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# PROMOTING THE EFFECTIVENESS OF DEMOCRACY PROTECTION INSTITUTIONS IN SOUTHERN AFRICA SOUTH AFRICA'S PUBLIC PROTECTOR AND HUMAN RIGHTS COMMISSION



Catherine Musuva



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EISA is a non-partisan organisation which seeks to promote democratic principles, free and fair elections, a strong civil society and good governance at all levels of Southern African society.



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# CONTENTS

Preface	vi
About the author	xii
Acknowledgements	xiii
Abbreviations	xiv
Executive summary	xv
1 Introduction	1
2 Methodology	3
3 Contextual background	4
4 Legal framework	8
5 Institutional governance and effectiveness	11
6 Interaction with the government	28
7 Interaction with other democracy protection institutions	32
8 Interaction with the public and non-state actors	34
9 Key research findings	37
10 Conclusion	39
11 Policy Recommendations	41
Endnotes	43
References	45
Appendix	47
About EISA	50
Other Research Reports	52

## PREFACE

This research report is the culmination of a project that EISA embarked on over three years, from 2007 to 2009, focusing on 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa'. The project, one of the components of a regional programme guided by the theme 'Consolidating Democratic Governance in the SADC Region: Phase II', has received financial support from the Swedish International Development Cooperation Agency (Sida) regional office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa. The seven elements of this regional programme are:

- Election quality
- Institutions of governance
- Gender equality and electoral processes
- SADC regional governance architecture
- The EISA annual symposium
- Regional resource centres
- The EISA democracy encyclopaedia

The overarching thrust of the programme is to improve governance architecture in Southern Africa, with a view to nurturing and consolidating democracy and sustaining peace and political stability, which are the key prerequisites for sustainable development and the eradication of poverty. The focus of this regional programme is consistent with EISA's vision of 'an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment'. The primary goal is to enhance the quality of electoral processes, improve the capacity of key national and regional institutions that are central to the achievement of democratic governance in the SADC region, and help to reverse gender imbalances in political participation and representation. The specific objectives of the programme are to:

- improve the quality of elections, with a view to advancing democratic governance;
- enhance the effectiveness of selected governance institutions;

- improve gender equality in the realm of governance;
- promote democratic governance and political integration through the SADC Organ on Politics, Defence and Security and its strategic plan, SIPO;
- expand and deepen the knowledge base in relation to democratic governance in the SADC region.

The aim of this particular project is to contribute to enhancing the institutional effectiveness of governance institutions.

Conventionally, studies of and research relating to the state and governance have tended to focus on the traditional arms of government – the executive, the legislature and the judiciary – and the separation of powers among them, with some attention paid to the bureaucracy or civil service. This focus has reduced the role of the state in governance to these organs of government, to the exclusion of other equally important statutory bodies established by the government itself, namely the democracy protection institutions (DPIs).

Although the establishment of DPIs is one of the more effective methods of promoting democratic governance in the SADC region, these institutions have received little attention in the existing policy and academic discourse on democracy and governance. With this research project EISA aims to fill this lacuna in the democracy and governance debate in Southern Africa by restoring these institutions to their rightful place.

DPIs are those statutory institutions established by governments specifically to protect democratic governance. They may be enshrined in the country's constitution, supported by legislation, or created by legislation. The constitutional provisions and enabling legislation reinforce their significance in governance architecture at the national level.

At the continental level, the African Union (AU) has also come to realise and recognise the importance of DPIs to the promotion of democratic governance. Article 15 of the African Charter on Democracy, Elections and Governance, which was developed with technical assistance from EISA and was ultimately adopted by the AU Heads of State Assembly in Addis



Ababa, Ethiopia, in January 2007, specifically elaborates principles and best practice relating to DPIs.

This article commits AU member states to:

- establish public institutions that promote and support democracy and constitutional order;
- ensure that the independence or autonomy of the said institutions is guaranteed by the constitution;
- ensure that these institutions are accountable to competent national organs;
- provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

The principles represent a clear commitment by African governments to strengthening the DPIs and promoting their institutional effectiveness. The aims are admirable, but, as the English aphorism goes, the proof of the pudding is in the eating. It is one thing for African governments to make such commitments, it is quite another to translate them into practice. In other words, as this report will illustrate, African governments do not always 'walk the talk'. Put somewhat differently, few African countries practise what the African Charter on Democracy, Elections and Governance preaches.

In 2008 EISA analysed three democracy protection institutions that are central to the achievement of democratic governance in the SADC region. These were: the Office of the Ombudsman, national human rights institutions (NHRIs), and electoral management bodies (EMBs) in 14 SADC member states. The analysis, which was guided by a list of questions, revealed different stages of institutional development in each country and established that the remit of the institutions differs from one country to another.

In 2009 the focus of the project shifted from the normative aspects addressed in the first stage to an assessment of the performance, effectiveness, independence and relationships of these institutions to other arms of government, other democracy protection institutions, and civil society,

within their operating environment. Empirical research was conducted by researchers in each country between March and July 2009 into two institutions – the Office of the Ombudsman and the national human rights commission – in the eight countries: Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Tanzania and Zambia.

Conventionally, the Office of the Ombudsman is established to protect the people against violations of human rights, the abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making governments responsive to people's needs and public servants more accountable to members of the public. This office has emerged as an important avenue for individual complaints against the actions of public authorities.

Typically, national human rights institutions are mandated to protect and promote human rights. A number of countries have established NHRIs which use the Ombudsman concept. The genesis of NHRIs lies in a resolution passed in 1946 by the United Nations Economic and Social Council inviting member states to consider the desirability of establishing local information groups or human rights committees to serve as vehicles for collaboration with the United Nations.

In 1991 delegates to the first International Workshop on National Institutions for the Promotion and Protection of Human Rights agreed on the Paris Principles, which were adopted a year later. The Paris Principles are a set of broad general standards which apply to all NHRIs, regardless of their structure or type. They are adopted by NHRIs and endorsed by the UN Commission on Human Rights and the UN General Assembly. Among the main principles are that the NHRI must:

- be independent and be guaranteed by statute or the constitution;
- be autonomous from government;
- be plural and diverse in its membership;
- have a broad mandate based on universal human rights standards;
- have adequate powers of investigation;
- have sufficient resources to carry out its functions.

The mandates of these two DPIs to address administrative and executive impropriety and ensure the respect and promotion of human rights suggest that they play an important role in exercising oversight over the executive and in promoting democracy, human dignity, and the rule of law. The overall objective of this research project, therefore, was to investigate the extent to which they have translated their mandate into action, thereby advancing and protecting democracy. The research examined the performance of the two institutions with regard to the following: legal framework, the effectiveness of institutional governance, independence, resources, and interaction with the other arms of government, the public, and non-state actors.

In July 2009 EISA convened a one-day policy dialogue forum during which senior officials of the 12 DPIs covered in the research, as well as the researchers, came together to deliberate on the findings. Thereafter, the researchers refined their reports, taking into account the input of the DPI officials. The culmination of the research project is eight country reports, in which the political, operational and resource conditions and constraints under which these institutions function are analysed.

The mere presence of offices of the Ombudsman and NHRIs in the SADC region is, in itself, an encouraging step, although not all SADC countries have these institutions in place. Where they do exist they do so in a variety of forms, with different nomenclatures, and each has its own character.

I acknowledge with gratitude all those whose input resulted in the successful implementation of the project. First and foremost, EISA's Executive Director, Denis Kadima, who contributed immeasurably to the conceptualisation of the regional programme on consolidating democratic governance in the SADC region, of which the DPI project is a part. I am grateful too to Ebrahim Fakir, Manager of Governance Institutions and Processes at EISA, for guiding the research process and editing the reports, thereby ensuring their quality. Without the selfless commitment and dedication of the project coordinator, Catherine Musuva, this project would not have seen the light of day. I take my hat off to her for her hard work.

The project would not have succeeded without the dedication of our research associates, based in the eight countries, who conducted the fieldwork. I

am equally indebted to the officials and staff of the democracy protection institutions, who supported the project with information and participated in the policy dialogue, and to the various respondents who willingly supplied the researchers with additional insights.

It would be remiss of me not to extend a special word of thanks to Professor Kader Asmal, former member of the South African Parliament and former Cabinet minister, who is currently a professor of law at the University of the Western Cape and who, despite his busy schedule, graced our multi-stakeholder dialogue workshop with his presence giving a thought-provoking and insightful keynote address on DPIs and setting the scene for what proved to be a lively discussion among the participants. I am pleased to report that some of Professor Asmal's ideas and thoughts have found a place in the reports.

Various other colleagues at EISA played their own distinctive roles in supporting this project and their contributions deserve acknowledgement. They are Kedibone Tyeda, Nkgakong Mokonyane, Maureen Moloji, Jackie Kalley, Alka Larkan, Oliva Fumbuka, Edward Veremu, Dipti Bava, Wallen Chidawanyika and Usha Kala. Our editor, Pat Tucker, and typesetter, Sue Sandrock, have done a marvellous job controlling the quality of our publications, for which we are hugely thankful.

Finally, I am profoundly grateful to our partners, Sida Regional Office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa, for their generous financial support.

In conclusion, I hope and trust that this research report will assist policy-makers to identify areas of organisational and institutional reform in order to improve the effectiveness, efficiency and responsiveness of DPIs and, in the process, deepen and entrench democratic governance in the SADC region.

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September 2009*

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## ABBREVIATIONS

CEO	Chief Executive Officer
CGE	Commission for Gender Equality
COSATU	Congress of South African Trade Unions
CSAP	Civil Society Advocacy Programme
CSO	Civil society organisation
DPI	Democracy protection institution
EISA	Electoral Institute of Southern Africa
ESR	Economic and social rights
EU	European Union
HRC	Human Rights Commission
NGO	Non-governmental organisation
ODAC	Open Democracy Advice Centre
OPP	Office of the Public Protector
PAIA	Promotion of Access to Information Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission

## EXECUTIVE SUMMARY

The Public Protector and the South African Human Rights Commission (SAHRC) were established alongside other institutions to support constitutional democracy and are entrenched in Chapter 9 of the 1996 Constitution of the Republic of South Africa. Both democracy protection institutions (DPIs) came into operation in 1995.

