



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions

**A report to the National
Assembly of the Parliament of
South Africa**

31 July 2007

Members of the Committee:

Hon Prof AK Asmal, Chairperson, (ANC), Hon Mr S L Dithebe, (ANC), Hon Ms C Johnson, (ANC), Hon Adv T M Masutha, (ANC) - replaced by Hon Mr C V Burgess, (ANC), Hon Mrs M J J Matsomela, (ANC), Hon Dr J T Delport, (DA) – replaced by Hon S M Camerer (DA), Hon Ms M Smuts, (DA), Hon Mr J H van der Merwe, (IFP), Hon Mrs S Rajbally, (MF), Hon Mr S Simmons, (UPSA)

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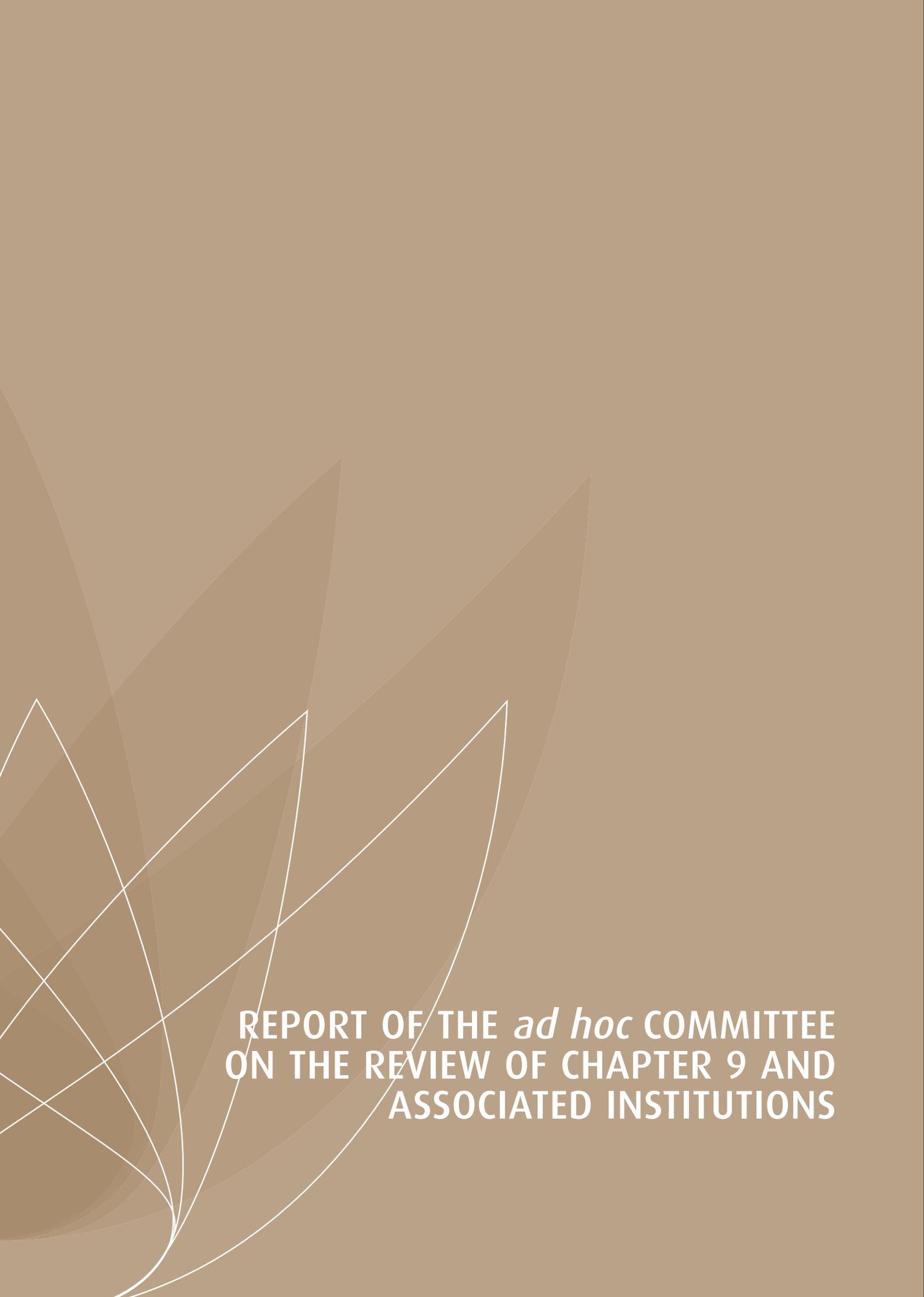
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TABLE OF CONTENTS

Foreword	v	General conclusions	63
Executive summary	viii	Recommendations	63
Chapter 1 Context	2	Chapter 5 The Auditor-General	66
Introduction	3	Background	67
Approach and methodology	5	Constitutional and legal mandate	68
Guiding Principles	9	Findings	69
Conclusion	17	General conclusions	77
		Recommendations	78
Chapter 2 Common Issues and Key Recommendations	18	Chapter 6 The Public Service Commission	80
Financial matters and budget allocations	19	Background	81
Appointments	21	Constitutional and legal mandate	81
Relationship with Parliament	26	Findings	84
Institutional governance arrangements	32	General conclusions	92
Accessibility	35	Recommendations	93
A single human rights body	37	Chapter 7 The Public Protector	94
Chapter 3 The Electoral Commission	42	Background	95
Background	43	Constitutional and legal mandate	96
Constitutional and legal mandate	43	Findings	97
Findings	45	General conclusions	106
General conclusions	50	Recommendations	106
Recommendations	51	Chapter 8 The National Youth Commission	108
Chapter 4 The Financial and Fiscal Commission	54	Background	109
Background	55	Constitutional and legal mandate	110
Constitutional and legal mandate	55		
Findings	56		

Findings	110	Constitutional and legal mandate	167
General conclusions	116	Findings	171
Recommendations	116	General conclusions	184
		Recommendations	185
Chapter 9 The Pan South African Language Board	118	Chapter 13 The Independent Communications Authority of South Africa	188
Background	119	Background	189
Constitutional and legal mandate	119	Constitutional and legal mandate	192
Findings	120	Findings	192
General conclusions	129	General conclusions	202
Recommendations	129	Recommendations	202
Chapter 10 The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities	132	Chapter 14 Conclusion	204
Background	133	Annexures	
Constitutional and legal mandate	133	Selected Constitutional provisions	206
Findings	135	Table 1. Comparison of provisions relating to appointment to and removal from office, as well as remuneration and conditions of service of office bearers	219
General conclusions	142	Table 2. Membership, date of appointment and expiry of office	228
Recommendations	143	List of Chapter 9 and other statutory institutions in which the National Assembly has a role to play	232
Chapter 11 The Commission for Gender Equality	146	Terms of reference	236
Background	147	Questionnaire	240
Constitutional and legal mandate	148	List of submissions and representations	244
Findings	150	Report on the Public opinion survey	248
General conclusions	162		
Recommendations	162		
Chapter 12 The Human Rights Commission	166		
Background	167		



**REPORT OF THE *ad hoc* COMMITTEE
ON THE REVIEW OF CHAPTER 9 AND
ASSOCIATED INSTITUTIONS**

FOREWORD

It is an honour to present to the National Assembly the outcome of an intensive, robust and comprehensive process engaged in by the Committee in carrying out its assigned task. This report on the Review of Chapter 9 and Associated Institutions documents the first ever parliamentary review of a set of institutions that are at the core of consolidating, growing and sustaining our hard-fought democracy.

The individual and collective experiences and wisdom of the Members enriched and invigorated our discussions. While maintaining the necessary respect for the independence and dignity of the institutions, Members asked probing and sometimes difficult questions that allowed us to present our findings and recommendations with confidence and conviction.

The work of the Committee would have been difficult without the team of dedicated support staff assigned by the Speaker. These energetic and enthusiastic professionals provided secretarial, research and legal support that enabled the Committee to complete its work successfully with the minimum amount of disruption. In particular, the Committee would like to thank the core report-drafting team who were charged with organising, processing and analysing the large volume of information received and distilling the key issues for the attention of the National Assembly. The Committee also appreciates the assistance of two external consultants in the drafting and editing of the report.

The Committee feels that the report would be of interest to six main constituencies, in no order of importance or preference:

- **The eleven institutions reviewed.** It is hoped that the institutions will use the information, particularly the recommendations,

presented in the report for the primary purpose of strengthening the institutions and enhancing their efficiency and effectiveness.

- **Members of Parliament.** Individual Members of Parliament should look at the elements of the report relating to ways in which their individual and collective oversight work could be conducted more effectively to further support and improve the institutions reviewed. In particular, the interaction of Members of Parliament with citizens during their constituency work becomes critical in increasing citizens' access to information and services of the institutions.
- **The public.** The general public should take a keen and active interest in the contents of the report because the institutions reviewed were designed to protect, promote and enhance the rights of citizens. The institutions are expected to assist people to vindicate their rights. The effectiveness and efficiency with which the institutions discharge their duties have a direct bearing on the quality of life of all South Africans, but particularly the poor, marginalised, rural and previously disenfranchised.
- **The Executive.** The Executive initiated this review and then referred it to the National Assembly. As many of the recommendations have direct relevance for the Executive, it is important that there should be engagement between the Executive and Parliament on the substance of the recommendations and the approach that Parliament would take in ensuring their implementation and monitoring.
- **The National Assembly and Parliament.** The report was agreed to unanimously by

the Committee and is hereby presented to the National Assembly for its consideration. If adopted, it is respectfully suggested that the National Assembly and Parliament should determine a programme of action to ensure the implementation and monitoring of the recommendations as adopted. It would be important for Parliament to address the Executive in determining its programme of action, and in particular to consult on how the Executive, on its side, wishes to address the matters raised in the report.

- **The media.** The media may be expected to play an enormously important role not only in popularising the content of this report and providing critique and analysis, but also in drawing attention to the work and the constitutional obligations of the institutions reviewed (and all other organs of state).

A historic duty rests with the National Assembly to address the issues raised in the report. This important challenge for the National Assembly, and for Parliament, comes at the right time when there is a high degree of interest in the institutions reviewed.

The report begins with a brief introduction on

the context of the Committee's brief, the establishment of the institutions reviewed and the approach and methodology adopted by the Committee. It then elaborates a set of principles that guided the work of the Committee, and discusses the issues that were considered generic to all the institutions reviewed and presents key recommendations in this regard. The report then discusses each institution in detail and makes specific recommendations for each institution.

The Committee commends this report to the National Assembly.

Hon Prof AK Asmal, Chairperson, (ANC)
Hon Mr S L Dithebe, (ANC)
Hon Ms C Johnson, (ANC)
Hon Adv T M Masutha, (ANC), replaced by Hon Mr C V Burgess, (ANC)
Hon Mrs M J J Matsomela, (ANC)
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Hon Ms M Smuts, (DA)
Hon Mr J H van der Merwe, (IFP)
Hon Mrs S Rajbally, (MF)
Hon Mr S Simmons, (UPSA)

31 July 2007
National Assembly, Cape Town





EXECUTIVE SUMMARY

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1. Background to review

With the advent of democracy in South Africa in 1994, a human rights culture was made the cornerstone of the new constitutional dispensation and a wide-ranging set of human rights, including socio-economic rights, was inscribed in a Bill of Rights and incorporated in the Interim Constitution of 1993 and repeated in the final Constitution of 1996.

From the outset the leadership in South Africa was determined that those rights would not just remain rights on paper, but would be actively realised, promoted and entrenched in the interests of all the people and particularly of the poor and the marginalised and those whose human rights had been consistently violated and abused for generations. The object was the complete transformation of our society from a culture that was oppressive, secretive and profoundly disrespectful of basic human rights into a human rights based culture in which the human dignity of all is both respected and celebrated.

In order to achieve this goal, a range of institutions were established in the Constitution itself and in national legislation, the purpose of which was to strengthen constitutional democracy in South Africa by the active promotion of a culture of human rights and the protection, development and attainment of those rights, including monitoring and assessing their implementation and observance. Each of the institutions was meant to focus on a particular sector of society where the need for transformation was felt to be greatest. Reflecting the government's determination to achieve this transformation, these institutions uniquely were made independent of government so that they could exercise their powers and perform their vital functions without fear, favour or prejudice,

being accountable only and directly to the people's democratically elected representatives in the National Assembly.

Ten years into the new democracy, the government thought it was opportune to assess the extent to which society had been transformed and human rights entrenched through the operation of these institutions. Such a review would identify their effectiveness and relevance, individually and collectively, and the requirements to strengthen them further to ensure that they were best able to achieve their objectives.

2. Appointment of Committee

As the institutions had specifically been made independent of government, the Executive felt it to be inappropriate for it to undertake such a review itself and therefore requested the National Assembly to conduct a review. Accordingly, the National Assembly on 21 September 2006 by resolution appointed a multi-party *ad hoc* committee for this purpose.

The Committee, which was to report by 30 June 2007, a date subsequently extended to 31 July 2007, was given detailed terms of reference. It was required to review the state institutions supporting constitutional democracy as listed in Chapter 9 of the Constitution (the so-called Chapter 9 institutions) as well as the Public Service Commission as established in Chapter 10 for the purpose, in the first instance, of broadly assessing whether the current and intended constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy, and whether a rationalisation of function, role

or organisation is desirable or will diminish the focus on important areas. The Committee was further also to conduct its review with reference to other organs of state of a similar nature whose work related closely to the work of the aforementioned institutions.

Turning to the individual institutions, the Committee was also specifically tasked with –

- reviewing the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability;
- reviewing institutional governance arrangements in order to develop a model of internal accountability and efficiency;
- improving the co-ordination of work between the institutions covered in this review, as well as improving co-ordination and co-operation with government and civil society;
- recognising the need for a more structured oversight role by Parliament in the context of their independence; and
- reviewing the funding models of the institutions, including funding derived from transfers and licences and other fees, with a view to improving accountability, independence and efficiency.

3. Institutions reviewed

The Committee in accordance with its terms of reference conducted a review of the Chapter 9 institutions, namely the Public Protector, the 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 and the Electoral Commission, as well as the Public Service Commission.

In addition, the Committee included in its review the Pan South African Language Board, the Financial and Fiscal Commission, the Independent Communications Authority of South Africa and the National Youth Commission. All of these, with the exception of the last-mentioned, are covered in the Constitution itself and enjoy special status. All eleven are in their different spheres engaged in strengthening the fabric of our constitutional arrangements.

These institutions were established at different times and are at different stages of development. The Committee took this into account.

4. Approach and methodology

The approach and methodology of the Committee are set out in detail in Chapter 1 of this report. The Committee engaged extensively with the relevant institutions themselves, relevant Ministries and departments, relevant parliamentary committees and the public and civil society. The Committee also commissioned a public opinion survey, based on a questionnaire developed by it, to get a general sense of public awareness of the institutions.

In order to ensure consistency in the Committee's approach to its work, it elaborated a range of guiding principles and criteria against which the institutions were measured, namely the aspects guaranteeing their independence, accountability mechanisms and practices, and the effectiveness of the institutions. All of these were examined within the

framework of the indivisibility, interdependence and interrelatedness of human rights.

Each of the institutions was examined in respect of its constitutional and legal mandate and the institution's understanding and interpretation of that mandate; its powers and functions; appointment procedures for office-bearers; public awareness of the institution; its relationship with Parliament, the Executive, and (other) Chapter 9 and associated institutions; its institutional governance arrangements; and its financial arrangements. A separate chapter in the report is accordingly devoted to each institution in which these issues are reported on in detail, which is followed by general conclusions and findings, and recommendations specific to the institution aimed at resolving identified problems and shortcomings and generally strengthening the institution.

5. Findings and recommendations on common issues

Pursuant to its mandate to assess in broad terms whether the current and intended legal mandates of the institutions are suitable for the South African environment, whether their consumption of resources is justified in relation to their outputs and contribution to democracy and whether a rationalisation of function, role or organization is desirable or will diminish the focus on important areas, the Committee in Chapter 2 examines a range of broad issues in respect of which common difficulties and lack of consistency and coherence in approach were identified. The Committee then, in this all-important Chapter, makes fully motivated findings and recommendations, which respond to its broad mandate on these issues. The findings and recommendations can be summarised in outline as follows:

5.1. FINANCIAL MATTERS AND BUDGET ALLOCATIONS

Noting that the different institutions follow different and inconsistent funding processes and recognising that their financial independence is an important indicator of their true independence, the Committee recommends that their budgets should be contained in a separate programme in Parliament's Budget Vote, the required processes to this end to be negotiated with National Treasury.

5.2. APPOINTMENTS

Allowing for variation depending on the different mandates, powers and functions of the institutions, a reasonable degree of consistency in appointments is required and appointment procedures should be consistent with upholding and protecting the independence of these institutions. Specifically –

- selection criteria should be adjusted;
- the role of Ministers in appointments should be removed;
- appointments should be staggered to enhance continuity;
- chairpersons should be appointed either by the institutions themselves or by the relevant parliamentary committee; and
- public involvement in appointment processes should be enhanced.

5.3. RELATIONSHIP WITH PARLIAMENT

The Committee notes that the institutions are accountable to the National Assembly, but stresses that they also complement and are supportive of Parliament's oversight function. The Committee examines both aspects of the institutions' interaction with Parliament and

finds that Parliament's engagement with the institutions currently is wholly inadequate. Recommendations are made to effect improvements. In particular, a unit on constitutional institutions and other statutory bodies should be set up in the office of the Speaker to co-ordinate all interactions with these institutions, and the capacity of portfolio committees to engage with substantive reports of these institutions should be significantly enhanced.

5.4. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

The Committee finds that internal tensions have been experienced in most of the institutions. This is often the result of the absence of clear lines of authority between the members of the institution, its head and the secretariat. The Committee recommends that enabling legislation be reviewed to clarify lines of authority where necessary.

The Committee finds further that there is no uniformity concerning the determination of the remuneration and conditions of service of the members of the institutions. However, section 219(5) of the Constitution provides for the establishment of a framework by national legislation for determining these. Such legislation should be adopted urgently and be made applicable to all the affected institutions. This could possibly be achieved by amending the Independent Commission for the Remuneration of Public Office-Bearers Act.

Present arrangements for the regulation of conflicts of interest differ widely between the institutions. The Committee recommends that the enabling legislation should be amended to provide a coherent and comprehensive framework in this regard.

5.5. ACCESSIBILITY

The Committee finds that the institutions are largely urban-based and recommends that they should be innovative to ensure they become more accessible to the public, especially in rural areas. At the same time, it could not confirm the usefulness of provincial offices where such have been established and holds that such offices should be established only where a demonstrable need can be shown.

5.6. A SINGLE HUMAN RIGHTS BODY

The Committee finds that the multiplicity of institutions created to protect and promote the rights of specific constituencies in South Africa has in practice resulted in an uneven spread of available resources and capacities, with implications for effectiveness and efficiency. This has created fragmentation, confounding the intention that these institutions should support the seamless application of the Bill of Rights.

The Committee therefore proposes the establishment of an umbrella human rights body to be called the South African Commission on Human Rights and Equality, into which the National Youth Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board) and the Commission for Gender Equality should be incorporated together with the Human Rights Commission.

The Committee accepts that this process of amalgamation will neither be easy nor speedy, but it should be finalised within a reasonable time. It therefore recommends that as a first step a task team be set up consisting of the heads of the relevant institutions and a number of members of the National Assembly to pro-

duce a roadmap to guide the process, the task team to report to the National Assembly within 12 months.

6. Findings and recommendations on individual institutions

In the context of the Committee's findings and recommendations on identified issues common to all the institutions under review and the proposed establishment of an umbrella human rights commission in the medium term, the Committee in separate chapters examines and makes findings and recommendations on the individual institutions with a view to resolving specific problems and generally strengthening their effectiveness and efficiency. These would be interim and immediate measures in the case of those institutions, which would in due course be amalgamated into the umbrella body.

The full findings and recommendations are detailed in the respective chapters. For purposes of this summary a few are highlighted:

1. Co-ordination and co-operation between the institutions in a revived Forum of Independent Statutory Bodies should be actively encouraged.
2. Relevant institutions should publish the number, nature and outcomes of complaints they have received. Where complaints are referred to another body, progress should be tracked.
3. The legal mandate for engagement in international work, where applicable, should be clarified.
4. Codes of conduct and registers of financial interest should be kept and be made accessible.
5. Innovative ways must be found to promote public awareness of the respective institutions.
6. The failure of state departments and other organs of state to respond to recommendations made by the respective institutions should be pertinently brought to the attention of Parliament.
7. Motivated recommendations are made to alter the composition of specified institutions.
8. Formal agreements should be entered into between relevant institutions to prevent any possibility of duplication or overlap of functions.
9. The institutions need to develop strategies to attract and retain staff.
10. The National Youth Commission's mandate should be widened to encompass both children and the youth.
11. Concerning the Pan South African Language Board, its lexicography units should be transferred to the Department of Arts and Culture, and the Board itself should be incorporated in the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as a joint activity in a relatively short period. According to legal advice this could be achieved without necessarily amending the Constitution.

12. For purposes of ensuring a smooth transition to a consolidated body, the Committee recommends that a task team be set up consisting of three members of each of the affected bodies together with six members of the National Assembly, preferably from the relevant portfolio committee. The task team should report within 12 months.
13. Regarding the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, see the recommendation above relating to the Pan South African Language Board.
14. The Commission on Gender Equality Act, which is out of date, should be amended as soon as possible to bring it into line with the Constitution.
15. For purposes of coherence and consistency, the oversight and accountability of the Commission for Gender Equality should be located with the National Assembly component of the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, which should for that purpose also be formalised in the Assembly rules as a separate committee of the Assembly.
16. Concerning the Human Rights Commission, pending the establishment of the proposed umbrella human rights commission the Department of Justice and Constitutional

Development should without delay introduce amending legislation to bring the Human Rights Commission Act into line with the Constitution and in the process make provision for other specified issues.

17. Further, Parliament should initiate the speedy appointment of at least two more Commissioners to the Human Rights Commission, one of whom should be designated to deal with the rights of disabled persons and the other with the right of access to information.

18. The Independent Communications Authority of South Africa Act should be amended to make the President rather than the relevant Minister responsible for the appointment of Councillors. Other specified issues should also be covered in the amending legislation.

7. Conclusion

The Committee expresses the hope that the institutions that have been reviewed will use the information contained in this report, and particularly the detailed recommendations, for the primary purpose of strengthening them and enhancing their efficiency and effectiveness.

The Committee agreed to the report unanimously.



CHAPTER 1

CONTEXT

1. Introduction

Emerging from a racially divided and oppressive past, where basic human rights were violated in the extreme by an illegitimate government that failed to honour even the most basic tenets of the rule of law, South Africa crafted a Constitution that is unique and far reaching in its provisions. Amongst others, it established an array of constitutionally protected institutions created to strengthen democracy and to promote respect for human rights in our society.

The new, democratically elected government inherited a state, which was farcically bureaucratic, secretive and unresponsive to the basic needs of the majority of its citizens. Most of the state institutions had little or no credibility and were profoundly distrusted by the majority of the people.

For some constitutional negotiators it was therefore clear that in order to transform South African society from an intensely oppressive society into an open and democratic society based on human dignity, equality and freedom would require more than a change in the system of government. It would be necessary to create a set of credibly independent institutions whose task it would be to strengthen constitutional democracy.

It was envisaged that these independent institutions would support constitutional democracy because they would, amongst others, help to:

1. Restore the credibility of the state and its institutions in the eyes of the majority of its citizens;
2. Ensure that democracy and the values associated with human rights and democracy flourished in the new dispensation;

3. Ensure the successful re-establishment of, and continued respect for, the rule of law; and
4. Ensure that the state became more open and responsive to the needs of its citizens and more respectful of their rights;

Many civil society groups who had come to distrust the apartheid State and its institutions more broadly or who were eager to see new institutions emerge that would be tasked to attend to the particular concerns of constituents, strongly advocated for the establishment of independent institutions that would look after their particular concerns about, for example, language rights, gender rights or human rights in general.

At the time, a widely shared belief emerged that at least some of these institutions were necessary to enhance democracy and, more importantly, to empower the citizens of South Africa. Many South Africans are poor and marginalised and will not be able to enforce their rights without assistance from independent bodies such as those established by the Constitution. These institutions are of fundamental importance to democracy exactly because they have been empowered to act on behalf of those who would not otherwise gain access to courts or other mechanisms for enforcing their rights.

To guarantee their independence and protection from undue influence and interference, the constitutional negotiators deemed it appropriate to afford these institutions maximum protection by providing for their establishment and independence under the Constitution. To that end Chapter 9 of the Constitution established six key institutions, the Public Protector, the

South African Human Rights Commission, the Commission for Gender Equality, the Auditor-General, the Electoral Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to strengthen constitutional democracy in South Africa. Our Constitution also makes provision for the establishment of an independent authority to regulate broadcasting in Chapter 9. Certain other related institutions, such as the Public Service Commission and the Financial and Fiscal Commission and the Pan South African Language Board were established in other Chapters of the Constitution.

These institutions have come to play a vital role in the development and consolidation of democracy in South Africa. Yet, almost as a testimony to the robustness of the developing South African democracy and the enormous expectations of a liberated South African society, these institutions have been the subject of criticism by politicians and civil society, including the media.

Nine years after the adoption of the final Constitution and ten years after the attainment of democracy in South Africa, the Executive considered it necessary to evaluate the progress made towards the consolidation of democracy and the promotion and protection of constitutional rights, values and principles in South Africa.

As part of this national process, the Government recognised the necessity to review the effectiveness and relevance of the institutions created during the constitution-making process to gain a better understanding of how they could be further assisted and supported with a view to strengthening them. Cabinet therefore tasked the Minister of Public Service and

Administration in February 2005 with conducting a review of Chapter 9 institutions and the Public Service Commission.

The correct location of this review received particular attention early in the review process, given the constitutionally guaranteed independence of these institutions. It soon became clear that it was not the Executive but the National Assembly of Parliament, which was the appropriate body to conduct such a review. Section 181(5) specifically states “these institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year”. It was therefore appropriate that the National Assembly should undertake the task of reviewing these institutions. The Constitution in fact compels the National Assembly to do so. Therefore on 18 July 2006 the Cabinet Committee on Governance and Administration recommended that Parliament conduct the review.

Section 181(3) of the Constitution requires all other organs of state to assist and protect these institutions and to ensure their independence, impartiality, dignity and effectiveness and the Executive initiated the review process, in part, to give effect to these constitutional duties.

As a result, on 21 September 2006, the National Assembly adopted a resolution establishing an *ad hoc* committee to review State institutions supporting constitutional democracy (the so-called “Chapter 9” institutions) and the Public Service Commission established in Chapter 10 of the Constitution.¹ The resolution included terms of reference mandating the Committee to review these institutions, for the purpose of:

¹ Composition of the *ad hoc* Committee: Members: Hon. Prof. Kader Asmal (Chairperson), Hon. Mr S L Dithebe, Hon. Ms C Johnson, Hon. Adv T M Masutha - replaced by Hon. Mr C V Burgess, Hon. Mrs M J J Matsomela, Hon. Dr J T Delpont - replaced by Hon. Ms SM Camerer, Hon. Ms M Smuts, Hon. Mr J H van der Merwe, Hon. Mrs S Rajbally, Hon. Mr S Simmons. Parliamentary support staff: Dr. L Gabriel, Mr. M Philander, Ms. C Silkstone, Mr. T Molukanele, Adv A Gordon (Adv M Vassen as alternate), Ms. T Sepanya, Ms. L Monethi, Ms. J Adriaans, Mr T Schumann, Mr E Nevondo. Additional technical support staff: Prof. P De Vos (UWC), Mr. A Kamieth (intern), Mr. K Hahndiek (former Secretary to the National Assembly)

1. Assessing whether the current and intended constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy, and whether a rationalisation of function, role or organisation is desirable or will diminish the focus on important areas;
2. Reviewing the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability;
3. Reviewing institutional governance arrangements in order to develop a model of internal accountability and efficiency;
4. Improving the co-ordination of work between the institutions covered in this review, as well as improving co-ordination and co-operation with government and civil society;
5. Recognising the need for a more structured oversight role by Parliament in the context of their independence; and
6. Reviewing the funding models of the institutions, including funding derived from transfers and licences and other fees, with a view to improving accountability, independence and efficiency.

The Committee was also authorised to conduct its review with reference to other organs of state of a similar nature whose work was closely related to the work of the institutions specifically mentioned in the resolution.

At its first meeting on 10 October 2006 the Committee therefore decided that in addition to

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 referred to in Chapter 9 of the Constitution and the Public Service Commission referred to in Chapter 10 of the Constitution it would include in its review the Pan South African Language Board established in Chapter 1 of the Constitution, the Financial and Fiscal Commission referred to in Chapter 13 of the Constitution, the Independent Communications Authority of South Africa also covered in Chapter 9 of the Constitution and the National Youth Commission. The review therefore covered 11 institutions in all.

For ease of reference, the Committee agreed to be officially referred to as the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions.

The Committee was required to submit its report to the National Assembly by 30 June 2007. This was subsequently extended to 31 July 2007. The Terms of Reference are contained in annexure 4 of this report.

The Committee elected Professor Kader Asmal as Chairperson.

2. Approach and Methodology

2.1. APPROACH

Given the national importance of the review and the public interest in the institutions under review, the Committee placed great emphasis on devising a methodology and approach that would maximise public input and awareness of its work.

Engagement with the institutions themselves was considered to be necessary and a priority. It was considered important that there was a shared understanding and appreciation of the terms of reference of the Committee between the Committee and the institutions under review, amongst the institutions themselves and amongst the public at large. The Committee accordingly commenced its work with a meeting with the heads of the eleven institutions. The Committee highlighted the fact that its review would focus specifically on the institutional matters and political considerations specified in the terms of reference. The institutions all pledged their collaboration with the Committee and support for the review process.

In formulating an approach to its work, the Committee emphasised the following key considerations:

1. With the exception of the National Youth Commission all institutions under review were products of the constitution-making process and therefore the relevant provisions of the Constitution, read together with the terms of reference of the Committee, should be the point of departure for the deliberations and recommendations.
2. Given the major challenges facing the developmental state, the Committee agreed that even thirteen years after the advent of the new constitutional order, the work done by the various institutions was vital for deepening democracy and promoting a human rights culture in South Africa. Emphasis would thus be placed on whether the institutions were effective in fulfilling their mandates. Where they were not, remedial action to ensure that the laudable and important goals set for these institutions would be achieved in a cost-effective, efficient and people-centred manner would be recommended.
3. The institutions are at different stages of development due largely to them being established at different times.
4. Each institution fulfilled a different function and no two institutions could be said to have exactly the same constitutional status. The Committee therefore wishes to underscore the fact that the institutions had each to be treated according to its particular merits.
5. Distinction could be drawn, for example, between institutions that strengthen constitutional democracy through the promotion and protection of human rights, and the investigation and settlement of complaints regarding the violation of these rights, such as the Human Rights Commission, the Commission for Gender Equality and the Pan South African Language Board and those whose purpose lies in occupying key democratic institutional positions and fulfilling fundamental democratic roles and functions, such as the Auditor-General, the Electoral Commission and the Financial and Fiscal Commission.
6. In crafting recommendations, a focus on strengthening the institutions should be paramount. In forwarding recommendations for immediate consideration, the Committee recognised the challenge for Parliament in amending legislation. However some of the Acts pertaining to the institutions are out of date and do not accurately reflect the constitutional order.
7. The Committee feels that constitutional amendments should be avoided. Recommendations requiring constitutional amendments and/or radical institutional reorganisation should be considered for future implementation.

8. Public participation processes should ensure as much public access and opportunity for input into the work of the Committee as is possible.

2.2. METHODOLOGY

2.2.1. Engagement with institutions under review

To ensure the completeness of information received from the institutions under review, the Committee developed a questionnaire based on its terms of reference. The questionnaire consisted of 25 questions organised into five sections: the role and functions of the institutions, their relationships with other bodies, institutional governance, their interaction with the public, and financial and other resource matters. A copy of the questionnaire is presented in annexure 5 of this report.

On 20 October 2006 the Committee met with the heads of all institutions under review to apprise them of the terms of reference of the Committee and to inform them about administrative aspects of the questionnaire. The Committee commends the institutions for submitting their responses to the questionnaire within the stipulated deadline.

Responses to the questionnaire, annual reports of the institutions, special reports published by the institutions, media reports, public submissions and submissions from civil society organisations formed the basis of interactions between the Committee and individual institutions held between 24 January and 14 March 2007. During these encounters, the Committee requested the institutions to clarify further certain aspects of the matters raised in their responses to the questionnaire since some of the reports appeared to be too general. The

Institutions were also afforded the opportunity to inform the Committee of any relevant information that might not in their view have been adequately covered in the questionnaire.

The Committee invited the institutions to make supplementary written submissions where necessary.

The Committee was pleased to note the interest of Members of Parliament in its interactions with the institutions under review. Chairpersons of the Portfolio Committee on Justice and Constitutional Development, the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Children, Youth and Disabled Persons were present during the Committee's encounter with the National Youth Commission. The Chairperson of the Standing Committee on the Auditor-General was present and gave a presentation during the Committee's encounter with the Auditor-General. The Acting Chairperson and several members of the Portfolio Committee on Communications were present during the Committee's encounter with the Independent Communications Authority of South Africa. Members of Parliament attended the Committee meeting with the Commission for Gender Equality.

2.2.2. Engagement with the public and civil society

During November and December 2006 and January 2007, the Committee advertised for submissions from the public in various national and regional newspapers. Members of the public were invited to share their experiences relating to the institutions under review. The Committee received a number of submissions from individuals.

Furthermore, the Committee invited nearly 150 civil society organisations, including groups focusing on human rights, labour and business, and academic and legal institutions to make written submissions. After consideration of the written submissions, the Committee invited several civil society organisations and research institutions to make oral submissions on the institutions under review.

In order to get a general sense of the extent of public awareness of the institutions, the Committee commissioned a research institute to conduct a public opinion survey. The survey was based on a questionnaire developed by the Committee. The questionnaire was administered to 2500 respondents nationally. The outcomes of the survey are presented in a full report contained in annexure 7 of this report.

2.2.3. Engagement with relevant Ministries and Departments

The Committee addressed letters to the appropriate Ministers, which were copied to the corresponding Departments, to draw their attention to the mandate of the Committee and to invite written submissions on the institutions with which they are associated. The following Ministries were requested for information: Arts and Culture, Communications, Education, Finance, Home Affairs, Justice and Constitutional Development, Minister in the Presidency, Provincial and Local Government and Public Service and Administration.

After consideration of the written submissions received, the Committee invited the Ministers of Communications, of Finance and of Justice and Constitutional Development to make oral submissions. The oral submissions to a lesser or greater extent covered matters such as the independence of Chapter 9 and associated

institutions, the proposed funding model for Chapter 9 and associated institutions, the role of the directorate responsible for Chapter 9 institutions in the Department of Justice and Constitutional Development and the proposed constitutional and legislative amendments relating to the Independent Communications Authority of South Africa.

2.2.4. Engagement with relevant Parliamentary Committees

Letters were also sent to a number of Chairpersons of parliamentary committees to invite them to submit written comment on the institutions. Information was requested from the following Committees: Portfolio Committee on Arts and Culture, Portfolio Committee on Communications, Portfolio Committee on Education, Portfolio Committee on Finance, Portfolio Committee on Home Affairs, Portfolio Committee on Justice and Constitutional Development, Portfolio Committee on Pro-vincial and Local Government, Portfolio Committee on Public Service and Administration, Standing Committee on the Auditor-General, Standing Committee on Public Accounts, Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Disabled Persons, and Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women.

The Chairperson of the Portfolio Committee on Justice and Constitutional Development and the Chairperson of the Standing Committee on the Auditor-General were invited to make oral submissions to the Committee.

A full list of submissions is contained in annexure 8 of this report.

3. Guiding Principles

To ensure consistency in the approach of the Committee to each institution, and to maintain its focus, it was necessary to identify a set of guiding principles derived from the terms of reference of the Committee, the relevant provisions of the Constitution including the authoritative Constitutional Court interpretations of some of the Constitutional provisions and international literature on related institutions.

These guidelines provided the framework within which the institutions were reviewed.

The Committee adopted the following guiding principles:

3.1. INDEPENDENCE

Sections 181, 191, 196 and 220 of the Constitution guarantee the independence of most of the institutions under review. Section 181(2) furthermore provides that the Chapter 9 institutions “must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice”. Moreover section 181(3) requires other organs of state to “assist and protect these institutions” to ensure their “independence, impartiality, dignity and effectiveness”. Section 181(4) furthermore states that “no person or organ of state may interfere with the functioning of these institutions”.

The Constitution also guarantees the independence of other institutions, such as the Public Service Commission (section 196(2), (3)), the Broadcasting Authority (section 192) and the Financial and Fiscal Commission (section 220(2)).

It is noteworthy that there is no explicit constitutional provision for the independence of the

Pan South African Language Board. The independence of the Board is provided for in the Act pertaining to the Board.

In the two Constitutional Court judgments directly dealing with Chapter 9 Institutions, and another decision dealing with the concept of independence in more general terms, the Constitutional Court provided some helpful guidelines for looking at the notion of independence of these institutions. These guidelines have been duly factored in and are referred to in greater detail below.

3.1.1. General test for independence

The Constitutional Court set out a general test that could be used to judge the independence of an institution in its judgement in *Van Rooyen and Others v S and Others*². According to the Constitutional Court, the determining factor is whether, from the objective standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence.

The judgement said that in determining independence consideration should be given to the perception of independence by a well-informed and objective person. Such person should be guided by the social realities of South Africa and the Constitution, particularly the values contained in the Constitution and the differentiation it makes between the different institutions.

The factors such an observer may look at to determine whether an institution is independent or not are: financial independence; institutional independence with respect to matters directly related to the exercise of its constitutional mandate, especially relating to the institution’s control over the administrative

² 2002 (8) BCLR 810 (CC).

decisions that bear directly and immediately on the exercise of its constitutional mandate; appointments procedures and security of tenure of appointed office-bearers.

3.1.2. Not part of government

The Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality*³ that, although a Chapter 9 institution such as the Electoral Commission is an organ of state as defined in section 239 of the Constitution, these institutions cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority. These institutions are state institutions and are not part of the government. Independence of the institution refers to independence from the government. The Court could not agree that these institutions would be subject to the constitutional provisions of co-operative government when they are in fact independent from government.⁴ This means that Chapter 9 institutions are *not* (Committee's emphasis) subject to the co-operative government provisions set out in Chapter 3 of the Constitution. These institutions perform their functions in terms of national legislation, but "are not subject to national executive control".⁵ They are part of governance but not part of government.

There is a need for these institutions to "*manifestly be seen to be outside government*" (Committee's emphasis). The judgement lays down that a very clear and sharp distinction must be drawn between these institutions and the Executive authority and no legislative provision or action by the Executive that would create an impression that the institution is not manifestly outside government would be constitutionally acceptable.

The relationship between Parliament and the institutions is different since they are accountable to the National Assembly. The independence of the institutions must, however, be maintained.

3.1.3. Organs of state must assist and respect

Another aspect of independence can be found in section 181(3) which provides that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the *independence, impartiality, dignity and effectiveness* (Committee's emphasis) of these institutions and section 181(4) which states that no person or organ of state *may interfere* (Committee's emphasis) with the functioning of these institutions. Similar provisions for the Public Service Commission are contained in section 196(3) of the Constitution and are made in legislation pertaining to other bodies such as the Independent Communications Authority of South Africa.

From these provisions a few conclusions can be drawn. Firstly, independence is not synonymous with impartiality. Just because a body is able to exercise its duties impartially does not necessarily mean that its independence has been safeguarded. Independence is in essence a more encompassing concept than impartiality. The specific aspects of independence are elaborated later in this chapter.

Secondly, other organs of state have a constitutional duty to ensure the dignity of the Chapter 9 and Chapter 10 institutions. In various judgements dealing with dignity in other contexts the Constitutional Court has argued that dignity will be impaired when action sends a signal that the institution is not worthy of respect. This does not mean institutions should not and can-

³ 2001 (9) BCLR 883 (CC).

⁴ *Ibid.* par 28-29.

⁵ *Ibid.* Par 31.

not be criticised and subjected to questioning, but such questioning should be done with due regard to the independence of these institutions.

Lastly, organs of state have a duty to ensure the effectiveness of these institutions. This is done as part of the accountability and oversight mechanisms established by Parliament and within the context of the independence of the institutions.

3.1.4. Financial independence

The Constitutional Court affirmed the basic principle that Chapter 9 and Chapter 10 institutions must have some degree of financial independence in order to function independently and to be able to exercise their duties without fear, favour or prejudice. At the same time the Constitutional Court made it clear that this did not mean that these institutions could set their own budgets. What was required was for Parliament to provide a reasonable amount of money that would enable the institutions to fulfil their constitutional and legal mandates. It is important to note that this task is clearly one to be exercised by Parliament. As the Court indicated: “It is *for Parliament, and not the executive arm of government* (Committee’s emphasis), to provide for funding reasonably sufficient to enable the [Chapter 9 institutions] to carry out [their] constitutional mandate.” The Court accepted that there would inevitably be a tension between the government/Parliament on the one side and the independent institution(s) on the other about the reasonableness of the amount of money to be provided to ensure the effective fulfillment of its constitutional mandate. To determine the reasonable amount of money an institution requires is, however, easier said than done.

It is incumbent upon the parties to make every effort to resolve that tension and to reach an agreement by negotiation and acting in good faith. This, according to the Constitutional Court, would no doubt entail considerable meaningful discussion, exchange of relevant information, a genuine attempt to understand the respective needs and constraints and the mutual desire to reach a reasonable conclusion.⁶ Hence, when Parliament engages in this process it must deal with requests rationally, in the light also of other national interests.

This means the institutions must be afforded an adequate opportunity to defend their budgetary requirements before Parliament or its relevant committees. Thus “no member of the executive or the administration should have the power to stop transfers of money to any independent constitutional body without the existence of appropriate safeguards for the independence of that institution.”

In the light of the indication in the Treasury submission to the Committee of the National Treasury’s acceptance of the role of Parliament in the determination of budgets, the Committee will have to determine what mechanisms should be put in place to ensure that the budget process safeguards the independence of these institutions.

3.1.5. Administrative independence

In the case of the *NNP v Minister of Home Affairs*, the Constitutional Court laid down that the independent bodies supporting democracy require more than financial independence. For these institutions to operate independently and for them to fulfill their respective tasks without fear, favour or prejudice, the Constitutional Court said that the administrative independence of these institutions should be safeguard-

⁶ *New National Party* par 97.

ed. This implies that these institutions must have control over those matters that are directly connected with their functions under the Constitution and the relevant legislation.

No matter what arrangements Parliament or the Executive might make, it is important that the institutions retain the ability to maintain operational control over their core business. What is required, therefore, is that no such arrangements should equate to interference with the constitutional mandate of the bodies to perform their duties impartially.

In the *New National Party* case the Constitutional Court made it clear that section 181(3) requires the Executive to engage with the bodies in a manner that would ensure that the efficient functioning of the Commission is not hampered.

The Constitutional Court further indicated that a failure on the part of the Executive to comply with such obligations “may seriously impair the functioning and effectiveness of those State institutions supporting constitutional democracy and cannot be condoned”. This means that neither Parliament nor the Executive can interfere directly in the day-to-day running of these institutions, can instruct the institutions on day-to-day matters regarding their programmes and implementation, or can get directly involved in the employment or management of staff by these institutions.

At the same time Parliament and the Executive have a duty to support these institutions and, if institutional problems are of such magnitude or seriousness that they make it difficult or impossible for an institution to fulfill its constitutional and legislative tasks, Parliament can - indeed must - assist such institutions to resolve such problems. There was cause for such occasion in

July 2006 when Parliament appointed an *ad hoc* Committee to resolve operational issues arising from an alleged dispute within the office of the Public Protector.

Such assistance must not, however, have the effect of removing control over matters directly connected with an institution’s functions and must not hamper the efficient functioning of the institution.

In short, while Parliament and the Executive can engage with these institutions to assist them to improve their performance, they cannot do so in a way that would remove control over the administration from the institutions or that would result in interference in the functioning of these institutions.

The Constitutional Court referred to the fact that the Department of Home Affairs cannot tell the Electoral Commission how to conduct registration, whom to employ, and so on. If the Commission asks the government to provide personnel to assist in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be provided with adequate funds to enable it to do what is necessary.

At present, the institutions under review display a wide array of arrangements regarding the involvement of the Executive and/or Parliament in their administration. For example, the Public Protector and the Commission for Gender Equality must consult the Minister of Finance when appointing staff. While this might be a practical measure related to confirmation of financial resources, such arrangements should be framed within the purview of the independence of these bodies. This would avoid any perception that these arrangements infringe on the independence of these institutions.

Perhaps more serious is the example of the Public Service Commission in respect of which the Minister of Public Service and Administration has the power through legislation to appoint the Director General of the Commission.

The possible effect of such administrative arrangements on the independence of these bodies is unclear. Therefore, the Committee considered whether such arrangements are appropriate and if not what other arrangements should be put in place to ensure accountability without interfering with independence. This is discussed later in this report.

3.1.6. Independence and appointments/removals procedures

The general provisions in sections 193 and 194 of the Constitution provide for the appointment and removal of the Public Protector, the Auditor-General and the members of the various Commissions established in Chapter 9 of the Constitution. Similar provisions are made in Chapter 10 for the Public Service Commission and in Chapter 13 for the Financial and Fiscal Commission.

When required to certify whether the proposed Constitution of 1996 met the provisions of the values of the Constitution identified in the Constitutional principles laid down in the 1993 Constitution, the Constitutional Court found that the provision that would allow for a dismissal of the Auditor-General or the Public Protector by a simple majority of the members of the National Assembly did not comply with the requirements of independence, given the fact that the Auditor-General would act as a watchdog over the government.

The appointment of the Auditor-General, the

Public Protector and the various Commissioners (with the exception of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities) is assigned to a Committee of the National Assembly, proportionally composed of members of all parties represented in the Assembly.⁷ This is mainly done through the establishment of *ad hoc* Committees. The Committee feels that given the nature and composition of *ad hoc* Committees and the specific knowledge required to effectively recommend appointments to a Commission or other constitutional body, a more appropriate mechanism is required. Recommendations are made in this regard later in this report.

The general provisions of the Constitution in section 193 do not specify the process for the appointment. However, section 193(6) read with section 59(1)(a) provides for the facilitation of the involvement of civil society in the recommendation process. The Committee considered whether the current practice of inviting civil society bodies to nominate candidates is sufficient or whether other practical and reasonable mechanisms should be devised to enhance the participation of civil society. The Committee makes a specific recommendation later in this report as to how this could be achieved.

Regarding removal from office, it is important to note that no general authority is in fact given to the National Assembly for the removal from office of the Auditor-General, the Public Protector or Commissioners. This can only be done on objective grounds, including "misconduct, incapacity and incompetence".⁸ This means that these office-holders cannot be removed from office on any other ground without an amendment of the Constitution.

⁷ Section 193(5).

⁸ Section 19(1)(a), section 196(11)(a).

The Constitution does not contain any provisions for the appointment and dismissal of members of the Independent Broadcasting Authority that must be set up in terms of section 192 of the Constitution. The Constitution, section 192, does however require this authority to be independent and to act in the public interest.

Applying the general principle set out by the Constitutional Court, it is clear that members of the Authority should have some degree of protection against dismissal if, from the objective standpoint of a reasonable and informed person, the perception is to be supported that the institution enjoys the essential conditions of independence as described earlier. At the very least this should require that members of the Authority should not be subject to dismissal on non-objective grounds relating to choices they have made, but only on objective criteria such as incapacity, misconduct or incompetence. The 2000 Act provides for this.

It is interesting to note that in relation to the dismissals procedure the Constitution makes a distinction arising out of the nature and authority of the office. Regarding the Auditor-General and the Public Protector, the former requires a 60% vote of the members of the National Assembly for removal from office and the latter requires a simple majority. The Committee feels that the same arrangements for the Auditor-General should also have been applied to the Electoral Commission.

3.1.7 . Limits to independence

In *Van Rooyen and Others v S and Others* (as well as in the *First Certification Case*), the Constitutional Court made it clear that the requirements of independence will not be the

same for all bodies whose independence is being guaranteed. Each institution should be approached differently. This means that, depending on the nature and mandate of the institution; the stringency of the requirements for independence may differ. An institution dealing with complaints against the legislature and Executive such as the Public Protector will require more vigorous protection of its independence to ensure the legitimacy of the institution in the eyes of the public.

Thus, some basic principles can be identified to establish the minimum requirements for independence. As indicated earlier, there is a constitutional imperative for these institutions to be seen not to be part of government. Thus, any involvement of the Executive in the daily operations or institutional arrangements of an independent institution would be constitutionally unacceptable. Even where the President is given a role like the power to appoint members of the various commissions, this is a formal role.

The National Assembly is given the constitutional authority to deal with the independent institutions and has a constitutional duty to hold these institutions to account. Again, this excludes any interference in the daily operations or institutional arrangements of these institutions. Parliament can - and indeed has a constitutional duty in this regard - enact legislation that will allow these institutions to fulfill their constitutional mandates in an *effective* (Committee's emphasis) manner. However, two essential requirements must be met in respect of any intervention by Parliament or the National Assembly: First, an intervention must not interfere with the final control over the finances or administration of the relevant institution; and, second, it must not give rise to a reasonable apprehension of interference amongst informed individuals.

The difference in the powers and functions of the Chapter 9 and associated institutions therefore determines the extent of authority of the National Assembly and touches on their independence.

3.2. ACCOUNTABILITY OF THE CHAPTER 9 AND ASSOCIATED INSTITUTIONS

In considering the concept of accountability, distinction must be drawn between accountability and the interrelated concept of oversight. Often, these concepts are used interchangeably, yet they have very distinct and precise purposes and functions. In a report prepared for the Joint Rules Committee of Parliament in July 1999,⁹ it is stated that accountability “implies a relationship [defined by] a hierarchy and a duty of a body to explain and justify its conduct to another body”. The Constitution is specific regarding the accountability of Chapter 9 institutions, the Public Service Commission and the Financial and Fiscal Commission to the National Assembly or Parliament in sections 181(5), 196(5) and 222 respectively.

While there is no constitutional provision for accountability of the Independent Communications Authority of South Africa, the Pan-South African Language Board and the National Youth Commission, the Acts establishing these institutions require their annual reports to be tabled in Parliament.

In terms of section 181(5) of the Constitution, state institutions supporting constitutional democracy “are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year”. This requires reporting to the National Assembly on the implementation of their mandates and expenditure of public funds. Similarly, the associated

institutions report to the National Assembly or Parliament through their annual reports. Parliament, and specifically the National Assembly, must provide for mechanisms to ensure such accountability. The crucial component of the accountability mechanism is the structures, systems and processes established by Parliament to engage effectively with the reports it receives.

Oversight refers to the role played by the legislature in assessing the performance and conduct of organs of state and recommending action for improvement. Section 55(2)(b) of the Constitution empowers the National Assembly to conduct oversight over any organ of State. The interrelatedness of accountability and oversight is evident in the types of reports issued by Chapter 9 and associated institutions that serve to inform and complement Parliament’s oversight of specific matters. Such “special reports” would require different processes and exposure in Parliament.

While oversight is continuous, accountability refers to a particular instance, incident or event.

Furthermore, in the report mentioned above, reference is made to “*amendatory accountability*”. This refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered.

As mentioned earlier, in the case of the Public Protector, the National Assembly conducted an inquiry in 2006 at the request of the Public Protector through the Office of the Speaker, arising out an alleged dispute in the Office of the Public Protector. It is important to note that the accountability mechanism put in place by the National Assembly in this instance *assisted* the Public Protector.

⁹ Corder H, Jagwanth S, Saltau F (1999): Report on Parliamentary Oversight and Accountability

Due consideration must be given to ensuring that the oversight role of Parliament and the accountability mechanisms established do not infringe on the independence of Chapter 9 and associated institutions.

3.3. EFFECTIVENESS

Assessing the effectiveness and efficiency of Chapter 9 and associated institutions was a critical component of the terms of reference of the Committee. Effectiveness refers to more than a quantitative assessment of output, but rather a quantitative and qualitative assessment of outcomes. Section 181(3) of the Constitution compels other organs of state to assist and protect Chapter 9 institutions to ensure their effectiveness.

In addition, the Committee draws the special attention of all bodies established by the Constitution to the provisions of section 237, which is headed “diligent performance of obligations”. This section states that all constitutional obligations must be performed diligently and without delay. The importance of examining effectiveness is that it shifts the focus from inputs and outputs to an outcomes-based assessment of the projects, programmes and policy implementation of the institutions. The assessment therefore goes beyond concerns about whether an institution is fulfilling its constitutional and legal duties efficiently and examines the relevance, impact and quality of the institutions. “Relevance” would elaborate on whether the institutions address a particular need and “impact” would assess the extent to which the need is addressed.

3.4. INDIVISIBILITY, INTERDEPENDENCE AND INTERRELATEDNESS OF HUMAN RIGHTS

Traditionally, a distinction was made between civil and political rights on the one hand and social and economic rights on the other. Social and economic rights were regarded as claims against the State and therefore not equal to civil and political rights.

The Bill of Rights in our Constitution contains both civil and political rights and social and economic rights. It is based on the widely accepted idea that all rights are universal, indivisible, interdependent and interrelated as affirmed in the Vienna Declaration and Programme of Action of 1993. Any assessment of the appropriateness and effectiveness of Chapter 9 and associated institutions must therefore take this into account.

Given our particular history, the indivisibility and interrelatedness between political and civil rights, on the one hand, and socio-economic rights, on the other, cannot be denied. Without socio-economic rights, political and civil rights cannot exist in a meaningful way and vice versa. With due recognition to the challenges faced by the State, our Constitution makes provision for the progressive realisation of social and economic rights, with the exception of basic education including basic adult education, which is peremptory.

What this means in practice is that a true constitutional democracy encompasses more than simply providing people the opportunity to vote. Socio-economic rights, such as the right

to adequate housing, basic services, water and health care are fundamental rights in the sense as they go to the heart of vulnerable groups' most basic survival needs.

Furthermore, providing for both civil and political rights, and also socio-economic rights in the Constitution, meant giving actual substance and content to the notion of equality. These rights aim to create a "minimum civic equality", which in turn allows people to fully exercise their political and civil rights. For example, a person would arguably be more willing and able to exercise their civil and political rights, when their basic needs of food, shelter, adequate health care and basic services have been met.

The drafters of our Bill of Rights realised the indivisibility and interdependence of human rights. Within the South African context, for our Constitution to have "a meaningful place in the hearts and minds of the citizenry" it had to address the "pressing needs of ordinary people". It could not be seen to "institutionalise and guarantee only political/civil rights and ignore the real survival needs of the people – it must promise both bread and freedom"¹⁰.

The Committee thus had to assess whether the current and intended constitutional and legal mandates of the constitutional bodies enhanced the promotion and protection of human rights in general, given the interrelated nature of human rights.

It could be argued that because of the interdependence and indivisibility of rights, there could be a danger that a proliferation of human rights bodies could result in the creation of gaps in services and support to the public and furthermore could create tremendous confusion regarding public access to recourse for remedial action. Where there are various bodies dealing with human rights matters, well-structured and effective co-ordination amongst the bodies, efficient record-keeping and document management and compatible systems and processes are vital to ensure that services to the public are accessible, comprehensive and that duplication of work is kept to a minimum. The Committee had to assess whether one single "umbrella" human rights body would not be better suited to give content to the indivisibility and interdependence of human rights by creating a seamless and focused approach to human rights as a whole.

4. Conclusion

With due regard to its terms of reference and having established a set of principles to guide its work, the Committee now turns to the review of each of the institutions. The Committee begins with distilling the common issues and makes key recommendations in this regard.

¹⁰ Haysom 1992: 454

CHAPTER 2

COMMON ISSUES AND KEY RECOMMENDATIONS

During the course of its deliberations it soon became evident to the Committee that there are a number of issues common to the institutions being reviewed that require its attention. While the precise difficulty that these broad issues present might differ from one institution to the next, when viewed collectively it is apparent that a lack of consistency and coherence in approach is ultimately undermining of their individual, and even common, efforts.

Accordingly, the Committee is of the view that a number of these arrangements merit urgent review for the purposes of identifying a more systematic approach, particularly those regarding funding and budgets, the appointment of commissioners, collaboration between the institutions, internal governance arrangements and the relationship of the institutions with Parliament.

1. Financial matters and budget allocations

As discussed earlier in this report, financial independence is an important indicator of the independence of the Chapter 9 and associated institutions. The Committee is therefore concerned at the inconsistent accounts it received from the institutions under review as to their budget processes. The Committee learnt that the institutions follow different funding processes, some institutions enjoying more autonomy in those processes than others.

With the exception of the Public Service Commission, which has its own Budget Vote, the budgets of all the institutions are located within the budget appropriations of various national government departments. For example, the budget allocations for the Human Rights Commission, the Commission for Gender

Equality and the Public Protector can be found in the Vote of the Department of Justice and Constitutional Development, while the National Youth Commission has its budget allocation within the Presidency's Vote. However, the departments do not have any authority to adjust the allocations to these institutions, acting merely as a conduit for the transfer of monies to the relevant institutions. Most of the institutions, however, indicated that while they submit their budget proposals directly to National Treasury, they are not able to defend their budget submissions and seldom receive the allocations that they request.

The Committee notes that the institutions reviewed expressed general unhappiness with the budget processes and in some instances their budget allocations.

The Committee believes that the location of the budgets of the institutions within the budget allocations of specific government departments impacts negatively on the perceived independence of the institutions and creates a false impression that the institutions are accountable to the respective government departments for the use of their finances. The Committee's view in this regard is shared by National Treasury, who referred in its submission to the general presumption that agencies that are funded through departmental Budget Votes are accountable to the respective departments. While the institutions under review are not agencies of the government, it appears that this distinction is not always apparent in practice in the relationship between the institutions and government departments.

Therefore, the Committee concludes that the budget processes of the institutions should be revised to accomplish a greater degree of standardisation and to promote and protect the

independence of the institutions. In its evidence to the Committee, the National Treasury suggests that consideration be given to the location of the budgets of certain of these bodies in the Budget Vote of Parliament in recognition of the fact that these bodies are accountable to the National Assembly.

Given that the institutions under review each have specific mandates and, furthermore, that their budgets and financial arrangements differ, the Committee is in agreement with National Treasury that the institutions whose budgets could be provided for in Parliament's Budget Vote would include those institutions whose mandates require express independence from the Executive. These institutions include the Electoral Commission, the Human Rights Commission, the Public Protector, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Financial and Fiscal Commission. The Committee feels, however, that it is invidious and unsatisfactory to distinguish between bodies, which, apart from the National Youth Commission, are all described by legislation as independent bodies. The Committee therefore does not accept the recommendation of the National Treasury in this regard.

The Committee also considers strange the National Treasury's contention that the current location of the budget of the Auditor-General within the National Treasury Budget Vote is satisfactory, given the special relationship between National Treasury and the Auditor-General and the fact that the Auditor-General provides services on a cost-recovery basis.

The Committee therefore recommends as follows:

a) The budgets of all bodies identified by the Constitution and which are included in this review should be part of Parliament's Budget Vote. This is elaborated hereunder.

- Since most of the institutions are accountable to the National Assembly and Parliament maintains oversight over them, the Committee is of the view that Parliament's Budget Vote would be a more appropriate location for the budgets of the institutions.

- Furthermore, the Committee highlights the requirement for Parliament to establish or identify appropriate structures and mechanisms to ensure an effective and efficient budget process.

- The process should be negotiated with National Treasury and should afford the institutions adequate opportunity to motivate their budget submissions directly to National Treasury before decisions on the budget allocations are taken. If such an arrangement is agreed to, the programme within Parliament's Budget Vote for these institutions would still fall under the Public Finance Management Act and would be subject to accountability and audit arrangements common to other organs of state.

b) The Committee understands that all the Chapter 9 and associated institutions fall within the purview of the Standing Committee on Public Accounts. The Committee therefore reiterates that the Standing Committee should exercise its jurisdiction over these bodies more fully.

2. Appointments

The matter of appointment procedures was the area in which the Committee received the largest number of representations.

The effectiveness and efficiency of the appointment procedures are critical, especially given the role of Parliament in this regard. The Committee considers this important because Parliament does not sit throughout a year. An *ad hoc* or a portfolio committee usually makes recommendations to the National Assembly. Therefore, the procedures must fit into the agendas of committees and must be taken into consideration when the programme of Parliament is being worked out. The Committee makes this point because some proposals made in submissions to the Committee did not appear to take into account the sessional nature of the parliamentary timetable.

There are significant differences in the appointment processes of commissioners and members of the Chapter 9 and associated institutions. The appointment procedures are detailed in Annexure 2.

The Committee acknowledges that the different mandates, powers and functions of the institutions mean that their composition and appointment procedures cannot be identical and that, as such, it would be incorrect to apply a 'one-size-fits-all' approach to appointments. Nevertheless, the Committee maintains that a reasonable degree of consistency is required but that there must in fact be variation allowed.

Furthermore, the Committee acknowledges that any appointment procedure should be consistent with the principle of upholding and protecting the independence of the institutions.

2.1. SELECTION CRITERIA

The Constitution makes general provisions for the appointment of the Public Protector, the Auditor-General and the Commissioners of the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. Under section 193, certain selection criteria and procedures are elaborated. These include the requirements that appointees to these institutions must be South African citizens must be fit and proper persons to hold the particular office. A further requirement is that the composition of the Commissions must reflect the race and gender composition of South Africa.

Furthermore, section 193(3) stipulates that specialised knowledge of, or experience in, auditing, state finances and public administration are additional requirements that must be taken into account when appointing the Auditor-General.

In addition, a number of other constitutional provisions are applicable:

- Section 186 requires that the composition of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities must be broadly representative of the main cultural, religious and linguistic communities and must broadly reflect the gender composition of South Africa.
- Section 196(10) requires that a person appointed to the Public Service Commission must have knowledge of, or experience in, administration, management or the provision of public services.

The selection criteria for commissioners of other institutions are elaborated in the specific legislation establishing the respective institu-

tions. Some inconsistencies are evident in the elaboration of appointment procedures in the respective legislation.

The Committee feels that additional criteria should include interest or a record of involvement in matters related to the functions of the specific body. This would apply to all bodies reviewed, with the exception of the Auditor-General.

The Committee is concerned about the lack of availability of sufficient people for appointment to these bodies. There is also insufficient representation of rural people in the Commissions. The Committee feels that it is up to Parliament to ensure that the pool is enlarged. Advertisements should be placed in newspapers. These should be supplemented by discussions on radio.

In submissions received by the Committee, some civil society groups suggested that individuals with high political profiles should be disqualified from appointment to any of the Chapter 9 or associated bodies. These submissions pointed to the provisions of the Electoral Act, which bars individuals with a high political profile from appointment to the Electoral Commission. The Committee is of the view, however, that, given South Africa's political history, it would be unacceptable to place an absolute ban on the appointment of individuals who had been actively involved in politics. Such restriction would disqualify many prominent and worthy candidates from possible appointment to a Chapter 9 institution. However, the Committee adds two qualifications to this view.

Firstly, any individual who holds a high-level position in a political party or other political entity and is appointed to a Chapter 9 or asso-

ciated institution must resign from that post on being appointed.

Secondly, any member of a Chapter 9 or associated institution who becomes a candidate for a political party in the election for a legislature, whether at local, provincial or national level, should resign his or her membership of the Chapter 9 or associated institution immediately. The Committee views this as being in accordance with the general practice in the public service and in other similar bodies such as higher education institutions.

2.2. ROLE OF PRESIDENT AND MINISTERS

The Committee notes that there is no uniform approach to appointments. The bodies were set up at different times and there is no central body dealing with appointments. Apart from the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Financial and Fiscal Commission, the National Assembly recommends candidates for appointment to Chapter 9 and associated institutions. Either the President or the relevant Minister makes appointments.

