need to be protected and therefore we have to device policies and laws that protect them that include them within the existing relation system.

If necessary, set minimum wages that enable them to dispute resolution mechanisms that give them rights as the basic conditions of employment act has begun to do. Parliament is the key institution in that process in terms of ensuring that people are protected. Courts are another key institution I know that their real problem with access to court and that kind of thinking which is ... the legal system has to be looked at in terms of transformation.

The public protector may be one but you know, but it would be limited in respect of farmworkers I would imagine the situation in relation of farmworkers and the state. The human rights commission could be an important institution because it may be that no one is paying any attention to farmworkers and the human rights commission sees the abuses of human rights.

That happens on a daily and weekly basis to farm workers and politically its going take it up and make a big song and dance about to force parliament or the department of labour or who ever to change laws, and the civil society itself would be another institution. I mean organisations of farm workers or support groups of farmworkers. That's how the democratic system work in terms of having a whole different range of far more than informal institutions that deal with it. And a lot of it is about where you place your priorities.

CHAIRPERSON

Mary, you are the last speaker on this issue.

MARY

It is not very on this issue. I would just for a suggestion made by Cathy that we try and organise some joint of public meeting across theme-groups on the question of judicial in the courts, because I think that an important area personally it make sense to me that if the public protector should cover courts then within our theme committee that we have a joint meeting with the public people working on the public service to discuss with them how they think the public protector should be designed and also with the sub-theme group for the security and policy operators monitoring them, because they should also be covered by the public protector the policy security. Now if we do not talk to them we are going to come up with competing recommendations which is not going to be helpful in the process.

CHAIRPERSON

Those would be theme-committees (5) within the judiciary and the courts. So we got those three categories, the sub-theme, 1, 2, and 4 and then theme committee 5 that we need to set up a meeting with. I think we all agreed. Is there any opposition? May I then raise quickly a few things around this whole thing of the public protector. The first things is that I think the official deadline that is still reflected in the books is tomorrow for submissions.

Although there has been some extensions, we would rather like to ask the political parties to bring in their submissions rather earlier than later. Then we would continue to ask the public to bring in their submissions. But we would like to ask the political parties to please come forward with their submissions. Here we are not looking for more than one page because after all you do not have to be given details. The public protector office will have so many staff members. That is not the kind of thing we are looking for.

They are just looking at the broader principles, we need the public protectors. How should this provision look like in the constitution?

What are the issues that need to be highlighted in the constitution or even debates leading to that. So that the one thing just to ask in particular political parties why we acknowledge that and still we go for the public because I think the next thing I want to point out is that our report on block three would then be somewhere three weeks from now. In other words, we need to urge the submission to come in so that on the basis of those submissions, we can really get on with our submissions, hear of the issues that are conscientious on which we are unable to come up with conscientiously.

What are the issues which are not problematic? Are there any issues that we think we need to highlight for the constitutional

committee to pay special attention to?

Because we are not meant here to have endless debates. Well, I just meant to synthesise things and to say OK, it does not seem like the agreement or there is a bit of a problem here, can the constitutional committee pay attention to that and the debates and the negotiation would happen there. We just do the processing here. Hence I am urging that the political parties submissions must come in. At least by the end of tomorrow if possible. If not, by the end of next week.

Having said that, may I then propose also that we agree that this is the constitution that is not known generally by the majority of the people in this country. So it is not an institution about which you can go to next week to whatever community and say we want your views on this matter, because they simply do not know what you are talking about. So one perhaps useful hearing or evidence that you can get are only from stake holders. People who work in areas where, in fact they are familiar with these issues. I would advise the legal profession with people who are quite familiar with this things. I think Cathy can help us think up who are the stakeholders.

I do not know whether Social Workers would perhaps be familiar and might be able to make inputs on these things. But if we can have a list of people whom we can solicit evidence from so that we can invite them for hearing here. Rather than pretend we can go out to the public and get opinions on this matter. So that we can then have the category of our work around this issue where by we have this hearing. Further on to agree that we have the responsibility to take this institution to our people by way of seminars.

There it would be asked, talking information and saying to people here in the institution that the constitution is looking at including as one of the provision for you now. So that we can be able to address the problems of this country. I just want to put these ideas broadly to you and hear if there is any opposition or even agree broadly. There we can be able to work out just a work program having in mind the facts, in fact the program that we will work on would actually have the frame whereby in fact we can spy.

This week we hope we would get involved on these kind of activities. Maybe the hearings are going to be over in two days or during a particular week. Then maybe the information seminars would start on the particular week, and that does not have to stop the question of our report, because the hearing from stakeholders I think are more urgent theme because then if there are more issues we can address those in our discussion also on submissions and we can send our report. We can continue with the activities like actually going out to the public and handing information seminars, really it could be more about educating our people and familiarising them with the institutions. Can I just have some reaction from the meeting so that then we can record our discussions around these matters. Sis Harriet.

