

Emasculated but still potent

No document in recent South African history has attracted as much critical attention and speculation as the Final Report of the Truth and Reconciliation Commission. The report, due to be handed to President Mandela by TRC chairman Archbishop Desmond Tutu in Pretoria tomorrow, is likely to have a profound effect on the lives of all South Africans. **ROBERT BRAND** and **JOHN YELD** consider its expected findings and recommendations.

The TRC's final report, due to be handed to President Mandela tomorrow, has been one of the most keenly anticipated documents in South Africa's recent history.

The reasons for such anticipation are sharply contradictory.

One is a genuine desire on the part of deeply committed South Africans to see what recommendations the TRC has come up with, after its marathon two-and-a-half years' work, to promote reconciliation in a divided society.

Another is the more cynical hope that, in the run-up to the 1999 elections, the report will provide a useful "stick" with which to beat (metaphorically speaking) political opponents named by the TRC as perpetrators of gross human rights violations.

Yet another motivation is an unabashed desire by some opponents of the TRC to see in its final report confirmation of their deep-rooted prejudices that the truth body has been a hopelessly

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flawed mechanism, developed and manipulated by the former liberation movements to deal with South Africa's political "old guard" from the apartheid era.

Those who have been anticipating a register in which perpetrators of gross human rights abuses in South Africa between March 1 1960 and May 20 1994 are named, their deeds catalogued and appropriate action against them recommended, are only partly rewarded.

The report does name perpe-

trators on the basis of findings of "reasonable probability" that they were involved in human rights abuses, either by commission or omission, during the period under review by the TRC.

The test used by the commission to name perpetrators was similar to that applied in civil legal proceedings, as opposed to the much more stringent test of "proof beyond reasonable doubt" required in criminal cases.



But the report contains far fewer names of perpetrators than was anticipated by both the TRC itself and by observers. The reason for this is an eloquent appeal judgment delivered by then Chief Justice, Mr Justice Michael Corbett, some two years ago.

A High Court application was brought by two retired policemen for an interdict against the TRC before its first scheduled public hearing in East London in April 1996, preventing it from hearing any testimony against them relating to their alleged involvement in the poisoning of Port Elizabeth student leader Siphiso Mtshuku until they had been given adequate notice and access to all relevant documentation.

A temporary interdict was granted, and the issue then went

all the way to the Appeal Court.

In his definitive judgment, Judge Corbett ruled that people about to be named publicly to their detriment by the TRC did indeed have the right of prior, timeous notification of the allegation/s against them, and also had to be given reasonable opportunity to respond to, or make representations about, such allegations before these were made public by the TRC.

It is a ruling the TRC has taken very seriously, but the overall effect has been to emasculate the final report.

Acting in terms of the Corbett judgment, the TRC sent out more than 200 "Section 30" notices to individuals and organisations about two months ago, in-

forming them that it was contemplating making detrimental findings against them in the report and asking for their responses.

Such notices were sent to leaders across the political spectrum, and included some of the top political names in the country such as the ANC's Ronnie Kasrils and Winnie Madikizela-Mandela; the National Party's PW Botha, FW de Klerk, Pik Botha and Magnus Malan; the Inkatha Freedom Party's Mangosuthu Buthelezi; the Freedom Front's Constand Viljoen and Tienie Groenewald; the AWB's Eugene TerreBlanche; Letlapa Mpahlele, director of operations of the Azanian People's Liberation Army; and spy Craig Williamson.

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Lawyers representing some of those who received Section 30 notices immediately challenged the TRC, arguing that their clients had not been given sufficient details about the contemplated negative finding to allow them to respond meaningfully or in time.

These lawyers threatened applications for High Court interdicts to stop the publication and handover of the final report, if their demands were not met.

The TRC, having taken high-level legal advice, was determined not to be caught out on "due process" in its final days.

So, because of the overwhelming need to get the report handed over and to wind up the TRC's already over-extended life-span, the commissioners opted for a prudent, if conservative, route.

The result is that the names of a number of prominent perpetrators have been omitted from the report – some being erased literally at the 11th hour on the floor of the printing room.

However, the TRC has resolved to include a full list of named perpetrators in a codicil to the final report, to be published on completion of the amnesty process (probably in late 1999).