The Public Protector is established to protect the people against violations of their human rights, abuse of power, error, negligence, unfair decisions and maladministration in public administration.

The SAHRC has a wide-ranging mandate to promote and protect human rights, which encompass civil, political, economic and social rights, all of which can be translated into enforceable legal claims.

These two institutions, established to protect the rights of citizens and act as a check against the abuse of state power, were the subject of a study conducted by the Electoral Institute of Southern Africa (EISA) between March and May 2009. Equivalent institutions in seven other countries, namely, Botswana, Lesotho, Malawi, Mauritius, Namibia, Tanzania and Zambia, also formed part of the research. The study assessed the regulatory framework, performance and capacity of the two institutions in order to ascertain the contribution they make to enhancing and promoting citizen rights and contributing to more vibrant and rights-based democracies. Using a qualitative questionnaire consisting of 40 questions, data were gathered from the Public Protector and the South African Human Rights Commission and interviews were also held with the chief executive officers of both institutions.

The data generated from the questionnaires and interviews were analysed and are presented in this report, together with an analysis of other existing literature on the two institutions. The main elements of the research were an investigation of the legal framework, institutional governance and effectiveness, independence, and interaction with government, other DPIs, the public and CSOs. The research concludes that both institutions



are valuable to democracy promotion and protection, but that their effectiveness is hampered in several ways, a point that was noted in the report of the 2007 parliamentary review of Chapter 9 institutions. The problems include resource constraints, weak levels of collaboration and cooperation among DPIs, an uncooperative executive and Parliament's haphazard oversight of DPIs.

The report recommends strengthening the capacities of both institutions with additional resources; closer and more visible collaboration among DPIs, particularly where their mandates overlap; and the adoption of an effective procedure by Parliament for considering and debating the reports submitted to it, as well as a dedicated structure to oversee DPIs.

## INTRODUCTION

This report was commissioned by EISA as part of its programme on Consolidating Democratic Governance in the Southern African Development Community (SADC) member states. It is part of a study in eight SADC countries on state democracy protection institutions (DPIs) that lie outside the realm of the three branches of government – the legislature, the executive and the judiciary – and which are becoming prominent actors in democratic governance.

The African Charter on Democracy, Elections and Governance calls upon the African Union member states to establish DPIs to promote and support the constitutional order. Two such institutions, namely, the ombudsman and Human Rights Commission (or the equivalent institutions in the respective countries) were the subject of the study in Botswana, Lesotho, Malawi, Mauritius, Namibia, Tanzania, Zambia and South Africa. In the case of South Africa the institutions covered were the Public Protector and the South African Human Rights Commission (SAHRC).

The primary object of the study was to evaluate progress in the advancement and protection of democracy and constitutional rights through the work of selected state institutions established to fulfil these functions. The study assessed the regulatory framework, performance and capacity of these two institutions in order to ascertain the contribution that, once established, they make to enhancing and promoting citizen rights and contributing to more vibrant and rights-based democracies.

This report is structured in three main parts. The first is the introductory section, which includes the methodology, the contextual political background of South Africa leading to the establishment of these institutions, and the legal framework of each institution. The second part details the findings derived from both primary and secondary sources of information under the main headings of institutional governance and effectiveness and interaction with the government, other DPIs, the

public and non-state actors. This is done in each section first for the Public Protector and then for the Human Rights Commission. The final section summarises the main findings, draws general conclusions and makes policy recommendations.

## METHODOLOGY

The primary research instrument was a questionnaire agreed upon during a methodology workshop convened by EISA in February 2009, which brought together all eight country researchers. The questionnaire included a total of 40 standard questions. This ensured that similar data were collected on each equivalent institution in each country and also provided a standardised format for reporting the findings.

The methodology used was qualitative in nature and the questionnaire was divided into the following categories: general/legal, institutional effectiveness, independence, institutional governance, interaction with the public and non-state actors, and resources (see Appendix).

The questionnaire was administered in South Africa to the Public Protector and the Human Rights Commission and, in addition, in-depth interviews were held between March and April 2009 with the chief executive officers of both institutions. The data generated from the questionnaires and interviews were analysed and are presented in this report together with an analysis of other existing literature on these institutions. The scope and sample size could be regarded as the main limitations of the study, as the research did not probe the perceptions of users of the services of the institutions but only targeted senior officials at their national offices. This is thus an attempt to get a glimpse of the political, operational and resource conditions and constraints under which the institutions function and will hopefully form the basis of more evaluative qualitative research – from the perspective of citizens and other institutions the DPIs seek to serve.

---

## CONTEXTUAL BACKGROUND

This section summarises the broad political context within which the Public Protector and the Human Rights Commission were established, and their defining features.

When formal apartheid ended in 1994, after a negotiated settlement, the newly elected democratic government undertook to redress past inequalities, inequities, injustices and oppression, amid high hopes and expectations from the public about the tangible benefits democracy would bring. The post-apartheid government elected in 1994 inherited a state which was farcically bureaucratic, secretive and unresponsive to the basic needs of the majority of its citizens (Parliament of South Africa 2007).

Faced with the mammoth task of creating a foundation for democratic rule that would foster development and economic growth in the new dispensation, those involved in crafting a new constitution for the country looked to providing a rights-based constitution based on the rule of law and the principle of the separation of powers and functions in the state and in government. Thus, a constitutional order and a set of constitutional rules with a human rights orientation (even if some might argue, only in theory),<sup>1</sup> play a central role in South Africa's democracy.

Human rights appear in the first of the founding provisions of South Africa's Constitution, which includes a Bill of Rights and guarantees civil, political, social and economic rights. Chapter 2 of the 1996 Constitution contains the Bill of Rights. Section 7 of the Constitution states that:

- (1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Recognising that the task of promoting and protecting human rights cannot be left to the government or to the individual, the political parties engaged in the negotiations for a new constitution agreed that institutions must be established that would advance democratic governance. The South African Constitution, which is considered one of the most progressive in the world, enshrines in Chapter 9 state institutions to protect constitutional democracy, each of them with a specific mandate. They are:

- The Public Protector
- The South African Human Rights Commission
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Commission for Gender Equality
- The Auditor General
- The Electoral Commission
- The Independent Authority to Regulate Broadcasting

The seven institutions were established to protect the rights of citizens through a responsive state and the fact that they are enshrined in the Constitution gives them public legitimacy. Subject only to the Constitution and the law, they act as a check on the abuse of state power and ensure that human rights are upheld. Other organs of the state, through legislative and other measures, have an obligation to assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness.

The characteristics of the Public Protector and the Human Rights Commission have been informed by international standards, including the 1992 Paris Principles.<sup>2</sup> The main principles are that the democracy protection body:

- is independent and is guaranteed by statute or the constitution;
- is autonomous from government;
- is plural and diverse, including in its membership;

- has a broad mandate based on universal human rights standards;
- has adequate powers of investigation;
- has sufficient resources to carry out its functions.

However, South Africa is not a signatory to the African Charter on Democracy, Elections and Governance adopted by the member states of the African Union in January 2007, which contains a section on DPIs in Article 15.<sup>3</sup>

South Africa chose to have two separate institutions for administrative oversight and consideration of human rights violations, whereas some countries have opted for a hybrid institution to tackle both issues. The Public Protector, essentially an ombudsman, is established to protect the people against violations of their human rights, abuse of powers, error, negligence, unfair decisions and maladministration, in order to improve public administration and make government's actions more open and the government and its public servants more accountable to members of the public (International Ombudsman Institute website: <http://www.law.ualberta.ca/centres/ioi/>). This office has emerged as a widely established avenue for individual complaints against the actions of public authorities.

Apart from being a complaint mechanism the Public Protector, like the classical ombudsman, lacks executive authority. He or she possesses only persuasive powers in the form of the right to make recommendations or by means of the ability to engage in negotiation or mediation in order to resolve grievances. While at first glance this may appear to relegate the Public Protector to a back-seat role in the fight against corruption, maladministration and the abuse of power it is advantageous for several reasons. The very absence of executive authority makes it relatively easy to accord real independence and a wide mandate to the ombudsman as a custodian of citizens' rights and as an agency that complements the judiciary in administering justice. This, in turn, brings with it great freedom of movement and action. Thus, for example, the ombudsman is afforded simple and quick access to confidential documentation held by the state and individuals through its powers to subpoena witnesses,

coupled with the power to refuse to disclose it to any person (Pienaar 2000).

The SAHRC has a wide-ranging mandate which encompasses civil, political, economic and social rights, all of which are justiciable. Some commentators and analysts, however, argue that broad mandates result in commissions that are unable to prioritise their work and are consequently unable to stick to programme areas (Human Rights Watch 2001). Like the Public Protector, the SAHRC lacks executive authority to make binding decisions, but has strong powers to sue either in its own name or on behalf of an aggrieved party. Its jurisdiction extends to and encompasses the state, individuals and the private sector.



## LEGAL FRAMEWORK

As mentioned above, both the Public Protector and the SAHRC were established, first in the Interim Constitution and later in the Final Constitution, the Constitution of the Republic of South Africa Act 108 of 1996, alongside other institutions, to support constitutional democracy. Given their location in Chapter 9 of the Constitution the DPIs are commonly referred to as Chapter 9 institutions. Their legal frameworks are described below.

### **CONSTITUTIONAL AND LEGAL FRAMEWORK OF THE PUBLIC PROTECTOR**

The Office of the Public Protector (OPP) came into being on 1 October 2005.<sup>4</sup> The 1996 Constitution, together with the Public Protector Act 23 of 1994, provides the legal framework for the OPP, which is mandated to ‘investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action’ (Constitution 1996).