HARRIET

I agree with your view on how we proceed. I would also want to add among ourselves actually we also need to utilise our members for instance. If we could get Amakhosi for instance to tell us exactly how thorough the traditional authority structure, how the function of the public protector is achieved and also keeping in mind that Amakhosi in the country have had various historical experiences and therefore when we talk about this structure we should really, we should be aware of that there are certain differences in various regions. Therefore we should focus our attention in a more informed way.

So I am just throwing this out as or so far we have experts but in certain areas the experts obviously are bringing very close the more profound thinking which is at the present happening both internationally and nationally. But we also need to utilise what we have among ourselves. I thought I would just add this and then when it comes to looking at, I didn't hear you tell us how we are going to handle the submission. Whether we need to look at them individually as home work, and then come here with something we have in mind, in fact putting it in. Conscientious and problematic issues and so on. Whether we are going to look at it here as a group submission by submission.

CHAIRPERSON

I think first of all on the matter of utilising the expertise from our traditional rulers, I think that should be taken seriously, because I think we have already acknowledged the one issue that we need to address is the whole question of how these structures will function. But in particular, the public protector in areas of Amakhosi.

Perhaps it would be a useful thing if Amakhosi who are around with us here and others who can come together and perhaps work out an opinion that they can channel through the administration. Just by way of seeing how this structure can be facilitated, in those areas. Then on the other issue of your last question Sis Harriet was about the submission. I think there are two things as soon as submissions are in, as soon as possible, the administration to pass them on to us just for us to immediately read them all of us. I mean we always have to read documentation.

So as soon as it's in we read the submissions and we ourselves make our notes on the issues as we pick up as we react to them. But secondly I think there is an exercise whereby we would ask the expert together with the administration to facilitate discussions at the very next meeting after we have received the submissions. Whereby issues can be teased out so that in fact when we come here we are not all going through line by line the submission. We can immediately attach the issues and we can be limiting those that are not contentious and addressing those that are contentious and at least identifying them, so that we can be able to actually work on the report as soon after that exercise as possible, so that we won't hear just ... saying ...



here is the ANC submission.

We would have to say the submissions are raising these issues, these are the differences in terms of what is contained in the submissions. Broadly all the submissions are in agreement that there should be a public protector. That is not the issue.

I am just making an example or broadly all the submissions are saying there should not be a public protector whatever it is saying and only addressing those things that need our attention because the thing is that we need to facilitate the discussions of the constitutional committee. Rolling ... is that fine?.

So may we then address the agenda item number four. That is for us to agree on the date of the next meeting and as far as I am concerned, I think the next meeting should be such that we would have read even this document of the public protector and we would have also looked at the report here. But prioritise issues of furthering or finalising or sharpening our ideas on the programmes on the public protector. So I think let us agree on a realistic date and I was wanting to say, whether we should not say we should meet on Thursday, so that we have one day in between, at least we give ourselves a chance - not unless people see it otherwise.

BRONWIN

Do you think that political parties are going to have got it by Thursday? - the submissions. Let's set it for next week, because then by that point, at least the program would be read. Political parties would have their submissions so that people spend this week actually facing political parties to take the submission on this issue very seriously.

CHAIRPERSON

Can we say reasonably that we can expect all political parties to have their submissions in by Thursday? I mean I'm not saying we would meet on Thursday. I'm just saying if the submission can be in by Thursday. Can we be assured by members of different political parties, I will certainly fight mine and make sure that the submission is in, so that at least if its in on Thursday, so that in fact those are circulated before the weekend and then when we meet next time and clearly it will not be Monday, because on Monday there is a meeting of chairpersons. Also a GA that would receive report of what ever progress we have made. So perhaps can we be looking at Tuesday? - but parliament meet in the afternoons.

Mrs Wolngard is addressing us at 09h00 on Tuesday. Can we do what we usually do, be with her for two hours or an hour and a half or whatever length of time. And then stay on another 45 minutes to look at whether we would have the proposal of the program so we would actually be working on the basis of a worked out proposal. So that we would meet at 09h00 to 11h30 on Tuesday. Is that agreed?

MALE

Are we going to be informed upon the meeting because some of us need notice?

CHAIRPERSON

Do you have a diary with you just now because maybe you could just diarise it and then in addition we'll have notices. I agree because I also find ... even when I have diaries I still need a notice.

MALE

Because I find it a joke myself. The reverend we attended the wrong meeting this morning and we said no we are just observing.

CHAIRPERSON

So then, let's agree then.

FEMALE

So then the meeting would be here.

CHAIRPERSON

Most probably.

FEMALE

So I'll try and get this venue, I am not sure if we would be able to. But I would send the notice out indicating that we need it.

CHAIRPERSON

We are not meeting tomorrow, we are now meeting on Thursday but we are working on all those days. I think the emphasis must be on us really working so that when we next meet, you know it's really just to adopt a program and if possible, work it out such that we actually have at least even if it's not precise dates at least every week we have a clear program worked out around the public protector.