The President appoints the office-bearers of a number of the institutions under review on the recommendation of the National Assembly. In this regard, the President's powers are non-discretionary in the sense that provided the correct procedure has been followed, he or she may not refuse to make the appointment. The recommendations to the President follow a public process through the proceedings of the National Assembly. The President's role is to carry out the recommendations.

The Committee notes, however, that there have been instances where the non-discretionary

nature of the President's power of appointment has not been fully appreciated. For example, despite the National Assembly's recommendation that eleven commissioners be appointed to the Human Rights Commission, the President appointed only five commissioners. This has impacted negatively on the work of the Commission.

More recently, there was an inordinate delay in effecting the National Assembly's recommendations for the appointment of commissioners to the Commission for Gender Equality. The National Assembly's recommendations in this regard were communicated to the Presidency in October 2006. The appointments, however, were made only in May 2007. This delay arose as a result of the Office of the President being unable to determine the terms of office of the full-time Commissioners. The Commission for Gender Equality Act requires that the term of office of full-time Commissioners should not expire at the same time. The *ad hoc* committee dealing with recommendations was reconvened to recommend terms of office for those to be appointed as full-time Commissioners.

The Committee is also concerned at the role given to Ministers in the appointment processes of the Pan South African Language Board, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Independent Communications Authority of South Africa. The role of the relevant Ministers in this respect could be seen as infringing on the independence of those institutions and, as such, is in the view of the Committee inappropriate. Accordingly, the Committee recommends that Ministers should play no role in the appointment procedures for independent institutions.

2.3. CONTINUITY

The Committee is of the view that the simultaneous expiry of the terms of office of all, or even a large portion, of the members of a commission negatively impacts on the effectiveness and efficiency of the institution. For example, the Committee found that the fact that the Commission for Gender Equality was without Commissioners for more than a year has considerably undermined its operational effectiveness and efficiency.

The Committee also notes the general absence of mechanisms to ensure the transfer of knowledge from outgoing to newly appointed commissioners, which results in the loss of institutional memory. This lack of continuity is compounded by the absence of knowledge-management strategies and adequate document-management systems in the institutions.

The Committee also raises the need for a degree of continuity in the light of the role of the Chief Executive Officers who could supplant the role of the commissions by becoming the focus of the institutional memory.

In its interactions with the Committee, the Public Service Commission, for example, expressed considerable anxiety that the term of office of the Chairperson and the Commissioners would expire at the same time. The Commission proposed an amendment to the legislation to allow for staggering of appointments and expiry of terms of office. The Human Rights Commission would face a similar situation in the future. The Committee feels that the principle of staggering should apply to all bodies under review, except the Auditor General and the Public Protector. The Committee is of the view that this may not require legislative amendment if the nominat-

ing and appointing authorities are allowed to stagger appointments.

In the interactions of the Committee with the bodies, the Committee learnt of the absence of a systematic, co-ordinated and timely process for the replacement of Commissioners on expiry of their terms of office. Through engagement with the institutions and examination of the constitutional and statutory requirements, the Committee concludes that Parliament must take responsibility for the inefficiencies in this regard, as it is the National Assembly that is charged with initiating the appointment procedures in most instances. In particular, the Committee believes that the National Assembly should develop mechanisms to monitor the expiry of terms of office, and to ensure that the procedures to appoint Commissioners are initiated well in advance, so as to prevent such large-scale or long-term vacancies that can cripple operations.

The Committee recommends that the procedures set up should allow for appointments to be made at least one month before the expiry of the terms of office of the outgoing commissioners. This would allow for a period of hand-over and the conducting of exit interviews, thereby enhancing continuity.

2.4. APPOINTMENT OF CHAIRPERSONS

The Committee notes that legislation does not provide for a uniform method of appointing the chairpersons of the various commissions under review. For example, the relevant legislation provides that the Chairperson of the South African Human Rights Commission be appointed by the members of the Commission themselves. However, in the case of the Commission for Gender Equality, it is the President who appoints the Chairperson, while the Commissioners

appoint from among themselves the Deputy Chairperson.

There are advantages to each of the methods of appointment. Where commissioners appoint their own chairperson, there is an excellent chance that he or she will enjoy the confidence of fellow commissioners. This method of appointing a chairperson could also enhance the legitimacy of the body and strengthen public perceptions about its independence.

On the other hand, as newly appointed commissioners are required to select a chairperson at the start of their term, they may not have adequate knowledge about fellow commissioners eligible for the chairpersonship for their choice to be appropriately informed. In theory at least, the parliamentary committee charged with the appointment of the commissioners is in a better position to assess eligible candidates as it will have studied their qualifications and would have conducted in-depth interviews.

The Committee therefore proposes that the legislation should provide for a uniform method of appointing the chairpersons of the various commissions currently appointed on the recommendation of the National Assembly. This process could either provide for the appointment of a chairperson by the commission itself, or by the relevant parliamentary committee. In any event, it should also provide, where applicable, for the appointment of a deputy chairperson by the commissioners themselves.

2.5. PUBLIC PARTICIPATION IN THE APPOINTMENT PROCESS

The Constitution, in section 193(6), provides for the involvement of civil society in the appointment processes of the Auditor-General, the Public Protector, the Human Rights Commission,

the Commission for Gender Equality and the Electoral Commission. Public involvement in this instance is at the discretion of the National Assembly. In the Committee's investigations in general, it finds that there is public participation through the nomination of commissioners. However, the Committee emphasises the need for greater and more meaningful public involvement in the appointment procedures, provided that this is timely and efficient.

At present, the involvement of civil society in the appointment of commissioners and office-bearers to Chapter 9 institutions is through the nomination of individuals. A parliamentary committee shortlists nominees for interview and the list of recommended candidates is presented to the National Assembly for adoption. The recommendations of the National Assembly are sent to the President for appointment. Civil society has no involvement in the processes following the nomination process.

In submissions received by the Committee, some civil society organisations said that civil society must be involved from the beginning of the process. These submissions appear to ignore the fact that Parliament cannot determine who from civil society should be asked to be involved. The representation of civil society is not self-evident. It would be incorrect for Parliament to select representatives of civil society for this purpose. What the Committee says is that the appointment system must involve the public, to meet the Constitutional requirements.

The Committee considers the involvement of civil society in the appointment procedures to be necessary; particularly as such involvement would enhance the transparency and overall credibility of these procedures and greater public awareness of these bodies.

Therefore, the Committee is of the view that the National Assembly should devise appropriate mechanisms to ensure the active and meaningful participation of civil society in this regard. The Committee proposes that lists of short-listed candidates should be published for public comment before selection panels/committees make recommendations to the National Assembly.

The Committee makes the following general recommendations to improve the appointment procedures:

- a) The Acts elaborating appointment and dismissal procedures should be reviewed to ensure:
 - Consistency with the provisions of the Constitution;
 - A degree of standardisation in the appointment and dismissal procedures across the institutions;
 - That the role of Ministers is removed;
 - Appropriate provisions are made for Parliament's role in the appointment and removals processes;
 - That selection criteria are defined including matters raised under section 2.1 in this chapter;
 - A uniform method of appointing the chairpersons of the various commissions currently appointed on the recommendation of the National Assembly. This process could either provide for the appointment of a chairperson by the commission itself, or by the relevant parliamentary committee;

- Appointment of Deputy Chairpersons, where applicable, should be done by the Commissions themselves.
- b) Members of the National Youth Commission should not be restricted to youth. The wisdom and experience of older persons would enhance the work of the National Youth Commission.
 - c) The portfolio committee which oversees a particular institution, rather than an *ad hoc* committee, should submit nominations from which recommendations for appointment are to be made by the National Assembly;
 - d) The National Assembly should consult civil society and other role players to define and elaborate the role of civil society in the recommendation procedures;
 - e) The National Assembly must establish mechanisms to ensure that the procedures for the replacement of commissioners are carried out efficiently. This should include matters such as the staggering of appointments, exit interviews and hand-over periods discussed in section 2.3 of this chapter. The Committee recommends that the process should commence at least 6 months before the date of expiry. Furthermore the appointment of new commissioners should be made at least 1 month before the expiry of the term of office of outgoing commissioners.

3. Relationship with Parliament

The constitutional institutions both complement and are supportive of Parliament's oversight function. They complement Parliament's oversight role as, together with Parliament, they act

as watchdog bodies over the government and organs of state. In addition, these institutions support and aid Parliament in its oversight function by providing it with information that is not derived from the Executive.

Furthermore, these institutions must account to Parliament. However, a distinction may be drawn between the institutions listed in section 181 of the Constitution and the Public Service Commission on the one hand, and the other institutions under review. The institutions listed in section 181 and the Public Service Commission are unique in that the Constitution guarantees their independence, yet explicitly states that they are accountable to the National Assembly and must report on the performance of their functions to the Assembly at least once a year.

3.1. ACCOUNTABILITY AND THE NATIONAL ASSEMBLY

In terms of section 181(5) of the Constitution, the state institutions supporting constitutional democracy are accountable to the National Assembly and must report on their activities and the performance of their functions at least once a year. A similar provision can be found in section 196(6) with respect to the Public Service Commission. Accountability in this sense requires that the institutions report to the National Assembly on the performance of their functions, as well as on how their budgets were spent. As mentioned earlier, there is also another type of reporting to Parliament that serves a very different purpose. This is to inform, assist and complement Parliament's oversight role.

Accordingly, there are, two interrelated but distinct ways in which such institutions engage with the National Assembly. Firstly, the annual

reports of these institutions provide an account of their respective activities, as well as how their budgets are spent. These must be tabled in the National Assembly, and are then referred to the relevant portfolio committee. The Committee notes that, in addition to their annual reports, each year the Chapter 9 and associated institutions are required to submit to the National Assembly their budgets and strategic plans.¹¹ However, it is evident that portfolio committees have had minimal engagement with the institutions under review on these documents, despite these being essential for effective oversight of the performance, conduct and effectiveness of the institutions.

The Committee suggests that the Whips should give serious attention to the annual reports being debated in the National Assembly, with due regard to the exigencies of time.

Secondly, some of the institutions, particularly those concerned with human rights matters, may submit substantive reports to the National Assembly for consideration and action. For example, in terms of section 184(3) of the Constitution, the South African Human Rights Commission is required regularly to submit reports to the National Assembly on the measures taken by organs of state towards the realisation of socio-economic rights concerning housing, health care, food, water, social security, education and the environment. Such reports are an important source of information and can considerably enhance Parliament's oversight of government departments. It seems to the Committee that not enough attention is given to the value of these reports, which require more extensive circulation and consideration.

In their interactions with the Committee, all the commissions, excluding the Auditor-General,

expressed their frustration at the unsatisfactory opportunities for meaningful engagement with the portfolio committees. Many of the institutions indicated that their interactions with Parliament were restricted to annual meetings with portfolio committees of very limited duration (approximately 2-3 hours). The reasons given to the Committee for the limited interaction of portfolio committees with the Chapter 9 and associated institutions include uncertainty on the part of the committees regarding the extent of engagement required from them given the independence of the institutions; capacity constraints and the extensive workloads of committees. On the positive side, the institutions were all in favour of frequent and more meaningful interaction with Parliament, calling for a review of the institutional arrangements in Parliament in order to facilitate a closer relationship. Of course, Parliament cannot be overwhelmed with the consideration of annual reports and special reports of the Chapter 9 and associated institutions, but the perfunctory way in which they are regarded must be addressed.

The Committee expresses grave concern at the inadequacy of the present arrangements by means of which Parliament exercises its oversight of these institutions. Perhaps more importantly, the Committee is of the view that Parliament is not making full use of these institutions to inform, assist and complement its oversight of the Executive and to brief Members of Parliament on the range of matters of public interest that may be reported by the institutions.

Some of the institutions put before the Committee their support of a proposal in a 1999 report to the Joint Rules Committee in which it was suggested that a standing committee on constitutional institutions be established to act as an accountability and an over-

¹¹ Idasa Report p 29.

sight structure. The Committee, however, recalls and reaffirms the reasons for the rejection of this proposal by the Joint Rules Committee. These include:

1. Such a committee would be impractical, due mainly to the wide-ranging and specific knowledge and experience required amongst the membership of the committee to engage meaningfully with all matters reported by Chapter 9 and associated institutions;
2. Membership of the committee would be difficult to maintain due to commitments of Members on portfolio committees; and
3. The proposed functions of the committee would result in considerable duplication of the work of portfolio committees.

The Committee proposes an alternative arrangement, discussed in detail later in this chapter.

3.2. PARLIAMENT'S GENERAL OVERSIGHT ROLE

As discussed earlier in this report, the National Assembly has a constitutional obligation to provide for mechanisms to maintain oversight of national executive authority and any organ of state in terms of section 55(2) of the Constitution. In this regard, the institutions under review are able to support Parliament in its oversight role by providing it with an alternative source of information in the form of substantive reports.

The content of such reports vary widely according to the underlying constitutional and legal mandate. For example:

- The Public Protector must report to Parliament twice a year on the findings of investigations of a serious nature, and may also do so at any time of his or her own volition or if requested to do so by the Speaker of the National Assembly or the Chairperson of the National Council of Provinces.
- The Human Rights Commission must submit quarterly reports to Parliament on findings in respect of functions and investigations of a serious nature which were performed or conducted by it, and may do so at any other time it deems necessary. The Human Rights Commission also has a constitutional obligation to compile reports on how far organs of state have come in progressively realising a number of socio-economic rights.
- The Commission for Gender Equality may make recommendations concerning gender issues and must prepare and submit any reports to Parliament that relate to international conventions, covenants and charters.

These substantive reports are tabled and then referred to the relevant parliamentary committee(s) by the Speaker or Chairperson of the respective House for consideration. Referrals of such reports are not usually accompanied by instructions to report back or to take specific action unless there is a legal requirement to do so or where there is a special request in that regard.

The Rules of both the National Assembly and the National Council of Provinces stipulate that committees are authorised to determine their own procedures (NA Rule 138 and NCOP Rule 103). Only in special circumstances, therefore, would the presiding officer when referring a report to a committee, instruct a committee to report to the House. Such special circumstances in practice include when there is a legal

requirement and when a report includes specific recommendations directed at Parliament in pursuance of the relevant institution's performance of its mandate.

In all other circumstances, it is the prerogative of the committee to decide whether it needs to submit a special report to the House on a report referred to it. This approach is also written into the rules of the National Assembly and the National Council of Provinces (NA Rule 305(2) and NCOP Rule 101(4)) and ensures that committees are free to determine their own programmes and priorities.

A committee that is instructed to report or decides itself to submit a report on a substantive report referred to it would therefore engage with the substantive matters raised and could well decide to interact with the relevant institution on those matters. The committee would then, as appropriate, make its own recommendations to the House for consideration and possible adoption by it. If the House adopts a committee report containing recommendations, the practice is that the presiding officer communicates the decisions of the House in writing to the institution concerned and to any affected organ of state.

Whilst the Houses and their committees must continue to control their own agendas and cannot have their agendas determined for them, and hence cannot be expected to react to all reports received, the Committee believes that whenever a substantive report from an institution is tabled and is of such a nature that it requires a response from Parliament, whether that is pertinently specified or not, it is incumbent on the relevant committee to submit a report to the House in order to give appropriate effect to the constitutional injunction in section 181(3) which requires of Parliament (as of all

organs of state) to assist these institutions and ensure their effectiveness.

Some substantive reports received from these institutions may indeed justify a House debate, particularly when the relevant committee(s) has also submitted a report on the substantive issues raised. In such circumstances, the Whips and Programme Committee should consider arranging for a debate in the House. In so doing, the House would also be performing its constitutional function of debating matters of national importance since these institutions are themselves routinely engaged in such matters.

3.3. RECOMMENDATIONS FOR IMPROVEMENT OF ACCOUNTABILITY AND OVERSIGHT

The Committee notes that there have been various submissions or proposals made for enhanced oversight of executive action by Parliament. These include the Report on Parliamentary Oversight and Accountability submitted to the Joint Rules Committee in 1999 and the Draft Oversight Model developed by the Joint Rules Committee Task Team on Oversight and Accountability in 2007. These should be seen in the context of strengthening the role and functions of parliamentary committees. The rationalisation of portfolio committees has also been mooted. The Committee is of the view that this is a matter for another report.

The Committee feels that at this stage it is important to build the capacity of portfolio committees. Specific recommendations are made in this regard later in this chapter.

The Committee acknowledges that the present arrangements by which the National Assembly exercises oversight of the institutions under review are inadequate. Accordingly, the

Committee has considered a number of mechanisms intended to improve Parliament's interaction with the Chapter 9 and associated institutions.

3.3.1. Unit on Constitutional Institutions and Other Statutory Bodies in the Office of the Speaker

The Committee considers a lack of co-ordination, the absence of systems to monitor reports and track the terms of office of commissioners as being among the major shortfalls in the current parliamentary arrangements for oversight and accountability with respect to the Chapter 9 and associated institutions. In its interim report to the Speaker on 28 November 2006, the Committee, therefore, recommended the establishment of a unit on constitutional institutions and other statutory bodies appointed by the National Assembly. A list of bodies is presented in annexure 3 of this report.

The Committee feels that the following factors should be taken into account in considering this unit:

The unit should be located in the Office of the Speaker and always act under instruction and direction of the Speaker. The Committee acknowledges that the Speaker has delegated the responsibility for Chapter 9 institutions to the Deputy Speaker. This is, however, an internal arrangement and the Speaker is still ultimately accountable for the responsibilities of the National Assembly towards Chapter 9 and associated institutions.

The unit should not be subsumed under the duties of the National Assembly Table. For this intervention to be effective, the unit must devote focused attention to the Chapter 9 and associated institutions.

The Committee envisages that the unit will co-ordinate all interactions between the National Assembly and the state institutions strengthening democracy (namely, the Public Protector, the Human Rights Commission, the Commission for the Protection of Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission) and other independent institutions (namely, the Public Service Commission, the Financial and Fiscal Commission and the Pan South African Language Board), who are accountable to the National Assembly and/or must report to the National Assembly. All other bodies in which the National Assembly or Parliament plays a role in appointments could also be included.

The main functions of the unit would be to -

1. Receive and, through the Speaker, direct correspondence from such bodies to the appropriate structure in the National Assembly. This would include recommendations for the most appropriate portfolio committee or group of portfolio committees to which reports should be referred and drafting terms of reference for such committees in respect of such reports, including timeframes for reporting to the Speaker or the National Assembly;
2. Co-ordinate the oversight and accountability functions of the National Assembly with respect to these bodies to ensure that the National Assembly complies with its constitutional duties in a consistent, efficient and fair manner;
3. Co-ordinate, through the Office of the Speaker, the timely and effective recommendation by the National Assembly for the appointment of commissioners and office-bearers to the relevant bodies in accordance with the National Assembly's function.

4. Highlight issues emanating from reports tabled in Parliament by such bodies for possible debate in the National Assembly.
 5. Ensure that the National Assembly discharges its constitutional obligations in respect of these organisations in a systematic, coherent, comprehensive and efficient manner.
 6. Ensure the timely communication of recommendations contained in reports adopted by the National Assembly to the relevant Ministers where appropriate.
 7. Monitor and track the progress of recommendations communicated to Ministers and other appropriate bodies.
 8. Act as a clearing-house and repository of information and documentation received from the organisations.
1. The capacity of portfolio committees must be enhanced. Such measures would include the appointment of specialist researchers, report writers, and administrative and secretarial staff;
 2. Sufficient budgets, although the Committee notes that current allocations are not always fully utilised;
 3. Ease of access to other technical support staff as and when required;
 4. The development of specialist knowledge and expertise by Members;
 5. The drawing up of guidelines, manuals and advice for committee chairpersons;
 6. Adequate meeting venues and facilities; and
 7. The establishment of subcommittees within committees to focus on specific matters emanating from reports of Chapter 9 and associated institutions. This would allow the committees to develop a wider range of expertise.

The unit should be headed by a senior official at the level of Deputy Director-General, assisted by at least three senior officials at Chief-Director and Director levels, a librarian and adequate administrative and secretarial staff.

The Committee recommends the immediate establishment and staffing of this unit.

3.3.2. Strengthening the Portfolio Committees

The Committee recommends a number of measures below aimed at strengthening the oversight role of portfolio committees concerning the Chapter 9 and associated bodies. In this regard the Committee is particularly concerned that the reports that these institutions submit to Parliament should be efficiently and comprehensively addressed by the relevant committee(s).

3.3.3. Accountability Standards Legislation

Among the problems experienced in connection with the National Assembly's oversight role in respect of the constitutional institutions is that there is little to guide committees in holding the institutions to account while simultaneously respecting their independence. As a consequence, committees are often unclear on how, or the extent to which, they should respond to the work done by the Chapter 9 Institutions.

The 1999 Report on Parliamentary Oversight and Accountability recommended the adoption

of an “Accountability and Independence of Constitutional Institutions Act”. This proposal envisaged that legislation would recognise and regulate the interrelationship between the Chapter 9 bodies and Parliament’s oversight function while ensuring their independence. This proposal was never adopted by Parliament. However, the Committee is of the view that an adapted version of such legislation would assist greatly in providing structure to the accountability and oversight work done by Parliament. The Committee cautions that such accountability legislation will require careful crafting and should only be considered after extensive consultation with the affected institutions.

4. Institutional governance arrangements

The Committee notes a number of common problems concerning the institutional governance arrangements of the various bodies under review.

4.1. INTERNAL TENSIONS

The Committee is aware that internal tensions or conflicts have taken various forms. Tensions have arisen amongst commissioners themselves, between commissioners and the secretariat and within the secretariat. In at least one case, this has led to immobilisation and in the case of another commission this has led to the resignation of commissioners on at least two occasions.

For the most part the enabling legislation provides little assistance, and is even ambivalent or confusing, concerning the powers and functions of commissioners in relation to a chairperson, or chairpersons or commissioners in rela-

tion to the secretariat. Furthermore, the enabling legislation generally does not provide for mechanisms to deal with tensions should they arise, while internal arrangements in this regard are typically unsatisfactory.

Internal conflicts have to some degree undermined the effective operations and efficiency of some of the institutions. The Committee is of the view that the absence of clear lines of authority has exacerbated this tendency. The Committee feels that there must be clearer demarcation of functions. It is now vital that clear lines of authority are determined within the commissions, between the commissioners and the secretariat and within the secretariat.

The Committee notes that section 36(2)(b) of the Public Finance Management Act 1 of 1999 requires that a Chief Executive Officer must be the accounting officer of that institution. However, the chairperson or head of a commission or institution is either explicitly or implicitly mandated to provide overall leadership and direction for the institution. There is a lacuna in the Public Finance Management Act regarding the definition of executive authority. Because the law left out the constitutional institutions in this definition, the National Treasury furnished a definition by regulation. However, some of the institutions were unaware of this and this has contributed to tension and sometimes paralysis between Chief Executive Officers and chairpersons of commissions.

The Committee recommends as follows:

- a) The Committee feels that, where appropriate legislation is not clear, such legislation must be amended to clarify the lines of authority between the chairperson of a commission or the head of an institution and the Chief Executive Officer as well as

between chairpersons of commissions and other commissioners.

- b) Furthermore, while this report cannot go into detail, the Committee feels that a code of conduct that would apply to all Chapter 9 and associated institutions is required.

4.2. REMUNERATION AND CONDITIONS OF SERVICE

There is no uniformity in the procedures for determining the salaries and conditions of employment of commissioners and heads of institutions. The President in consultation with Cabinet, for example, determines the salaries of members of the Human Rights Commission, while the National Assembly is charged with determining the remuneration and conditions of service for the Public Protector.

The Committee notes that Parliament has not carried out its obligation in terms of section 219(5) of the Constitution (Annexure 1). This explains, to some degree, the disparities in the determination of remuneration and conditions of service amongst the Chapter 9 and associated institutions. This section provides for national legislation, which must establish the framework for determining the salaries, allowances and benefits of, amongst others, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the Broadcasting Authority referred to in section 192. In this regard, the Committee wishes to draw attention to the requirement of section 237 of the Constitution, which states that all constitutional obligations must be performed diligently and without delay.

The Committee is not aware of how increases

in salaries and improvements in conditions of service are carried out. The eccentricity of this is exemplified if one looks at the salaries and conditions of service of the Human Rights Commission, which are determined by the President. The Committee draws the attention of the National Assembly to this lacuna as an urgent priority. The envisaged framework legislation will guide the approach to all bodies and bring about a degree of comparability.

It is also not clear to the Committee that the salaries and benefits of the commissioners and heads of institutions are commensurate with the nature and role of the functions that they are required to perform.

The Committee notes that at present the Independent Commission for the Remuneration of Public Office-Bearers Act 92 of 1997 provides for a Commission, appointed by the President, to recommend salaries of any member of the National or Provincial Cabinets and legislatures, as well as other bodies such as the Council of Traditional Leaders, and members of the Judiciary. This is an advisory body and the President has the discretion to accept or reject recommendations. The Committee recommends that consideration should be given to extending the mandate of this to include the Chapter 9 and associated institutions.

Although the legislation permits this body to conduct an inquiry into any matter in respect of which it is authorised by section 219 of the Constitution, it does not provide the requisite remunerative framework for the Auditor-General, the Public Protector, and other commissions established in terms of the Constitution, including the Broadcasting Authority established in terms of section 192 of the Constitution. The Committee is of the view that the Act could be amended to include such bod-

ies within its ambit and to extend the Commission's powers to establish the requisite frameworks as envisaged by the Constitution. Alternatively, new legislation could be formulated and adopted.

In the light of the above, the Committee recommends that:

- a) Framework legislation in terms of section 219(5) of the Constitution (Annexure 1) must be adopted urgently, either by amendment of the Independent Commission for the Remuneration of Public Office-Bearers Act or through development of new legislation.

4.3. MECHANISMS FOR DISCLOSURE OF INTERESTS

All the bodies under review are public bodies regulated in terms of national legislation and fulfilling a public function. As such, all of these bodies receive public funds and have a legal duty to spend such money in accordance with their mandate. The bodies are subject to the Public Finance Management Act and its accounting officers have a duty to ensure the effective, efficient, economical and transparent use of institutional resources.¹²

Furthermore, these institutions exercise important constitutional and legal mandates and are required to act in an independent and impartial manner. Without public trust, these institutions would lose credibility and legitimacy and this would hamper their effectiveness. It is without question that the senior leadership of these institutions must uphold the highest standards of ethics. The Committee is, therefore, of the opinion that mechanisms must be put in place to ensure that there can be no conflicts of interest, and that the governance of these institutions is open and transparent.

¹²PFMA section 38(1)(b).

Thus, it is of concern to the Committee that for the most part there is no systematic approach to guard against conflicts of interest. While some institutions provide for the compilation of a list of members' interests, others do not. Where such a list is kept, it did not appear to the Committee that these lists are readily available to the public and the media. Examples of the lack of consistency and confusion that predominate abound:

- The Human Rights Commission has no policy as yet on disclosing and/or seeking permission for involvement of the executive members in private/commercial organisations. However, in September 2006 members were required to submit forms to declare their membership of boards of organisations. The members were also requested to state on the declaration form whether or not they receive financial reward for their board membership. Presently there is no committee established to verify the submissions. The completed submissions are taken to the office of the Chief Executive Officer for review.
- The Commission for Gender Equality has a system in terms of which a declaration of interests is made on a prescribed form. The human resource office, where a register is kept, facilitates this process. The Commission's policy also provides that every gift above R500 must be declared in the register.
- The Electoral Commission Act explicitly regulates conflicts of interest and prohibits any full-time Commissioner from taking up any other employment or occupation or the holding of any other office, unless specifically authorised to do so by the President. The Act further prohibits Commissioners from sitting in a meeting where a conflict of interest may arise and requires that they disclose

their interest and recuse themselves. An employee may furthermore not accept any gift or any other benefit(s) valued at R200 or more offered to him or her as an officer or employee without prior permission from the Commission, which reserves the right to order non-acceptance of any such gift or benefit. For this purpose, a gift register is kept with the human resources department for the declaration of such gifts or benefits to employees valued at R200 or more offered to them by or on behalf of a person or organisation with whom the Commission has, or may enter into, a business relationship, and also any gifts or benefits that may be interned or perceived to influence them in the performance of their functions.

The present arrangements around the regulation of conflicts of interest therefore differ widely. There is also disagreement among the various institutions about the minimum requirements for good governance.

Given the fact that these institutions make use of public funds, fulfil public functions and are subject to the Public Finance Management Act, the Committee recommends that:

- a) The enabling legislation should be amended to provide a coherent and comprehensive framework for the regulation of conflicts of interest. In order for such regulation to be effective, it should include minimum standards of disclosure, including:
 - i. All personnel of Chapter 9 and related bodies must be required to disclose all substantial gifts, benefits, and outside financial interests in a public register and this register must be easily accessible to the public;

- ii. Directorships and/or partnerships held by commissioners or senior officials must be disclosed and published in the annual reports of the Chapter 9 and associated institutions. Other declarations should be kept in a register that is easily accessible to the public.
- iii. Each institution must adopt rules that would regulate actions in terms of conflicts of interest.

5. Accessibility

The Committee notes that the Chapter 9 and associated institutions are largely urban-based. The Committee is mindful of the fact that at least forty-five percent of South Africa's population lives in rural areas. Those who live in rural areas are far more likely to be poor, lack access to transport and have low levels of formal education. These are the very marginalised and vulnerable people most likely to be in need of assistance to enforce their rights or gain access to state grants.

Therefore, it is apparent that in order to realise their mandates more fully, the Chapter 9 and associated institutions must facilitate better access to the public in rural areas and become more visibly involved in education and promotion campaigns in rural areas. The Committee has been told that institutions lack the human and financial resources to address this problem fully. The Committee also notes that there has been a trend for Chapter 9 and associated institutions to open provincial and/or regional offices in an attempt to be more accessible. The Committee, however, is of the opinion that this is not necessarily the most effective way to deal with the problem. Although exact figures were not provided by many of the institutions, it is clear that these provincial offices take up a sizeable amount of the budget. Provincial

offices require, at a minimum, premises, appropriate infrastructure and staffing.

Apart from the expenditure, several other problems also arise when such offices are opened. Such problems include that of establishing clear lines of authority and accountability between the national office and the provincial offices. Where commissioners are based in the provinces, it is also necessary to clarify their role in respect of the relevant provincial office. The Committee could not find demonstrable evidence that these principles are consistently adhered to by all institutions.

Where a body has the power to investigate complaints, uncertainty may also arise about whether such complaints will be dealt with by the provincial office or the national office. It appears to the Committee that most complainants prefer the national office. This problem becomes more acute where staff members at provincial offices do not have the requisite expertise to deal with complicated complaints. In such cases, there is the danger of duplication of work as staff at the provincial office will initially investigate a complaint, and only once they realise it is too complex refer it to the national office. Moreover, unnecessary duplication may also arise when decisions of the provincial offices are made subject to vetting by the national office. A further problem is that of unreasonable delays in finalising cases.

The Committee was also informed of problems arising from the difficulties of commissioners in overseeing and monitoring the work done in provincial offices. At the same time, the Committee was unable to confirm the usefulness of all the provincial offices. The Committee therefore holds the view that provincial offices should only be opened where a demonstrable need can be shown and that, if this is done,

clear lines of authority must be established from the outset. These arrangements can be periodically reviewed to ensure that they remain appropriate to the context.

The Committee wishes to emphasise that the institutions under review should be innovative in their use of resources to ensure that they become more accessible to the public, especially in rural areas. This can include the use of existing state infrastructure as points of contact between the institutions and the community. Thus, information leaflets and education material could be distributed at such establishments as well as at post offices; libraries, community centres and social grant pay-points. The use of offices of non-governmental organisations and places of religious worship could also be investigated.

The Committee also notes that the government has a number of initiatives, such as the Thusong Service Centres, and Community Development Workers, which have been set up in the rural areas of South Africa. Such centres may be invaluable in providing the institutions under review greater access to rural communities. Service agreements could be reached with such centres and safeguards can be put in place to ensure that the bodies retain their independence and impartiality.

The Committee makes the following recommendations to increase public access to the institutions and their work:

- a) Institutions should explore innovative public outreach and awareness mechanisms including:
 - i. Use of existing government infrastructure such as libraries, post offices, community centres and social grant pay points;

Thusong Service Centres and Community Development Workers;

- ii. Use of offices of non-governmental organisations and faith-based organisations;
- b) Provincial offices should only be established where the need has been determined. Intuitions should consider sharing of facilities in provincial offices where practical and appropriate.

6. A single human rights body

For reasons peculiar to its democratic transition, South Africa is unique in the number of different institutions it has established in terms of the Constitution and by ordinary legislation to protect and promote human rights. In addition to establishing a national Human Rights Commission, the Constitution creates a number of specialised human rights bodies to protect and promote the rights of specific constituencies.

These specialised human rights institutions include the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Pan South African Language Board. Moreover, Parliament created the National Youth Commission, amongst others, to promote the rights and interests of the youth of South Africa.

It is quite clear that the area covered by the human rights milieu is broad, requiring practical mechanisms to ensure that it is sufficiently encompassing, that there are no gaps and that the core elements of investigation and protection are maintained. A multiplicity of institutions results in an uneven spread of available resources and capacities, which has unfortunate implications for effectiveness and efficiency.

The Committee is of the view that the present institutional framework has created fragmentation, confounding the intention that these institutions would support the seamless application of the Bill of Rights.

There are many advantages to the establishment of an umbrella human rights commission. Firstly, there is avoidance of the potential for duplication of effort that can easily occur given the extent to which the mandates of many of the institutions overlap. The present lack of collaboration and co-ordination that characterises their relationship with one another also exacerbates the potential for duplication of activities.

Secondly, given the importance of ensuring that resources are utilised most advantageously, a single human rights commission would be administratively more efficient. Not only would the sharing of common resources result in cost savings, but it would also permit the more effective use of resources and a greater ability to deliver an effective service for a range of customers. In addition, there would also be opportunity for a fundamental review and reallocation of resources of the existing bodies, enabling the commissioners to concentrate on issues of greatest concern.

Thirdly, the establishment of a single human rights commission is more readily accessible to the public who, at present, must determine which of a multiplicity of institutions is the correct forum to approach. This can be frustrating and confusing for complainants, who may well be referred from one body to another. A single human rights commission would also provide the opportunity for a co-ordinated approach to the promotion of public awareness of the Bill of Rights, as well as of the contribution of the proposed commission to the promotion of a human rights culture in South Africa.

Human rights are interdependent and indivisible and rights cannot be easily compartmentalised. Individuals often experience human rights violations in multiple ways and may not know how this experience would be translated into a rights discourse. Such individuals may then not know which of the institutions to approach or, worse, may approach the wrong organisation, which must then refer the complainant to another body. At present the different institutions are not necessarily located in the same building or even in close proximity, which creates difficulties when referring complaints. The complainant may well become discouraged by the referral or may not understand the reason for it. Creating one institution will address this problem

Fourthly, arguably the most important task of the human rights bodies is to assist those who would not otherwise be able to do so, to enforce their rights by legal action, if necessary. Currently with the exception of the Human Rights Commission, these institutions are not effectively fulfilling this task. Moreover, a combination of geography and capacity frustrates ready access by the poor and marginalised individuals to these institutions. This is an untenable situation that could partly be addressed by an umbrella human rights commission of South Africa, with offices across the country.

Lastly, the various bodies (with the exception of the National Youth Commission) are all accountable to the National Assembly and report to the National Assembly about their activities. This process is not always satisfactory. By amalgamating the five bodies into one, it would simplify the oversight task of the National Assembly and would, in turn, enhance the level of parliamentary oversight provided. A single body will also be able to engage with the National Assembly in a more coherent and consistent manner.

There is the fear that other more powerful interests will swamp a particular interest group. However, the primary objective of a single commission is not to represent interest groups or to give them a voice - this is the function of civil society organisations - but rather to act as a vehicle to promote change and, where appropriate, assist individuals to assert their rights. It is important to ensure, however, that the discrete elements are not submerged.

A single human rights commission's essential role will be to promote a human rights culture in its broadest sense, vindicate the rights of citizens, ensure that resources are focused on the most important strategic issues and wherever possible be involved in policies relating to human rights. Furthermore, having commissioners with responsibilities for specific issues (for example, a commissioner for gender equality and a disability commissioner) will further allay fears of marginalisation.

A single body will bring many important benefits:¹³

1. A single organisation will be a strong and authoritative champion for equality and human rights. The new body will incorporate the expertise on specific areas of human rights, now spread across bodies, and will thus be better able to respond to the myriad human rights challenges in South Africa.
2. The interdependence and interrelated nature of human rights means that a single body is better placed to tackle barriers and inequalities affecting several groups, and to identify and promote strategic solutions to address endemic human rights abuses.
3. A single commission will benefit individuals seeking advice and support on all discrimination issues and will provide information on human rights in an accessible and user-

¹³See also "Fairness for All: A new Commission for Equality and Human Rights", White Paper presented to British Parliament in May 2004 pp 16-18.

friendly way. Providing a single point of contact for individuals and for the agencies and organisations to which they turn for advice will deliver real benefits for everyone.

4. A single commission will be able to develop and implement policies and approaches that will better address the reality of the many dimensions of oppression often experienced by the same person. It will therefore be able to tackle systemic discrimination suffered by some people on multiple grounds.
 5. A single commission will be more effective at promoting improvements to the delivery of public services. It will provide guidance and support on human rights good practice and compliance, and can adopt a cross-cutting seamless approach to the full breadth of human rights issues on a sector-by-sector basis with, for example, health authorities, local government and education providers.
 6. A single commission will also provide an opportunity to pursue a more coherent approach to enforcing the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act and, once they are brought into effect, the promotional aspects of that legislation.
 7. A single commission will combine the strengths of the existing commissions with the expertise from key organisations representing the new equality strands, identifying and promoting creative responses to the challenges and opportunities it will face.
 8. A single commission will be better equipped to interact with civil society organisations and to work with them to promote and protect human rights.
- The Committee envisages that the new Commission on Human Rights and Equality will be more than the sum of its parts. It will be a centre of excellence, in research and knowledge, across the full breadth of its equality and human rights spectrum. It will be able to generate cross-strand learning and information sharing, applying principles and advances in one area of human rights work to others, and delivering this in a coherent and integrated way. It will become the focus of a more informal non-court driven process to realise and protect human rights and could play a pivotal role in the promotion and protection of human rights in South Africa.
- In order to address the challenges of a multiplicity of human rights bodies, to give effect to the principles elaborated above, and to leverage the benefits of a single human rights body, the Committee recommends as follows:
- a) The Committee proposes the establishment of a strengthened, highly organised and unitary body, called the South African Commission on Human Rights and Equality that will be better equipped to deal with the many challenges in promoting and protecting human rights in South Africa.
 - b) This newly established Commission should include the current Human Rights Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (including the Pan South African Language Board) and the National Youth Commission (including children's rights). The inclusion of these institutions is elaborated in the chapters dealing specifically with the relevant institution.

- c) The Committee highlights that this umbrella human rights commission should have dedicated commissioners for each of the following areas: gender, children and youth and people with disabilities.
- d) Furthermore, there should be a dedicated information commissioner.
- e) This body must be well funded and must have the necessary legal power not only to promote human rights and address systemic violations of rights, but also to operate as an advice centre for the millions of people in South Africa who otherwise would not have been able to challenge a breach of their rights.

The Committee notes that the process of amalgamation will neither be easy nor speedy. Apart from the National Youth Commission, these bodies are established by the Constitution and amalgamation thus requires significant constitutional amendment. In order for such amendment to be effected, Parliament and the Executive must give it due consideration.

The Committee also notes that each of the existing institutions currently employ full-time commissioners as well as relatively large staff

complements and that any amalgamation would have to take cognisance of this fact. However, it is in the interest of all South Africans that an amalgamation of institutions is finalised within a reasonable period. To this end the Committee further recommends that -

- f) A task team be set up to explore the modalities of an amalgamation of the five bodies mentioned and to report to the National Assembly on its findings. The aim of this report must be to provide a roadmap that would guide amalgamation of the bodies within a reasonable period;
- g) This task team to consist of the heads of all the bodies involved in the amalgamation along with a number of Members of the National Assembly nominated by the Speaker and proportionally representing the various political parties;
- h) This task team to report to the National Assembly within 12 months after the Committee's report is adopted.

CHAPTER 3

THE ELECTORAL COMMISSION

1. Background

As the interim Constitution was being discussed and debated, all parties involved in the multi-party negotiation process recognised the need for the establishment of certain key institutions. There was clear recognition that the legitimacy of the new democratic order would depend on the success of the first democratic elections. There was broad agreement that an independent electoral commission was essential to conducting free and fair elections successfully. Accordingly, the Electoral Act 150 of 1993 was enacted. Sixteen high-profile individuals (eleven local and five from abroad) were appointed as commissioners.

The mandate of this Commission was to conduct South Africa's first fully democratic elections, at the national level for both chambers of Parliament (the Senate and the National Assembly) and at the provincial level for the legislatures of the nine new provinces. Elections were held from 26-29 April 1994 under a system of proportional representation with party lists. The newly constituted Parliament had a special mandate to sit as a Constitutional Assembly and draft a final Constitution for the Republic of South Africa. The Constitution adopted on 8 May and amended on 11 October 1996 replaced the interim Constitution of 1993, and provided for the establishment of a new permanent Electoral Commission as one of six state institutions supporting constitutional democracy.

When drafting the final Constitution, the Constitutional Assembly noted that most Western European countries have their election authority located in a government ministry, usually the Ministry of the Interior. However, as South Africa had different democratic assumptions, the Constitutional Assembly felt that an

independent electoral commission was more appropriate. It was imperative that South Africa's Electoral Commission should not only be institutionally independent but also be seen to be independent and impartial. An electoral commission that was located in a government department would be too close to the seat of power.

In addition, the Constitutional Assembly recommended that the electoral authority be established in the Constitution. However, as it would be difficult to specify all requirements of an electoral commission in a sustainable manner and regular amendment of the Constitution would not inspire confidence or stability, it was agreed that the Constitution should provide a basic framework. Matters of detail should be covered in the general election laws (statutes, regulations and proclamations).

2. Constitutional and legal mandate

Section 190(1) of the Constitution sets out the functions of the Electoral Commission, which are to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation, ensure that such elections are free and fair and declare the results of such elections within a period of time prescribed by national legislation but which is as short a time as reasonably possible. Accordingly, the Electoral Commission Act 51 of 1996, which came into force on 17 October 1996, provides for the establishment and composition of an Electoral Commission to manage elections for all three spheres of government and for referendums.

2.1. POWERS AND FUNCTIONS

The Commission is assigned a wide array of powers and functions that are executive, administrative, quasi-judicial, regulatory, educational and advisory in nature. Section 190 of the Constitution sets out the Commission's core functions, namely to:

1. Manage elections of national, provincial and municipal legislative bodies in accordance with national legislation.
2. Ensure that these elections are free and fair.
3. Declare the results of such elections within the prescribed period.

The Electoral Commission Act, 1996, provides the Commission with further powers and functions that include:

1. Promoting conditions conducive to free and fair elections.
2. Promoting knowledge of sound and democratic electoral processes.
3. Compiling and maintaining voters' rolls by means of registering eligible voters.
4. Compiling and maintaining a register of political parties.
5. Establishing and maintaining liaison and co-operation with political parties.
6. Undertaking and promoting research into electoral matters.
7. Developing and promoting the development of electoral expertise in all spheres of government.

8. Continuously reviewing legislation, and proposed legislation and making related recommendations.
9. Promoting voter education.
10. Promoting co-operation with and between persons, institutions, governments and administrations.
11. Adjudicating disputes that are of an administrative nature relating to the holding of elections.
12. Appointing appropriate public administrations to conduct elections when necessary.

Section 23 of the Electoral Commission Act, 1996, empowers the Commission to make regulations, which may prescribe penalties of a fine or imprisonment not exceeding two years, regarding -

1. Time limits and the manner in which appeals and reviews may be brought to the Commission.
2. The voters' rolls.
3. The registration of parties.
4. The conduct of persons, parties and candidates in so far as such conduct may promote or inhibit the conduct of a free and fair election.
5. The holding of referendums.

The Electoral Act 73 of 1998 regulates in detail the duties of the Commission and the Chief Electoral Officer in respect of -

1. The compilation and maintenance of a national common voters' roll.
2. The proclamation and preparation for elections.
3. The management of national and provincial elections, as well as the determination and declaration of results.
4. The system of objections and appeals.

Various other Acts are also applicable. The Local Government: Municipal Structures Act 117 of 1998 and the Local Government: Municipal Electoral Act 27 of 2000 provide for the appropriate electoral systems for local government elections, and their regulation. Section 4 of the Local Government: Municipal Electoral Act, 2000, states that the Commission must administer the Act in a manner conducive to free and fair elections. The Act also regulates the management of the two separate electoral systems established for metropolitan and local municipalities on the one hand and district municipalities on the other hand; the nomination of ward candidates and the election procedures concerning ward elections; and the election procedures for district councils.

The Commission also participates in the delimitation of municipalities into wards. The Local Government: Municipal Structures Act, 1998, requires that the Demarcation Board for the purposes of an election delimit all municipalities that must have wards into wards, after consulting with the Commission. In addition, section 23 of the Local Government: Demarcation Act, 2000, requires that the Commission express its view on the effect of a boundary re-delimitation on the representation of voters in the affected councils. Depending on the Commission's view in this regard, the delimita-

tion may come into effect at the next General Election.

In addition, in terms of the Public Funding of Political Parties Act 103 of 1997, the Commission is responsible for managing and administering the Represented Political Parties' Fund in respect of the parties participating in national and provincial legislatures.

3. Findings

In response to the questionnaire it had circulated, the Committee received a written submission from the Electoral Commission. This document, together with oral and written submissions, formed the basis for the Committee's discussions with the Electoral Commission that took place on 28 February 2007. In addition, the Commission submitted supplementary documentation. The following findings arise from these interactions:

3.1. CONSTITUTIONAL AND LEGAL BASIS

- a) The Constitution and enabling legislation refer to the "Electoral Commission" and not the "Independent Electoral Commission", which was the name this institution had under the Interim Constitution, 1993, and the Independent Electoral Commission Act 150 of 1993. Although the word "independent" was subsequently specifically omitted in replacing legislation, it was in popular use to describe the Electoral Commission and the Commission decided to retain the adjective as its brand name. The Committee is of the view that this should be regularised in subsequent legislation.
- b) The Electoral Commission accepts that the principles of co-operative government and

intergovernmental relations contained in section 41(1)(h) of the Constitution apply to it (Annexure 1). However, the Committee obtained legal opinion to the effect that the Constitutional Court had held in the case of *Independent Electoral Commission v Langeberg Municipality* that while the Chapter 9 institutions are organs of state, they do not form part of government.¹⁴ This is discussed in greater detail in Chapter 1 of this report. Therefore, the Committee submits that relevant provisions of section 41(1) of the Constitution relating specifically to co-operative government and intergovernmental relations do not apply to the Electoral Commission (or any of the other Chapter 9 institutions).

- c) The Committee highlights that the increasing international demand on the services and advice of the Electoral Commission is an indication of international recognition of the professional status and credibility of the Commission. The Committee congratulates the Electoral Commission accordingly.
- d) The Commission provides technical assistance to a number of electoral management bodies in other parts of Africa. For example, in support of government initiatives, and by way of bilateral agreements, the Commission has rendered technical, managerial, and logistical support to the electoral commissions of the Democratic Republic of the Congo (DRC), the Comoros, and Lesotho. These activities were funded by the Department of Foreign Affairs. The Committee highlights that the enabling legislation does not specifically empower the Commission to engage in such activities. However, the Committee notes that the Commission had interpreted its mandate to promote democracy through elections

broadly, so as to allow it to perform such functions.

- e) The Committee notes that the role of the Commission on the African continent has increased, with requests coming largely from the Department of Foreign Affairs and from electoral commissions or similar bodies in other African states. Although the Department of Foreign Affairs funds such activities, the Commission acknowledges that undertaking such activities nevertheless impacts on its resources, particularly human resources. The Committee is concerned at the lack of discretion to refuse such requests from the Department of Foreign Affairs. The Committee is of the view that this lack of discretion may adversely affect the independence of the Commission from the Executive.
- f) As indicated earlier, the Commission's duties include the management of national and provincial elections, as well as the determination and declaration of results. After having declared the results, the Commission nominates persons from official party lists as members of the relevant legislature. The Committee has noted, however, that in nominating the new members, the Commission strictly follows the names of the candidates in the order in which they appear on the party lists. No attempt is made to ascertain whether the candidates so nominated are eligible at that time for nomination as members in terms of the Constitution. As a result there have been a number of instances where candidates upon nomination were not in fact eligible to be so nominated as they still held other posts in the public domain from which they had not yet resigned. The outcome in such cases was that the nomination was invalid and the

¹⁴2001 (3) SA 925 (CC).

seat concerned immediately became vacant. This inevitably causes embarrassment in what is a very important public process. The Committee believes that the Commission should develop a mechanism to ensure as far as possible that only those candidates are nominated to become members of a legislature who are constitutionally eligible for nomination.

3.2. APPOINTMENTS

The Electoral Commission Act, 1996, provides in section 5 that the Electoral Commission consists of five members, one of whom must be a judge, appointed by the President on the recommendation of the National Assembly by means of a majority resolution. Commissioners are nominated by a committee of the National Assembly, proportionally composed of members of all parties represented in the National Assembly, from a list of no fewer than eight recommended candidates submitted by a high profile panel constituted for that purpose. The panel is composed as follows: The President of the Constitutional Court, as chairperson; a representative from the Human Rights Commission; a representative from the Commission on Gender Equality; and the Public Protector. The Committee feels that using such a high-profile panel is cumbersome, expensive and demanding on the panelists but that the exigencies of democracy require continued support for this process.

The Committee notes that three of the four panelists are members of human rights bodies. This is a unique arrangement that is not followed by any of the other institutions under review but reflects the special requirements of the Commission as far as appointments are concerned.

No provision is currently made in the enabling legislation to stagger the appointment of commissioners, although this would in the Committee's view be of great benefit to ensure the seamless functioning of the Commission over time.

3.3. PUBLIC AWARENESS

a) The Commission stated that the rate of voter participation appears to be declining. However, the Commission contends that a decline in the number of voters is common as democracies mature. Nevertheless, the Commission has commissioned research to identify potential areas for improvement (for example, voters in rural areas require targeting). The Committee maintains that the Commission is not sufficiently innovative in its approach to voter registration and voter education. The Committee makes certain specific recommendations in this regard.

b) The Committee notes that the Commission keeps a record of formal complaints received. The Committee suggests that it would be useful for the number, nature and outcome of complaints to be reflected in the annual report of the Commission.

3.4. RELATIONSHIP WITH PARLIAMENT

a) At present, the Commission accounts to the National Assembly through its interactions with the Portfolio Committee on Home Affairs. The Committee notes that much of the Commission's work impinges on the work of the Department of Justice and Constitutional Development. The Committee accordingly suggests that, as appropriate, a joint meeting of the Portfolio Committees of Home Affairs and Justice and Constitutional Development be held.

- b) The Commission has engaged from time to time with the Standing Committee on Public Accounts (SCOPA), the Portfolio Committee on Foreign Affairs and the Portfolio Committee on Provincial and Local Government on matters relating to their specific mandates.
- c) However, as is the case with most of the institutions under review, the Committee finds that the involvement of a multiplicity of portfolio committees in conducting oversight creates an environment in which a thorough understanding of the work of the institution is easily lost. The Commission was not entirely satisfied that the degree of oversight and accountability is sufficient, and proposed an integrated oversight mechanism in Parliament. The Committee makes specific recommendations in Chapter 2 of this report in this regard.
- b) In addition to the Chapter 9 institutions, the Forum included other statutory bodies, such as the Public Service Commission, the Pan South African Language Board and the National Youth Commission. The Forum also created a technical committee consisting of the chief executive officers of these bodies.
- c) The Committee believes that this body is now defunct. Unfortunately, over time almost all of the other statutory organisations have withdrawn from the Forum, so that only the Chapter 9 institutions remained. Among the reasons advanced for the failure of the Forum in this regard is the disparity of available resources (both human and material) that has prevented some institutions from being able to collaborate. The Committee feels that the creation of the Forum was a positive development. The Committee makes specific recommendations for the collaboration and co-operation of the institutions under review. In the interim, the Committee believes that this body should be revived.

3.5. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Commission informed the Committee of the creation in 1998 of a voluntary body, the Forum of Independent Statutory Bodies (FISB), to –
 - i. Liaise between the various constitutional and statutory bodies in order to foster common policies and practices and promote co-operation;
 - ii. Share information on developments in the field of human rights, promote best practices, avoid duplications and ‘project a rational, cost effective human rights regime in the country’ that would benefit the populace; and
 - iii. Make common representations to government on matters of common interest.
- d) It is to the credit of the Commission that it works extensively with various youth organisations to promote voter registration prior to elections. The Committee believes that such activities should not be confined to the period preceding an election, but should be planned and implemented in a sustained manner.

3.6. RELATIONSHIP WITH THE EXECUTIVE

The Commission works closely with the Department of Home Affairs, particularly regarding the issuing of identification documents and voter registration. As indicated earlier, the Committee feels that the Commission could be more innovative in terms of voter registration. At present, we follow the Anglo-

Saxon or common law system of voluntary registration. However, the Committee believes that there is nothing to prevent us from exploring the civil law system of compulsory voter registration as a means of increasing voter registration.

In addition, the Commission engages continuously with the Executive on specific matters. For example, the Committee learnt that the Commission engages with the Minister of Education on the Commission's Schools Project; the Minister of Provincial and Local Government on establishing electoral units; the Ministers of Defence and Safety and Security on security and logistics relating to elections; and the Minister of Foreign Affairs on the provision of technical electoral assistance to other parts of the African continent and election observation in other countries.

3.7. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Commissioners are responsible for policy-making, supervision and monitoring, while the administration and financial management are the responsibility of the Chief Electoral Officer. In all institutions, there are tensions between policy and operations. However, the Committee notes that the Commission is currently engaged in the task of defining the respective roles and responsibilities of the Commissioners and the Chief Electoral Officer.
- b) The Committee commends the Commission for having developed a code of conduct for staff and Commissioners. The Committee however stresses the importance of full compliance with the provisions of section 9(1)(b) of the Electoral Commission Act that requires that the Commissioners, if appoint-

ed in a full-time capacity, serve as such to the exclusion of any other duty or obligations or the holding of any other office, unless expressly authorised to do so by the President. The Committee is not convinced that the Commission has paid sufficient attention to this legal obligation, particularly as conflicts of interest may arise.

- c) The Committee is satisfied that the Commission adequately coordinates the activities of its provincial offices. In this regard the Committee notes that all provincial offices submit monthly reports to Head Office, and the provincial managers report directly to the Chief Electoral Officer. The provincial offices also use information technology systems extensively to communicate with each other.

3.8. FINANCIAL ARRANGEMENTS

The Commission informed the Committee that there is constant interaction between it and National Treasury regarding its budget. The budget allocation of the Commission is located within the budget vote of the Department of Home Affairs. As discussed elsewhere in this report, the Committee feels that this arrangement impacts negatively on the independence of the Commission from the Executive.

The Committee refers to the judgement of the Constitutional Court in *New National Party v The Government of the Republic of South Africa* on the independence of the Chapter 9 institutions.¹⁵ The judgement also spelt out the role of the Executive and Parliament in upholding that independence, particularly regarding the inadequacy of the budgetary arrangements. The Committee discusses the principle of independence, and the Constitutional Court's judgement in the *New National Party* case, in greater

¹⁵ CCT 9/99

detail in Chapter 1 of this report and makes specific recommendations regarding the budgetary arrangements of the institutions under review in Chapter 2 of this report.

The Committee notes that, while the Commission is funded mainly by way of direct transfer from the Department of Home Affairs, additional transfers are received from the African Renaissance and International Co-operation Fund, which is administered by the Department of Foreign Affairs, for election assistance in Africa.

The Commission's budget allocation and spending fluctuate, but appear to increase substantially at the time of a general election. For example, in the 2005/2006 financial year the Electoral Commission's budget increased sharply to R979 million to fund the local government elections that took place in March 2006.

Table 1 gives a financial summary for the Electoral Commission for the period 2003/04 to 2009/10.¹⁶

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Total Revenue*	660 062	538 126	979 457	512 340	485 755	894 363	813 020
Total Expenses	612 914	593 876	925 626	536 443			
Surplus/ (Deficit)	47 148	(55 750)	53 831	(24 103)			

* This includes the baseline parliamentary allocation, as well as other income in the form of interest received and sponsorship income.

4. General Conclusions

- a) The Committee believes that the current constitutional and legal mandate for the Electoral Commission is suitable for the South African environment. However, the legal basis for the Commission's increasing international role, particular in the rest Africa, should be established.
- b) The Committee finds that the consumption of resources by the Electoral Commission is commensurate with its roles and functions.
- c) At first sight it may appear inappropriate to have special arrangements for the appointment of Commissioners, but after due consideration the Committee believes it proper to maintain the present arrangements. The Committee makes recommendations to enhance consistency, coherence and accountability in Chapter 2 of this Report.
- d) The institutional governance arrangements of the Electoral Commission require refinement, particularly regarding the delineation of the powers, roles and functions between the Commissioners and the Chief Electoral Officer and compliance of full-time

¹⁶National Treasury (2007) Estimates of National Expenditure and the Commission's submission to the Committee

Commissioners with section 9(1)(b) of the Electoral Commission Act which requires that Commissioners seek permission from the President to undertake outside work or to hold any other office.

- e) The Committee highlights the need to reconstitute the Forum of Independent Statutory Bodies to improve coordination between Chapter 9 and associated institutions.
 - f) The Electoral Commission should also develop more innovative ways to increase voter registration and enhance voter education.
 - g) The parliamentary mechanisms for oversight of the work of the Electoral Commission and engagement with the reports of the Commission are inadequate. Specific recommendations for improvement are made in this chapter. Furthermore, the Committee makes general recommendations for the improvement of the oversight and accountability mechanisms that would apply to all the Chapter 9 and associated institutions under review in Chapter 2 of this report.
 - h) Although the Commission is satisfied with the present budgetary arrangements, the Committee believes it necessary that the process for the development of its budget should follow the process identified in Chapter 2 of this report.
 - i) The discrepancy between the Commission's preferred name of "Independent" Electoral Commission and its actual name in law, namely the "Electoral Commission" should be regularised at an appropriate time.
- ## 5. Recommendations
- The Committee makes the following recommendations to improve the effectiveness and efficiency of the Electoral Commission:
- a) The legal mandate for the Electoral Commission to conduct international work must be clearly established. Furthermore, in terms of its international work, the Department of Foreign Affairs should give timely notice of the intended participation of the Electoral Commission in foreign election processes in order to provide the Commission with adequate time to plan for its involvement. It appears that the Commission feels compelled to accept these invitations. The Commission should also have and exercise the right to choose which invitations it would accept.
 - b) The Commission should develop a mechanism to ensure as far as possible that, after having declared the result of an election, the candidates it nominates from party lists for appointment to the relevant legislature are indeed eligible at that time to become members of that legislature in terms of the Constitution.
 - c) In the interests of improving co-ordination between Chapter 9 and associated institutions, the Committee recommends that, as an interim measure, the reconstitution and revitalisation of the Forum of Independent Statutory Bodies, a voluntary organization, and full participation in the forum by all Chapter 9 and associated institutions should be actively encouraged.
 - d) The Electoral Commission should also develop more innovative ways to increase voter registration and enhance voter education.

This should include consideration of the application of the “continental” approach to voter registration whereby automatic registration is integrated with registration for other government services such as pensions, housing, tertiary education and revenue collection. Collaboration with the private sector including amongst others, banking institutions and real estate agencies should also be explored for this purpose.

- e) Mechanisms to improve the relationship and interaction between Parliament and the Commission should be clearly established. The oversight and accountability of the Electoral Commission should be conducted by the National Assembly through the Portfolio Committee on Home Affairs, as is the current situation. The role of the proposed Unit in the Office of the Speaker of the National Assembly discussed in Chapter 2 of this report should also be considered in this regard.
- f) The budget process and location of the Commission’s budget allocation should be revised in accordance with the recommendations of the Committee in Chapter 2 of this report.
- g) The Commission should publish the number, nature and outcomes of complaints received, as well as any recommendations made to Parliament and their outcomes as part of its annual report.
- h) The Commission should speed up the process of defining the roles, powers and functions of Commissioners and the Chief Electoral Officer.
- i) The Commission should ensure stringent compliance with the provisions of section 9(1)(b) of the Electoral Commission Act 51 of 1996 requiring that Commissioners seek permission from the President to hold an outside office or perform any other extraneous obligation or duty. Furthermore, the directorships, partnerships and consultancies of Commissioners and senior officials must be disclosed in a special annual publication. In addition, the disclosures of pecuniary and other interests of Commissioners and staff members must be kept available in a register and an indication must be made in the annual report of where such information is available. General recommendations are made in this regard in Chapter 2 of this report.
- j) In common with all the proposals, the terms of office of Commissioners should be staggered. This is also a very small Commission. As a result, it may be necessary to increase the size of the Commission.
- k) The discrepancy between the name of the Commission preferred by the Commission itself and its actual name in law should be regularised in subsequent legislation.



CHAPTER 4

THE FINANCIAL AND FISCAL COMMISSION

1. Background

The Financial and Fiscal Commission is a uniquely South African contribution to governance. South Africa is a unitary state with three spheres of government: local, provincial and national. These three spheres must operate within an existing tax (and public expenditure) regime that has been designed so that the bulk of revenue collection occurs at the national level. The Constitution requires that a system be put in place to ensure an equitable and transparent division of revenue between different spheres of government.

Certain revenues may be generated at the provincial and local levels. While the national sphere of government raises the bulk of revenues, its expenditure responsibilities are lower than those of the provincial and local spheres of government, located closer to the recipients of services. This mismatch between revenue raised and expenditure responsibilities is known as vertical fiscal imbalance.

Financial imbalances exist between the provinces, and also between localities within provinces. Such differences in expenditure responsibilities and existing (and potential) revenue sources among the different provinces are commonly referred to as horizontal fiscal imbalance.

A system of intergovernmental fiscal relations has the potential for political manipulation, unless it is based on equity, which in turn is informed by sensible, reasonable, objective and quantifiable criteria. In addition, it is highly desirable to have an impartial and independent institution to ensure that the system that is developed and implemented contains these characteristics.

There was agreement among the constitutional negotiators to create a Financial and Fiscal Commission to assist with the revenue-sharing process between the different spheres of government. The Financial and Fiscal Commission was, therefore, created to make recommendations to all legislative authorities and other entities regarding the financial and fiscal requirements of the three spheres of government concerning matters such as revenue sharing, financial allocations, taxation, borrowing and criteria to be considered in determining fiscal allocations.

The Committee accepts that the Commission is an important advisory body that strengthens the fabric of our constitutional arrangements. Although the Commission is not a Chapter 9 institution, it is entrenched in Chapter 2 of the Constitution and, therefore, enjoys status and protection under the Constitution.

The Commission plays an important part in the strategic evolution of intergovernmental fiscal relations, as well as in assisting in maintaining the balance between fiscal decentralisation and the unitary state. The Commission sees itself as not only having a role in influencing the fiscal system, but also in facilitating its long-term sustainability.

2. Constitutional and legal mandate

The 1993 Constitution established a Financial and Fiscal Commission, and provided that the first appointment of members to the Commission had to be effected within 120 days of the passing of the Constitution. Accordingly, on 25 August 1994, the President announced the appointment of the first such Commission.

The Commission's objectives and functions as

contained in the 1993 Constitution were to apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities regarding the financial and fiscal requirements of the three spheres of government, including -

- a) Financial and fiscal policies,
- b) Equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at the national level,
- c) Taxes, levies, imposts and surcharges that a provincial government intends to levy,
- d) The raising of loans by a provincial or local government and the financial norms applicable, and
- e) Criteria for the allocation of financial and fiscal resources.

The 1993 Constitution did not describe the Commission as independent in quite the same manner as is found in the 1996 Constitution. Nevertheless, the 1993 Constitution required that Commissioners performed their duties fairly, impartially and independently, and it was an offence to influence a member of the Commission to act otherwise. Commissioners were also protected from removal from office on arbitrary grounds. Only the President was permitted to remove commissioners, and only on the grounds of misconduct, incapacity or incompetence.