The Public Protector’s jurisdiction, therefore, extends to all levels of government, but it cannot investigate the judicial functions of courts and the private sector. Section 7 of the Public Protector Act of 1994 gives the Public Protector the right to initiate investigations. The law grants the Public Protector powers of search and seizure as well as powers to subpoena persons to appear before him/her or produce any document that has a bearing on a matter under investigation. The Executive Members Ethics Act of 1998 enables the Public Protector to investigate any complaint received from the president, a member of Parliament or premier or a member of a provincial legislature about an alleged breach of the code of ethics governing the conduct of members of the Cabinet, deputy ministers and members of the executive councils of the provinces.

The Public Protector is appointed by the president, on the recommendation of the National Assembly, for a seven-year non-renewable term of office.

The Public Protector is assisted by the Deputy Public Protector, also appointed by the president. The Public Protector appoints the chief executive officer. Their functions are elaborated below.

#### **CONSTITUTIONAL AND LEGAL FRAMEWORK OF THE SAHRC**

Section 184 of the Constitution states that the core functions of the SAHRC, which was established on 12 October 1995, are to promote respect for human rights and a culture of human rights, promote the protection, development and attainment of human rights, and monitor and assess the observance of human rights. The SAHRC has powers to investigate and report on the observance of human rights, secure appropriate redress where human rights have been violated, carry out research and educate on human rights (Constitution 1996).

The SAHRC monitors the government and people outside government to ensure that they support the Bill of Rights. It also monitors laws to make sure they are in line with the Bill of Rights. It is obliged to request relevant organs of state to submit annual reports on measures that they have taken to realise the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, land, education and the environment.

The SAHRC receives additional powers and functions from the Human Rights Commission (HRC) Act 54 of 1994. However, since the Constitution came into effect in 1996, a number of provisions in the HRC Act have rendered the Act outdated. For instance, s 15 of the Act states that the commission reports to the presidency, in fact, it reports to Parliament, as stated in the Constitution. Section 19 of the Act states that the president makes regulations regarding certain matters relating to the staff of the commission, but this expired in 1996 and the commission has since made its own regulations.

The necessary amendments to the Act have not yet been effected by Parliament, although they have been discussed on numerous occasions by the commission, Parliament and the Ministry of Justice and Constitutional Development. Nonetheless, the commission's operations have not been gravely hampered by the outdated and inappropriate clauses of the principal Act.

The SAHRC also has other obligations in terms of the Promotion of Access to Information Act (PAIA) 2 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000. The PAIA gives the public the right to access records held by public bodies and requires the SAHRC to prepare guidelines on how to use the Act, report to the National Assembly each year about requests for information received by government departments and conduct education of civil servants and the general public on how to exercise the rights given by the Act. The PEPUDA relates to special measures to promote equality with regard to race, gender and disability and has yet to come into operation as the regulations have not been promulgated (Parliament of the Republic of South Africa 2007).

The SAHRC may investigate abuses; take steps to secure redress, including bringing court cases; and carry out human rights education. It may subpoena witnesses and it also has powers of search and seizure. However, it has no power to enforce its recommendations, or even to require a response. It may investigate relations between individuals or between individuals and corporate entities, as well as between the state and its citizens.

The HRC Act provides that no fewer than five commissioners must be appointed, but does not stipulate the maximum number that may be appointed. Commissioners are appointed by the president, on the recommendation of the National Assembly, for a maximum of seven years, renewable once. Commissioners may be appointed to serve either full time or part time.

Nominations from the public are presented to an ad hoc committee of the National Assembly established for the purpose of recommending appointees.

Other sections of this report mention further legal clauses regulating the Public Protector and the SAHRC.

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## INSTITUTIONAL GOVERNANCE AND EFFECTIVENESS

Internal governance arrangements are an important determinant of the smooth running of an institution and guide the organisation's strategic vision. Equally, the ways in which each institution puts into practice its legal mandate determine its degree of effectiveness. The dictum 'justice delayed is justice denied' impresses upon the OPP and the SAHRC the need to act on citizen complaints within a reasonable time frame. Therefore a critical measure of effectiveness of democracy protection institutions is their capacity to respond timeously and effectively to the needs of those in society they have been established to serve. It must be noted, however, that in the absence of indicators to quantify the resources expended in an investigation it was difficult to gain an accurate insight into how cost effectively resources are allocated and used by these institutions. A number of governance and operational issues pertaining to the two institutions are covered in this section.

### **GOVERNANCE AND OPERATIONS OF THE OPP**

The Public Protector's powers, as the head of the institution, are outlined in the law. The Public Protector delegates powers to the Deputy Public Protector. The CEO is appointed by the Public Protector and is responsible for assisting the Public Protector in the performance of all financial, administrative and clerical functions. Together the three make up the executive and are based in the national office in South Africa's capital, Pretoria.

The OPP's structure differs from that of other DPIs such as the Human Rights Commission, which have a number of commissioners as well as a secretariat. This means that the Public Protector is not limited to playing a strategic role but is also involved in operational issues. South Africa has had two public protectors since the institution was established. The first was Adv Selby Baqwa, who served from 1995 to 2002. The current Public Protector is Adv Lawrence Mushwana, whose seven-year term expires in 2009. The Deputy Public Protector is Adv Mamiki Shai and the

chief executive officer, Mr Themba Mthethwa, is the chief accounting and administrative officer and is appointed by the Public Protector. According to the CEO, the Public Protector has been able, in practice, to establish a clear and workable division of roles among the three full-time executives, that is, the Public Protector, Deputy Public Protector and CEO.

The OPP has offices in all nine provinces of South Africa and a full-time staff of about 220 out of a total of 238 available posts, translating into a vacancy rate of 7.6 per cent, which has contributed to the reduction in the backlog of cases. In compliance with employment equity requirements the OPP provides a breakdown of its staff by race and gender in its annual report. Of the 55 positions in the top, senior and mid-management occupational bands, 32 (58%) are occupied by women (Public Protector 2008). The organisational structure, though defined, is continuously reviewed to ensure its effectiveness.

Since 2004 the OPP has inculcated a culture of integrated annual strategic planning and produces three-year strategic plans, the current one spanning the period 1 April 2008-31 March 2011. The strategic plan contains the OPP's organisational strategy, which is broken down into the following four areas to enhance effectiveness: investigations and reporting, executive management, outreach, and corporate support services. The institution is, however, constrained in its work by an insufficient budget to increase the remuneration of its investigative staff. This has resulted in a high turnover of investigative staff and, in turn, in a number of vacant senior positions.

In investigating improper conduct in all state institutions and recommending corrective action the OPP performs a unique role that is not carried out by any other institution, whether in the realm of the state or the realm of civil society. In order to realise its legal mandate it strives for the following outcomes: to improve service delivery by state institutions, evaluate the fairness of state action and ensure that the citizens of the country realise their human rights.

In order to measure and assess its effectiveness the OPP has recently developed and adopted the Service Delivery Charter, in addition to the

already existing Performance Management System, for assessing staff performance. The institution is also audited annually. The OPP has never commissioned an external evaluation but it was reviewed in 2007 by an ad hoc committee established by the National Assembly to review all the Chapter 9 institutions.

It is also one of the institutions included in the Global Integrity survey, an international project that assesses the existence (legal framework), effectiveness (human resources, independence, funding, compliance with its findings, right of initiative and turnaround time of investigations) and citizen access (accessibility of its reports) of key national-level anti-corruption mechanisms in a diverse range of countries.<sup>5</sup> In assessments conducted by Global Integrity in 2004, 2006 and 2008, the South African National Ombudsman (Public Protector) received overall scores of '90- Very Strong', '91- Very Strong' and '88- Strong' respectively (Global Integrity Reports 2004, 2006 and 2008 available at: <http://report.globalintegrity.org>).

Methodological changes over the years in the scoring criteria and sub-categories mean that the higher or lower scores were not necessarily the result of changes on the ground. The generally high scores of the Public Protector indicate strong governance inputs, for instance, its legal basis and resources rather than, for example, the outcomes of its work, reduced administrative impropriety and increased government accountability. Therefore, while the high ratings received by the OPP on the Global Integrity assessments are encouraging, suggesting institutional and organisational integrity, one must be cautious about attributing them directly to the substantive effectiveness of the OPP.

Section 181(5) of the Constitution states that the DPIs are accountable to the National Assembly and must report to it at least once a year on their activities and functions. To this end, the OPP produces an annual report, a document which is available to the public through its offices and its website at no charge. The annual report provides an account of investigations in the previous year, with a breakdown of complaints received, completed cases and incomplete cases. It also reports on the performance of the OPP by strategic objectives. Selected investigations,

including those initiated by the OPP itself, are reported in full. Human resource issues and financial statements are also presented.

Compliance by the concerned public agencies with the recommendations of the Public Protector is very high, although it is sometimes delayed. The Public Protector has extensive powers to demand public information but has only had to resort to subpoenas on two occasions to obtain the necessary information to conclude an investigation (Parliament of the Republic of South Africa 2007). This demonstrates the seriousness with which the institution is viewed by public service institutions and public servants, despite the fact that it is not permitted by legislation to impose penalties but only to make recommendations. The OPP has also noted the cooperation it receives from government agencies in accessing information pertaining to investigations. Pre-selected discretion, where the OPP finds a way of not taking on cases which are inconvenient and in which information is hard to get, perhaps also contributes to the high compliance with its recommendations.

#### **CONFLICT MANAGEMENT AND CONFLICT OF INTEREST**

The OPP has a disciplinary management and grievance policy to deal with internal conflicts among staff but the policy does not apply to the Public Protector and the Deputy Public Protector, who report to Parliament. Discord between the Public Protector and his deputy in 2006, which erupted into the public domain, not only undermined the dignity of the OPP but also brought to the fore how crucial effective institutional governance in such institutions is.<sup>6</sup>

At the request of the Public Protector the National Assembly appointed an ad hoc committee on Operational Problems in the OPP. The committee found that the dispute had not only been aggravated by inadequate internal mechanisms but had also had a negative impact on the operation of the office (Parliament of the Republic of South Africa 2007). This incident shows the extent to which the personalities of the individuals in these positions influence the performance of the institution and are therefore an important consideration when making leadership appointments. It also shows, by extension, that even when there is a strategic plan in place leadership and people skills are critical for its successful implementation.



