

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

**FOURTEENTH REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL**

29 SEPTEMBER 1993

1. INTRODUCTION

- 1.1 The Constitutional Principles contained in Schedule 7 of the draft constitution for the transitional period do make provision not only for "universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution"(Principle X) but also for the independence and impartiality of inter alia the office of the Ombudsman "in the interest of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service (Principle XXVI)

- 1.2 In this report we draw attention to the office of the Ombudsman and the Human Rights Commission. We identify those matters which call for decision by the Negotiating Council. Such matters include terminology, the procedure for the appointment of the Ombudsman, the tenure of office, certain powers of the Ombudsman and the relationship between the national Ombudsman and SPR Ombudsman. We also point to the differences between the powers and functions of the Ombudsman, on the one hand, and of the Human Rights Commission, on the

other. Instructions on each of these matters would facilitate the finalisation of the draft text on the Ombudsman and the Human Rights Commission.

- 1.3 A proposed text for Chapter 8 of the Constitution is attached as an addendum to this report. In preparing this draft text we have had regard to written submissions made to us by various parties, the debate within legal and academic circles and other proposed enforcement mechanisms of human right such as the Constitutional Court, Ombudsman and Human Rights Commission. We also had the benefit of a draft text on the Ombudsman and Human Rights Commission prepared by the Technical Committee on Fundamental Rights during the Transition as well as the relevant sections of the Interim Report on Group and Human Rights and Report on Constitutional Models prepared by the South African Law Commission. We have also received written submissions from the present Ombudsman (Mr Justice P van der Walt).

2. TERMINOLOGY

- 2.1 The question has arisen as to the appropriateness of the term Ombudsman. The principal objection to the name Ombudsman appears to be a perception that it bears certain gender connotations. In an apparent effort to overcome this concern the Technical Committee on Fundamental Rights during the Transitional period suggested that the designation Ombud be opted for.
- 2.2 In August 1974 in Vancouver the International Bar Association defined the institution of the Ombudman as follows:
- "An office provided by the constitution or by action of the legislature or parliament and headed by an independent high level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports. "

2.3 The International Bar Association opted for the appellation Ombudsman. Throughout the years the institution or office of Ombudsman has borne various designations and titles. In Sweden the term "Justiteombudsman" has been used since 1809. In Denmark the term "Folketingets Ombudsman" is used. In Norway the Ombudsman is known as a "Sivilombudsman". On the other hand, an Ombudsman whose powers relate to complaints of national servicemen and conscientious objectors is termed "Militieombudsman". In France the term "Mediateur" is used. In Netherlands the term Ombudsman is used. In 1977 the Austrian constitution introduced the "Volksanwaltschaft" meaning the office of the "Public Advocate". In Italy the Ombudsman is known as "Public Defender", and in Spain "Defender of the People". In certain Commonwealth countries, including the United Kingdom the term Parliamentary Commissioner or Parliamentary Commissioner for Administration is used. In Northern Ireland the term "Parliamentary Commissioner" is used. More recently Australia appointed a "Federal Ombudsman". In Japan the office bears the designation of Administration, inspection, Bureau of the Administration Management Agency. Several African countries have adopted the institution of the Ombudsman in their constitutions, the most recent example being Namibia. In South Africa from 1991 (Act 104 of 1991) the name Advocate-General was changed to Ombudsman.

2.4 The literal meaning of Ombudsman in Swedish is *representative* which is the designation our Technical Committee prefers. We understand that it has no gender connotation and is internationally acceptable.

3. PROCEDURE FOR APPOINTMENT OF OMBUDSMAN

3.1 It is now a well settled constitutional practice that the Ombudsman is responsible to the legislature or parliament. Parliament would therefore be the appropriate body to appoint and remove an Ombudsman. Section 1 of the draft text so provides.

3.2 The Negotiating Council will notice that the method of appointment opted for in the draft text is similar to the method of appointment of Constitutional Court judges.

4. TENURE OF OFFICE

Section 1 (4) of the draft text provides for a term of office of seven years subject to a possible change by the new constitution adopted under Chapter 5. There is no prohibition against a renewal of the appointment. Another view is that the Ombudsman's appointment be "permanent and full-time". Whereas the latter view provides substantial security of tenure, the limited term of office would allow a dynamic development of the crucial and relatively new institution of Ombudsman which may be stultified by a lifetime appointment.

5. CERTAIN POWERS OF THE OMBUDSMAN

We seek to draw attention to certain powers of the Ombudsman which may be open to debate.

