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## THE LESOTHO HUMAN RIGHTS COMMISSION

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### PART A. INTRODUCTORY COMMENTARY

#### 1 Introduction

The Kingdom of Lesotho is a former British protectorate which gained independence from Britain in 1966. Since then, it has had a bumpy political landscape. From 1970-1986, Lesotho was under one-party rule and its Constitution was suspended; then, from 1986-1993 it was under military rule, after which it returned to democracy in 1993.<sup>1</sup>

Although the Lesotho Human Rights Commission (LHRC) was formed in 2011 with the enactment of the Sixth Amendment to the Constitution Act, a cabinet decision for its establishment was taken as far back as 1995.<sup>2</sup> The mandate of the LHRC is to oversee the promotion and protection of human rights in Lesotho.<sup>3</sup> The LHRC has been long awaited, and its establishment presents an opportunity to reform Lesotho's human

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1 K Matlosa and N Pule, "Civil-Military Relations in Lesotho, 1966-1998: Problems and Prospects", 10(2) *African Security Review* (2001), p 43.

2 CAB/DEC/11/1995 (records in the human rights unit of the Ministry of Law, Constitutional Affairs and Human Rights).

3 Sixth Amendment to the Constitution Act 2011.

rights culture.<sup>4</sup> Since independence, the country has been known for its discrimination against women,<sup>5</sup> as well as for police brutality and torture committed with impunity.<sup>6</sup> The LHRC could serve to help address Lesotho's failure to domesticate ratified treaties<sup>7</sup> and submit, timeously or at all, its periodic and other state reports to the relevant treaty bodies.<sup>8</sup> The establishment of the LHRC also supplements pre-existing institutions that advance human rights and democracy, such as the Office of the Ombudsman, the Police Complaints Authority (PCA) and the Directorate of Corruption and Economic Offences (DCEO), whose limited mandates have made it difficult for them to protect human rights fully in Lesotho.<sup>9</sup>

When it was adopted in 1993, the Constitution of Lesotho did provide for the establishment of a human rights commission but it vested this human rights mandate in the Office of the Ombudsman. The formation of the LHRC is thus to be seen as a direct result of the call made by the 1993

4 For instance, in its report on a promotion mission to Lesotho in 2006, the African Commission on Human and Peoples' Rights recommended that Lesotho must establish a national human rights institution in order to bolster the work of the other institutions.

5 I Shale, "Women and Succession To Chieftainship in Lesotho: The Evolution of Customary Law and the 1993 Constitution", 21 *Lesotho Law Journal* (2014), pp 87-105; L Juma, "Chieftainship and Gender Equality in Lesotho: Negotiating the Right To Equality in a Jungle of Pluralism", 22 *Texas Journal of Women and Law* (2012), p 157; KA Acheampong, "The Ramifications of Lesotho's Ratification of the Convention on Elimination of All Forms of Discrimination Against Women", 9(1) *Lesotho Law Journal* (1993), p 71; KA Maope, "A Note on Discrimination and Section 18 of the Constitution of Lesotho", 14(2) *Lesotho Law Journal* (2001), p 395.

6 Amnesty International "Lesotho: Authorities Must Ensure An Independent Investigation into Torture Allegations and Death" (22 February 2019), available at <https://www.amnesty.org/en/documents/afr33/9896/2019/en/> (accessed 22 February 2019); FJ Likoti, "The Implications of Executive Influence on the Police Service: A Study of the Lesotho Mounted Police Since Independence", 2(2) *Lesotho Law Journal* (1999), p 201.

7 Lesotho is a state party to the core UN human rights instruments. It acceded to both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1992, acceded to the International Convention on Elimination of Racial Discrimination (CERD) in 1971, ratified the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) in 1995, acceded to the Convention Against Torture (CAT) in 2001, ratified the Convention on the Rights of the Child (CRC) in 1992, ratified the International Convention on the rights of Migrant Workers and Members of their Families (CMW) in 2005, and acceded to the Convention on the Rights of Persons with Disabilities (CRPD) in 2008.