Section 12 of the Public Protector Act allows the Public Protector to be assisted by officers in the public service seconded to the service of the Public Protector in terms of any law regulating such secondment. The Act also contains specific provisions to prevent conflicts of interest among the Public Protector and staff. Firstly, the Act provides that a member of the institution should serve in a full-time capacity to the exclusion of any other duty or obligation arising out of any other employment or occupation or the holding of any other office (Public Protector Act 23 of 1994). This bars the Public Protector and the staff from performing remunerative work outside their official duties.

Secondly, the Act prohibits members of staff from conducting an investigation in which they have any pecuniary interest or any other interest which might preclude them from being fair and unbiased. Such persons are further required to disclose such an interest.

No legal provisions or internal policies touch on the disclosure of private commercial or financial interests, however, senior managers disclose their interests informally to the Public Protector (Parliament of the Republic of South Africa 2007). On the one hand, this might be construed as encouraging transparency from within in the absence of public disclosure requirements. On the other, this laudable but unregulated practice introduces an element of arbitrage, where decisions about possible conflicts of interest are left to the Public Protector's discretion.

#### **COMPLAINTS HANDLING**

The services of the Public Protector are free and the OPP operates a toll free number. Any person can make a complaint over the telephone, in person, or in writing, by stating what the complaint is, why the Public Protector should investigate the complaint and any other information that might be relevant to the case. A complaint must be made within two years of the occurrence of the incident or matter concerned.

The most common types of cases investigated by the OPP include the following:

- Insufficient or no reasons were given for an administrative decision.



- The interpretation of criteria, standards, guidelines, regulations, laws, information or evidence was wrong.
- Processes, policies or guidelines were not followed or were not applied in a consistent manner by an official or public administration.
- Adverse impact of a decision or policy on an individual or group.
- Failure by an official or administration to provide sufficient or proper notice.
- Due process denied.
- A public service was not provided to all individuals equitably.
- Denial of access to information.

Parliament of the Republic of South Africa 2007

The OPP has service delivery indicators in place so investigators can ensure that complaints are thoroughly investigated and finalised in a timely manner. Between the second half of 2008 and the first quarter of 2009, 7724 provincial cases were opened. In the same period 1 493 investigations were opened at the national office. Of these, 7 570 were finalised at provincial level and 1 967 at national level, but at both levels these figures include cases carried over from the previous financial year.

Some cases were complex, could not be finalised timeously, and are still under investigation. In other words, the time taken to act on complaints appears to depend on the particulars of the case, with delays varying from a few months to a few years. In its current strategic plan the OPP aims to reduce the turnaround time for cases from one year to eight months. This will go a long way to dispelling any existing dissatisfaction or disillusionment with the OPP.

In 2008 the OPP began automating its manually driven investigations and reporting processes using the SAP Investigative Case Management software. This is part of its new information technology infrastructure, which seeks to use modern technology to make the capturing and management of case-related information more efficient.

## FUNDING

For the OPP to fulfil its mandate it must have access to sufficient resources. The focus here is on financial resources, as the human, physical and technological resources have been mentioned above. The OPP is funded through the Department of Justice and Constitutional Development, a less than ideal channel, which does not bode well for its independence. This hampers the way it motivates its needs and, according to the CEO, makes it impossible for it to be seen to be effective, because it gets less than it requires.

The holding department negotiates the OPP's budget and does not consider its needs, a factor that affects planning negatively. A total of 77 per cent of the budget is spent on salaries (60% of the staff members are investigators) and 20 per cent is used for outreach programmes. Information about the salaries of the Public Protector and Deputy Public Protector is available to the public and the salaries are determined by public service scales.

In the financial year 2007/8 the OPP received additional funding from the European Union (EU) through the Civil Society Advocacy Programme (CSAP), a special project funded by the EU and jointly implemented by the OPP, the SAHRC and the CGE. The funds were used for the salaries of six OPP employees and for conducting public awareness and sensitisation mobile clinics in the provinces.

**Table 1**  
**Budget 2005-2010**

Year	Budget allocation (in ZAR)	Expenditure (in ZAR)
2005/06	58 627 000	58 230 000
2006/07	61 598 000	62 417 000
2007/08	81 480 000	81 421 000
2008/09	86 475 000	To be audited
	5 000 000	Roll over from 2008/2009
2009/10	107 699 000	Current year

Source: OPP 2009

Table 1 shows that the annual budget of the OPP has grown incrementally each year and, with the exception of 2006/07, the institution has underspent its budget allocation. This may appear to contradict its position that it is financially constrained. However, the CEO explained that the budget increments have not been significant enough to enable it to allocate funds for salaries for vacant positions and the underspend has been within the accepted 1 per cent, which keeps it in the good books of the Auditor General. The budget is prepared using historical cost-based costing and the zero-based model. In terms of the historical costing budgeting model historical spending models are adjusted, based on inputs from managers and economic conditions, for inflation and for abnormal activities. In the zero-based model the operations of the OPP are analysed and inputs from the different units are used to determine all the activities that would be performed and the expected resources that would be required to perform those activities. Costs are then estimated based on standard costs to arrive at the budgeted figures.

In terms of resource constraints, the OPP requires additional funding to maintain the current staff establishment and to fill vacant posts. In addition, it needs to allocate resources to maintaining and/or upgrading its information technology infrastructure. It also needs to implement its communication strategy so as to raise the profile of the institution and increase public awareness. One way of doing this would be to initiate a mobile office project to reach out and create access points to communities all over in South Africa.

### **INDEPENDENCE**

The independence of the OPP is critical to the credibility of its findings and essential to adherence to its recommendations. Section 181 of the Constitution asserts and protects the independence of the Public Protector along with other DPIs. Section 181(2) states that these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.

Section 13(a) of the Public Protector Act further states that the Public Protector must serve impartially and independently and perform his

or her functions in good faith, without fear, favour, bias or prejudice. In addition, other organs of state, through legislative and other measures, must assist and protect the institution to ensure its independence, impartiality, dignity and effectiveness, as stated in s 181(3) of the Constitution. Section 181(4) of the Constitution provides that no person or organ of state may interfere with the functioning of these institutions.

Collectively, these provisions provide a strong framework for protecting the institution from political encroachment. However, in practice, the manner in which the appointee to this office interprets his/her powers could favour power-holders rather than the people. The government can influence this by making convenient appointments that will protect certain political interests at the expense of constitutional democracy (Friedman 2009).

The Public Protector and Deputy Public Protector are appointed by the president from a short list of names presented by the National Assembly.<sup>7</sup> A parliamentary committee comprising one member of each political party represented in Parliament submits a nomination to the National Assembly. The resolution recommending the appointment must enjoy the support of at least 60 per cent of members of the National Assembly, in the case of the Public Protector, or a simple majority, in the case of the Deputy Public Protector. The Public Protector is appointed for a maximum of seven years. The Deputy Public Protector, on the other hand, is appointed for a term not exceeding seven years and may be reappointed for one additional term. Both appointees must have at least ten years' experience in the administration of justice and be admitted as advocates or judges of the High Court. Both must serve in a full-time capacity to the exclusion of any other duty or obligation arising out of any other employment or occupation or the holding of any other office (Public Protector Act 23 of 1994). The Public Protector can be removed from office by the president on grounds of misbehaviour, incapacity or incompetence.

Generally, appointments to the OPP have supported the independence of the institution, although critics have used the fact that the current Public Protector was appointed from the African National Congress parliamentary caucus to imply political bias. In 2003, when Lawrence

Mushwana was appointed Public Protector, a Member of Parliament from the Democratic Alliance, Douglas Gibson, said it was against better judgement for 'ANC politicians to be redeployed in sensitive positions that demand neutrality or a non-political presence' (Sefara 2004). Moreover, the relationship between the Public Protector and the ruling party has been questioned in the past, when high-profile investigations have been perceived to favour the ANC.<sup>8</sup>

One can surmise from these cases that the Public Protector considers the political implications of his findings and therefore finds reasons not to pursue certain investigations and is thus seen in these instances as not protecting the public interest but the interests of powerful political and economic constituencies. A judgement handed down by Pretoria High Court Judge N Poswa in July 2009 criticised Mushwana for refusing to investigate certain allegations and drawing conclusions without launching a proper probe into the 2004 Oilgate scandal (*The Times* 3 August).

Judge Poswa, in *The Mail & Guardian v the Public Protector*, ordered that the Public Protector or his successor investigate complaints that were not investigated, re-investigate all complaints that were investigated and write a report on the outcome of his/her investigation (Poswa 2009).

At the same time, the findings against former senior politicians, such as the former Minister of Health, for contempt of court, and the former Minister of Public Service and Administration, for failure to disclose a gift, have been cited as evidence of the impartiality and independence of the office (Global Integrity 2008).

#### **GOVERNANCE AND OPERATIONS OF THE SAHRC**

The SAHRC consists of the commissioners and the secretariat. The commissioners, under the leadership of the chairperson, set out policy and the secretariat, under the leadership of the CEO, implements it. Media coverage of the commission has reflected that, on occasion, the chairperson comments on day-to-day matters relating to the commission and the CEO comments on political matters that would be assumed to fall under the ambit of the chairperson, giving the impression that the division of roles between the two is blurred.

Although the CEO acknowledges that the public does not understand the difference between the two roles he says those who occupy them understand one another's role, as outlined in the law, and that commonsense prevails in other instances. The 2007-2008 Annual Report of the SAHRC elaborates on the roles of both the commissioners and the CEO, as follows:

... commissioners lead in developing the vision, setting priorities and ensuring that programmes and resource allocations are consistent with the SAHRC's vision. Commissioners also act as public representatives of the Commission at national and international fora, as well as as an interface with local communities and other stakeholders.

