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## **SUBMISSION TO THE AD HOC COMMITTEE ON THE REVIEW OF STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

### **INTRODUCTION**

As a section 21 not-for-profit company and a registered law clinic, the AIDS Law Project (ALP) seeks to develop, implement and use laws and policies to protect and advance the rights of people living with HIV/AIDS. In so doing, it aims to ensure a rights-based response to the HIV/AIDS epidemic that it believes is best suited to reducing new HIV infections and minimising the negative social impact of AIDS. Part of the Centre for Applied Legal Studies at the University of the Witwatersrand, Johannesburg from 1993 until 2006, the ALP – as an independent organisation – is now formerly associated with the Wits School of Law.

Fundamental to our work is the Constitution of the Republic of South Africa, 1996 – the rights that it entrenches; the positive and negative obligations that it imposes on the state; and the structures that it recognises and empowers to ensure the realisation of the values upon which our sovereign, democratic state is based. In our view, these three elements are intertwined and interdependent – rights cannot be realised without corresponding obligations to respect, protect, promote and fulfil them; obligations can be avoided in the absence of accountability mechanisms.

It is with this in mind that we welcome the National Assembly's decision of 21 September 2006 to establish an Ad Hoc Committee ("the Committee") on the Review of State Institutions Supporting Constitutional Democracy ("the Chapter 9s") and the Public Service Commission (PSC). In particular, we welcome the Committee's terms of reference, which implicitly recognise the important roles ascribed by the Constitution to the Chapter 9s and the PSC whilst at the same time acknowledging potential room for improvement.

Our interest in this review process is twofold:

- First, our experience in dealing with various Chapter 9s – which is reflected in Annexure 1 to this submission – indicates that many of them are not fulfilling the roles envisaged by the Constitution. In our view, this ordinarily has little to do with the bodies' constitutional and statutory mandates but is rather a direct result of timid and/or uninspired leadership. Where leadership has been strong and impassioned, Chapter 9s have flourished. With this in mind, our submission seeks to understand the structural problems that undermine strong and effective leadership and how these may be addressed.
- Second, we are aware of the inherent tensions involved in any process where one arm of government considers amending the mandate and/or functioning of any organ of state set up to monitor, report on and hold that arm of government to account. While Parliament is entitled – and is indeed the only body constitutionally mandated – to perform this task, it must do so in a way that strengthens the ability of the Chapter 9s to discharge their primary roles. By inviting interested parties such as ours to reflect on their experiences, the Committee appears mindful of the need to address this concern.

Notwithstanding our commitment to this process, our submission does not seek to address the Committee's full terms of reference.<sup>1</sup> For example, we only consider those institutions with whom we have interacted directly since their coming into existence – the South African Human Rights Commission (SAHRC), the Commission on Gender Equality (CGE), the Public Protector and the Auditor-General (AG).<sup>2</sup> Further, our considerations and recommendations are somewhat limited in their scope, being based largely on our experience during and flowing from such interactions.<sup>3</sup>

In particular, our submission begins with an overall assessment of the relevant institutions. It thereafter addresses the appropriateness and/or adequacy of the institutions' constitutional and statutory mandates, with a focus on the desirability of any rationalisation of function, role and/or organisation. In addition, but in brief, we also consider the need for a more structured oversight role of the various institutions, with particular attention to the roles of Parliament and civil society, as well as the funding implications of our proposals.

## SUMMARY OF RECOMMENDATIONS

This submission reaches the following conclusions:

- Section 187 of the Constitution – dealing with the CGE – should be deleted;
- The contents of section 187(1) of the Constitution should be incorporated into section 184(1) of the Constitution – dealing with the SAHRC – as follows:
  - “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;  
and
    - (d) in respect of each of subsections (a), (b) and (c), develop and implement a dedicated focus on gender equality.”<sup>4</sup>
- The Commission on Gender Equality Act 39 of 1996 should be repealed, with all references to the CGE in other statutes being amended to refer to the SAHRC instead;
- The South African Human Rights Commission Act 54 of 1994 (“the SAHRC Act”) should be amended in accordance with the proposed new section 184(1)(d) of the Constitution, to ensure that the SAHRC's dedicated focus on gender equality is assigned to a specialised unit within the commission – with dedicated commissioners – tasked with promoting “respect for gender equality and the protection, development and attainment of gender equality”;
- The mandate of the SAHRC, as set out in the SAHRC Act, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”) and the Promotion of Access to Information Act 2 of 2000 (PAIA), should

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<sup>1</sup> These are set out in the minutes of the proceedings of the National Assembly of 21 September 2006

<sup>2</sup> While the work of numerous of the other bodies under review may be relevant to our areas of focus, our lack of direct experience of these bodies limits our ability to engage critically with the specific questions raised by the Committee's terms of reference.