Sections 220, 221 and 222 of the 1996 Constitution confirm the Commission's contin-

ued existence as an independent and impartial body subject only to the Constitution and the law. Unlike the 1993 Constitution, the 1996 Constitution does not set out detailed provisions relating to the Commission's objectives and functions, instead providing for the promulgation of national legislation to deal with such matters.

The Financial and Fiscal Commission Act 99 of 1997, which brought the enabling legislation in line with the 1996 Constitution, provides among other matters for the Commission's status, powers and functions, its composition and its operating procedures. In terms of the legislation, the Commission is empowered to act as a consultative body for, and make recommendations and give advice to, organs of state in the national, provincial and local spheres of government on financial and fiscal matters. The enabling legislation empowers the Commission to perform its functions either on its own initiative or on the request of an organ of state.

The legislation also restates the constitutional provisions relating to the Commission's independent status. Therefore, the enabling legislation provides that the Commission is independent and subject only to the Constitution and the law, and must be impartial; no person or organ of state may interfere with its functioning; and organs of state are required to assist the Commission in performing its functions effectively.

3. Findings

The Committee met with the Commission on 2 February 2007. The discussions were informed by the Commission's written response to the Committee's questionnaire. The Commission supplemented its response to the questionnaire

with additional information as requested by the Committee. From these discussions, as well as the submissions received, the following emerged:

3.1. CONSTITUTIONAL AND LEGAL BASIS

Section 220(2) of the Constitution guarantees that the Commission is independent and is subject only to the Constitution and the law and requires it to act in an impartial manner. The Constitution also requires that the Commission report regularly to Parliament and to the provincial legislatures. These provisions are repeated in the enabling legislation. Therefore, while the Commission is not a Chapter 9 institution, its constitutional and legal position is similar to that of the Chapter 9 bodies.

3.2. UNDERSTANDING AND INTERPRETATION OF MANDATE

- a) The Commission's understanding of its mandate is that, in essence, it exists to make recommendations concerning intergovernmental fiscal relations, both in South Africa and elsewhere on the African continent. The Commission stated that a proper interpretation of its mandate requires that it focus on -
 - i. Adopting an independent research agenda, with a strong emphasis on proactive research,
 - ii. Strengthening its focus on the financial impact of meeting presidential targets at the present service delivery rates,
 - iii. Conducting institutional analyses between the spheres of government, especially where there may be a lack of organisational or institutional capacity,
 - iv. Developing funding formulas for higher education, and
 - v. Offering advisory services on a cost recovery basis.
- b) The Committee notes, however, that there is no explicit legal authority that permits the Commission to perform a role in shaping intergovernmental relations outside South Africa. The Committee notes further that the demand for the Commission's expertise elsewhere on the African continent appears to be increasing. The Committee understands that there would be no problem with the Commission performing such a role on the African continent, provided that it does not detract from its primary responsibilities nationally. In this regard, the Committee recommends that the legal mandate to perform such activities be clarified by legislation.
- c) The Committee is not satisfied that the Commission's mandate permits it to provide advisory services on a cost recovery basis. Again, while the Committee understands the introduction of such a revenue stream for the Commission, the legal mandate for such work must be clarified by legislation.
- d) The Committee notes the Commission's many invaluable contributions to the shaping of financial and fiscal relations in South Africa. For example, the Commission originally proposed a framework for intergovernmental fiscal relations. The Commission also recommended that social security grants be a national responsibility, administered through the establishment of the national social security agency to improve efficiency in the registration of beneficiaries and the administration of grants. A further example is that of the

costed norms approach to the allocation of provincial equitable shares based on the costing of services that provinces are obliged to deliver in terms of national policy, legislation and the Constitution as an alternative to the present transfer system that does not take into account all relevant factors in determining normative expenditure. While the proposal was not accepted, it led to widespread debate.

- e) The enabling legislation is very clear as to the Commission's advisory role. Section 3(1) of the Financial and Fiscal Commission Act refers to the Commission as a consultative body. Therefore, the Executive is not bound to accept its recommendations.
 - f) The Committee notes that the Commission's recommendations enjoy a high degree of acceptance. The Committee has been informed of the effectiveness of the Commission's recommendations and notes that, according to the Commission, the National Treasury accepts approximately 70% of its recommendations. While the Executive is not bound to accept the Commission's advice or recommendations, unlike the other institutions under review, there is a special provision that requires that the Executive, through the Minister of Finance, must respond to the Commission's annual submission of recommendations on the division of revenue and other intergovernmental fiscal matters and provide reasons for deviations or non-acceptance of the Commission's recommendations.
- b) Section 200(1) of the 1993 Constitution provided for a Commission composed of a chairperson and a deputy chairperson, a person designated by each of the provincial executive councils, as well as seven Commissioners appointed by the President on the advice of Cabinet.
 - c) Initially, section 221 of the 1996 Constitution made provision for the appointment of 22 Commissioners by the President. As the size of the Commission was cumbersome, in 2001 a constitutional amendment reduced the number of Commissioners from 22 to 9. The President appoints all Commissioners.
 - d) The Commission is now composed of a chairperson and deputy chairperson, three persons selected after consultation with the Premiers, two persons selected after consulting with organised local government and two other persons.
 - e) The procedures to select and appoint commissioners to the Commission provide yet another instance of the enormous variation that the Committee encountered regarding appointments. At present, Parliament plays no role in the selection and appointment of Commissioners to the Commission.
 - f) While the Committee acknowledges that the specificities of different institutions may require different appointment procedures, the Committee considers that there is merit in applying a similar approach to the appointments of commissioners of the Chapter 9 and associated institutions, particularly since the nature of the appointments procedures relate directly to the independence of these institutions.

3.3. APPOINTMENTS

- a) The Committee notes that there have been a number of constitutional and legislative amendments to the composition of the Commission and the appointments process for its Commissioners:

- g) Regarding the appointment procedures pertaining to the Commission, the Committee finds the selection and appointment of Commissioners solely by the Executive, as well as a total lack of parliamentary involvement, inconsistent with the principle of independence.
- h) In this regard, the Committee notes and accepts the Commission's submission that the appointment process should be similar to that for Chapter 9 institutions, in terms of which the President appoints commissioners, and does so on the recommendation of the National Assembly.
- i) The Committee notes that the Chairperson and Deputy Chairperson are appointed as full-time Commissioners, while the remaining Commissioners are appointed on a part-time basis. The legislation is silent as to whether Commissioners are appointed as part-time or full-time Commissioners. It seems to the Committee that there should be clarity on this point.
- j) The Committee finds that, given the largely advisory nature of the Commission's work, its present composition is too large. In this regard, the Committee believes that the appointment of three to five full-time Commissioners would create a less cumbersome structure, and would considerably ease decision-making and, therefore, increase efficiency.
- k) On the issue of provincial representation, the Committee believes that the Commission can take the voice of the provinces into account more systematically by going to each of the provinces and presenting its reports. Furthermore, dedicated commissioners can be allocated the task of facilitating relations with the provinces and with local government.
- l) The Committee notes that such a change to the appointment and composition of the Commission will require constitutional amendment.

3.4. PUBLIC AWARENESS

During its interaction with the Committee, the Commission informed the Committee that it was still debating on how to engage meaningfully with the public, as it did not want to be perceived as being a campaigning organisation. This lack of an external communications strategy is regrettable. The Committee considers it important that the Commission establish mechanisms for public engagement and input into its recommendations. This would facilitate the inclusion of civil society perspectives in developing recommendations for the expenditure priorities and would enhance the Commission's credibility and legitimacy. A visible public presence may also lend additional weight in the eyes of policymakers to the Commission's recommendations.

3.5. RELATIONSHIP WITH PARLIAMENT

- a) The Committee notes that, as is the case with some other constitutional bodies, the Commission is not specifically required to account to Parliament, but has a constitutional and statutory obligation to report regularly to both Houses of Parliament and to the provincial legislatures.
- b) The Committee also notes that the Commission established an office in Cape Town to facilitate its relationship with Parliament. Since 2003 the Deputy Chairperson of the Commission regularly

attends relevant parliamentary committee meetings.

- c) However, the Committee believes that Parliament's engagement with the Commission is still inadequate. In order to facilitate its relationship with Parliament, the Commission suggested the establishment of a special not parliamentary oversight mechanism. The absence of formal protocols also makes the relationship with Parliament difficult. The Committee learnt that the Commission has prepared such protocols but has not identified someone in Parliament to champion this initiative on its behalf.
- d) The Committee accepts that the absence of a parliamentary mechanism able to facilitate and co-ordinate the Commission's interactions with Parliament creates difficulties.
- e) The Commission's reports on the Division of Revenue Bill are referred to both Houses of Parliament and then to the Select and Portfolio Committees on Finance, as well as to the Joint Budget Committee. However, its recommendations are potentially of relevance to a multiplicity of parliamentary committees from both Houses of Parliament, depending on the nature of the recommendations. The Commission is called to brief the specified Committees individually on its recommendations, which is enormously time consuming.
- f) In this regard, the Committee is of the view that the proposed unit in the Office of the Speaker could greatly assist with co-ordinating the interactions between the Commission and parliamentary committees. This proposal is discussed more fully and recommendations are made in this regard in Chapter 2 of this report.

3.6. RELATIONSHIP WITH THE EXECUTIVE

The Committee has learnt that the Executive accepts a high proportion of the Commission's recommendations, which is indicative of the existence of an effective and co-operative relationship. The effectiveness of the Commission's work has been explored more fully earlier in this chapter.

3.7. RELATIONSHIP WITH THE PROVINCES

- a) The Committee has been informed that the Commission has a close working relationship with the provinces. The Commission has observer status at the Budget Council, in which it becomes aware of issues emanating from the provinces. The provinces also consult with the Commission on specific matters. In addition, the Commission visits all the provinces to inform them of its annual recommendations, and some of the work that it undertakes emanates from the questions raised by provinces.
- b) It has been said that there may be some potential for tension as the Commission is tasked with making recommendations on policy but is not responsible for the implementation of its recommendations. The potential for tension arises when provinces consider that the recommendations should have a higher status. In this regard, the Committee believes that it is for the Commission to make it quite clear that it is an advisory body.

3.8. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Committee notes the absence of any formal relationships between the Commission and any of the Chapter 9 institutions, although the Commission has established an informal relationship with the Human Rights Commission.
- b) The Commission expressed the view that there is no overlap between it and the other constitutional institutions being reviewed, as it is the sole institution that advises on inter-governmental fiscal relations in South Africa. However, as the Commission is increasingly involved in service delivery issues as these relate to the expenditure responsibilities and budget requirements of the various spheres of government, the Committee is of the view that there is potential for increased co-operation and collaboration between it and the Chapter 9 and related constitutional institutions, particularly the Human Rights Commission. General recommendations to improve collaboration and co-ordination of activities between the various Chapter 9 and associated institutions are made in Chapter 2 of this report.

3.9. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Committee finds that the current system whereby the President determines the remuneration, conditions of employment and other benefits of Commissioners taking into account, among other factors, the recommendations of the Minister of Finance, requires revision.
- b) At present, the determination of salaries is a

lengthy process and is the cause of some dissatisfaction among the Commissioners. In this regard, the Committee directs attention to section 219(5) of the Constitution that requires the adoption of framework legislation to determine the salaries, allowances, and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution. This legislative framework has not yet been enacted. The recommendations of the Committee in this regard are contained in Chapter 2 of this report.

- c) The Committee notes that the Chairperson of the Commission is also its Chief Executive Officer. While the Committee understands that the Chairperson of the Commission considers this satisfactory, the Committee believes that this creates significant challenges for sound institutional governance, since the directing authority and the implementing authority are vested in the same person.
- d) The Commission has a high staff turnover. The Committee understands that this is a consequence of the specialist nature of the Commission's work, which makes the Commission's staff members highly desirable to other government departments. Low salary levels for specialist staff also contribute to staff turnover. Although the Commission is aware of this problem, the Committee notes that it does not have a staff retention policy and strategy in place to stem the losses.
- e) The Commission informed the Committee that there have been few significant internal conflicts. Although the Committee learnt that the powers, roles and responsibilities of full-time and part-time Commissioners have

been determined, these are recorded in the minutes of the inaugural meeting of the Commission's steering committee in July 1996.

- f) The Committee believes that a more formal delineation of the powers, roles and responsibilities of Commissioners is required.
- g) The Committee learnt that there is no code of conduct for Commissioners and staff. However, the Commission has mechanisms in place to govern the requirements of disclosure of financial and other interests, including the disclosure on an annual basis (or whenever circumstances may change) by Commissioners of their business interests with the Chairperson of the Commission. Such business interests include membership of other commissions or boards, any business activities or involvements, as well as involvements with any trusts or any other organisation. The disclosure extends to other members of a Commissioner's family. However, these disclosures are not readily accessible. General recommendations are made in this regard in Chapter 2 of this report.
- h) The Committee notes that Commissioners are not permitted to take part in particular activities of the Commission if they, their families, life partners or business associates have a financial interest in those activities.

3.10. FINANCIAL ARRANGEMENTS

- a) The Committee understands that, although the Commission does not have a separate budget vote (its budget falls under the vote for National Treasury), the Commission has always obtained the funds it has requested.
- b) The Committee is, however, of the view that the location of the Commission's budget allocation within the budget allocation for the National Treasury could impact negatively on the perceived independence of the Commission. It would be important to ensure a budget process that enhances the independence of the Commission. The Committee's recommendations, detailed earlier in this report, regarding the financial arrangements for all the Chapter 9 and associated institutions under review should be considered in this regard.
- c) The Commission's budget allocation for the period 2003/04 to 2009/2010 is summarised in the table below, as well as its expenditure from 2003/04 to 2005/06. The Commission exceeded its budget allocation in 2003/04, but underspent in 2004/05 and 2005/06.

Table 1 : Summary of allocations and operating expenses, as well as the allocations under the Medium Term Expenditure Framework¹⁷

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Allocations from National Treasury	12 679	17 869	19 660	21 705	20 178	21 125	22 156
Total operating expenses	14 955	16 716	19 019				
Surplus/ (Deficit)	(2 485)	1 552	1 060				

¹⁷National Treasury (2007) Estimates of National Expenditure and the Commission's submission to the Committee

4. General conclusions

- a) The Committee considers the work of this Commission to be very valuable for transparent financial relations between central government, the provinces and local government. Its relevance may also increase in future.
- b) The Committee considers the appointment procedures for Commissioners to be inappropriate. General recommendations are made to enhance consistency, coherence and accountability in Chapter 2 of this report. In addition, specific recommendations relating to the Commission are made below.
- c) The efficiency and effectiveness of the institution could be enhanced if certain institutional arrangements are addressed. These are elaborated in the recommendations.
- d) The Committee finds that public awareness of, and engagement with, the Commission's work is inadequate and makes recommendations in this regard.
- e) The parliamentary mechanisms for oversight of the work of the Commission and engagement with the reports of the Commission are inadequate. The Committee makes general recommendations for the improvement of the oversight and accountability mechanisms that would apply to all the Chapter 9 and associated institutions under review in Chapter 2 of this report.
- f) The budget process and funding model of the Commission adversely affects its accountability and independence. The Committee makes general recommendations in Chapter 2 of this report for the

improvement of the budget process that would apply to all the Chapter 9 and associated institutions under review.

5. Recommendations

- a) There is a strong argument for the Commission's continued existence. The Commission performs an important function in influencing the fair and equitable vertical and horizontal distribution of resources among the spheres of government. This is an invaluable service, which the Commission has performed commendably, particularly in the early years of our democracy.
- b) While, at present, intergovernmental relations in South Africa are stable, in a different political environment tension between the different spheres of government about the equitable distribution of funds may well emerge. As such, the Commission may be required to perform a stabilising role, which it is uniquely positioned to do, as the nature of the Commission's recommendations must take into account the interests of all spheres of government. The Committee is of the view that the Commission should be retained to fulfil its current role, with the institutional improvements recommended below.
- c) The efficiency and effectiveness of the Commission could be further improved by implementing the following recommendations:
 - d) The appointments procedure and budget arrangements should be reviewed to support further and assert the Commission's independence. The Committee makes specific proposals in this regard in Chapter 2 of this report.

- e) More specifically, regarding appointments of Commissioners:
 - i. Commissioners should be appointed by the President on the recommendation of Parliament.
 - ii. The present number of nine Commissioners should be reduced to three to five full-time Commissioners.
 - iii. In the meanwhile, there should be clarity concerning whether Commissioners are appointed on a part-time or full-time basis.
- f) The legislative framework envisaged in section 219(5) of the Constitution to determine the salaries, allowances, and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution must be enacted. The Committee makes proposals in this regard in Chapter 2 of this report.
- g) Certain institutional governance matters, such as a conflict resolution policy and mechanisms, a staff retention policy and strategy and the Commission's governance model should be addressed to improve its efficiency and effectiveness.
- h) Details of directorships, partnerships and consultancies must be disclosed in the Commission's annual reports. The pecuniary and other interests of Commissioners and senior officials should be disclosed in a register, and mention should be made in the annual report of where such information is available.
- i) The legal mandate for the work of the Commission in shaping intergovernmental relations in the rest of Africa, as well as the initiation of cost recovery advisory services, should be clarified.
- j) There is room for increased collaborative and co-operative relations with relevant Chapter 9 and related constitutional bodies. In the absence of a formalised mechanism to facilitate such relations, and as an interim measure, the Committee recommends that the reconstitution and revitalisation of the Forum of Independent Statutory Bodies (a voluntary forum which the Committee understands to be at present defunct) should be encouraged.
- k) Mechanisms for meaningful public involvement and for promoting public awareness of the Commission's work should be established. The Commission should develop an external communications policy and strategy to guide the development of such mechanisms.
- l) Mechanisms to improve the relationship and interaction between Parliament and the Commission should be developed. The role of the proposed unit in the Office of the Speaker of the National Assembly discussed in Chapter 2 of this report should be considered in this regard.
- m) The budget process and location of the Commission's budget allocation should be revised in accordance with the recommendations of the Committee in Chapter 2 of this report.



CHAPTER 5

THE AUDITOR-GENERAL

1. Background

The remit of the Auditor-General is extremely wide. In South Africa, the Auditor-General audits the accounts of every public authority and any other body that the law prescribes. The independent government audit is an important part of a democratic system of transparent and accountable governance. In general terms the audit is intended to reveal deviations from accepted standards and violations of the principles of legality, efficiency, effectiveness and economy of financial management early enough to allow for corrective action, to make those accountable accept responsibility, and to take steps to prevent such breaches or at least make them more difficult.¹⁸ In short, 'without audit, no accountability; without accountability, no control; and if there is no control, where is the seat of power?'¹⁹

Therefore, the justification for an independent public auditor lies in the concept of public accountability. Accounting officers must annually submit an account to Parliament or the relevant legislative authority on what has happened in their departments, or institutions, in the preceding financial year. Typically this involves some form of audit. The task of the Auditor-General in this process is to provide an independent investigation and evaluation of, as well as public reporting on, the financial administration of the executive authority of the public sector. It is this information that will assist Parliament or any other legislative body in exercising its oversight function.

Both here and internationally it is accepted practice that Auditors-General can only accomplish their task effectively and objectively if they are independent of the body they are tasked with auditing, and are protected against outside influence. Furthermore, the Auditor-

General must not only be independent but must be seen to be independent. Such independence is necessary given that the Auditor-General is tasked primarily with auditing the executive branch of government, and must be free to report objectively on any shortcomings in the financial administration of any executive authority. Given the power that is concentrated within the Executive, there is the accompanying threat that this power will be used to interfere with or otherwise adversely influence the activities of the Auditor-General.

Nevertheless, despite the inherent tension that the struggle for independence from Executive influence presents, a degree of co-operation is both normal and in the best interests of making the most efficient use of public funds. The practical implementation of any recommendations emanating from an audit is best achieved with the active participation of the Executive.

The relationship between national audit institutions and Parliament is generally co-operative and complementary, as both ultimately pursue the same goal. Typically, Parliament has the power to appropriate budgets but does not have the necessary resources actively to monitor and assess budget implementation. National audit institutions provide independent reports on government's use of public funds, thereby enhancing parliamentary oversight of the Executive.

The Auditor-General as a national audit institution has a long history. It was only in 1989, however, that legislation made separate provision for the Auditor-General and his or her staff. The great defect of this legislation was that the Executive retained the power of veto on certain administrative matters relating to the audit office, a situation that was contrary to the internationally accepted principle of an independent

¹⁸ De Loor, J. The Role of the Auditor-General. In J. Gildenhuys (ed) *Ethics and the Public Sector*. Speeches and Papers presented at the Second Winelands Conference held at the University of Stellenbosch, 1989.

¹⁹ De Loor, J. 1989, p 80

audit institution being required for proper accountability. This placed the Auditor-General in the unenviable position of having to report on the financial affairs of the executive authority without fear or favour, while being dependent on the goodwill and co-operation of the latter for the procurement of essential resources for carrying out its assigned task. Therefore, concerning the status of the institution of the Auditor-General, its independence was not recognised, nor was its jurisdiction comprehensive.

With the establishment of a democracy imminent, the apartheid regime passed the Audit Arrangements Act 122 of 1992 establishing an office of Auditor-General outside of the public service and creating for it its own revenue fund. This Act also provided for the transfer of overall supervision to an oversight body known as the Audit Commission, which was composed mainly of Members of Parliament.

The Auditor-General Act 12 of 1995 brought the legislation in line with the provisions of the 1993 Constitution. The Public Audit Act 25 of 2004 has now replaced both of these Acts, ensuring alignment with the 1996 Constitution and enhancing the financial and administrative arrangements of the Auditor-General, including those concerning accountability to Parliament.

2. Constitutional and legal mandate

The 1996 Constitution and the Public Audit Act 25 of 2004 provide the applicable legal framework for the Auditor-General. Section 181 of the Constitution affirms the Auditor-General's constitutional status, locating the office among the State Institutions Strengthening Constitutional Democracy found in Chapter 9.

The Public Audit Act came into operation in 2004, repealing the Auditor-General Act of 1995 in its entirety. The Public Audit Act, 2004, provides that the Auditor-General is the supreme audit institution of the Republic, and restates the provisions of section 181 of the Constitution, confirming that the Auditor-General is independent and subject only to the Constitution and the law, must be impartial and act without fear, favour or prejudice and is accountable to the National Assembly.

Section 188 of the Constitution provides that the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, all municipalities, and any other institution or accounting entity that the Auditor-General is required to audit in terms of legislation. In addition, the Constitution provides the Auditor-General with the discretionary power to audit and report on the accounts, financial statements and financial management of any institution funded from the National or Provincial Revenue Fund or by a municipality, or any other institution that is authorised by law to receive money for a public purpose.

The Public Audit Act distinguishes between the Auditor-General's constitutional and other functions. The Auditor-General's constitutional functions require that the Auditor-General perform annual mandatory audits of government departments, administrations, Parliament and the provincial legislatures, constitutional institutions, municipalities, municipal entities and certain consolidated financial statements.

In addition to these mandatory audits, section 4(3) of the Act furnishes the Auditor-General with the discretion to audit and report on the accounts, financial statements and financial

management of public entities and other institutions that meet certain criteria.

The legislation also sets out the Auditor-General's other functions. Section 5 of the Act empowers the Auditor-General to provide various audit-related services commonly performed by a supreme audit institution; give advice and support to a legislature outside the scope of the Auditor-General's normal audit and reporting functions; comment on a response by an auditee to a legislature's review of an audit report; carry out an investigation or special audit of any specified institution if the Auditor-General considers it to be in the public interest or on receipt of a complaint or request.

In addition, the legislation provides that the Auditor-General may co-operate with persons, institutions and associations, nationally and internationally; appoint advisory structures external to the administration of the office to provide specialised advice; and do any other thing necessary to fulfil his or her role effectively.

The Auditor-General provides reliable information concerning what is described as the management of public funds. While the Auditor-General offers a range of audit services (including regularity audits and audits of performance information, performance audits, special investigations and sustainable development audits), regularity audits that attest to the quality and reliability of the financial information presented by government departments are performed most frequently. It appears to the Committee that generally the present unreadiness of public sector departments and entities hampers the Auditor-General's ability to report on performance or non-financial information.

Increasingly, however, this is an area of reporting that has potential for growth and for providing information regarding the extent to which public sector institutions are providing services in a cost effective way. The focus areas of such performance audits are increasingly based on the strategic service delivery areas of government.

3. Findings

The Committee received written submissions from the Auditor-General in response to the questionnaire that was circulated. This document, supplemented by various submissions, formed the basis for the discussions that took place between the Committee and the Auditor-General on 14 March 2007. The Auditor-General also supplied further supplementary information at the request of the Committee. From these the Committee finds as follows:

3.1. CONSTITUTIONAL AND LEGAL BASIS

3.1.1. Independence

a) The Committee finds that the Constitution and the enabling legislation provide the Auditor-General with the requisite legal protection from external interference. Section 181 of the Constitution guarantees the Auditor-General's independence, while the Public Audit Act, 2004, restates the constitutional provisions concerning independence. In addition, the constitutional and statutory framework contains provisions that are accepted markers of independence. The Constitution sets out special procedures to safeguard the Auditor-General's tenure and makes his or her dismissal only possible on the grounds of misconduct, incapacity or incompetence.

b) The Constitution also stipulates special majorities for both the Auditor-General's appointment and removal from office. The appointment of the Auditor-General requires approval by the National Assembly by a resolution adopted with a supporting vote of at least 60 percent of the members of the National Assembly. In order to dismiss the Auditor-General from office, a resolution adopted with a supporting vote of at least two-thirds of the members of the National Assembly is required.

c) Furthermore, as the office of the Auditor-General finances its operations through audit fees, it is financially independent of the Executive.

d) As power can never be wholly unfettered, the Committee notes that the Constitution and the enabling legislation charge certain bodies with internal and external oversight of the Auditor-General:

i. Internal oversight is achieved through an audit committee, established by section 40 of the Public Audit Act, 2004. The members of the audit committee are appointed by the Deputy Auditor-General in consultation with the Auditor-General. The audit committee must consist of at least three persons, the majority of whom are not in the employ of the Auditor-General. Specifically, the chairperson of the audit committee must not be employed by the Auditor-General and must be independent, knowledgeable of the status of the position, have the requisite business, financial and leadership skills, and must not be a political office-bearer.

The audit committee has key financial oversight responsibilities that typically accrue to audit committees, including that of commenting in the annual report on the effectiveness of internal control, as well as evaluating the Auditor-General's annual financial statements. It can make recommendations to the Auditor-General, to the external auditor and to the National Assembly's Standing Committee on the Auditor-General, if necessary.

ii. In terms of the Constitution, the Auditor-General is accountable to the National Assembly. The Standing Committee on the Auditor-General was established in terms of section 10(3) of the Public Audit Act as a parliamentary oversight mechanism for the Auditor-General. This Standing Committee replaces the previous Audit Commission, and is a multi-party committee that exercises oversight responsibilities that focus on performance, appointments and the nature and scope of the audits performed by the Auditor-General, including consultation on its fee structure. In collaboration with the Auditor-General, the Standing Committee is currently reviewing the Office's governance model, as well as considering the remuneration, benefits and conditions of service for the Auditor-General. The Standing Committee reports to the National Assembly.

3.1.2. Appointments

a) As identified earlier in this report, the Committee finds that there is no uniform procedure for the appointment of office-bearers to the Chapter 9 and associated institutions.

In the case of the Auditor-General, the President appoints the Auditor-General on the recommendation of the National Assembly with a supporting vote of at least 60 percent of the members of the National Assembly. The Public Audit Act tasks the Speaker of the National Assembly with initiating the process of appointing the Auditor-General as contemplated in section 193 of the Constitution. A committee of the National Assembly nominates a candidate for appointment and makes recommendations on the conditions of employment.

- b) The Committee also notes that section 193 of the Constitution provides criteria for appointment as Auditor-General: The incumbent must be a man or a woman who is a South African citizen, and is fit and proper to hold that office. In addition, due regard must be given to specialised knowledge of or experience in auditing, state finances and public administration.
- c) The Auditor-General is appointed for a fixed non-renewable term of office of between five and ten years in terms of the Constitution both the previous and present Auditors-General were appointed for seven years.
- d) Given the enormously important role that this Office plays in enhancing the financial accountability of the public sector, the Committee finds that it is essential to ensure that appointments occur in a timely fashion so as to ensure continuity, as well as to allow for the transfer of institutional memory. While the existence of a dedicated Standing Committee will obviously assist in this regard, the Committee believes that the proposed unit in the Office of the Speaker will be well placed to initiate and oversee the practicalities that accompany this process.

3.2. INTERPRETATION OF CONSTITUTIONAL AND LEGAL MANDATE

- a) As previously mentioned, the Committee notes that at present the Auditor-General performs mostly regularity audits, which entails reporting on whether the financial statements fairly represent, in all material aspects, the financial position and the results of the operations for a given financial year. In this regard, the Committee understands that the nature of public sector audits requires the Auditor-General to report more extensively than the private sector on the detail and nature of financial management shortcomings, and the root causes thereof, in order to enable stakeholders to manage public resources better.
- b) In common with the majority of the Chapter 9 bodies, the enabling legislation does not give the Auditor-General authority to make binding decisions. Thus, to some extent the Auditor-General must rely on the co-operation of government departments to accept and act on recommendations contained in the audit reports. In this regard, the Auditor-General is also assisted by the oversight function of parliamentary committees, particularly the Standing Committee on Public Accounts (SCOPA). The Committee notes that the Auditor-General regularly submits reports addressing recommendations to Parliament. However, the lack of implementation of the recommendations contained in these reports by affected departments is a cause for concern. The Committee was made aware that some government departments have received qualified audits for a number of years. The Committee suggests that the Auditor-General should make special reports to Parliament in such circumstances, which should result in debates in Parliament. The

Committee believes in publicity as a means of enforcement.

- c) The Committee notes that there are a number of other audit services that the Auditor General can provide, including particularly performance auditing, which entails evaluating how economically resources were procured, as well as the efficiency with which they were used.
- d) Although at present the procedures and systems of most government departments are not sufficiently developed to allow for performance audits, the auditing of performance information is being phased-in in some departments. Given that the Auditor-General intends eventually to conduct performance audits for all government departments, the Committee highlights the need to build the capacity of the office of the Auditor-General for this purpose. This will require a systematic review of resources, including personnel. The Committee is also aware that the most effective use of the information contained in the performance audits will require that the report provided to parliamentary committees is timely.
- e) Moreover, the Committee emphasises that Parliament should establish mechanisms to ensure the systematic, comprehensive and efficient processing of performance audit reports. These would be very different to the present regularity reports, and the capacity of the Standing Committee on Public Accounts and the relevant portfolio committees will require strengthening in order to deal with these reports effectively.
- f) The Committee finds that the Auditor-General performs extensive audit services of an international nature. For example, the

Auditor-General is involved in developing financial management and accountability models in the public sector in parts of Africa. In addition, the Auditor-General has audited the World Health Organisation and the United Nations Industrial Development Organisation, and is presently auditor to the United Nations Organisation itself. These contracts have been obtained competitively and are evidence of the Auditor-General's good standing and professionalism.

- g) Nevertheless, it is cause for concern that the enabling legislation does not specifically allow the Auditor-General to do this kind of work. At present the Auditor-General relies on section 5(1)(a) of the Public Audit Act as the legal basis for its international work. The section, which is referred to earlier, provides that the Auditor-General may for a fee and without compromising the role of the Auditor-General as an independent auditor, provide audit related services to an auditee or other body, which is commonly performed by a supreme audit institution.
- h) The Committee is not satisfied that international audit work can be regarded as work commonly performed by a supreme audit institution established for a national purpose.
- i) The Committee finds that only 5% of the Auditor-General's resources are allocated to these international services. This is a figure that the Auditor-General has determined will not compromise its efficiency or put a strain on resources. The Committee accepted that these international services also create opportunities or incentives that attract trainees and experts, who might otherwise choose to work within the private sector. While the Committee finds that the international work of the Auditor-General does not

negatively affect its national responsibilities and provides the office with a number of important benefits, the present lack of a legal mandate to perform such work is unsatisfactory and should be clarified.

3.3. PUBLIC AWARENESS

- a) Many South Africans, including those in positions of leadership, are not fully aware of the important work of the Auditor-General. The Committee finds that an unacceptable situation. The Committee notes that the office of the Auditor-General has identified the need to inform the public of its work as a priority and has begun to engage with the media and with civil society in this regard. In the case of civil society, fostering such relationships may become increasingly important, particularly with regard to issues of corruption.
- b) The Committee notes that the Auditor-General has implemented a complaints mechanism to deal with complaints against the Auditor-General. The Committee understands that the mechanism is not intended as a general complaints or reporting hotline, but rather for complaints pertaining to the exercise of powers and the performance of duties by, and the administration of, the institution when performing audits.
- c) Nevertheless, the Committee finds the complaints machinery to be overly complex, requiring that the complaint be in the form of an affidavit or affirmation properly commissioned by a commissioner of oaths. The Committee is of the view that complaints mechanisms should generally entail a more accessible procedure if they are to be effective.

3.4. RELATIONSHIP WITH THE EXECUTIVE

- a) The Committee notes that the Auditor-General has a close working relationship with National Treasury. For some years the Auditor-General and National Treasury have held quarterly meetings on areas of mutual interest, and hold meetings of a technical nature on an informal basis. The Committee accepts that, given the technical nature of the work of the Auditor-General and the kinds of audit information required, the continued close working relationship with national and provincial treasuries is necessary for the Auditor-General to conduct his or her work effectively and efficiently.
- b) The Auditor-General has also informed the Committee that the office enjoys friendly and professional relations with all government departments, Parliament and public entities in obtaining information. Since there is a keen understanding of the role of the Auditor-General, bodies being audited also appreciate the importance of providing the Auditor-General with adequate and relevant information to facilitate a reliable audit outcome.
- c) As has been indicated earlier in this Chapter, the Auditor-General cannot make enforceable decisions and must therefore rely on the co-operation of government departments to implement any recommendations that are made in audit reports. In the circumstances, the extent to which departments fail to implement such recommendations has been noted as a matter for concern.

3.5. RELATIONSHIP WITH PARLIAMENT

- a) The Committee finds that the Auditor-General has a highly structured relationship with Parliament. The Auditor-General accounts to the National Assembly through the Standing Committee on the Auditor General, which was established in May 2006 as a dedicated committee for this purpose. Despite the fact that the Standing Committee has only recently been formed, it has already engaged with the Auditor-General on its strategic plan and budget for the next three years, as well as its latest annual report. This is similar to the oversight work of a portfolio committee in relation to a government department. The Auditor-General and the Standing Committee are in the process of fleshing out their governance relationship. This process is due for completion by July 2007.
- b) In addition, there is a special parliamentary committee that oversees the accounts of all government departments and public entities. The Standing Committee on Public Accounts considers the Auditor-General's reports and recommendations when exercising parliamentary oversight over expenditure by government and public entities.
- c) The Committee notes that the Auditor-General provides technical support and secretarial assistance to the Association of Public Accounts Committees, which is an organisation that aims to empower the Public Accounts Committees in all ten legislatures to discharge their oversight duties effectively.
- d) The Committee notes that the Standing Committee on Public Accounts is in many ways provided with direct assistance in its

functioning by the office of the Auditor-General. While this is commendable and clearly beneficial for as long as Parliament continues to grapple with capacity problems, particularly in relation to its committees, both Parliament and the office of the Auditor-General should exercise care to observe the need for them to remain at arms length in the interests of the constitutional independence of each. The Auditor-General is after all as an office itself accountable to the National Assembly and relevant committees as occasion demands, and such accountability should not be compromised by the nature of the day-to-day co-operation between them.

3.6. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Committee notes the potential for overlap between the functions of the Auditor-General and those of the Public Protector. The Public Protector is mandated to investigate any conduct in state affairs or in public administration in any sphere of government that is alleged or suspected to be improper or to result in impropriety or prejudice, while the Public Audit Act empowers the Auditor-General to investigate any body, institution, or entity using public funds if the Auditor-General considers that such an investigation would be in the public interest, or on receipt of a complaint or request.
- b) It was put to the Committee that the Auditor-General does not regard the conduct of special investigations as a core function. The Auditor-General does also refer matters for investigation to the Public Protector. There is, however, no formal understanding between these two institutions regulating their working relationship.

- c) The Committee finds that the absence of a formal memorandum of understanding and mechanisms to track and monitor progress of referred matters is of deep concern. The Committee recommends that there should be a note in the annual report of each institution on matters referred to the other as well as the outcome of such cases.
- d) When audit work is undertaken, it appears to the Committee that areas such as conditions of service, human resource management, and codes of conduct create the potential for overlap between the Office of the Auditor-General and the Public Service Commission. The Committee learnt that the Auditor-General and the Public Service Commission have co-operated successfully in a number of instances, such as the audit of the interests of public office-bearers and senior public servants in the public service.
- e) The Committee notes that a formal memorandum of understanding exists between the Public Service Commission and the office of the Auditor-General. The specific purpose of this memorandum of understanding is to enhance co-operation, efficiency and effectiveness and to avoid duplication of functions performed by the Auditor-General and the Public Service Commission. The agreement identifies areas of collaboration such as the sharing of information generally, training, the sharing information on best practices and methodologies, the co-ordination of audits and special investigations, and other projects. The memorandum identifies the procedures to be followed for purposes of structuring these interactions and provides for contact persons within the respective institutions to facilitate such co-operation and collaboration.
- f) The Committee finds that there is immense potential for enhanced co-operation and collaboration between the Chapter 9 institutions, particularly as the scope of the Auditor-General's work broadens to include performance auditing. Since performance audits will include the efficiency and economy of service delivery measured against agreed standards and outcomes contained in strategic and business plans of departments, the potential for overlap with the Public Protector, the Public Service Commission, the Human Rights Commission and the Financial and Fiscal Commission becomes obvious. Recommendations aimed at ensuring effective co-operation and collaboration are made in Chapter 2 of this report.

3.7. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Committee notes that, while the Auditor-General is in overall control of, and is accountable for, the administration of his or her office, the internal governance arrangements include a number of checks and balances.
- b) In addition to the audit committee referred to previously, the Deputy Auditor-General is head of the administration and is responsible for the administration of the Office. Furthermore, despite the fact that under the legislation the Auditor-General is the sole repository of legal authority and power, the Auditor-General is empowered to appoint an advisory committee to assist him or her.
- c) The Office of the Auditor-General has provided for the disclosure of interests of both office-bearers and staff. The Committee notes that the Auditor-General and all staff

are required by the Code of Professional Conduct and Ethics to disclose any direct or indirect relationship or interest that may be regarded as incompatible with, or adversely influencing or impairing, the values and principles of the Code. A central register is kept of all reported interests and relationships. The Auditor-General is not allowed to perform outside remunerative work or to sit on the boards of companies. Staff members are required to obtain permission to perform outside work and must disclose any involvement as directors. The Committee, however, is not satisfied that this register is sufficiently accessible to the public. This issue is discussed more fully in Chapter 2 of this report.

- d) The Auditor-General identified staff recruitment and retention as a constraint. There is a limited pool of chartered accountants available. In addition, the focus on public sector auditing, together with employment equity requirements, have placed further constraints on the potential number of chartered accountants available for employment. The Committee notes that the Auditor-General has initiated a trainee accountant scheme to increase the pool of chartered accountants, including a full-time bursary scheme, with the object that trainees, once qualified, will work for the Auditor-General. In addition, the Auditor-General's international work is a means of attracting and retaining staff.

- e) As in other areas, the recruitment and appointment of staff are determined by the policies of the institution, which follow the provisions of the relevant legislation concerning representivity. In this regard, the issue of representivity is enormously important and special care must be taken in making appointments, especially at senior level.

3.8 FINANCIAL ARRANGEMENTS

- a) Although the legislation provides for the possibility of Parliament appropriating monies for the Office of the Auditor-General, since 1993 no parliamentary appropriation has been necessary. The Auditor-General is able to generate its own income through audit fees.
- b) The Committee finds that, among the institutions under review, the Auditor-General is unique in this regard. However, the Committee notes that the non-payment or late payment of monthly invoices by auditees can result in difficulties with cash flow management.
- c) The table below summarises the revenue and expenditure of the Auditor-General since 2003/04.

Table 1: Revenue and Expenditure of the Auditor-General²⁰

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Revenue	583 446	613 322	764 204	875 466	1 013 229	1 062 773	1 110 056
Expenditure	547 138	613 367	784 130				
Surplus/ (Deficit)	36 308	(45)	(19926)				

²⁰ Auditor-General, Annual Report 2004/05, 2005/06 and supplementary submissions to the Committee

4. General conclusions

The following general observations may be drawn from the Committee's findings:

- a) The present configuration and operations of the Auditor-General are suitable for the current South African environment. The effectiveness of the Auditor-General will be enhanced when government departments acquire a sufficient level of readiness for the conduct of performance audits. This, however, may prove a challenge in terms of human resource capacity, particularly given the fact that the Auditor-General has already identified shortage of skills as a constraining factor. Furthermore, the parliamentary mechanisms to process the outcomes of performance audits would need to be strengthened.
- b) The Committee feels that the Auditor-General expresses a good understanding of his mandate and applies it effectively and efficiently. However, the Committee believes that the Auditor-General is incorrect in relying on section 5(1)(a) of the Public Audit Act to provide the necessary legislative mandate to perform international work. The Committee understands the necessity for the performance of external work, especially for the purposes of attracting and retaining staff, provided that the performance of such work does not detract from the Auditor-General's primary obligations. The absence of a legislative mandate is unsatisfactory and should be corrected.
- c) A disregard by government departments and other public institutions of recommendations made by the Auditor-General in audit reports is a cause for concern. Instances of persistent disregard can however be taken up by the National Assembly with the affected executive authority. In that regard the National Assembly acts in partnership with the Auditor-General and should assist to ensure the effectiveness of the Office.
- d) The Committee had an oral presentation from the Chairperson of the Standing Committee on the Auditor-General. Regrettably this was not possible in the case of the Standing Committee on Public Accounts, although the Committee received a written submission from that Committee. Based on these inputs, the Committee understands that the interactions between the Auditor-General and Parliament are generally satisfactory. The Auditor-General accounts to Parliament through a dedicated, multi-party Standing Committee on the Auditor General, while the Standing Committee on Public Accounts deals with the Auditor-General's substantive reports.
- e) The structured nature of the interactions between the Auditor-General and these standing committees permits effective oversight of the Auditor-General on the one hand and provides the vehicle for parliamentary engagement with the Auditor-General's reports and recommendations on the other.
- f) The Auditor General has adequate institutional arrangements, including conflict resolution mechanisms and a code of conduct for staff and disclosure of interests, to ensure efficiency and effectiveness.
- g) At present, collaboration and co-ordination of activities with the other Chapter 9 and associated institutions needs attention.
- h) There is insufficient public awareness of the Auditor-General's work.

5. Recommendations

The Committee considers the functioning of the Auditor-General consistent with its terms of reference concerning efficiency. In addition, the international recognition of the standards established by the Auditor-General reflects well on the Office and its personnel.

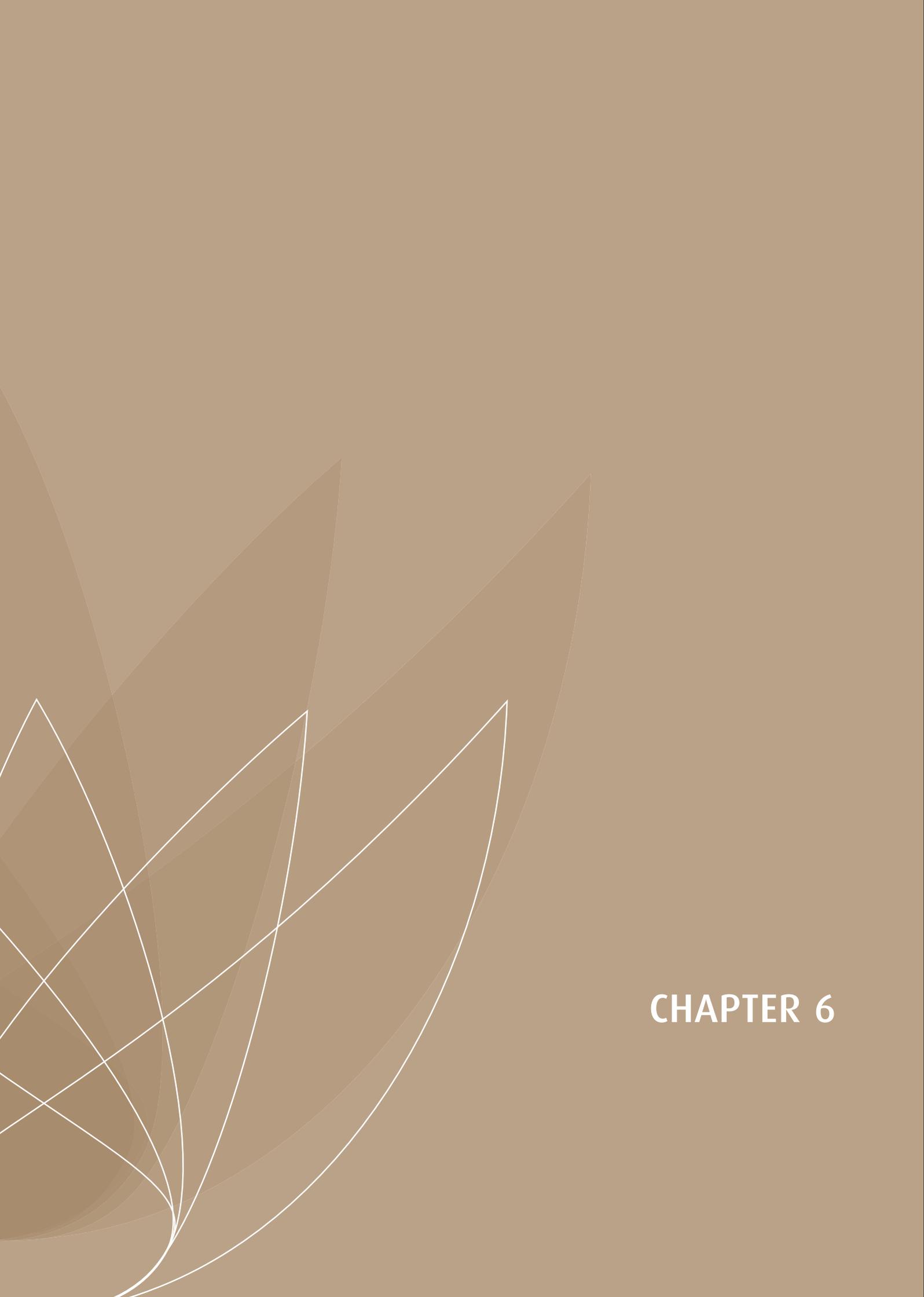
In order to strengthen the efficiency and effectiveness of the Office further, the Committee makes the following recommendations:

- a) The legal mandate for the international work performed by the Auditor-General should be clarified by legislation.
- b) The Auditor-General should continue to develop its capacity to conduct performance audits of all national and provincial government departments and municipalities.
- c) The Auditor-General and the Standing Committee on Public Accounts should bring

persistent disregard for the Auditor-General's recommendations by government departments and other public institutions to the special attention of the National Assembly.

- d) The Auditor-General should continue in its efforts at increasing public awareness of the activities of the Office.
- e) There should be a formal agreement with the other Chapter 9 institutions to deal with any possibility of duplication or overlap of function. This is particularly necessary where there is referral of cases or complaints to another body. Specifically, the Committee recommends that the Auditor-General formalises its relationship with the Public Protector and establishes mechanisms to track and monitor referred matters. In addition, the Auditor-General should include details of the number of complaints investigated, outcomes and referrals in its annual report.





CHAPTER 6

CHAPTER 6

THE PUBLIC SERVICE COMMISSION

1. Background

A body was established in 1912 with the broad responsibilities of a traditional centralised personnel institution for the public service. Under apartheid, the public service became a tool of the regime, geared towards serving the material needs and political interests of a minority at the expense of the vast majority of South Africans.

Until 1994, no independent body existed to monitor and evaluate the operations of the public service and to advise on policy. Consequently, when negotiating the adoption of the new constitution and its principles, the establishment of an independent and impartial Public Service Commission was regarded as crucial if the public service was to be transformed in order that it might attend to the concerns of the people as a whole and contribute to the evolution of a new society.

From the advent of democracy, the promotion of growth and development has been a priority for South Africa. Higher levels of growth deepen the country's transformation and safeguard the stability of the political transition, while development relates to an improvement in the well-being of people, as a result of a range of targeted social, political and economic processes. South Africa's approach to development is one that values growth, sustainable development, equity, democratisation and the protection of basic human rights.

The public service is considered to be an important instrument in the achievement of such growth and development objectives. This is so because the services that the public service offers are frequently the only hope that people have to better their lives. In order that growth and development might happen, it is impera-

tive that the public service is supported by sound monitoring and evaluation systems, which provide timely information on the effectiveness, or otherwise, of programmes.

Although the Public Service Commission is established in Chapter 10 of the Constitution, like the Chapter 9 institutions its purpose is to protect and support democracy. As such, it is charged with safeguarding the public interest through the effective monitoring and evaluation of government practices. More specifically, the Public Service Commission is vested with oversight responsibilities for the public service, and monitors, evaluates and investigates public administration practices. It is also charged with promoting the values and principles governing public administration contained in section 195 of the Constitution, including professional ethics, efficiency, representivity and impartiality. A full list of these values and principles can be found in Appendix 1.

2. Constitutional and legal mandate

The Public Service Commission is the only institution established in terms of Chapter 10 of the Constitution.

The history of the establishment of the first ever democratic Public Service Commission is interesting. The 1993 Constitution made provision for an independent and impartial Public Service Commission, composed of between three and five commissioners. The 1993 Constitution mandated the Commission to make recommendations, give directions, and conduct enquiries regarding the organisation, administration, conditions of service, personnel administration, efficiency, effectiveness and comportment of the public service. The

Commission was also assigned a capacity-building and human resource development function through its responsibility for the South African Management and Development Institute (SAMDI). Provincial commissions in all nine provinces performed similar functions to that of the national Public Service Commission.

However, concern had arisen around the potential for conflict of interest regarding the Commission's role and function in terms of the 1993 Constitution: The Commission was vested with executive and decision-making powers and, consequently, played a key role in the functioning of the public service.

Therefore, a new model for the Public Service Commission was devised, which confines its role primarily to monitoring and advising on merit and equity, promoting the values and principles of sound public administration in the public service, including a high standard of professional ethics, and promoting efficiency. In terms of its constitutional and legal framework, this restructured Commission is a single Commission (the provincial commissions were abolished), which is much larger than the one that existed under the 1993 Constitution. Members of the reconstituted Commission were appointed in January 1999, but delays prevented the Commission from beginning its operations until July 1999.

Although the Commission is not a Chapter 9 institution, section 196 of the 1996 Constitution affirms the Commission's independence and requires that it be impartial, performing its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.

Other organs of state must assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness and no organ of state or person may interfere with the Commission's functioning.

The Commission is accountable to the National Assembly and must report to it at least once a year. The Constitution also states that in respect of its activities in a province, the Commission must report to the relevant provincial legislature. (It is noteworthy that these provisions are similar to those relating to the Chapter 9 institutions).

As already mentioned, the Commission's mandate is to maintain effective and efficient public administration and a high standard of professional ethics in the public service. Section 196(4) of the Constitution sets out the Commission's powers and functions, which are to -

- a) Promote the values and principles set out in section 195 throughout the public service;
- b) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- c) Propose measures to ensure effective and efficient performance within the public service;
- d) Give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
- e) Report in respect of its activities and the performance of its functions, including any finding it may make and directives and

advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are being complied with; and

- f) Either on its own accord or on receipt of a complaint –
 - i. Investigate and evaluate the application of personnel and administration practices;
 - ii. Investigate grievances of employees in the public service and recommend appropriate remedies;
 - iii. Monitor and investigate adherence to applicable procedures in the public service; and
 - iv. Advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.

As indicated, section 195 is set out in full in appendix 1 this report. Broadly, however, the values and principles provided for in section 195 include:

- a) A high standard of professional ethics;
- b) The efficient and effective use of resources;
- c) The need for a development-orientated public administration;
- d) Impartiality, fairness, equity and the absence of bias in providing services;

e) Responsiveness to the needs of the people and the importance of encouraging participation in policy-making;

f) Transparency;

g) The maximisation of human potential;

h) Representivity; and

i) Employment and personnel practices that are based on ability, objectivity, fairness and the need to redress the imbalances of the past.

In addition, the Public Service Commission Act 46 of 1997 empowers the Commission to perform inspections, conduct inquiries and make rules in relation to the activities of the public service. In particular, the Commission may²¹

a) Inspect departments and other organisational components in the public service. The Commission is provided with access to the necessary official documents and information for it to perform its functions;

b) Conduct an inquiry into any matter that it is authorised to do by the Constitution. For the purpose of the inquiry, the Commission is empowered to summons any person who may be able to provide information of material importance to the inquiry; and

c) Make rules as to the investigation, monitoring and evaluation of those matters to which section 196(4) of the Constitution relates; as to the powers and duties of Commissioners, including delegated powers and duties; and as to the manner in which meetings of the Commission will be convened.

²¹ Sections 9, 10 and 11, Public Service Commission Act 46 of 1997

3. Findings

The Committee met with the Public Service Commission on 26 January 2007. The discussions at the meeting were informed by the written submission received from the Commission in reply to the questionnaire circulated by the Committee beforehand. In addition, at the request of the Committee, the Commission supplied it with supplementary information. From these the following emerged:

3.1. CONSTITUTIONAL AND LEGAL BASIS

- a) Since 1993, the Commission has performed its functions more than adequately. It has seen its duties as an important contribution not only to the public service but also to the development of the country.
- b) Without wishing to detract from the excellent work performed by the Commission over the years, the Committee feels that increasingly the need is for a body that has, as its sole focus, broader strategic issues relating to the setting and monitoring of the regulatory framework, as well as longer-term issues of professional standards and commitment. The Commission has now reached a stage where the demands placed on it are such that it can no longer sustain service delivery within its current approved establishment. However, the Committee is of the view that simply increasing the Commission's staff establishment is not necessarily the solution, as it does not address the underlying problems, which relate to the breadth of the Commission's mandate and the size of the public administration. The Committee also recognises that the proposed establishment of a single public service with a greater role for departments and

a more active role for the Minister for the Public Service and Administration introduces new dynamics.

- c) In its deliberations, the Committee noted the recommendations of the Presidential Review Commission, also known as the Maphai Commission.²² The Maphai Commission found that there was a need for a small body, 'radically and appropriately structured so that it is capable of carrying out [its] functions more efficiently, effectively and cost effectively'.²³
- d) A major recommendation of the Maphai Commission was that a less elaborate and professionally managed body be appointed. Although the body would remain independent, reporting to the President as well as to Parliament, the Maphai Commission recommended that such a central public service monitoring and inspection unit be located in the Office of the President, led by three senior, experienced commissioners (rather than the fourteen commissioners provided for in the 1996 Constitution). The unit, which it proposed be called the Office of the Public Service Commission, would be responsible for monitoring, inspecting, reviewing, assessing and advising the President about the implications of policy decisions and actions, and would recommend changes based on its findings and conclusions. The proposed Office should have a small but expert staff, as well as the power to contract out some of its monitoring and inspection functions to accredited service providers. The Maphai Commission made similar recommendations with regard to the provincial commissions.
- e) The Committee studied the recommendations of the Maphai Commission but feels

²²Presidential Review Commission. Developing a Culture of Good Governance, 27 February 1998.

²³Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa. Developing a Culture of Good Governance, presented on 27 February 1998.

that they are not appropriate at this time. The proposed single public service will bring about root-and-branch change in the public service. In all likelihood this will create enormous tensions at a time when service delivery needs to be developed further, and the infusion of the principles of *batho pele* requires a concerted effort.

- f) Regarding the size of the Commission, the Committee is of the view that the present composition of fourteen Commissioners is too large, creating an unwieldy and cumbersome structure that does not allow for speedy decision-making, creates logistical difficulties in arranging meetings and is not cost effective.
- g) The Committee learnt that the Commission had conducted an institutional assessment in 2002, which concluded that the present structure is a large one that has led to the Commission experiencing the difficulties described above. The assessment proposed two options: the first that the Commission be streamlined to consist of three full-time and eleven part-time commissioners; and the second that the Commission be reduced in size from fourteen to three full-time commissioners. The second option would require that the Constitution be amended,
- h) The Committee notes, however, that the context has changed since 2002. There has been increasing demand for accelerated quality service from the public administration. This requires a responsive and readily accessible Public Service Commission. Therefore, any considerations around the size of the Commission must take into account the current context of the public service, the demands placed on a developmental state, its broad mandate and the fact

that its work encompasses the public service at both national and provincial levels. The Committee believes that between five and seven commissioners will meet the new needs of the institution.

- i) The Committee understands that, at present, of the fourteen Commissioners, nine are allocated to the provinces. This is a national Commission and, as such, "deployment" might affect the role of these "provincial" Commissioners. The Committee believes that, in fact, the provincial offices should be the conduits of information to the national office.

3.2. INDEPENDENCE

- a) The Constitution and the Public Service Commission Act provide the legal basis for the Commission to perform its functions independently, without fear, favour or prejudice. However, the Commission is of the view that its independence is not simply a matter that can be regulated in law. The Commission is mindful that it operates in the context of a developmental state where there is a major focus on the transformation of society and also of the public service itself. The Commission cannot afford to hold itself aloof when exercising its independence. The Commission submitted that for it 'independence is about the direct or indirect interference with the programme and decisions of the institution and not about issues of location and participation in government activities'.
- b) The practical implications of this approach are demonstrated where the Executive has requested that the Commission intervene in national and provincial departments to conduct investigations and to provide advice.

For example, the Commission was requested to intervene in the Eastern Cape and KwaZulu-Natal provincial administrations. The intervention was designed to tackle service delivery challenges, specifically in the areas of health, education, roads, public works and social development and to improve turn-around times. The Commission was also involved in an intervention in the Department of Correctional Services in 2001. In this intervention, a senior official of the Commission was deployed to form part of the management team of the Department of Correctional Services for a period of six months. There have been other occasions for such interventions.

- c) The nature of these interventions has required that the Commission engage daily with executive functions, and has shown that the Commission has performed regulatory and executive functions, rather than simply advisory functions.
- d) The Committee finds that the nature of the Commission's work creates a tension that makes the exercise of independence very difficult. The Commission must strike a balance between the exercise of its independence and the expectations of government departments that it provide them with support, as well as direct calls for involvement in the executive functions of government. By its own admission, the needs of the public service are such that the Commission cannot afford to hold itself aloof when it acts independently and, on occasion, this has resulted in it getting its hands dirty as is demonstrated by the fact that it has exercised executive functions when it has intervened in government departments at the request of the Executive.

e) An interesting development occurred while the Committee was deliberating. The Public Service Amendment Bill, 2006, proposes the assignment of investigative powers to the Minister that are similar to those conferred on the Commission by the Constitution, and will vest the Minister with oversight responsibilities and powers. In terms of the proposed amendment, the Minister can make binding decisions emanating from investigations. The Committee notes that the Commission has problems with the proposed amendment. In this regard, the Committee is concerned that the overlap of functions might in effect make the Commission all but redundant.

- f) The Committee notes that the Minister for the Public Service and Administration appoints the Director-General of the Commission. It appears to the Committee that the explanation for such an approach was rooted in the time when the predecessors of the Commission formed part of the Administration. The Committee finds it surprising, however, that this arrangement has continued and it should be corrected.

3.3. UNDERSTANDING AND INTERPRETATION OF MANDATE

- a) The Commission's work is informed by its constitutional imperatives. Given its broad mandate, which covers all areas of public administration and a public service with in excess of one million employees, the Commission has structured its work into six key performance areas, namely monitoring and evaluation; service delivery and quality assurance; leadership and performance improvement; public administration investigations; professional ethics and strategic human resource reviews; and labour relations improvement.

- b) The Committee notes that the Commission's mandate is confined to the public service. Although the principles enunciated in section 195 of the Constitution apply to all administration in every sphere of government, organs of state, and public enterprises, at present the Commission's mandate refers only to the administrations in the national and provincial spheres of government. In this regard, the proposed single public service will increase the Commission's workload.
- c) The Commission has produced very valuable documents and carried out important initiatives. Apart from its Annual Report on the State of the Public Service, its outputs include conducting citizen-satisfaction surveys in various government sectors; developing and piloting citizen forums (as well as developing a related toolkit); the drawing up and implementation of the framework for the evaluation of heads of departments; developing rules for the lodging of complaints relating to maladministration, corruption, standards of service provided, dishonesty or improper dealings with regards to money and the behaviour, competency or attitude of staff; managing the national anti-corruption hotline, as well as developing a code of conduct for public servants; developing and managing the financial disclosure framework for managers; and developing rules for the management of grievances.
- d) The Committee commends the Commission on developing various tracking mechanisms to see whether departments implement its recommendations. Nevertheless, the Committee is dismayed that the Executive does not enforce many of the Commission's recommendations, and that they are not discussed in Parliament.
- e) The net result is that the improvements in public administration recommended by the Commission may not be implemented. The Commission stated that there is a need for powers of enforcement similar to those it enjoyed under the 1993 Constitution. However, the Committee finds that the Commission has in fact considerable powers (including the power to summons and to call departments to account), but that it does not use its powers in this regard strategically. For example, the Committee learnt that the Commission had, in fact, used its powers to summons Directors-General but they did not publicise such summons, thereby foregoing the persuasive power that knowledge of such a precedent can bring in ensuring co-operation from departments.
- f) The Commission provided details of the number of complaints or cases that it deals with, as well as the number of referrals where it lacks the necessary jurisdiction to consider a matter itself.
- g) In terms of section 196(4)(f)(ii) of the 1996 Constitution, the Commission is empowered to investigate grievances of public servants. Table 1 below sets out the number of grievances lodged by public servants in terms of section 35 of the Public Service Act, 1994, dealt with by the Commission in the past five financial years:

Table 1: Number of grievances lodged by public servants, and number of referrals

Financial year	Number of grievances	Number of referrals
2001/2002	93	132
2002/2003	29	34
2003/2004	29	29
2004/2005	37	220
2005/2006	42	364
2006/2007 (up until 31 December 2006)	156	262

In the past financial year (2006/07), the nature of the grievances commonly related to salary increases or adjustments, performance assessments, unfair treatment, filling of posts, the undermining of authority, the refusal to approve an application and disciplinary matters.

Between 1 September 2004 and 31 December 2006, 4 182 corruption and service delivery cases were received *via* the National Anti-Corruption Hotline (which is managed by the Commission). Of these, 2 296 cases were related to corruption and corruption-related acts. These cases were referred to the relevant departments for investigation. In addition, in the same period the Hotline has received more than 20 000 abusive calls or calls that were not related to substantive allegations. Table 2, below, sets out the relevant statistics.

Table 2: National Anti-Corruption Hotline - cases reported from 1 September 2004 to 31 December 2006

Corruption and corruption related cases	2 296
Service delivery complaints	1 105
Information related cases	108
Frivolous cases	507
Outside the Commission's jurisdiction	166
Total	4 182

3.4. APPOINTMENTS

- a) At present, the Public Service Commission consists of fourteen Commissioners. The National Assembly approves five of the Commissioners, while the Premiers of the provinces each nominates one Commissioner. In both these cases, the President appoints the Commissioners. The President is also responsible for designating one Commissioner as Chairperson and another as Deputy Chairperson.
- b) The process for nomination is as follows. Whenever the President is required to appoint a Commissioner who must be approved by the National Assembly, the President must address a request in writing to the Speaker of the National Assembly that the National Assembly approves a fit and proper person for appointment. A Commissioner so appointed must be recommended by a committee of the National Assembly, and approved by the Assembly by means of a majority resolution.