5.1 Powers of Entry, Search and Seizure

In section 3 (2) of the draft text we make provision for certain powers of entry, search and seizure which the Ombudsman would reasonably require for purposes of a lawful investigation. In the draft text we propose that these powers be subject to the provisions of this constitution and the law of privilege.

5.2 Competence and Compellability of the Ombudsman as a Witness

In the draft text we have made provision for an Ombudsman or any member of his or her staff not be competent and compellable to answer questions in any court proceedings. It is debatable whether an Ombudsman should have a discretion as to whether to testify about any information which comes to his or her knowledge in the course of a lawful investigation. If an Ombudsman is competent or compellable to so testify he or she may be rendered ineffective inasmuch as people may be reluctant to provide information to the Ombudsman if confidentiality may be breached during ensuing court proceedings. On the

other hand, if an Ombudsman is not competent to so testify, valuable testimony may be kept away from the courts.

6. RELATIONSHIP BETWEEN THE NATIONAL OMBUDSMAN AND THE SPR OMBUDSMAN

6.1 The Negotiating Council is required to make a decision on the structural and functional relationship between the national Ombudsman and SPR Ombudsman. In this regard our Technical Committee has developed three possible models, from which a choice may be exercised:

6. 1. 1 The **first model** envisages that:

A national Ombudsman shall have functions and powers to investigate maladministration or any other administrative abuses at any level of government.

Such an Ombudsman shall be obliged to appoint in every SPR at least one SPR Ombudsman who shall perform such functions and have such powers as may be assigned to him or her by the Ombudsman or by law.

The appointment of such SPR Ombudsman shall be subject to consultation with the legislature of each relevant SPR.

6.1.2 The **second** model provides that:

A national Ombudsman shall have functions and powers to investigate maladministration or any other administrative abuses at any level of government.

Each SPR may by law establish and regulate the office of a SPR Ombudsman.

The powers and functions of such a SPR Ombudsman shall not derogate from the powers of the national Ombudsman at any level of government.

This model is to be found in the draft text.

6.1.3 The *third model* contemplates that:

There shall be a separation of powers and functions of the national and SPR Ombudsman.

The national Ombudsman shall be empowered to investigate administrative and other abuses only in respect of areas of administrative competence of the national government.

The SPR Ombudsman would in turn have the power to investigate administrative abuses only relating to the administrative competencies of **SPR'S**.

That the national Ombudsman shall be appointed by and be accountable to parliament and the regional Ombudsman by and be accountable to the SPR legislature.

The national and SPR Ombudsman shall from time to time identify areas of common interest and cooperation.

ADDENDUM TO THE 14th REPORT (CONSTITUTIONAL ISSUES)

Chapter 8

The Ombudsman and Human Rights Commission

The Ombudsman

Establishment and appointment

1. (1) There shall be an Office of the Ombudsman for the Republic to which shall be appointed an Ombudsman who shall have the functions, powers and duties prescribed by this Constitution and by any other law.

(2) Subject to subsection (3), the provisions of section 88 dealing with the appointment of Judges of the Constitutional Court shall apply *mutatis mutandis* to the appointment of the Ombudsman: provided that, in the absence of consensus, a majority of 75% of the joint standing committee shall be sufficient for a nomination made by such committee to the joint sitting of Parliament.

(3) The Ombudsman shall be a South African citizen who is a fit and proper person to hold such office and who -

(a) is a Judge of the Supreme Court of South Africa; or

(b) is qualified to be admitted as an advocate and has, for a cumulative period of at least 10 years after having so qualified:

(i) practised as an advocate or an attorney, or

(ii) lectured in law at a university; or

(c) has knowledge of or experience in the administration of justice or public administration.

(4) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, the Ombudsman will hold office for a period of 7 years.

(5) The remuneration and other conditions of employment of the Ombudsman shall be prescribed by an Act of Parliament and such remuneration shall not be reduced during his or her term of office.

(6) The Ombudsman shall not perform remunerative work outside his or her official duties.

(7) The Ombudsman may be removed from office by the President, but only on the grounds of misbehaviour, incapacity or incompetence determined by the joint standing committee of Parliament referred to in section 88 and upon receipt of an address from both the National Assembly and the Senate requesting such removal.

(8) An Ombudsman who is the subject of investigations by the joint standing committee of Parliament in terms of subsection (7) may be suspended by the President pending such investigation.

Independence and Impartiality

2. (1) The Ombudsman shall be independent and impartial and carry out his or her functions, powers and duties subject only to this Constitution and the law.

(2) The Ombudsman and the persons appointed in terms of section 4(1) shall have such immunities and privileges as may be assigned to them by Act of Parliament for the purpose of ensuring the independent and impartial exercise of their powers and functions.