8 For instance, Lesotho ratified the CAT in 2001 but to date has not submitted its initial state party report. The African Charter was ratified in 1991, its initial report submitted in 2001, and second periodic report only submitted in 2018.

9 Limitations of the Ombudsman and the PCA are illustrated in section 2.2 of this chapter.

World Conference of Human Rights for the establishment of national human rights institutions (NHRIs).<sup>10</sup> Since then, the United Nations, through organs such as the Office of the High Commissioner for Human Rights (OHCHR) and United Nations Development Programme (UNDP), have supported the establishment of NHRIs mandated to protect and promote human rights at the national level.<sup>11</sup> In Lesotho, the Constitution was amended in 2011 to provide for the establishment of the LHRC, and in 2016 the Human Rights Commission Act was passed to operationalise the latter.

Despite the existence of a legal framework for an NHRI in Lesotho, to date the Commission has not been operationalised: that is, the commissioners have not been appointed and no other operational steps, including the choice of office space, have been taken. Since there is no practice yet, the analysis of the LHRC in this Chapter will be limited to assessing the LHRC's challenges and opportunities as reflected in the legal framework. The main argument here is that the composition of the Commission is unlikely to ensure pluralism and that the manner in which members are appointed to it undermines its ability to act independently. In developing this argument, the chapter analyses the LHRC's establishment, its conformity with the Paris Principles, its mandate, and its accountability to the public as reflected in both the Sixth Amendment to the Constitution Act of 2011 and the Human Rights Commission Act of 2016.

## 2 Establishment and evolution of the LHRC

### 2.1 The model of the LHRC

There are different models of human rights institutions. Lesotho has chosen a human rights commission with a broad mandate to promote, protect, monitor and sustain human rights in the country.<sup>12</sup> The Commission is expected to carry out this broad mandate by performing the following functions:

- (a) Monitor the state of human rights throughout Lesotho;
- (b) Monitor the human right situation of detainees;

10 Vienna Declaration and Programme of Action (A/CONF.157/23) April 1995, on the World Conference on Human Rights, 14-25 June 1993.

11 Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, UN Doc HR/P/PT/4/Rev.1. (2010), p 2.

12 Human Rights Commission Act 2016, section 3.

- (c) Investigate violations of human rights, and if necessary, be responsible for instituting proceedings against such violations in the courts of law ...
- (g) Advocate for ratification, recommend domestication, of international and regional human rights instruments;
- (h) Promote and monitor the harmonisation of national laws and practices with international and regional instruments to which Lesotho is a State Party ...<sup>13</sup>

While the LHRC has a broad mandate as envisaged in the Paris Principles, its ability to deal with socio-economic rights may be limited by the specific mention in the Act that it shall perform its mandate in accordance with the Constitution. This is a challenge because, in its Chapter 2, the Constitution does not recognise socio-economic rights as human rights; these are instead treated, in Chapter 3, as non-justiciable directive principles of state policy.<sup>14</sup>

The other challenge in the model is that the LHRC is composed of only three members, namely the chairperson, deputy chairperson and a commissioner. Restricting the Commission to three members may limit its ability to execute a broad mandate that includes investigation, mediation, litigation, inspection of places of detention, and advocating for the ratification and domestication of international instruments. The members may also be inundated with complaints and ultimately fail to discharge these functions properly.

This challenge could be overcome, however, by virtue of the fact that the general management and administration of the Commission are vested in its director-general, who shall be appointed by the Commission in consultation with the minister.<sup>15</sup> Another factor that may alleviate the burden on the commissioners is that the Act provides for the appointment of other members of staff, the number and qualifications of whom depend on the needs of the Commission.<sup>16</sup> Where necessary, the Act also makes provision for secondment of public officers to perform functions for the Commission when the commission so requests.<sup>17</sup> The Commission is at liberty, too, to engage the services of advisors or consultants.<sup>18</sup>

So, depending on their number, expertise and the mandate the Commission assigns to them, support staff – whether provisioned by way

13 Human Rights Commission Act 2016, section 7.

14 Constitution of Lesotho 1993, section 25; see also *Khathang-Tema Baits'okoli & Another v Maseru City Council & Others Court of Appeal of Lesotho CA (Civ) 4/2005*.