- c) A Commissioner nominated by the Premier of a province must be recommended by a committee of the provincial legislature and approved by that legislature by way of a majority resolution.
- d) The Committee has learnt with dismay that the terms of office of all Commissioners will expire in 2008. In this regard, the Committee believes that there is urgent need to amend the relevant legislation to ensure that appointments are staggered. The issue of the staggering of appointments of commissioners is also discussed more fully in Chapter 2 of this report.

3.5. PUBLIC AWARENESS

- a) The Committee finds that public awareness of the Commission and its work is poor. The Committee notes that the Commission has deliberately adopted a constrained approach to marketing itself as it does not have the capacity to cope with the influx of complaints and queries that increased awareness and publicity brings. However, the Commission conceded that it should do more.
- b) The Committee learnt that the Commission does provide a box at all its offices where the public can lodge complaints. Complainants are informed of the outcome of their complaint.

3.6. RELATIONSHIP WITH PARLIAMENT AND THE PROVINCIAL LEGISLATURES

- a) The Commission is accountable to the National Assembly and must report to it on an annual basis. The Commission interacts primarily with the Portfolio Committee on Public Service and Administration, the Select Committee on Local Government and

Administration and, occasionally, with the Standing Committee on Public Accounts. Parliament (both the National Assembly and the National Council of Provinces) is seen as a key stakeholder.

- b) The Committee notes that the research undertaken by the Commission is evidence-based, involving the gathering and collation of qualitative and quantitative data. The provision of useful and relevant research on public administration strengthens the potential political oversight role of both Parliament and the provincial legislatures.
- c) Nevertheless, the Commission voiced its frustration with the exercise of parliamentary oversight. While the interaction between the Commission and parliamentary committees has been useful, the Commission is concerned that the information that it generates is not being utilised as effectively as it could be. In the view of the Commission, a great deal turns on the interest of committees of Parliament.
- d) It is also a concern that the Commission has extremely limited interaction with the provincial legislatures, although it submits the same reports to the provincial legislatures as it does to Parliament. In this regard, the Committee notes the Commission's efforts to monitor the extent of its interactions with a view to improving the present situation. The Committee believes that the Commission should continue with its efforts by working closely with Premiers.

3.7. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Commission entered into a formal memorandum of understanding with the office of the Auditor-General and the office

of the Public Protector in 2002 to enhance co-operation, efficiency and effectiveness and to avoid the duplication of resources.

- b) In terms of the understanding with the Public Protector, the Public Service Commission is to investigate complaints from public servants while the Public Protector is to investigate complaints from the general public. These referrals arise from complaints lodged with the Commission by members of the public in terms of the complaints rules. Complaints lodged with the National Anti-Corruption Hotline are not referred to the Public Protector as its case management system requires that callers are given feedback as soon as possible. The referral system would not facilitate feedback with the requisite urgency.
- c) The Commission provided the Committee with the number of complaints that it has referred to the Public Protector. In this regard, the Committee notes that although the Public Protector acknowledges receipt of all complaints that the Commission refers to it, the Commission does not receive feedback on the outcome of investigations.

Table 3: Complaints lodged in terms of the complaints rules and referred to the Public Protector

Financial year	Number of cases referred to the Public Protector
2004/2005	3
2005/2006	23
2006/2007 (up until 31 December 2006)	50

- d) The Commission also has an informal relationship with the Human Rights Commission in terms of which they exchange information obtained through research conducted into the implementation of the Promotion of Access to Information Act, 2000.
- e) The Committee believes that there are other grounds for forming relationships with Chapter 9 and associated institutions. The Committee is surprised that the Commission does not liaise with, or maintain a relationship with, the Commission for Gender Equality as gender-related issues abound in the public service.

3.8. RELATIONSHIP WITH THE EXECUTIVE

- a) The Commission has a close and interactive relationship with the Executive that extends far beyond that provided for in terms of the legislation. Thus, the Director-General of the Office of the Public Service Commission is the co-chair of the Governance and Administration cluster of the Forum of South African Directors-General.
- b) The Committee is informed that the Commission, through the Minister for the Public Service and Administration, can submit memorandums to Cabinet to obtain approval for initiatives and to inform Cabinet of strategic issues emanating from its investigations and monitoring and evaluation work. The Committee believes this to be improper.

- c) In addition, the Commission is on occasion requested by the Executive to participate in interventions, to conduct investigations and to provide advice. The research reports generated by the Commission are circulated to all executing authorities. The Commission also provides inputs annually for the President's State of the Nation Address, as well as for the Budget Vote speech of the Minister.
- d) Regarding the Commission's interaction with the provincial administrations, the Committee is informed that the Commission has frequent interaction with heads of departments regarding the Commission's role and function and how it can add value to the work of the provincial administrations. However, the capacity in the Commission's provincial offices is inadequate, with the result that it is unable to do monitoring and evaluation for each department annually, which calls into question the usefulness of such provincial offices.

3.9. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) Commissioners do disclose their financial interests. The disclosure takes place through the Director-General in the Office of the President and includes outside remuneration and all other financial interests. However, in common with the other constitutional bodies, Commissioners should disclose directorships and similar interests in the annual report. General recommendations pertaining to disclosure are made in Chapter 2 of this report.
- b) The Commission has regional offices in all provinces. These serve as a base for Commissioners in the provinces and are

administered by regional directors and a staff complement of five. The Committee expressed its concern regarding the effectiveness of the regional offices. In addition, as mentioned earlier, the Committee is concerned that the "deployment" of Commissioners to regional or provincial offices may affect their role in what is a single national Commission.

- c) There is a clear allocation of roles and responsibilities to Commissioners individually and to committees of the Commission. The Committee was informed that under governance rules determined by the Commission all structures within the Commission have mechanisms to deal with conflict. With regard to employees, the Rules for Dealing with Grievances of Employees in the Public Service (2003) apply. In addition, in terms of the Performance Management and Development System for the Senior Management Service, senior managers must enter into performance agreements in which dispute resolution mechanisms are stipulated.
- d) Human resource capacity, and staff retention, particularly at the level of middle management, are matters for concern.

3.10. FINANCIAL ARRANGEMENTS

- a) The Committee was informed that although the Commission's budget has grown, it is not commensurate with the increased demands of its mandate. For example, the National Anti-Corruption Hotline requires resources that go far beyond those originally budgeted for. An unintended result of the Hotline is that it receives service delivery complaints about government departments, which have to be processed. Other areas affected by inadequate funding include the conduct of

Citizens' Forums, the Commission's monitoring and evaluation function and strategic human resource reviews, as well as its provincial offices.

- b) The Commission's budget is a discrete and separate item in the annual appropriation. However, the conduit of information to Treasury is through the Ministry for the Public Service and Administration. The Commission stated that as it does not sit on the Ministerial Committee on the Budget (MINCOMBUD), it is unable to influence it, nor can it ask the Minister to do so on its behalf. Furthermore, there is a perception that the Commission falls under the Department of Public Service and Administration, as the Minister presents the Commission's budget to Parliament.
- c) Table 4 below sets out the allocations and expenditure since 2003/04, as well as the Commission's allocation in terms of the Medium Term Expenditure Framework. The Committee is of the view that the National Treasury has taken into account the importance of the Commission's work. The Commission's allocation has increased from R64 million in 2003/04 to R97 million in 2006/07, and in terms of the Medium Term Expenditure Framework, the Commission's allocation will continue to increase to R116 million in 2009/10.

Table 4: Income and expenditure 2003/04 – 2009/10²⁴

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Budget Allocation	64 215	73 081	86 106	97 003	105 357	110 506	116 965
Additional funding	2 000	3 500	7 000				
Expenditure	64 145	71 128	84 725				
Surplus/ (Deficit)	2 070	5 463	8 381				

²⁴National Treasury (2007), Estimates of National Expenditure and the Commission's submission to the Committee

4. General conclusions

- a) The present constitutional and legal mandate of the Commission is suited to the current South African environment. Very important changes are being prepared in the public service, and it is a great pity that all the present members of the Commission will retire next year. The proposed changes to the public service will have a very big impact on the efficiency of the new Commission.
- b) The Commission is acutely aware that it operates in the context of a developmental state in which a key focus is the transformation of society and also of the public service itself. Accordingly, it has adopted a useful approach to the constitutional and statutory provisions relating to its independence in that it guards against direct or indirect interference with the programmes and decisions of the institution, but it does not hold itself aloof from government activities. The Committee believes that this is a very sensitive area, which the Commission has handled well.
- c) The Commission reveals a good understanding and application of its mandate, powers and functions. However, the Commission's capacity to fulfil its mandate is severely tested, particularly in terms of its financial and human resource capacity. This is likely to be strained further with the introduction of the proposed single public service with the accompanying changes.
- d) The present arrangements concerning the appointment of Commissioners are unsatis-

factory, in particular those relating to the Commission's size and the fact that there is no staggering of the appointment of Commissioners. General recommendations in this regard are made in Chapter 2 of this report, while specific recommendations are made below.

- e) The outcome of the Commission's interactions with Parliament and the provincial legislatures is unsatisfactory. Recommendations are made in this regard.
- f) The Commission has adequate institutional arrangements, including conflict resolution mechanisms, a code of conduct for staff and disclosure of interests, to ensure efficiency and effectiveness. Nevertheless, general recommendations are made in this regard in Chapter 2 of this report.
- g) At present, collaboration and co-ordination of activities with the Chapter 9 and associated institutions is unsatisfactory. General recommendations are made in this regard in Chapter 2 of the report.
- h) Public awareness of the Commission's work is insufficient.
- i) The Commission contends that the increased allocation for the National Anti-Corruption Hotline has not adequately taken into account the increased workload that has resulted from service delivery complaints. The Committee believes that the present budgetary arrangements are satisfactory. However, general recommendations relating to budgetary arrangements for the institutions under review are made in Chapter 2 of this report.
- a) The process of selecting and appointing new Commissioners must take into account the need for staggering, so as to avoid institutional memory loss. This is a particular concern given that the present Commissioners' terms of office come to an end next year. General recommendations are made in this regard in Chapter 2 of this report.
- b) The number of Commissioners appointed should be reduced from fourteen to between five and seven Commissioners. With the increased role of the Minister and a proper system being in place, the appointment of between five and seven Commissioners will meet the new needs of the Office.
- c) In the meantime, until changes in the composition are made, Commissioners located in the provinces must play a greater advocacy role by actively promoting the Commission's work in the provincial legislatures. Furthermore, the Commission should seek to increase the relevance of its reports to the provincial legislatures by providing information that is pertinent to the provinces.
- d) Until the Committee's principle recommendation concerning Parliament's role in the budget process is effected, there must be a clear statement of understanding when the Commission's budget is presented to Parliament, to which the Minister for the Public Service and Administration contributes, that the Commission and its budget do not form part of the Department of Public Service and Administration.
- e) The Commission should include information in its annual report that reflects the outcome of the recommendations it has made to Parliament and the provincial legislatures.
- f) The Commission should actively promote public awareness of its role and activities.

5. Recommendations

To enhance the Commission's efficiency and effectiveness, the Committee recommends that -

CHAPTER 7

THE PUBLIC PROTECTOR

1. Background

Democratic governments worldwide are entrusted with the responsibility of protecting and enhancing the rights of their citizens. However, governments are not infallible. In order to promote and ensure effective government, different forms of supervision and oversight of state functionaries have been identified.

This is to ensure that citizens enjoy some degree of protection if their rights are breached, in particular in the event of administrative impropriety. However, litigation tends to be formal, expensive and dilatory to the point where the ordinary person is deterred from using it to assert or enforce his or her rights. Therefore, most democracies have an institution that is similar to that of the Public Protector, although they go by a variety of names, including that of ombudsman, mediator and commissioner. In broad terms, these institutions will assist in maintaining and establishing efficient and proper public administration, as they are able to insist that the administration acts within democratic principles.

Therefore an institution such as the Public Protector is an important addition to the armory of mechanisms that are employed to create the substance of fair and stable constitutional government. In furtherance of this ideal, appointments to this office require an experienced public officer to monitor the implementation of policy and the provision of services to ensure administrative justice and fair treatment of all the people.

The idea of the office of the Ombudsman originated in Sweden, spreading at first to the Scandinavian countries and then later to various Commonwealth and other European countries. In particular, the transition to democracy and

growth in democratic structures of governance in the past few decades have led to the establishment of many more such offices in recent times.

During the negotiating process in South Africa, it was unanimously agreed that the establishment of an independent and impartial ombudsman with substantially expanded powers to investigate and review the regularity and legality of administrative actions was vital for the protection and enforcement of the rights that were to be contained in the transitional Constitution.

However, the term Public Protector was preferred because of the gender connotations concerning the word 'ombudsman'. Therefore, the 1993 Constitution provided for the establishment of the Public Protector, and Chapter 9 of the Constitution of 1996 confirms the continued existence of this office as a State Institution Supporting Constitutional Democracy.

The office of the Public Protector came into being on 1 October 1995. As a historical aside, prior to the advent of democracy, the apartheid regime established the office of the Advocate-General, which was not established in the context of a democratic state and fell far short of the prerequisites for an ombudsman.

In contrast, the office of the Public Protector was established for the purpose of ensuring government accountability and providing remedies for maladministration and abuse of authority. It is up to the Public Protector to use his or her powers to investigate, report on and suggest remedial action for a wide range of improprieties in the public administration, including maladministration, the abuse or unjustifiable use of power, corruption, unlawful enrichment, and acts that unlawfully prejudice a citizen.

2. Constitutional and legal mandate

Section 112 of the 1993 Constitution created an independent and impartial Office of the Public Protector. The Constitution of 1996 provides for the continued existence of an independent and impartial Public Protector as a state institution supporting constitutional democracy. The Public Protector 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 the alleged or suspected conduct, and to propose appropriate remedial action.

The operational requirements of the office are provided for under the Public Protector Act 23 of 1994, as amended.

2.1. INDEPENDENCE AND IMPARTIALITY

The Constitution contains the following provisions that aim to protect the independence and impartiality of the office of the Public Protector:

- a) Section 181 lists the Public Protector as a state institution strengthening constitutional democracy, declaring it independent, and subject only to the Constitution and the law. It also requires the office to be impartial, and to exercise its powers and perform its functions without fear, favour or prejudice.
- b) In terms of section 181(5), the Public Protector is accountable to the National Assembly, and must report to the Assembly at least once a year on the activities of the office and the performance of its functions. In addition, section 8 of the Public Protector Act, 1994, was amended in 1998 by providing that the Public Protector may submit special reports when necessary.

- c) Section 181(3) of the Constitution directs other organs of state, through legislative and other measures, to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.

- d) Section 181(4) prohibits any person or organ of state from interfering with the functioning of the Public Protector.

The governing legislation strengthens these constitutional principles. Furthermore, section 5(3) of the Public Protector Act, as amended, indemnifies the Public Protector and any member of his or her office against liability in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament in terms of the Act or the Constitution.

2.2. POWERS AND FUNCTIONS

Section 182(1) of the Constitution assigns to the Public Protector the power 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.

Furthermore, section 6(4) of the Public Protector Act provides the Public Protector with additional powers to investigate, whether on own initiative or on receipt of a complaint, any alleged -

- a) Maladministration in connection with the affairs of government and any alleged abuse of power or other improper conduct by a person performing a public function;
- b) Improper or dishonest act or omission or offences; and

- c) Improper or unlawful enrichment or receipt of any advantage or promise of such enrichment or advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function.

Section 6(4) and (5) deal with the power to investigate either an alleged act or any attempt to commit such an act.

The Public Protector Act gives the Public Protector special powers to assist him or her in conducting an investigation. The Public Protector may direct any person to appear before him or her to give evidence or produce a document in his or her possession or under his or her control. The Public Protector may also request the assistance of any person at any level of government or anyone who performs a public function, to assist the Public Protector in performing his or her duties with regard to a special investigation.

Section 182(3) of the Constitution specifically provides that the Public Protector may not investigate court decisions.

It is very important though rather unusual that the Constitution provides that the Public Protector must be accessible to all persons and communities, and that the Public Protector should ensure transparency and openness, especially in reporting, unless exceptional circumstances as determined by national legislation require otherwise.

The Executive Members' Ethics Act, 1998, enables the Public Protector to investigate any complaint received from the President, a Member of Parliament or Premier or member of a provincial legislature of an alleged breach of the code of ethics governing the conduct of

Members of the Cabinet, Deputy Ministers and Members of Executive Councils of the provinces.

3. Findings

The Public Protector responded in writing to the Committee's questionnaire. This document formed the basis for the Committee's discussions with the Public Protector, which took place on 7 February 2007. The Committee's findings were also informed by further submissions from the Public Protector and from the Ministry of Justice and Constitutional Development, as well as a number of other submissions. From these, the Committee finds as follows:

3.1. CONSTITUTIONAL AND LEGAL BASIS

a) The Public Protector accepts that the principles of co-operative government and inter-governmental relations as set out in section 41(1) of the Constitution apply to his office. However, the Committee has obtained legal opinion that refutes this. In the case of the *Independent Electoral Commission v Langeberg Municipality*,²⁵ the Constitutional Court had occasion to consider this matter. The Court held that while Chapter 9 institutions are organs of state, they do not form part of government. Therefore, the Committee reiterates that the principles of co-operative government do not apply to the Public Protector, and that none of the Chapter 9 institutions are bound by the principles of co-operative government.

b) The Public Protector Act provides that the remuneration and other terms and conditions of service of the Public Protector and the Deputy Public Protector are determined by the National Assembly on the advice of the parliamentary committee to which the matter is referred.

²⁵ 2001 (9) BCLR 883 (CC)

- c) The Committee notes that, while this strengthens the independence of the office, in practice the determination of remuneration has created difficulties, particularly with regard to periodic adjustments or increases.
- d) In his submission to the *ad hoc* Committee on Operational Problems in the Office of the Public Protector set up by the National Assembly originally in 2006, the Public Protector objected to not being consulted as a public office-bearer prior to the publication of the report of the Independent Commission for the Remuneration of Public Office-Bearers. This Commission makes recommendations regarding the salaries of public office-bearers, including judges. In terms of the Constitution, the Public Protector's salary is benchmarked against that of a Judge of the Supreme Court of Appeal. As such, the recommendations of the Commission, once endorsed by the President, will impact on the Public Protector.
- e) In the same submission, the Public Protector complained that the present budgetary arrangements undermine his independence. In particular, the budgetary arrangements allow for a situation where, in fact, National Treasury and the Department of Justice and Constitutional Development decide his pay. The Deputy Public Protector's salary and conditions of service are dependent on the public service scales.
- f) The Committee regrets that section 219(5) of the Constitution, which requires the enactment of framework legislation to determine the remuneration for office-bearers of the various constitutional institutions (including the Public Protector), has not yet been enacted. This matter is discussed in

greater detail and general recommendations are made in Chapter 2 of this report.

3.2 INTERPRETATION AND UNDERSTANDING OF MANDATE

- a) As previously mentioned, the Public Protector is mandated to investigate any conduct in state affairs, or in 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.
- b) A number of submissions made to the Committee brought to its attention criticism of the Public Protector for narrowly interpreting his mandate. Of course this would relate to his mandate in investigating any sphere of government. It appears that the criticism is linked to cases involving high-level people in public life. While there is this view, the Committee is in no position to establish the validity of these perceptions. This is a matter for the office of the Public Protector to respond to. The Committee does, however, in that regard draw attention to the constitutional provision relating to the Public Protector's dignity.
- c) A very important element in the Public Protector's work is the response of government departments following requests for information. Such information must be supplied in order for the Public Protector to investigate complaints. 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. Nevertheless, the Committee notes that investigations are often delayed by the failure of departments or public entities to co-operate in a timely fashion.

d) The Committee spent considerable time enquiring about the time taken to settle cases. Table 1 in subparagraph (f) below provides details of the number of new cases received, cases finalised and cases carried forward since 1999.

The Committee also asked about the level of acceptance of the Public Protector's recommendations. The Public Protector informed it that acceptance of recommendations is very high.

e) The Committee notes that the more common types of cases investigated include:

- i. Insufficient or no reasons given for a decision;
- ii. The interpretation of criteria, standards, guidelines, regulations, laws, information or evidence was wrong;
- iii. Processes, policies or guidelines were not followed or were not applied in a consistent manner;
- iv. Adverse impact of a decision or policy on an individual or group;
- v. Failure to provide sufficient or proper notice;
- vi. Due process denied;

vii. A public service was not provided to all individuals equitably; and

viii. Denial of access to information.

f) The Public Protector deals with an enormous workload. The Public Protector informed the Committee that, despite a slight decrease in new cases, the workload has actually increased with the focus on systemic problems.

The Committee is concerned that the backlog in cases has increased from 1999, but understands that there is a strategy to address the backlog.

Furthermore, the Committee notes that there appears to be a problem with the Public Protector's data system, which as a result is not operational, making it difficult or cumbersome for the office to provide the necessary statistics, as these all need to be compiled manually.

Table 1 below provides statistics of cases carried forward, new cases received and cases finalised.

Table 1: Summary of cases carried forward, new cases received and cases finalised

	Cases carried forward from previous year	New Cases	Cases finalised	Cases carried over to following year
1999	10 884	9 085	6 993	12 976
2000/01	13 326	10 442	9 649	14 120
2001/02	13 427	12 174	12 202	13 399
2002/03	13 399	15 674	21 705	7 368
2003/04	7 520	17 295	15 946	8 869
2004/05	9 292	22 350	7 539	14 103
2005/06	14 103	17 415	17 619	13 899

(Note that there appear to be discrepancies between cases carried forward from a previous year and cases carried over to a following year)

g) The Committee notes that the office of the Public Protector has conducted very few proactive or own-initiative investigations. The Committee was able to establish that the office had in fact initiated only 10 such cases in 2006/07, 7 cases were finalised and a total of 18 cases have been carried forward to the present financial year. Again, the steadily increasing number of cases carried forward each year is a cause for concern to the Committee. In cases where a matter is one of great public importance, the public would expect the Public Protector to act. Table 2 below provides the relevant statistics.



Table 2: Own initiative investigations: Cases initiated and finalised 2002/03 – 2006/07

	Cases initiated	Cases finalised	Cases carried forward
2002/03	6	1	6 (1 case had been brought forward from 2001/02)
2003/04	2	5	3
2004/05	16	3	16
2005/06	7	8	15
2006/07	10	7	18
Total	41	24	18

3.3. APPOINTMENTS

- a) The Public Protector and the Deputy Public Protector are appointed by the President on the recommendation of the National Assembly for a non-renewable period of seven years. The resolution recommending the appointment of the Public Protector must enjoy the support of at least 60% of the members of the National Assembly, while that of the Deputy Public Protector requires a simple majority.
- b) As far as qualifications are concerned, the criteria laid down for appointment are extensive and broad and do not compare with those for other Chapter 9 institutions. The criteria have, in any event not really been applied. In practice, appointment turns largely on having legal qualifications, or experience in the administration of justice. The Committee notes for example, that a Member of Parliament with ten years experience is also eligible for appointment.
- c) The qualifications require revisiting. General recommendations in this regard are made in Chapter 2 of this report.

3.4. PUBLIC AWARENESS

- a) The Constitution requires that the Public Protector be accessible to all persons and communities. Similarly, the Public Protector Act requires that the Public Protector must make his or her office accessible to the public.
- b) The Committee learnt that the Public Protector has a national head office, nine provincial offices, and six regional offices, and is in the process of creating two more regional offices in the Northern and Eastern Cape. In addition, there are 73 visiting points located mostly in rural areas. The Public Protector has an outreach programme involving each of its regional offices. The Committee notes from submissions made to it that in general there appears to be a higher degree of satisfaction with the head office as opposed to regional and/or provincial offices. The issue of provincial and regional offices is explored in greater detail in Chapter 2 of this report.
- c) The Committee finds that the office of the Public Protector should actively explore ways and means of interacting with community-based organisations in order to gain access to the most disadvantaged and poor, especially in rural areas. In addition, the Committee makes recommendations elsewhere regarding the innovative use of existing government initiatives to increase public awareness.
- d) Submissions were made to the Committee that the public is not aware of the Public Protector, despite its outreach activities and the establishment of provincial and regional offices. These submissions are fortified by the findings in a Cabinet document that over half of respondents had never heard of the

Public Protector, the South African Human Rights Commission and the Commission on Gender Equality and therefore did not understand their functions.²⁶ This is confirmed by a survey undertaken by the Committee, which indicated that only 42% of the respondents had heard of the Public Protector.

- e) The Committee reiterates that where the functions of the institutions under review overlap, there should be concerted joint efforts. These are not bodies that are ephemeral or private institutions. They are constitutional bodies and should be widely accessible, especially in the area of human rights.
- f) As mentioned above, the Committee finds that the institutional capacity of the office of the Public Protector to deal with complaints in a timely fashion requires strengthening. The inability to finalise cases speedily may dissuade the public from utilising the Public Protector as an alternative dispute resolution mechanism, thereby undermining the office's effectiveness. The Committee believes that delays in arriving at recommendations leads to dissatisfaction and disillusionment in the whole system. On this point, the Committee believes that backlogs should be dealt with as a priority, and that the extent of the reduction in the backlog rests with the Public Protector,

3.5. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Committee's terms of reference include the issue of collaboration between the institutions under review. The Committee has learnt that -

²⁶ Government of the Republic of South Africa, Macro-social Trends in South Africa. Discussion document produced by the Office of the Presidency. 2006.

- i. To avoid the potential for duplication of functions, the Public Protector has a memorandum of understanding with the Public Service Commission concerning the referral of complaints to each other. Neither the Public Protector nor the Public Service Commission were able to inform the Committee of the number of referrals and the outcomes thereof. Recommendations regarding the referral of cases are made in Chapter 2 of this report.
 - ii. Where a matter involves the promotion, monitoring and assessment of human rights and an abuse of those rights, the office of the Public Protector will refer it to the appropriate commission. For example, the practice of creating “gated communities” by closing off public access to neighbourhoods for the purposes of crime prevention was referred to the Human Rights Commission.
- b) The Committee notes the absence of systematic collaboration between the various Chapter 9 and associated institutions. In evidence before the Committee reference was made to the fact that the respective strengths and capacity of the institutions is not the same, making collaboration even more complicated. For example, in the past the Public Protector had more offices in the provinces than the Commission for Gender Equality, which made it very difficult if not impossible to refer cases from the Public Protector to the Commission for Gender Equality.
- c) The Committee views this as a serious matter. That there are disparities in capacity and resources should not result in a lack of liaison. Mandatory meetings are necessary to establish a culture of co-ordination. Joint activities may have budget implications, requiring planning and a special budget for implementation. The issue of co-ordination and collaboration is discussed more fully in Chapter 2 of this report.
- d) The Committee concludes that the Chapter 9 institutions have adopted a reactive approach to collaboration in terms of which their working together occurs on an informal basis. The Committee believes that a more purposive strategy towards their working together would be far more effective and efficient, especially in the area of the protection of human rights in respect of which there is a very loose and informal interaction between them.

3.6. RELATIONSHIP WITH CIVIL SOCIETY

- a) The Committee notes that a key ingredient in the success of forming such a relationship is the public’s knowledge of their rights and how to act on any violation of such rights. Promoting knowledge of human rights is a shared responsibility of both the office of the Public Protector and civil society. In this regard, a sustained and structured relationship would be advantageous. The Committee notes, however, that in reality the relationship with civil society is reflected as weak, as well as being informal and intermittent.
- b) The Committee notes that the enabling legislation does not require the Public Protector to have contact or establish meaningful liaison with civil society, which is in contrast to the Commission for Gender Equality.
- c) However, civil society organisations are often the first port of call for distressed individuals or groups in need of redress.

Furthermore, civil society organisations are a valuable network for access to communities and residents, particularly at the local level or in far-flung rural communities and residences.

- d) A submission made to the Committee emphasised the need to reach out to the poor, marginalised and vulnerable. The Committee is of the view that the relationship with civil society is crucial to enhancing the effectiveness of the office. In this regard, the Committee notes that the office of the Public Protector has stated that ‘co-operation with civil society organisations is of high importance to the office of the Public Protector as these organisations are often the eyes and ears of the Public Protector where individuals are unable to access the Public Protector or did not know about the Public Protector’.
- e) The Committee believes that the relationship with civil society needs to be firmed up in the light of submissions made by civil society that have questioned the Public Protector’s operations and effectiveness.
- f) The Committee highlights the need for increased attention to and allocation of resources towards building healthy relations with civil society. Such encounters are a means of informing civil society of the work of the Public Protector, and of human rights issues of the day.

3.7. RELATIONSHIP WITH PARLIAMENT

- a) At present the Public Protector is accountable to the National Assembly through the Portfolio Committee on Justice and Constitutional Development. In his submission, the Public Protector advocated greater

interaction and better relations with the Portfolio Committee.

- b) In addition, the Public Protector proposed the need for a mechanism within Parliament to facilitate a more systematic interaction between it and the Chapter 9 and related bodies.
- c) The Committee agrees that there should be more systematic engagement and co-ordination of activities, and makes recommendations in this regard in Chapter 2 of this report.

3.8. RELATIONSHIP WITH THE EXECUTIVE

- a) The Public Protector has criticised the role of the Department of Justice and Constitutional Development and the National Treasury in the financial arrangements of the office, which impacts on its internal operations and also on its staff appointments.
- b) The Department of Justice and Constitutional Development is unique in having a special directorate with a large staff complement to deal with the Chapter 9 institutions. This Directorate has wide terms of reference to deal with budgetary processes; promote proposals emanating from the reports of the Chapter 9 institutions; evaluate and investigate the Chapter 9 institutions founding legislation; and promote and promulgate legislation to enhance the institutions’ effectiveness.
- c) The Committee makes recommendations in Chapter 2 of this report concerning the appropriate financial arrangements for the institutions under review and in relation to staffing.

d) In addition, the Committee highlights the recommendations of the *ad hoc* Committee on Operational Problems in the Office of the Public Protector concerning the need to maintain the lines of authority and accountability between the office of the Public Protector and other organs of state. In the light of the sentiments expressed by the Public Protector as reflected in the previous paragraph, it is especially important that clear lines of authority are observed between the Public Protector and the Department of Justice and Constitutional Development so as to protect the independence of the office of the Public Protector.

3.9. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Committee regrets the recent public discord between the Public Protector and the Deputy Public Protector, highlighting that such disputes tarnish the image of the office and undermine its credibility. In this regard, the Committee notes the findings of the *ad hoc* Committee on Operational Problems in the Office of the Public Protector appointed by the National Assembly in 2006 at the request of the Public Protector to investigate the operational problems in that the *ad hoc* Committee found that the dispute had not only been aggravated by inadequate internal systems but also had negatively impacted on the operation of the office. This Committee notes that the *ad hoc* Committee made several general recommendations to bring about stability in the internal operations, and in particular highlighted the need to fill senior posts.
- b) The Committee is dissatisfied with the internal governance arrangements. Too many senior posts remained unfilled for too long a

time. A number of key vacancies, including that of the chief financial officer and Chief Executive Officer, have only recently been filled as a result of the recommendations of the *ad hoc* Committee. Whatever the difficulties in filling these posts, the Committee believes that these vacancies seriously impinged on the operations of the Office.

- c) The Committee notes the lack of representivity in appointments within the office of the Public Protector, and within its provincial offices, which must be corrected.
- d) The Committee notes that the North West Province has a staff complement that is more than double that of any of the other provincial offices. The reason for this is historical as the North West Province office was an inherited structure from the former Bophuthatswana homeland, which had five ombudsman offices.
- e) The Committee accepts the explanation but believes that this has lasted too long. The Committee finds that the present situation is neither an efficient nor effective use of resources.
- f) It emerged in evidence that there is urgent need for a case management system. Such a system allows for the tracking of cases from the beginning to their conclusion, thereby enabling progress to be monitored. At present, the office simply does not have access to the necessary data. The office has paid for a system but it is not operational. Presently statistics are compiled manually and, as the Committee has noted earlier, the absence of a case management system creates difficulties in compiling statistics and in monitoring the progress with cases.
- g) With regard to policies on disclosure of out-

side interests, the Public Protector informed the Committee that there were no policies in any form in place until 2003. The Public Protector is not permitted to perform other remunerative work. Presently, all senior managers declare their interests informally to the Public Protector, but a task team has been established to attend to this.

- h) As is the case with all the bodies it reviewed, the Committee finds the arrangements concerning the disclosure of interests unsatisfactory. The issue is discussed more fully and recommendations are made in Chapter 2 of this report.
- i) The Public Protector Act provides that the National Assembly must determine the remuneration and other terms and conditions of employment of the Public Protector. The Committee has dealt with this earlier in the chapter. It is clear to the Committee that the absence of a legislative framework in terms of section 219(5) of the Constitution to determine the remuneration of office-bearers for the Chapter 9 and associated constitutional institutions is cause for enormous dissatisfaction and frustration.
- j) The Public Protector Act makes provision for the tabling in Parliament of a document setting out the remuneration, allowances and other conditions of employment in appoint-
- ing new staff. The Committee notes that the last occasion on which such a document was tabled was in 2002.

3.10. FINANCIAL ARRANGEMENTS

- a) Table 3 below gives a financial summary for the office of the Public Protector for the period 2003/04 to 2009/10. With the exception of 2004/05, the Public Protector has underspent each year in the period under review. This is of concern to the Committee, given the dissatisfaction that the Public Protector expressed concerning budgetary constraints.
- b) It is noted that the budgetary allocations will have more than doubled between 2003/04 and 2009/10.
- c) Nevertheless, the Committee finds that it has insufficient information to draw any conclusions with regard to cost effectiveness.

Table 3: Revenue and Expenditure – Office of the Public Protector²⁷

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Total revenue	44 628	50 063	59 258	67 784	78 722	86 475	95 099
Total expenditure	41 001	53 201	58 230				
Surplus/ (Deficit)	2 627	(3 138)	1 028				

²⁷ National Treasury (2007), Estimates of National Expenditure and the Public Protector's submission to the Committee

4. General conclusions

- a) The present configuration and operations of the office of the Public Protector is suitable for the current South African environment.
- b) In light of the recommendations of the *ad hoc* Committee on Operational Problems in the Office of the Public Protector, it is necessary that internal mechanisms are set up to deal with breakdowns in relations.
- c) The appointments and budget arrangements are unsatisfactory. Recommendations to enhance consistency, coherence, accountability and affordability are made in Chapter 2 of this report.
- d) The National Assembly's oversight of the office of the Public Protector is unsatisfactory. Recommendations are made in this regard in Chapter 2 of this report.
- e) The Public Protector's institutional arrangements, particularly the arrangements concerning disclosure of interests, are inadequate.
- e) At present, the collaboration and co-ordination of activities with the Chapter 9 and associated institutions are effectively non-existent.
- f) Public awareness of the role of the office of the Public Protector and its work is insufficient.

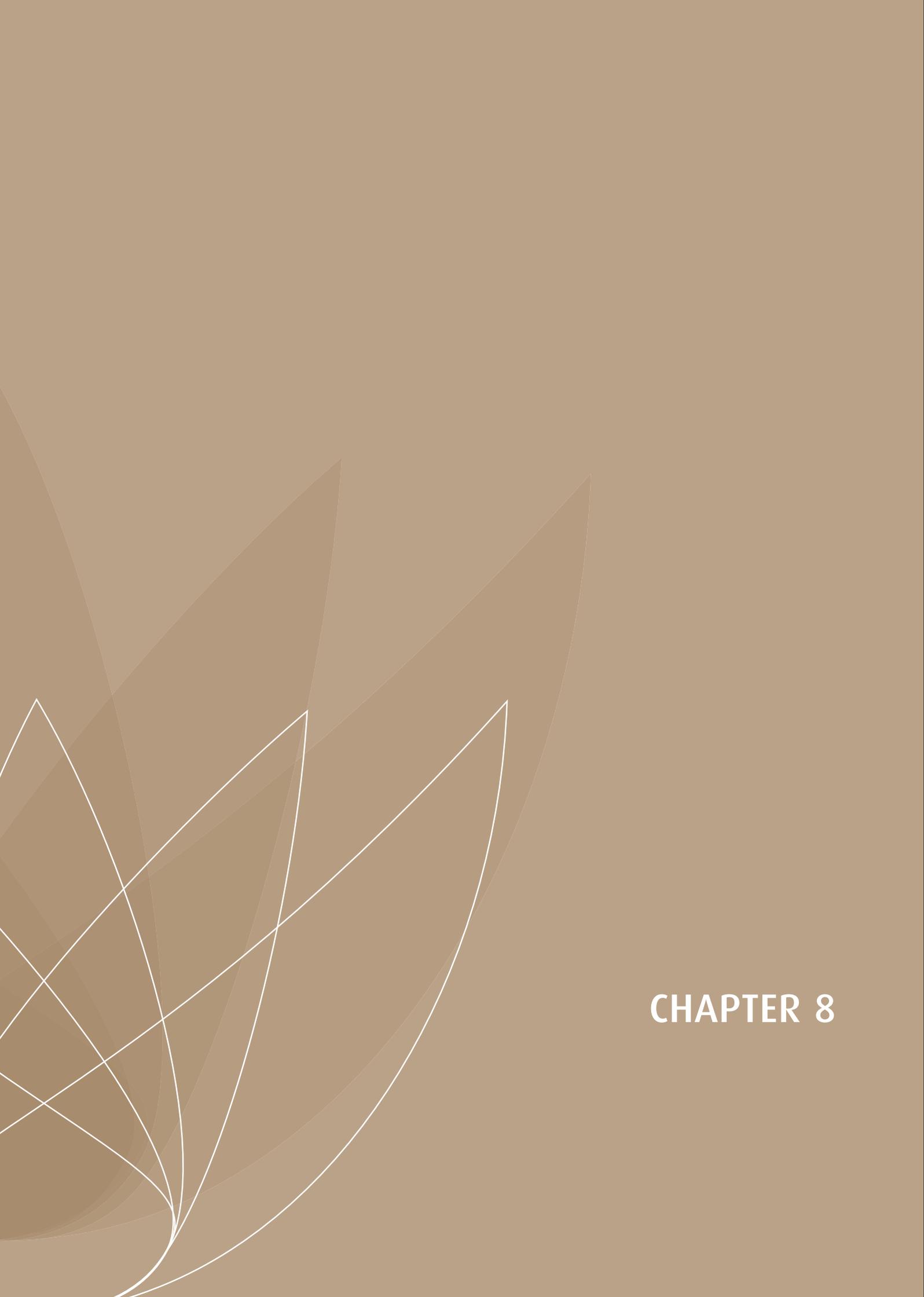
5. Recommendations

The Committee recommends that -

- a) The office of the Public Protector continue without substantive change to either its mandate or to its powers and functions.
- b) The Public Protector should be proactive in increasing public awareness of the activities of the office. In this regard the Committee refers to the recommendation of the *ad hoc* Committee on Operational Problems in the Office of the Public Protector, namely that there is need for an effective communication strategy to allow the office to keep the public adequately informed of its work and of progress with cases, thus avoiding any misunderstanding.
- c) The Public Protector should participate in the proposed formal collaborative structure to be formed between the Chapter 9 and associated institutions to ensure co-ordinated activities and the establishment of joint projects.
- d) There should be a formal agreement with relevant institutions to prevent any possibility of duplication or overlap of functions. This is particularly necessary where there is referral of cases or complaints to another body. Specifically, the Committee recommends that the Public Protector formalises its relationship with the Auditor-General, the Commission for Gender Equality and the Human Rights Commission and establishes mechanisms to track and monitor referred matters.
- e) The Public Protector needs to develop a staff retention strategy to address staff turnover, particularly at a senior level.
- f) Mechanisms should be developed to improve

the relationship and interaction between the National Assembly and the Public Protector. The role of the proposed unit in the Office of the Speaker of the National Assembly discussed in Chapter 2 of this report would be helpful.

- g) The appointments procedures in respect of the Public Protector and the Deputy Public Protector should be reviewed. The Committee makes general proposals in this regard in Chapter 2 of this report.
- h) The budget process and location of the Public Protector's budget allocation should be revised in accordance with the recommendations of the Committee in Chapter 2 of this report.
- i) The directorships, partnerships and consultancies of the Public Protector and the Deputy Public Protector and senior officials must be disclosed in the annual report of the office. In addition, the disclosures of pecuniary and other interests of the office-bearers and staff members must be kept available in a register and an indication must be made in the annual report of where such information is available. General recommendations in this regard are made in Chapter 2 of the report.
- j) The appropriate lines of authority and accountability between the office of the Public Protector and other organs of state, more particularly the Department of Justice and Constitutional Development, should be observed so as to protect the independence of the office of the Public Protector.
- k) Clear protocols for the delegation of powers and functions must be established so as to avoid the potential for internal conflict.



CHAPTER 8

CHAPTER 8

THE NATIONAL YOUTH COMMISSION

1. Background

Prior to democracy in South Africa in the early 1990s, political, social and economic oppression ensured that the majority of South African youth grew up vastly disadvantaged. Black South African youth were forced to live in underdeveloped, poor communities, with minimal government services, grossly inadequate schooling, practically non-existent sporting and recreational facilities and little or no access to adequate health care and social development. The squalor of apartheid was the harsh reality for the majority of the youth. Many of the youth, however, were active in asserting their needs, forming youth organisations, joining political movements and protesting against the injustices of the apartheid system. Young people participated vociferously in the national liberation struggle, fighting for freedom, equality and justice. However, for many young people, this required huge sacrifices including education, social exclusion, living under the fear of arrest, torture and detainment and having to move away from their families. Many of the youth were not afforded the opportunity to develop and advance to their full potential.

The new democratic dispensation recognised the importance of youth development in its transformation agenda. Youth development remains a critical component of the full realisation of the vision of a new and better South Africa founded on the values of human dignity, equality, human rights, non-racialism and non-sexism.

The National Youth Commission was established on 16 June 1996 in terms of the National Youth Commission Act 19 of 1996. This was part of the democratic government's plan to develop a comprehensive strategy to address the challenges facing young men and women between the ages of 14 and 35 years.

The creation of a National Youth Commission was in direct response to the recommendations of a Youth Summit convened by the then Deputy President, Thabo Mbeki, in December 1994. Representatives at the Summit had called for the establishment of a Commission that would serve to highlight and monitor the situation of young people, while co-ordinating and initiating the development of appropriate policies and strategies geared to youth development.

Approximately 70% of South Africa's population is under the age of 35 years, while youth in the age group between 14 and 35 years make up close to 40% of the total population. This figure rises to 60% when the total population for the continent is considered, and it is expected that this figure will rise to 80% by the year 2020. Accordingly, it is to be expected that youth development will continue to grow in prominence as youth continue to grapple with such issues as poverty, employment opportunities, education, substance abuse and the effects of the scourge of HIV and AIDS.

Although the National Youth Commission is not a constitutional institution, it is a statutory body that is accountable to the President. The President, however, has delegated his powers in this regard to the Minister in the Presidency. Furthermore, the Commission is funded through a transfer payment from the Presidency. Nonetheless, the Committee deemed it necessary to include the Commission in its review for three main reasons: the importance of youth development; the fact that a committee of Parliament advertises, compiles a shortlist and interviews for the appointment of Commissioners; and the oversight role of the National Assembly over the Commission as an organ of state.

2. Constitutional and legal mandate

The preamble to the National Youth Commission Act 47 of 1997 acknowledges the role that the youth have played, and will continue to play, in society, as well as the need to redress the imbalances of the past. As such, the Act establishes a National Youth Commission mandated to -

- a) Co-ordinate and develop an integrated national youth policy;
- b) Develop an integrated national plan for the development of youth in South Africa;
- c) Develop principles and guidelines and make recommendations to the Government for the implementation of an integrated national youth policy;
- d) Co-ordinate, direct and monitor the implementation of such a policy;
- e) Implement measures to redress the imbalances of the past;
- f) Promote uniformity of approach among organs of state, including provincial governments, towards youth development;
- g) Maintain close liaison with similar institutions, bodies or authorities in order to foster common policies and practices and to promote co-operation;
- h) Co-ordinate the activities of the provincial youth commissions, and link those activities to the national youth policy; and
- i) Develop recommendations relating to any matters that may affect the youth.

2.1. POWERS AND FUNCTIONS

The Act provides the Commission with extensive powers and functions that include:

- a) Developing and monitoring of national policy;
- b) Acting as a link between government, youth organisations and the youth generally;
- c) Maintaining close liaison with similar bodies to foster common policies and practices and to promote co-operation;
- d) Conducting research;
- e) Monitoring and reviewing the policies and practices of organs of state and other public bodies with regards to youth matters;
- f) Developing and conducting information and educational programmes;
- g) Evaluating legislation, and recommending new legislation to Parliament;
- h) Preparing and publishing reports to Parliament on any legal instrument relevant to youth matters; and
- i) Monitoring the Republic's compliance with applicable international instruments.

3. Findings

The Committee received from the Commission a written response to the questionnaire it had circulated. This document formed the basis for the Committee's discussions with the Commission, which took place on 24 January 2007. The Committee's findings were supple-

mented by written submissions, as well as further representations from the Commission, which were supplied at the Committee's request. From these, the following emerged:

3.1. CONSTITUTIONAL AND LEGAL BASIS

- a) The Committee notes that the Commission is not a Chapter 9 institution, nor is it established in terms of any other constitutional provision. The legal basis for the establishment and functioning of the Commission is the National Youth Commission Act 19 of 1996.
- b) The Commission is not autonomous and is situated in the Office of the President and accounts directly to the Minister in the Presidency.
- c) The Committee notes that there is some discussion regarding the restructuring of the Commission. The Committee learnt that a convention in June 2006 reviewed the implementation of youth programmes. The convention proposed that a national youth development agency be established in South Africa merging the functions of the National Youth Commission and the Umsobomvu Youth Fund to drive a seamless approach to the implementation of youth programmes. In essence, the agency will find expression at national, provincial, district as well as local government levels. This agency should be given the authority to table and influence legislation critical to youth development.

3.2. INTERPRETATION AND UNDERSTANDING OF MANDATE

- a) The Committee is not satisfied that the

Commission is addressing its mandate adequately, as the Committee contends that the Commission's mandate in law is more far-reaching than as interpreted by the Commission. The Commission has adopted the following strategic priorities: policy and research; advocacy and lobbying; co-ordination and capacity building; and monitoring and evaluation. However, even within these focal areas, the Committee wishes to reiterate that the Commission is not addressing its mandate adequately. For example, the Commission has not reported on the Government's compliance with its international obligations regarding youth development.

- b) The Commission is tasked with the co-ordination and development of an integrated national youth policy. The Commission adopted such a policy in 2000, but this policy was never formally adopted as the Commission wished to personally hand over the policy to President Mandela but the opportunity to do so never arose. Subsequently, the policy did not form the basis of the National Youth Development Policy Framework (2002 – 2007), which was adopted by Cabinet in 2002. To date the policy has yet to be finalised, although the Commission has been instrumental in developing the aforementioned National Youth Development Policy Framework that has been used extensively. It is evident that the Commission's focus on the Framework has been at the expense of other core activities.
- c) The Committee notes that the absence of an integrated youth policy creates enormous difficulties, as there is nothing against which to measure the success or failure of measures aimed at youth development. At present, youth development initiatives are not

integrated, occurring in a haphazard way across various government departments and structures.

- d) The Commission informed the Committee that it does not have the resources to implement programmes aimed at youth development. Instead, it sees itself as an advisory body rather than an implementer of programmes. The Commission indicated that it has adopted a limited approach to initiating youth development programmes by means of piloting flagship programmes, which are then handed over to the Executive for roll-out. This, however, creates a fragmented approach to youth development issues.
- e) The Committee notes that the Commission has prioritised research. Thus, for example, it plans to launch the Youth Development Research Institute by September 2007, has conducted a study on localising youth development and is planning to conduct a desk-top study on establishing ward committees and youth representation. While such initiatives are commendable, the Committee notes that the research is not empirical in nature. More generally, regarding the Commission's research function, the Committee is of the view that the Commission should be strategic in the use of its resources, particularly given the research already being conducted by the Youth Desk in the Office of the Presidency.
- f) The Committee finds that the Commission has not been strategic in the use of its powers to ensure that youth matters attract greater visibility. For example, the Committee notes that the Commission has not published any reports to Parliament on government's implementation of human rights instruments pertaining to youth, although the Commission

plans to lobby for the implementation and ratification of the African Youth Charter by the South African Government.

- g) The Commission states that the enabling legislation does not provide it with adequate powers of enforcement where there is neglect of youth development issues. However, the Committee contends that nothing prevents the Commission from receiving complaints and recommendations from the public, and youth in particular, on any matter relating to youth development. Therefore, if the Commission is to have any relevance, it should be able to receive and consider such complaints and recommendations, which will provide a more meaningful basis for the Commission's work. The Committee further notes that the Commission has not utilised its powers to approach either the President or Parliament with regard to any matter relating to the exercise of its powers or the performance of its functions.

3.3. APPOINTMENTS

- a) The Commission consists of up to five full-time members, who are appointed by the President on the advice of a committee of Parliament for a period not exceeding five years. This term of office is, however, renewable. At present, five Commissioners are appointed for three years.
- b) The criteria for appointment and the appointment process are set out in the provisions of the enabling legislation. Commissioners must be fit for appointment on account of their qualifications, knowledge or experience relating to the functions of the Commission. The Committee contends that there is no reason why the appointment of Commissioners should be limited to persons under 35 years

of age. There may be other persons, over the age of 35, who are suitably qualified and experienced in the area of youth development and should therefore not be excluded from appointment.

- c) In practice, the matter of appointments is referred to the Joint Monitoring Committee on Improvement of Quality of Life and Status of Children, Youth and Disabled Persons, which advertises, compiles the short list and conducts the interviews.
- d) The Committee finds that the present system does not allow for continuity in the appointment of Commissioners. Some degree of continuity is necessary when appointing Commissioners in order to avoid loss of institutional memory, thereby undermining the Commission's effective and efficient functioning while creating a situation in which Commissioners are overly dependent on the Youth Desk in the Presidency for critical strategic support.

3.4. PUBLIC AWARENESS

- a) The Committee is of the view that the Commission should be more proactive and creative in its efforts to ensure greater visibility of its work. This can be achieved through various means, including targeted campaigns that address the issues that most affect the youth, as well as the dissemination of pamphlets and displaying posters at the many government and parliamentary access points.
- b) The South African Youth Council was formed for the purpose of co-ordinating and enhancing the participation of civil society in youth matters. The Committee is not satisfied that the Commission's engagements with civil society are sufficiently structured.

3.5. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Commission states that there is no overlap between its work and that of the Chapter 9 institutions, since none of these institutions are tasked with monitoring and co-ordinating the integration of youth development.
- b) The Committee rejects this. Not only does section 8(1)(a)(vi) of the enabling legislation task the Commission with maintaining close relations with institutions, bodies or authorities similar to it in order to foster common policies and practices and to promote co-operation, but the Commission is specifically mandated to make recommendations on policy concerning the commonality and uniqueness of gender, the provision of equal resources to the genders and the principle of equal representation of genders on administrative and other bodies. A relationship with the Commission for Gender Equality would therefore appear to be an obvious necessity.
- c) The Committee learnt that the Commission has worked closely with the Electoral Commission to develop a plan to mobilise youth participation in democratic processes, particularly the elections. This partnership involves youth participation in voter education programmes, joint media appearances, and facilitating partnerships with youth organisations. In addition, the Commission stated that there had been meetings between it and the Chapter 9 institutions for the purposes of information sharing. However, these meetings appear to occur on an *ad hoc* basis, the last such meeting having been in May 2006.

3.6. RELATIONSHIP WITH PARLIAMENT

- a) The Commission is required to report to the President at least once a year, and the President is tasked with tabling the report promptly in the National Assembly.
- b) The Commission's interaction with Parliament is largely through the Joint Monitoring Committee on Improvement of Quality of Life and Status of Children, Youth and Disabled Persons, although the Commission briefs other parliamentary committees from time to time on specific issues. Given the broad scope of the Commission's mandate, the Committee is of the view that there is, however, room for greater interaction between the Commission and other parliamentary committees.

3.7. RELATIONSHIP WITH THE EXECUTIVE

- a) It was put to the Committee that the Commission's interaction with the Executive occurs chiefly through the Minister in the Presidency and by means of reporting via the Social Cluster of Cabinet. Other less formal mechanisms for interaction with the Executive exist through interactions with various Ministers and participation in various inter-ministerial forums.
- b) The Committee finds that the Commission has a close working relationship with the Presidency. This is the result of the special nature of the legislation. The Commission's relationship with the Executive therefore differs from the relationship other Chapter 9 bodies have with the Executive.
- c) The Committee finds that the Presidency, through its Youth Desk, has provided the Commission with critical strategic support,

particularly while the new Commissioners took up their positions in mid-2006.

- d) The Committee finds that there appears to be considerable overlap between the Commission's mandate and that of the Youth Desk. Certainly there is a close working relationship between the two structures. A Youth Desk was set up in the Presidency in 2005. The Minister in the Presidency informed the Committee that the Youth Desk is directly integrated into the institutional structures of the Presidency, performing an integrating and facilitative role with regards to youth development issues by ensuring, amongst others, that the policies and programmes proposed by the Commission are taken through the Cabinet cluster system. The Committee is of the view that this is a serious overlap, in the sense that if the Commission is formulating policy, it then clashes with the functions of the Youth Desk in relation to policy formulation. The Youth Desk also facilitates and administers the Presidential Youth Working Group and youth initiatives associated with the Accelerated and Shared Growth Initiative for South Africa (AsgiSA), as well as acting as a link between national line departments and the actual implementation of the National Youth Service.
- e) The Commission informed the Committee that it has experienced difficulties in securing the co-operation of all government departments, although this has improved since 2006 when an unprecedented number of departments established youth directorates. Most government departments have reduced issues of youth development to skills development, and youth development is not generally considered to include the provision of houses and basic services for youth.

- f) The Committee finds that the various institutions or structures created within government to focus on youth issues do not complement each other and that very often there is a degree of duplication, which is a waste of resources.
- b) The Committee is unable to establish what the precise functions or terms of reference of these provincial commissions are or should be.

- g) The lines of accountability for youth development institutions are blurred and confusing. There are a multiple number of bodies dealing with youth development as well as the State-established Umsobomvu Fund. This fund focuses on skills development and employment as opposed to the entire scope of youth economic participation. However, it does not seem to the Committee that there is much interaction and thus there is very little guarantee that policy emerging from the National Youth Commission will find expression in the Umsobomvu Fund or in other government departments for that matter.

3.8. RELATIONSHIP WITH THE PROVINCIAL YOUTH COMMISSIONS

- a) The Commission's relationship with the provincial youth commissions is not clear. The Commission states that the enabling legislation does not provide it with the necessary authority concerning the provincial youth commissions. In this regard, the Committee recommends that the Commission formalise the Chairperson's Forum, which is the vehicle for the Commission's interaction with the provincial commissions, as a means of regularising its authority. The Committee also notes that there is very little information on the specifics of the composition, powers, budget and activities of the provincial commissions in the legislation. It is critical that this be addressed.

3.9. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Committee notes that the lines of accountability and authority are not clearly drawn. The Committee learnt that on occasion there has been a blurring of functions between the Commissioners and the secretariat, as sometimes the secretariat are called upon to perform what is essentially a political function.
- b) The Committee noted that the Commission had several vacancies in key positions, for example, the Chief Financial Officer and the Chief Executive Officer. This means that the administrative functioning of the Commission is compromised.
- c) The Committee notes that the Commissioners were unable to attend the initial meeting with the Committee in September 2006, as they were all unavailable. However, the Committee expressed the view that there needed to be a clear policy on overseas visits.

3.10. FINANCIAL ARRANGEMENTS

- a) The Commission stated that its funding arrangements are inadequate. It does not have an opportunity to motivate for its own budget with National Treasury as the budget process is led by the Presidency. The Commission's budget is allocated from the Presidency's Vote. The amount allocated then informs the Commission's business plan.

-) The Committee notes that the Commission's funding arrangements are unusual, as the Commission's budget falls under that of the Presidency. The Committee is also of the view that the allocation of financial resources to the Commission is not modest. Table 1 below sets out the Commission's allocation and expenditure since 2003/04, as well as the amounts it has been allocated in terms of the Medium Term Expenditure Framework.
- c) Institutional governance mechanisms require attention, particularly regarding clarification of the powers and functions of the Chief Executive Officer vis-à-vis the Commissioners.
- d) The parliamentary mechanisms for oversight of the Commission are inadequate. General recommendations are made in Chapter 2 of this report for the improvement of parliamentary mechanisms of oversight and accountability.

Table 1: Income and expenditure 2003/04 – 2009/10²⁸

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Budget allocation	13 766	13 488	17 983	19 228	20 614	21 647	22 621
Additional funding	2 322	1 728	2 045				
Expenditure	15 892	17 015	18 656				
Surplus/ (Deficit)	(196)	(1 815)	1 3 72				

4. General Conclusions

- a) When viewed against the Committee's terms of reference, the Commission, as it is presently formed, does not serve its purpose. The Committee presents certain recommendations for the rationalisation of the role and function of the Commission in order to enhance its relevance.
- b) The Committee considers the appointment procedures in respect of the Commission to be, generally speaking, appropriate. However, the present arrangements have resulted in an entirely new Commission being appointed en masse in 2006, with an accompanying loss of institutional memory with reference to the previous Commission. General recommendations are made in Chapter 2 of this report to enhance a more professional approach.
- e) The budget process and funding model affect the Commission's ability to carry out its mandate. The Committee makes general recommendations in this regard in Chapter 2 of this report for the improvement of the budget process.
- f) The Commission has a disclosure mechanism in terms of which all senior managers and Commissioners sign an annual disclosure form. This is done by way of an affidavit, and the forms are then submitted to the Presidency and are dealt with in line with the Public Service Regulation Framework.

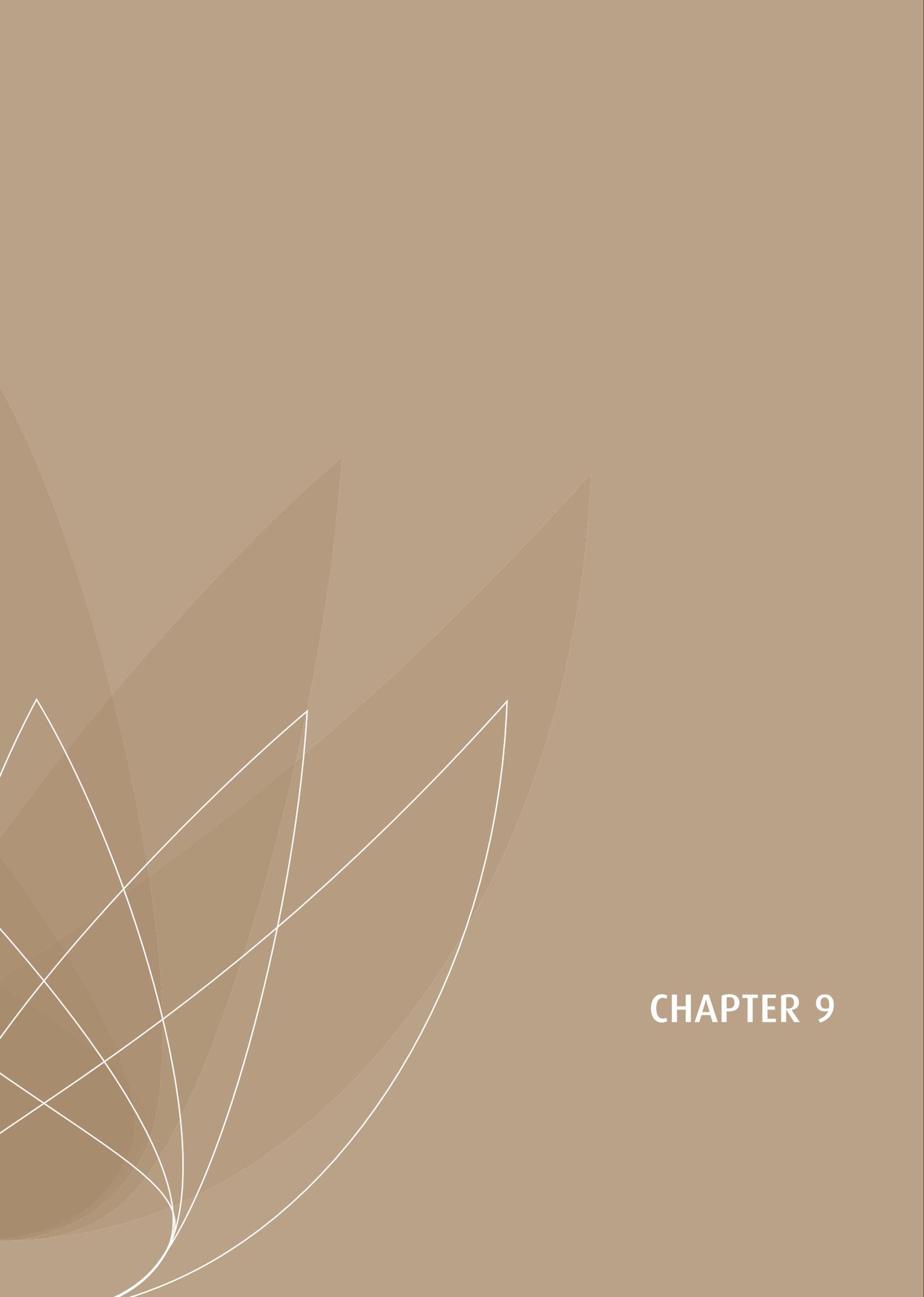
5. Recommendations

- a) The Commission is not particularly effective in carrying out its mandate. In particular, the Committee notes the similarity between the Commission's mandate and the tasks being

²⁸National Treasury (2007), Estimates of National Expenditure and the Commission's submission to the Committee

performed by the Youth Desk in the Office of the Presidency. Despite submissions from various youth formations that the Commission be abolished, the Committee is mindful of the importance of youth development in South Africa, as well as the many challenges that face this sector of our population.

- b) In addition, the Committee is of the view that it is an anomaly that there is no specialised structure devoted to promoting children's rights, despite their vulnerability as a group. There need to be specific institutional arrangements for the voice of our young people. Accordingly, the Committee is of the view that the Commission's mandate should be widened to encompass both children and the youth and that the Commission should be given powers to receive complaints, investigate matters and actively lobby. There is indeed already a degree of overlap as the Commission's mandate includes children aged 14 to 18 years.
- c) The Committee is accordingly proposing a two-stage process for the future, namely that the reconstituted Commission devoted to children and youth issues should fall under the umbrella of the Human Rights Commission, and that a dedicated commissioner for children and youth be appointed.
- d) The Committee further proposes that in the interim, whilst the recommendation set out in (b) above is addressed, a number of recommendations to improve the efficiency and effectiveness of the Commission be implemented forthwith:
- i. The Commission's enabling legislation should be urgently reviewed and amended so as to include both the youth and children. Furthermore, in addition to the Commission's existing powers, it should be mandated and capacitated to lead campaigns actively, hear and investigate complaints and undertake research on important matters such as child abuse, violence amongst our children and youth, drug abuse and so forth.
 - ii. The reconstitution and revitalization of the Forum of Independent Statutory Bodies, a voluntary body, should be actively encouraged in order to improve co-ordination between Chapter 9 and associated institutions.
 - iii. The Commission should develop more innovative ways to increase its visibility.
 - iv. Mechanisms to improve the relationship and interaction between Parliament and the Commission should be determined. The role of the proposed unit in the Office of the Speaker of the National Assembly discussed in Chapter 2 of this report should also be considered in this regard.
 - v. In general, the appointment procedures should be reviewed. The Committee makes proposals in this regard in Chapter 2 of this report.
 - vi. The budget process and location of the Commission's budget allocation should be revised in accordance with the recommendations of the Committee in Chapter 2 of this report.
 - vii. The directorships, partnerships and consultancies of Commissioners and senior officials should be disclosed in the annual reports. In addition, the disclosures of pecuniary and other interests of Commissioners and staff members must be kept available in a register and an indication must be given in the annual report of where such information is available. General recommendations are made in this regard, in Chapter 2 of this report.



