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EMBARGOED UNTIL TABLED IN THE NEGOTIATING COUNCIL

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION
NINTH PROGRESS REPORT : 7 SEPTEMBER 1993**

INTRODUCTION

During its discussion of the Technical Committee's Eighth Progress Report, the Negotiating Council instructed the Committee to proceed with the drafting of provisions dealing with the Ombud and the Human Rights Commission. The draft Chapter 8 which follows sets out the most important constitutional provisions which the Committee recommends should govern the office of the Ombud and the Human Rights Commission during the transition. In drafting the provisions the sentiments expressed by members of the Council during the said discussion and in written submissions to the Committee were taken note of. It is, however, pointed out that no attempt has been made to provide for the finer details as these should be contained in ordinary legislation, including the amendment of existing laws. In the case of the ombud, statutory provision will have to be made for the transition of the existing dispensation under the Ombudsman Act, 1979, to the new order.

The choice of the name "Ombud" has been both criticised and supported in submissions to the Committee. The Committee prefers the term "Ombud" to "Ombudsman" as gender has become a major issue in the constitutional affairs of this country. On the other hand "Ombudsman" is the accepted term which is used world-wide. While the term is perceived by the initiated as being gender-neutral, popular perceptions indicate the male. In the light of this political reality, the Committee prefers its chosen compromise. Otherwise a completely new name must be chosen, such as Director of Public Accountability.

The Ombud and the Human Rights Commission form part of the broad structure of enforcement mechanisms which are being attended to by the Technical Committee on Constitutional Matters. With this in view our Committee recommends that it would be more appropriate for that Committee to finalise the provisions relating to the Ombud and the Human Rights Commission in the context of its recommendations concerning the other enforcement mechanisms.

CHAPTER 8

OMBUD AND HUMAN RIGHTS COMMISSION

Appointment of Ombud

1. (1) There shall be an Ombud for the Republic who shall, subject to this section, be appointed by the National Assembly.
- (2) Whenever the appointment of the Ombud is due the [authority which is to recommend the appointment of judges] shall forthwith submit to the Speaker a list containing the names of at least three persons qualified and willing to occupy the office of Ombud.
- (3) The National Assembly shall within 30 days after receipt of the list referred to in subsection (2) by the Speaker, or, if Parliament is not then in session, within 30 days after the commencement of its next ensuing session, elect one of the persons on the list and appoint such person as the Ombud, provided such a person has been found to be a fit and proper person for appointment by a joint committee of the National Assembly and the Senate.
- (4) The Ombud shall be a South African citizen of acknowledged integrity, impartiality and independence.
- (5) The Ombud shall hold office for the duration of this Chapter.

Note: As the provisions on the Ombud will form part of the Transitional Constitution it is not possible to extend the Ombud's term of office beyond the duration of the Transitional Constitution.]

Powers and Duties of Ombud

2. (1) The powers and duties of the Ombud shall be -
 - (a) to investigate, on own initiative or on the receipt of a complaint, any alleged -
 - (i) infringement or threatened infringement of a fundamental right entrenched in Chapter 3 by an administrative act at any level of government;

- (ii) maladministration in the public administration or in connection with the affairs of government at any level or by a person performing a public function;
 - (iii) abuse or unjustifiable exercise of power or unfair, capricious or discourteous or other improper conduct or undue delay by a person performing a public function;
 - (iv) improper act or omission with respect to public funds;
 - (v) improper enrichment of or the receipt of any improper advantage or any 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; or
 - (vi) improper prejudice or act or omission other than those referred to above as may be prescribed by law;
- (b) to endeavour to resolve any dispute or to rectify any act or omission complained of, by -
- (i) mediation or conciliation between, or negotiation with, the opposing parties;
 - (ii) recommending to an appropriate authority measures to achieve such settlement or rectification;
 - (iii) assisting, where necessary, any complainant in the taking of appropriate legal steps against any offending authority;
 - (iv) submitting a report to Parliament or other appropriate legislature or authority on any matter investigated by him or her; or
 - (v) any other means as may be deemed expedient in the circumstances by the Ombud or prescribed by law; and
- (c) generally to advise government at any level on ways and means to enhance respect for fundamental rights and democratic values within the public administration and to perform such other functions as may be prescribed by law.

- (2) The Ombud shall conduct an investigation under section (1) in a manner he or she deems expedient in the circumstances, and shall for the purpose of such an investigation, in addition to such powers as may be prescribed by law -
 - (a) have the powers a judge of the Supreme Court has to require any person to appear before him or her to give evidence or to produce any document or other article; and
 - (b) have access to such information or evidential material which in the opinion of the Ombud may be relevant to the investigation.
- (3) The Ombud may publish for general information particulars of his or her findings on any matter investigated under subsection (2).
- (4) The Ombud shall report on his or her activities to Parliament annually.

Deputy Ombuds and Assistants

3.
 - (1) The Ombud may appoint one or more deputy ombuds and as many assistants as are necessary for the discharge of the work of the office of Ombud.
 - (2) The Ombud may assign any of or all the functions referred to in section 2 to a deputy ombud or an assistant subject to such conditions as he or she may deem expedient.