One of the names it did not remove entirely, despite representations from lawyers, was that of FW de Klerk, and he brought an 11th-hour application for an interdict in the Cape High Court yesterday. The final report also contains recommendations that some of those named perpetrators be investigated by the statutory legal authorities – such as the relevant attorneys-general – with a view to prosecution.

However, it also recommends that the Government set a fixed time-limit on such prosecutions.

Neither of these recommendations was adopted unanimously by the commissioners, and there was intense debate around this issue.

WHAT REPORT IS LIKELY TO SAY

In its final report, the TRC is expected to:

- Name perpetrators of gross human rights violations from across the political spectrum;
- Not include as many names of perpetrators as it had hoped because of last-minute threats of legal action to stop the final report;
- Recommend criminal investigations into and possible prosecution of some perpetrators;
- Ask the Government to set a firm cut-off date by which investigations and/or prosecutions must be concluded;
- Name perpetrators who committed abuses outside SA, but not make any recommendations about possible extradition proceedings;
- Reject the application of "lustration" – barring from public office and withdrawing of pensions and financial benefits – to perpetrators of gross human rights violations;
- Say that any past human rights abuses must be considered when appointing people to public office in future;
- Say perpetrators must be re-assimilated into society, to prevent them being isolated and forced into undesirable activities such as mercenary soldiering;
- Confirm its existing reparation and rehabilitation policy, which recommends R3-billion over six years to victims of human rights abuses;
- Stress that appropriate restitution must be made over and above individual reparations, if reconciliation is to be achieved in South Africa;
- Say the Government must consider carefully recommendations for funding such restitution – such as a wealth tax on people with assets exceeding R2-million, or a 1% of share capital donation from companies listed on the Johannesburg Stock Exchange;
- Emphasise that such restitution funds must not be wasted or diluted on suspect development projects;
- Stress the need to entrench the culture of human rights in SA, through education and training in government and other institutions;
- Emphasise the need for transparency in government, and to maintain and promote a free press and freedom of speech;
- State that the organs of civil society must be strengthened, and no citizens must feel excluded from political activity;
- Confirm the wholesale destruction of apartheid era documents by, particularly, the security police, Military Intelligence and the National Intelligence Service;
- Regret that a crucial part of South Africa's "social memory" has been lost through the destruction of these documents;
- Recommend that all state documents be controlled by the State Archive in terms of the Archives Act of 1996, and that the archive be given appropriate authority and resources.

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However, the TRC recognised that, in the final analysis, it was the right of the relevant attorneys-general to decide whether, after appropriate investigation, to prosecute named perpetrators.

The recommendation relating to a fixed time limit on such investigations/prosecutions was in response to criticism from those who reminded the TRC that its mandate was specifically to bring the whole issue of past human rights abuses in South Africa to a close.

If it were to recommend a series of criminal investigations, these would probably result in major, time-consuming trials and possible appeals which could drag on for years, and the whole issue would be prolonged interminably, they argued.

Certain people are named in the report as having been responsible for gross human rights abuses committed by South Africans outside the borders of the country.

However, the TRC has not made any particular recommendations in terms of what action should be taken in this regard.

This thorny issue – which includes the question of possible extradition and/or arrest when named perpetrators travel outside South Africa – has been left to the politicians and diplomats to find an appropriate solution.

During the TRC's lifespan it both asked for, and was offered unsolicited, possible recommendations for inclusion in its final report, and many responses contained tough proposals on how to deal with perpetrators. These included that those found to have committed gross human rights violations be barred from holding public office and/or serving in the civil service and the armed forces, and that, if any of them were state employees, their pensions and other financial benefits should be withheld or reviewed.

The collective name for such sanctions is lustration, and this

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Apartheid-era documents destroyed

The TRC's final report confirms the massive destruction of official apartheid-era documents by state departments such as Military Intelligence, the security police and the National Intelligence Service (NIS).

The TRC found that most of these documents had been destroyed on the strength of guidelines sent out by the NIS, although these guidelines were accepted and verified by the Cabinet as late as 1993.

Technically, because of the guidelines, most of those involved in the destruction of documentation could justifiably claim to have been following legitimate orders.

The report contains very strong recommendations regarding the future management of state documents, to the effect that these should all come under the control of the official State Archives in terms of the Archives Act of 1996, which it describes as excellent legislation.

It also recommends that the State Archives should be given the required authority and resources to ensure that this act is fully complied with.

In its report, the TRC states that it recognises that the "voices" of several sectors of the South African community that ought to have been part of

the "social memory" of the country, have been silenced, or severely reduced, through the wholesale destruction of documentation.