CHAPTER 9

CHAPTER 9

THE PAN SOUTH AFRICAN LANGUAGE BOARD

1. Background

The marginalisation and suppression of indigenous languages in South Africa was part of the systematic and deliberate oppression of the majority by the apartheid government. By refusing recognition to indigenous cultures and languages, the apartheid government stripped people further of their heritage, dignity, identity and sense of belonging. At the same time, the languages of the ruling minority were elevated and developed through considerable state assistance. English and Afrikaans, recognised as the only two official languages during the apartheid era, were the medium of instruction at schools, and all government information and communication were provided in these languages only. This had the effect of systematically diminishing the status, usage and development of indigenous languages and also created access barriers to the limited government services provided to the majority of the population.

It was therefore a key consideration during the constitution-making process in South Africa to provide due recognition to the historically diminished indigenous languages in respect of their use and status. In our present Constitution, there is considerable emphasis on languages.

As part of the founding provisions, the 1996 Constitution in Chapter 1 recognises eleven official languages of South Africa, including nine indigenous languages. Furthermore, the Constitution requires the state to take practical and positive measures to elevate the status and advance the use of the indigenous languages.

To ensure the development of all the official languages in South Africa, with particular attention to the previously marginalised languages,

the Constitution also makes provision in section 6(5) for the establishment of a Pan South African Language Board. The Board was established by the Pan South African Language Board Act 59 of 1995 and its first members were appointed in the same year.

2. Constitutional and legal mandate

The Pan South African Language Board is established in terms of Chapter 1 of the Constitution. Its constitutional position therefore differs markedly from the Chapter 9 bodies under review in this report. Unlike these bodies, the Board does not have its independence and authority guaranteed in the Constitution; neither is there a constitutional obligation placed on the Board to act without fear, favour or prejudice when implementing its mandate, although these guarantees are contained in legislation. Furthermore, no provision is made in the Constitution for the Board to be accountable solely to the National Assembly.

The constitutional role of the Board must be understood in the context of the constitutional duty placed on the state to take practical and positive measures to elevate the status and advance the use of indigenous languages in order to ensure that all official languages enjoy parity of esteem and are treated in an equitable manner.

The Board is therefore created in section 6(5) of the Constitution to assist the state in this task (Annexure 1). It provides for the creation of the Board by national legislation and requires the Board to promote, and create conditions for, the development and use of all official languages in South Africa, as well as the Khoi, Nama and San languages and sign language.

The Board must also promote and ensure respect for all languages commonly used by communities and for religious purposes in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu, Arabic, Hebrew and Sanskrit.

The Pan South African Language Board Act provides for the recognition, implementation and furtherance of multilingualism in South Africa and the development of previously marginalised languages. In terms of the Act, the objects of the Board are, amongst others, to promote respect for, and ensure the implementation of, the following principles:

- a) The creation of conditions for the development and promotion of the equal use and enjoyment of all the official South African languages;
- b) The prevention of the use of any language for the purposes of exploitation, domination or division;
- c) The promotion of multilingualism;
- d) The promotion of the provision of translation and interpreting facilities;
- e) The further development of the official South African languages;
- f) Fostering respect for languages other than the official languages; and
- g) The promotion of respect for, and the development of, languages used by communities and for religious purposes.

The powers of the Board conferred on it by the Act may be grouped broadly as follows: advisory functions in relation to functions of the

Executive; investigation and remedy of complaints; promotion of language rights and usage; and co-ordination of language planning.

3. Findings

The Committee met with the Pan South African Language Board on 31 January 2007. It is regrettable that the Chairperson of the Board was unable to attend this meeting. The Board's written response to the questionnaire, various public submissions, and the Committee's consideration of relevant documents such as the annual reports and budgets of the Board formed the basis of the discussions. The Committee reports on the following findings:

3.1. CONSTITUTIONAL AND LEGAL MANDATE

- a) The Committee notes that there is a serious discrepancy between the provisions of the Constitution and the provisions of the Pan South African Language Board Act regarding the main objective of the Board. Section 6(4) of the Constitution states that "*all official languages must enjoy parity of esteem and must be treated equitably*" (Committee's emphasis). The Act on the other hand states that one of the main objectives of the Board is to create "*conditions for the development and for the promotion of the equal* (Committee's emphasis) use and enjoyment of all the official South African languages".
- b) When this discrepancy was pointed out to the members of the Board, they informed us that the Board preferred the construction of its mandate in the Act. The Committee notes that this view is not constitutionally tenable because the Constitution is the higher law and all law that is in conflict with the

Constitution is invalid to the extent of the conflict. Moreover, the Committee is perplexed at the Board's assertion in this regard, given that the "equal" use and enjoyment of all languages in South Africa would have enormous and far-reaching social, political, business and resource implications and would not be possible. The Committee draws the special attention of the National Assembly to this important matter.

- c) It emerged during the Committee's interactions with the Board and from considering the documentation at the disposal of the Committee that the Board evidently does not fully appreciate its constitutional and legal mandate. The Committee feels that the Board has a very narrow focus and has therefore not fully pursued its extensive legislative mandate nor has made use of its extensive powers. For example, the Committee was unable to find significant evidence either in documentation or in its interactions with the Board that the Board has implemented programmes to promote the use of sign language, to promote the use of interpretation and translation facilities, to investigate alleged abuses of a language right, policy or practice, to facilitate co-operation with language-planning agencies outside South Africa or to monitor the observance of constitutional and legislative provisions regarding the use of language.
- d) The Committee notes the Board's submission during discussions that it had standardised interpretation, translation and editing qualifications and had developed guidelines for translation and interpretation services.
- e) The Board has also used a considerable amount of its available resources (more than R9 million, or almost one third of its budget, in 2006) in its lexicography activities and the development of dictionaries for the different languages. The Committee turns to this in relation to the Department of Arts and Culture later in this Chapter.
- f) The Committee is of the view that the Board has misconstrued its mandate as it relates to interaction with the public. The Constitution and the Act state that the Board must promote all official languages as well as respect for multilingualism. In fact, the Act states that the Board has a legal duty actively to "promote an awareness of multilingualism as a national resource." This necessarily requires the Board to embark on information and public education campaigns as ignorance and prejudice against multilingualism are amongst the greatest obstacles in its realization. This has not been done. The Committee notes that, because of this misapprehension regarding its mandate, the Board has unfortunately not devised or implemented a coherent and sustained public education campaign. Instead, it has been involved only in *ad hoc* and reactive campaigns, thereby falling far short of what is required by the Constitution.
- g) The Committee notes that in terms of the Act the Board also has the power to monitor the observance of the constitutional provisions regarding the use of language and the contents and observance of any existing and new legislation, practice and policy dealing directly or indirectly with language matters at any level of government. However, the Committee was informed by members of the Board that there has been no systematic monitoring of this kind – merely "informal checking to see whether there has been compliance". The Committee considers it unfortunate that no

details are available about the monitoring of the observance of the relevant constitutional provisions as this makes it very difficult to ascertain the effectiveness of the Board.

3.2. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) Sections 5 and 10 of the Pan South African Language Board Act provide for the appointment of the Board, a Chief Executive Officer and other staff and establishes the Board as the policy-making body. However, The Committee was told by members of the Board that the legislation is not clear enough about the exact relationship between the members of the Board and the staff and that there have been some instances where the Board members have encroached on management responsibilities best left for the Chief Executive Officer to deal with, instead of focusing on governance and policy issues. The Committee finds this lack of clear lines of authority between the Board and the staff deeply troubling. The roles of part-time members of the Board are also not clearly defined.
- b) Members of the Board also told the Committee that there was a need to improve the institutional governance arrangements and expressed the view that it was imperative that clear policy guidelines be provided for the Board members to enable them to acquaint themselves with their role and the extent of their mandate within the functioning of the institution. The Committee is of the view that this passive attitude is unhelpful and counter-productive and believes that Board members should take pro-active steps to clarify the extent of their mandate.
- c) The Committee also notes that the Board has not ensured that the relevant management policies and procedures are put in place to ensure the effective and accountable running of the Board's affairs and to guard against wasteful or unwarranted expenditure. The Committee notes with concern that the Auditor-General provided a qualified audit report for the financial year 2004/05. The report pointed out that most policies or procedures for internal controls and efficient risk management were not approved or updated regularly. The Committee was not presented with any evidence that this has been rectified.
- d) The Committee also notes that the National Lexicography Units, which fall under the authority of the Board, have not reported to the Board in an adequate fashion. According to the Auditor-General's report, during the 2003/04 financial year only four of the eleven units submitted their financial statements, while only one submitted the statements in the required format. During 2004/05 only one unit did not submit a financial statement, while three of those which had submitted statements did not comply with the requirements. The Committee is concerned that the Board failed to take the necessary steps immediately to ensure that all the units report in the required manner.
- e) In terms of the Pan South African Language Board Act, the Board appoints the Chief Executive Officer on such terms and conditions as the Board may determine. This necessarily means that the Board has authority over the Chief Executive Officer and has a duty to oversee his or her work. The Committee finds that the Board was unable or unwilling to give the appropriate direction to the former Chief Executive Officer and

that internal disputes accordingly resulted. There was a desperate lack of internal dispute resolution mechanisms between the Board and the Chief Executive Officer. The Board also informed the Committee that, because the former Chief Executive Officer was so strong-willed, relations with the Department of Arts and Culture had become strained. Relations with the Department seemed to have improved since the departure of that Chief Executive Officer.

- f) The Chief Executive Officer is a member of the Board, participates in the Board's debates and has the rights and duties of other members, but does not vote. The Committee is of the view that while the participation of the Chief Executive Officer in the meetings of the Board is an operational requirement, this arrangement leads to a blurring of responsibilities and needs to be addressed.
- g) The Committee advises that the Board should also develop and approve an internal dispute resolution mechanism.
- h) The Board confirmed, in its response to the Committee during deliberations, that it does not have mechanisms for the Chief Executive Officer, the Chairperson, the Deputy Chairperson and other members of the Board to disclose private financial interests or other relevant involvements.
- i) The Committee notes that regulations issued in terms of the Act require the Chief Executive Officer to seek the Board's permission to perform outside remunerative work. However, the Act prohibits members of the Board or staff from conducting investigations in respect of matters in which they have pecuniary or other interest that might pre-

clude them from exercising their powers, duties and functions in a fair and unbiased manner. If a member of the Board or a staff member fails to disclose such interests, the Board may take such steps, as it deems necessary to ensure a fair and unbiased investigation.

- j) The Committee recommends that, in common with other bodies, the Board should have a register of interests and any directorships or partnerships held by members of the Board should be published in its annual report.
- k) The Committee notes with concern that the Board does not have in place a mechanism that would allow the public to raise complaints about its work. Moreover, the Committee was presented with evidence that the Board does not always follow up on the complaints it has received.

3.3. PUBLIC AWARENESS

- a) As stated above, the approach of the Board to public awareness is based on a misunderstanding of its legal mandate. This has resulted in the absence of a clear and sustained public education campaign. This situation changed in 2003 when, in response to a decline in complaints lodged by the public, the Board launched a linguistic human rights awareness campaign. The Committee is not satisfied that this piecemeal approach to public awareness and outreach is adequate, appropriate and good value for money.
- b) The statistics at the disposal of the Committee suggest that the Board does not have the kind of public profile that the important work it is tasked to do warrants

and requires. Moreover, the Committee considers the decline in the number of complaints received by the Board to be indicative of the decline in its public profile. During the 2002/03 financial year the Board received 83 complaints, during 2003/04 it received 22 complaints and during 2004/05 it received 33 complaints.

- c) The Committee was informed that the Board received only about 400 complaints since its inception. The slight increase in 2004/05 was the result of an intervention by the Board to raise the public profile of its language human rights initiative. The general decline, however, points to the notion that the Board may have become surplus to requirements. The Board appears to have little impact. This brings into question its continued existence in its current form.

3.4. APPOINTMENTS

- a) The Minister of Arts and Culture appoints no fewer than eleven and no more than fifteen persons as members of the Board. When it becomes necessary to fill vacancies on the Board, the Minister, after consultation, with the Portfolio Committee on Arts and Culture, appoints an *ad hoc* committee of no fewer than nine persons to invite the public to nominate persons for appointment. This *ad hoc* committee submits to the portfolio committee a shortlist of no more than 25 candidates for the portfolio committee to consider.
- b) The portfolio committee interviews the candidates and submits a final shortlist of no more than 20 names to the Minister for appointment. The Minister then appoints members of the Board from the names that appear on the shortlist after consulting with the portfolio committee. Members of the

Board are appointed for a term of five years and are eligible for re-appointment for one more term.

- c) The Act sets minimum criteria that bind the Minister when appointing members to the Board. It requires that the Board of 11 to 15 members should be broadly representative of the diversity of users of the official languages. It also requires that members of the Board must be supportive of the principle of multilingualism and must have language skills, which may include interpreting, translation, terminology, lexicography, literacy teaching and language planning.
- d) The Board elects one of its members as the Chairperson and another as Deputy Chairperson. The Chairperson and the Deputy Chairperson hold office for a period of not more than two years after which elections are held for a new chairperson and deputy chairperson. This approach seems to have hampered the efficient functioning of the Board. Since 2002 the Board has had three chairpersons. It has led to a loss of continuity and focus and has further undermined the effectiveness of the Board. The Committee is of the view that, in the event of the Board being retained in its present form, this rotation of chairpersons should be reviewed and a chairperson should be appointed for a full 5-year term.
- e) The term of the current members of the Board ended on 30 February 2007. Although the Act does not provide for an extension of the term of office of members, the Minister extended the term of office of the current members until the end of June 2007. At the time of writing this report, the Portfolio Committee on Arts and Culture had agreed on a final shortlist of candidates for appoint-

ment. The Portfolio Committee felt that only one member of the Board should be recommended for reappointment, given the under-performance of the Board. In the light of the recommendations made by this Committee about the reconstruction of the Pan South African Language Board and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, it may be wise to put a moratorium on the appointment of a new Board.

3.5. RELATIONSHIP WITH THE EXECUTIVE

- a) Unlike Chapter 9 institutions, the independence of the Board is not guaranteed in the Constitution. As pointed out above, the Board's founding Act does provide for its members to serve impartially and independently and exercise and perform their powers and functions in good faith and without fear, favour, bias or prejudice, subject only to the Constitution and the Act. The Act also states that no organ of state may interfere with the Board or its members and requires all organs of state to afford the Board such assistance as may be reasonably required.
- b) Despite these legal assertions of impartiality and independence, the Act invests the Minister of Arts and Culture with wide powers over the Board. The Minister may terminate a member's membership of the Board if the Minister is satisfied that the member no longer complies with the requirements for membership of the Board; if the member has requested the Minister to be removed; if the member has been absent for two consecutive meetings of the Board without leave; or if, on reasonable grounds, the majority of the members recommend the removal of the member. The Minister may also dissolve the Board on any reasonable grounds. The Committee notes that these provisions are extraordinarily broad and afford the Minister vast discretionary powers over the Board. Such authority afforded to the Minister places a question mark over the Board's independence.
- c) The Committee makes recommendations in Chapter 2 of this report regarding the powers of Ministers in respect of the appointment procedures of the bodies under review.
- d) Given these powers accorded to the Minister by the Act, it is not surprising that the Board informed the Committee that its relationship with the Department of Arts and Culture is not cordial. The Committee was informed of severe tension between the Board and the Department and a view from the side of the Board that the Department was encroaching on its mandate on language development, which, in turn, it felt, compromised its independence.
- e) This view contrasted sharply with a view from the Department that it sees the development of languages as one of its primary responsibilities. To that end the Department has undertaken initiatives involving the creation of extensive capacity in terminology development and management; the co-ordination and advancement of human language technologies; language policy development; the provision of translation, editing and interpreting services; literature promotion and development; the establishment of language research and development centres; and the development of telephone interpreting services for South Africa.

- f) The Department has also established the National Language Forum which co-ordinates the activities of language units within government and legislatures, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities and the Board. The Department claims that national and provincial departments look to the National Language Forum for guidance on language policy implementation. There has also been established within the Department a National Language Services Directorate that is tasked with the development of languages, has also been established within the department.
- g) The Department maintains that there is no overlap between its responsibilities and those of the Board. Despite the provisions of the Act which, as has been pointed out above, give the Board a broad mandate to promote multilingualism and indigenous languages, the Department views the Board as an advisory body that may monitor the development of languages. The Department maintains that the Board cannot be expected to do the work of language development and be watchdog at the same time and that it is best suited to investigate complaints, conduct research, and monitor and make recommendations to appropriate institutions.
- h) The Committee is of the view that the present impasse between the Board and the Department is untenable and needs to be resolved without delay. The Committee recommends that the National Lexicography Units established by the Board be transferred to the National Language Services Directorate of the Department. The Committee is of the view that this is the best course of action because -
 - i. The Board does not have the required human and financial capacity to deal adequately and comprehensively with the important task of developing indigenous South African languages. In contrast the National Language Services Directorate situated in the Department is well-funded and better equipped to deal with the development of South Africa's indigenous languages; and
 - ii. The Board as such is not involved in the issue of language development, but has for all intents and purposes delegated this task to the National Lexicography Units. The rest of the Board's work relates to raising public awareness, dispute resolution, the promotion of multilingualism and the promotion of respect for other languages.
- i) In order to facilitate this change, the Committee recommends that the Board delegate some of its members and the heads of the Lexicography Units to meet with representatives of the Department to map the way forward.

3.6. RELATIONSHIP WITH PARLIAMENT

- a) Unlike the other institutions under review, the Board is not explicitly made accountable to the National Assembly. However, the Board does submit its annual report to the National Assembly, which refers it for consideration to the Portfolio Committee of Arts and Culture. The members of the Board informed the Committee that they felt there was a complete lack of constructive engagement by the National Assembly with its annual reports. They also expressed frustration at the general lack of engagement by the National Assembly with its work. The

National Assembly has not taken any action to deal with the recommendations and frustrations contained in the annual reports.

- b) Apart from its annual report, the Act also requires the Board to submit quarterly reports to Parliament to furnish details of its activities. It is unclear to the Committee whether these quarterly reports are regularly submitted and whether the Portfolio Committee engages with these reports. The Committee also notes that the Board has not requested a special debate in either of the Houses of Parliament on important aspects contained in any of its reports.
- c) The Committee further notes with concern that, despite this overlap, the Board only has a tentative, unsigned co-operation agreement with the Commission. The Committee was also informed that these two bodies have not formalised their working relationship in any other way, although they do co-operate on an informal and *ad hoc* basis,
- d) The Committee received submissions from civil society pointing out this overlap and the lack of formal co-operation between these bodies and suggesting that steps should be taken to address this matter. The Committee is of the view that the absence of such an agreement leads to duplication and renders both institutions less effective than they otherwise would have been. The duplication of mandates also has serious cost implications.

3.7. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Pan South African Language Board Act requires the Board to promote close co-operation between itself and other organs of state, institutions and persons involved in the development of languages. However, the Committee is unaware of the Board having initiated any activities to promote such close co-operation with organs of state, or any persons or institutions.
- b) There is a clear overlap between the mandate of the Board and that of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Both institutions are empowered to promote the rights of marginalised linguistic communities and to conduct research on this issue. While the Commission ostensibly deals with the matter from a rights-based perspective and the Board from a more practical perspective, the Committee is of the opinion that – apart from the work done by the Lexicography Units of the Board – there is in principle very little difference between the mandates of the two institutions.
- e) In the light of these considerations, the Committee recommends that the Board be amalgamated with the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and that a new institution, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (including the Pan South African Language Board), be created to face the important challenges of especially the promotion of indigenous languages in South Africa. This proposal is addressed further below.
- f) There is a cross-referral of cases and informal co-operation with the Human Rights Commission: the Commission refers cases involving language rights violations to the Board and the Board refers human rights issues to the Commission. The Committee again emphasises the importance of efficient record-keeping, tracking and monitoring of referrals.

3.8. FINANCIAL ARRANGEMENTS

a) The budget of the Board has increased from just over R19 million in 2002/03, to just over R29 million in 2005/06. Of this amount, just more than R9 million, or about one third of the total budget, was allocated for the lexicography work of the National Language Units. The salary expenses and the expenses of the Board accounted for another R9 million, which means that only one third of the available money was spent on the mandated activities of the Board. The Committee also notes with concern the relatively high amount budgeted for the office of the Chief Executive Officer.

b) The Committee notes that the Board has been setting up provincial offices in several provinces and that the cost of these provincial offices takes up a sizable amount of the budget. The Committee was unable to identify the demonstrable benefits of such offices vis-à-vis the realisation of the Board's legal and constitutional mandate and related activities, which require considerable attention. The Committee is of the opinion that these offices are not cost-effective and that they should be closed as soon as is practicable. The Committee makes more detailed recommendations in this regard in Chapter 2 of this report.

c) The budget for the Board for the past four years is summarised in the following Table:

Table 1: Income and Expenditure of the Pan South African Language Board²⁹

ITEM	2002/03	2003/04	2004/05	2005/06
INCOME				
Grant Received	18 645 000	21 634 000	24 677 000	26 976 000
Other Income	228 680	490 287	45 009	229 914
Interest Received	648 253	1 313 006	311 496	306 410
Total Income	19 521 934	23 437 293	25 033 505	27 512 324
EXPENDITURE				
Total Expenses	19 302 026	21 924 587	29 928 505	29 126 342
SURPLUS/(DEFICIT)	219 907	1 512 706	(4 895 000)	(1 614 000)

²⁹The Board's submission to the Committee

4. General conclusions

The Committee draws the following general conclusions in addressing the specific matters contained in its terms of reference:

- a) While the current and intended constitutional and legal mandates of the Pan South African Language Board are still suitable for the South Africa of today, the contribution of the Board to democracy is limited.
- b) Reorganisation of the Board will bring about a sharper focus on its constitutional and legal mandates and avoid duplication of work with that carried out by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Department of Arts and Culture.
- c) The appointments procedure for the Board requires revision, particularly to assert further the independence of the Board. The Committee makes general recommendations in this regard in Chapter 2 of this report.
- d) Institutional governance arrangements of the Board require attention. This includes establishing clear lines of accountability between the Board and the Chief Executive Officer and a stringent system for disclosure of interests.
- e) The Board has a legal requirement to promote close co-operation with organisations performing similar work to its own. Little evidence of such co-operation is evident. This requires serious attention.
- f) The relationship between the Board and the National Assembly, through the Portfolio

Committee on Arts and Culture, is unsatisfactory. The Committee makes general recommendations in this regard in Chapter 2 of this report.

- g) Funding of the Board appears to be adequate. The budget process arrangements, however, require amendment to assert further the independence of the Board. The Committee makes general recommendations in this regard in Chapter 2 of this report.

5. Recommendations

- a) As pointed out above, the Committee is of the firm view that there is an unnecessary, ineffective and costly duplication of work between the Board and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and between the Board and the Department of Arts and Culture on language development needs. It is therefore recommended that the Lexicography Units of the Board be transferred to the Department of Arts and Culture and that the Board be incorporated into the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as a joint activity.
- b) The Committee is aware of the fact that both the Board and the Commission are constitutional bodies and that it might not be possible to amend the Constitution in the near future. The Committee is nevertheless of the opinion that the consolidation of the two bodies as a joint activity should and can be achieved in a relatively short period. Legal advice obtained by the Committee suggests that the location of the Board as a joint

activity within the Commission can be achieved without necessarily amending the Constitution. The motivation for such a move can be summarised as follows:

- c) The Board is a creature of the Constitution and has a constitutional duty to fulfil its functions in accordance with section 6(5). However, the Constitution does not stipulate in what manner or form the Board must fulfil these constitutional obligations. The Constitution furthermore does not require that the Board act independently, nor does it guarantee its sovereignty. Instead, Parliament is accorded the discretion through legislation to provide for an institution that would fulfil these functions. It would therefore be constitutionally tenable – but not ideal in the long term – for Parliament to adopt legislation that would combine the Board with the Commission if certain conditions are met: -
 - i. The envisaged legislation will have to ensure that the mandate of the new body encompasses the duties accorded to the existing Board in the Constitution minus the functions transferred to the Department of Arts and Culture. Such a new body must therefore be given a mandate to promote and create conditions for the development and sustainability of all official languages as well as the Khoi, Nama and San languages and sign language, and a mandate to promote and ensure respect for other listed languages.
 - ii. The legislation must take cognisance of the fact that the independence and impartiality of the Commission is guaranteed in the Constitution. This means that the existing legislative arrangement, which does not allow the Board sufficient independence from the Minister and the Department, may not be replicated in the new legislation. The legislation must also provide for a mandate for the new body that accords with the mandate of the Commission in the Constitution.
 - iii. The Constitution provides for the appointment of Commissioners to the Commission to be regulated by legislation and does not prescribe a specific appointments procedure. New legislation can thus provide for the appointment of a new body of Commissioners capable of fulfilling the mandate of both bodies. The requirement in the Constitution that such a body must be broadly representative of the main cultural, religious and linguistic communities in South Africa is already mirrored in the Pan South African Language Board Act, which suggests that the joining of the two could be done relatively speedily.
- d) The Committee is of the view that it is imperative that members of the two institutions should work together to ensure a smooth transition to joint activity. At the same time such a transition would require amendment of legislation. The Committee therefore recommends that each of the bodies nominate three members to form a task team with six members of the National Assembly (preferably members of the Portfolio Committee on Arts and Culture) nominated by the Speaker in proportion to the various parties' electoral strength to deal with the practical implementation of the proposal. The task team should be required to report to the National Assembly within one year of the adoption of this report with a practical plan for implementing this proposal. Such a report should also contain draft legislation ready for submission to the Portfolio Committee on Arts and Culture.



CHAPTER 10

THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES

1. Background

The negotiators of South Africa's 1993 Constitution were confronted with a stark choice about the way in which human rights would be protected in a new democratic order. Would such a Constitution protect the rights of cultural, linguistic or other groups, or would it protect individuals to choose for themselves whom they wished to associate with and how they wished to live their lives? The negotiators decisively rejected the first option and chose, instead, to inscribe a justiciable Bill of Rights with a list of individual rights into the Constitution. Instead of protecting group rights, the Bill of Rights protects the right of individuals who have a strong association with a particular cultural, linguistic or other community, to associate freely with the community of their choice. Thus the Bill of Rights shows respect for South Africa's cultural and linguistic diversity without perpetuating apartheid-style group classifications based on language, culture or religion.

However, the negotiators of the 1996 Constitution agreed to address further concerns of cultural, linguistic and religious minorities by creating the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to help promote respect for the rights of such. According to a Human Sciences Research Council Report entitled "Overcoming the Legacy of Discrimination in South Africa", pressure for the creation of the Commission came mainly from groups who wished to ensure the continued recognition and support for the Afrikaans language and culture in a democratic South Africa. However, given the diverse nature of South African society, the Constitution created a Commission that would deal with the important issue of the promotion and protection of the rights of *all* cultural, linguistic and religious communities.

The Commission was identified in Chapter 9 of the Constitution and given constitutional protection as one of the institutions strengthening constitutional democracy. In the negotiations the Constitutional Assembly was bound by the constitutional principles. The Constitutional Assembly agreed that the establishment of the Commission would give proper expression to constitutional principles XI and XII relating to encouragement of diversity of language and culture and the protection and recognition of collective rights of self-determination in forming and joining organs of civil society including linguistic, cultural and religious associations.

Despite agreement in 1996 on the provisions creating the Commission, it took six years before Parliament adopted the requisite legislation to set up the Commission and it only became fully operational in 2004. Given the short lifespan of the Commission, the Committee finds that it was difficult to determine to what extent the Commission has fulfilled its mandate. This must be kept in mind when reading the Committee's findings in this chapter.

2. Constitutional and legal mandate

Section 185 of the Constitution states that the primary objects of the Commission are three-fold. Firstly, it must promote respect for cultural, religious and linguistic communities. Secondly, it must promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association. Thirdly, it must recommend the establishment or recognition of cultural councils for communities in

South Africa. The section also states that legislation must provide the Commission with the power necessary to achieve these objectives and should include the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 states that, apart from the objects listed in the Constitution, the Commission also has the object of fostering mutual respect among cultural, religious and linguistic communities and promoting the right of communities to develop their historically diminished heritage.

To achieve these goals, the Act contains the following powers and functions of the Commission:

- a) To conduct information and education programmes to promote public understanding of the objects, role and activities of the Commission;
- b) To conduct programmes to promote respect for, and further the protection of, the rights of cultural, religious and linguistic communities;
- c) To assist in the development of strategies that facilitate the full and active participation of cultural, religious and linguistic communities in nation-building in South Africa;
- d) To promote awareness among the youth of South Africa of the diversity of cultural, religious and linguistic communities and their rights;
- e) To monitor, investigate and research any

issue concerning the rights of cultural, religious and linguistic communities. When conducting an investigation the Commission has the power to summon witnesses, who have a legal duty to produce all relevant documentation;

- f) To educate, lobby, advise and report on any issue concerning the rights of cultural, religious and linguistic communities;
- g) To facilitate the resolution of friction between and within cultural, religious and linguistic communities or between any such community and an organ of state where the cultural, religious or linguistic rights of a community are affected;
- h) To receive and deal with requests related to the rights of cultural, religious and linguistic communities; and
- i) To make recommendations to the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities.

The Act also provides for the powers and duties of the Commission in the creation and recognition of community councils. The Commission is given the power to recognise community councils created by communities themselves or fostered by the Commission where communities are not organised already. The Act states that the aims of a community council recognised by the Commission should be to preserve, promote and develop the culture, religion or language of the community for which it is recognised or advise the Commission on, and assist the Commission in, matters concerning the achievement of the objects of the Commission.

The Constitution further states that the

Commission may report any matter that falls within its functions or powers to the South African Human Rights Commission for investigation.

3. Findings

The Commission responded to the questionnaire circulated by the Committee. The response formed the basis of the Committee's meeting with the Commission on 16 February 2007. The Commission provided the Committee with supplementary information at the request of the Committee. Following consideration of all the information at its disposal, the Committee finds as follows:

3.1. CONSTITUTIONAL AND LEGAL BASIS

- a) The Committee notes that the Commission had not settled yet on what exactly constituted a cultural, religious or linguistic community – despite the fact that it was the main task of the Commission to promote respect for the rights of such communities. The Committee also notes that the Commission often used the words “community” and “group” interchangeably both in its written and oral submissions. The Committee finds this disturbing and perplexing. It does not seem to bode well for the effectiveness and relevance of a body charged with protecting and promoting the rights of communities, if that body has not determined what the nature of the communities are that they are supposed to protect. The Committee therefore recommends that the Commission engage further with this issue with a view to producing a workable definition of communities.
- b) As set out above, the Commission has the power to initiate the establishment of community councils and can also recognise community councils. However, the Commission was not able to provide the Committee with the set of criteria the Commission uses for the recognition of such communities. The Committee is of the view that the Commission should devise a policy on the recognition of community councils taking into account the Bill of Rights.
- c) The Committee notes that there is a tension between the two potentially contradictory roles envisaged for the Commission by the Constitution and the legislation. On the one hand the Commission is mandated to promote the protection of authentic cultural, religious and linguistic identities. On the other hand, it is also mandated to promote national unity, friendship and peace. The Committee notes that the Commission believes that there is no real contradiction between these two goals. The Commission argues that by providing the space within which communities can thrive, it is helping to build tolerance, understanding and peace between different communities. The Committee believes that the aim of cultivating respect for community diversity is laudable and that this may well be the best way for the Commission to deal with what otherwise would appear to be a contradiction in its mandate.
- d) The Committee is concerned that while the Commission has the power to deal with complaints, it has only received 25 complaints since its inception.
- e) The Committee further notes with concern that the Commission complained that it did not have the power to investigate complaints fully because section 185(3) of the

Constitution and the concomitant section of the legislation requires it to report any matter that falls within its powers and functions to the South African Human Rights Commission. The Commission is clearly misunderstanding its powers in this regard as it is *not required* (Committee's emphasis) to refer a matter to the Human Rights Commission, but is merely permitted to do so if it sees fit. There is, therefore, no legal impediment to the Commission investigating complaints about the breach of the cultural, religious or linguistic rights of individuals protected in the Bill of Rights.

- f) The Committee is of the view that legitimate minority concerns should primarily be dealt with in a human rights context. However, the Committee feels that the Human Rights Commission has already established procedures for the adequate investigation of complaints. The Human Rights Commission does this relatively speedily.
- g) The Commission is concerned that it was "not a party in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" and argued that there was a need for it to be involved in Equality Court work to ensure that Equality Courts balanced individual rights and community rights. The Committee finds that this submission fundamentally misconstrues the nature of its mandate and of the provisions of the Act. As the Constitution provides for the protection of the rights of members of cultural, religious and linguistic communities as individual human rights, there is no need to "balance" the rights of communities against the rights of individuals. The Bill of Rights guarantees individual rights, including the rights of individuals to freely associate with communities.

h) In effectively pursuing its constitutional mandate, the Commission therefore has a duty to assist individuals who complain that they have been discriminated against because they belong to a particular cultural, religious or linguistic community. The Act provides for any body – including the Commission – to approach an Equality Court with such a complaint on behalf of any person or group of people. The Committee recommends that the Commission familiarize itself with the provisions of the Act and make every attempt to take relevant complaints of the public to the Equality Court on behalf of aggrieved individuals.

- i) The Commission has the power to review legislation that may impact on the rights of cultural, religious and linguistic communities and to make recommendations to the appropriate authority for changes to such legislation. The Committee notes that the Commission has not yet done so.

3.2. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Act provides for the appointment of no fewer than 11 and no more than 17 Commissioners who, in turn, must appoint a Chief Executive Officer responsible for the formation and development of an efficient administration. The Commission functions with an executive committee, but all important decisions must be taken by the plenary consisting of all Commissioners. Only the Chairperson of the Commission serves in a full-time capacity.
- b) The Commission informed the Committee that there are no clearly defined roles for Commissioners and that there has been tension between Commissioners and the secre-

tariat. This tension stems mostly from the lack of clarity on the role of part-time Commissioners in relation to the secretariat, particularly regarding the implementation of the decisions of the Commission. The Committee notes with concern that after four years of existence this obvious confusion about roles has not been addressed and that Commissioners seem not to realise that they have the power and the duty to fix this problem themselves. The Committee therefore recommends that the Commission address this problem forthwith.

- c) Section 15 of the Act states that every member of the Commission has a duty to disclose to the Commission any personal or private business interests which that member or that member's spouse, partner or close family member may have in any matter before the Commission, and must withdraw from the proceedings of the Commission when that matter is considered, unless the Commission decides that the member's interest in the matter is trivial or irrelevant. The Act also prohibits a Commissioner from using his or her position or privileges for private gain or to benefit another.
- d) The Commission informed the Committee that all members of the Commission have declared their interests. The Commission however admitted that this declaration has not been updated for 2007. The Committee was also informed that the Chief Executive Officer and all senior employees have been requested to submit information about their financial and other interests to the Commission in line with the Public Finance Management Act. However, the 2005/06 report of the Auditor-General on financial statements of the Commission reveals that

senior officials had not declared their interests, contrary to good corporate governance. The Committee is of the view that both the Commissioners and the senior officials should declare their interests annually in line with the recommendations made in Chapter 2 of this report.

- e) The Commission submitted that it has approved a Code of Conduct dealing with transgressions by, and conflicts between, Commissioners. Staff relations are informed by the Public Service Handbook for Senior Management.

3.3. PUBLIC AWARENESS

- a) The Commission has a public education and advocacy unit whose function it is to conduct information and education programmes to promote public understanding of the Commission's objects, role and activities. The Commission was only launched in 2004, and needed to conduct extensive promotional work to establish a public profile. In that regard a national consultative conference was held, and the media campaign that accompanied the conference assisted in making the public aware of the conference and its objects.
- b) During 2004/05 the Commission received 16 complaints and during 2005/06 it received 29 complaints. Complaints about religion headed the list, followed by complaints about culture and language. Most complaints about culture were from rural areas, while most complaints about language were from urban areas. There is a concentration of complaints in the Gauteng province. The Commission has handled complaints from only three other provinces.

- c) The Committee is concerned about the small number of complaints lodged with the Commission as this suggests either that the public is unaware of the work done by the Commission, or that it has no confidence that the Commission will be able to address its concerns. The Committee therefore recommends that the Commission take proactive steps to improve its profile by, amongst others taking relevant cases to the Equality Courts.
 - d) The analysis of the complaints shows that by the time the 2005/06 annual report was published in 2006, none of the complaints received during the 2004/05 financial year had been concluded. While only three of the 29 complaints received during 2005/06 were settled satisfactorily, 26 of the complaints were scheduled for consideration and investigation in 2007. The Committee is concerned at the slow pace of investigation of the complaints.
 - e) The Commission informed the Committee that it did not have an established procedure for the public to complain about its investigations. The Chairperson and the Chief Executive Officer receive such complaints. The submission by the Commission did not provide the number of complaints that the Chairperson or the Chief Executive Officer had received from the public.
- Commission. The Minister must also appoint a selection panel consisting of persons who command public respect for their fair-mindedness, wisdom and understanding of issues concerning South African cultural, religious and linguistic communities. The panel must submit to the President a list of names of at least one-and-a-half times the number of vacancies to be filled. This list of nominees must be broadly representative of the main cultural, religious and linguistic communities and must also broadly reflect the gender composition of South Africa. The President then selects the requisite number of Commissioners from the list of nominees and appoints them.
- b) The Act provides for the President to appoint the Chairperson and no fewer than 11 and no more than 17 other Commissioners. The President may appoint a deputy chairperson from the ranks of the Commissioners. The President determines the number of Commissioners to be appointed. The President may reduce the number of Commissioners only when appointing Commissioners for a new term. The Committee is of the view that the Commission is too big. The size of the Commission contributes to the confusion about the role of the Commissioners and seems wasteful and expensive. The Committee therefore recommends that the number of Commissioners should not exceed 11.

3.4. APPOINTMENTS

- a) The National Assembly is not involved in the appointment process for Commissioners. The Act provides that, whenever vacancies need to be filled, the Minister for Provincial and Local Government must invite individuals and organisations to nominate suitably qualified individuals to serve on the
- c) It is unclear why the Minister for Provincial and Local Government should play such a central role in the appointment of Commissioners. The role of the Minister in this process may impact negatively on the independence of the Commission, which is guaranteed in section 181 of the Constitution. While the role and function of the Commission does not require the high-

est protection from Executive influence to safeguard its independence, the involvement of the Minister may well create the impression in the minds of the public that the Commission is not independent.

- d) The Committee therefore recommends that the Commission be appointed by the President on the recommendation of the National Assembly. In line with the recommendations in Chapter 2, the Committee recommends that the relevant portfolio committee should invite nominations, draw up a short-list and interview the candidates before recommending a list of names to the National Assembly for approval.

3.5. RELATIONSHIP WITH THE EXECUTIVE

- a) The Commission does not have any formal relationship with the Executive. It interacts with relevant members of the Executive on an *ad hoc* basis. However, the Executive currently plays a decisive role in the appointment of the Commissioners. As pointed out above, this might impact negatively on public perceptions about the independence of the Commission and the procedure for appointment should be changed to ensure that the National Assembly and not the Minister or the President plays the decisive role in the appointment of Commissioners.
- b) The Committee notes that the member of the Executive formally designated to deal with the affairs of the Commission is the Minister for Provincial and Local Government. It is unclear why the Commission is required to deal with this Minister who does not seem to have a specific link with the work done by the Commission. The mandate of the Commission, properly understood,

requires it to promote and protect the rights of individuals who belong to particular cultural, religious or linguistic communities. The promotion and protection of rights associated with the work of the Commission is the proper ambit of the Portfolio Committee on Arts and Culture. The Committee therefore recommends that the Minister of Arts and Culture should be designated as the member of the Executive dealing with the Commission.

3.6. RELATIONSHIP WITH PARLIAMENT

- a) In terms of section 181 of the Constitution the Commission is accountable to the National Assembly. At present the Commission reports to the Portfolio Committee on Provincial and Local Government. The Commission has expressed dissatisfaction with this arrangement and has indicated that the work done by the Commission does not relate to the interests and expertise of the members of the Portfolio Committee on Provincial and Local Government. The Committee agrees with the Commission. For the reasons provided in the previous paragraph, the Committee is of the view that the Commission should rather report to the Portfolio Committee on Arts and Culture.
- b) The Commission has expressed some frustration with the lack of interaction with the National Assembly. Although the Commission submits its reports to the National Assembly and appears before the relevant Portfolio Committee once a year, there is no proper feedback from the Assembly. The Committee is of the view that the proposals on parliamentary oversight in Chapter 2 of this report will address most of the concerns of the Commission.

3.7. RELATIONSHIP WITH CHAPTER NINE AND ASSOCIATED INSTITUTIONS

- a) The Act allows the Commission to make appropriate arrangements with another constitutional institution or an organ of state to assist the Commission in the performance of any of its functions. The Act also requires the Commission to co-operate with other constitutional institutions and organs of state where the functions of the Commission overlap with those of such other constitutional institutions or organs of state. As mentioned above, the Commission may also report any matter that falls within its functions and powers to the South African Human Rights Commission for investigation.
- b) The Committee was informed that there was some informal co-operation between the Commission and other Chapter 9 bodies through membership of the Forum of Chairpersons and Deputy Chairpersons of Chapter 9 Institutions. Recently, the Chief Executive Officers of these institutions have also organised themselves into a forum that shares information on programmes and challenges they experience in their institutions. The Commission pointed out that, because of these interactive initiatives, *ad hoc* collaboration has resulted, including a co-hosting of human rights day activities with the Human Rights Commission, and there has been fruitful collaboration on a few programmes. However, the Committee notes with concern that the Commission has no formal co-operation agreement with any of the other Chapter 9 institutions or with the Pan South African Language Board, despite the fact that there are clear areas of overlap of functions.
- c) The Commission attempted to draw a distinction between the work done by the Pan South African Language Board to promote multilingualism and its work to promote the rights of linguistic minorities. It argued that it did not have to work with the Pan South African Language Board because the functions of these two bodies did not overlap in any material way. The Committee is of the opinion that the differences in the functions of these two institutions are less pronounced than the Commission suggests. Both bodies have the power to deal with complaints where individual members of linguistic communities feel aggrieved about respect for their language and both have a constitutional duty to promote and protect the right of individuals to have their languages respected.
- d) However, the Committee notes with concern that despite this overlap, no formal co-operation agreement has been reached with the Pan South African Language Board. An agreement with the Board was concluded but it has not been signed. The Committee has been informed that these two bodies have also not formalised their working relationship in any other way, but do co-operate in an informal manner. The Committee received submissions from civil society pointing out this overlap and the lack of formal co-operation between these bodies and suggesting that steps should be taken to address this matter.
- e) The Committee is of the view that the absence of such an agreement leads to duplication and renders both institutions less effective than they would otherwise have been. The duplication of mandates also has serious cost implications. The Committee therefore recommends that the Board be incorporated within the Commission and that

a new institution, the “Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (including the Pan South African Language Board)”, be created to face the important challenges of especially the promotion of indigenous languages in South Africa. This proposal is further addressed below.

- f) The Commission also submitted that it refers matters falling outside of its mandate to other institutions as mandated by the Act, but it failed to mention how many such matters were referred. The Committee notes with concern that no systems are in place to provide statistics about such cases and to follow up on referrals and recommends that such systems be developed and put in place forthwith.
- g) In its submission the Commission seemed to lament the legislative provision that it may report matters falling under its functions and powers to the Human Rights Commission for litigation. The Committee is of the view that the Commission should have been actively promoting collaboration especially in matters pertaining to equality, given its stated desire, and its mistaken belief, that it has no role to play in terms of the equality legislation.

3.8. FINANCIAL ARRANGEMENTS

- a) The first budget allocation of the Commission was determined by the Department of Provincial and Local Government in 2003/04 and had no direct relation to strategic plans as the institution had not yet been established. The Commission informed the Committee that it has begun to engage with the National Treasury when dealing with the budget process, and that the money is still allocated

to it via the Budget Vote of the Department of Provincial and Local Government. The Commission was concerned about the involvement of the Executive and proposed that the budget should be dealt with by the National Assembly. The recommendations in this regard in Chapter 2 of this report deal with this problem and the Committee believes that these will allay the concerns of the Commission.

- b) The Commission received R8.9 million in appropriations from government in the 2003/04 financial year, which was later adjusted to R7.9 million. At that stage the Commission was not fully functional and was still housed in the Department of Provincial and Local Government. The budget for the Commission has grown steadily since then and for the current financial year the budget is R13.4 million. The table below provides a breakdown of income and expenditure, as well as the amounts allocated in terms of the Medium Term Expenditure Framework.
- c) The Commission’s principal source of income is a transfer from the National Treasury, and is appropriated in the Vote of the Department of Provincial and Local Government. Expenditure has increased substantially from the first year of operation, suggesting that the institution did not do much in the first year of operation, but started doing work in the 2004/05 financial year.
- d) The Committee is surprised at the large increases in the Commission’s budget in terms of the medium Term Expenditure Framework. From the Committee’s interaction with the Commission it was unclear whether this money would be spent in an effective manner. The Committee was informed that the

Commission planned to open provincial offices and that some of the money would go towards this. As the Committee has pointed out in Chapter 2, it is of the opinion that the opening of provincial offices is seldom the most effective way for a Chapter 9 institution to spend its limited resources. The Committee therefore recommends that a moratorium be placed on the opening of further provincial offices at least until the Commission has formalised its relationship with the Pan South African Language Board.

g) The Commission submitted that its current staff complement was 15, and that there are 46 vacancies that needed to be filled in 2007. Although the Commission is in its infancy, the Committee is of the view that the small staff complement hinders the Commission's work. The slow pace of completing investigations attests to this. It creates the impression that the Commission is overwhelmed. The staff complement at the end of 2006 showed that there was one researcher for religion, culture and diminished identity.

Table 1: Income and Expenditure 2003/3004 – 2009/2010³⁰

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Income	7960	9 718	11 586	13 403	15 447	18 496	20 393
Expenditure	1 280	12 471	11 427				
Surplus/ (Deficit)	6 680	(2 753)	159				

- e) The largest items on the financial statement of the Commission are the salaries at R3.7 million and consultancy fees at R1,2 million during the 2005/06 financial year. With the small staff complement, it appears that the Commission was dependent on consultants and other service providers for the provision of research and other services. It appears that the allocations were just sufficient to keep the office running and acquire equipment.
- f) There was overspending in both the 2004/05 and 2005/06 financial years. Although the overspending could be explained by the costs of setting up a new institution, the Commission did not explain the overspending.

4. General conclusions

The Committee draws the following general conclusions in addressing the specific matters contained in its terms of reference:

- a) While the current and intended constitutional and legal mandates of the Commission are still suitable for the South Africa of today, the duration of the existence of the Commission makes it difficult for the Committee to draw absolute conclusions regarding its contribution to democracy.
- b) Reorganisation of the Commission in line with the recommendations made in the Chapter dealing with the Pan South African Language Board will enhance the work of the Commission and avoid duplication.

³⁰National Treasury (2007), Estimates of National Expenditure and Commission's submission to the Committee

- c) The appointments procedure for the Commission requires revision. The Committee makes general recommendations in this regard in Chapter 2 of this report.
- d) Institutional governance arrangements of the Commission should be revised. This includes establishing clear lines of accountability and an appropriate system for disclosure of interests.
- e) The relationship between the Commission and the National Assembly, through the Portfolio Committee on Arts and Culture, is unsatisfactory. The Committee makes general recommendations in this regard in Chapter 2 of this report.
- f) Funding of the Commission appears to be adequate. The budget process arrangements, however, require amendment to assert further the independence of the Commission. The Committee makes general recommendations in this regard in Chapter 2 of this report.

5. Recommendations

- a) As pointed out above, the Committee is of the firm view that there is an unnecessary, ineffective and costly duplication of work between the Commission and the Pan South African Language Board. It is therefore recommended that the Pan South African Language Board be incorporated into the Commission.
- b) The Committee is aware of the fact that both the Commission and the Board are established by the Constitution and that it might not be possible to change the Constitution in the near future. The Committee is nevertheless of the opinion that the joining of the two bodies should and can be achieved in a relatively short period. The Committee is of the view that speedy action could turn the situation around. The Committee obtained legal advice, and is informed that the two bodies can be joined without necessarily changing the Constitution. The motivation for such a move can be summarized as follows:
 - i. The Board is a creature of the Constitution and has a constitutional duty to fulfil its functions in accordance with section 6(5) of the Constitution. However, the Constitution does not stipulate in what manner or form the Board must fulfil these constitutional obligations. The Constitution furthermore does not require that the Board act independently, nor does it guarantee its sovereignty. Instead, Parliament is accorded the discretion through legislation to provide for an institution that would fulfil these functions. It would therefore be constitutionally tenable, although not ideal in the long term, for Parliament to adopt legislation that would incorporate the Board into the Commission if certain conditions were met.
 - ii. As set out in the Chapter on the Pan South African Language Board, the envisaged legislation will have to ensure that the mandate of the new body encompass the duties accorded to the existing Board.
 - iii. The amalgamating legislation must take cognisance of the fact that the independence and impartiality of the Commission is guaranteed in the Constitution. This means that the new legislation should

not only provide for a mandate for the new body that would accord with the mandates of both the Commission and the Board, but should also ensure that the Commission's independence is not affected.

- iv. The Constitution provides for the appointment of Commissioners to the Commission to be regulated by legislation and does not prescribe a specific appointments procedure. Amalgamating legislation can thus provide for the appointment of a new body of Commissioners capable of fulfilling the amalgamated mandate of the two bodies. The requirement in the Constitution that such a body must be broadly representative of the main cultural, religious and linguistic communities in South Africa is already mirrored in the Pan South African Language Board Act, which suggests that the amalgamation could be done relatively speedily. As set out above, the current system of appointments does not accord fully with the requirements of independence and should be changed to allow the National Assembly to nominate Commissioners for appointment in line with the recommendations in Chapter 2 of this report.
- v. The Committee is of the view that it is imperative that members of the two institutions work together to ensure a smooth amalgamation process. At the same time, such a process would require amendment of legislation. We therefore recommend that each of the bodies nominate three members who will form a task team together with six members of the National Assembly (preferably members of the Portfolio Committee on Arts and Culture) nominated by the Speaker in proportion to the various parties' electoral strength to deal with the practical implementation of the proposal. The task team should report to the National Assembly within one year of the adoption of this report with a practical plan for implementing the proposal. Such a report should also contain draft legislation ready for submission to the Portfolio Committee on Arts and Culture.
- vi. The Committee is of the view that, as discussed in Chapter 2 of this report, in the long term the Commission should be amalgamated with the South African Human Rights Commission, thereby addressing the Committee's central recommendation of a single Human Rights Commission for all rights issues as discussed in Chapter 2 of this report.



CHAPTER 11

THE COMMISSION FOR GENDER EQUALITY

1. Background

South African women are subject to deeply entrenched and overlapping forms of oppression, with a result that they suffer unfair discrimination in almost every aspect of human endeavour. While much has been done since the advent of democracy to address structural gender inequalities, discrimination on the grounds of gender remains a reality for many South African women. Their plight is aggravated further by such factors as race, sexual orientation, rural origins and indigence. South Africa remains a society with strong patriarchal tendencies in which women are expected to fulfil inferior, gender-based roles.

It was, therefore, hardly surprising that at the time of the drafting of both the 1993 and 1996 Constitutions, women and other gender activists expressed concern that the unique and pressing human rights based needs of women would be subsumed in and sublimated by the larger struggle for the establishment of a human rights culture in the country. Agreement emerged about the critical need to establish a separate body to deal with the distinctive needs of women in South Africa, and to prevent the marginalisation of those concerns most closely associated with the lives of women.

The 1993 Constitution accordingly created an independent Commission for Gender Equality to deal specifically with the promotion of gender equality and to advise and make recommendations relating to gender equality and the status of women. Legislation to establish the Commission was finally enacted by Parliament in June 1996 and the Commission on Gender Equality Act 39 of 1996 came into operation on 8 August 1996.

The discussion around the 1996 Constitution

reaffirmed the constitutional basis of the Commission. Section 181 read with section 187 establishes such a Commission.

One of the issues that arose in the discussion concerned the relationship between the Commission and the national gender machinery aimed at advancing the needs of South African women. While many countries had established gender machineries as a single structure in the form of women's ministries, the concern was expressed that such an arrangement would serve to marginalise women's issues in South Africa. Instead, a collection of interrelated institutions was proposed situated both within and outside of government. These were to operate at national, provincial, regional and local level. The Commission for Gender Equality formed part of the national gender machinery and was to function within this integrated set of institutions. In addition, the adoption of a 'gender mainstreaming' approach that integrated gender concerns into all aspects of governance was agreed upon. However, as the Constitution specifically establishes the Commission as an independent body, the constitutional basis for the Commission's role within the national gender machinery is unclear.

Although, the decision was to establish a separate and distinct Commission for Gender Equality, there was, nevertheless, awareness that there might be duplication in the roles of the Commission and other bodies, such as the Human Rights Commission and the Public Protector. However, the historical oppression of women in a starkly patriarchal society weighed heavily in the decision to establish the Commission for Gender Equality as its establishment meant increased public participation to influence government policy and promised greater horizontal accountability of the state to achieve substantive gender equality.

2. Constitutional and legal mandate

The Commission has a broad mandate to achieve gender equality in South Africa. The legal mandate of the Commission is derived from the Constitution, and such other legislation as the Commission on Gender Equality Act 39 of 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

2.1. CONSTITUTIONAL MANDATE

Section 119 of the 1993 Constitution provided for the establishment of a Commission for Gender Equality 'to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women'. Section 120 stated that legislation would provide for the composition, powers, functions and functioning of the Commission and for all related matters.

The 1996 Constitution affirms the existence of the Commission and provides in greater detail for the Commission's powers and functions.

Section 187 of the 1996 Constitution states that the Commission must promote respect for gender equality and the protection, development and attainment of gender equality. It also affirms that the Commission must have the power, as regulated by legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. These powers and functions are fully detailed in the Commission on Gender Equality Act.

2.2. MANDATE IN TERMS OF COMMISSION ON GENDER EQUALITY ACT

In common with other institutions, in terms of section 181 of the Constitution the Commission is independent. More specifically with regard to the Commission, the Commission on Gender Equality Act affirms the independence of the Commission and requires Commissioners to perform their duties without fear, favour or prejudice. The Act also prohibits any organ of state or person from interfering with, hindering or obstructing the Commission in the exercise of its duties. The legislation requires that all organs of state afford the Commission the assistance it reasonably requires to protect its independence, impartiality and dignity.

The Commission's functions can be grouped into five broad categories, namely monitoring and evaluation, investigations, education and information, research, and liaison. The Act provides the Commission with wide powers to fulfil its functions.

Firstly, the Act requires the Commission to monitor and evaluate the practices of organs of state at any level; statutory bodies or functionaries; public bodies and authorities; and even private businesses, enterprises and institutions, in order to promote gender equality. The Commission is also authorised to make any recommendations to Parliament or any other legislature that it considers fit in response to its monitoring activities.

Secondly, the Commission has a legal duty to prepare and carry out information and education programmes to foster public understanding of gender equality and of the Commission's role.

Thirdly, the Commission is tasked with the important duty of reviewing laws and policies likely to affect gender equality and the status of women. These include Acts of Parliament; any system of personal and family law or custom; any system of indigenous law, customs or practices; and any other existing law or draft legislation. The Act also empowers the Commission to make recommendations to Parliament or other relevant legislatures about necessary amendments to the law and the adoption of new legislation.

Fourthly, the Commission has a duty to investigate any gender-related issues of its own accord or on receipt of a complaint. When investigating such a complaint, it is required to try and resolve the dispute or to rectify the act or omission complained of, through mediation, conciliation or negotiation. The Commission also has the power, at any time during the process, to refer the matter to the Human Rights Commission, the Public Protector or any other relevant authority. The Commission has wide powers of search and seizure and can subpoena any witnesses when investigating complaints in order to gather the necessary information. This means that, unlike civil society organisations, the Commission (subject always to appropriate procedures) has the power not only to compel the provision of evidence from any public or private body, but also the attendance of witnesses for purposes of an investigation.³¹

It is the view of the Committee that section 38 of the Constitution, which allows anyone to approach a competent court to enforce a right found in the Bill of Rights, additionally empowers the Commission to take a case to court on behalf of a complainant.

In the fifth instance, the Commission has the duty to monitor South Africa's compliance with

international agreements adopted by the state relating to the objects of the Commission. There are very important international conventions at issue on matters of race, women and children, and human rights in general.

Finally, the Commission must, as far as is practicable, maintain close liaison with institutions, bodies or authorities with similar objectives to those of the Commission, in order to foster common policies and practices and to promote co-operation where appropriate. The Commission must also liaise and interact with any organisation that actively promotes gender equality.

2.3. MANDATE IN TERMS OF PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

Although significant progress has been made in transforming our society and its institutions, structural gender inequalities remain deeply embedded in social relations, practices and attitudes in South Africa. These inequalities invariably lead to unfair discrimination on the basis of sex and gender and frustrate the achievement of the society promised by the Constitution. To address this problem in a systematic, consistent and fair manner, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted in order to carry out the provisions of the Constitution.

The Act is intended to provide an easier method for ordinary people to challenge unfair discrimination by the state, or by private institutions or individuals, through the creation of a system of equality courts. It envisages an important role for the Commission for Gender Equality in the successful implementation and functioning of the provisions of the Act.

³¹ Civil Society Advocacy Programme (CSAP). Organisational and institutional assessment of the South African Commission for Gender Equality. Final Report, October 2006. p.40

Firstly, section 20 of the Act allows the Commission to institute proceedings under the Act in an equality court on behalf of any aggrieved person or group. In addition, where a presiding officer of such a court decides to refer a matter to the Commission, it must deal with it speedily. The Act also places a duty on the Commission to assist complainants who wish to lodge a complaint and to conduct investigations where necessary.

Secondly, the Act envisages that the Commission will play a role in the promotion and achievement of equality. Under the Act, the Commission may, for example, request any state institution or any person to supply information on any measures relating to the achievement of equality, including information on executive action and compliance with the law. The Human Rights Commission must also consult the Commission when it deals with equality plans submitted by government departments. Unfortunately, this second part of the Act has not yet been brought into force.

3. Findings

The Committee met with the Chairperson of the Commission, supported by the officials of the Commission, on 2 March 2007. The Commission's written response to the Committee's questionnaire, as well various written and oral submissions, including those from civil society and certain government Ministries, informed the discussions. The Committee requested the Commission to furnish it with additional information relating to its monitoring of the implementation of international treaties, the number of complaints lodged with it by the public during the 2005/06 financial year, the number and nature of complaints that were finalised in 2005/06 and the number and nature of complaints not fully dealt with during the same year.

The Committee had a preliminary discussion with the Chairperson as to why there was no proper Commission in place. The reasons for this are expanded on in the report.

The Committee finds that it must report on the Commission in pain and sorrow, rather than in anger. As such, it strongly believes that the Commission represents a lost opportunity as until now it has failed to engage in a sustained and effective manner with the policies, approaches and mechanisms to eliminate all forms of gender discrimination and to promote gender issues in South Africa.

3.1. CONSTITUTIONAL AND LEGAL BASIS

As with the Human Rights Commission, the Committee notes that the Commission on Gender Equality Act of 1996 came into law before the 1996 Constitution was enacted, and contains references to the now repealed 1993 Constitution. Accordingly, the Act requires amendment to bring it into line with the Constitution.

3.2. UNDERSTANDING AND INTERPRETATION OF MANDATE

The Commission has a broad mandate and powers and has, at times, used its powers towards achieving its objectives, most notably by intervening as a friend of the court (described in Latin as *amicus curiae*) in gender-related Constitutional Court cases. However, the Committee finds that the Commission's presentation to the Committee of its understanding and interpretation of its mandate is inadequate:

- a) The Commission informed the Committee that it requires greater powers, including powers of enforcement, in order that it might deal more effectively with the various forms of gender discrimination in our society.

- b) The Committee is of the view that, although the Commission may not have any enforcement powers, the Commission on Gender Equality Act provides the Commission with wide-ranging legal powers that, if utilised appropriately, could prove extremely effective. Thus, for example, in undertaking an investigation the Commission is afforded with powers of subpoena, as well as powers of search and seizure. It can also conduct on-site inspections. Furthermore, the Commission has the power to recommend the protection of witnesses where necessary, and to recommend reparations. It may also refer matters to court for enforcement.
- c) The Committee expresses concern that the Commission has not used these powers, thereby contributing to the perception that it is powerless.³²
- d) The Committee finds that the Commission has interpreted the enabling legislation as preventing it from initiating litigation in its own name or on behalf of any other person. The Commission has confined its role to supporting or participating in cases that raise important gender issues.³³ This has come about in some instances in response to an invitation by of the Constitutional Court to make submissions. In other cases the Commission has applied to be a friend of the court.³⁴
- e) The Committee finds this reticence surprising, given the fact that section 38 of the Constitution, which provides for access to the courts for purposes of enforcement of rights, allows anyone, including the Commission, to approach a court on behalf of another person, group or even in the public interest in order to assist in enforcing their rights.
- f) The Promotion of Equality and Prevention of Unfair Discrimination Act clearly provides the Commission with the capacity to litigate in the equality courts in its own name or on behalf of another. The Committee, therefore, finds it even more surprising that the Commission has never assisted anyone in taking a case to the equality courts because it 'has never been approached by prospective litigants'. The Committee believes that, even if litigants have not approached the Commission, the Commission has a duty actively to seek out litigants on whose behalf it could take groundbreaking cases to the equality courts.
- g) The Committee finds that the Commission is not being used as an alternative forum for the resolution of complaints in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act. Equality courts are empowered to refer matters to the Commission for resolution by means of mediation, conciliation or negotiation. The Commission is also empowered to investigate cases referred to it by the equality courts and to make recommendations. It is not the Commission's fault that until now the equality courts have not referred matters to the Commission.
- h) The Commission has a duty to monitor and evaluate the policies and practices of government departments to ensure that concern for gender equality remains a top priority in the work done by the departments to ensure 'gender mainstreaming'. The government is the largest employer in the country. The Committee has not been able to ascertain to what extent the Commission has had success in this regard, nor could the Commission provide the Committee with adequate proof of its activities.

³² Civil Society Advocacy Programme (CSAP). October 2006. p 68

³³ Civil Society Advocacy Programme (CSAP). October 2006, p.40

³⁴ In this regard see *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA); *Bannatyne v Bannatyne* 2003 (2) BCLR 111 (CC); *S v Jordan* 2002 (11) BCLR (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39; *Christian Lawyers Association v Minister of Health* 1998 (4) SA 1113 (T)

- i) The Committee finds that the Commission has not adequately fulfilled its legal obligation to monitor and evaluate government's compliance with relevant international obligations such as the Convention for the Elimination of Discrimination Against Women and other relevant instruments. It was not clear whether the Commission has fully grasped the nature of its legal obligation in this regard and, if it did, whether it had given any priority to this.
- j) The Commission told the Committee that it was unable to adequately monitor and evaluate the implementation of the Convention for the Elimination of Discrimination Against Women and other relevant international legal instruments because it found it difficult or even impossible to obtain the necessary and timely information from the Office on the Status of Women. The Committee is of the view that the Commission has the necessary legal powers to obtain all relevant documents from the relevant government department or agency, but that it was either unaware of this power or unwilling to use it. The Committee finds this reticence regrettable.
- k) The Committee notes that the Commission has a legal duty to liaise with similar institutions in terms of its mandate and functions. However, the Committee finds that the Commission has not been proactive in fostering structured relations with either the Chapter 9 and associated institutions, or with civil society organisations involved with gender issues. This is explored more fully later in this chapter.
- l) The Commission informed the Committee that it has undertaken research largely relating to systemic gender-related problems, where the Commission has identified gaps

in the law, or where a specific issue has come to its attention. However, the Committee believes that such research would be more effective and far-reaching if undertaken in collaboration with related institutions, such as the Human Rights Commission, as it would enhance the impact of the research and help to place systemic problems of gender oppression within the broader human rights agenda.