15 Human Rights Commission Act 2016, section 29.

16 Human Rights Commission Act 2016, section 33(2).

17 Human Rights Commission Act 2016, section 34(1) and (2).

18 Human Rights Commission Act 2016, section 34(3).

of direct employment, secondment or consultancy – could thus assist the Commission to fulfilling its broad mandate.

## 2.2 Relations with other human rights institutions

When the Constitution was amended in 2011 to establish the LHRC, institutions and units were already in existence within government to oversee the promotion and protection of human rights in Lesotho. For instance, the 1993 Constitution provided for the Office of the Ombudsman.<sup>19</sup> The first Ombudsman was appointed in 1993, a time when Lesotho had recently returned to democratic rule after 16 years of one-party rule (1970-1986) and seven of military rule (1986-1993). Hence, the Ombudsman was seen as an institution that would “strengthen democracy and the democratic process in Lesotho by providing checks and balances in support of good governance”.<sup>20</sup> The mandate of the Ombudsman includes investigation or inquiry and recommendation of remedial or preventive action in several areas: injustice, maladministration and unlawfulness in public entities; violation of human rights; corruption; and protection of the environment.<sup>21</sup>

In a 2009 study on the effectiveness of the Ombudsman, Kapa concludes that despite resource constraints, the Office has done fairly well in protecting human rights and combating injustice and maladministration in the public service.<sup>22</sup> However, the Office has faced a number of challenges that prevent it from fully protecting human rights in Lesotho. First, the mandate conferred on the Ombudsman is limited in that section 19(1) of the Ombudsman Act excludes the King, Parliament, cabinet, courts of law and the Public Service Commission from the Ombudsman’s scope of investigation.<sup>23</sup> Secondly, the Ombudsman lacks the authority to investigate allegations of human rights violations in the private sector.<sup>24</sup> That is, victims of human rights violations committed in the private sector or by any of the abovementioned public offices cannot be investigated by

19 Constitution of Lesotho, 1993 sections 134-135.

20 P Mosisili, “Preparing the Lesotho Ombudsman for the New Millennium”, in V Ayeni (ed) *The Ombudsman and Good Governance in the Kingdom of Lesotho* (2000), p 12.

21 Ombudsman Act 1996, section 7.

22 MA Kapa, “Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: The office of the Ombudsman in Lesotho”, 39 *EISA Research Report* (2009), p 34.

23 Ombudsman Act 1996, section 19.

24 Section 135(2) of the Constitution sets out the scope of operation for Office of the Ombudsman to investigate all departments of government and their members; any local government authority and its members or officers; and any statutory corporations, their members and officers.

the Office of the Ombudsman. Thirdly, the Ombudsman does not have the power to enforce his or her decisions.

Another pre-existing institution is a human rights unit that was established in 1995 through a cabinet decision as an organ of government responsible for promoting, protecting and monitoring human rights in Lesotho.<sup>25</sup> At the time of its establishment, the unit was part of the Ministry of Justice, and is currently located in the Ministry of Law, Constitutional Affairs and Human Rights.<sup>26</sup> Since its establishment, the unit has acted as a bridge between government and civil society organisations (CSOs) in matters of human rights. It has been responsible for the preparation and submission of state party reports, educating law enforcement officers and the general public on human rights, and acting as a focal point for regional and international organisations such as the OHCHR, African Commission and other human rights mechanisms. Among the challenges the human rights unit faces are financial and human resource constraints. It is currently staffed by only two people, a chief legal officer and a legal officer. These challenges have hindered its performance in carrying out its mandate.<sup>27</sup> Another challenge is that, inasmuch as it is an arm of government, the unit lacks the independence necessary for fulfilling its mandate without interference.