<sup>3</sup> See Annexure 1 to this submission

<sup>4</sup> Proposed deletions are indicated by bold text in square brackets, with underlined text indicating proposed additions.

be expanded to ensure better implementation and use of the Equality Act and PAIA;

- Parliamentary oversight of the Chapter 9s should be accompanied by civil society oversight in a new Joint Chapter 9 Oversight Committee; and
- Dedicated funding for the Chapter 9s should be ensured, with financial accountability falling within the purview of a Joint Chapter 9 Oversight Committee.

## OVERALL ASSESSMENT

Our analysis of the work and mandates of the Chapter 9s is underpinned by our commitment to respect for and the protection, promotion and fulfilment of fundamental human rights. Our rights-based approach to this analysis recognises the link between human rights and development on the one hand and human rights and constitutional democracy on the other.<sup>5</sup> Such links are recognised by our Constitution, which expressly entrenches a broad range of rights and imposes both positive and negative obligations on the state in respect of such rights.<sup>6</sup>

Implicit in the Constitution is the recognition that human rights will always be under some degree of threat and that – even with the best of intentions – governments will from time to time come under pressure to limit rights. Also implicit is the notion that respect for rights will ensure that development in South Africa takes place equitably and is driven – in part – by the duty to meet people’s basic needs. With this in mind, the Constitution therefore recognises the need for and sets up strong, independent institutions tasked with protecting and promoting human rights. In particular, it expressly tasks bodies such as the SAHRC and the CGE with monitoring the state’s compliance with its constitutional duties.

The threats to human rights are many, arising from a range of sources both within and outside of government:<sup>7</sup>

- For its part, the state may fail to consider – or simply be oblivious to – the sometimes unforeseen and unintended human rights violations of its policies and programmes. Under pressure to “deliver”, the state may feel compelled to take shortcuts that potentially undermine human rights themselves as well as a culture of human rights. All too often, governments respond to powerful corporate interests in a manner that either diverts resources away from constitutionally required interventions or results in insufficiently or inappropriately regulated sectors – unjustifiably limiting access to essential goods, services or programmes.
- In addition to placing pressures on governments in an anti-human rights fashion, the private sector may be tempted to limit rights in its ongoing quest to expand the bottom line.

In this context, the mandates of the Chapter 9s are not particularly easy to fulfil. Despite having legally recognised roles, which demand loyalty first and foremost to the Constitution, such bodies will often be perceived to be pro- or anti-government when faced with a stand-off between the state and any third party – whether an individual, a

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<sup>5</sup> See Sunetra Puri (ed.), *DEVELOPMENT Outreach: Human Rights and Development* (World Bank Institute: Washington, DC, October 2006), available online at <http://www1.worldbank.org/devoutreach/october06/>

<sup>6</sup> Section 7(2) of the Constitution

<sup>7</sup> These are but a few of the ever-present threats to human rights, which will be greatest in times of political instability, economic recession and social change.

community, an organ of civil society or the private sector. Discharging their constitutional and statutory obligations in such a context requires that the Chapter 9s be answerable to all stake-holders – not just the state – and vested with leadership that enjoys broad public confidence.

All of the Chapter 9s that are the focus of this submission have excelled in discharging their legal duties at some time or another, leading us to conclude that the potential for the full realisation of their mandates is indeed possible. Inspiring examples include:

- The SAHRC’s hosting of public hearings and/or issuing of reports on a range of fundamental rights issues, including:
  - School-based violence;<sup>8</sup>
  - The right of everyone, as set out in section 29(1)(a) of the Constitution, to a “basic education”;<sup>9</sup> and
  - The rights of asylum seekers, refugees and foreign migrants to be free from xenophobic violence.<sup>10</sup>
  
- Regular *amicus curiae* (friend of the court) interventions by the CGE in key constitutional cases dealing with gender equality, including:
  - *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)*;<sup>11</sup>
  - *Amod v Multilateral Motor Vehicle Accidents Fund*;<sup>12</sup>
  - *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)*;<sup>13</sup>
  - *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*;<sup>14</sup>
  - *Omar v Government of the Republic of South Africa and Others*;<sup>15</sup> and
  - *S v Baloyi (Minister of Justice and Another Intervening)*.<sup>16</sup>
  
- Two key Public Protector reports concerning HIV/AIDS:<sup>17</sup>
  - *Special report on Sarafina II*;<sup>18</sup> and

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<sup>8</sup> The hearings took place in late September 2006. A report has not yet been issued.