3.3. APPOINTMENTS

The Committee is deeply concerned about the shambles that has accompanied the recent appointment of new Commissioners. Due to the delay in the appointment of Commissioners, the Commission was, in essence, expected to function with only a Chairperson and a secretariat for a period of 14 months. The Committee finds such a frivolous approach to the appointment of Commissioners to a constitutional body of this nature regrettable in the extreme. The Committee feels that it is important to use this example to illustrate the severe negative impact of the lack of a systemic and coordinated process and mechanism for the appointment of Commissioners. The Committee provides details relating to the pathology of the process that has betrayed the interests of women:

- a) The Commission for Gender Equality Act provides for a Commission consisting of a Chairperson and no fewer than seven but no more than eleven Commissioners. The Act, which as already indicated predates the 1996 Constitution, provides that the President appoints the Commissioners who are nominated by a joint committee of the National Assembly and the National Council of Provinces and approved by both Houses of Parliament at a joint meeting. The legis-

lation has not yet been amended. The Constitution is very clear, however, that the National Assembly must recommend persons for appointment nominated by a committee of the Assembly and approved by the Assembly by a majority of its members. The Committee therefore recommends that the legislation be brought up to date.

- b) The Act provides that, before appointing members of the Commission, the Minister of Justice and Constitutional Development must invite interested parties to propose candidates for consideration by the joint committee. As indicated, this has in any event been overtaken by section 193 of the Constitution of 1996 which provides that nominations for appointment as members of the Commission must be made by a committee of the National Assembly. The Commissioners may be appointed on either a full or part-time basis – no fewer than two and no more than seven may be appointed on a full-time basis. This is slightly anomalous. The Committee believes that the committee of the National Assembly, which could be an *ad hoc* committee, should extend the invitation to interested parties to propose candidates for appointment.
- c) Due largely to policy differences amongst Commissioners, a number of vacancies arose between January 2004 and January 2005, while the terms of seven Commissioners expired in April and May 2006. The Committee notes that, with the exception of the Chairperson whose appointment is to expire in October 2007, the Commission has been without Commissioners for an extended period, as these vacancies were only filled in May 2007. The Committee was informed by the Chairperson of the Commission that it had continued to operate
- legally in the absence of Commissioners, as section 4(2) of the Act provides for the validity of the Commission's proceedings despite there being a vacancy in the Commission. The Committee is also concerned that section 4(2) of the Act does not ensure the legal validity of the Commission in a case where no Commissioners have been appointed. Therefore the Committee is of the view that the situation is highly unsatisfactory, as a Commission without Commissioners cannot really be legally operational.
- d) The appointments process began in September 2005, when the Deputy Minister for Justice and Constitutional Development submitted nominations to the National Assembly to consider shortlisting appropriate candidates for recommendation for appointment. On 2 November 2005 the Assembly, by resolution, established an *ad hoc* committee to consider nominations to fill the vacancies in the Commission and required it to report by no later than 15 February 2006. However, shortly after establishing the *ad hoc* committee, the last parliamentary session for 2005 ended, delaying its work. The *ad hoc* committee asked the National Assembly to extend its term to 22 March 2006, as it needed time to receive briefings from the Department of Justice and Constitutional Development on the appointment process. Why this was necessary is not clear to the Committee.
- e) As the tenure of all Commissioners, except the Chairperson, would end on 18 and 30 April 2006, the Minister had extended an invitation to the public on 24 February 2006 to nominate suitable candidates to fill eleven vacancies on the Commission. The invitation stated that the Minister would rec-

commend that the tenure of members not go beyond 30 September 2007. The successful candidates would therefore serve for a term of one year.

- f) The *ad hoc* committee engaged with the Department about the process and the limitation placed on the tenure of Commissioners. Members of the public and women's organisations addressed the Speaker of the National Assembly, raising concerns about the short term of office, particularly regarding its impact on attracting suitable candidates. The Commission also raised the same concerns with the Presidency, the Ministry and the Speaker. The Speaker discussed the matter with the Minister and requested that the Minister re-advertise the vacancies and call for nominations of persons to serve a term of office not exceeding five years as determined by legislation. On 26 May 2006, the Minister re-advertised the vacancies calling for nominations for a term of office not exceeding five years.
- g) On 23 March 2006 the National Assembly agreed to extend the term of the *ad hoc* committee to 12 May 2006. On that date, the committee reported to the Assembly, recommending that the House support the Speaker's call that the vacancies be re-advertised for a term of office not exceeding five years and that the House extend its term to allow it to complete its work. The House adopted this report on 17 May 2006.
- h) With an expanded mandate specifically to consider the staggering of the term of full-time Commissioners within the five-year limit imposed by legislation, the *ad hoc* committee recommended 11 candidates for appointment on 18 September 2006. In its report, the *ad hoc* committee recommended that the term of office of full-time Commissioners be staggered over the five years. After failing on 21 September 2006 to achieve the majority support of 201 votes as required by the Constitution, the House finally approved the recommendation of candidates by resolution on 12 October 2006.
- i) The Speaker communicated the decision of the National Assembly to the President on 17 October 2006 to initiate the appointment of Commissioners. As mentioned previously in Chapter 2 of the report, in March 2007 the *ad hoc* committee was reconvened specifically to consider and make recommendations to the President, through the Office of the Speaker, on the staggering of the terms of office of the full-time Commissioners. The appointments were only made in May 2007. While the *ad hoc* committee's initial failure to address the issue of staggering of appointments provides some reason for the delay, it is nevertheless unclear to the Committee why it took five months for the appointments of the Commissioners to be effected, when all that was required was for the President to assent formally to the recommendation of the National Assembly.
- j) The Committee reiterates that the inordinate delay in appointing Commissioners is highly unsatisfactory, displaying a lack of seriousness about the appointment of Commissioners. The delays also highlight a more systemic problem, namely that there is no uniform process or consistency of approach in the way vacancies are filled or appointments are made. The involvement of parliamentary *ad hoc* committees in the appointment of commissioners, particularly in instances where vacancies arise during times of parliamentary recess, creates problems. The Committee makes specific recommendations in Chapter 2 of this report in order to rectify this situation.

- k) The Committee regrets to conclude that very few parties come out of this with credit.

3.4. PUBLIC AWARENESS

- a) The Committee finds that public awareness of the Commission is generally poor. Nor does there appear to have been any significant increase in public awareness in past years: A countrywide study in 2000 found that only 34% of respondents had heard of the Commission. The most recent study, conducted in 2002, found that only 27% of women had heard of the Bill of Rights and only 34% of respondents knew of the Commission.³⁵ The Committee is dissatisfied with the degree of general awareness concerning the Commission and its activities, and finds that the lack of public visibility undermines the Commission's credibility and efficacy. The Committee is concerned that very few applications and requests for systemic investigations are made to the Commission. It is sad that over this period that there has been no significant increase in requests.
- b) The Commission has a major role to play as a champion of the rights of women, through education, promotion and assistance with complaints. If women do not approach the Commission, it can hardly assist them in enforcing their rights.
- c) The Committee notes that in addition to its head office, the Commission has established offices in all provinces, most recently in Mpumalanga and Gauteng. Public awareness programmes are carried out through a variety of means, including workshops, seminars, dialogues with civil society organisations, campaigns and the distribution of promotional materials such as pamphlets and posters.

The Committee was informed, however, that these public awareness programmes are neither systematic, nor are they linked to a broader outreach programme.³⁶

- d) The Committee notes that the Commission has the power to investigate gender-related complaints of its own accord or on receipt of a complaint. The Commission's annual report for 2005/06 reveals that, although provinces do report complaint statistics, these are not collated. This makes it very difficult to ascertain the precise number of complaints the Commission receives annually, let alone what the outcomes of such complaints have been. The Committee learnt that the Commission lacks the electronic systems and software to conduct analyses of the complaints received. Analysis is currently done manually and, generally, only annually for reporting purposes.³⁷ This is a serious concern, impacting adversely on the Commission's ability to monitor and plan accordingly.

3.5. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Committee is perplexed by the Commission's contention that its role and functions do not overlap with those of the other Chapter 9 and associated institutions. The Commission informed us that it views its role as complementing that of the other Chapter 9 institutions. However, this patently ignores the reality that there are vital overlaps between the roles of different institutions as the rights of women cannot be divorced from human rights in general.
- b) The Committee notes, in particular, that the Commission on Gender Equality Act envisages such an overlap and requires the

³⁵ Civil Society Advocacy Programme (CSAP). October 2006, p 21. Quotes from the National Institute for Public Interest Law and Research (NIPILAR) (2000) Awareness of human rights and human rights institutions (Johannesburg: CASE); and Government of South Africa (2006), A nation in the making: A discussion document on macros-social trends in South Africa, Pretoria: Policy Co-ordination and Advisory Services (The Presidency) 2006.

³⁶ Civil Society Advocacy Programme (CSAP). October 2006, p 73

³⁷ Civil Society Advocacy Programme (CSAP). October 2006, p 76

Commission, as far as it is practicable, to maintain close relations with institutions or bodies having similar objectives to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction and in other relevant circumstances.

- c) The Committee notes that in 1998 the Commission formed part of a newly created Forum for Independent Statutory Bodies, which was aimed at providing better liaison among constitutional and statutory bodies, sharing information on developments in the field of human rights, and making joint representations to government on matters of common interest. Participation in the Forum was voluntary. Most organisations have since pulled out, leaving only the Chapter 9 institutions to continue with this vision. Even this pared down version of the Forum is struggling to implement substantive joint programmes successfully. Among the reasons given for this is a disparity in resource allocation, both human and financial, that has inhibited some Chapter 9 institutions from fully participating in collaborative activities. This body has, therefore, not functioned successfully, and it appears to the Committee that it is defunct.
- d) Today there is therefore limited co-operation between the Commission and other Chapter 9 and associated institutions. The Committee believes that this is entirely unsatisfactory and that there is an urgent need for greater and more structured co-operation and collaboration between the Chapter 9 institutions and related bodies. Such co-operation and collaboration should be focused, carefully planned and implemented in a structured manner.
- e) The Committee is aware of the potential for forum-shopping, with the attendant dangers of complainants taking their claims from one body to the other even where there is no case. As such, it is of particular importance that the relevant bodies should work together to monitor the system of referrals. This is a particular concern for the Committee, as the present referral system between the Commission and the Human Rights Commission and the Public Protector appears to be informal in nature. Furthermore, the Committee notes that the Commission does not appear to have systems in place to monitor the progress of its referrals to other institutions.
- f) Conversely, a danger exists that complainants with a valid claim will be referred from one institution to another without being assisted. The Committee therefore recommends that the various human rights bodies take immediate steps to integrate their complaints databases to ensure better co-operation and prevent forum-shopping. The Committee further recommends that the structured co-operation should be aimed at embarking on joint public awareness campaigns, human rights advocacy campaigns and human rights training, as well as joint submissions to Parliament or the courts on issues of vital mutual concern. The Committee makes recommendations in this regard in Chapter 2 of this report.

3.6. RELATIONSHIP WITH INTERNATIONAL ORGANISATIONS

- a) The Committee notes that the Commission participates in a number of regional and international meetings, such as those organised by the Southern African Development Community states, the African Union, and

the United Nations Committee on the Status of Women. The Committee learnt that, typically, these bodies do not provide the opportunity for the Commission to participate officially. The Commission must generally attend these meetings as part of the official government delegation, either as delegates or as technical advisers to the official country delegation, and not in their capacity as spokespersons for an independent statutory body. The Committee regrets this lack of official recognition, as it is a serious obstacle to the ability of the Commission to present an independent account of government's progress regarding the achievement of gender equality in South Africa. Such treatment violates its independent status.

- b) The Committee notes that the Commission's lack of voice and failure to consult with external stakeholders, including civil society, prior to international meetings is another factor that undermines the Commission's credibility and effectiveness.

3.7. RELATIONSHIP WITH THE EXECUTIVE

- a) Although independent, the Commission operates as part of the national gender machinery, the institutional mechanism established by government in accordance with its obligations in terms of international treaties and conventions. However, as the Committee pointed out in Chapter 2 of this report, like all other Chapter 9 institutions the Commission is obliged to be independent and to perform its legislative and constitutional mandate impartially. Therefore it cannot be part of the government. The Committee is, therefore, concerned that the Commission does not fully appreciate the need to remain independent and act independently from the Executive.
- b) The Commission distinguishes itself from the Office on the Status of Women and the special programme directorates, which are tasked exclusively with the implementation of the National Gender Policy Framework within government structures. The Commission audits the implementation of the Policy Framework. However, the Committee finds that the role and functions of the Commission, the Office on the Status of Women and the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women are blurred as these other components of the gender machinery also have monitoring functions.
- c) The Commission informed the Committee that its relationship with the Executive is unstructured and issue-based. The Committee notes that the Commission experiences difficulties in obtaining access to official documents, such as the country report on the status of women. In addition, the Commission complained of the lack of recognition that prevents it from participating in official processes concerning gender referred to previously.
- d) The Committee notes that the Commission commits itself to pursuing a co-operative relationship with all state institutions, including the Executive and the Legislature, in line with principles of co-operative government as set out in section 41 of the Constitution. As discussed in Chapter 1 of this report, the Committee reiterates that the principles of co-operative government do not apply to the Chapter 9 institutions and that this approach is inconsistent with the independence of the Commission and the rulings of the Constitutional Court.

3.8. RELATIONSHIP WITH PARLIAMENT

- a) In terms of the Constitution, the Commission is accountable to the National Assembly. However, section 15(2) of the Commission on Gender Equality Act provides that the Commission must report annually to the President, who, in turn, will 'cause such report to be tabled promptly in Parliament'. While this requirement does not prevent the Commission from submitting any report at any time to Parliament, in practice the Commission's annual report is first presented to the Minister of Justice and Constitutional Development, who presents it to the President for tabling in Parliament. The Committee finds that this circuitous and time-consuming route of reporting to the National Assembly is inefficient, unnecessary and does not give effect to the intentions of the Constitution.
- b) The Commission reports to the Portfolio Committee on Justice and Constitutional Development on an annual basis. The Chairperson of the Commission told the Committee that the portfolio committee is overextended and that its interaction with the Commission is not adequate. The Committee agrees that the nature of the Commission's interaction with the portfolio committee is largely confined to scrutiny of the Commission's annual report, which is unsatisfactory.
- c) The Commission has interacted with the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women on particular issues, such as the implementation of the Domestic Violence Act 116 of 1998, which was adopted to protect, amongst others, women against violence from their life partners. In addition,

the Commission has made submissions to Parliament on the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, as well as on other legislation.

- d) The Committee notes that the Commission has not approached Parliament, particularly the portfolio committee, with regard to any matter relating to the exercise of its powers or the performance of its functions as it is legally entitled to do. Although the Chairperson of the Commission has told the Committee that the Commission has written to the Speaker, it is regrettable that the Commission has not turned to Parliament for assistance with its various problems.

3.9. RELATIONSHIP WITH CIVIL SOCIETY

- a) The Commission on Gender Equality Act requires the Commission to liaise and interact with any organisation that actively promotes gender equality and other sectors of civil society. The Commission confirmed that there was little interaction between itself and the gender-based civil society organs but expressed frustration that civil society organisations did not take the initiative in building co-operative relationships. It is clear that any interaction with civil society occurs on an *ad hoc* basis. The Committee believes that this failure to take proactive steps to formalise interaction with civil society bodies is deeply regrettable and in breach of the Commission's legal obligations. This is an important provision, as Parliament has considered it necessary that such human rights bodies must have structured relationships with civil society.
- b) The Committee finds that, since 2000, the Commission has had limited consultation with civil society as a way of informing its overall strategic planning, its work and its

focus areas. It was put to the Committee that this is in contrast to the situation prior to 2000, when there was a substantial degree of consultation with civil society to inform the Commission's strategic planning and priorities. While the Committee cannot ignore the effects of the absence of a full Commission since 2004, it finds that the failure to consult broadly undermines the Commission's credibility and brings into question the relevance of its work to its constituency.

- c) The Committee notes the perception amongst external stakeholders that the Commission is unwilling to take a public stand on controversial issues of overwhelming public importance such as issues around service delivery failures, the impact of poverty on women and the roll-out of anti-retroviral drugs for people living with HIV and AIDS. The Committee notes that such perceptions, whether they are based on fact or not, undermine the credibility of the Commission and contribute to a situation where external stakeholders are dissuaded 'from seeking the support of the Commission for their activities, or from considering the Commission as a central player in the ongoing struggles for gender equality'.³⁸ The Committee, therefore, wishes to emphasise once again its finding that the Commission needs to improve its relationships with civil society organisations.

3.10. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) It is common cause that there has been significant internal conflict between Commissioners since the inception of the Commission more than ten years ago. In 2001/02 senior persons resigned on

account of ideological differences of opinion, which should not have led to such tension. Again in 2004/05 differences emerged concerning the nature of the Commission's approach on women's issues. As a result of internal tensions, a significant number of persons resigned.

There have also been tensions between Commissioners and staff members. The Committee was informed that certain problems arose when Commissioners were allocated to specific provinces, which led to tension between the staff employed by the Commission in that province and the Commissioner involved. These tensions have impacted on the institution's overall effectiveness and efficiency, have affected the Commission's credibility, and have fed the perception that the Commission lacks programmatic focus.

The Committee is of the view that these tensions should have been handled in a different way and should not have affected the Commission's work. The Committee believes that some of these tensions could have been avoided if the division of roles and responsibilities amongst Commissioners and between Commissioners and staff had been clearly identified from the outset. The Committee was informed that the different roles have now been clarified and that Commissioners have been given terms of reference.

The Committee is of the view that it might be necessary formally to identify the lines of authority, responsibilities and accountabilities in the organisation. These must be delineated in a detailed manner and should not be unduly legalistic.

³⁸ Civil Society Advocacy Programme (CSAP). October 2006, p 54

- b) The Committee is dissatisfied with the Commission's present mechanisms for disclosure of interests. Commissioners are prohibited in terms of the legislation from conducting or assisting in an investigation in which they have any form of pecuniary or other interest. While the Committee learnt that the Commission does require disclosure, such information is not readily accessible to interested persons. The Committee discusses the issue of disclosure of interests more fully and makes recommendations in this regard in Chapter 2 of this report.
- c) The Committee finds that the provision in the relevant legislation that the President determines the remuneration of Commissioners is unsatisfactory. This has been the cause of some dissatisfaction among Commissioners, as any adjustment is accompanied by lengthy delays in receiving approval.
- d) In addition, the Committee finds that the present method of determining the level of remuneration for Commissioners is a difficult issue. The Commission on Gender Equality Act fails to outline the conditions of service of Commissioners, simply stating that this is to be determined by the President. In practice, Commissioners are remunerated in line with public service and National Treasury regulations. The Commissioners are remunerated at lower levels than members of other similar constitutional bodies. The Commission has expressed concern about this.
- e) The level of remuneration of Commissioners has received criticism from some sectors of civil society, as salaries of Commissioners appear to comprise a disproportionate portion of the Commission's budget.³⁹
- f) The Committee learnt that there are no performance agreements against which Commissioners can be evaluated in order to hold them accountable.⁴⁰ While remuneration for Commissioners comprises 35% of the Commission's budget, the Commission stated that this is due to the large number of Commissioners and not the levels of payment.
- g) The Committee understands that the Commission feels that the number of Commissioners should be reduced.
- h) While the Commission has the authority to employ the skilled staff it needs, the Commission has had difficulties with poor staff morale and a high staff turnover. The Commission's inability to retain staff is a serious concern to the Committee, as it directly impacts on the continuity and efficiency of the Commission's work.

3.11. FINANCIAL ARRANGEMENTS

- a) The Commission informed the Committee that the Commissioners and the secretariat prepare a Medium Term Expenditure Framework budget, which is submitted to the Department of Justice and Constitutional Development for inclusion in the Department's budget. In the past, the Commission was then invited to present its budget to the National Treasury. However, this process was amended for the past financial year and the Commission informed the Committee that it was not provided an opportunity to present its requirements to the Treasury. The budget agreed upon by Treasury is then included in the budget for the Department of Justice and Constitutional Development, from which money is allocated to the Commission.

³⁹ Civil Society Advocacy Programme (CSAP). October 2006, p 60

⁴⁰ Civil Society Advocacy Programme (CSAP). October 2006, p 60

- b) The Committee notes that the Commission does not have a separate Vote but that its budget falls under the Budget Vote of the Department of Justice and Constitutional Development, which transfers the funds directly to the Commission. The Committee is of the view that the location of the Commission's budget allocation within the Budget Vote of the Department impacts negatively on the perceived independence of the Commission. The Committee makes specific recommendations in Chapter 2 of this report in this regard.
- c) The budget of the Commission has increased from just over R19 million in 2003/04 (of which R1.7 million was donor funds) to over R37 million in 2006/07. Taking into account donor funds, the Commission has, however, underspent since 2003/04.
- d) The Table below also shows the budgets for the Commission in terms of the Medium Term Expenditure Framework. The Table reveals that the Commission's budget will increase significantly from R39.7 million in 2007/08 to R46.5 million in 2009/10.
- e) The Committee also notes with concern that the Commission has been opening provincial offices across South Africa. The Commission informed the Committee that six staff members staffed each office and that the average yearly cost for a provincial office was approximately R1.5 million. The Committee has not been presented with any evidence to justify the existence of provincial offices and could not be directed to any tangible deliverables flowing from the work done by these offices. The Committee is of the opinion that it may well be that this expenditure is a wasteful allocation of resources. The Committee questions the need for provincial offices, and makes specific recommendations in this regard in Chapter 2 of this report.

Table 1: Income and Expenditure 2003/04 – 2009/10⁴¹

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Income	19 300	22 400	28 000	37 757	39 745	44 193	46 550
Expenditure	19 000	20 700	25 800				
Surplus/ (Deficit)	300	1 700	2 200				

⁴¹ National Treasury (2007), Estimates of National Expenditure and the Commission's submission to the Committee

4. General conclusions

- a) The Committee believes that, in the interim, a strong and effective Commission acting on its own is absolutely necessary for the transformation of gender relations in our country. It is a matter of regret that a combination of factors, both internal and external to the Commission, has undermined its efficiency and effectiveness and has brought into question its relevance in its present formation.
- b) The Commission displays a poor understanding of its legal and constitutional mandate. Recommendations to rectify this are included.
- c) The approach to the appointment of Commissioners was regrettable. This sorry state of affairs has undermined the Commission's operations. The Committee includes recommendations aimed at addressing this problem.
- d) The Committee finds that the Commission's efficiency and effectiveness can be enhanced if certain institutional arrangements are addressed. These are elaborated on in the recommendations below.
- e) The relationship between the Commission and civil society is unsatisfactory and requires urgent attention.
- f) The Committee finds the collaboration between the Commission and the other Chapter 9 and related constitutional institutions to be informal and unsystematic. This is of particular concern with regards to the referral of cases. In Chapter 2 of this report the Committee makes general recommendations for the improvement of such collaborative relations that would apply to all the Chapter 9 and associated institutions under review
- g) The Committee finds that public awareness of, and engagement with, the Commission's work is inadequate and the Committee makes recommendations in this regard.
- h) At present, the Commission's interaction with Parliament, more specifically with the Portfolio Committee on Justice and Constitutional Development, is unsatisfactory and insufficient for effective oversight and accountability. In addition to specific recommendations aimed at facilitating the Commission's accountability to the National Assembly, the Committee in Chapter 2 of this report makes general recommendations for the improvement of the oversight and accountability mechanisms that would apply to all the Chapter 9 and associated institutions under review.
- i) The budget process and funding model of the Commission adversely affect its accountability and independence. The Committee makes general recommendations in Chapter 2 of this report on measures for the improvement of the budget process that would apply to all the Chapter 9 and associated institutions.

5. Recommendations

5.1. RECOMMENDATIONS FOR IMMEDIATE IMPLEMENTATION

The Committee makes the following recommendations to strengthen the efficiency and effectiveness of the Commission in the interim:

- a) The National Assembly should –
 - i. Establish appropriate mechanisms for the timely initiation and systematic imple-

mentation of the processes for the appointment of Commissioners to ensure that the outrageous delay experienced in the appointment of the current Commissioners is never repeated. The recommendations of the Committee in Chapter 2 of this report should be considered in this regard.

- ii. As soon as is reasonably possible, amend the Commission on Gender Equality Act of 1996 to bring it into line with the Constitution. The Committee is not in a position to recommend which committee or entity within Parliament should initiate this. This is a matter for Parliament to determine.
 - iii. Ensure that the appointments procedure, and budgetary arrangements, are reviewed to support further and assert the Commission's independence. The Committee's recommendations in Chapter 2 of this report should be considered in this regard.
 - iv. Ensure that clear lines of accountability, command and authority, particularly between the Commissioners themselves and between the Commissioners and the secretariat, are clearly specified in the Commission's policies.
- b) The Commission should -
- i. Develop and popularise a five-year strategic plan and performance plans that set annual priorities, for example the socio-economic empowerment of women. This would serve as an important monitoring and evaluation tool for the Commission, civil society and Parliament.
 - ii. Place greater emphasis on exercising its powers of investigation of its own accord and bring the outcomes of such investigations to the special attention of Parliament by means of its reporting to the National Assembly. Where appropriate, matters should also be referred to the Public Protector or Human Rights Commission.
 - iii. Develop more stringent processes and accountability measures for the co-ordination of the work of its provincial offices. Where provincial offices are to be established, the Commission should consider sharing premises with other constitutional bodies that might already have provincial offices. A cost-benefit analysis should be conducted before the establishment of additional provincial offices is approved.
 - iv. Address forthwith certain institutional matters, such as policies to deal with internal conflict at all levels, including amongst Commissioners and between Commissioners and the Secretariat, and the development of a staff retention policy and strategy.
 - v. Ensure that collaborative relations with the other Chapter 9 Institutions and related constitutional bodies are established and formalised, where appropriate. Collaboration should include, amongst others, joint research, joint submissions to the National Assembly (or Parliament) and joint court applications. All joint activities should be budgeted in consultation with the other relevant institutions.
 - vi. Formulate a communications strategy to ensure that it raises its public profile and

embark on a public awareness campaign and public outreach programme.

vii. Ensure that the details of directorships, partnerships and consultancies of Commissioners and senior officials are disclosed in the annual report. Disclosure of the pecuniary and other interests of Commissioners and staff members should be made and kept in a register. Mention should be made in the annual report of where such information is available to interested parties. General recommendations concerning the disclosure of financial interests are made in Chapter 2 of this report.

c) For coherence and consistency, the oversight and accountability of the Commission should be moved from its current location with the Portfolio Committee on Justice and Constitutional Development to the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women. The Joint Monitoring Committee should meet with the Commission at least twice per year to engage on its strategic plan and annual report. The Joint Monitoring Committee should also provide opportunities for engagement on specific reports of the Commission as required. The interactions between the Joint Monitoring Committee and the Commission should be co-ordinated by the proposed unit in the Office of the Speaker discussed in Chapter 2 of this report.

5.2. RECOMMENDATIONS FOR FUTURE IMPLEMENTATION

The Committee makes the following recommendation for future implementation:

a) Human rights are indivisible and interrelated, and the fact that some Chapter 9 institutions refrain from dealing with overlapping issues is not ideal. Given the indivisibility and interrelated nature of human rights, the Committee recommends that the Commission for Gender Equality be incorporated into a single national human rights institution, which will have a dedicated Commissioner for Gender Equality.

b) The main advantage for the existence of a single body is that matters will then not fall through the cracks. The present plethora of bodies each competing for resources and areas of competence cannot be said to be the most efficient or effective model. International best practice seems to be to recognise the seamlessness of rights and promote them under a single umbrella body, which gives full expression to all dimensions of human rights.

c) However, as this requires large-scale constitutional amendment, the Committee recognizes that this recommendation may not be able to be implemented immediately. The Committee's recommendations in this regard are elaborated further in Chapter 2 of this report, as well as in the Chapter on the Human Rights Commission.



CHAPTER 12

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

1. Background

South Africa's 1996 Constitution is often referred to as transformative as it requires and assists in facilitating the complete transformation of our society from a culture that was oppressive, secretive and profoundly disrespectful of basic human rights to a human rights based culture in which the human dignity of all is both respected and celebrated.

The Bill of Rights holds out the promise to all South Africans, no matter how poor or marginalised, that their human dignity will be respected and protected against abuse not only by the state but also by private institutions and individuals. The South African Human Rights Commission has a vital role to play in honouring this constitutional promise. Many poor and marginalised individuals in South Africa do not have easy access to the legal system and therefore cannot exercise their rights without assistance from a strong, independent and impartial human rights body. At the same time, the establishment and entrenchment of a vibrant human rights culture requires strong leadership from a legitimate, independent and authoritative body, as envisaged with the establishment of the Commission.

For an accurate and responsible evaluation of the Commission, it is important to consider just how it fits into our democratic landscape. More specifically, a keen understanding of the Commission's place in the constitutional architecture vis-à-vis the Legislature, the Executive and the Judiciary is necessary.

The Commission has a duty to promote and protect human rights but does not act as a substitute for the Legislature, the Executive or the Judiciary. Instead, the Commission finds itself positioned somewhere between the Judiciary,

which is tasked with enforcing human rights, and the Legislature to which the Executive and other institutions are accountable. On the one hand, the Commission has the power to demand answers from the Legislature, the Executive and private institutions and individuals about adherence to and protection of human rights, amongst others through its power of subpoena. On the other hand, it does not have the authority, like a court, to make binding judgments. Instead, the Commission must try to ensure the realisation of rights through co-operation and mediation. In this regard, it acts as a check on the legislative and executive branches of government, while assisting them with the promotion and protection of human rights in the broadest sense of the word. In order to be effective, the Commission needs to act fearlessly, without showing any favour or prejudice. Yet it must also co-operate, when necessary, with some of the institutions it is required to hold accountable. By nature its work is sensitive. Therefore, institutions engaged with the promotion and protection of human rights need support.

2. Constitutional and legal mandate

The Commission's mandate is extremely broad, encompassing almost every aspect of civil, political, social and economic rights. The legal mandate of the Commission is derived from section 184 of the 1996 Constitution; the Human Rights Commission Act 54 of 1994; the Promotion of Access to Information Act 2 of 2000; and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

2.1. CONSTITUTIONAL MANDATE

The 1993 Constitution provided for the establishment of a Human Rights Commission to promote the observance of, respect for, and protection of fundamental rights through a variety of means.⁴² The Human Rights Commission Act 53 of 1994, based on the provisions contained in the interim Constitution, saw the Commission's establishment in October 1995 and its launch on 21 March 1996.

Similarly, the 1996 Constitution provides for an independent and impartial South African Human Rights Commission. Section 184 requires the Commission to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa.

In order to achieve these goals the Constitution requires the adoption of legislation that provides for the investigation and reporting of human rights abuses; steps to be taken to secure redress when rights have been violated; research to be undertaken; and the education of society about the importance of human rights. In addition, section 184(3) tasks the Commission with the duty to monitor the implementation of the social and economic rights protected in the Constitution by once a year requiring relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of these rights.

2.2. MANDATE IN TERMS OF THE HUMAN RIGHTS COMMISSION ACT

While other legislation is applicable to the Commission's activities, the Human Rights

Commission Act 54 of 1994 forms the basis of the Commission's work. The Act affirms the independence of the Commission and requires Commissioners to serve impartially and independently and exercise their powers, duties and functions in good faith and without fear, favour, bias or prejudice. The Act also prohibits any organ of state, or any person, from interfering with, hindering or obstructing the Commission in the exercise of its duties. The Act requires that all organs of state afford the Commission the assistance it reasonably requires to protect its independence, impartiality and dignity.

The Act provides the Commission with wide powers to carry out its responsibilities, which include the promotion of human rights through education; the monitoring and evaluating human rights; and protecting the rights of ordinary people through investigation of complaints, mediation, litigation, and redress.

It is important to note that the Commission is not a court of law and cannot make binding decisions on complaints lodged with it. It can, however, investigate individual complaints or systemic infringements of human rights, make recommendations, and "name and shame" the parties found to be violating the rights of others. It can also mediate disputes and take cases to court in either its own name or on behalf of an aggrieved party.

When investigating complaints, the Commission has considerable powers to gather information, including the power (within the limits of the law) to subpoena witnesses, to enter and search premises, and to attach articles of relevance to its investigation. These powers provide the Commission with all the legal tools it requires to pursue its investigations and to address more systemic infringements of human

⁴² In terms of section 116 of the 1993 Constitution, the Commission's powers and functions were to 'promote the observance of, respect for and the protection of fundamental rights; develop an awareness of fundamental rights among all people of the Republic; make recommendations to organs of State at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the full observance of such rights; undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions; and request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights'. In addition, the Commission could comment on whether proposed legislation was in violation of international human rights law and could investigate, either on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, as well as assist the complainant in achieving redress, including pursuing a case before a court or other forum.

rights (For example, systemic infringements that occur in certain sectors such as farming communities and schools).

Furthermore, as part of the Commission's monitoring and evaluation function, relevant organs of state must provide the Commission with information on an annual basis on measures taken to realise the rights contained in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. The role of the Commission in this respect is of cardinal importance, particularly for the vast numbers of South Africans for whom the realisation of the socio-economic rights contained in the Bill of Rights is a priority as it concerns their daily struggle for survival.

There is an important provision in the Act that is not found elsewhere. Parliament recognised after lengthy debate that placing emphasis exclusively on political rights is like throwing a rope of sand to our people. Therefore, the Constitution provides the Commission with a unique power to identify, defend and initiate socio-economic aspects of the Bill of Rights. Given the tremendous socio-economic disparities found in our society, the Commission is under enormous pressure to deliver in respect of its part of the promises concerning the socio-economic rights contained in the Constitution. Unless these rights are adequately addressed, the full enjoyment of the civil and political rights also found in the Constitution will remain a secondary consideration.

2.3. MANDATE IN TERMS OF PROMOTION OF ACCESS TO INFORMATION ACT

The right of easy access to the relevant information necessary to vindicate one's rights is of supreme importance in a constitutional democracy. The legislation aimed at helping ordinary

South Africans to gain such access gives the Commission an important role in its implementation.

The Promotion of Access to Information Act 2 of 2000 creates an elaborate framework within which individuals must operate to access relevant information, but does not create a separate Information Commissioner to oversee the implementation and smooth running of the system. Instead, the Act envisages that the South African Human Rights Commission will play a major role in ensuring the effective implementation and operation of this constitutionally mandated legislation.

Firstly, the Act requires the Commission to take a lead in educating and informing the public about the way the legislation works. The Commission is required to compile and regularly update a guide on how to use the Act. The guide must be published in each official language of the Republic and must be compiled within three years of the commencement of section 10 of the Act, which came into operation on 15 February 2002. The Commission must also, within the available resources, develop and conduct education programmes to help members of the public, especially those from disadvantaged communities, to understand the ways in which they can exercise their rights in terms of the Act.

Secondly, the Act requires that the Commission monitor the Act's implementation and submit detailed reports to the National Assembly in this regard. The Commission must report annually to the National Assembly on the number of cases lodged in terms of the Act, their outcomes and how many of the decisions were appealed internally or to the courts. This report must also include any recommendations for the improvement or amendment of the Act or

related legislation and particulars of records of requests for access to information in relation to each public body in terms of the Act.

Thirdly, the Act allows the Commission to assist people who approach it and wish to exercise their rights with making the necessary applications in terms of the Act.

The Act explicitly states that any expenditure in connection with the performance of the Commission's functions in terms of the Act must be defrayed from moneys appropriated to the Commission for that purpose.

2.4. MANDATE IN TERMS OF PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

Although significant progress has been made in transforming our society and its institutions, structural inequalities remain deeply embedded in social relations, practices and attitudes. These inequalities invariably lead to unfair discrimination and the marginalisation of vulnerable groups and frustrate the achievement of the society promised by the Constitution, which upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society. To address this problem in a systematic and comprehensive manner, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted in terms of section 9(4) of the Constitution, which prevents or prohibits unfair discrimination on any of the listed grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Act provides an accessible avenue for ordi-

nary people without access to lawyers to challenge unfair discrimination by the state or, unusually, by private institutions or individuals through the creation of a system of equality courts. It envisages an important role for the South African Human Rights Commission in the successful implementation and functioning of the provisions of the Act.

Firstly, the broad jurisdictional provisions in the Act allow the Commission to institute proceedings in an equality court on behalf of any aggrieved person or group. Where a presiding officer of such a court decides to refer a matter to the Commission, it must deal speedily with such a case. The Act also places a duty on the Commission to assist complainants who wish to lodge a complaint and to conduct investigations where necessary.

Secondly, the Act envisages an important role for the Commission in the promotion and achievement of equality. The Commission may, for example, request any state institution or any person to supply information on any measures taken relating to the achievement of equality including, where appropriate, legislative and executive action and compliance with legislation, codes of practice and programmes. The Commission is also charged with receiving equality plans from government Ministries and must consult with the Commission for Gender Equality when dealing with such plans. This part of the Act has not yet been brought into force. This is regrettable, as it is clear that matters of discrimination still require urgent attention.

The Commission must on a quarterly basis in special reports to the President and to Parliament in terms of the Human Rights Commission Act, include an assessment of the extent to which unfair discrimination on the

grounds of race, gender and disability persist in South Africa and the effects of such practices. These reports must include recommendations on how best to address the problems identified.

South Africa also has international obligations under numerous binding treaties and customary international law in the field of human rights, which promote equality and prohibit unfair discrimination. Among these are the rights specified in the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child.

3. Findings

The Committee met with the Commission on 9 March 2007. The Commission's written response to the Committee's questionnaire, as well various submissions from civil society, the academic sector and the Ministries informed the discussions. The Commission also supplied the Committee with supplementary information following the discussions. From these, the following emerged:

3.1. CONSTITUTIONAL AND LEGAL BASIS

a) The Human Rights Commission Act, 1994, is outdated. This legislation was originally consistent with the provisions of the 1993 Constitution, which differ in important respects from those contained in the 1996 Constitution. This is no longer sufficient. These discrepancies have implications for the Commission's mandate and functioning. For example, the 1996 Constitution entrenches a number of socio-economic rights not contained in the 1993 Constitution, such as the right to a clean environment, the right of access to housing

and healthcare, the right of access to food, water and social security and the right to education. The Commission is constitutionally mandated to monitor the progressive realisation of these socio-economic rights contained in the Bill of Rights. As the Human Rights Commission Act predates the 1996 Constitution, it makes no mention of this important task.

- b) When the Department appeared before the Committee, it was informed through the Deputy Minister of Justice and Constitutional Development that the preparation of draft legislation to amend the Human Rights Commission Act to bring it into line with the 1996 Constitution was "at an advanced stage".
- c) Furthermore, the regulations promulgated in terms of section 19 of the Human Rights Commission Act relating to staff matters, including salaries, appointments, codes of conduct, transport and legal liability, are outdated and in some instances in contravention of labour law.⁴³ This creates difficulties in managing the Commission and contributes to difficulties in the promotion and maintenance of healthy labour relations within the Commission.
- d) The Commission has raised this matter on a number of occasions with both the Portfolio Committee on Justice and Constitutional Development and the Department of Justice and Constitutional Development. The Committee was supplied with a letter to the Minister of Justice and Constitutional Development, dated 27 October 2005, in which officials of the department informed the Commission that their draft staff regulations had been submitted to the former Minister towards the end of 2004.

⁴³For example, section 16 of the Regulations limits the grant of paid maternity leave to two confinements, while no maternity leave may be granted in the first year of employment at the Commission. This is in contravention of the Basic Conditions of Employment Act 75 of 1997.

- e) During 2002 the Commission submitted draft staff regulations to the Department for comment and promulgation. However, the Department indicated that section 19 of the Human Rights Commission Act, which would have formed the legal basis for the promulgation of the regulations, required amendment. As these amendments were never accomplished, the drafting of the regulations stalled. Since then the Commission has updated its draft regulations, which are substantially in line with the rules applicable in the Public Service. These have been adopted as “interim regulations”.
- f) The Committee notes with concern that the delay in updating the Human Rights Commission Act and its associated regulations affects the ability of the Commission to carry out its mandate effectively and efficiently, and impacts negatively on its operational efficiency.

3.2. UNDERSTANDING AND INTERPRETATION OF MANDATE

- a) The Committee was impressed with the way in which the members of the Commission explained their understanding of the Commission’s mandate when they appeared before the Committee. The Commissioners showed a firm grasp of the social, economic and political context within which they were required to operate and displayed an intimate knowledge of the legal mandate under which they were required to achieve their goals.
- b) Over the past decade, the Commission has built up 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. At the same time, the Commission has managed to retain civil relationships with the Legislature and Executive, and has worked with relevant individuals and institutions in the other branches of government when this was required.

- c) The Commission has also developed an international reputation as an independent institution for the promotion and protection of human rights and assists human rights commissions elsewhere in Africa with capacity building.
- d) The members of the Commission affirmed their belief in the interdependence and indivisibility of rights and expressed a desire to investigate and report every complaint and promote all the rights in the Constitution. However, the Chairperson of the Commission informed the Committee that, given the Commission’s limited resources, it remained a reality that, unless a specific issue had a strong champion, the chances were that the Commission would focus its resources elsewhere.

- e) Despite its many remarkable achievements, and in the light of the admission made above that strong champions get things done, the Committee wishes to highlight the following important areas in need of further attention and improvement:

3.2.1. Children and disabled persons

- a) The Committee is of the view that children and disabled persons are among the vulnerable groups most in need of a champion to

ensure the full realisation of their rights. However, the Committee notes that, despite the contributions of the Commission in the promotion and protection of human rights broadly, it devoted limited resources and energy to the promotion and protection of the rights of children and disabled persons. While the Committee is pleased to note that the Commission has now appointed a full-time co-ordinator to address the rights of children and disabled persons, the Committee is of the view that each of these areas is of considerable importance and, therefore, each should be dealt with by a “champion” of its own. Accordingly, the Committee expresses the need for the establishment of distinct structures with a dedicated focus on the rights of children and disabled persons.

- b) However, the Committee is not in favour of the proliferation of human rights bodies. It therefore recommends that such dedicated structures should form part of existing human rights bodies. Until legislation is enacted to include children in the National Youth Commission’s mandate, the Human Rights Commission should strengthen its focus on children.
- c) The Committee also wishes to propose the appointment of a dedicated Commissioner to “champion” the rights of disabled persons. The Committee notes that the Office on the Status of Disabled Persons has been established to promote and protect the rights of people with disabilities. This office is located within the Office of the Presidency and its staff report directly to the Minister in the Presidency. Provincial offices replicate the national office.
- d) The Committee is concerned that there may be some duplication of functions, which

may result in squandering of resources. Furthermore, fragmentation of functions and services could result in confusion and uncertainty amongst the public.

- e) The Committee, therefore, suggests that once a dedicated Commissioner has been appointed for the Commission, the Office of the President should review the Office on the Status of Disabled Persons.

3.2.2. Promotion of Access to Information Act

- a) The Promotion of Access to Information Act gives people the right to request relevant information, thereby providing ordinary people with easy access to information necessary for them to enforce their rights and access that to which they are entitled. The reason for the Act is that for a long time government departments failed to supply required information.
- b) The Committee was informed that this very important legislation aimed at promoting access to information does not, as intended, provide ordinary people with easy access to information needed for them to enforce their rights and access their entitlements. The Committee was informed that about 50 percent of the requests for information from government departments never receive a response.
- c) The complex and potentially expensive appeals mechanism provided for in the legislation places further obstacles in the way of ordinary individuals wishing to access information. The Act contains a long list of grounds for refusing a request. Once a request has been refused, an elaborate internal appeals process must be followed,

which requires that an individual provide legal reasons for the appeal. This is not an easy task for most laypersons.

- d) Should this internal appeals process be unsuccessful, an aggrieved individual can only challenge decisions denying access to information in an ordinary court of law. The cost and complexity of such processes often make it difficult if not impossible for individuals or groups without adequate resources to exercise their right to information through the Act. It is significant that only a handful of cases reach the courts.
- e) Without assistance, members of the public whose requests for information are denied would have to show extraordinary resilience if they were to lodge a successful appeal in the courts. As noted above, the Human Rights Commission has the power to assist individuals with these appeals. It is not clear to the Committee whether the Commission has assisted any individuals or groups wishing to lodge an appeal, as envisaged in the Act.
- f) The Committee was also informed about the lack of knowledge by public servants and private bodies of the provisions of the Act. Given the fact that the Commission was tasked with the duty to inform and educate all parties about the provisions of the Act, this lack of knowledge points to a failure on its part. The Committee notes that this failure may be blamed partly on the lack of resources provided for this task, despite the explicit provisions in the legislation providing for funding.
- g) The Committee notes that the Commission has failed to prepare guidelines on the provisions and implementation of the Act with-
in the legally stipulated timeframe. The Committee acknowledges, however, that the deadline applicable to the Commission was extended through the issuing of the necessary regulations. As mentioned, capacity constraints have also contributed to the Commission's failure in this regard.
- h) The Committee received proposals for a new body to deal with this issue. The proposals centre around the establishment of an independent information commissioner mandated to receive appeals from persons lodging requests for information and make binding orders on access and disclosure. The information commissioner would also give advice to government departments and officials seeking clarification of their duties and responsibilities with respect to access to information. Such a proposal results from impatience with the capacity of the Commission to provide real teeth in implementing this legislation.
- i) The Committee believes that a dedicated information commissioner would go a long way towards ensuring effective implementation of the Act. In its submission to the Committee, the Commission proposes two options concerning the location of an information commissioner. One option is to create an entirely new body that does not form part of the Commission. This would ensure that the staff and commissioner of this body would be appointed as specialists, who will deal solely with the Promotion of Access to Information Act as well as legislation pertaining to privacy.
- j) The second option, which the Committee favours, is to appoint an information commissioner within the Human Rights Commission. The Committee is opposed to

the proliferation of human rights bodies, and this approach would ensure that the information commissioner works within an existing structure. To ensure the success of this intervention, the Committee proposes that the information commissioner should be allocated a 'ring-fenced' budget within the budget allocation of the Human Rights Commission and a dedicated staff.

- k) There are many advantages to this option, including the efficient and effective sharing of infrastructure and other resources.
- l) At the request of the Committee, the Commission costed the two options. The estimated cost for option 1 is approximately R 7,6 million, while that for option 2 is approximately R 5,6 million. The Committee recognises that accepting the second option of vesting an information commissioner within the Human Rights Commission is much cheaper and, therefore, cost effective.
- m) Notwithstanding the resource constraints of the Human Rights Commission, the Committee highlights the urgent need for the Commission to pay particular attention to its functions and obligations in terms of the Promotion of Access to Information Act.
- n) In general, the Committee is of the opinion that the Commission needs to adopt a more aggressive stance towards the implementation of the Act, particularly regarding provisions on the reporting by private and public bodies as well as assisting in the bringing of matters to the courts.

3.2.3. The Promotion of Equality and Prevention of Unfair Discrimination Act

- a) Section 28 of the Promotion of Equality and Prevention of Unfair Discrimination Act, which relates to special measures to promote equality with regard to race, gender and disability, has not yet come into operation. The Committee was informed that the Commission has raised this problem with the previous Minister of Justice, but that it has not received a response. In 2006 a committee of Parliament also looked into this matter, but the Committee is not aware that any results were forthcoming.
- b) The Committee finds it regrettable that six years after the Act came into force, the regulations that would bring this section into operation have yet to be promulgated. This delay adversely affects the Commission's effectiveness in promoting the right to equality, which is central to the enjoyment of all other human rights in South Africa.
- c) The Committee commends the Commission for its initiatives in terms of the Act. Amongst others, the Commission has -
 - i. Produced a guide on how to use the Act;
 - ii. Established an Equality Unit and has ensured law clinic status for the legal services departments of most of its provincial offices to handle equality court work;
 - iii. Brought and concluded at least fifteen cases of unfair discrimination in equality courts; and
 - iv. Received and processed approximately 428 equality cases in 2005/06.

d) The Committee notes the following challenges that negatively impact on the Commission's work in this regard:

- i. Not all the designated equality courts are fully functional and where they are functional they are not always easily accessible and/or visible to the public. The regulations are also cumbersome, and the Committee has been informed that the average time for a complaint to be finalised is two years, which is inordinately long.
- ii. The cost of public transport to access equality courts is unaffordable to poor complainants.
- iii. In some instances, presiding officers and clerks at equality courts are hesitant to act because they are unfamiliar with the Act and, therefore, lack confidence.

e) The Committee was informed that the Act does not appear to be used much by the poor and marginalised, but primarily by the wealthy or educated. The Committee is therefore of the opinion that the Commission must take a more proactive approach towards assisting individuals affected by unfair discrimination, especially in rural areas and in isolated townships.

3.2.4. International obligations

a) The Committee notes that the Commission has interpreted its mandate to include monitoring of how South Africa fulfils its obligations in terms of international treaties. The Commission has increased its capacity to do this, and envisages playing a strong monitoring role regarding the ratification, reporting and following up on the recommenda-

tions of treaty bodies as well as the work of the various special rapporteurs. The Commission is now aiming to present an independent account of South Africa's compliance with its various international human rights treaty obligations. The Committee is of the view that such work is vital and accordingly commends the Commission for taking this initiative.

b) The Committee notes the Commission's participation in the processes to promote human rights and the growth and development of national human rights institutions in Africa. The Committee learnt of the rich interplay between the Commission and the national human rights institutions of other countries. In this regard, the Commission regularly hosts delegations from other countries. The Committee also notes that the Commission was requested to do a presentation to the Judicial Committee of the Pan African Parliament on its mandate, and more generally on the role and place of human rights and national human rights institutions in the broader human rights framework of the African continent. This is another example of the commendable activities of the Commission.

3.3. APPOINTMENTS

a) While the 1993 Constitution provided for the appointment of eleven Commissioners, the Human Rights Commission Act of 1994 provides that no fewer than five Commissioners may be appointed. However, the Act does not stipulate the maximum number of Commissioners that may be appointed.

b) In terms of the 1996 Constitution, the President appoints both full-time and part-time commissioners on the recommenda-

tion of the National Assembly after adoption of a resolution supported by a majority of its members. When appointments need to be made, an *ad hoc* Committee of the National Assembly is established for this purpose. This Committee invites nominations from the public and civil society, draws up a shortlist and calls applicants on the shortlist for interviews. The Committee then submits its recommendations to the National Assembly for approval. Commissioners hold office for a fixed term that is determined by the President but may not exceed seven years. Commissioners may be reappointed for one further term.

- c) The Committee notes with concern that the term of all five Commissioners currently serving will come to an end simultaneously in 2009. This may result in a loss of institutional memory and may negatively affect the continuity of the Commission. The Committee therefore proposes that at least two new Commissioners be appointed immediately. One commissioner should be appointed to deal with rights issues relating to disabled persons, while the second should deal with issues of access to information. The Committee discusses the issue of the staggering of appointments of commissioners more fully and makes recommendations in this regard in Chapter 2 of this report.
- d) The Committee is not convinced that the case for limitations of the term of office has been made, particularly in a country with limited resources for the replacement of commissioners. In the case of the Human Rights Commission, continuation of the term of office would be required, particularly in consideration of the important responsibilities of the Commission and the proposed

revision of the human rights framework and mechanisms. The Committee makes a specific recommendation to address this matter.

- e) The Committee notes that, during the previous appointment cycle, the Office of the President may have misunderstood the provisions of the Constitution and hence disregarded the National Assembly's recommendation to appoint eleven Commissioners, appointing only five. The Committee believes that the appointment of only five commissioners to an institution with as broad a mandate as that of the South African Human Rights Commission is deeply problematic and wholly inadequate. The Committee fails to understand the rationale for the appointment of the minimum number of Commissioners, particularly given the expanded mandate of the Commission in terms of the Promotion of Access to Information Act and the Promotion of Equality and Prevention of Unfair Discrimination Act. The Committee, therefore, recommends that the legislation should provide for the appointment of a minimum of seven Commissioners.

3.4. PUBLIC AWARENESS

- a) The Commission has a constitutional and legal mandate to conduct public education and promote public awareness of human rights. The Committee was informed that the Commission has embarked on extensive public education, particularly through its official training provider, the National Centre for Human Rights Education and Training. The Committee was impressed by the model developed by the Commission, as well as by the range of activities and programmes undertaken by this body. It is, however, of some concern that the Commission's public

awareness campaigns remain, in essence, urban based, although the Committee was informed that the Commission has now launched a programme aimed at addressing this bias.

- b) The Committee was also informed that the Commission has had considerable success in including human rights education across the school curriculum. The Commission is to be congratulated on this very important achievement, which has not been replicated by other entities elsewhere.
- c) The Committee notes that the Human Rights Commission is one of the most widely known of the Chapter 9 institutions, with approximately 50% of the public indicating an awareness of the existence of the Commission. Nonetheless, the Committee supports the Commission's contention that more needs to be done to increase public awareness of the functions, activities and services of the Commission.
- d) The Committee notes that the Commission has admitted that it does not, at present, have a comprehensive and effective communications policy and strategy. This undermines the good work done by the Commission. The Committee is of the opinion that such a strategy should make better use of existing points of contact between the public and state institutions such as public service offices, post offices, community centres and social grant pay-points to enhance its visibility and provide ordinary people with better access to its services. The Committee refers to some innovative initiatives on the part of government that could be useful in this regard. This matter is discussed more fully and general recommendations are made in Chapter 2 of this Report.
- e) The Commission's relationship with civil society is unstructured. While committees allowing for civil society participation were established in terms of section 5 of the Human Rights Commission Act, these committees are no longer functioning. The Committee supports the intention, expressed by members of the Commission, to reconstitute the committees as a way of bringing outside expertise into the work of the Commission, including the expertise of civil society.
- f) The Committee received a representation alleging that commissioners should not serve on the boards of non-governmental organisations because this could lead to conflicts of interest. However, the Committee does not share this view. The Committee believes that the involvement of commissioners with non-governmental organisations will serve to strengthen relationships with such organisations and will build the capacity and knowledge of Commissioners. The Committee, in fact, encourages such involvement with non-governmental organisations, as long as it does not detract from a Commissioner's core functions and responsibilities to the Commission.
- g) Some submissions before the Committee concluded that the Commission does not focus sufficiently on issues that deeply involve the public such as the HIV and AIDS pandemic. Given the enormous public expectations resting on the shoulders of the Commission, the Committee is of the view that the Commission should develop a comprehensive strategic communications strategy that will inform the public about its various activities and will highlight the Commission's independence and willingness to assist the most marginalised and vulnerable sections of the community.

- h) The Committee notes that the Commission, through its legal department, deals with a relatively large number of complaints. Obviously, such a large number of complaints reflects on the state of human rights in our society. From the 5 763 complaints received in 1999/2000, the Commission's caseload has increased to 11 710 in 2005/06. Of the more than 11 700 complaints received in the year ending in 2006, 3 903 were accepted, and 547 were rejected because they did not, in the opinion of the legal department, constitute a human rights claim. A further 1 636 complaints were referred to other bodies such as the Commission for Gender Equality and the Public Protector for resolution. The Commission could not tell the Committee whether these cases referred to other bodies were ever resolved because the Commission had not followed this up, which is pretty much common practice. The status of the remaining 5 624 cases is unclear to the Committee. The Commission resolved 732 cases through mediation, conciliation or court intervention, while in 1 360 cases a finding was made after receiving the version of both parties involved.
- i) The Committee notes that the Commission has identified the lack of public awareness of the provisions of the Promotion of Access to Information Act and the Promotion of Equality and Prevention of Unfair Discrimination Act as constraining factors in their effective implementation and utilisation. Accordingly, the Committee recommends that the Commission be more proactive in promoting public awareness of the provisions of these Acts.

3.5. RELATIONSHIP WITH PARLIAMENT

- a) The Commission is accountable to the National Assembly. At present it reports to the Portfolio Committee on Justice and Constitutional Development on its annual report. The Committee understands that usually the Portfolio Committee would engage with this report for about two hours. Members of the Commission expressed a desire for more structured and informed engagement by the Portfolio Committee with the annual report. The Committee's proposals on parliamentary oversight in Chapter 2 of this report addresses these concerns.
- b) As the Commission's mandate is broad, straddling almost every sector of society, it is frequently requested to appear before different parliamentary committees to provide input on issues relevant to each committee. This often draws the Commission away from its core work and places extra strain on its human resources. In this regard there is need for a focal point in Parliament to facilitate and co-ordinate the manner in which Parliament and the Human Rights Commission (as well as other Chapter 9 Institutions) interact. The Committee addresses this matter in the general chapter on the relationship between Parliament and the Chapter 9 and associated institutions.
- c) The Committee compliments the Commission on the publication of its 6th Socio-Economic Rights Report in 2006. The Committee notes the progressive improvements in the socio-economic rights reports over the years. In particular, there has been a vast improvement in the manner in which information is solicited from government departments and the accuracy with which

that information is reported. The Committee emphasises the need to ensure that the information in these reports is current, since the reports can act as important yardsticks for the Executive, civil society and the courts for measuring the progressive realisation of socio-economic rights in South Africa. The Committee suggests that the Commission should highlight specific aspects of its socio-economic rights report by making use of its legal mandate to bring matters to the attention of the National Assembly for discussion and action. This could serve as an impetus for national debate on matters of national or public interest emerging from the Commission's reports.

- d) The Committee further recommends that the National Assembly should arrange bi-annual joint meetings of the portfolio committees dealing with the subject areas covered in the socio-economic rights report. These would include housing, health, environmental affairs, education, social development and water affairs.

3.6. RELATIONSHIP WITH THE EXECUTIVE

- a) The Commission engages with the Executive in an *ad hoc* or unstructured fashion, based on particular human rights issues that may arise. However, members of the Commission informed the Committee that it does not always receive the necessary reports from government departments, especially concerning the provision of information for the socio-economic rights reports. While the Commission's socio-economic rights reports do mention non-compliant departments, this does not appear to be a sufficient deterrent. The Commission also reported that, when dealing with requests for access to information in terms of the Promotion of

Access to Information Act and with complaints against government departments in general, the Commission is regularly met with a lack of co-operation or assistance from government officials.

- b) As the Commission can only make recommendations and cannot formally sanction offending officials, its effectiveness lies, in part, in its ability to hold those responsible publicly accountable and to seek answers to conduct that impacts on human rights. Accordingly, the Commission's efficacy is compromised by the tardiness of government departments in responding, or their failure to respond altogether.
- c) The Commission informed the Committee that its practice at present is to write to government departments on three occasions to solicit the required information or response. Only if there is no response after the third letter of request does the Commission resort to its powers of subpoena. The Committee views this as an overly timid approach and a poor use of resources. The Committee, therefore, recommends that the Commission should proceed to use its powers of subpoena if a department does not respond after a reasonable time following the first letter of request.
- d) The Commission has a unique opportunity to solicit the assistance of the National Assembly in dealing with problematic relationships with members of government departments. The Committee, therefore, recommends that if a matter is one of public importance and a department either does not respond within a reasonable time, or responds but rejects the complaint, or provides incomplete information, the Commission should exercise its powers in

terms of section 6 of the Human Rights Commission Act to bring the matter to the attention of the National Assembly.

3.7. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) As the Commission's mandate is extraordinarily broad, there is much potential for overlap or duplication of functions between it and other Chapter 9 and related institutions. In 1998 the Commission initiated the creation of a Forum for Independent Statutory Bodies to provide for better liaison among the various constitutional and statutory bodies, to share information on developments in the field of human rights, and to make common representation to government on matters of common interest. Participation in this body was voluntary. However, over time most organisations pulled out of the Forum, leaving only the Chapter 9 institutions to continue with collaborative efforts. The remaining institutions have been struggling to implement substantive joint programmes successfully. A reason that was given for the lack of cohesion was the disparity in resource allocation, both human and financial, that has prevented or inhibited some Chapter 9 institutions from participating in joint programmes. More recently, the European Union has funded a project to formalise the co-operation between the Commission, the Public Protector and the Commission for Gender Equality.
- b) There is a need for greater and more structured co-operation and collaboration between the Chapter 9 institutions and related constitutional bodies. Such co-operation and collaboration should be focused, planned and implemented in a structured manner. The Committee has been informed by Commissioners that, given the proliferation of bodies, there is a danger that complainants will forum-shop and will take their claims from one body to another even where they have no case. Conversely, a danger exists that complainants with a valid claim will be referred from one institution to another without being assisted.
- c) The Committee, therefore, recommends that the various human rights bodies take immediate steps to integrate their complaints databases to ensure better co-operation and prevent such forum-shopping.
- d) The Committee further recommends that such structured co-operation should be aimed at embarking on joint public awareness campaigns, human rights advocacy campaigns and human rights training, as well as joint submissions to Parliament or the courts on issues of vital mutual concern.
- e) High quality research in the field of human rights is important and necessary but can be very costly. The Committee recommends that the Commission co-operate with other Chapter 9 institutions or academics to plan and execute joint research projects. Such projects should be budgeted for at the start of each year and would require long term planning from all bodies involved.
- f) At present, the Commission collaborates with other institutions in the following ways:
- i. The Commission has a formal arrangement with the Commission for Gender Equality regarding the handling of cases and complaints by the legal departments of both institutions. In addition, the Commissions have indicated that they

attempt to ensure that their offices are in the same building or in close proximity of each other but are constrained by existing long-term leases. The Committee is of the opinion that this should be a high priority because it will save money and provide better and more convenient access to the public.

- ii. There is no formal relationship with the Public Protector, although complaints have been referred between the institutions where appropriate. The Committee is pleased to note that the Commission has an electronic database and system that allows it to monitor complaints referred to other constitutional bodies. As previously recommended, this database should be integrated with those of other human rights bodies as soon as possible.

3.8. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Commission has experienced internal dissent and this led to the resignation of its Chief Executive Officer towards the end of 2005. According to news reports, the Commission had been beset with difficulties in the preceding two years, including an exodus of staff and reports of victimisation by senior management. In July 2005 unhappy staff members addressed an open letter to the Speaker of the National Assembly stating that at least 15 staff members had resigned in the first six months of the year and asking for her urgent intervention to save the Commission from a "crisis".
- b) The structural reasons for such tensions can be found in the relevant provisions of the Public Finance Management Act that assigns

the position of chief accounting officer to the Chief Executive Officer. The Chairperson of the Commission also informed the Committee that the Human Rights Commission Act fails to make it clear that the Chairperson is the head of the Commission. This has led to confusion about the hierarchical relationship between the Chief Executive Officer and the Chairperson of the Commission and the lines of authority between them. The Committee believes that establishing clear lines of authority is imperative in any institution or body, and has made appropriate recommendations to deal with such problems should they arise in the future in Chapter 2 of this report.

- c) The division of roles and responsibilities amongst Commissioners and between commissioners and staff has not always been clear, creating tensions that have impacted on the Commission's organisational efficiency and effectiveness. The Committee is pleased to note that in order to avoid the potential for conflict, the Commissioners and Chief Executive Officer have signed performance contracts. In addition, they meet regularly to ensure the smooth running of the Commission. The Commission has also adopted a document in 2006 that outlines the channels of accountability in the organisation. Furthermore, Commissioners conduct visits to the provincial offices to ensure the overall smooth running of the organisation.
- d) The Committee finds that the issue of full-time Commissioners undertaking private work requires clarification. There is no policy in place that requires Commissioners to disclose or seek permission for their involvement in private or commercial concerns. However, in September 2006 Commissioners were for the first time required to

declare their membership of boards or organisations, and whether such memberships were accompanied by financial reward. The issue of the disclosure of financial interests, as well as membership of boards is discussed more fully in Chapter 2 of this report. The Committee also makes recommendations in this regard.

- e) The Committee notes that in the absence of the necessary legislative framework contemplated in terms of section 219(5) of the Constitution, the President determines the remuneration and conditions of service of Commissioners in consultation with the Cabinet and the Minister of Finance. Such an arrangement can create the perception that the independence of the Commissioners is not fully safeguarded. The Committee therefore finds this arrangement wholly unsatisfactory. The Committee makes recommendations in this regard in Chapter 2 of this report.

3.9. FINANCIAL ARRANGEMENTS

- a) Members of the Commission informed the Committee that the Chief Executive Officer prepares the draft budget in consultation with the Commissioners. Once this process is finalised, it is submitted to the Treasury to influence the Treasury's budgetary determination in terms of the Medium Term Expenditure Framework. A copy of the budget is also submitted to the Director-General of the Department of Justice and Constitutional Development.
- b) This is done in October and months later the Commission is informed about the size of its budget by the Department of Justice and Constitutional Development. The Chairperson of the Commission made it clear

that the Chief Executive Officer never interacts with the department regarding the Commission's budget.