Conditions of Service

4.
 - (1) The State President shall determine the remuneration and other conditions of service of the Ombud which shall not be less favourable than those of a judge of the Supreme Court.
 - (2) The Ombud shall not be disciplined or removed from office except by Parliament and upon a finding by the [authority recommending the appointment of judges], after a proper inquiry, that the Ombud committed misconduct or is unable to continue effectively with his or her functions.

- (3) A deputy ombud or an assistant who is not subject to the laws applicable to the public service and seconded to the office of the Ombud shall be appointed subject to such conditions of service as may be determined by the State President after consultation with the Ombud: Provided that a deputy ombud or an assistant -
- (a) shall hold his or her office and perform his or her functions subject to the exclusive control and supervision of the Ombud; and
- (b) shall not be transferred, disciplined or removed from office without the concurrence of the Ombud.

Regional Ombuds

5. (1) The Constitution of an SPR may provide for the appointment of a regional ombud to perform the functions referred to in section 2 with regard to all matters under the jurisdiction of such SPR.
- (2) The Ombud shall have concurrent jurisdiction with a regional ombud in all matters except a matter in relation to which the SPR legislature has exclusive [overriding] powers in terms of this Constitution.
- [Comment:** Clause 5(2) can only be finalised once agreement has been reached on the exact nature and scope of SPR powers.]

Complaints

6. (1) Any person wishing to lodge a complaint with the Ombud or a regional ombud shall do so by means of an affidavit or affirmed declaration or in any other form as the Ombud may in a specific case or generally approve.
- (2) If such a person is illiterate or for any other reason unable to lodge such complaint in accordance with the requirements of subsection (1), such person shall be entitled to require the assistance of any government authority or agency in the vicinity.

Human Rights Commission

7. (1) There shall be a Human Rights Commission which shall consist of -
- (a) two members of the National Assembly elected by it from different political parties;
 - (b) a judge of the Supreme Court, a magistrate, a lawyer in private practice and a teacher of law; and
 - (c) nine persons selected on the basis of their knowledge of or experience in human rights matters.

[**Comment:** During its discussion of the Eighth Progress Report reservations were expressed by the Negotiating Council with regard to our proposal that members of the National Assembly should serve in the Human Rights Commission. Perhaps this matter should be reconsidered in view of the fact that a direct link between Parliament and the Commission could be very beneficial to the promotion of a human rights culture. Such a link could for instance fulfil an educative function in respect of the legislature. In the Committee's view it would be important for Parliament as the lawmaker and for political parties represented in Parliament to be seen by the public at large as an integral part of the development of this country's human rights culture. The Committee emphasizes that there is no danger of political control of the Commission because Parliamentary representation would only amount to less than 15% of the members.]

- (2) (a) The members referred to in subsection (1)(b) and (c) shall subject to paragraph (b) of this section be appointed by the State President.
 - (b) No person referred to in subsection (1)(b) or (c) shall be appointed as a member of the Commission unless he or she has been recommended by [the authority which is to recommend the appointment of judges] and found by a joint committee of the National Assembly and the Senate to be a fit and proper person.
- (3) The members of the Commission shall be appointed for the duration of this Chapter subject to their remaining, in the case of the members referred to in subsection (1)(a) and (b), a member of the National Assembly, a judge, a magistrate, a lawyer in private practice or a teacher of law, as the case may be.

- (4) The Commission shall determine its internal procedure, including the appointment of its chairperson, the procedure to be followed at its meetings and the quorum necessary for a meeting and for a resolution of the Commission.

Powers and Duties of the Human Rights Commission

8. (1) The powers and duties of the Human Rights Commission shall be -
- (a) to initiate and co-ordinate educational programmes and information projects aimed at the protection and promotion of democratic values and human rights generally and of the fundamental rights entrenched in Chapter 3 in particular;
 - (b) to investigate violations of such rights insofar as persons in general or a specific group or community is affected;
 - (c) to advise the legislature or executive at all levels of government as regards the consistency of any law, programme or action, or any proposed law, programme or action, with such values or rights;
 - (d) to mediate disputes -
 - (i) on issues affecting the said values and rights with which the Ombud or a regional Ombud cannot deal or which have been referred by the Ombud or regional ombud to the Commission;
 - (ii) on constitutional issues between legislative, executive or other authorities referred by such authorities, or in terms of section..... to the Commission;
- [Note: A provision of Chapter 7 will provide for such referrals]
- (e) to establish an adjudicative tribunal with the power to make binding decisions in appropriate cases in order to procure the expeditious and fair resolution of disputes concerning the protection of the rights referred to in paragraph (a); and
 - (f) to deal with any other matter as may be prescribed by law.

- (2) For the purposes of an investigation referred to in subsection (1)(b) the provisions of section 2(2) shall apply mutatis mutandis.
- (3) The jurisdiction and powers and the procedures to be followed by a tribunal referred to in subsection (1)(e) shall be as prescribed by law.
- (4) The Commission shall establish at least one permanent office in each SPR.
- (5) The Commission shall report on its activities to Parliament annually.

Human Rights Commissioner

9. (1) The Human Rights Commission shall appoint a Human Rights Commissioner who shall be responsible for the discharge of the work of the Commission.
- (2) The Human Rights Commissioner shall hold office for the duration of this Chapter.
- (3) The Human Rights Commissioner may appoint such staff as may be necessary to assist him or her in the discharge of the duties referred to in subsection (1).