<sup>9</sup> See the *Report of the Public Hearing on the Right to Basic Education*, available online at [http://www.sahrc.org.za/sahrc\\_cms/downloads/RBE\\_Report.pdf](http://www.sahrc.org.za/sahrc_cms/downloads/RBE_Report.pdf)

<sup>10</sup> See *Report: Open hearings on Xenophobia and problems related to it*, available online at [http://www.sahrc.org.za/sahrc\\_cms/downloads/Xenophobia%20Report.pdf](http://www.sahrc.org.za/sahrc_cms/downloads/Xenophobia%20Report.pdf). These hearings were co-hosted by the National Assembly’s Portfolio Committee on Foreign Affairs.

<sup>11</sup> 1999 (4) SA 1319 (SCA)

<sup>12</sup> 1998 (4) SA 753 (CC)

<sup>13</sup> 2003 (2) SA 363 (CC)

<sup>14</sup> 2005 (1) SA 580 (CC)

<sup>15</sup> 2006 (2) SA 289 (CC)

<sup>16</sup> 2000 (2) SA 425 (CC)

<sup>17</sup> For further discussion of these two HIV-related complaints, see “The Constitution and public health policy”, in Hassim, Heywood and Berger, *Health & Democracy: A guide to human rights, health law and policy in post-apartheid South Africa* (Cape Town: Siberlink, 2007).

<sup>18</sup> On 20 May 1996, the Public Protector issued his report following an investigation into various funding-related matters regarding the play *Sarafina II* – commissioned by the Department of Health (DoH) as part of its HIV prevention programme. The report concluded that the “tendering procedures followed by the DoH were completely flawed and defective”, and that there had been “material non-compliance” with state Tender Board Regulations and the funding contract with the European Union, the source of the funds for the commissioned work (at paragraph 6.5.1 of the report).

- A report into “allegations of impropriety in connection with Cabinet’s approval of the Government’s Operational Plan for HIV and AIDS”.<sup>19</sup>
- Annual financial oversight of government departments – of the highest quality and integrity – by the office of the AG.

Yet most of these Chapter 9s also have somewhat patchy records – some obviously less patchy than others. In particular, the issue of the state’s response to HIV/AIDS – a significant source of conflict between government and civil society for much of the past decade – has not received the attention that such a threat to our democracy and culture of human rights deserves. The Chapter 9s, which were well placed to ensure a speedy and comprehensive resolution of the stand-off between government and the Treatment Action Campaign (TAC), were either unable or unwilling to rise to the challenge.

The CGE, for example, has been largely silent on the HIV/AIDS epidemic, despite it being arguably one of the gravest threats to the attainment of gender equality in South Africa.<sup>20</sup> Its commissioners should have been spurred into action upon reading the express recommendations of Parliament’s Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women in its November 2001 report entitled “How Best Can South Africa Address the Horrific Impact of HIV/AIDS on Women and Girls?” At minimum, the CGE should have added its voice to those demanding that the state and its civil society and private sector partners devise and implement an effective response to the epidemic – in order to mitigate the impact on women and girls.

This submission, however, is not about what could and should have been done by the Chapter 9s in the past. Some of our concerns in this regard, which are set out in the attached Annexure 1, are intended to explain the context within which we have interacted with various Chapter 9s and which undeniably has an impact on the stance we have adopted. Instead, this submission primarily aims to address our key concerns in respect of the four identified institutions – to ensure that their work is of a consistently high quality, is effective and has a wide reach and impact.