Other oversight bodies whose mandates have a bearing on human rights are the PCA and the DCEO. The PCA is a statutory body that was established in terms of section 22 of the Police Service Act of 1998 and became operational in 2003.<sup>28</sup> It is a civilian body with the mandate to oversee policing by investigating complaints by the public about the conduct of members of the Lesotho Mounted Police Service (LMPS) and reporting its findings to the police authority, which in terms of the Act is the Minister.<sup>29</sup>

Two major challenges that the PCA faces are inaccessibility and lack of powers beyond the investigation of allegations and recommendation of remedial action. In terms of accessibility, the PCA is, first and foremost, unknown to the public in Lesotho. Secondly, the public has no direct access to it. In terms of the Act, complaints can be lodged with the PCA only through the commissioner of police and the police authority. Lodging complaints through the commissioner of police involves navigating a lot of

25 See note 2.

26 *Ibid.*

27 Interview with the Chief Legal Officer, Human Rights Unit (25 February 2019).

28 Police Service Act 7 of 1998, section 22.

29 *Ibid.*, section 22(3).

bureaucracy in that they have to go through the station commander of the police officer/s alleged to have committed the misconduct; the station commander then escalates the matter to the officer in charge of the district concerned, who, if the matter is not resolved, takes it to the officer responsible for the region and thereafter the Inspectorate, Complaints and Discipline (IC&D) office. It is only if the IC&D is unable to resolve the matter that the commissioner of police refers it to the PCA.<sup>30</sup>

Owing to this cumbersome procedure, victims of police misconduct opt for litigation for damages against the government rather than reporting to the PCA. For the few who do opt to report, cases get sifted through the procedure above, with very few reaching the PCA. This process has also been criticised for lacking transparency and leading to abuses of power and unnecessary delays.<sup>31</sup>

The DCEO was established in 2005 through the Prevention of Corruption and Economic Offences Act of 1999. The mandate of the DCEO is to fight corruption through a three-pronged approach combining public education, prevention and investigation. To date, the DCEO has investigated and initiated the prosecution of cases involving public officials, private individuals and companies. One of the challenges the DCEO faces is that it has limited capacity in terms of staffing and office space; as a result, it operates only from the capital city of Maseru and lacks offices in the country's other nine districts.

Both the Sixth Amendment to the Constitution Act and the Human Rights Commission Act are silent on the relationship between the Commission and those pre-existing oversight bodies that to one degree or another have a human rights mandate. This silence leads to a conclusion that the LHRC is meant to exist side by side with them. The problem with this, however, is that it can lead to overlap, duplication and unhealthy competition between institutions.

Despite the legal framework's silence on the matter, it is clear that, once it becomes operational, the Commission will take over some of the functions initially performed by these bodies. For instance, while the inspection of detention facilities is, in terms of the Ombudsman Act, one of the functions of the Ombudsman, section 7(b) of the Human Rights Commission Act tasks the Commission with this function. Similarly, for a

30 This procedure is not contained in the Police Service Act, but forms part of the standard procedures adopted by the LMPS throughout the country.

31 Lesotho's Initial Report to the Committee on Migrant Workers, UN Doc CMW/C/LSO/1 (13 April 2016), paragraph 38.

long time the human rights unit has been responsible for promoting human rights and acting as a link between the state, CSOs and the international community. The same powers are now also vested in the Commission. The Police Service Act establishes the PCA as an oversight body with the mandate to investigate human rights violations and abuse of power by the police. This function may be transferred the Commission given that under section 7(c) of the Human Rights Commission Act, the Commission is empowered, inter alia, “[to] investigate violations of human rights”.