The CEO oversees the implementation of the strategic business plan, establishes and maintains a good governance framework in collaboration with commissioners, ensures statutory compliance with the Constitution and other Acts, adheres to the provisions of the Public Finance Management Act (PFMA) and Treasury Regulations, provides strategic leadership, manages risk and co-ordinates and integrates national and provincial offices.

SAHRC 2008

At the time of writing this report the commission had six commissioners, all but one of whom served full time, the sixth was a part-time commissioner. The chairperson was Mr Jody Kollapen and other commissioners were Dr Zonke Majodina (deputy chairperson), Dr Leon Wessels, Mr Tom Manthata, Prof Karthy Govender and Dr Pregs Govender. Commissioners are assigned responsibilities by province and subject areas. The terms of all but one of the commissioners came to an end in September 2009. The most recently appointed commissioner was appointed in early 2009. With an almost entirely new set of appointees looming, there are concerns about continuity and the preservation of institutional memory.

The SAHRC has an office in each of the nine provinces and a total staff of 138. The head office in Johannesburg also serves the Gauteng province.

The secretariat has been headed (since 2005) by the CEO, Adv Tseliso Thipanyane, the third CEO since the commission was established in 1995. The commission is divided into several programme areas: corporate services; education and training; legal services, research and documentation; parliamentary liaison and legislation and treaty body monitoring; information and communications; and special programmes. The commission has between 20 and 30 lawyers.

A three-year strategic plan guides the SAHRC's activities. The current plan runs from July 2008 to August 2010. The plan is adopted by the commissioners and used by Parliament, as well as internally, to monitor the commission's performance. Quarterly reports detailing the extent to which activities meet the objectives set out in the strategic plans are submitted by the CEO to the commissioners. As constitutionally required, the commission submits an annual report to Parliament. Both the strategic plan and the annual report are available to the public at no cost.

The only external evaluations that have been undertaken were done by the CSAP and Parliament. The CSAP evaluation, conducted in 2006, assessed the SAHRC against recommended international benchmarks of the United Nations High Commissioner for Human Rights. In the main, the evaluation noted that the commission had achieved a great deal in the first decade of its existence and had gone through steep learning curves. It further noted the commission's willingness to examine itself and to correct what it could. The parliamentary review was conducted from 2006 to 2007 by a multiparty ad hoc committee which reviewed the Chapter 9 institutions as well as other state institutions. The review assessed the effectiveness and relevance of the institutions and requirements to further strengthen them to enable them to fulfil their objectives. It hailed the commission for establishing

a reputation amongst human rights activists and members of the public as an active and passionate defender of human rights. With limited financial and human resources, the Commission has made a real difference to the promotion and protection of human rights in the areas it focused on.



To ensure the smooth running of the institution the CEO holds meetings with the commissioners once a month and with senior management staff fortnightly. All staff meet quarterly. Performance appraisals are conducted twice a year for all staff. There is also a labour union, to which staff members belong, in addition to a grievance policy to deal with staff issues.

The commission seems to have overcome the problem of high staff turnover that characterised it in its first ten years and is compliant in terms of employment equity, with the staff complement representative in terms of race and gender. Of nine senior managers all but two are female. In the provincial offices four of nine managers are male. The commission, however, struggles to meet the 2 per cent disability requirement.

With the commissioners responsible for specific human rights and with the programmes of the secretariat, mentioned above, the commission combines both a programme- and a complaints-led approach which may be seen as a response to criticisms in its earlier years that it focused on events whose impact was questionable (Civil Society Advocacy Programme 2006).

#### **COMPLAINTS HANDLING**

The SAHRC uses two approaches to protect rights: intervening in cases of human rights violations, using negotiation, mediation, litigation or the press; and investigating human rights violations in vulnerable groups and making suggestions how these should be handled. The public is able to file complaints about human rights violations by phone, in writing, or in person, within three years of the occurrence of the incident.

Complaints are then referred to the legal department for scrutiny. At this stage, the complaint can be rejected if it does not fall within the mandate of the SAHRC, be referred to another organisation that is better suited to handle it, or be accepted. In cases where the complaint is either rejected or referred, the complainant may appeal to the chairperson within 45 days. If the complaint is accepted it will be investigated and dealt with in one of the following ways: through a public hearing, negotiation, mediation or litigation.



The turnaround time for investigating complaints, according to the internal regulations, is 90 days, but this varies depending on the case. The CEO stated that the legal staff apply their minds and are thorough in conducting their investigations. Complaints are managed electronically through the Flowcentric system.

**Table 2**  
**Statistical overview of complaints received**  
**April 2007 To March 2008**

Carried over	Accepted		2 251
Not accepted	Rejected		1 106
	Referred		2 524
	<b>Sub-total</b>		<b>3 630</b>
Pending			807
Accepted	Current/Open complaints		2 824
	Finalised	Resolved	664
		Closed	1 329
		Sub-total	1 993
	<b>Sub-total</b>		<b>4 817</b>
<b>Grand total*</b>			<b>11 505</b>

Source: SAHRC Annual Report April 2007– March 2008

\* The grand total is the sum total of carried over (2251), not accepted (3630), pending (807) and accepted (4817).

These figures show that of a total of 9254 complaints received the SAHRC carried over 3631 (pending and current/ open cases – grand total less total carried over). The commission also offered once-off advice by means of telephone and interviews in 4273 instances. The top ten types of complaints investigated during this period, in ascending order, related to housing, property, human dignity, limitation of rights, unjust administrative action, access to information, healthcare, food, water and social security, labour relations, equality, and arrested, detained and accused persons.

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While the Constitution and the HRC Act give it wide-ranging powers to deal with human rights violations the commission admitted to capacity challenges in dealing with complaints within the stipulated 90 days, which have resulted in backlogs. The workload that comes with the number of complaints strains the capacity of the commission. For example, from time to time the commission will convene public hearings on a particular violation but it can be up to a year before the report is concluded and publicised. At the same time, complainants cause delays by not providing full information at the start or by not responding promptly to requests for information. Although the commission has numerous backlogs these do not compare to the backlogs endemic at the courts but are undesirable, nonetheless, as the intention is that the commission offer a cost-free and speedier alternative recourse mechanism to that offered by the courts, which are inaccessible and unaffordable by a large segment of the population.

According to the CEO the commission dealt with more than 10 000 complaints in 2008 but went to court fewer than 30 times because it prefers to resolve complaints amicably. To date, it has not used its powers of search and seizure. Its findings are almost always accepted, although they may not always be applied. With this track record, the CEO expressed no desire for the commission to be given the power to make binding decisions.

The commission has, on several occasions, been accused of being reactive as opposed to proactive, only responding to issues once they have been highlighted in the media. In view of the country's history of violation and disrespect for human rights, crimes against humanity, the impact of apartheid, class and income inequalities, corruption, high levels of poverty and violence, among others, the societal context within which the commission has been working presents a challenge to its effectiveness, in spite of its broad mandate. Human rights, particularly economic and social rights, remain an abstraction for many, and the HRC is under pressure to deliver on its mandate in this regard. In addition, the commission has been accused of failing to protect the increasing numbers of refugees, asylum seekers and internally displaced persons in the country. These accusations surfaced particularly after the outbreak of xenophobic violence in 2008.<sup>9</sup> The CEO admitted that capacity constraints limit the commission's scope

and said its main focus is to catalyse change. It also serves as a learning ground for countries that have recently established HRCs and has received many delegations from around the world eager to learn from its experience. The CEO attributed this to the strong founding legislation, including its power to monitor justiciable economic and social rights.

### FUNDING

The SAHRC's operating budget for the 2009/2010 financial year is R68-million. The budget allocation has increased steadily from R7-million in 1996. Table 3 reflects the budget allocations in the last five years.

**Table 3**  
**Budget allocations**

Year	Budget allocation (in ZAR)
2005/06	41 774 000
2006/07	49 220 000
2007/08	55 281 000
2008/09	60 503 000
2009/10	68 000 000

Source: SAHRC 2009

According to the CEO some believe the commission should receive more money, but he did not feel this was a major concern. Funds are channelled to the commission from the Treasury through the Ministry of Justice and Constitutional Development and this model has not posed any serious challenges to the commission's independence or been used by the line ministry to exercise any undue influence, he said. The commission also has funding partnerships with non-governmental organisations (NGOs) amounting to about a third of its budget. It has also established the SAHRC Trust to receive donations to complement the funding it receives from the state. The concept of a trust fund is that it will offer additional independence and legitimacy, but the Trust has not taken off (Civil Society Advocacy Programme 2006).

**INDEPENDENCE**

As is the case with other democracy protection institutions the founding legislation and s 181 of the Constitution safeguard the independence of the SAHRC and protect it from political interference. In practice, however, the institutions are not immune to political pressure, given their mandates and the environment in which they operate.

The CEO of the SAHRC emphasised that the commission accepts no instructions from anyone but the law and the law will not allow a constitutional body to be compromised. He added that in the past 14 years no one could pinpoint any decision of the commission which was unduly influenced.

However, the commission has not escaped being labelled as toothless. In 2008 the SAHRC issued ultimatums to ANC Youth League leader Julius Malema and Congress of South African Trade Unions (COSATU) secretary general Zwelinzima Vavi to retract their inflammatory 'kill for Zuma' remarks within 14 days, failing which the commission would take the matter further. Both leaders defied the commission, refusing to apologise or retract their statements and claiming they had been misquoted. The COSATU leader, however, met with the commission and subsequently issued a statement saying that he regretted his comments. The SAHRC took no further action. There is also a perception that the commission does not use its litigation and subpoena powers sufficiently to put pressure on government in relation to human rights matters, for example, progress towards realising ESRs (Human Rights Institute of South Africa 2007).