## **CONSTITUTIONAL AND STATUTORY MANDATES**

When addressing the issue of constitutional and statutory mandates,<sup>21</sup> the Committee’s terms of reference speak about mandates that are “suitable for the South African environment”. In our view, this environment is – in large part – influenced by our constitutional democracy that –

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<sup>19</sup> In 2004, the Public Protector investigated – and dismissed – “allegations of impropriety in connection with Cabinet’s approval of the Government’s Operational Plan for HIV and AIDS”. This was in response to a complaint lodged by a prominent AIDS denialist. In this case, the Public Protector had to consider the allegation that the decision to adopt the plan “was unconstitutional and irrational as it did not take into account the best available evidence on the disease and ... was based on the unproven premise that HIV causes AIDS”. In dismissing the complaint, the Public Protector expressly recognised government’s duty “to formulate and implement a policy” to give access to ARV medicines to everyone in need of them.<sup>19</sup> Whilst aware that there may be differences of scientific opinion, the Public Protector made it plain that “what is expected of the state is to act responsibly and reasonably under the circumstances” – to ensure that public health policy follows “the collective opinions of the international community based on research and the best available information” (at paragraph 11.4 of the report).

<sup>20</sup> See, for example, “Memorandum Handed to Commission on Gender Equality on 1 April 2003”, available online at [http://www.tac.org.za/newsletter/2003/ns12\\_04\\_2003.htm](http://www.tac.org.za/newsletter/2003/ns12_04_2003.htm) and attached hereto as Annexure 2. Implicit in a separate memorandum delivered by the TAC to the SAHRC on the same day is the recognition that the SAHRC’s record on HIV/AIDS – whilst inadequate – was substantially better than that of its sister commission. That document (“Memo Handed to Human Rights Commission on 1 April 2003”) is part of the same TAC press release that is attached hereto as Annexure 2.

<sup>21</sup> While the terms of reference refer to “Constitutional and legal mandates”, we prefer to use the term constitutional and statutory mandates, given that both the Constitution and various statutes set out the legal mandates of the relevant bodies.

- Is both representative and participatory;<sup>22</sup>
- Guarantees certain fundamental rights;
- Imposes obligations on the state (positive and negative) and private parties (largely negative) in respect of such rights; and
- Poses certain obligations on the state and the public service in respect of the exercise of public power.

It is important to note that the Chapter 9s, as a collective, are mandated by the Constitution to “strengthen [representative and participatory] constitutional democracy”. Some, such as the Independent Electoral Commission (IEC) and the AG, have very distinct and defined roles. But the rest are different. Existing alongside a range of other organs of state – such as the executive, the courts and statutory councils – whose work is essential to the everyday functioning of our democracy, they appear to have somewhat secondary and supportive roles to play. In short, they are neither the primary drivers nor enforcers of state policy or rights obligations – their roles appear to be more facilitatory in nature.

In this section, we concentrate on the SAHRC and the CGE. Our concerns regarding the AG and the Public Protector – which apply with equal force to the SAHRC and the CGE – are largely limited to ensuring that the institutions have the requisite political space and financial and human resources to discharge their obligations.<sup>23</sup> But in respect of the SAHRC and the CGE, our concerns are somewhat broader, particularly insofar as their statutory mandates are concerned. Of utmost concern is our perception that the SAHRC and the CGE appear to operate largely as government-funded non-governmental organisations, playing roles that are in many ways indistinguishable from their counterparts in civil society. This point receives further elaboration below, which includes an analysis of their constitutional and statutory mandates.

### **Constitutional mandates**

Section 184 of the Constitution, which sets out the SAHRC’s constitutional mandate, speaks about two main areas of focus – promoting respect for and the protection, development and attainment of human rights; and monitoring and assessing the observance of human rights. The CGE’s constitutional mandate, set out in section 187 of the Constitution, is focused on promoting respect for and the protection, development and attainment of gender equality. There is clearly some degree of overlap:

- In terms of section 184, the SAHRC has the powers – as regulated by statute – necessary to do its work, including powers to investigate and report on the observance of human rights, to take steps to secure “appropriate redress where human rights have been violated”, to carry out research and to educate. It is also mandated to require “relevant organs of state” to provide it with information – every year – regarding the realisation of rights to housing, health care, food, water, social security, education and the environment.
- The CGE, in terms of section 187 of the Constitution, also has the powers – as regulated by statute – necessary to do its work, including powers to monitor, investigate, research, educate, lobby, advise and report on gender equality issues.

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<sup>22</sup> *Doctors for Life International v Speaker of the National Assembly and Others*, as yet unreported decision of the Constitutional Court in case no. CCT12/05 (17 August 2006), available online at <http://www.constitutionalcourt.org.za>

<sup>23</sup> This primarily raises concerns about oversight and funding mechanisms.