To avoid overlap and duplication of functions among these oversight bodies, the best approach would be for the Commission to foster good relations with them with a view to having them complement one another and work collaboratively towards a shared goal. For instance, the Ombudsman could continue with its mandate of dealing with maladministration, while human rights issues, including the inspection of detention facilities, are reserved for the Commission. Similarly, the cases of police brutality investigated by the PCA could be taken over by the Commission for purposes of litigation, given that the PCA is limited to investigation and recommendation and does not have the power to take further steps.

The relationship between, and applicable modes of operation among, the Commission and each of these bodies should be determined in the regulations the Commission adopts once it becomes operational. Clarification of this kind would help to avoid a multiplication of functions, a situation which, as EISA has noted with respect to South Africa, “[can] create overlapping jurisdictions, which is very confusing for the public ... costly to the taxpayer, and ... creates [the] possibility of unhealthy competition ....”<sup>32</sup>

### **2.3 Evolution of the Human Rights Commission**

Although the Commission has not yet commenced operations, its evolution may be traced as far back as 1995, when a cabinet decision for its establishment was taken.<sup>33</sup> The decision was clear that two separate entities were to be formed – the human rights unit, as an arm of government, and the human rights commission, as an independent entity.<sup>34</sup>

32 Electoral Institute for the Sustainability of Democracy in Africa (EISA) 2009; see also C Musuva, “Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa’s Public Protector and Human Rights Commission”, 41 *EISA Research Report* (2009).

33 See note 2.

The human rights unit was established and operationalised immediately. However, it took 16 years and enormous pressure from CSOs and the international community for the Sixth Amendment to the Constitution, establishing the Commission, to be adopted by Parliament. It took a further five years for an enabling law to be enacted, and three years hence the LHRC has not commenced operations – that is to say, 24 years after the notion was conceived of setting up a human rights commission in Lesotho, this institution is still not up and running.

The state of affairs can be attributed to several factors, chiefly so to resource constraints and the government's lack of political will to support the functions of the Commission. With regard to political will, the fear may well be, when it goes operational, the Commission will expose the human rights violations that take place in Lesotho. Institutions, such as the DCEO, with no power to make binding decisions, have succeeded in investigating and initiating prosecutions of government officials, including ministers, a former deputy prime minister, and other high-ranking officials. Given that the Commission is independent from government and indeed has the power to make binding decisions, there are presumably concerns that it would investigate and prosecute government officials implicated in human rights violations such as murder and torture.<sup>35</sup> Another factor that may have hindered the Commission's operationalisation is consideration of the resources that would be needed for the salary packages of the three commissioners, the director-general and the support staff.

A further key aspect of the LHRC's evolution is a case that challenged the manner in which the Human Rights Commission Act was adopted. Immediately after the Act was adopted, two CSOs that were at the forefront of advocacy for establishing an NHRI in Lesotho, Development for Peace Education (DPE) and the Transformation Resource Centre (TRC), lodged a case in the Constitutional Court challenging the manner in which the Act was passed. The basis of the case was that, in view of the Commission's importance in the protection of human rights, there ought to have been broad public participation before the Act was made law. The organisations claimed they had been denied an opportunity to present proposals on sections of the Human Rights Commission Bill of 2015.<sup>36</sup>

Among the arguments raised in this case was that there had been no public participation in the enactment of the Human Rights Commission

34 *Ibid.*

35 See note 6.

36 *DPE & TRC v Speaker of National Assembly & Others* Constitutional Case No 5 of 2016.

Act, contrary to section 20 of the Constitution and to National Assembly Standing Orders 54 and 79. The Human Rights Commission Bill was first tabled before the National Assembly on 2 November 2015. Although the Chairperson of the Portfolio Committee to the National Assembly said there had been wide consultation with all interested stakeholders, including a United Nations team,<sup>37</sup> the two CSOs disputed this. The latter had drafted proposed amendments to the Bill, but these were not considered because the Bill had been sent to the Senate already on 9 December 2015. In April 2016, the Clerk of the National Assembly, acting pursuant to section 80(3) of the Constitution and National Assembly Standing Order No 64(7), recalled the Bill to the National Assembly since the time for the Senate to debate the Bill had lapsed. This recall of the Bill was labelled a violation of the right to participate in public affairs, as contained in section 20 of the Constitution, since the applicant parties had not had any other opportunity to present the proposed amendments which they had prepared.