FEMALE

Does this mean all the theme groups?

CHAIRPERSON

No, just us our sub-theme group. Now the other matter - for at least we have settled item 4. Not unless we get notices from Bronwin saying that we are meeting the public service people tomorrow or we are meeting the sub-theme group 4.

It might be a useful thing to try and fit in those meetings, in fact this week. I think let us try and do that and theme committee 5, if we can just ask Bronwin to set up those meetings or we can just ask Snakes to do that for us. So we'll be expecting, I think let us just say we should all be expecting that the meeting will be likely to be scheduled for us to meet these two sub-themes as well as theme committee 5, in the next few days before the end of the week. Cathy can you be with us? You can't. I think that takes care of item 4. Item no. 5.

Is there any other business, just to say that this morning at the core-group meeting it was pointed out when I was raising the issue of the acquired we are having of the first issue bearing public protector but are not having our two experts.

Having been formalised by the administration and so on like all other theme committees, because the matter that have been put by the administration block one, was the gender one. So we do have our expert on that, we do have work for them, it's not that there is no work. But we just need to set that one off.

What was pointed out was that we ourselves actually have not given in names at the end of last year to start with, of experts, and that we actually ought to be edged today to please give the names of our proposals for experts for all the other matter, public protector human rights commission and the land commission.

We did say that fortunately for us Dr Albertine is also competent with the public protector and the human rights commission and what was agreed was that the matter should be taken up with the ANC and if the ANC have seconded her for the issue of gender commission wants to do so also for the other issues then that would be taken up with the committee that is dealing with the experts. For today we really just took advantage of her. This is actually informal. So it will still be formalised so we are asking that there should be proposals. Otherwise I don't know if there is any other business.

MALE

Yes, I wonder if I'm afraid it might be quoted wrongly in the minutes, when you were reporting about the question raised by professor Ngubane about issues of traditional leaders. It seemed you said it will now be handled by theme committee 3 instead of 2. I wonder which one is it, because you said 3.

CHAIRPERSON

I thought I said on that issue because I did not mention three in another connection. But I said the committee 2 which deals with structures of government. Do you have that Bronwin? OK. Sis Harriet.

HARRIET

Just two points. One is do we have a list of names of these

experts such as experts on land commission or public protector?  
CHAIRPERSON

I see a list here. Proposals from the National Party, I think you have it in front of you. So that all we have right now.

HARRIET

The second question has to do with it has become obvious that our theme committee at our ..... during our daily operations what came out is the awareness of the problem that this country has, awareness if you like call it developing and developed country, first world, third world or whatever. But we are very much aware of these things. I have a feeling that in other themes they are not as aware. How are we going to put this across in such a way that it is appreciated by the constitution? Everybody at the end of the day because we are such a small little sub-theme some way all this effort we are putting into this might get lost in the large development of things. Themes  
...

CHAIRPERSON

I think you are raising a good point and I think I regret that you didn't raise it in for instance in the theme committee meeting because that's your first forum where you have more people. But I think you should also have to raise it in the CA because I mean in fact the approach of this coming Monday meeting is that, there will be the brief reports from people either chairperson or representatives of different theme committees of such-theme committees and then there would just be a free for all. You know we won't have the formal list of speakers, that sort of thing.

You know people would just speak and I think that where really and in fact we are beginning to say, let everybody as you know, come in the exercise of constitution making and share with us what we have done so far and where we are at. Otherwise Monday meeting was actually conceived initially as another meeting of CC. Then I had already raised this other point of broadening out and getting other elected representatives to be involved and also to deal with this upper thing on part of the 310 who are not in theme-committees.

That we opened up and said fine, although it meant to be an informal exercise of us just again going around and giving reports and having ideas of what is going on. How far are people, why don't we let other people come in, so I think especially because its going to be run informally those issues should be raised, whatever we feel has been left out in the report and is important to share and to synthesise other people about. We should be just be able to raise but unless there was another formal way, maybe you wanted us to be able to do that to achieve it.

HARRIET

Yes I think it should be implied, I'm lying to you, but I think

it may help to have an approach. It would be effective. In fact, I nearly raised it this morning but I thought perhaps there seemed to be such a rush, everybody wanted to get out of there and I realised that they were likely to take in what we are talking about. I think it required a certain approach of working this out in such a way that it received consideration ..... [the tape goes blank at the end while this lady is still speaking. The beginning of tape 3 is not clear].

### **TAPE 3:**

CHAIRPERSON

I think just like the issue of how the structures operate in the traditional areas, I think this is another point that really relates to all the structures again of the awareness that has come up that in fact in dealing with each of them, you need to be conscious and sensitive to this fact that in fact you have two worlds in the same country and therefore you need to be sensitive to certain realities about that. [The tape goes blank again].