While the constitutional mandates may appear somewhat different, with the CGE's work being "limited" to issues of gender equality, they are – in all material respects – the same. They have similar powers and are both tasked with promoting respect for and the protection, development and attainment of rights. While the singular focus on gender equality is necessary, there is nothing in the constitutional mandate of the CGE that appears to justify its existence. In our view, this separation results – at least – in the following problematic outcomes:

- The apparent removal of gender equality issues from the SAHRC's mandate undermines its work on human rights broadly, in particular its focus on socio-economic rights – which have clear gender dimensions and implications;
- Separate sets of commissioners deliberate over the work and mandates of separate institutions whose areas of work clearly overlap; and
- Each institution requires significant financial and human resources for setting up and maintaining its own infrastructural and administrative systems;

In short, we submit that there is no justifiable basis for a separate CGE, whose existence appears – somewhat ironically and tragically – to undermine and marginalise issues of gender. Instead, the constitutional mandate of the SAHRC should be expressly amended to ensure that the issue of gender equality is appropriately prioritised in its work. For example, when reporting on the realisation of rights to housing, health care, food, water, social security, education and the environment, the SAHRC should consider the gender dimensions of such rights and whether and in what way their realisation has affected the lives of women and girls.

In addition to ensuring that there is a focus on gender in all of the SAHRC's work, we submit that a specialised unit – under the direct leadership of dedicated commissioners – be set up within the commission to promote "respect for gender equality and the protection, development and attainment of gender equality". In this way, the dedicated focus on gender equality is maintained, the issue of gender equality is addressed as an integral part of all human rights work, and unnecessary duplication is avoided. In addition, it will ensure that a single group of commissioners – including those tasked with the gender equality mandate – will have oversight over the human rights work of the SAHRC.

In making this recommendation, we are mindful of the fact that constitutional amendments should be considered only as a matter of last resort and that the Bill of Rights – in particular – is sacrosanct. In this case, however, we are proposing an amendment that seeks to ensure that the Constitution's promise of gender equality – which draws from its founding values of "dignity, the achievement of equality ... and non-sexism" – is indeed realised. In any event, we are simply suggesting that the mandate of one body be incorporated into that of another, to be accompanied by the requisite resources to ensure that such a mandate is indeed discharged.

### **Statutory mandates**

As already mentioned, one of the mandates of the SAHRC – on the basis of information provided to it by "relevant organs of state" – is to report on the realisation of rights to housing, health care, food, water, social security, education and the environment. Whilst potentially a powerful mechanism for ensuring that socio-economic rights are indeed realised, this aspect of the SAHRC's work – in our view – is one of its most disappointing. The reports, which are not released every year and are ordinarily published very late –

- Appear to rely too heavily on what government departments are prepared to divulge – with this information often taken simply at face value, without

significant interrogation and follow-up where there is prima facie evidence of rights violations; and

- Indicate the absence of proper monitoring and evaluation tools and systems, with the SAHRC having failed to develop a set of indicators to fulfil their mandate to “monitor the progressive realization of socio-economic rights”.<sup>24</sup>

There appears to be nothing in the SAHRC’s mandate which prevents it from doing a substantially better job on this score. Linked to its monitoring of socio-economic rights is the question of ensuring remedies for those whose rights are either violated or not promoted. Here we believe there is nothing in law that prevents the SAHRC from playing a central role in the transformation of the legal sector, arguably a necessary condition if the Constitution’s guarantee of access to courts (and other dispute resolution mechanisms) in section 34 is to be realised. In our view, the SAHRC is ideally placed to ensure that people are able to enforce their rights through significantly expanded access to legal services – in part by ensuring that the state complies with its positive obligations in respect of section 34 and as set out in section 7(2) of the Constitution.<sup>25</sup>

However, if the SAHRC is indeed to be able to deal effectively with access to justice concerns, ensuring that people are able to assert and realise their rights, its statutory mandate should be further amended. An obvious place to start would be to clarify and strengthen its role in respect of two key pieces of legislation required by the Constitution’s Bill of Rights: the Equality Act and PAIA.<sup>26</sup> In respect of each of these statutes, we envisage a role for the SAHRC that is both educative and facilitative – ensuring that people are aware of their rights (as set out in the two statutes) and are, in fact, able to prosecute their rights claims, regardless of their economic status.