(3) No member of the Cabinet or the Legislature or of any organ of the state or any other person shall improperly interfere with the Ombudsman in the exercise of his or her powers, duties and functions.

(4) All organs of the state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the Ombudsman in the execution of his or her functions, powers and duties.

Powers, Functions and Duties

3. (1) The Ombudsman shall be entitled -

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged -

(i) maladministration in connection with the affairs of the government at any level; or

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; or

- (iii) improper or dishonest act, omission or corruption with respect to public money; or
 - (iv) improper or unlawful enrichment or the receipt of any improper advantage or promise of such enrichment or advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function.
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by -
 - (i) mediation, conciliation or negotiation; or
 - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
 - (iii) any other means as may be expedient in the circumstances.
- (c) at any time prior to, during or after an investigation -
 - (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
 - (ii) if he or she deems it advisable, to refer any matter which has a bearing on maladministration to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other recommendation he or she deems expedient to the affected public body or authority.
- (d) Nothing in this subsection shall be construed as empowering the Ombudsman to investigate the performance of judicial functions by any court of law.

(2) The Ombudsman shall conduct an investigation under subsection (1) with due regard to the circumstances of each case, and shall for the purposes of such investigation, in addition to such powers as may be prescribed by law, but subject to the provisions of this Constitution and the law of privilege, have the power to -

- (a) direct any person to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which in the opinion of the Ombudsman, has a bearing on the matter being inquired into, and may examine such person for that purpose; and
- (b) enter or authorise another person to enter any building or premises and there to make such investigation or inquiry as he or she may deem necessary and seize anything on those premises which in his or her opinion has a bearing on the purpose of the investigation.

(3) The Ombudsman or any member of his or her staff shall not be competent or compellable to answer questions in any proceedings in a court of law or before any body or institution established by or under any law in connection with any information which in the course of his or her investigation has come to his or her knowledge.

(4) Recourse to or exercise of any powers, functions and duties of the Ombudsman, shall not oust the jurisdiction of the Court to hear any matter or cause whatsoever.

(5) Notwithstanding any other provision the Ombudsman shall report in writing on his or her activities to Parliament at least once every year.

Staff and expenditure

4. (1) The Ombudsman may appoint, in a manner prescribed by law, such persons as may be necessary for the discharge of the work of the Office of the Ombudsman.

(2) The Ombudsman may delegate any of his or her functions to persons referred to in subsection (1) subject to such conditions as shall be prescribed by law.

(3) Expenditure incidental to the performance of the functions of the Ombudsman in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

SPR Ombudsman offices

5. (1) An SPR legislature may by law establish and regulate an Office of SPR Ombudsman.

(2) An SPR law referred to in subsection (1) shall not in any way derogate from the powers of the Office of the Ombudsman established in terms of section 1.

Human Rights Commission

Establishment and appointment

6. (1) There shall be a Human Rights Commission which shall consist of 11 fit and proper persons who are South African citizens.

(2) The provisions of section 88 dealing with the appointment of Judges of the Constitutional Court shall apply *mutatis mutandis* to the appointment of the members of the Commission.

(3) The Human Rights Commission shall have powers, duties and functions vested in it by an Act of Parliament which shall include the duty to -

- (a) promote the observance of, the respect for and the defence of fundamental rights;
- (b) develop an awareness of fundamental rights amongst all people of the Republic;
- (c) make recommendations to the government and all organs of the state at all levels when it considers such action advisable for the adoption of progressive measures in favour of fundamental rights within the framework of the law and this Constitution as well as appropriate measures for the further observance of those rights;

- (d) prepare such studies for report on or relating to fundamental rights as it considers advisable in the performance of its duties; and
- (e) request any organ of government to supply it with information on any legislative or executive measures adopted by it in or relating to matters of fundamental rights.

(4) If the Commission is of the opinion that any provisions of any proposed legislation might be contrary to the provisions of Chapter 3 of this Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.

(5) If the Commission, after due investigation, is of the opinion that there is substance in any complaint made to it, it may assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief.

Staff of the Human Rights Commission

7. (1) The Commission shall appoint a director who shall be the principal executive officer of the Commission, who shall be empowered to appoint staff subject to the approval of the Commission and such conditions of service as may be prescribed by Act of Parliament.

(2) The expenditure incidental to the performance of the functions of the Commission in terms of this Constitution or any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

(3) The Commission shall be required to report to the President at least once in every year on the performance of its mandate, and the President shall cause such report to be tabled promptly in the National Assembly and the Senate.