The Court held, however, that unlike the South African Constitution, which specifically guarantees “public access and involvement” in the parliamentary legislative process, the Constitution of Lesotho does not do so. It held that section 20 of the Constitution provides for the right to participate in public affairs through freely chosen representatives, namely Members of Parliament, and that “anyone else including the citizens, are strangers and have no right of audience in the National Assembly”.<sup>38</sup> The Court held, furthermore, that although National Assembly Standing Orders 76 and 54 provide for public participation, the extent of such is at the discretion of Parliament.<sup>39</sup>

While the Court acknowledged the need for public participation in the enactment of the Human Rights Commission Act, it stated that such participation remained at the discretion of the National Assembly portfolio committee and would have best taken place in 2011 during the enactment of the Sixth Amendment to the Constitution Bill of 2011.<sup>40</sup> Accordingly, the case was dismissed. The Human Rights Commission Act consequently remains with provisions that are not compliant with the Paris Principles as far as the composition, appointment and independence of the LHRC are concerned.

37 *Ibid*, paragraph 14.

38 *Ibid*, paragraphs 24 and 43.

39 *Ibid*, paragraphs 25-27 and 53.

40 *Ibid*, paragraphs 56-57.

### 3 The nature of the Human Rights Commission

#### 3.1 Legal framework

The Human Rights Commission of Lesotho is a creature of the Constitution. It was established by the Sixth Amendment to the Constitution Act 2011 which amends the Constitution by creating a new chapter referred to as Chapter XIA. Section 133A of the Constitution, as amended, provides that “[t]here is established a Human Rights Commission (in this Chapter referred to as the Commission) which shall be independent and free from interference and subject only to this Constitution and any other law”.

The administration and regulation of the Human Rights Commission and other matters related to it are governed by the Human Rights Commission Act of 2016.<sup>41</sup> The Act contains provisions relating to the Commission’s objectives, status, headquarters and functions, as well as to qualification for appointment to the Commission, tenure, and removal from office. The Act also provides guidance on the jurisdiction of the Commission and procedures for filing complaints, conducting enquiries and investigations, and making decisions.

#### 3.2 Independence

The independence of an NHRI can be assessed from the conformity of its legal framework with the Paris Principles. The indicators of independence set out in the Paris Principles include pluralism in composition of the commission, adequacy of resources and funding, and clearly defined tenure of office for the members of the commission.<sup>42</sup> It is with reference to these indicators that the LHRC’s independence is assessed in this section.

As far as the law is concerned, section 133A of the Sixth Amendment Act provides that the Commission “shall be independent and free from interference and subject only to this Constitution and any other law”. Its independence from government is reinforced in section 4 of the Human Rights Commission Act, which provides that, in terms of status, the Commission shall be a body corporate with perpetual succession and a common seal, with the capacity to sue or be sued in its own name and to enter into financial contracts and other undertakings. This implies that the

41 Preamble of the Human Rights Commission Act 2016.

42 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993).

Commission is entirely distinct from government and as such has the autonomy to perform its functions free from governmental interference.

This apparent independence is threatened, however, by the procedures for appointment of the members of the Commission (as discussed in more detail in the next section). The fact that the commissioners are, in terms of section 8 of the Human Rights Commission Act, appointed by the King on the advice of the Prime Minister would seem to imply that the Commission is but one of the organs of government and therefore not truly independent.