### *The Equality Act*

In a previous submission to Parliament,<sup>27</sup> we recognised that the SAHRC “has a particular role to play in relation to the [Equality] Act”, it being “empowered and/or mandated to –

- Institute proceedings under the Act;
- Promote equality;
- Monitor equality plans contemplated in section 25 of the Act;
- Compile a report “on the extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic”; and
- Monitor regular progress reports in cases where reporting has been ordered by equality courts.”<sup>28</sup>

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<sup>24</sup> See, for example, the 6<sup>th</sup> *Economic and Social Rights Report* (August 2006), in particular chapter 3 dealing with health. This chapter fails seriously to examine, analyse and question key issues, such as – for example – the current level of access to health care services. If this question is not asked, one cannot determine whether there is indeed progressive realisation of the right. For more analysis of the SAHRC’s monitoring work, see Dwight G Newman, “Institutional Monitoring of Social and Economic Rights: a South African Case Study and a New Research Agenda” (2003) 19 *South African Journal on Human Rights* 189.

<sup>25</sup> The SAHRC does not appear to be playing this central role in current Department of Justice and Constitutional Development (“the DoJ”) initiatives to draft and adopt a Legal Services Charter. Our position on the draft charter, which appears to conflate essential black economic empowerment with access to legal services, will be set out in a submission to the DoJ that we are currently drafting.

<sup>26</sup> A third constitutionally-required statute, the Promotion of Administrative Justice Act 3 of 2000, is not considered. We do not believe that such a specialised and complex piece of legislation should be dealt with by a body such as the SAHRC, which would result in an unbearably heavy workload and would invariably touch on the mandate of the Public Protector.

<sup>27</sup> Written submission on the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 to the Joint Monitoring Committee on the Improvement of the Quality of Life and the status of Women and the Joint Monitoring Committee on the Improvement of the Quality of Life and the status of Children, Youth and Persons with Disabilities (22 September 2006). A copy of that submission is attached hereto as Annexure 3.

<sup>28</sup> Footnotes omitted

In our previous submission, we noted that this mandate was “in addition to the SAHRC’s constitutional mandate to ‘investigate and report on the observance of human rights and to take steps to secure appropriate redress when human rights have been violated’, as amplified by the Human Rights Commission Act 54 of 1994.”<sup>29</sup> In respect of the proper role to be played by the SAHRC in respect of the Equality Act, we stated as follows:

“It is critical the SAHRC plays a proactive and dedicated role in creating awareness about the equality courts and their powers and remedies. It should be involved actively in empowering people to use the Act, to ensure that the Act becomes fully operational, and to monitor the functioning of the equality courts. In addition, it must make full use of its powers to institute action on behalf of complainants and thereby assist poor people to access justice.

We have been critical of the SAHRC and have expressed disappointment at its failure to tackle many rights violations with the necessary urgency, its failure to intervene in politically charged court cases, not adequately using its powers of search and subpoena and not fully holding government accountable. But part of our frustration, however, lies with the somewhat limited role ascribed to the SAHRC by the Act.”<sup>30</sup>

Our major concern, however, was that “[a]lthough empowered to institute action on behalf of rights claimants, the SAHRC is not recognised by the [Equality] Act in a manner that recognises the full import of section 34 of the Constitution, which grants everyone ... ‘the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.’” In our view, when section 34 is read in the context of section 7(2) – which requires the state to “respect, protect, promote and fulfil the right in the Bill of Rights” – and section 9(4) – which requires legislation along the lines of the Equality Act – of the Constitution, alternative forms of dispute resolution appear to be envisaged. With this in mind, we recommended the following:

“One such mechanism may be that which has been adopted by the Competition Act 89 of 1998, which sets up a competition authority composed of the Competition Commission, Competition Tribunal and Competition Appeal Court. In short, the Commission investigates and “prosecutes” consumer complaints, the Tribunal adjudicates and the Appeal Court takes on the role of an ordinary court of appeal. If such a model were to be applied to the Act, it would see the SAHRC taking on the role of investigator (of rights violations) and “prosecutor” (before the equality courts). This would ensure that access to resources (including legal resources) would not be determinative of access to justice, as appears to be the case at the moment.”

We remain of the view that the SAHRC’s mandate needs to be expanded in this or some other comparable way, to ensure that the rights guaranteed by the Constitution – and expanded upon in the Equality Act – do not simply remain on paper but are actually realised. This, in our view, is a way for the SAHRC actively to promote respect for and ensure the protection, development and attainment of human rights.