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## INTERACTION WITH THE GOVERNMENT

As independent institutions, one investigating administrative impropriety in any sphere of government, the other human rights violations, the Public Protector and the HRC lie at the crossroads of government and civil society. The two institutions are also important in the chain of democratic accountability and can aid in the horizontal accountability of state institutions, that is, government's reporting to other state institutions. On the other hand, all organs of state at all levels are obliged by the Constitution to render such reasonable assistance to democracy protection institutions in conducting their tasks. The findings on their relationship with the government are presented below.

### **THE PUBLIC PROTECTOR'S RELATIONSHIP WITH THE EXECUTIVE AND PARLIAMENT**

The Public Protector is accountable to Parliament and is required to report to the National Assembly in writing at least once a year. He/she may also, at any time, submit a report to the National Assembly on the findings of a particular investigation if: he/she deems it necessary or in the public interest; it requires the urgent attention of, or an intervention by the Speaker of the National Assembly; or he/she is requested to do so by the chairperson of the National Council of Provinces. To ensure the transparency of and public awareness about the activities of the Public Protector reports must be open to the public unless exceptional circumstances, as described in the Act, require that a report be kept confidential.

In practice, this provision has rarely been used. The findings of an investigation are also made available to the complainant and to any other person implicated. Cases are published on the Public Protector's website.

The CEO described the relationship with Parliament, from which the OPP derives its authority, as good. Theoretically, the Public Protector should promote horizontal accountability by assisting Parliament to play

its oversight role over the executive, but this is not the case in practice. Although the Public Protector submits its annual reports and strategic plans to the National Assembly the National Assembly does not debate them in depth and does not provide substantive feedback to the Public Protector, reducing the reporting requirement to a mere formality.

The CEO described the relationship with the executive arm of government as 'average'. When asked to elaborate, he mentioned the Department of Justice and Constitutional Development, through which the Public Protector receives its annual budget, an arrangement he does not consider satisfactory, believing that the OPP should receive its budget from Parliament rather than from a government department. This would give the OPP the opportunity not only to motivate its budget but to be financially independent of the executive and rid it of the friction that arises from this arrangement. On the other hand, the CEO said the OPP has never had occasion to use its subpoena powers because government officials have been forthcoming with information required for investigations.

#### **THE SAHRC'S RELATIONSHIP WITH THE EXECUTIVE AND PARLIAMENT**

The SAHRC has a civil relationship with government, relating, as the CEO says, 'without fear or favour'. However, the fact that the commission has received inadequate assistance from both Parliament and the executive has created serious challenges.

The SAHRC feels that Parliament has not taken its reports seriously, largely failing to summon government departments to respond to reports or to take up the commission's recommendations, giving the CEO the impression that Parliament has not embraced the commission's work fully. The SAHRC has introduced a newsletter aimed at parliamentarians and also makes submissions to Parliament on various Bills. These activities fall under the Parliamentary Liaison and Legislation and Treaty Monitoring Department.

Information requested from the executive is either delayed or never provided. Attempts by the commission to elicit information, include summoning Cabinet ministers, using its powers of subpoena, and

reporting government officials to Parliament. The socio-economic hearings held in March 2009 are a case in point, where a lack of response from state organs led to the postponement of the public hearings on two occasions. The hearings were held in line with the commission's constitutional mandate in terms of s 184(3) to monitor and promote human rights.

This provision requires that all organs of state must provide the commission with information on measures they have taken to realise the rights enshrined in the Bill of Rights. These measures should include, among others, eradicating the scourge of poverty, unemployment and inequality; dealing with the crisis in education; addressing the slow pace of land reform and the huge housing backlog and other critical social challenges that continue to plague the people of South Africa.

In a press release the commission stated that it would write to the Speaker of Parliament to raise its concerns about the lack of submissions from some national and provincial government departments. It went on to add that the lack of cooperation confirmed the findings of the Report of the Independent Panel Assessment, which highlighted the inadequate attention paid by Parliament to the commission's reports on ESRs (SANGONET 2009).

According to the CEO, since 1997, when the commission acquired the mandate to monitor government's steps towards the realisation of ESR, compliance has been poor, with most government departments failing to respond. Of the few who do comply many provide shoddy information. It is a criminal offence to frustrate the work of the SAHRC but the commission has declined, thus far, to lay criminal charges, preferring to use only its powers of search, seizure and arrest where there is no other option. However, it has now threatened to sue government departments if they do not meet next year's reporting deadline, although that is not how it wishes to operate, says the CEO regretfully, while acknowledging that it cannot continue to complain about lack of cooperation if it fails to use all the powers available to it.

Thus far, the commission has sued the Minister of Justice and subpoenaed the Minister of Minerals and Energy and the Minister of Agriculture.

Another area of frustration for the commission is the worrying attitude of government. Among the examples of this attitude are its failure to ratify the International Covenant on Economic, Social and Cultural Rights that it signed in 1994. The Human Rights Development Report produced by the commission stated that the issue had been discussed with Parliament several times, with the commission arguing that many of the provisions address issues about ESRs that are pertinent to South Africa and ratification would be a powerful step towards showing South Africa's commitment to ratifying these concerns. Linked to this is government's failure to comply with its international reporting obligations in relation to, for example, the Convention on the Rights of the Child, which it ratified in 1995. Although the country is required to submit a report to the committee every five years, it has submitted only its initial report, in 1997.

On the domestic front, as mentioned above, the promotional aspects of the PEPUDA relating to the HRC, which the SAHRC helped draft, have not come into force since the Act was passed in 2000. The unconstitutionality of the HRC Act, as reflected in the outdated clauses cited above, has not generated any attempt by government to amend the Act. Parliament gave the Minister of Justice an instruction to do so by May 2008 but to date no amendments have been made. Instead, the commission had made its own regulations, in line with the public service, and has continued to go about its business.

Lastly, the commission has a dual function as a custodial and monitoring body, and as a catalyst in monitoring PAIA but has faced capacity challenges in doing so. However, the slow advance in the implementation of PAIA, in the public sector and the poor compliance of public and private sector bodies with their duty to report to the SAHRC imply a disrespect for the commission.

On a positive note, the CEO said the commission has a close relationship with the Congress of South African Trade Unions (COSATU), a government partner, in relation to ESRs. COSATU and the SAHRC have held joint public hearings and organised activities such as poverty hearings and marches against the xenophobic attacks of 2008.



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## INTERACTION WITH OTHER DEMOCRACY PROTECTION INSTITUTIONS

There is an implied overlapping role between the OPP, the SAHRC and the other institutions set up to support constitutional democracy in South Africa. With regard to human rights, which are interrelated and indivisible, it is to be expected that the line dividing the three human rights institutions, that is, the Public Protector, the HRC and the Commission for Gender Equality (CGE), is not always clear cut, particularly that between the HRC and the CGE. Precisely because of the overlaps and the multiplicity of institutions dealing with human rights, strong views have been expressed in support of the amalgamation of some of these institutions. One of the recommendations of the parliamentary committee that reviewed Chapter 9 institutions was that one umbrella human rights body should be established, incorporating the HRC, CGE, National Youth Commission (which has since ceased to exist) and the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities. On the other hand, strong views have also been expressed in support of keeping them separate, one reason being the prominence the CGE has given to gender rights.

The extent of collaboration or coordination with other democracy protection institutions established by Chapter 9 of the Constitution, apart from the EU-funded CSAP, is best described as unsystematic. According to the CEO of the OPP, the OPP has drafted a collaboration strategy with other Chapter 9 institutions which has been circulated to them for their input. In addition the Public Protector refers human rights complaints that fall outside its jurisdiction to the SAHRC and the CGE.

Joint events between the Public Protector and the SAHRC have been reported in the media, such as one held in Kimberley on Human Rights Day (a national holiday on 21 March) 2009 where the Public Protector and the chairperson of the SAHRC urged South Africans to use Chapter 9 institutions to protect their rights.

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The CEO of the SAHRC mentioned that a forum of chairpersons and CEOs of the Chapter 9 institutions had been formed to enhance their cooperation through, for example, implementing joint projects from time to time. Although there is a commitment among the institutions to work together, an element of competition, among other challenges, has prevented this from happening to the greatest extent possible. Commissioners and CEOs of the institutions sit on interview panels to fill senior positions in each other's institutions and staff and commissioners move from one to other, sometimes through poaching.

The SAHRC, the CGE and the Public Protector jointly run the CSAP, funded by the EU, to facilitate interaction between the Chapter 9 institutions and civil society so that communities are able to gain access to the organisations mandated to uphold their constitutional rights. It is not clear how successful the CSAP has been in helping the institutions to become more accessible to rural communities but it has been criticised for not functioning properly (Isaack 2007). Three years after its inception the CSAP has failed to build relationships with civil society organisations (Human Sciences Research Council 2007). According to a media report in May 2009 the European Union wanted a R10-million donation returned after an audit revealed that certain funds had not been properly accounted for, but the SAHRC, which was responsible for the funds, denied this in a press statement (Moaga 2009). In the statement the SAHRC stated that the audit had raised technical-compliance queries to which the commission had responded, but there had been no suggestion by the EU that the work had not been done.

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## INTERACTION WITH THE PUBLIC AND NON-STATE ACTORS

While these DPIs have been established and are functional, their long-term credibility depends on their social legitimacy, that is, their ability to earn and maintain the trust and confidence of the public, particularly the poor and vulnerable. Political parties and civil society organisations can also contribute in a number of ways to protecting and promoting human rights. This section therefore, deliberates on the way in which these institutions interact with the public and non-state actors.

### **THE PUBLIC PROTECTOR'S INTERACTION WITH THE PUBLIC, POLITICAL PARTIES AND CIVIL SOCIETY ORGANISATIONS**

The OPP was established to serve the South African public by ensuring that public officials and institutions uphold their constitutional rights and that the people are protected from arbitrary neglect by those who are supposed to serve them. The Public Protector's relationship with the public is defined by its constitutional obligation (s 182(4)) to be accessible to all persons and communities. The OPP has nine provincial offices, a head office and seven regional offices. The Executive Support Unit deals with complaints made to the national office by the public, whereas the Provincial Investigations and Coordination Unit deals with provincial complaints.