- c) The National Treasury makes its recommendation to Cabinet where the Minister of Justice and Constitutional Development may have to defend the budget of the Commission. There seems to be some confusion, however, about the role of the Minister and her officials in the budgeting process.
- d) The Committee believes that there is a need to ensure consistency and certainty in the funding arrangements of the institutions under review, which at present are sadly lacking. The Committee addresses ways to deal with this matter in Chapter 2 of this report.
- e) The Committee notes with approval that the Commission has received unqualified audit reports for five consecutive years. Expenditure trends versus budget allocation have increased over the past five years due to an increase in the Commission's activities. Some of these activities relate to the legislative duties of the Commission in terms of the Promotion of Access to Information Act and the Promotion of Equality and Prevention of Unfair Discrimination Act.
- f) In 2001/02 the Commission was allocated R32.7 million, which has increased to R 49.2 million in 2006/07. The following table provides a detailed breakdown of the Commission's baseline allocation and expenditure since 2003/2004, as well as of the increases in terms of the Medium Term Expenditure Framework.

**Table 1: Budget allocation and expenditure
2003/04 – 2009/10⁴⁴**

R'000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Budget Allocation	32 728	37 653	41 774	49 220	55 281	60 603	66 129
Expenditure	29 458	38 827	42 393				
Surplus/ (Deficit)	3 270	(1 174)	(719)				

g) The Committee notes with concern that there has been a dramatic increase in personnel costs and that these comprise roughly 60% of total expenditure. However, the Committee was unable to quantify to what extent the increased budget and increased spending on personnel have contributed to an increase in the mandated activities of the Commission.

4. General conclusions

a) It appears to the Committee that the Human Rights Commission more than adequately satisfies requirements as identified in the Committee's terms of reference with regard to professionalism, efficiency and effectiveness. The Committee believes that the work done by the Commission is of vital relevance for South Africa and makes an important contribution to the deepening of democracy and the achievement of a human rights culture in this country.

b) As pointed out previously, however, legislation governing this institution is outdated and must be amended. There is also a need, firstly, for closer co-operation between human rights institutions and, secondly, for a rationalisation of functions, role and organi-

sation of the various human rights institutions to ensure that the rights of vulnerable and marginalised sectors of society are given priority and to bring our institutions in line with international good practice in this regard.

c) The Committee considers the appointment procedures for Commissioners to be inappropriate. In Chapter 2 of this report, the Committee makes recommendations that it believes will enhance consistency, coherence and accountability in this process.

d) The Committee supports the Commission's intentions to establish mechanisms to enhance collaboration and co-ordination with other Chapter 9 and associated institutions and civil society organisations. The Committee encourages the Commission to be more vigorous in its efforts in this regard. A full discussion is found in Chapter 2 of this report, as well as recommendations in this regard.

e) The parliamentary mechanisms for oversight of the work of the Commission and engagement with its reports are inadequate. The Committee makes general recommendations in Chapter 2 for the improvement of the oversight and accountability mechanisms

⁴⁴National Treasury (2007), Estimates of National Expenditure and the Commission's submission to the Committee

that would apply to all the Chapter 9 and associated institutions under review.

- f) The budget process and funding model of the adversely affects its accountability and independence. The Committee makes general recommendations in Chapter 2 for the improvement of the budget process that would apply to all the Chapter 9 and associated institutions under review.

5. Recommendations

The principal recommendation of the Committee in respect of the Human Rights Commission is to establish a Commission that would comprehensively address the promotion and protection of all human rights within a single institution. This recommendation flows from the Committee's understanding that all human rights are interdependent and indivisible and that one well-resourced body would better address the human rights needs of especially the most marginalised and vulnerable members of the community.

The Committee is, however, aware of the fact that the establishment of a single Commission is a complex task that will also require significant constitutional amendment. The Committee discusses the reasons and advantages for such a move in Chapter 2 of this report, where it also provides detailed proposals for the implementation of this recommendation.

The Committee notes that this amalgamation may take some time to complete but that the Commission may well benefit from the insights gained during this review process. The Committee is, therefore, of the opinion that there is a need for the immediate implementation of specific recommendations in this regard.

5.1. RECOMMENDATIONS FOR IMMEDIATE IMPLEMENTATION

The Committee makes the following recommendations to further improve the efficiency, effectiveness and independence of the Commission:

- a) The Department of Justice and Constitutional Development should –
- i. Finalise and table in Parliament forthwith a new draft of the Human Rights Commission Act of 1994 to bring it into line with the 1996 Constitution and the mandates of the Commission. The draft Bill should also address the issues concerning the respective responsibilities and powers of the Chairperson and Chief Executive Officer of the Commission.
 - ii. The draft should further provide for the regulation of pecuniary and other interests of Commissioners and senior officials in line with the recommendations of the Committee, and should require that the Commissioners and officials disclose their interests in a register that is kept available to interested parties.
- b) In particular, Parliament should –
- i. Initiate a review of the appointments and budget arrangements for all the Commissions to support further and assert the Commissions' independence. The Committee makes specific proposals in this regard in Chapter 2 of this report.
 - ii. Initiate the speedy appointment of at least two more Commissioners. One should be specifically designated to deal with the rights of disabled persons and

- the other with access to information issues.
- iii. Ensure that no less than seven Commissioners are appointed for a term of no more than 7 years, renewable for a further term.
 - iv. Ensure that the Portfolio Committee on Justice and Constitutional Development meets with the Commission more often to review the Commission's annual report and strategic plan and activities.
 - v. In consultation with the Committee of Chairpersons of the National Assembly, co-ordinate the Commission's interactions with other parliamentary committees.
 - vi. Pass an amendment to the Human Rights Commission Act 54 of 1994 to provide for the President to extend the term of office of the current Commissioners for a period of 2 years. Parliament should ensure that the comprehensive revision of the Act is completed before this extended term of office expires.
- c) In the meantime, the Commission should: -
- i. Initiate the process of establishing formal collaborative relationships with other relevant Chapter 9 institutions as suggested in this chapter to ensure far closer co-operation between institutions with a view to their eventual amalgamation. This process must pay special attention to the need to integrate the complaints databases of the relevant human rights institutions, as discussed above.
 - ii. Use the powers granted to the Commission in terms of section 6 of the Human Rights Commission Act, or corresponding provisions in the proposed amending legislation, to bring to the attention of the National Assembly through the Office of the Speaker shocking instances of departmental failures or unsatisfactory responses to any enquiries or complaints.
 - iii. Develop a communications policy and strategy to raise awareness of and popularise its work.
 - iv. Expand on and further invigorate public awareness campaigns and public education programmes.



CHAPTER 13

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

1. Background

The Independent Communications Authority of South Africa (the Authority) is an independent body established as the regulator and main licensing body in the broadcasting and telecommunications sectors. The Authority is the successor to the previous Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority and took over their functions.

The rationale for the merger of these two bodies in 2000 into a single entity is ostensibly found in the increasing convergence of the broadcasting, telecommunications and information technology sectors, as well as in efficiency and cost benefits. However, neither the enabling legislation, nor the Authority's internal structure in which the divisions for broadcasting and telecommunications continued to operate quite separately from each other, reflected these technological advancements. It was only in 2005, with the enactment of the Electronic Communications Act 36 of 2005, that the underlying legislation pertaining to broadcasting and telecommunications was repealed to effect convergence of these sectors.

The enactment of legislation to establish the Authority has a complex history, as the broadcasting and telecommunications sectors have developed separately and were regulated by different laws. However, digitalisation has seen the traditionally separate broadcasting and telecommunications sectors converging, with the result that the old service and technology-specific legislation no longer met the requirements of markets that had subsequently merged.

1.1. INDEPENDENT BROADCASTING AUTHORITY

The Independent Broadcasting Authority was established in terms of the Independent Broadcasting Act 153 of 1993 on 30 March 1994, its purpose being to ensure a free, fair and open broadcasting system. Its objects provided for the regulation of broadcasting activities in the public interest to promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level, which when viewed collectively would cater for all languages and cultural groups. The legislation established an independent regulatory authority to ensure the development of three levels of broadcasting: public, private and community-based.⁴⁵

The passage of the Independent Broadcasting Authority Act in 1994 took place "in the pressure-cooker environment of the political negotiations";⁴⁶ giving effect to the prevailing view that freedom of expression is a prerequisite for free political activity. As such, priority was given to ensuring that the regulation of broadcasting was done independently of the then government and, therefore, that broadcasting was free from political interference. A fair process for awarding licenses, whether to private or public broadcasters, was also considered important.

These priorities were captured in section 15 of the 1993 Constitution, which entrenched the right of freedom of expression. Specifically, section 15(2) of the 1993 Constitution provided that "all media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of diversity of opinion". While section 16 of the 1996 Constitution sets out the right of freedom of expression, it does not contain a provision

⁴⁵ Horwitz, R. *Communications and Democratic Reform in South Africa*. Cambridge University Press: New York. 2005.

⁴⁶ Horwitz, R. 2005. p 148

similar to that contained in section 15(2) of the 1993 Constitution. An independent regulator for broadcasting is instead provided for in Chapter 9 of the 1996 Constitution that deals with state institutions supporting constitutional democracy. Section 192 of the Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, as well as to ensure fairness and diversity of views broadly representing our society.

However, the provision relating to broadcasting is not placed in section 181 of the Constitution which lists the other institutions found in Chapter 9 as state institutions strengthening constitutional democracy. A possible explanation for this distinction is that the constitutional entrenchment of the broadcasting regulator was decided only in 1996, shortly before the passage of the final Constitution. The negotiators debated the proper location in the Constitution of the principle that had been embodied in section 15(2) of the 1993 Constitution, as the drafters of the 1996 Constitution did not believe that the provision should form part of the Bill of Rights. Nevertheless, it was thought that the protection afforded by section 15(2) of the 1993 Constitution was sufficiently important to require incorporation elsewhere in the Constitution.

Traditionally broadcasters have been closely regulated in terms of who may broadcast and what may be broadcast. Given South Africa's political history, the provision for the existence of an independent regulator for broadcasting is intended to give meaning to certain rights such as freedom of expression, the right of access to information, and language rights. If implemented effectively, such regulation can therefore contribute to the quality of democracy.

1.2. SOUTH AFRICAN TELECOMMUNICATIONS REGULATORY AUTHORITY

The importance of telecommunications to modern life should not be underestimated. It would not be stretching the point too far to say that virtually all of modern life is dependent on telecommunications. Certainly, it is a driving factor in economic growth, determining a country's ability to participate in the global economy.⁴⁷ Direct revenue from telecommunication services comprises, on average, between two and three percent of the gross domestic product for most countries. In South Africa, this percentage is significantly higher, being estimated to be in the region of six percent, and it is impossible to determine the value of the sector to the economy as a whole.⁴⁸

Until 1992, telecommunications in South Africa was delivered on a monopoly basis through a government department responsible for Posts and Telecommunications. The department fell under the control of the Postmaster General, who was subject only to the Minister of Posts and Telecommunications. South Africa was not unique in this regard. It is only in the past 25 years that there has been a trend in parts of the democratic world to liberalise telecommunications.⁴⁹ The alleged benefits of liberalisation (and the resulting competition) for the sector include greater efficiency, cheaper services, more pricing options, more services, better and more reliable technology, and better customer service. This is in contrast to the historical position that viewed the telecommunications industry as a natural monopoly, as this was thought to be the most efficient and effective way of providing services at the lowest cost.⁵⁰

Before 1996, the communications sector in South Africa was a monopoly driven exclusive-

⁴⁷ Love, D. An Overview of the South African Telecommunications Industry: From Pre-1994 Policy-Making to Gloomy 2005 Realities. Honours Research report submitted to the University of the Witwatersrand. Supervisor: Professor Tom Lodge. 2005. p 3.

⁴⁸ Love, D. 2005. p 4.

⁴⁹ Love, D. 2005.

⁵⁰ Love, D. 2005. p 3

ly by the government Department of Posts and Telecommunications. The sector was commercialised in 1992 with the establishment of an incorporated entity Telkom SA Limited (Telkom). However, the *locus* of power remained largely unaltered with the Postmaster General and the Minister of Communications retaining control over Telkom.

In 1996 the new government issued a White Paper that expressed commitment to the ideal of telecommunications not being simply an aspect of development, but a precondition for its success.⁵¹ The White Paper set out a clear route marking the transition from exclusivity through a duopoly towards full liberalisation. The resulting regulatory framework created by the Telecommunications Act 103 of 1996 was intended to smooth the sector's liberalisation.

It is widely accepted that a major component of the reform of the communication's sector is the existence of an independent regulator that is considered to be credible to the industry, legitimate to consumers and accountable to stakeholders.⁵² As, globally, this sector has in the past been characterised by state-owned monopolies, the international model now requires that these regulators be independent to reduce the potential for conflict of interest arising from the multiple public roles played by the state in this sector. Therefore, regulators are intended "to set the rules of the game, particularly reduce barriers for new entrants and curtail any abuses of the dominant market power of incumbents who often continued to be owned by the state".⁵³

It is argued that the presence of an independent regulator has a direct influence on the speed and quality of reform, and is essential for raising investment capital, and ensuring efficient and responsive service delivery.⁵⁴

However, while there may be general agreement regarding the need for an independent regulator, the complex relationship of government with the industry creates many manifestations of this ideal.⁵⁵

In South Africa, while the 1996 Constitution has provided in section 192 that national legislation must create an independent authority to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society, no such constitutional imperative existed for telecommunications. Instead, the Telecommunications Act 103 of 1996 created an independent regulator.

The South African Telecommunications Regulatory Authority was established in 1997 with regulatory responsibilities. The Minister of Communications was empowered to play a major role in licensing and regulation of the sector, despite the possibility for conflicts of interest arising from the Minister's multiple roles in the sector as both policy maker and custodian of state assets.

1.3. INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

As previously stated, in May 2000 both the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority were dissolved, and their functions transferred to the newly established Authority. The Independent Communications Authority of South Africa Act 13 of 2000 established a single regulatory authority for the purposes of regulating both broadcasting and telecommunications. The merger of the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority was undertaken in recognition of the rapid convergence of the broadcasting, telecommunications and infor-

⁵¹ Love, D. 2005.

⁵² Love, D. 2005. p 6.

⁵³ Gillwald, A. Submission on the Independent Communications Authority of South Africa (ICASA), 2007. p 6

⁵⁴ Cohen, T. Rethinking (Reluctant) Capture: The Development of South African Telecommunications 1992 – 2002 and the Impact of Regulation. Work in progress for the TPRC Conference, Washington D.C., 28 September 2002.

⁵⁵ Cohen, T. 28 September 2002.

mation technology sectors requiring a single regulator.

Nevertheless, more than a decade since the transition to democracy, South Africa continues to have a heavily regulated and partially government-owned communications sector. Yet the country's social and economic development agenda remains pressing. Prices of services have risen considerably; for example, the price of a landline remains unaffordable to the vast majority of South Africans. These high prices are not only detrimental to the economy, but also prevent many South Africans from participating in the knowledge economy.⁵⁶

2. Constitutional and legal mandate

As previously mentioned, the 1996 Constitution establishes through national legislation an independent regulatory authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing our society.

Both the Constitution and the enabling legislation describe the Authority as independent. Not only does section 192 of the Constitution establish an independent regulator through legislation, the enabling legislation affirms this by providing that the Authority is independent, subject only to the Constitution and the law. The Authority must be impartial, and perform its functions without fear, favour or prejudice.

Furthermore, the legislation specifically provides that the Authority must function without any political or commercial interference. While the issue of independence is explored more fully elsewhere in this chapter, this is a theme that the Committee was referred to time and time again, particularly in the submissions it

received. In this regard, it is noteworthy that the submissions from the Ministry and Department of Communications were both devoted entirely to this topic.

As successor-in-title to the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority, the Authority regulates the environment for operators in broadcasting and telecommunications and provides universal access and service delivery. Its functions include making regulations; issuing licences to providers of telecommunications and broadcasting services; planning; supervising licence holders; controlling and managing the frequency spectrum; hearing and deciding on disputes and complaints brought by industry or members of the public against licence holders; and protecting consumers from unfair business practices, poor quality services and harmful or inferior products. The Authority has been recently assigned postal services, previously under the auspices of the Department of Communications.

The Authority must also give effect to the Electronic Communications Act 36 of 2005. This Act repealed the Independent Broadcasting Authority Act, the Telecommunications Act and part of the Broadcasting Act 4 of 1999. The Electronic Communications Act provides for the regulation of electronic communications (which includes broadcasting, telecommunications, network services and electronic communications) in the public interest and for that purpose to promote and facilitate convergence.

3. Findings

The Committee met with the Independent Communications Authority of South Africa on 20 February 2007. The discussions were informed by the Authority's written response to

⁵⁶Love, D. 2005.

the questionnaire circulated by the Committee prior to the meeting, as well as submissions from the Ministry and the Department of Communications and individuals. The Committee also requested additional information from the Authority, which was provided, and received subsequent submissions from the Department of Communications. The Committee finds as follows:

3.1. CONSTITUTIONAL AND LEGAL BASIS

a) The Constitution and enabling legislation is clear regarding the Authority's independence. Section 192 of the Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society.

Accordingly, the Independent Communications Authority of South Africa Act 13 of 2000, as amended, guarantees the Authority's independence: Section 3(3) not only states that the Authority is independent, subject only to the Constitution and the law, and must be impartial, but requires that it perform its functions without fear, favour or prejudice. In this respect section 3(3) mirrors the provisions of section 181(2) of the Constitution, which is the provision that lists the other bodies created in Chapter 9 of the Constitution as state institutions strengthening constitutional democracy. Furthermore, section 3(4) of the Act states that the Authority must function without any political or commercial interference.

b) The Committee received submissions on the issue of the Authority's independence. It was put to the Committee that the constitutional provision for the establishment of a

body of this nature is inappropriate. In particular, the Department of Communications presented a number of factors in support of this view, including:

- i. The Authority is not listed in section 181 of the Constitution and, consequently, can be distinguished from the other institutions described in Chapter 9 of the Constitution;
 - ii. The constitutional criteria of fairness, efficiency and diversity were intended to apply to broadcasting, and not to telecommunications or to electronic communications; and
 - iii. Given the rapid technological developments within the communications sector, it is no longer appropriate to retain the Authority's constitutional status. Constitutional entrenchment creates the danger that the regulator might be unable to adapt sufficiently swiftly to an ever-changing technological environment.
- c) The Committee notes that the submissions from the Ministry and Department of Communications only address the Authority's legal standing. The Committee is of the view that this is a misunderstanding, as the Constitution is not the only place that provides for an independent regulator. In fact, the phraseology of the enabling legislation goes much further than the constitutional provisions. Furthermore, there are other constitutional institutions, not found in Chapter 9 of the Constitution, which are nonetheless independent. The relevant constitutional provisions and the legislation determine their legal status.

- d) The Committee also considered the submission of Parliament's Constitutional Review Committee that section 192 of the Constitution should be amended by substituting the word 'communications' for the word "broadcasting". However, the Committee is of the view that for political and legal reasons such an amendment is unnecessary at this time.
- e) Further, on the issue of independence, the Committee notes that while the Authority is described in the enabling legislation as independent, the Independent Communications Authority of South Africa Act, as amended, contains a number of provisions that appear to be in conflict with, or potentially curtail, the Authority's independence:
- i. Section 6A provides that the Minister must, in consultation with the National Assembly, establish a performance management system to monitor and evaluate the performance of the Chairperson and other Councillors of the Council established by the Act. Performance agreements are to be concluded between every Councillor, including the chairperson, and the Minister, and the evaluation process is to be undertaken by a panel constituted by the Minister in consultation with the National Assembly. The panel's report, however, is submitted to the National Assembly for consideration. The Committee notes however, that the system is not yet operational. In the view of the Committee, this is a matter for the Authority.
 - ii. Section 5 provides that the Minister, on approval by the National Assembly, appoints the Councillors. The appointment of the Councillors by the Minister is discussed in greater detail later in this chapter.
 - iii. Section 10 provides that the chairperson and Councillors are paid such remuneration and allowances and receive such benefits as the Minister may determine with the concurrence of the Minister of Finance.
 - iv. In terms of section 14A(2), the Authority may appoint experts to assist it in performing its functions. However, where the expert is not a citizen or permanent resident, the Authority must seek the Minister's approval before appointing such expert.
 - v. Section 15 states that, in addition to monies appropriated from Parliament, the Authority may also receive money determined in any other manner as may be agreed between the Minister and the Minister of Finance and approved by Cabinet. The Authority has made proposals on the issue of self-funding. These are discussed in greater detail later in this chapter.
- f) The Committee is of the view that the powers that the legislation gives to the Minister, as set out above, may negatively affect the independence of the Authority from the Executive and should, therefore, be revised.
- g) The Committee is convinced of the necessity for the existence of an independent regulator for both the protection of free speech and the economic development of the sector. In particular, the Committee highlights the importance of an independent regulator for broadcasting as a key construct of democracy. Furthermore, markets where

monopolies or, as is the case in South Africa, duopolies continue to exist require that the regulator be vigilant in monitoring the behaviour of the incumbent(s) with regard to possible overcharging and denial of fair access to rivals. In South Africa, despite some liberalisation of the telecommunications market, the state has retained significant shareholdings in the communications sector.

- h) In its supplementary submission to the Committee, the Authority points to the necessity for competition within the communications sector. A competitive communications environment is regarded as being a fundamental enabler of economic growth in both emerging and developed markets. The liberalisation of our communications sector, which is accompanied by a rapidly increasing range of services and stakeholders, requires a sophisticated and independent regulator to ensure maximum benefits to our society.

3.2. UNDERSTANDING AND INTERPRETATION OF MANDATE

- a) As discussed above, in terms of its constitutional and legal mandate, the Authority's objects are to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution, as well as the regulation of electronic communications, which has now overtaken broadcasting and telecommunications, and postal matters.
- b) The Committee notes that the Authority's mandate is extremely broad. The Committee understands that the increased scope of responsibilities that accompany the passing

of the Electronic Communications Act will have implications for the Authority's organisational structure and processes, as well as its workload.

- c) The Committee finds the Authority's understanding of its functions adequate.
- i. It was put to the Committee that the current high prices within the telecommunications sector are indicative of systemic problems relating to a lack of competition.⁵⁷ This is a serious concern as it speaks to the Authority's core mandate, which is to regulate the communications sector in the public interest and to ensure fair and diverse access to, and provision of, services. High prices prevent access to a wide range of services, effectively barring, or creating unequal opportunities for, access to the knowledge economy that underpins modern life.
- ii. The Committee notes that the Authority is unique amongst the Chapter 9 and associated institutions as it is the only one that issues licenses. The Committee considers this to be a critical function, as it has great potential for corruption.

3.3. APPOINTMENTS

- a) In terms of the Independent Communications Authority of South Africa Act, as amended, the Minister appoints the Chairperson and eight Councillors upon the approval of the National Assembly. The appointment process must encompass the following principles: public participation in the nomination process; transparency and openness; and the publication of the shortlist for comment. The procedure for the appointment of Councillors is as follows:

⁵⁷ Gillwald, A. 2007.

- i. The National Assembly must submit a list to the Minister that is one –and-a-half times as long as the required number of appointees. Technical and sectoral experts may assist the National Assembly in the selection, evaluation and appointment processes.
 - ii. The Minister must then recommend to the National Assembly the persons he or she proposes to appoint from the list submitted. The National Assembly may request that the Minister reconsider if it is not satisfied with the Minister’s selection of appointees measured against the qualifications listed in the amended legislation. The Committee notes that, beyond requiring that the Minister reconsider his or her selection of appointees, the legislation is silent as to what should happen if the Minister and the National Assembly disagree on the Minister’s selection of appointees.
- b) In order to be considered as suitable candidates for appointment, Councillors must be persons who are committed to fairness, freedom of expression, openness and accountability and when viewed collectively are representative of a broad section of the population. Councillors must possess suitable qualifications, expertise and experience in a very wide range of fields that include, among others, broadcasting, electronic communications, postal policy or operations, public policy development, electronic engineering, law, marketing, journalism, entertainment, education, economics, finance or any other relevant expertise or qualifications.
 - c) The Chairperson is appointed for a renewable period of five years. Other Councillors are appointed for a term of four years, renewable for a further term. The Chairperson and all Councillors are appointed on a full-time basis, to the exclusion of any other remunerative employment, occupation or office.
 - d) The Committee learnt that highly paid, personal technical advisers assist each Councillor. This is the only institution under review that has such an arrangement. The Committee finds the appointment of these technical advisers both unusual and costly.
 - e) The Committee notes the recent decision to increase the number of Councillors to nine. This is not only in contrast to the international trend to reduce the size of regulatory bodies as the sector matures, but is also costly, and inhibits rather than enhances speedy decision-making. The Committee understands that the Authority had previously made submissions requesting that the number of Councillors be reduced but its proposals were not accepted by Parliament at the time. However, the Committee understands that there is a division of functions between Councillors and that, therefore, a degree of expertise is required. The Committee is unable to decide in this very technical area whether there should be five, seven or even eleven Councillors. While the view of the Authority is important, it seems that the nature of the Authority will determine its composition, and that any changes must be accompanied by greater consultation.
 - f) The Committee highlights that until now there has not been a systematic study of the various, and vastly divergent, appointment procedures that are applicable to the Chapter 9 and associated institutions. The appointment of Councillors to the Authority’s

Council illustrates once more the lack of uniformity and consistency when selecting and appointing office-bearers. While the Committee acknowledges that a “one size fits all” approach is inappropriate, the Committee notes that, apart from the Pan African Language Board, this is the only institution under review in respect of which the Minister and not the President appoints office-bearers. The Committee is dissatisfied with the extent of the Minister’s involvement in the appointment of Councillors as this may create a perception that the Authority is not an independent institution.

3.4. PUBLIC AWARENESS

- a) As part of its functions as regulator the Authority must interact with the public in various ways, including conducting public hearings on licensing, regulation and policy matters. The Authority also uses media releases and interviews, the website and corporate brochures as the main forms of communication to inform the public of the Authority’s regulatory activities. The Authority receives public enquiries through an e-mail system. The Committee commends the Authority on its public participation efforts but highlights the need for a systematic and coherent public awareness programme and communications policy and strategy, especially in relation to consumer complaints against operators.
- b) The Committee notes the absence of a formal mechanism to deal with complaints by the public regarding the Authority’s work or the failure to attend to issues. This is unacceptable. The Authority does have a policy that, where a complainant has exhausted the avenues of complaint within the Authority, he or she will be directed to the Public Protector.

3.5. RELATIONSHIP WITH PARLIAMENT

- a) The Committee notes that the Authority is accountable to the National Assembly and appears before the Portfolio Committee on Communications on average twice a year. The Independent Communications Authority of South Africa Act, as amended, requires that the Authority present the Minister with its annual report, which is then tabled in Parliament. The Committee is of the view that this can create the perception that the Authority lacks independence, thereby undermining its credibility.
- b) The Committee feels that there is need for stronger and more effective interaction between the Authority and the portfolio committee. In this regard, attention is drawn to the Committee’s recommendations to strengthen the role of portfolio committees when exercising oversight of the institutions under review.
- c) More specifically concerning oversight of the Authority, the Committee is of the view that the issue of technical expertise for membership of a parliamentary committee of this nature has not received sufficient attention. If robust interaction is to occur between the portfolio committee and the Authority, members of the portfolio committee must possess a certain degree of technical competence in, or knowledge of, the field. This is of particular importance in light of the portfolio committee’s role in the appointment of Councillors and the assessment of performance.
- d) The Committee notes that the provision that permits the appointment of a panel of technical and sectoral experts to assist the portfolio committee in the appointments process is not mandatory, and, in fact, this provision was not

made use of in the first cycle of appointments under the amended legislation.

3.6. RELATIONSHIP WITH CHAPTER 9 AND ASSOCIATED INSTITUTIONS

- a) The Authority contended that any overlap between it and the institutions under review is of a general nature insofar as the Authority's work is aimed at promoting democracy and ensuring freedom of expression.
- b) As is the general case for all the institutions under review, the Committee finds that there is no formal collaborative relationship between the Authority and any of the Chapter 9 or associated institutions. The Committee makes specific recommendations for the collaboration and co-operation of the institutions under review.

3.7. RELATIONSHIP WITH THE EXECUTIVE

- a) The Committee notes that in its submission the Authority stated that it maintains a co-operative and effective relationship with the Minister of Communications on all matters pertaining to policy and implementation. A system of minuted, bilateral meetings ensures overall co-ordination between policy and implementation activities of both.
- b) Although the Authority is constitutionally and legally independent, it described itself as being "connected" to the executive arm of government through the Ministry of Communications. The Ministry plays a supportive role on matters of policy, strategic alignment, and budgeting. As previously mentioned, the Authority also submits its annual report to Parliament *via* the Minister of Communications.

3.8. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

- a) The Committee accepts that a lack of capacity, experience, resources and understanding of the sector has contributed to the Authority's difficulties.⁵⁸ The Committee has learnt that the Authority has had to resort to the use of consultants to compensate for the shortage of skills available to it. Unfortunately the use of consultants often fails to take into account the nature of the South African market and the social needs of a developing nation, and has failed to transfer the skills necessary for implementation.
- b) The Committee finds that the difficulties experienced by the Authority with the recruitment and retention of staff is a matter for serious concern. The Committee accepts that the Authority's inability to pay market-related salaries is a contributory factor, particularly in an industry that offers lucrative and competitive packages. In this regard, the Committee highlights the need for a staff recruitment and retention strategy.
- c) The Committee received a submission that perceptions of the Authority's lack of independence and inability to regulate effectively undermine its credibility. In a self-perpetuating cycle, such perceptions dissuade those who have expertise and political weight from availing themselves for appointment to the Authority or its secretariat, compounding the capacity constraints of the Authority.
- d) The Committee understands that the Independent Communications Authority of South Africa Act, as amended, requires that a substantial number of regulations be drafted (one submission put the figure at no less

⁵⁸Gillwald, A. Submission on the Independent Communications Authority of South Africa (ICASA), 2007. p 9

than 200 regulations), either in the form of entirely new regulations, or existing regulations that must be reformulated to meet the requirements of the Electronic Communications Act. Furthermore, the Committee learnt that the Authority has been handed additional responsibilities (for example, it is now the regulator for postal services) but these have not been accompanied by additional budget allocations, which is placing the already under-resourced Authority under increased financial strain.

- e) The Committee finds that internal conflict and tensions have undermined the Authority's operational effectiveness and efficiency. The Committee notes the events surrounding the suspension of the Authority's Chief Executive Officer in January 2006 that left the Authority without a Chief Executive Officer for approximately eight months. The Committee finds this to be an extraordinary way of operating, especially since the Chief Executive Officer subsequently resigned without any disciplinary procedures being conducted.
- f) The Authority states that the remuneration that Councillors receive is not competitive. In this regard, the Committee notes the wide discrepancies that exist between the various institutions regarding the determination of remuneration, benefits and conditions of service for office-bearers. The Committee makes general recommendations in this regard in Chapter 2 of this report.
- g) The Committee notes that the Authority has adopted a code of conduct that sets out the standards to promote and ensure the integrity and good conduct of its Chairperson, Councillors and Chief Executive

Officer. In addition, the Chairperson, Councillors and Chief Executive Officer are required to declare all financial interests. These are recorded in a register, which has public and confidential sections. Section 12 of the Independent Communications Authority of South Africa Act, as amended, also prohibits Councillors from participating in meetings or hearings in which they have an interest. General recommendations are made in this regard in Chapter 2 of this report.

- h) The Committee has learnt that there is a great deal of litigation that involves the Authority. This is cumbersome, costly and time-consuming. The Committee is of the view that while this is not unusual in the communications industry internationally, mechanisms should be established to avert litigation through arbitration, for example.

3.9. FINANCIAL ARRANGEMENTS

- a) Adequate funding is a prerequisite for an effective and independent regulatory agency. From the evidence received, the Committee is of the view that the Authority's budget is inadequate for the efficient and effective performance of its operations, particularly in light of the many additional responsibilities that accompany the enactment of the Electronic Communications Act.
- b) The Authority's transformation from an organisation that is technology- and service-based to one that is focused on convergence requires substantial funding. Some of the needs that have been identified include a complete redesign of the existing regulations, as well as the re-organisation of the Authority's internal structuring involving,

amongst others, a skills audit for the entire staff, developing a comprehensive human resources database, consolidating enforcement-monitoring functions, and robust staff training on the implications of convergence. This transformation process may also require additional external expertise and support.

- c) The Committee heard that the Authority's sources of income are the funds allocated to it by Parliament and interest earned on cash balances. The Authority's budget allocation takes the form of direct transfers from the Department of Communications. There are substantial increases in the allocations in terms of the Medium Term Expenditure Framework. However, the Committee notes that in years past the Authority's operating expenses generally exceeded its income from government appropriations. Therefore, with the exception of 2003/04, the Authority has shown a deficit in each of the financial years under consideration, as is demonstrated in the Table below.
- d) At present all revenues from licence fees collected by the Authority are transferred to the National Revenue Fund. These are considerable amounts: In 2005/06 the Authority collected R1 486 million; while in 2004/05 it collected R1 256 million.
- e) The Committee investigated the possibility of alternative funding models, including the sourcing of funds over and above the parliamentary allocation. The Committee learnt that the Authority is developing a self-funding model that is based on the concept that a percentage of the licence fee revenue collected be retained to fund the Authority's operations, thereby eliminating its reliance on government funding. Initially, the Committee rejected this proposal, being persuaded, amongst others, by the fact that there are too many uncertainties (the amounts collected may vary from one year to the next), and the potential that this may well result in the inflation of licensing fees creating additional barriers to market entry.

Table 1: Income and Expenditure: 2003/04 – 2009/10⁵⁹

R '000	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10
Grant available	123 954	128 633	150 489	199 738	222 475	242 272	263 607
Expenditure	116 949	153 262	178 605				
Surplus/ (Deficit)	7 005	(24 628)	(11 382)				

- f) The Authority subsequently made a supplementary submission on its proposal to devel-

⁵⁹National Treasury (2007), Estimates of National Expenditure and the Authorities submission to the Committee

op a self-funding model in terms of which the Authority would fund its operations by retaining a percentage of the licence fee revenue that it collects, thereby eliminating its reliance on government funding.

- g) As noted previously, the Authority collects approximately R1 billion in fees from industry players, transferring all collected fees to the National Revenue Fund. The current fee structure of the South African communications sector varies according to the technologies and services offered, and are a combination of regulatory fees and additional fees based on market activity. The Authority's funding proposal identifies four potential funding models for national regulators, all of which have certain advantages and disadvantages:
- i. The first option is that of government grants. This is the present budgetary arrangement and has the advantage of providing the most predictable cash flow solution. However, this option does not allow for financial flexibility in an environment that is characterised by rapid change, and there is also the danger that the amount allocated may be insufficient. Furthermore, there is significant risk of the regulator becoming embroiled in political debate, which could prevent it from pursuing its independent mandate, thereby undermining its credibility and legitimacy.
 - ii. The second option is that of regulatory fees. The funding of regulators entirely from regulatory fees would dissolve the tension between market developments and political interests. Potential disadvantages are the possibility of high fluctuations in cash flow and the erection of barriers to market entry due to excessive fees. Both of these disadvantages can be addressed by legislation.
 - iii. A third option is funding from market activities. While this option is the most market-friendly and the regulator itself has a vested interest in maintaining a prosperous sector, the major disadvantage of this option is difficulties of implementing while respecting some basic principles of regulation so that only revenues from regulated activities are subject to regulatory charges.
 - iv. A hybrid model incorporates a number of these models.
- h) The Authority identified six criteria which it believes require consideration in order to assess whether a funding option will provide it with sufficient resources in the long term, namely political independence, financial flexibility, income stability, ease of implementation, incentives towards pro-market regulation and credibility among market players. Taking all of these into account, the Authority concludes that it will clearly benefit from a government-independent hybrid model of regulatory and market-activity-based fees.
- i) Such a model would not only significantly enhance the Authority's credibility within the sector, but it should also comfortably provide sufficient funding of its activities. Furthermore, the model would be easy to implement as the existing fee collection system could stay in place unaltered. The only change would be that the Authority would retain a portion of collected fees while continuing to transfer the remaining funds to the National Revenue Fund. There would

also be a savings on administrative costs associated with the government grants.

- j) The Committee notes that the Authority stated that it would need to retain approximately 30% of the fees collected to replace the present direct government funding. The Authority did warn, however, that sufficient funding through a percentage of collected fees could only be ensured if the overall fee collection base does not change significantly.
- k) A concern that is frequently raised is the accumulation of excess funds. Several options are available to address this concern.
- l) The Committee is persuaded by the Authority's submission on alternative funding models and recommends that it be permitted to retain a portion of the revenue it collects, the precise details of the funding model to be determined after further consultation with the relevant stakeholders.

4. General conclusions

- a) The Authority is a very important body to South Africa. The Committee finds the existence of an independent regulator necessary for the protection of free speech, as well as the creation of a stable industrial and investment environment for the development of this strategic sector in the information age.⁶⁰ However, the perception that the Authority lacks independence is potentially undermining of its credibility and, therefore, its legitimacy. This is undesirable.
- b) The Committee considers the present appointment procedures for Councillors to

be inappropriate. General recommendations are made to enhance consistency, coherence and accountability in Chapter 2 of this report, while specific recommendations are included below.

- c) The efficiency and effectiveness of the institution could be enhanced if certain institutional arrangements were addressed. These are elaborated in the recommendations below.
- d) The parliamentary mechanisms for oversight of the Authority's work are inadequate. In addition to recommendations that are specifically applicable to the Authority, the Committee makes general recommendations in Chapter 2 of this report for the improvement of the oversight and accountability mechanisms that would apply to all the Chapter 9 and associated institutions under review.
- e) The budget process and funding model of the Authority adversely affects its accountability and independence. The Committee makes general recommendations in Chapter 2 of this report for the improvement of the budget process that would apply to all the Chapter 9 and associated institutions reviewed. In addition, specific recommendations are made concerning the Authority's funding below.

5. Recommendations

The Committee recommends that -

- a) The appointment procedures for Councillors be reviewed to support and assert the

⁶⁰Gillwald, A. 2007. p 3

Authority's independence further. The Committee makes general proposals in this regard in Chapter 2 of this report. More specifically regarding appointments to the Authority, the Committee recommends that the legislation be amended as follows:

- i. The President, on the recommendation of the National Assembly, should appoint the Councillors.
 - ii. Regarding qualifications of Councillors for appointment, at least a third of those appointed should have technical expertise. This will obviate the need for technical advisers.
 - iii. The provision relating to the performance management system should be revised to remove the role of the Minister in this regard.
- b) The Authority's funding model should be revised on the basis as indicated in paragraph 3.9(h) above in order to support and enhance its independence and effectiveness.
- c) The legislative framework envisaged in terms of section 219(5) of the Constitution to determine the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution should be developed. The Committee makes proposals in this regard in Chapter 2 of this report.
- d) Certain institutional governance matters, such as a conflict-resolution policy and mechanisms, staff attraction and retention strategies and the Authority's governance model should be addressed to improve its efficiency and effectiveness.
- e) The directorships, partnerships and consultancies of Councillors and senior officials should be disclosed in the annual report. In addition, the disclosures of pecuniary and other interests of Councillors and staff members should be kept available in a register and an indication should be given in the annual report of where such information is available. General recommendations in this regard are made in Chapter 2 of this report.
- f) Collaborative relations with relevant Chapter 9 and related constitutional bodies should be established. The Committee makes general recommendations in this regard in Chapter 2 of this report.
- g) Mechanisms to improve the relationship and interaction between Parliament and the Authority should be determined. Consideration should be given to ensuring that members appointed to the Portfolio Committee on Communications have the relevant technical competence in the field. General recommendations are made in Chapter 2 of this report to strengthen portfolio committees in exercising oversight of the institutions under review. The role of the proposed unit in the Office of the Speaker discussed in Chapter 2 of this report should also be considered in this regard.

CHAPTER 14

CONCLUSION

The Committee, having conducted this first review, believes that it is correct to protect these bodies through our Constitution as was done in 1993 and 1996 because this insulates them from pressure, cajolement or undue influence.

The Committee considers this review to be a historic task of the National Assembly. It reflects on the strength of the democratic order that the National Assembly considered it appropriate to undertake this assessment of what this report already describes as uniquely positioned bodies, which are not paralleled anywhere else in the world.

The Committee is satisfied that, broadly speaking, the bodies have come up to the expectations laid down in the terms of reference issued by the National Assembly.

Whether all of these bodies should be included in Chapter 9 of the Constitution is a matter the Committee has given thought to. These bodies were set up when democrats felt that there should be special bodies to protect rights. The existence of these bodies was conditioned by time and context. Since then that context has changed. Democracy in our country now has firmer roots than in 1994 and the instruments of governance enthusiastically subscribe to the Bill of Rights.

The Committee therefore addressed this issue, but did so specifically in the context of strengthening the authority and functioning of what we call, broadly, Chapter 9 institutions within the paradigm of an entrenched culture of human rights. All the matters raised in this report and the recommendations put before the National Assembly should be considered in this context. It is very important that the National Assembly gives serious consideration

to the recommendations so that the work of these institutions is strengthened and the defects removed.

The Committee reiterates that it is vital to ensure the distinctiveness of the bodies as indicated in the report and their independent status, but in the area of human rights to give credence to interrelatedness. The Committee therefore proposes a cohesive, strong and comprehensive umbrella human rights body. The National Assembly and the Executive should give priority to this central recommendation.

Acknowledgements

The Committee could not have completed its work without the active participation of the institutions themselves, civil society and individuals. The Committee could not respond to all the individual submissions, as some were personal grievances to be dealt with elsewhere.

Members of the Committee have worked on other committees of a similar nature and would like specifically to mention the exceptional service rendered by the support staff assigned to this Committee. In particular, the Committee is grateful to the most senior member of staff assigned to the Committee, Dr. Gabriel, the researcher, Ms. Silkstone, the secretary, Mr. Philander, and Mr. Molukanele of the National Assembly Table.

The Committee issues a special word of thanks to Prof De Vos for assistance in drafting the report and the former Secretary to the National Assembly, Mr. Hahndiek, for assisting with editing and advice at the end of the reporting process.

ANNEXURE 1

SELECTED CONSTITUTIONAL PROVISIONS: CONSTITUTION OF SOUTH AFRICA, 1996

Chapter 1 Founding Principles

6. LANGUAGES

1. The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
2. Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- 3 (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
 - (b) Municipalities must take into account the language usage and preferences of their residents.
4. The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
5. A Pan South African Language Board established by national legislation must-
 - a) promote, and create conditions for, the development and use of-
 - i. all official languages;
 - ii. the Khoi, Nama and San languages; and
 - iii. sign language; and
 - b) promote and ensure respect for-
 - i. all languages commonly used by

communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

- ii. Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

Chapter 2 Bill of Rights

38. ENFORCEMENT OF RIGHTS

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of persons;
- d) anyone acting in the public interest; and
- e) an association acting in the interest of its members.

Chapter 3 Co-operative Government

41. PRINCIPLES OF CO-OPERATIVE GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

1. All spheres of government and all organs of state within each sphere must-
 - a) preserve the peace, national unity and the indivisibility of the Republic;
 - b) secure the well-being of the people of the Republic;
 - c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - d) be loyal to the Constitution, the Republic and its people;
 - e) respect the constitutional status, institu-

- tions, powers and functions of government in the other spheres;
- f) not assume any power or function except those conferred on them in terms of the Constitution;
 - g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
 - h) co-operate with one another in mutual trust and good faith by-
 - i. fostering friendly relations;
 - ii. assisting and supporting one another;
 - iii. informing one another of, and consulting one another on, matters of common interest;
 - iv. co-ordinating their actions and legislation with one another;
 - v. adhering to agreed procedures; and
 - vi. avoiding legal proceedings against one another.
2. An Act of Parliament must-
 - a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
 - b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
 3. An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
 4. If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

Chapter 9 State Institutions Supporting Constitutional Democracy

181. ESTABLISHMENT AND GOVERNING PRINCIPLES

1. The following state institutions strengthen constitutional democracy in the Republic:
 - a) The Public Protector.
 - b) The South African Human Rights Commission.
 - c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - d) The Commission for Gender Equality.
 - e) The Auditor-General.
 - f) The Electoral Commission.
2. These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
4. No person or organ of state may interfere with the functioning of these institutions.
5. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Public Protector (ss 182-183)

182. FUNCTIONS OF PUBLIC PROTECTOR

1. The Public Protector has the power, as regulated by national legislation-
 - a) 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;

- b) to report on that conduct; and
 - c) to take appropriate remedial action.
2. The Public Protector has the additional powers and functions prescribed by national legislation.
 3. The Public Protector may not investigate court decisions.
 4. The Public Protector must be accessible to all persons and communities.
 5. An report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

183. TENURE

The Public Protector is appointed for a non-renewable period of seven years.

South African Human Rights Commission (s 184)

184. FUNCTIONS OF SOUTH AFRICAN HUMAN RIGHTS COMMISSION

1. The South African Human Rights Commission must-
 - a) promote respect for human rights and a culture of human rights;
 - b) promote the protection, development and attainment of human rights; and
 - c) monitor and assess the observance of human rights in the Republic.
2. The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-
 - a) to investigate and to report on the observance of human rights;
 - b) to take steps to secure appropriate redress where human rights have been violated;
 - c) to carry out research; and
 - d) to educate.
3. Each year, the South African Human Rights

Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

4. The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (ss 185-186)

185. FUNCTIONS OF COMMISSION

1. The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are-
 - a) to promote respect for the rights of cultural, religious and linguistic communities;
 - b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
 - c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.
2. The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.
3. The Commission may report any matter which falls within its powers and functions

- to the South African Human Rights Commission for investigation.
4. The Commission has the additional powers and functions prescribed by national legislation.

186.COMPOSITION OF COMMISSION

1. The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.
2. The composition of the Commission must-
 - a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
 - b) broadly reflect the gender composition of South Africa.

Commission for Gender Equality (s 187)

187.FUNCTIONS OF COMMISSION FOR GENDER EQUALITY

1. The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
2. The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.
3. The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

Auditor-General (ss 188-189)

188.FUNCTIONS OF AUDITOR-GENERAL

1. The Auditor-General must audit and report on the accounts, financial statements and financial management of-
 - a) all national and provincial state departments and administrations;

- b) all municipalities; and
 - c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.
2. In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of-
 - a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
 - b) any institution that is authorised in terms of any law to receive money for a public purpose.
3. The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.
4. The Auditor-General has the additional powers and functions prescribed by national legislation.

189.TENURE

The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

Electoral Commission (ss 190-191)

190. FUNCTIONS OF ELECTORAL COMMISSION

1. The Electoral Commission must-
 - a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
 - b) ensure that those elections are free and fair; and
 - c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
2. The Electoral Commission has the additional powers and functions prescribed by national legislation.

191.COMPOSITION OF ELECTORAL COMMISSION

The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

Independent Authority to Regulate Broadcasting (s 192)

192.BROADCASTING AUTHORITY

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

General Provisions (ss 193-194)

193.APPOINTMENTS

1. The Public Protector and the members of any Commission established by this Chapter must be women or men who-
 - a) are South African citizens;
 - b) are fit and proper persons to hold the particular office; and
 - c) comply with any other requirements prescribed by national legislation.
2. The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.
3. The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.
4. The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of-
 - a) the South African Human Rights Commission;

- b) the Commission for Gender Equality; and
 - c) the Electoral Commission.
5. The National Assembly must recommend persons-
 - a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
 - b) approved by the Assembly by a resolution adopted with a supporting vote-
 - i. of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
 - ii. of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.
 6. The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (a).

194.REMOVAL FROM OFFICE

1. The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on-
 - a) the ground of misconduct, incapacity or incompetence;
 - b) a finding to that effect by a committee of the National Assembly; and
 - c) the adoption by the Assembly of a resolution calling for that person's removal from office
2. A resolution of the National Assembly concerning the removal from office of-
 - a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
 - b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

3. The President-
 - a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
 - b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.
 - a) administration in every sphere of government;
 - b) organs of state; and
 - c) public enterprises.
3. National legislation must ensure the promotion of the values and principles listed in subsection (1).
4. The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
5. Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
6. The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

Chapter 10 Public Administration

195. BASIC VALUES AND PRINCIPLES GOVERNING PUBLIC ADMINISTRATION

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - a) A high standard of professional ethics must be promoted and maintained.
 - b) Efficient, economic and effective use of resources must be promoted.
 - c) Public administration must be development-oriented.
 - d) Services must be provided impartially, fairly, equitably and without bias.
 - e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - f) Public administration must be accountable.
 - g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
2. The above principles apply to-
 1. There is a single Public Service Commission for the Republic.
 2. The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.
 3. Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

4. The powers and functions of the Commission are-
 - a) to promote the values and principles set out in section 195, throughout the public service;
 - b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
 - c) to propose measures to ensure effective and efficient performance within the public service;
 - d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
 - e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and
 - f) either of its own accord or on receipt of any complaint-
 - i. to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
 - ii. to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
 - iii. to monitor and investigate adherence to applicable procedures in the public service; and
 - iv. to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.
 - g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.
5. The Commission is accountable to the National Assembly.
6. The Commission must report at least once a year in terms of subsection (4) (e)-
 - a) to the National Assembly; and
 - b) in respect of its activities in a province, to the legislature of that province.
7. The Commission has the following 14 commissioners appointed by the President:
 - a) Five commissioners approved by the National Assembly in accordance with subsection (8) (a); and
 - b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8) (b).
8. a) A commissioner appointed in terms of subsection (7) (a) must be-
 - i. recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and
 - ii. approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.
- b) A commissioner nominated by the Premier of a province must be-
 - i. recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and
 - ii. approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.
9. An Act of Parliament must regulate the procedure for the appointment of commissioners.
10. A commissioner is appointed for a term of

five years, which is renewable for one additional term only, and must be a woman or a man who is-

- a) a South African citizen; and
 - b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.
11. A commissioner may be removed from office only on-
- a) the ground of misconduct, incapacity or incompetence;
 - b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
 - c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.
12. The President must remove the relevant commissioner from office upon-
- a) the adoption by the Assembly of a resolution calling for that commissioner's removal; or
 - b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.
13. Commissioners referred to in subsection (7) (b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

Chapter 13 Finance

214. EQUITABLE SHARES AND ALLOCATIONS OF REVENUE

1. An Act of Parliament must provide for-
 - a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
 - b) the determination of each province's equitable share of the provincial share of that revenue; and
 - c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.
2. The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account-
 - a) the national interest;
 - b) any provision that must be made in respect of the national debt and other national obligations;
 - c) the needs and interests of the national government, determined by objective criteria;
 - d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
 - e) the fiscal capacity and efficiency of the provinces and municipalities;
 - f) developmental and other needs of provinces, local government and municipalities;
 - g) economic disparities within and among the provinces;
 - h) obligations of the provinces and municipalities in terms of national legislation;
 - i) the desirability of stable and predictable

- allocations of revenue shares; and
- j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

219. REMUNERATION OF PERSONS HOLDING PUBLIC OFFICE

1. An Act of Parliament must establish a framework for determining-
 - a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
 - b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.
2. National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection.
3. Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
4. The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
5. National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

Financial and Fiscal Commission (ss 220-222)

220. ESTABLISHMENT AND FUNCTIONS

1. There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.
2. The Commission is independent and subject only to the Constitution and the law, and must be impartial.
3. The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214 (2).

221. APPOINTMENT AND TENURE OF MEMBERS

1. The Commission consists of the following women and men appointed by the President, as head of the national executive:
 - a) A chairperson and deputy chairperson;
 - b) three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;
 - c) two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed by national legislation; and
 - d) two other persons.
2. National legislation referred to in subsection (1) must provide for the participation of-
 - a) the Premiers in the compilation of a list envisaged in subsection (1) (b); and
 - b) organised local government in the compilation of a list envisaged in subsection (1) (c).
3. Members of the Commission must have appropriate expertise.
4. Members serve for a term established in terms of national legislation. The President

may remove a member from office on the ground of misconduct, incapacity or incompetence.

222.REPORTS

The Commission must report regularly both to Parliament and to the provincial legislatures.

Chapter 14 General Provisions

237.DILIGENT PERFORMANCE OF OBLIGATIONS

All constitutional obligations must be performed diligently and without delay.

239.DEFINITIONS

In the Constitution, unless the context indicates otherwise-

'organ of state' means-

- a) any department of state or administration in the national, provincial or local sphere of government; or
- b) any other functionary or institution-
 - i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - ii. exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;



ANNEXURE 2

COMPARISON OF PROVISIONS RELATING TO APPOINTMENTS, REMOVAL FROM OFFICE AND REMUNERATION AND CONDITIONS OF SERVICE IN CHAPTER 9 AND ASSOCIATED INSTITUTIONS

Table 1. Appointments procedures and conditions of service

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
The Auditor-General	<p>Chapter 9, Constitution of 1996 (sections 181, 188, 189, 193 and 194)</p> <p>Public Audit Act 25 of 2004</p>	<p>The President appoints the Auditor-General on the recommendation of the National Assembly.</p> <p>The Speaker initiates the process in the National Assembly for the appointment of the Auditor-General. (Section 6(1), Public Audit Act, 2004).</p> <p>A committee of the Assembly nominates the Auditor General designate. The nomination is approved by a supporting vote of at least 60% of members of the National Assembly. (Section 193(4) of the Constitution, 1996, and section 6 of the Public Audit Act, 2004).</p> <p>The President appoints the Auditor-General for single, non-renewable term of between 5 and 10 years. (Section 189 of the Constitution, 1996).</p> <p>The President determines the length of the term (section 6(2), Public Audit Act, 2004).</p>	<p>A resolution concerning the removal from office must be adopted with a supporting vote of at least two-thirds of the members of the National Assembly.</p> <p>(Section 8 of Public Audit Act, 2004 and section 194 of Constitution, 1996)</p>	<p>The Standing Committee on the Auditor General must, in consultation with the Auditor General, recommend to the President the conditions of employment (including the salary) for the Auditor General designate.</p> <p>(Section 7 (1) & (2) Public Audit Act, 2004).</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
The Commission for Gender Equality	<p>Chapter 9 of Constitution of 1996 (sections 181, 187, 193 and 194)</p> <p>Commission on Gender Equality Act 39 of 1996</p>	<p>The President appoints a Chairperson and no fewer than 7 and no more than 11 commissioners.</p> <p>Between 2 and 7 commissioners must be appointed as full time members for a period not exceeding five years, provided that the term of office of full-time members does not expire simultaneously. The appointment is renewable for a further term. (Section 3, Commission on Gender Equality Act, 1996).</p> <p>The Minister of Justice and Constitutional Development shall invite nominations through media and by notice in the Gazette.</p> <p>A joint <i>ad hoc</i> committee of both Houses of Parliament is established to consider the nominations and short list candidates. The nominations are approved by both Houses in a joint sitting.</p> <p>This procedure is contrary to the provisions for appointment of commissioners to the Commission for Gender Equality contained in the section 193(4) of the Constitution, 1996).</p>	<p>A resolution concerning the removal from office must be adopted with a supporting vote of a majority of the National Assembly.</p> <p>(Section 194, Constitution of 1996).</p>	<p>The President determines remunerations, allowances and conditions of service for both full time and part time members.</p> <p>(Section 8, Commission on Gender Equality Act, 1996).</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities	<p>Chapter 9 of Constitution of 1996 (sections 181, 185,193 and 194)</p> <p>The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002</p>	<p>The National Assembly has no role in the appointment of commissioners.</p> <p>The President appoints a Chairperson and no fewer than 11 and no more than 17 members for a period of 5 years.</p> <p>President appoints from a short list compiled by a selection panel appointed by the Minister (Section 11, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002).</p> <p>Chairperson and Deputy Chairperson appointed as full time members, while not more than three other members may be appointed in a full-time capacity (section 14, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002).</p>	The President can remove on grounds of misconduct, incapacity or incompetence, on adoption of a resolution of the majority of National Assembly members (section 17 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 and section 194, Constitution, 1996).	The Minister in consultation with the Minister of Finance determines conditions of service (section 15, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002).

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
The Electoral Commission	<p>Chapter 9 of Constitution of 1996 (sections 181, 190, 191, 193 and 194)</p> <p>Electoral Commission Act 51 of 1996, as amended by Act 117 of 1998, Act 27 of 2000, Act 34 of 2003 and Act 14 of 2004.</p>	<p>The President on the recommendation of the National Assembly appoints commissioners.</p> <p>The Portfolio Committee on Home Affairs considers a short list of candidates, compiled by a panel consisting of the President of the Constitutional Court, the Public Protector and representatives from the Commission for Gender Equality and the South African Human Rights Commission.</p> <p>The Portfolio Committee nominates candidates for consideration by the National Assembly. The National Assembly's recommendations for appointment to the President must be approved by a supporting vote of a majority of members of the National Assembly.</p> <p>The President appoints 5 members, one of who should be a judge, for a period of 7 years (section 6 of the Electoral Commission Act, 1996).</p>	<p>The President can only remove on the grounds of misconduct, incapacity and incompetence, after there has been a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court, and a majority resolution to that effect by the National Assembly.</p> <p>(Section 194 of Constitution, 1996; Section 7(3) of Electoral Commission Act, 1996).</p>	<p>President after consultation with Commission on Remuneration of Representatives determines conditions and remuneration. (Section 7 of Electoral Commission Act, 1996).</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
The South African Human Rights Commission	<p>Chapter 9 of the Constitution of 1996 (sections 181, 184, 193 and 194)</p> <p>Human Rights Commission Act 54 of 1994</p>	<p>A chairperson and 10 commissioners (Section 115 of 1993 Constitution) are appointed by the President for a term not exceeding 7 years. (Section 3, Human Rights Commission Act 54, 1994).</p> <p>Commissioners are appointed on the recommendation of the National Assembly after being nominated by a committee of the National Assembly and approved by a supporting vote of a majority of members of the Assembly. (Section 193(4) of the Constitution, 1996)</p>	<p>Requires the approval by the National Assembly and the National Council of Provinces by a resolution adopted by a majority of at least 75 per cent of the Members present at a joint meeting. (Section 3 of Human Rights Commission Act, 1994)</p> <p>This is contrary to the provisions of section 194 of the Constitution of 1996, which requires that the National Assembly resolution to remove a commissioner be supported by a majority of members.</p>	<p>The President in consultation with Cabinet and the Minister of Finance determines remunerations and conditions of service. (Section 13, Human Rights Commission Act, 1994)</p>
The Public Protector	<p>Chapter 9 of the Constitution of 1996 (sections 181, 182, 183, 193 and 194)</p> <p>Public Protector Act, 23 of 1994 (as amended by Act 113 of 1998 and Act 22 of 2003)</p>	<p>The President appoints Public Protector on the recommendation of the National Assembly for a non-renewable period of 7 years.</p> <p>The National Assembly initiates the appointment process.</p> <p>An <i>ad hoc</i> committee is established to nominate candidates.</p> <p>The National Assembly approves the nomination of the <i>ad hoc</i> Committee by a supporting vote of at least 60% of the members of the National Assembly. (Section 193, Constitution, 1996).</p>	<p>A resolution of the National Assembly must be adopted with a supporting vote of at least two thirds of the National Assembly (section 194 of Constitution, 1996).</p>	<p>The National Assembly determines the remuneration and conditions of service on the advice of the relevant parliamentary committee (section 2 of Public Protector Act, 1994).</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
Independent Communications Authority of South Africa	<p>Chapter 9 of the Constitution, 1996 (section 192)</p> <p>Independent Communications Authority of South African Act 13 of 2000, as amended by Act 3 of 2006</p>	<p>The National Assembly through the Portfolio Committee on Communications initiates the process and considers candidates for appointment.</p> <p>A Chairperson and 8 councillors are appointed by the Minister on the approval by the National Assembly.</p> <p>The National Assembly may invite technical experts to assist in the selection, evaluation and appointment processes of the councillors.</p> <p>The National Assembly submits to the Minister a list of suitable candidates at least 1^{1/2} times the number of required candidates. (Section 5, Independent Communications Authority Act, 2000 as amended).</p> <p>The Chairperson is appointed for a term of 5 years. Other councillors are appointed for a term of 4 years (section 7, Independent Communications Authority Act, 2000 as amended).</p>	<p>Removal from office requires the adoption by the National Assembly of a resolution calling for that councillor's removal. The Minister must remove a councillor from office on adoption of such a resolution by the National Assembly (Section 8, Independent Communications Authority Act, 2000 as amended).</p>	<p>The Minister of Communications with concurrence of Minister of Finance determines remuneration (section 10 of Independent Communications Authority Act, 2000, as amended)</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
Pan South African Language Board	<p>Chapter 1 of Constitution of 1996 (section 6)</p> <p>Pan South African Language Board Act 59, 1995, as amended by Act 10 of 1999 and Act 36 of 2001.</p>	<p>The Minister appoints no fewer than 11 and no more than 15 members for a renewable term of 5 years.</p> <p>The Minister, after consulting with the Portfolio Committee on Arts and Culture, appoints a committee to invite nominations for the general public. The Portfolio Committee conducts interviews and compiles a short list from the names forwarded to it by that committee. The Portfolio Committee's short list is then forwarded to Minister, who makes the selection for appointment after consulting with the Portfolio Committee (section 5, Pan South African Language Board Act, 1995, as amended).</p>	<p>Minister may terminate membership if he or she is satisfied that:</p> <ul style="list-style-type: none"> • The person no longer complies with criteria (fit and proper, South African citizen, broadly representative of diversity of users of official languages; have language skills; supportive of the principle of multi-lingualism); • Absence from two or more consecutive meetings of the Board without leave; • On request of member wishing to resign; • Recommendation of the majority of Board (on reasonable grounds). <p><i>(Section 5(4) Pan South African Language Board Act, 1995, as amended)</i></p>	<p>The Minister with the concurrence of Minister of Finance determines criteria for payment of honoraria and reimbursements to members (section 13, Pan South African Language Board Act, 1995, as amended).</p>
Public Service Commission	<p>Chapter 10 of Constitution of 1996 (section 196)</p> <p>Public Service Commission Act 17 of 1997</p>	<p>14 Commissioners appointed by the President: 5 are nominated by the National Assembly and 9 are nominated by Premiers of the provinces (section 196(7) of Constitution, 1996).</p> <p>The Portfolio Committee on Public Service and Administration considers nominations for the 5 candidates to be nominated by the National Assembly.</p>	<p>Removed in terms of section 196(11) and (12) of Constitution.</p> <p>Adoption by the National Assembly of a resolution for a Commissioner's removal.</p> <p>Written notification by the Premier that the provincial legislature has adopted a resolution for removal.</p>	<p>The President determines conditions of service and remunerations (section 6 of Public Service Commission Act, 1997).</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
National Youth Commission	<p>No Constitutional basis</p> <p>National Youth Commission Act 19 of 1996 (as amended by Act 19 of 2000)</p>	<p>President appoints 5 members for a renewable term not exceeding 5 years. Currently the commissioners are appointed for three years.</p> <p>Appointed on the advice of committee of Parliament (section 4, National Youth Commission Act, 1996</p> <p>The Joint Monitoring Committee on the Status and Quality of Life of Children, Youth and Disabled Persons considers nominations..</p>	<p>Removed from office by President after consultation with the Commission, if in his or her opinion there are grounds to do so.</p> <p>(Section of National Youth Commission Act, 1996) The</p>	<p>President, in consultation with the Minister of Finance determines conditions of service and remunerations.</p> <p>(Section 11 of National Youth Commission Act, 1996</p>

Name of body	Constitutional and legislative basis	Appointments process	Removal from office	Remuneration and conditions of service
Financial and Fiscal Commission	Chapter 13 of Constitution (sections 220 and 221) Financial and Fiscal Commission Amendment Act 99 of 1997, as amended by Act 96 of 1997 and Act, 25 of 2003	<p>There is no role for the National Assembly in the appointment process</p> <p>Appointed by the President for a term not exceeding five years.</p> <p>Section 221(1), Constitution made provision for 22 commissioners.</p> <p>Section 7 of the Constitution of the Republic of South Africa Second Amendment Act 61 of 2001 amended section 221 of the Constitution, 1996, reducing the number of commissioners from 22 to 9:</p> <ul style="list-style-type: none"> • Chairperson and Deputy Chairperson. • Three persons selected after consulting with the Premiers, from a list compiled in accordance with a process prescribed by national legislation. • Two persons selected after consulting with organised local government in accordance with a process prescribed by national legislation • Two other persons. <p>The Minister must consult Premiers to make nominations whenever vacancies for 3 persons appointed by Premiers need to be filled.</p>	Removed from office by the President on the findings of a tribunal appointed by the President for that purpose. (Section 11 of Financial and Fiscal Commission Act, 1997, as amended).	The President determines remunerations and other conditions of service taking into account factors such as recommendations of Minister and the commission in section 219(5) of the Constitution. (Section 9 of Financial and Fiscal Commission Act, 1997)

Table 2. Membership, date of appointment and expiry of office

Institution	Membership	Appointment date	Expiry of office date
The Auditor General	Mr T Nombembe	1 November 2006	30 October 2013
The Commission for Gender Equality	Mrs J Piliso-Seroke, Chairperson	1 October 2002	30 September 2007
	Fulltime:		
	Dr Teboho Maitse	All appointed 1 May 2007	30 April 2012
	Ms Nomboniso Papama Gasa		30 April 2012
	Ms Janine Lousie Hicks		30 April 2012
	Mr Dizkline Mfanozelwe Shozi		31 October 2011
	Dr Yvette Abrahams		31 October 2011
	Ms Ndileka Eumera Portia Loyilane		31 October 2011
	Part-time		
	Adv Salome Khutsoane	All appointed 1 May 2007	30 April 2012
	Adv Nomazotsho Memani-Balani		30 April 2012
	Ms Rosieda Shabodien		30 April 2012
	Rev Bafana Gideon Khumalo		30 April 2012
	Ms Kenosi Vanessa Meruti		30 April 2012
The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities	Dr MD Guma, Chairperson Ms M Bethlehem Dr WA Boezak Dr LP Boshego Prof S Dangor Dr MAE Dockrat Mr H Gouvelis Dr MD Jobson Dr JCH Landman Dr WRJ Langeveldt Ms M Le Roux Ms DDK Marais Mr BB Mgcina Dr ON Mndende Prof SE Ngubane Mr MKS Ntlha Ms M Soni Amin Dr TSC Magwaza	All appointed 1 January 2004	All expire in five years

Institution	Membership	Appointment date	Expiry of office date
The Electoral Commission	Dr B Bam, Chairperson Ms NFT Mpumlwana Mr. T Tselane, and Mr F Van der Merwe Judge H Q Msimang	20 October 2004 20 October 2004 20 October 2004 20 October 2004 12 February 2006	Term of office expires in seven years.
The South African Human Rights Commission	Jodi Kollapen, Chairperson Zonke Majodina, Deputy Charlotte McClain-Nhlapo Tom Manthata Leon Wessels Kathy Govender	All appointed 1 October 2002	Term of office expires in seven years. Resigned 1 December 2006
The Public Protector	Mr M L Mushwana Ms M Shai, Deputy Public Protector	1 October 2002 1 December 2005	Terms of office expires in seven years.
The Independent Communications Authority of South Africa	Mr P Mashile, Chairperson Ms T Cohen Mr Z Masiza Mr M Zokwe Mr N Nkuna Ms B Ntombela Prof J van Rooyen Dr N Socikwa ** Ms M Mohlala, appointed on 1 October 2006, has resigned with effect from 31 May 2007. The Portfolio Committee is in process of appointing a new councillor.	1 July 2004 1 July 2004 1 July 2004 1 July 2005 1 October 2006 1 October 2006 1 October 2006 1 April 2007	30 June 2008 30 June 2008 30 June 2008 30 June 2009 30 September 2010 30 September 2010 30 September 2010 30 March 2011

Institution	Membership	Appointment date	Expiry of office date
The Pan South African Language Board	Mr HM Thipa, Chairperson Mr HA Strydom, Deputy Ms R Finlayson Mr MA Moleleki Mr MB Kumalo Ms H Morgan Ms MF Sadiki Mr P Nkomo Mr SNL Mkhathshwa Mr AC Le Fleur Mr PB Skhosona Mr Mr Malope Ms NCP Golole	All appointed February 2002	All expire February 2007 On 16 January 2007 the Minister extended term of office to June 2007
The Public Service Commission	The following are nominated by the National Assembly: Prof SS Sangweni, Chairperson Mr JH Ernstzen, Deputy Chairperson Dr EG Bain Ms MRV Mokgalong Ms N Mxakato-Diseko Nominated by the Provincial Legislatures: Mr JDS Mahlangu, Member (North West Province) Mr DW Mashego, Member (Mpumalanga) Mr M Msoki, Member (Eastern Cape) Ms PM Tengeneni, Member (KwaZulu/Natal) Mr P Helepi, Member (Free State) Dr NV Maharaj, Member (Western Cape) Mr KE Mahoai, Member (Limpopo) Mr KL Mathews, Member (Northern Cape) Dr R Mgijima, Member (Gauteng)	All appointed November 2003	All expire November 2008

Institution	Membership	Appointment date	Expiry of office date
The National Youth Commission	Ms N Nkondlo, Chairperson Ms V Tulelo Mr M Mothupi Mr D J Van Vuuren Mr O Sipuka	All appointed 1 July 2006	All expire 30 June 2009
The Financial and Fiscal Commission	Dr B Setai, Chairperson Mr J Josie, Deputy Ms T Ajam Mr R Maluleke Mr M Kuscus Mr K Chetty Mr B Mosley-Lefatola Ms G Moloi Dr A Melck	1 August 2005 30 January 2002 1 July 2004 1 July 2004 1 July 2004 1 January 2002 1 July 2004 1 July 2004 30 January 2002	30 July 2010 1 February 2007 30 June 2009 30 June 2009 30 June 009 31 December 2007 30 June 2009 30 June 2009 1 February 2007

ANNEXURE 3

LIST OF CHAPTER NINE AND OTHER STATUTORY INSTITUTIONS IN WHICH THE NATIONAL ASSEMBLY HAS A ROLE TO PLAY

LIST OF CHAPTER NINE AND OTHER STATUTORY INSTITUTIONS IN WHICH THE NATIONAL ASSEMBLY HAS A ROLE TO PLAY

Name of body	Role of Parliament
The Auditor-General	Appointed by President on recommendation of the National Assembly for a period of between 5 and 10 years (section 188 Constitution).
The Commission for Gender Equality	No fewer than 7 and no more than 11 members appointed by the President for a period of 5 years after nomination by National Assembly committee and approval by National Assembly (Section 193, Constitution).
The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities	No fewer than 12 and no more than 17 members appointed by the President for a period of 5 years. No role for Parliament in the appointment process. No role for the National Assembly except normal oversight role.
The Electoral Commission	5 members appointed by the President for a period of 7 years, on the recommendation of National Assembly after nomination by National Assembly committee.
The South African Human Rights Commission	Members appointed by the President for a term not exceeding 7 years on recommendation of National Assembly after nomination by National Assembly committee (Section 193, Constitution).
The Public Protector	Appointed by the President on recommendation of National Assembly, after nomination by National Assembly committee, for a non-renewable period of 7 years.
Independent Communications Authority of South Africa	Appointed by the Minister after approval by the National Assembly.