#### *PAIA*

Part of the SAHRC’s statutory mandate is to be found in PAIA, which ascribes certain roles to the body. These include the following mandatory roles:

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<sup>29</sup> Footnote omitted

<sup>30</sup> Footnote omitted

- Compiling and making available a guide on how to use PAIA;<sup>31</sup>
- Receiving reports from all public bodies regarding access to information requests made to those bodies, and submitting reports to the National Assembly that deal largely with the information received;<sup>32</sup> and
- An educative role, provided resources are available.<sup>33</sup>

In addition, PAIA permits – but does not require nor facilitate – the SAHRC to play a range of other important roles, including the following:

- Making recommendations regarding law reform;<sup>34</sup>
- Monitoring the implementation of PAIA;<sup>35</sup> and
- Upon request and only if reasonably possible, assisting persons use PAIA to claim their rights.<sup>36</sup>

The SAHRC's mandate in respect of PAIA does not sit particularly comfortably with its constitutional mandate. While its educative role is useful, its express mandate regarding receiving and reporting on information regarding access to information requests is somewhat limited. Instead of expressly being tasked with ensuring that the legislation is working, and that those seeking access to information are in fact able to do so without having to resort to the courts, the SAHRC has been given a role that is largely administrative in nature and devoid of content. In our view, its optional "mandate" – as set out in section 83(3) of PAIA and perhaps expanded – should form the basis of its express mandate, with appropriate resources allocated to ensure that this is indeed possible.

As an organisation that has found it difficult, time-consuming and expensive to make use of the provisions of PAIA,<sup>37</sup> we recognise the necessity for a Chapter 9 body such as the SAHRC to take charge of getting PAIA working. As the Supreme Court of Appeal noted in *Clause v Information Officer of South African Airways*, the aims of the legislation are being disregarded:

"It is unfortunate that the Promotion of Access to Information Act 2 of 2000 ... which (as appears from the preamble) was intended to:

- \* foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
- \* actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,'

should result in pre-trial litigation involving huge costs before the merits of the matter are aired in court. *One of the objects of the legislation is to avoid litigation rather than propagate it.* This is the fourth case in which information has been sought in terms of the Act that has in the past eighteen months required the attention of this court. ... The present appeal illustrates how a disregard of the aims of the Act and the absence of common sense and

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<sup>31</sup> Sections 10 and 83(1)(a)

<sup>32</sup> Section 32, 83(10)(b) and 84

<sup>33</sup> Section 83(2)

<sup>34</sup> Section 83(3)(a)(i)

<sup>35</sup> Section 83(3)(b)

<sup>36</sup> Section 83(3)(c)

<sup>37</sup> See, for example, *Treatment Action Campaign v Minister of Health*, unreported judgment of the Pretoria High Court in case no. 15991/04 (14/12/2004). A copy of that judgment is available upon request.

reasonableness has resulted in this court having to deal with a matter which should never have required litigation.”<sup>38</sup>

With this in mind, we recommend that the mandate of the SAHRC – as set out in sections 10, 32, 83, 84 and 85 of PAIA – be revised in a manner that grants a much stronger role to the SAHRC and both enables and requires it to act in a way that limits the need for unnecessary litigation. Rather than the SAHRC acting as a secretarial service for Parliament, it should use its limited resources to realise the right of access to information.

### **Concerns about the NGO-style operations of the SAHRC**

This submission has already raised our concern regarding the perception that the SAHRC appears to operate largely as a government-funded NGO. In other words, we see the SAHRC taking too little advantage of the powers accorded to it by the Constitution and its empowering statute, failing to use its constitutional status and powers to hold the state to account. Instead, it appears to tread carefully and conduct its work in a manner largely indistinguishable from that of large NGOs – through research, advocacy, workshops and *amicus curiae* interventions.

Our twofold concern, with the first aspect – state funding – being closely linked to the second, needs to be explained further. In and of itself, state funding of bodies tasked with holding it to account is not problematic – indeed the Chapter 9s should be government-funded – provided appropriate oversight and funding mechanisms are put in place.<sup>39</sup> But when Chapter 9s operate in a manner akin to NGOs, failing to use their powers and significant influence, concerns regarding self-censorship are raised. In particular, such a manner of operation may be indicative of structural problems with matters such as funding and appointment procedures.