According to the CEO the public sufficiently understands the role of the OPP, although sometimes the expectations of the public are unrealistic, expecting the OPP to operate like a court of law, issuing orders. However, a number of reports suggest that a large section of the public is not aware of the existence, let alone the mandate and the functions, of the Public Protector, despite its nationwide spread.<sup>10</sup>

The OPP has a Public Outreach Unit whose strategic objectives are to increase accessibility to OPP services, increase public awareness, manage outreach activities at the national level and take the OPP to the people.

According to its 2007/08 annual report 855 mobile clinics were conducted throughout the country and 3 850 complaints were received at these clinics, which reached more than 4 300 people. Three hundred and twenty information sessions were held with stakeholders and 23 workshops were held collaboratively with other DPIs. The Mobile Office Pilot Project was conducted in three provinces, the Eastern Cape, KwaZulu-Natal and Limpopo, as a means of bringing the services of the Public Protector closer to rural communities.

In its review of the Public Protector's relationship with civil society the ad hoc committee appointed by Parliament in 2006 to review the Chapter 9 institutions noted that the relationship is weak, informal and intermittent. The OPP mentioned that it is exploring areas of collaboration with CSOs through what the CEO referred to as stakeholder relationship management. This will entail holding at least one meeting a year with civil society groups and local government in each area in which it has an office.

The Open Democracy Advice Centre (ODAC) is the only non-governmental organisation listed in the *Public Protector Bulletin*, the official newsletter of the OPP, as one of the organisations the public can contact for alternative assistance on how and where to get redress.

The CEO said that the OPP has a good relationship with the ruling party, the African National Congress, but opposition parties have been known to try to use the Public Protector to fight their own political battles with other political parties or to score political points, particularly at election time.

#### **THE SAHRC'S INTERACTION WITH THE PUBLIC, POLITICAL PARTIES AND CIVIL SOCIETY ORGANISATIONS**

According to the CEO, the commission sees all South Africans as shareholders in the institution. The public has very high expectations of the SAHRC but no objective standard exists to measure the extent to which the commission has realised these expectations.

Although the commission could do more in terms of its mandate the CEO felt that with the resources at its disposal it has served the public well, despite persistent challenges, although some might disagree.

Since 2005 the commission has featured in the media at least three times a week and has recorded between 10000 and 15000 hits a month on its website, according to the CEO, who believed the success was the outcome of 14 years of hard work that now make the SAHRC a powerful brand.

The SAHRC has published various materials for public consumption in line with its mandate to promote human rights. These include booklets, brochures, newsletters, reports and, recently, a journal. They are aimed at providing information to ordinary South Africans on their rights, the obligations of the state and non-state entities in terms of these rights, the remedies available for human rights violations and how these remedies can be accessed and /or made available. In addition, the commission has a presence in all nine provinces. However, surveys point to a lack of public awareness of the commission, particularly in rural areas.

The SAHRC has a broad mandate which it arguably cannot implement on its own, hence the need to forge partnerships with CSOs. CSOs can contribute to protecting and promoting human rights by creating awareness about human rights issues, conducting training and research in the field of human rights, participating in human rights campaigns, and providing legal advice. While the SAHRC does not have a model of engagement with CSOs it has been able to develop good informal relationships with some of them.

Among those are human rights and legal organisations such as the Community Law Centre at the University of the Western Cape, for research; ProBono.org, to improve access to justice; and ODAC, in relation to the Openness Awards, awarded to individuals and government departments for promoting access to information. The commission has been in partnership with several other CSOs to host specific events.

The CEO believes that political parties, in the main, respect the commission because it is non-partisan. The commission endeavours not to let political parties use it as a political tool and rarely receives complaints from them.

## KEY RESEARCH FINDINGS

The main findings of the research, as per the main themes of the research questions, can be summed up as follows:

Firstly, in terms of the legal framework, the Constitution and establishing Acts constitute a desirable legal basis for promoting democracy and meet the normative international and continental standards, except for some outdated provisions in the HRC Act.

Secondly, the Public Protector and the Human Rights Commission have proved to be important institutions in South Africa's democracy and have made a valuable contribution to protecting and promoting democracy and constitutional rights, but challenges persist relating to their institutional governance and effectiveness. Resource and capacity constraints hamper the effectiveness of both institutions.

With regard to the OPP, limited resources prevent it from attracting and retaining highly qualified investigators. With regard to the HRC, the constraints relate to inadequate human resources to fulfil its broad-ranging mandate. Corporate governance principles such as strategic planning and performance monitoring are becoming institutionalised in both institutions to enhance their effectiveness. However, public disclosure of interests is not mandatory and, at best, only informal internal arrangements exist for such disclosure. There is an argument that the prevailing funding arrangement, whereby the two institutions are funded through the Department of Justice and Constitutional Development, is not ideal and undermines their autonomy. This is an issue for the OPP, which explained that this arrangement has been a constraining factor in its work. However, it is not an issue for the SAHRC.

Thirdly, there are overlaps between the two institutions and between them and other DPIs. However, collaboration and cooperation among the DPIs is weak and they sometimes compete with each other.

Fourthly, the two DPIs interact and relate differently to government. The OPP is content with its relationship with the executive insofar as it responds to the OPP's requests for information, cooperates during investigations and complies with its recommendations. On the other hand, the SAHRC views its relationship with the executive as a major challenge to its work. The executive is frequently uncooperative and the SAHRC has, on occasion, had to subpoena Cabinet ministers and request Parliament's intervention in dealing with the executive.

Despite the fact that they comply with their reporting requirements to Parliament both the OPP and the SAHRC state that Parliament has not engaged sufficiently with their reports and does not work closely with them to enhance its oversight role over the executive.

Finally, the OPP defines its interaction with the public by its constitutional obligation to be accessible to all persons and communities in South Africa. However, since several reports have shown that the Public Protector is one of the least known DPIs, the office has embarked on a number of outreach activities, including collaborating with CSOs, to remedy this. The SAHRC, the most widely known of the DPIs, sees the public as shareholders in the institution and, given its broad mandate, has forged partnerships with several CSOs.

## CONCLUSION

In the past 15 years South Africa has succeeded in establishing the necessary formal structures of democracy and the rule of law, but there have been gaps in implementation. Moreover, even with safeguards in place to protect them from political interference, events in the run-up to the April 2009 elections and created by the power contest within the ruling party have shown how state institutions can be used for political expediency.

A judge of the Supreme Court of Appeal, when handing down a ruling, asserted that the National Prosecuting Authority (NPA) case against President Jacob Zuma had been subjected to a 'baleful political influence' and subsequently charges of corruption, racketeering, money laundering, fraud and tax evasion against the ANC president, now president of the Republic, were dropped because of evidence of a political conspiracy between its former officials and former president Thabo Mbeki (*The Economist* 2009).

This and other examples, such as the dismissal of Vusi Pikoli as National Director of Public Prosecutions; the corruption charges against former Police Commissioner Jackie Selebi; and the battle between the Constitutional Court and Cape Judge President John Hlophe, suggest that the threat of the erosion of institutional integrity is very real. This raises the question of whether these public institutions are indeed able to withstand shocks caused by powerful actors seeking to use them for their own benefit (Seedat 2009). On the other hand, the Public Protector's apparent deference to the executive and, as a corollary, the ruling party, displayed in his reluctance to investigate fully high-profile cases implicating politicians, and the narrow interpretation of his mandate undermine constitutional democracy by protecting the few and not the many.

There is great anticipation and interest surrounding the appointment by the new government of a new Public Protector to succeed the



outgoing Public Protector, whose term expires in November 2009, and the chairperson and some of the commissioners of the HRC, whose terms expired in September 2009. How the new Parliament will handle the findings of the parliamentary review of the Chapter 9 and other institutions, led by Prof Kader Asmal, specifically, the recommendation to merge the SAHRC, the CGE and other bodies into one human rights body will also be of interest. Whether stakeholders will be supportive of or resistant to the implementation of the recommendations also remains to be seen. Indeed, some of the recommendations made in this report were mentioned in the parliamentary review, showing that they are yet to be dealt with.

It is hoped that research such as this will contribute to other efforts to review the performance of DPIs and that it will be possible to build on this work to conduct more holistic and in-depth research into these institutions and citizens' perceptions of them.

## POLICY RECOMMENDATIONS

Based on the findings of the research and taking cognisance of the fact that DPIs do not operate in a vacuum and need other well-functioning national institutions to function optimally in turn, the following recommendations are directed at the DPIs, Parliament and the executive.

- They must improve their internal governance. The leaders of both institutions should develop and adopt policies to promote transparency in the disclosure of the private interests of commissioners and senior officials to guard against conflicts of interest.
- The SAHRC should strengthen its monitoring of ESRs in order to enhance their effectiveness and should exercise its powers more vigorously where government departments are not complying in this regard. The Ministry of Finance should allocate additional financial resources to the two institutions to enable them to strengthen their infrastructure, deepen their work and step up their public outreach, education and awareness campaigns.
- Connected with the above, but also in the interests of promoting the independence of the DPIs, the current funding model should be reviewed jointly by Parliament, the Ministry of Finance and the leaders of the DPIs, with a view to giving Parliament and the DPIs a say in their budget allocations, without eroding the separation of powers.
- Interaction with other DPIs, particularly those with a human rights mandate, should be strengthened, systematised and made more visible. The heads of the DPIs need to pursue this actively and Parliament should encourage closer collaboration among them.