However, it also notes that some vital documentation – notably the prison files of political prisoners – have been meticulously preserved.

It recognises the moral right of individuals to see their own files, but also acknowledges that South Africa does not have the capacity to set up a practical operation similar to that in Germany where any citizen can view his or her *Stasi* (East German secret police) file.

The names of a number of prominent perpetrators of gross human rights abuses have been omitted, but will be included in a codicil to the final report of the TRC

model was adopted in parts of Eastern Europe after the fall of communism.

Several individual commissioners considered lustration an attractive option for South Africa, but after intense debate the TRC finally decided against making such a recommendation.

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This was partly because the TRC had become increasingly aware of the dangers of isolating individuals accused of gross human rights violations, rather than attempting to rehabilitate them into society.

The fear was that, if shunned, such perpetrators would simply find opportunities in undesirable activities such as chemical and biological warfare programmes elsewhere in the world or in mercenary groups and dubious "security" companies.

Secondly, the TRC was aware that if it recommended lustration, it would be punishing people who had come forward to assist it (whatever their motivation for doing so had been), and that, because of South Africa's lack of investigative capacity, those who had chosen to remain silent would in all probability escape censure.

Also, because there were many more amnesty applicants from the liberation movements than from the apartheid security forces, one side of the conflict would bear the brunt of possible lustration, which would be unfair.

So the report does not recommend lustration, but it does suggest that when people are considered for appointment to public office in future, any past involvement in gross human rights violations should be taken into account.

Among the TRC's most significant recommendations are those relating to the issue of reparations and restitution.

The TRC's reparation and rehabilitation policy, which recommended that R3-billion be paid over six years to declared victims of gross human rights violations, proved highly controversial when announced last year.

There were both some TRC commissioners and many people in government who were decidedly unhappy with the recommendations, and who believed the TRC should have recommended only symbolic and community reparations – such as monuments, statues, tombstones, community centres, playing fields, clinics, schools and hospitals – and excluded any individual reparations in the form of monetary payments.

However, the final report confirms the existing reparations policy. In addition, it stresses that such reparations will not bridge the yawning gap between the "haves" and "have nots", and that reconciliation in South Africa is dependent on a major injection of capital into reducing this gap.

It does not make a formal recommendation in favour of one particular mechanism for raising such funds, saying the TRC lacked the necessary economic expertise to make such a choice.

However, it points to various suggestions made during its Business Sector hearings and elsewhere, and states that these must be investigated seriously by the Government, in conjunction with labour and employers.

Such suggestions include:

■ A "wealth tax" of 0.5% on assets for 10 or 20 years for South Africans whose assets exceed R2-million (suggested by Stellenbosch University economics professor Sampie Terreblanche).

■ Using some of the assets of the R9-billion Sasria insurance fund, established during the apartheid era to compensate victims of political violence (a recommendation by the Afrikaanse Handelsinstituut).

■ A donation by all the listed companies on the Johannesburg Stock Exchange of 1% of their capital – estimated at R14-billion in July of this year – to a trust fund tasked with the upliftment of the poor (suggested by former editor and media executive Stephen Mulholland).

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The TRC's final report states categorically that reconciliation and peace will not be achieved in South Africa until the gap between rich and poor is bridged and restitution (over and above the recommended reparations for victims of gross human rights violations) has been made.

An equally strong recommendation is that, if and when such funding becomes available, it must be used for the upliftment of the poor and cannot be allowed to be siphoned off in dubious "development" or public relations projects – such as the controversial Aids play *Sarafina*, although this is not mentioned by name in the report.

The TRC tells the Government it has a particular responsibility in this regard.

Another major recommendation in the final report is that the culture of human rights in South Africa must be entrenched over the full gamut of such rights (first, second and third generation rights), as spelled out in the constitution.

Recommendations in this regard include teaching human rights at school and other educational institutions, and also providing appropriate human rights education within government structures.

The report states that the Government, the Human Rights Commission and non-government organisations have a particular responsibility in this regard.

Linked recommendations relate to promoting transparency in government.

The final report emphasises that freedom of speech and freedom of the press must be protected at all costs, and it warns about the dangers posed by some of the Government's recent veiled threats against the media.

It also emphasises that the notion of civil society must be strengthened, and that no citizens must feel excluded from the body politic.

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