Our major concern here is that the SAHRC does not seem to be adding any particular value as a Chapter 9. While its work is important, it is not significantly different from that of a range of NGOs. Consider that the SAHRC has the powers necessary to do its work, including powers to investigate and report on the observance of human rights, to take steps to secure “appropriate redress where human rights have been violated”, to carry out research and to educate. It therefore does not seem appropriate that its work should approximate the work of NGOs involved in advocacy, monitoring and evaluation and service provision. Instead, it should be using its particularly strong powers – including those of subpoena – to greater effect, to ensure that a rights culture flourishes; that rights holders are able to prosecute their claims; and that information necessary for efficient and effective monitoring and evaluation work is forthcoming.

### **OVERSIGHT**

Section 181(5) of the Constitution says that the Chapter 9s 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.” Importantly, the Constitution is silent on the manner in which this accountability is to be achieved – it leaves the detail to legislation. While we recognise the important role of Parliament in ensuring that the Chapter 9s are indeed held to account, we believe that there is a need for Parliament to structure its oversight role – including the mechanisms for appointing and dismissing office bearers – in a manner that brings relevant stakeholders into the process.

Our experience has shown that limited oversight, set against the backdrop of a Parliament that is composed only of members elected through proportional representation, has a negative impact on the functioning of Chapter 9s. In a context where Parliament, for

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<sup>38</sup> [2006] SCA 163 (RSA) at paragraph 1 (emphasis added)

<sup>39</sup> This issue is discussed in further detail below.

example, has often failed to make use of many of its oversight powers (in respect of the executive), it is unsurprising that the bodies appointed and funded by and accountable to Parliament are wary of taking such action. However, if the oversight mechanism were to be more inclusive, the potential for more robust Chapter 9s would be significantly enhanced.

In our view, there are numerous options available to Parliament. One of these is the setting up of a Joint Chapter 9 Oversight Committee, either through amendments to the relevant statutes or by way of a separate statute. Such a committee could be modelled on the Judicial Service Commission (JSC), which plays an integral role in the appointment and dismissal of judges. The JSC's composition is diverse, representing the judiciary, Parliament, the executive, the legal profession and academia (but not, unfortunately, civil society). In our view, the composition of any oversight committee set up by Parliament to hold the Chapter 9s to account should be similarly diverse, but particularly including several representatives of human rights NGOs and with space given to the relevant sectors to elect or select their own representatives.

## **FUNDING**

Most of our proposals have significant financial implications. Whilst incorporating the CGE's constitutional mandate into that of the SAHRC would free up some resources, the net result from the implementation of our recommendations would nevertheless be costly. In our view, however, cost should not be a deterrent. We submit that allocating appropriate resources for the identified purposes would not only amount to a wise investment in the long-term sustainability and relevance of the Chapter 9s, but would also go some way towards ensuring that the state is indeed able to "respect, protect, promote and fulfil the rights in the Bill of Rights".<sup>40</sup> This can only be done if the Chapter 9s play their proper constitutionally-recognised role in ensuring that a real culture of human rights is indeed established.

As a country, we are rightly prepared to invest significant resources in the IEC to ensure that our right to vote is respected, protected, promoted and fulfilled. Similarly, we correctly consider the allocation of sufficient resources for the proper functioning of our criminal justice system – the police service, the prosecuting authority and the courts – as necessary to ensure that our right to freedom and security of the person is also respected, protected, promoted and fulfilled. If we are equally passionate about realising all other rights, in particular socio-economic rights and gender equality, we should be equally prepared to ensure that Chapter 9s such as the SAHRC are appropriately and adequately resourced, provided appropriate financial accountability mechanisms are in place.<sup>41</sup>

## **CONCLUSION**

We once again thank the Committee for this opportunity to make written submissions regarding its review of the Chapter 9s and the PSC. Our critique of several of the institutions under review may – at times – appear as particularly harsh. If this is so, it is because we believe that the Chapter 9s have a crucial role to play in supporting constitutional democracy and indeed are capable of discharging their constitutional mandates. To date, our experience of the various Chapter 9s has been somewhat disappointing. Whilst some of the blame may be laid at their doors, our submission has attempted to show that a key part of the problem lies with inadequate and/or inappropriate statutory mandates. We trust that our recommendations will assist the Committee in its deliberations and that its report to the National Assembly will enable that body to take decisive action.

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<sup>40</sup> See section 7(2) of the Constitution

<sup>41</sup> In our view, financial accountability should fall under the watch of our proposed Joint Chapter 9 Oversight Committee.