- To improve the interaction between the institutions and government Parliament must adopt an effective procedure for considering and debating the reports submitted to it. Further, Parliament needs to establish a structure to oversee DPIs, with the dual aim of ensuring that they spend public funds usefully and that their decisions/recommendations comply with the law, and tapping into them as a resource in fulfilling its oversight responsibilities and ensuring that their recommendations are implemented. The executive should also be more cooperative about furthering the work of these institutions by complying with its legal requirement to report to the SAHRC on ESRs and on the promotion of access to information.
- Parliament should ensure that the appointees who succeed the Public Protector and the SAHRC commissioners whose terms come to an end in the course of 2009 support the institutions' demands for autonomy. While recognising the rights of majority parties and the political dynamics in social systems to determine key appointments to public office, the role, function and mandate of the OPP and the SAHRC may be so fundamental to the promotion and protection of citizen rights that it might be worth considering making the appointments on a cross-party consensus basis without necessarily depoliticising the process.
- The government of the Republic of South Africa should ratify the African charter on Democracy, Elections and Governance adopted in 2007 by member states of the African Union and apply the Charter, particularly Article 15, which deals with the institutionalisation and effectiveness of DPIs.

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**ENDNOTES**

- 1 South Africa is rife with human rights abuses. These include police use of torture against suspects and prisoners, lengthy delays in trials, prolonged pre-trial detention, vigilante and mob violence, hate crimes, xenophobic violence, rape, severe overcrowding in prisons, forcible dispersal of demonstrations, pervasive violence against women and children, societal discrimination against women and persons with disabilities, racial discrimination, rape, human trafficking, child labour and child prostitution. High levels of poverty persist and community protests over poor service delivery are common.
- 2 The Paris Principles are a set of broad general standards which apply to all national human rights commissions (human rights commissions, specialised commissions and offices of the ombudsman) regardless of structure or type. They were endorsed by the UN Commission on Human Rights in Resolution 1992/54 of March 1992 and by the UN General Assembly in Resolution 48/134 of 20 December 1993.
- 3 Article 15 states that state parties shall establish public institutions that promote and support constitutional order; ensure that the independence or autonomy is guaranteed by the constitution; ensure that these institutions are accountable to competent national organs; and provide these institutions with resources to perform their assigned functions effectively.
- 4 Under the apartheid regime the Office of the Advocate General, an ombudsman-like institution, existed but it did not live up to the democratic ideals with which the institution is associated.
- 5 These areas are scored against quantitative indicators and a qualitative researcher's notebook. Data from the different indicators are aggregated and used to generate a score for each category and an overall country score.
- 6 Unsubstantiated sexual harassment claims, dealing with internal matters through the media and a vague job description were the reasons for the degeneration in the relationship between the Public Protector and his deputy.
- 7 Prior to the amendment of the Act, in 2003, South Africa had the unique case of the Public Protector being appointed by the president through the legislature while the Deputy Public Protector was appointed by the executive through the Minister of Justice and Constitutional Development, posing a potential threat to the independence of the OPP.
- 8 Perhaps the most prominent example was the 'Oilgate' scandal exposed by the media in 2004 when PetroSA, a parastatal, advanced R15-million to Imvume Holdings, a company contracted to provide oil condensate for PetroSA's operations. Imvume diverted R11-million to the ANC (allegedly for its 2004 election campaign) instead of paying its supplier. Subsequently PetroSA repaid the amount to the supplier, resulting in a further loss of public funds. The Public Protector found that there was no maladministration on the part of PetroSA and that the R15-million lost its designation as public money when it was paid by PetroSA and was therefore beyond his jurisdiction.
- 9 These accusations persist, despite the well-executed 'Roll Back Xenophobia' campaign initiated by the commission in 1998 and the public hearings it held jointly

with Parliament in 2004. The hearings identified the role of government as key to any effort to combat xenophobia meaningfully.

- 10 See public opinion survey conducted by the Community Agency for Social Enquiry for the ad hoc committee on the review of chapter 9 institutions, which indicated that only 42 per cent of the respondents had heard of the Public Protector and 65 per cent had heard of the SAHRC. See also Mubangizi 2004, who writes that 66.4 per cent of the respondents had not heard of the Public Protector and 49.7 per cent had no knowledge of the SAHRC.

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### **Respondents**

Themba Mthethwa, Chief Executive Officer, Office of the Public Protector

Tseliso Thipanyane, Chief Executive Officer, South African Human Rights Commission

## APPENDIX

*Questionnaire*

<b>A. General</b>
1. How long has your institution been in existence? How and why was it established?
2. Please provide a description of your understanding of your institution's constitutional/legal mandate. Does it include a right of initiative?
3. What role or function does your institution perform that is not carried out by other institutions, whether in government or civil society?
4. What other democracy protection institutions exist in your country? How does your institution relate to them?
5. In what way, if any, does the role and function of your institution overlap with or potentially overlap with that of the other democracy protection institutions?
6. Does the founding legislation provide a clear, workable and comprehensive legal framework that supports and empowers the institution to successfully fulfil its core mandate?
7. What outcomes do you strive for in order to realise the constitutional/legal mandate set out in 1 above? How often do you engage in strategic planning?
8. What have been /are the major constraints facing your institution and how have these impacted on its ability to achieve its mandate?
<b>B. Institutional effectiveness</b>
9. What mechanisms are in place to deal with public complaints, to follow through on such complaints and to successfully resolve them?
10. How many cases/ complaints have been brought to you over the last year?
11. How many of these were resolved? How many are outstanding and what are the reasons for this?
12. How do you measure and assess your own effectiveness? What instruments do you use for monitoring and evaluation purposes?
13. Have you carried out any external evaluation looking at the successes or otherwise of your functions?
14. Do you produce annual reports? If so, are they publicly available?
15. What strategies do you employ in carrying out public outreach and ensuring public trust of your institution?



<b>C. Independence</b>
16. How do you view your relationship with the executive and parliament?
17. How do you view your relationship with political parties (both ruling and opposition)?
18. What legal and other mechanisms are in place to ensure and strengthen the institution's independence?
19. Who is your institution accountable to?
20. What is the extent of collaboration and coordination of the work carried out by your institution and similar/ related work carried out by other institutions of a similar nature?
21. What safeguards exist to protect your institution from political encroachment?
<b>D. Institutional governance</b>
22. What are the institutional governance arrangements in your institution? Are these arrangements clearly set out and do they allow for a smooth running of the institution? Do you embrace gender issues? What suggestions do you have to improve institutional governance arrangements?
23. Is there a clear, logical and workable division between the members of your institution appointed by President (on advice of the National Assembly) and the Secretariat?
24. Does your institution have mechanisms in place to deal with internal conflict in your institution? If yes, what are these mechanisms and are they effective?
25. What mechanisms are in place for Chief Executive Officers, Chairpersons and Commissioners to disclose and / or seek permission for private / commercial / financial interests or involvement as well as membership in any organisation? Are such mechanisms effective or sufficient to ensure transparency and avoid conflict of interest?
<b>E. Interaction with the public and non-state actors</b>
26. What is the extent of collaboration and coordination of the work carried out by your institution and similar/ related work carried out by non-state actors?
27. What was the intended relationship between your institution and the public? To what extent has this relationship been realised?
28. Does your institution have mechanisms in place to deal with complaints by the public about the work done by your institution or the failure to attend to issues?
29. How accessible are the offices of your institution to the public?
30. What kind of complaints do the public bring to you?

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31. Do the public have a sufficient appreciation of your role and mandate?
32. Are public expectations of your institution realistic/ unrealistic?
<b>F. Resources</b>
33. Is your institution funded through a designated ministry/ government department or through the consolidated fund voted directly by parliament?
34. Please give an indication of your budget allocation, additional funding and expenditure over the past five years.
35. Please illustrate the budget process followed by your institution, including the process of allocation of funds.
36. Please provide detailed information of the remuneration packages for office-bearers and Commissioners.
37. Are the current budgetary and administrative arrangements sufficient to ensure autonomy of democracy protection institutions?
38. To what extent are the resources allocated to your institution directly spent on meeting its key responsibilities?
39. What are the resource constraints faced by your institution?
40. How does this hamper the work of your institution?

## ABOUT EISA



EISA is a not-for-profit and non-partisan non-governmental organisation which was established in 1996. Its core business is to provide technical assistance for capacity building of relevant government departments, electoral management bodies, political parties and civil society organisations operating in the democracy and governance field throughout the SADC region and beyond. Inspired by the various positive developments towards democratic governance in Africa as a whole and the SADC region in particular since the early 1990s, EISA aims to advance democratic values and practices and to enhance the credibility of electoral processes. The ultimate goal is to assist countries in Africa and the SADC region to nurture and consolidate democratic governance. SADC countries have received enormous technical assistance and advice from EISA in building solid institutional foundations for democracy. This includes: electoral system reforms; election monitoring and observation; constructive conflict management; strengthening of parliament and other democratic institutions; strengthening of political parties; capacity building for civil society organisations; deepening democratic local governance; and enhancing the institutional capacity of the election management bodies. EISA was formerly the secretariat of the Electoral Commissions Forum (ECF) composed of electoral commissions in the SADC region and established in 1998. EISA is currently the secretariat of the SADC Election Support Network (ESN) comprising election-related civil society organisations established in 1997.

### **VISION**

An African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment

### **MISSION**

EISA strives for excellence in the promotion of credible elections, participatory democracy, human rights culture, and the strengthening of governance institutions for the consolidation of democracy in Africa

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## **VALUES AND PRINCIPLES**

Key values and principles of governance that EISA believes in include:

- Regular free and fair elections
- Promoting democratic values
- Respect for fundamental human rights
- Due process of law / rule of law
- Constructive management of conflict
- Political tolerance
- Inclusive multiparty democracy
- Popular participation
- Transparency
- Gender equality
- Accountability
- Promoting electoral norms and standards

## **OBJECTIVES**

- To enhance electoral processes to ensure their inclusiveness and legitimacy
- To promote effective citizen participation in democratic processes to strengthen institutional accountability and responsiveness
- To strengthen governance institutions to ensure effective, accessible and sustainable democratic processes
- To promote principles, values and practices that lead to a culture of democracy and human rights
- To create a culture of excellence that leads to consistently high quality products and services
- To position EISA as a leader that consistently influences policy and practice in the sector

## **CORE ACTIVITIES**

- Research
- Policy Dialogue
- Publications and Documentation
- Capacity Building
- Election Observation
- Technical Assistance
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