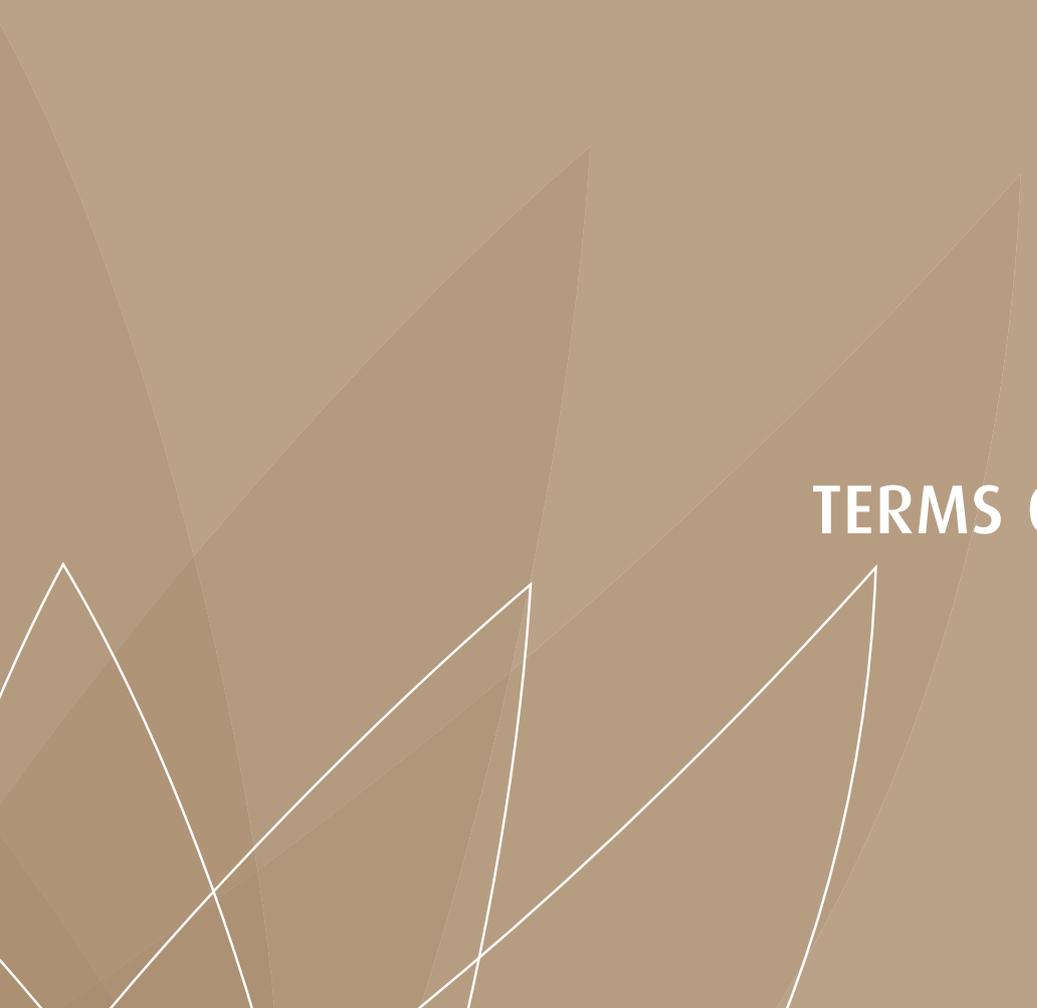
Part II: Other Constitutional and Statutory Bodies

Name of Body	Membership
Agricultural Marketing Council, National	10 members appointed by the Minister after committees of the Houses responsible for agriculture have submitted names of suitable candidates. (Section 9 of Agricultural Research Council Act 86 of 1990)
Drug Authority, Central	12 members appointed by the Minister after parliamentary committees for welfare of the National Assembly and the National Council of Provinces has made recommendations to the Minister in relation thereto after a transparent and open process of considering persons so nominated. (Prevention and Treatment of Drug Dependency Act 20 of 1992) Inspector-General of Intelligence
Appointed by the President after nominations by Joint Standing Committee on Intelligence and approval by National Assembly.	Judicial Service Commission
National Assembly designates six of its members to serve on the Commission (section 178, Constitution), for the duration of Parliament. The Members sit in the Commission when it considers appointment of judges.	Library and Information Services, Panel to appoint members of the National Council for
12 members of council appointed by Minister of Arts and Culture after consultation with the Minister of Education for a period of 3 years. The Portfolio Committee on Arts and Culture has to approve the panel that will compile a short list. (Section 7 of Library and Information Services Act 6 of 2001).	Lotteries Board, National
7 members appointed by the Minister for a period not exceeding 5 years, after recommendations by relevant Portfolio Committee (Section 3 of Lotteries Act 57 of 1997).	Magistrates Commission
The National Assembly appoints four of its members, for the duration of the term of Parliament.	Media Development and Diversity Agency
The Agency consists of 9 members, 6 of whom are appointed by the President on the recommendation of the National Assembly. The chairperson and 3 of the 6 members are appointed for 5 years, while the rest hold office for 3 years.	Pan South African Language Board

Membership	Name of body
11-15 members appointed by Minister for a period of five years after consultation with Portfolio Committee on Arts and Culture.	Public Service Commission
The Constitution and the Public Service Commission Act prescribes appointment of 14 Commissioners by the President for a period of 5 years, 5 of whom are approved by the National Assembly after recommendation by a committee of National Assembly.	Road Accident Fund, Board
The Director-General: Transport and no fewer than 11 and no more than 12 members appointed by the Minister for a period of not more than 3 years after recommendation by selection committee established by the Minister. (Road Accident Fund Act 56 of 1996).	Board of National Research Foundation
Appointed by Minister after consultation with relevant parliamentary committees (Section 6 of the National Research Foundation Act 23 of 1998).	Advisory Committee of the National Home Builders Registration Council
Appointed by Minister after he or she invited nominations from parliamentary committees for housing (Section 23 of Housing Consumers Protection Measures Act 95 of 1998).	National Home Builders Registration Council
Appointed by Minister after he or she invited nominations from parliamentary committees for housing. (Section 4 of Housing Consumers Protection Measures Act 95 of 1998).	Advisory Board on Social Development
Appointed by Minister after recommendations by committees of the National Assembly and National Council of Provinces on Social Development. (Section 5, Advisory Board on Social Development Act 3 of 2001).	South African Broadcasting Corporation (SABC) Board
12 non-executive members appointed by the President for a period not exceeding 5 years on the advice of the National Assembly and three executive members. (Section 13 of Broadcasting Act 4 of 1999).	National Youth Commission
Appointed by the President on advice of Parliament. The Joint Monitoring Committee shortlists candidates.	

ANNEXURE 4

TERMS OF REFERENCE



Thursday, 21 September 2006]

2079

No 46—2006] THIRD SESSION, THIRD PARLIAMENT

REPUBLIC OF SOUTH AFRICA

MINUTES OF PROCEEDINGS

OF

NATIONAL ASSEMBLY

THURSDAY, 21 SEPTEMBER 2006

- 1 The House met at 14:03.
- 2 The Deputy Speaker took the Chair and requested members to observe a moment of silence for prayers or meditation.
- 3 [14:04] The Chief Whip of the Majority Party moved: That the House refers the *Government Immovable Asset Management Bill* back to the Portfolio Committee on Public Works for further consideration.

Agreed to.

4. [14:05] The Chief Whip of the Majority Party moved: That the House establishes an *ad hoc* Committee on the Review of State Institutions Supporting Constitutional Democracy and the Public Service Commission—
 - (1) the Committee to consist of 10 members as follows: ANC 5; DA 2; IFP 1; and other parties 2;
 - (2) the Committee to review State Institutions Supporting Constitutional Democracy as listed in chapter 9 of the Constitution as well as the Public Service Commission as established in chapter 10 of the Constitution, for the purpose of—
 - (a) assessing whether the current and intended Constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy, and whether a rationalisation of function, role or organisation is desirable or will diminish the focus on important areas;
 - (b) reviewing the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability;
 - (c) reviewing institutional governance arrangements in order to develop a model of internal accountability and efficiency;

MINUTES: NATIONAL ASSEMBLY NO 46—2006

- (d) improving the co-ordination of work between the institutions covered in this review, as well as improving co-ordination and co-operation with government and civil society;
 - (e) recognising the need for a more structured oversight role by Parliament in the context of their independence; and
 - (f) reviewing the funding models of the institutions, including funding derived from transfers and licences and other fees, with a view to improving accountability, independence and efficiency;
- (3) the Committee to conduct its review also with reference to other organs of state of a similar nature whose work is closely related to the work of institutions covered in this review;
 - (4) the Committee may exercise those powers in Rule 138 that may assist it in carrying out its task; and
 - (5) the Committee to report by not later than 30 June 2007.
- Agreed to.

5. FIRST ORDER [14:05]

Consideration of Special Report of Joint Standing Committee on Intelligence (JSCI) (Announcements, Tablings and Committee Reports, 21 August 2006, p 1790—*Reports of Inspector General of Intelligence*).

Debate concluded.

The Deputy Chief Whip of the Majority Party moved: That the Report be noted. Motion agreed to. Report accordingly noted.

6. SECOND ORDER [15:10]

Consideration of *Request on Recommendations on Appointment of councillors to the Independent Communications Authority of South Africa* (as received from Minister) (Announcements, Tablings and Committee Reports, 20 September 2006, p 2078).

Question put: That Dr A J Barendse, Ms M Mohlala, Mr R Nkuna, Ms B Ntombela and Prof J C W van Rooyen be approved for appointment as councillors to fill vacancies on the Council of the Independent Communications Authority of South Africa.

Declarations of vote made on behalf of Inkatha Freedom Party, Democratic Alliance and African National Congress.

Question agreed to (Inkatha Freedom Party dissenting).

Dr A J Barendse, Ms M Mohlala, Mr R Nkuna, Ms B Ntombela and Prof J C W van Rooyen accordingly approved for appointment as councillors to fill vacancies on the Council of the Independent Communications Authority of South Africa.

7. THIRD ORDER [15:18]

Consideration of Report of *ad hoc* Committee on Nomination of Persons to fill Vacancies on Commission for Gender Equality (Announcements, Tablings and Committee Report, 18 September 2006, p 2053).

MINUTES: NATIONAL ASSEMBLY NO 46—2006

Thursday, 21 September 2006]

2081

Question put: That Adv S Khutsoane, Ms N Memani-Balani, Ms R Shabodien, Mr B G Khumalo and Ms K V Meruti be recommended for appointment as part-time councillors, and Dr T Maitse, Ms N P Gasa, Ms J L Hicks, Mr D M Shozi, Ms Y Abrahams, and Ms N E P Loyilane be recommended for appointment as full-time councillors on the Commission for Gender Equality.

AYES—176: Abram, S; Ainslee, A R; Anthony, T G; Asiya, S E; Asmal, A K; Batyi, F; Benjamin, J; Bhamjee, Y S; Bhengu, F; Bhengu, P; Bhoola, R B; Bici, J; Bloem, D V; Booi, M S; Botha, N G W; Burgess, C V; Cachalia, I M; Cele, M A; Chikunga, L S; Chohan-Khota, F I; Coetzee, R; Cronin, J P; Cwele, S C; Dambuzza, B N; Daniels, P; Diale, L N; Dikgacwi, M M; Dlali, D M; Doidge, G Q M; Doman, W P; Farrow, S B; Fihla, N B; Frolick, C T; Fubbs, J L; Gaum, A H; Gigaba, K M N; Gololo, C L; Gumede, D M; Hajaig, F; Hanekom, D A; Hendrickse, P A C; Hogan, B A; Jeffery, J H; Johnson, C B; Johnson, M; Kasienyane, O R; Kasrils, R; Kekana, C D; Khumalo, K K; Khumalo, K M; Khunou, N P; King, R J; Koornhof, G W; Kotwal, Z; Landers, L T; Lekgetho, G; Lekgoro, M M S; Lishivha, T E; Louw, J T; Luthuli, A N; Maake, J J; Mabe, L L; Mabena, D C; Madasa, Z L; Madella, A F; Madlala-Routledge, N C; Maduma, L D; Mahlangu-Nkabinde, G L; Mahlawe, N M; Mahomed, F; Mahote, S; Maine, M S; Maja, S J; Makasi, X C; Maloyi, P D N; Maluleka, H P; Maluleke, D K; Martins, B A D; Mashangoane, P R; Mashigo, R J; Masutha, T M; Mathibela, N F; Matlala, M H; Matsemela, M L; Mbili, M E; Mbombo, N D; Mdaka, N M; Mentor, M P; Meruti, M V; Mgabadeli, H C; Minnie, K J; Mnguni, B A; Mnyandu, B J; Moatshe, M S; Modisenyane, L J; Mogale, O M; Mogase, I D; Mohamed, I J; Mokoena, A D; Moloto, K A; Morobi, D M; Morutoa, M R; Mosala, B G; Moss, L N; Moss, M I; Motubatse-Houkpatin, S D; Mshudulu, S A; Mthembu, B; Mthethwa, E N; Mzondeki, M J G; Nawa, Z N; Ndzanga, R A; Nel, A C; Nene, M J; Nene, N M; Newhoudt-Druchen, W S; Ngaleka, E; Ngcengwane, N D; Ngcobo, B T; Ngcobo, E N N; Ngele, N J; Njikelana, S J; Njobe, M A; Nkabinde, N C; Nkem-Abonta, E; Nkuna, C; Nogumla, R Z; Ntuli, B M; Ntuli, M M; Ntuli, R S; Ntuli, S B; Nwamitwa-Shilubana, T L P; Nxumalo, M D; Nyambi, A J; Olifant, D A A; Oosthuizen, G C; Pandor, G N M; Phadagi, M G; Phungula, J P; Pieterse, R D; Radebe, B A; Ramakaba-Lesiea, M M; Ramgobin, M; Ramotsamai, C P M; Rasmeni, S M; Saloojee, E; Schippers, J; Schneemann, G D; Seadimo, M D; Sekgobela, P S; Semple, J A; Sibanyoni, J B; Sigcau, S N; Sithole, D J; Skosana, M B; Smith, V G; Smuts, M; Solomon, G; Sonto, M R; Sotyu, M M; Swart, M; Swart, P S; Swathe, M M; Thabethe, E; Tinto, B; Tobias, T V; Tolo, L J; Tsenoli, S L; Tshivhase, T J; Tshwete, P; Vadi, I; Van den Heever, R P Z; Van der Merwe, S C; Van der Walt, D; Van Dyk, S M; Van Wyk, A.

ABSTAIN—9: Bhengu, M J; Chang, E S; Mpontshane, A M; Rabinowitz, R; Sibuyana, M W; Smith, P F; Spies, W D; Vezi, T E; Vos, S C.

Majority of support required in terms of section 193(5)(a)(ii) of the Constitution of the Republic of South Africa, 1996, not obtained.

Decision of question postponed.

- 8 [15:47] Members' statements.
9 [16:20] House Chairperson Ms C-S Botha made a statement in regard to offensive remarks made by Mr R B Bhoola the previous day.

MINUTES: NATIONAL ASSEMBLY NO 46—2006

2082

[Thursday, 21 September 2006]

10. FOURTH ORDER [16:23]

Debate on Heritage Day: Proclaiming our African identity through our cultural heritage.
Debate concluded.

11. The House adjourned at 17:18.

ZA DINGANI
Secretary to Parliament

MINUTES: NATIONAL ASSEMBLY NO 46—2006

ANNEXURE 5

QUESTIONNAIRE

AD HOC COMMITTEE ON REVIEW OF CHAPTER 9 AND ASSOCIATED INSTITUTIONS

Questionnaire

Please read the following to assist you with the completion of the questionnaire:

- a) Please answer this questionnaire in English.
- b) This questionnaire has five sections. Please answer ALL questions. Where a question does not apply to your institution, your answer should indicate accordingly.
- c) Please respond to questions in the same sequence as the questionnaire.
- d) Provide detailed responses in a concise manner.
- e) Please e-mail completed questionnaires **preferably by 15 December 2006**, but **not later than 10 January 2007** to mphilander@parliament.gov.za

A. Role and Functions of Institution

1. How do you view your institution's constitutional/legal mandate? In other words provide a description of your understanding of your institution's constitutional/legal mandate.
2. What role or function does your institution perform that is not carried out by other institutions, whether in government or civil society?
3. In what way, if any, does the role and function of your institution overlap or potentially overlap with other Chapter 9 institutions?
4. What outcomes do you strive for in order to realise the constitutional/legal mandate set out in 1 above?
5. Does the empowering legislation governing your institution provide a clear, workable, and comprehensive legal framework that supports and empowers the institution to successfully fulfil its core mandate?
6. What mechanisms do you have in place to measure the outcomes set out in 4 above, and how do you assess the effectiveness and impact of your work?
7. Have you carried out any evaluation looking at the success or otherwise of your functions, especially in relation to recommendations sent to government, parliament or other public institutions?
8. What have been/are the major constraints facing your institution and how have these impacted on its ability to achieve its mandate?

B. Relationships with other bodies

9. How do you view your institution's relationship with the executive and Parliament, given its constitutionally guaranteed independence and impartiality and the constitutional requirement to be accountable to the National Assembly? In particular please address the following issues:
 - a) What legal and other mechanisms are in place to ensure and strengthen your institution's independence;
 - b) What mechanisms are in place to facilitate reporting to (and being accountable to) the National Assembly;
 - c) How do you view your relationship with the executive and under what circumstances do you engage the executive.

10. Is Parliament currently effectively fulfilling its oversight role over your institution? If not, how can this be improved?
11. What was the intended relationship of accountability between your institution and other institutions supporting constitutional democracy and the different branches of government? To what extent have these relationships been realised?
12. Does your institution have any official or informal relationship with other Chapter 9 institutions or institutions of a similar nature? If yes, describe the nature of this relationship and the outcomes envisaged and generated by this relationship.
13. What is the extent of collaboration and coordination of the work carried out by your institution and similar/related work carried out by other Chapter 9 institutions or institutions of a similar nature? Give examples of successful initiatives in this regard.

C. Institutional Governance

14. 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? Is there a clear, logical and workable division between the members of your institution appointed by the President on advice of the National Assembly and the secretariat? What suggestions do you have to improve the institutional governance arrangements?
15. 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?
16. 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? Are such mechanisms effective or sufficient to ensure transparency and avoid conflict of interest?

D. Interaction with the public

17. What was the intended relationship between your institution and the public? To what extent has this relationship been realised?
18. 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?
19. If you deal with public complaints, what mechanisms are in place to deal with such complaints, to follow through on such complaints and to successfully resolve such complaints?

E. Financial matters

20. Give an indication of your budget allocation, additional funding and expenditure over the past five years.
21. Please provide detailed information of the remuneration packages for office-bearers and Commissioners.
22. Please illustrate the budget process followed by your institution, including the process of allocation of funds.
23. Are the current budgetary and administrative arrangements sufficient to ensure autonomy of Chapter 9 institutions?
24. To what extent are the resources allocated to your institution directly spent on meeting its key responsibilities?



ANNEXURE 6

LIST OF SUBMISSIONS



AD HOC COMMITTEE ON THE REVIEW OF CHAPTER 9 AND ASSOCIATED INSTITUTIONS

SUBMISSIONS RECEIVED

INDIVIDUALS

1. Banda, Mr Bright
2. Bischof, Ms L
3. Boom, Mr Andrew
4. Borain, Mr Anthony
5. Botes, Mr Hennie
6. Boyle, Mrs M
7. Buys, Mr Enver
8. Canterbury, Mr Athol
9. Chohan, MP, Ms F I
10. Cloete, Mr E
11. Cloete, Mrs J
12. Coetzee, Mr D
13. Cort, Mrs J
14. Cronje, Mr Frans
15. Devenish, Prof G E
16. Doman, MP, Mr W P
17. Ms P Dyasi
18. Faasen, Mr Kobus
19. Franks, Ms Arlette
20. Gillwald, Prof Alison
21. Goedhys, Mr Diederik
22. Golele, Prof N C P
23. Govind, Mr N K
24. Gouws, Prof Amanda
25. Gqomo, Ms L N
26. Groenewald, Mr D
27. Gupta, Prof Ram Kishore
28. Haessler, Mr Fred
29. Haines, Mr Redvers
30. Hassan, Ms Fatima
31. Hlongwane, Mrs Jennifer
32. Houston, Mr E M
33. Jasson, Mr Heinz D G
34. Joosab, Mr E D
35. Khumalo, Ms Grace
36. Laher, Mr Ameen
37. Landman, Dr Chris
38. Langeveldt, Dr W
39. Lawrence, Mr Graham
40. Lesejane, Ms M E
41. Lilley, Ms Marilyn
42. Malefo, Mr L D
43. Maltese, X
44. Marawu, Mr M M
45. Mndai, Mr O
46. Modise, Mr L G M
47. Moeketsi, Mr P D
48. Moganetsi, Mr M J
49. Moila, Mr Modisi Jo
50. Morar, Mr R
51. Motsoeneng, Mr Thabang
52. Naidoo, Mr P
53. Ngamlana, Ms Koleka
54. Nkosi, Mrs N R
55. Nongayiyana, Mr T
56. Okungu, Mr M
57. Pillay, Mr Reggie
58. Poremba-Brumer, Mr D
59. Potter, Mr Charl
60. Pretorius, Ms Sarah
61. Prinsloo, Mr J P
62. Qhautse, Mr Aubrey
63. Schafer, Mr Karl Heinz
64. Semple, Ms J A
65. Seoka, Rt Rev Jo
66. Singh, Mr B
67. Skiti, Miss L
68. Smuts, MP, Ms M
69. Sokopase, Mr Yamkela
70. Swanepoel, Mr E
71. Thompson, Mr Rhett
72. Tyolwana, Ms Nonkosi
73. Ulrich, Mr Neil
74. Van der Merwe, Dr C J
75. Van der Merwe, MP, Mr J H
76. Van Heerden, Mr Fanie
77. Vorster, Mrs A M
78. Vosloo, Mr J M J S
79. White, Ms Mary
80. Williams, Mr Anthony
81. Williams, Miss Chris
82. Winegaard, Mr L
83. Wixley, Ms M
84. Anonymous
85. Anonymous

ORAL SUBMISSIONS

1. Aids Law Project
2. Congress of South African Trade Unions (COSATU)
3. Department of Communications
4. F W de Klerk Foundation
5. Foundation for Human Rights
6. Human Sciences Research Council (HSRC)
7. Institute for Democracy in South Africa (IDASA)
8. Ministry for Justice and Constitutional Development
9. Ms B A Hogan, MP, Chairperson of the Standing Committee on the Auditor-General
10. Ms F Chohan, MP
11. Open Democracy and Advice Centre (ODAC)
12. Prof Amanda Gouws
13. Tutumike
14. University of Cape Town (UCT)

NON-GOVERNMENTAL AND CIVIL SOCIETY ORGANISATIONS

1. Afriforum
2. Aids Law Project
3. Amukelani Resource Centre
4. ANC Youth League
5. ANC Women's League
6. Anonymous
7. Civil Society Prison Reform Initiative (CSPRI)
8. COSATU
9. Deaf Federation of South Africa (DEAFSA)
10. Edzwilini Lemindeni Haven
11. English Language Academy of SA
12. Foundation for Human Rights
13. Gender Advocacy Program (GAP)
14. F W De Klerk Foundation
15. Helen Suzman Foundation
16. Human Rights Institute of South Africa (HURISA)
17. IDASA (Political Information Monitoring Service)
18. Kathorus Community Radio
19. Lusikisiki Child Abuse Centre (Lucare)
20. Open Democracy Advice Centre (ODAC)
21. People Opposing Women Abuse (POWA)
22. TUTUMIKE
23. UWC Community Law Centre
24. UWC Gender Equity Unit

GOVERNMENT MINISTRIES AND DEPARTMENTS

1. Department of Arts and Culture
2. Ministry of Communications
3. Department of Education
4. Ministry of Home Affairs
5. Department of Justice & Constitutional Development
6. Minister in the Presidency
7. Ministry of Provincial and Local Government
8. Department of National Treasury

PARLIAMENTARY COMMITTEES

1. Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Persons with disabilities
2. Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women
3. Portfolio Committee on Communications
4. Portfolio Committee on Public Service and Administration
5. Standing Committee on Public Accounts
6. Standing Committee on the Auditor-General



ANNEXURE 7

REPORT ON PUBLIC OPINION SURVEY



CHAPTER NINE, CHAPTER TEN AND ASSOCIATED RIGHTS-BASED INSTITUTIONS: A PUBLIC OPINION SURVEY

RESEARCHED FOR
Parliament of the Republic of South Africa

BY THE
Community Agency For Social Enquiry

JUNE 2007

This report was compiled and produced for the **Parliament of the Republic of South Africa** by the **Community Agency for Social Enquiry (CASE)**

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Table of Contents

TABLE OF CONTENTS	250
EXECUTIVE SUMMARY	251
Background to the Study	251
Study design	251
Results	251
Conclusion	253
RIGHTS-BASED INSTITUTIONS SURVEY	254
Introduction	254
Background to the Study	255
Aim and Objectives	255
STUDY DESIGN	256
Instrument Design	257
Training & the Fieldwork Team	257
Capturing and Analysis	257
Limitations	257
RESULTS OF THE SURVEY	258
Demographic Profile	258
Awareness of Rights-Based Institutions	259
Importance and Effectiveness of Institutions	260
Conclusion	267

Executive Summary

BACKGROUND TO THE STUDY

Enshrined in Chapter 9, Chapter 10 and other sections of the South African Constitution is a list of institutions that were initiated to offer democratic support to South African citizens and serve to strengthen constitutional democracy in the South African Republic. These institutions include the:

- Human Rights Commission
- Commission on Gender Equality
- National Youth Commission
- Public Protector
- Independent Electoral Commission
- Public Service Commission
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Pan South African Language Board
- Auditor-General, and
- Independent Authority to Regulate Broadcasting

As part of a wider survey to rationalise the inclusion of these institutions within the constitution, C A S E was commissioned to undertake a nationwide survey to assess the awareness of the existence, significance and efficiency of these institutions.

STUDY DESIGN

The study consisted of a national household survey. Data from the 2001 Census was used as a sampling frame and a multi-stage stratified cluster sampling procedure was used to draw the sample. The sample was stratified by province, race and type of area and eight randomly selected respondents (aged 14 years and above) were interviewed in each selected enumerator area. In addition, a quota system was used to ensure a gender balance in the sample.

Data was captured using a Microsoft Excel template designed by C A S E and then exported to Stata 9 for cleaning and statistical analysis.

RESULTS

The following results were obtained from the household survey regarding the awareness of rights-based institutions and perceptions of the importance, effectiveness and efficiency of these institutions.

Demographic Profile

- The sample was evenly split between males and females.
- Ages ranged from 14 years old to 89 years old, with a slightly larger proportion of respondents in the 14 – 35 year age group than the >35 year age group.
- The majority of respondents were African followed distantly by Coloured (11%) and White (10%). Indians constituted the smallest group (3%).
- The majority of respondents had some secondary qualification and less than a quarter had some primary education. A total of 14% had some post-matric education while 4% had no formal schooling.

Awareness of the Rights-Based Institutions

- Over three quarters of the respondents were aware of the existence of the Independent Electoral Commission and two thirds had heard of the Human Rights Commission. Just over half had heard of the Commission on Gender Equality and the National Youth Commission, while a quarter had heard of the Pan South African Language Board.
- A significant relationship was noted between the level of awareness of the institutions and level of education at a 95% confidence interval. With an increase in education level, an increase in level of awareness was noted.
- A breakdown of the number of institutions that respondents were aware of, shows a substantial level of awareness of the chapter 9 and the associated rights-based institutions. Only 16% of respondents were not aware of at least 1 institution, and more than 50% of respondents were aware of 4 or more of the 8 institutions

Efficiency of Chapter 9 and Associated Rights-Based Institutions

- All of the institutions were rated as important by the respondents but not as effective. The HRC and IEC were rated as effective by 62% and 68% of respondents respectively, while half felt the same about the NYC and just over a third felt the same about the CGE. Only 23% felt that the PSLAB was effective in its function.
- On average, 90% of respondents agreed that the institutions could improve their services by “assisting people to understand and access their rights, informing the public more of what they are doing and being more visible.”
- In total, 554 respondents had some form of contact with one or more of the institutions, the majority with the IEC.
- The nature of the contact was mainly through attendance at a public meeting or event.
- More than half of the respondents that had laid a complaint indicated that they had found it easy to do so and just over a third indicated that they were informed of what was being done about this complaint.
- Approximately one quarter of respondents indicated that they were first contacted about their complaint within 2 to 4 weeks or 2 to 3 months and the majority indicated that it took less than one month to receive a final response.
- Most respondents felt that the overall manner in which their complaint was handled was very poor, while just over a quarter felt the manner was good.

CONCLUSION

Overall, awareness was high for the IEC and HRC but lower for the remaining institutions and overall awareness increased with an increase in the level of education. Although institutions were apporioned high importance, their effectiveness was rated poorly and the majority of respondents agreed that institutions needed to incorporate all of the suggested improvements.

Most contact with the IEC and the HRC mainly in the form of a public meeting or event and through elections. Few respondents laid a formal complaint, but of those that did, most were satisfied with the ease at which they were able to lay this complaint and feedback on their complaint.

For the most part, respondents were first contacted about their complaint between 2 to 4 weeks or 2 to three months after they had placed it, although some stated that they had never been contacted. In terms of finalisation, most respondents indicated that their complaint was finalised in less than a week, but again, many never benefited from a finalisation of their complaint. The manner in which complaint were handled was rated mainly as very poor.

Overall, it necessary to increase the awareness of less distinguishable institutions, especially for those respondents lacking in secondary or tertiary qualifications. It is also necessary to improve the effectiveness of institutions, promote contact and feedback and improve the handling of complaints,

Rights-Based Institutions Survey

INTRODUCTION

The Chapter 9 institutions and associated rights-based institutions that are the focus of this study are those institutions established primarily under Chapter 9 and Chapter 10 of the South African Constitution (although the mandates of some are specified elsewhere) that offer democratic support to South Africans and serve to strengthen constitutional democracy in South Africa.

These institutions are independent and should remain impartial at all times, exercising their powers and performing their functions without fear, favour or prejudice.⁶¹ Given that state institutions of the previous government had little credibility, there was a need under the new government for new Constitutional arrangements to support the new democracy. These institutions are intended to offer support and oversight on issues relating to constitutional rights between the government and the general public, and to promote the empowerment of South Africans.

When initiated, it was envisaged that these independent institutions would support constitutional democracy because, amongst other things, they would help to:

- Restore the credibility of the state and its institutions in the eyes of the majority of citizens
- Ensure that democracy and the values associated with human rights and democracy flourish in the new South Africa
- Ensure the successful establishment of and continued respect for the Rule of Law
- Ensure that the state became more open and responsive to the needs of its citizens and more respectful of their rights⁶²

The institutions described in Chapter 9 of the South African Constitution that offer this constitutional support include:

- *South African Human Rights Commission (HRC)*: performs the functions relating to human rights entrenched in Chapter 2 of the constitution. It functions to promote human rights and to monitor the conformation to these rights.
- *Commission for Gender Equality (CGE)*: functions to promote respect and promote attainment for gender equality.
- *Public Protector (PP)*: investigates and reports on improper conduct in state affairs or public administration, but may not investigate court decisions.
- *The Commission for the Promotion and Protection of the Right's of Cultural, Religious and Linguistic Communities*: aims to promote respect and tolerance for the rights of various groups within South Africa
- *The Auditor-General*: functions to audit and report on the accounts of all national, provincial and municipal departments within the government of South Africa, as well as any other institution that falls under national or provincial legislation.
- *The Independent Electoral Commission (IEC)*: serves to organise and manage all national, provincial and local election and to ensure that these elections are free and fair.

⁶¹Institute for Democracy in South Africa (IDASA). What are the Chapter 9 Institutions?
http://www.idasa.org.za/index.asp?page=faqs_details.asp%3FRID%3D76

⁶²Asmal, K. (2006): Rationale for the inclusion of Chapter 9 Institutions in the Constitution
http://oldwww.parliament.gov.za/pls/portal/web_app.utl_output_filter?p_index=speech_index&p_id=643233

Under Chapter 10 of the South African Constitution:

- *Public Service Commission*: to promote principles and values in the public service by investigating, monitoring, evaluating, communicating and reporting on public administration. And to ensure the promotion of excellence in governance and the delivery of affordable and sustainable quality services⁶³.

Other associated rights-based institutions:

- *National Youth Commission*: functions to coordinate, promote and monitor youth development through the implementation of an integrated youth development framework. Youth is defined as people aged 14 – 35 years.
- *Pan South African Language Board*: promotes multilingualism in South Africa by fostering the development of all 11 official languages, while encouraging the use of the many other languages spoken in the country.

For the purposes of this study, the above institutions shall be referred to collectively as ‘rights-based’ institutions.

BACKGROUND TO THE STUDY

In 1999, a report submitted to Parliament which detailed, amongst other issues, the ‘oversight’ role of Parliament (including the management of constitutional rights-based institutions), proposed a more structured oversight role by Parliament over these institutions. Subsequently, in February 2005 the Cabinet tasked the Minister of Public Service and Administration with conducting a review of these institutions, a responsibility later adopted by Parliament itself due to Constitutional requirements. On 21 September 2006, an *ad hoc* committee was established with the mandate to review State Institutions Supporting Constitutional Democracy, as listed in the South African Constitution.

AIM AND OBJECTIVES

In this context, the Community Agency for Social Enquiry (C A S E) was commissioned by the Parliament of the Republic of South Africa to undertake a brief survey of public perceptions of the relevant institutions. The aim of the study was to assess the awareness of South African citizens of the existence of the institutions, and to obtain perceptions regarding the importance and effectiveness of these rights-based institutions.

The specific objectives were to:

- Assess the levels of awareness of the rights-based institutions amongst the public
- Determine perceptions regarding the importance and effectiveness of the institutions in the eyes of South African citizens
- Determine perceptions regarding contact with these institutions.

⁶³ The Public Service Commission website: <http://www.psc.gov.za/>

STUDY DESIGN

The study consisted of a national household survey to assess public opinions on the above issues. A sample of 2500 households was selected using the South African Census 2001⁶⁴ data as a sampling frame. The sample was drawn by means of a multi-stage stratified cluster sampling technique, with the sample stratified by province, race and type of area. The next step was to select enumerator areas (EA's) from each stratum. A total of 313 EA's were selected across all nine provinces in the country, with the largest number of EA's selected proportionally from Gauteng and KwaZulu-Natal and the lowest from the Northern Cape. The sample distribution is indicated in the table below.

Province	Enumerator areas	Interviews
Gauteng	67	536
KwaZulu-Natal	66	528
Western Cape	40	320
Eastern Cape	38	304
Limpopo	30	240
North West	24	192
Mpumalanga	18	144
Free State	17	136
Northern Cape	13	104
<i>TOTAL</i>	<i>313</i>	<i>2504</i>

Table 1: Number of EA's and interviews, by province

The final sampling step involved the identification of eight stands per EA. Interviewers used a random interval (calculated by dividing the approximate number of stands in the EA by the total number of interviews required in that EA) to identify households that should be included in the sample. A random number grid was used to select the appropriate respondents aged 14 years or older. If selected respondents were under the age of 18 years, the parent or guardian was required to sign a consent form, formalising their acceptance of the conditions of the study and giving permission for the child to participate.

The original sample was drawn based on adults (aged 18 years or older), but this was later changed to include respondents aged 14 years and older to ensure that the target group of the National Youth Commission (youth aged 14 – 35 years) were included in the study. The distribution of the two groups is almost the same (see table in appendix). A gender quota was also used to ensure an even gender distribution in the sample.

The data has to be weighted due to over sampling in some strata to ensure sufficient numbers in small strata. The weights for this data were calculated as the inverse of the probability of selec-

⁶⁴Census 2001, Statistics South Africa

tion, using the same 2001 Census data as used for the sample selection.

Instrument Design

The original questionnaire was designed by the Research Unit at the Parliament of the Republic of South Africa and incorporated comments by C A S E researchers.

Training

One-day training sessions were held in four provinces over a period of two weeks in late May. Training aimed to:

- Provide a background on the rights-based institutions covered in the study
- Generate a through understanding of the aims of the questionnaire, the structure and the administering of the questionnaire.
- Establish a comprehensive understanding of the random selection procedures; and
- Discuss translations issues to ensure a common understanding of concepts

In total, 70 fieldworkers were employed nationwide to administer the questionnaires.

Capturing and Analysis

Data was captured electronically internally on a Microsoft Excel spreadsheet designed by C A S E. The data was then transferred to Stata 9 for cleaning and statistical analysis.

We have generally reported on the percentage distribution of the data across the institutions. Significance tests have been conducted to determine the importance of demographic variation (primarily in terms of sex, age and education) and only results that are statistically significant at the 95% level have been reported (i.e. results that we are 95% sure are not due to chance). These significance tests have been adjusted to take into account the sampling errors due to the sampling design using the survey analysis procedures in Stata.

Limitations

This study was carried out over a period of just over one month under extremely tight deadlines, making the fieldwork a challenge and limiting the time allowed for analysis. This was exacerbated by the public sector strike which took place at the same time.

A second limitation was that although there was a desire to include children (not just youth) in the survey, this was not possible due to logistical reasons at the time this was communicated. For this reason, the findings from this study are relevant only to those living in South Africa who are aged fourteen years and above.

Results of the Survey

This section considers the findings of the 2007 household survey of public perceptions of selected rights-based institutions conducted in nine provinces across South Africa. After describing the demographic profile, the findings are presented under three sections, namely awareness of the institutions, perceptions of the importance and effectiveness of the institutions and contact with institutions. Using the weighted data, the sample consisted of a total of 2457 interviews.

DEMOGRAPHIC PROFILE

	N	%
Gender		
Female	1214	50%
Male	1237	50%
N	2451	100%
Race		
African	1838	75%
Coloured	271	11%
White	240	10%
Indian	100	4%
N	2454	100%
Education		
No Formal Schooling	102	4%
Primary School	481	20%
Secondary School	1519	62%
Tertiary Diploma	235	10%
Undergraduate Degree	77	3%
Postgraduate Degree	22	1%
Other (Specify)	1	0%
N	2437	100%

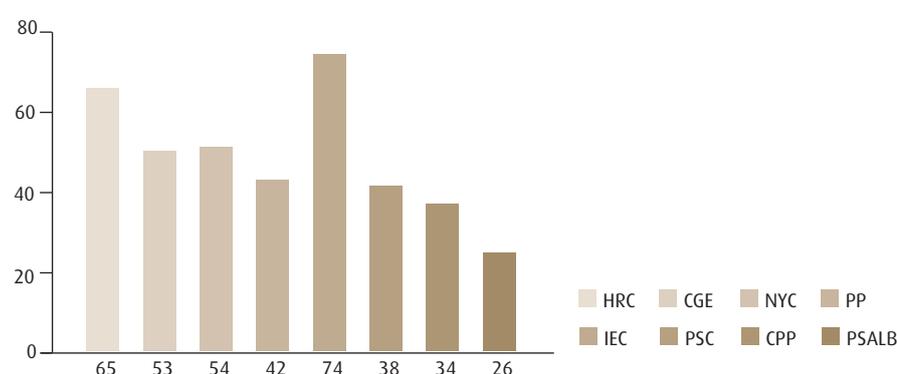
Table 2: Demographic Profile of Respondents

The sample was evenly split between males and females. The majority of respondents were African (75%), followed by Coloureds who constituted 11% of the sample. Overall, the racial distribution followed the general distribution of the South African population.

Most respondents (62%) had some form of secondary education, while 14% had a tertiary qualification in the form of a tertiary diploma or undergraduate or postgraduate degree. Few respondents (4%) had no formal education. A single respondent reported being an “apprentice” but did not reflect their education level and was recorded as “other.”

Awareness of Rights-Based Institutions

AWARENESS OF INSTITUTIONS



SOURCE: COMMUNITY AGENCY FOR SOCIAL ENQUIRY

Figure 1: Awareness of Right-based Institutions

Three quarters of respondents (74%) indicated that they had heard of the Independent Electoral Commission (IEC), while two thirds of respondents (65%) had heard of the Human Rights Commission (HRC). Just over half the respondents were aware of the Commission on Gender Equality (CGE, 53%) and the National Youth Commission (NYC, 54%).

It is important to note that a question that asks whether respondents have heard of an institution is likely to overestimate the number of people who are familiar with the institution, as respondents may confuse the institution with other bodies or simply fall into a pattern of positive responses. The levels of awareness of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CPP) and the Public Service Commission (PSC) appear particularly high, but in the absence of a question in which respondents are asked to explain the functions of the institutions, it is difficult to determine the accuracy of the reported awareness.

When comparing the mean of levels of awareness with the demographic results, there was no relationship between awareness and gender or age.

	%	95% Confidence Interval	
Comparison of Level of Education with Awareness of the HRC			
No formal education	29%	17%	42%
Primary	45%	39%	52%
Secondary	68%	65%	72%
Tertiary	91%	86%	95%

Table 3: Proportion Aware of the HRC, by education level

There was, however, an association between awareness and the level of education of the respondents. Overall, as the level of education increased so did the awareness of the institutions, as illustrated by the levels of awareness of the HRC indicated in the table above. A similar pattern was observed for all of the institutions.

	N	%
Overall Awareness Institutions		
None (0)	402	16%
Low (1-3)	704	28%
Medium (4-6)	822	35%
High (7-8)	529	21%
Total	2457	100%

Table 4: Overall Awareness of Institutions

There is, in general, a substantial level of awareness of the Chapter 9 and associated rights-based institutions. Only 16% of respondents were not aware of any of the institutions, and more than 50% of respondents were aware of 4 or more of the 8 institutions.

IMPORTANCE AND EFFECTIVENESS OF INSTITUTIONS

In this section we will examine respondents' perceptions of the importance and effectiveness of the Chapter 9 institutions.

With respect to the importance of these institutions, respondents who had indicated that they were aware of a particular institution were asked to indicate whether they thought the institution was "Not Important", "Important", "Very Important" or that they had no opinion on the matter. In the following analysis we created a dichotomous classification of "Important" (those who responded "Important" or "Very Important") and "Not Important" (those who responded "Not Important" or "Don't Know"). Responses to this question may have been biased towards "Important" because there were two categories specifying important and only one category explicitly specifying a lack of importance.

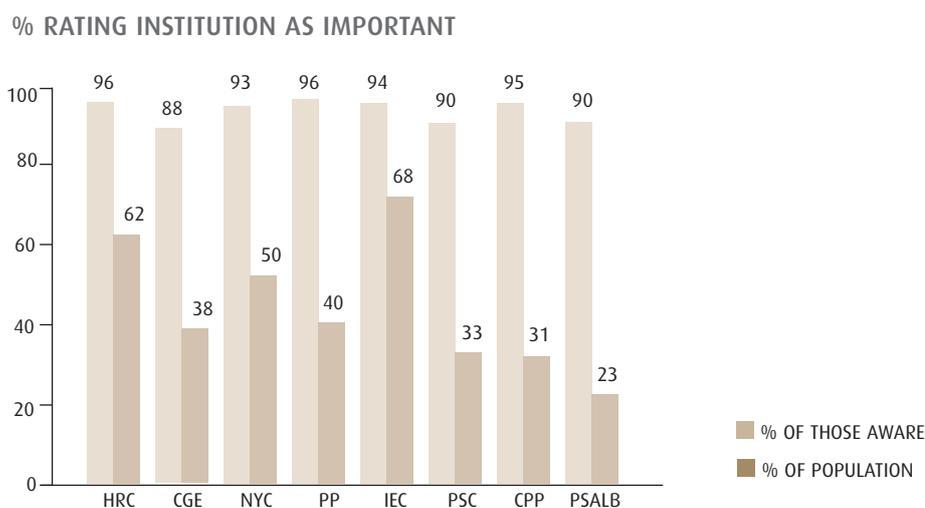
A similar approach was adopted with the effectiveness of institutions. Respondents were given a choice of "Not Effective", "Slightly Effective", "Effective", "Very Effective" and a category for no opinion. Again we created a dichotomous variable consisting of "Effective" (containing the responses "Effective" and "Very Effective") and "Not Effective" (containing the categories "Not Effective", "Slightly Effective" and "Do Not Know").

There are two possible ways in which the responses to these questions may be represented, both of which have merit. For example, we can calculate the proportion of respondents who thought the institution was effective out of the total who were aware of the institution or out of the total

population. In the first case we restrict our attention only to those respondents who were aware of the particular institution and assume that the remaining respondents cannot respond in any meaningful way on the importance of the institution. This method will tend to over-estimate the population estimate of importance since we are assuming that the population who are not aware of the institution would, if they were aware of the institution, have the same general opinions as those who are aware.

The second option (calculating the proportion out of the total population) assumes that all respondents who are not aware of the institution would think that the institution is not important. This method will tend to under-estimate the population estimate of importance.

In the analysis that follows we will report on both sets of statistics and recommend that, in communicating these results, the basis on which the calculation was performed is clearly specified.

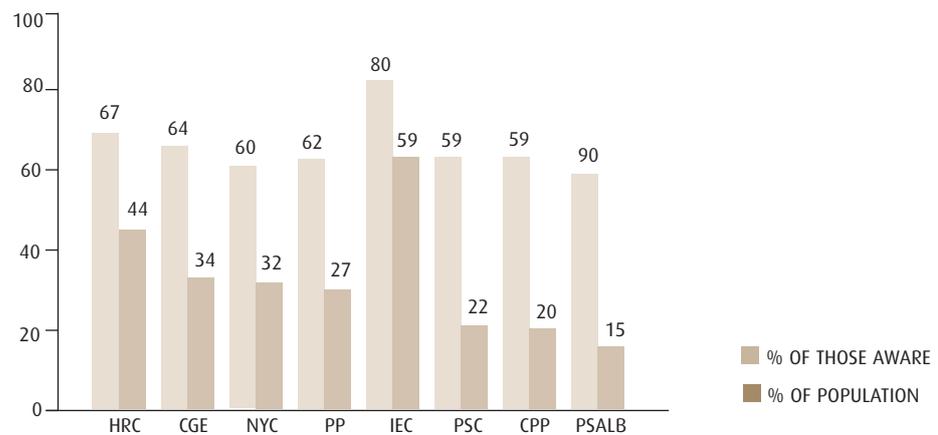


SOURCE: COMMUNITY AGENCY FOR SOCIAL ENQUIRY

Figure 2: Importance of Institutions

Almost all (between 88% and 96%) of the respondents who were aware of the institutions thought that the institution was important. However, when considering the total population, the proportions who think that the institution is important is significantly lower, from approximately 20% for the Pan South African Language Board (PSALB) to 68% for the IEC.

% RATING INSTITUTION AS EFFECTIVE



SOURCE: COMMUNITY AGENCY FOR SOCIAL ENQUIRY

Figure 3: Effectiveness of Chapter 9 Institutions

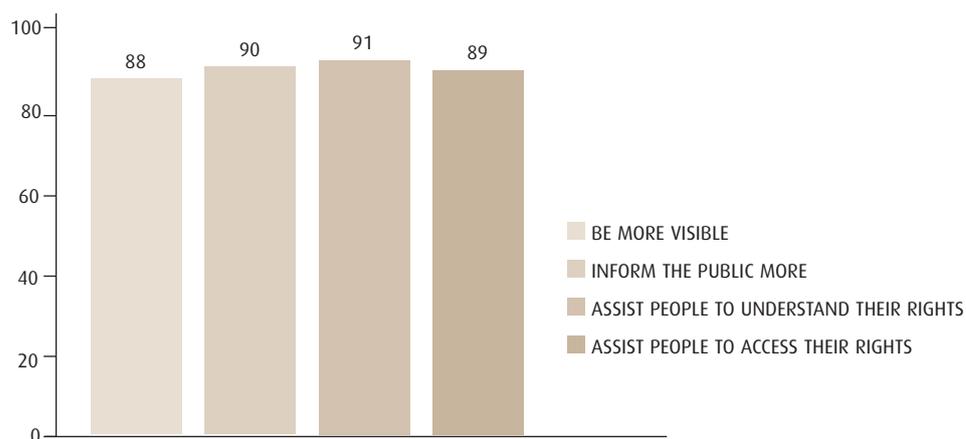
Among respondents who were aware of the institutions, a large proportion (80%) felt that the IEC was effective and just over two thirds (67%) felt that the HRC was effective in their functioning. As with the ratings on importance, the proportion of the total population who felt that the various institutions were important is significantly lower. A small proportion of the total population felt that the CPP (20%) or PSALB (15%) were effective or slightly effective in their performance, but in this case the perceptions of lower levels of effectiveness are likely to be a function of respondents' lack of awareness of these institutions.

	Mean	95% Confidence Interval	
Comparison of Age with Perceived Effectiveness of the NYC			
Youth (14 years – 35 years)	77%	70%	84%
Adults (> 35 years)	52%	40%	63%

Table 5: Perceptions of the Effectiveness of the NYC, by age

There was no significant relationship between perceived effectiveness and gender or level of education. A relationship was noted, however, between age and effectiveness with regards to the National Youth commission, in which perceived effectiveness was higher for respondents within the category of 'youth' (aged 14 – 35 years) than amongst older respondents.

RATING OF OVERALL MANNER OF HANDLING COMPLAINT



SOURCE: COMMUNITY AGENCY FOR SOCIAL ENQUIRY

Figure 4: Aspects Institutions could address to Improve their Services

When presented with four statements relating to what institutions could do to improve their service or performance, almost all respondents (between 88% and 91%) agreed with the statements. Because the levels of agreement were so high, there were no gender or age differences in terms of the improvement suggestions provided.

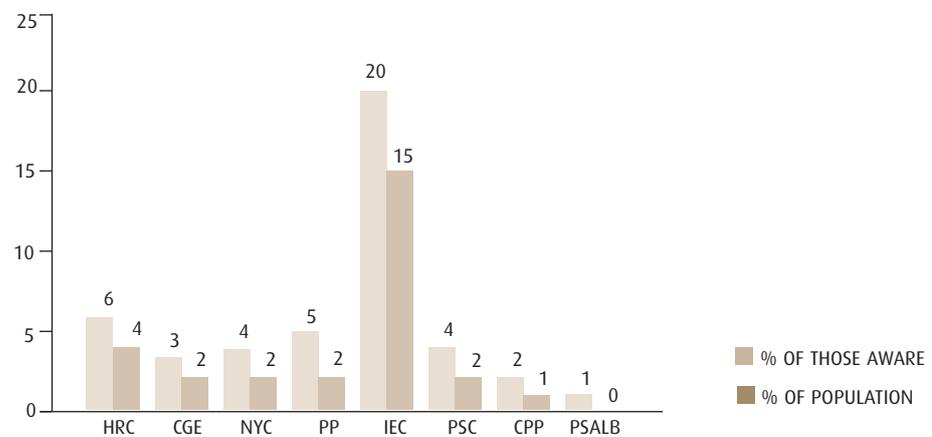
CONTACT WITH INSTITUTIONS

	N	%
Have you had any contact with any of these bodies?		
Independent Electoral Commission	368	66%
Human Rights Commission	98	17%
National Youth Commission	57	10%
Public Protector	55	10%
Commission on Gender Equality	39	7%
Public Service Commission	39	7%
Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities	19	4%
Pan South African Language Board	7	1%
<i>Total</i>	<i>554</i>	

Table 6: Contact with Institutions

When asked if respondents had had any contact with the institutions, 554 respondents indicated that they had. The majority (66%) indicated that they had had contact with the IEC. A smaller proportion had contact with the remaining institutions, the lowest being the PSALB.

% CONTACTING THE INSTITUTION



SOURCE: COMMUNITY AGENCY FOR SOCIAL ENQUIRY

Figure 5: Proportion who have contacted the Institutions

Among respondents who were aware of the institutions, very few had had any contact with the institutions save the IEC. This level of contact, higher than the other institutions, could be due to the elections which respondents perceived as a form of contact with the IEC.

	N	% of all respondents	% of those who made contact ⁶⁵
What was the nature of this contact?			
Attended a Public Meeting or Event	256	10%	46%
Other	195	8%	35%
Sent a Complaint	86	4%	16%

Table 7: Nature of the Contact with Institutions

When questioned about the nature of this contact, most respondents (10% of the total population and 46% of those who indicated having made contact) had attended a meeting or public event held by or dealing with a particular institution. Only 16% of respondents who had made contact did so by sending a formal complaint to one or more of the institutions. Upon closer analysis the “other” category consisted mainly of responses relating to voting in the elections as a form of contact.

⁶⁵ Proportions do not add up to 100% as not all respondents who indicated having contact with an institution responded to this question.

If you had complained, did you find it easy to do so?		
Yes	50	59%
<i>N</i>	86	100%
Were you told what was being done about your complaint?		
Yes	55	67%
<i>N</i>	86	100%

Table 8: Ease of Complaining and Feedback to Complaint

Under two-thirds of the respondents who had laid a complaint indicated that they had found it easy to do so and over a third indicated that they were informed of what was being done about this complaint.

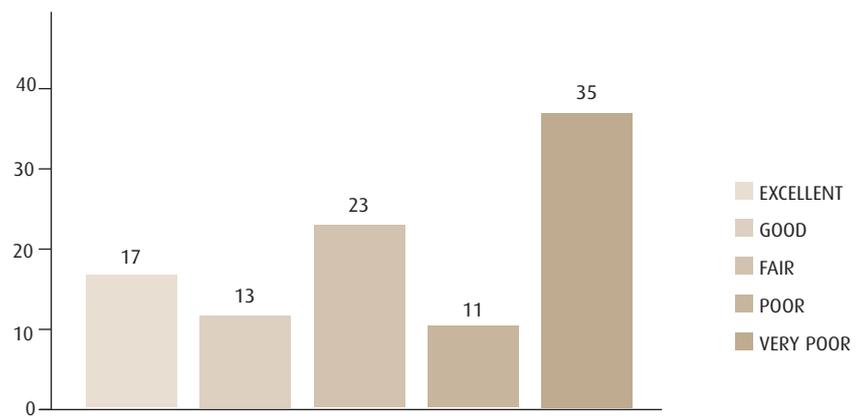
	N	%
How long before you were first contacted about your complaint?		
Less than one week	10	10%
2 - 4 weeks	27	27%
2 - 3 months	25	25%
More than 3 months	7	7%
More than 6 months	3	3%
Never	22	22%
Recent Complaint	7	7%
<i>N</i>	101	100%
How long before you were given a final response?		
Less than a month	27	36%
2 - 3 months	11	16%
More than 3 months	10	13%
More than 6 months	1	1%
Never	28	34%
<i>N</i>	77	100%

Table 9: Duration before first contact and response

Approximately a quarter of the respondents said that they were first contacted about their complaint 2 to 4 weeks after it was laid. Just under that proportion indicated that they had never been contacted.

Approximately a third indicated that their complaint took less than one month to finalise and just over one-third indicated that their complaint was never finalised.

RATING OF OVERALL MANNER OF HANDLING COMPLAINT



SOURCE: COMMUNITY AGENCY FOR SOCIAL ENQUIRY

Figure 6: Rating of overall handling of complaint

When asked to rate the overall manner in which their complaint was handled, a third indicated that the handling of the complaint was good or excellent, while almost half (46%) felt that the overall handling was poor.

CONCLUSIONS

In terms of awareness, the most widely recognised institutions were the IEC and HRC. It is important to increase the visibility of less prominent institutions that provide essential constitutional services to South African citizens or ensure that government departments are being properly managed and regulated. This is especially applicable to the CPP and PSLAB, given that indigenous cultures in South Africa have been historically marginalised and disempowered. As illustrated by the significant link between awareness and level of education, it is also necessary to reach the less educated proportions of the population as often it is these groups that are least empowered.

The findings indicate that the identified institutions are clearly regarded by the general public as important for the success of South Africa's young democracy. However, the perceived levels of effectiveness of these institutions tended to be lower. There is a perception that while these institutions have a vital role to play in offering support to citizens, they are falling short of their mandate. This is reflected in the extremely high level of agreement with the four suggestions for improvement in the services provided by the rights-based institutions. On average, 90% of respondents agreed that the concerned institutions should increase their visibility, assist citizens to understand their rights and access these rights, and do more to inform the public of their activities.

The IEC was the institution with which the highest levels of contact were reported, primarily through election mechanisms. The main form of contact with the institutions was through a public meeting or event or with the IEC through national, provincial or local elections. A very small proportion of the total population had made use of the mechanisms to lodge complaints.

Most of those who laid a complaint agreed that they found it easy to do so and indicated that they were told what was being done about the complaint. However, some frustration with the process was evident, in that almost half (46%) felt that the overall handling of the complaint was poor.

On the whole, the levels of awareness can be improved with regards to certain smaller institutions and amongst specific groups, such as those with lower levels of education (and possible lower access to information). The key areas for improvement, however, lie in the perceptions of effectiveness, the current lack of visibility and direct interaction with members of the public.