With regard to pluralism, the challenge is that the commission is composed of only three members. It is hence unlikely that they could ensure pluralistic representation of all the social forces in Lesotho, as required by the Paris Principles. This is therefore one of the bases on which the LHRC could fail to pass the test of independence.

The other indicator of independence relates to provisions concerning the tenure of office of members of an NHRI. The Human Rights Commission Act specifies that the period of tenure is seven years for the chairperson and five years for the other two commissioners.<sup>43</sup> This specification ensures a degree of independence in that members of the Commission will know that their period of service is not dependant on their pleasing the government of the day and that they are in a position to perform their functions without fear or favour.

Security of tenure is reinforced in section 10 of the Human Rights Commission Act, which stipulates procedures for removal of commissioners from office. It provides that “a member of the commission may be removed from office only for inability to exercise the functions of his office, whether arising from infirmity of body or mind, or any other cause ... or misbehaviour”. While this section protects members of the Commission from being removed arbitrarily, the problem is that the term “misbehaviour” is not defined – as such, it is subjective in meaning and creates the possibility for commissioners to be removed for acts that do not concern their ability to perform their mandate, as has been the case with the removal of leaders of the judiciary in Lesotho.<sup>44</sup>

This problem could be overcome by virtue of the fact that, unlike the removal of the president of the court of appeal and the Chief Justice under

43 Human Rights Commission Act 2016, section 9.

44 I Shale, “Independence and Accountability of the Judiciary in Lesotho: The Need for Reform of the Constitutional Process for Appointment, Discipline and Removal of Judges” 26(1) *Lesotho Law Journal* (2018), p 165.

the Constitution, the determination of conduct that warrants investigation is made not by the Prime Minister but Judicial Service Commission (JSC).<sup>45</sup> Nevertheless, the JSC arguably lacks full independence due to its composition: in terms of section 132 of the Constitution, it is made up of the Prime Minister's appointees, namely the Chief Justice,<sup>46</sup> the Attorney-General,<sup>47</sup> the chairperson of the Public Service Commission,<sup>48</sup> and a serving or former judge.<sup>49</sup>

### 3.3 Appointment procedure

Section 133B of the Sixth Amendment provides for the King to appoint, in accordance with the advice of the Prime Minister, a three-member commission consisting of a chairperson and two other members.<sup>50</sup> The same procedure is set out in section 8 of the Human Rights Commission Act, which governs the qualification for appointment as a commissioner. The exclusive discretion given to the Prime Minister to appoint members of the Commission creates the risk of an executively controlled Commission that is unlikely to be able to act independently. This system of appointment is also used in making judicial appointments and has exposed the judiciary to political manipulation.<sup>51</sup> It thus presents a real risk that commissioners will be appointed on the basis of political inclinations and without regard to their competence in the protection and promotion of human rights.

### 3.4 Financial autonomy

The Human Rights Commission Act creates room for the Commission's financial autonomy by stating that the government shall provide the Commission with adequate funds annually to enable it to discharge its functions.<sup>52</sup> The Act also gives the Commission the right to receive funds or gifts, whether movable or immovable property, without any conditions,

45 Human Rights Commission Act 2016, section 10(3).

46 The Chief Justice is appointed by the King on the advice of the Prime Minister in terms of section 120 of the Constitution of Lesotho 1993.

47 The Attorney-General is appointed by the King on the advice of the Prime Minister in terms of section 140 of the Constitution of Lesotho 1993.

48 The Chairperson is appointed by the King on the advice of the JSC in terms of section 136 of the Constitution of Lesotho 1993.

49 Judges are appointed by the King on the advice of the JSC in terms of section 120 of the Constitution of Lesotho 1993.

50 Sixth Amendment to the Constitution Act 2011, section 133B.

51 See note 45.

52 Human Rights Commission Act 2016, section 35(1).

as long as they are from lawful sources and used only for the purposes of promoting awareness and providing education in relation to human rights or carrying out other institutional operations as approved by the Commission.<sup>53</sup> If it is duly implemented, this section ensures that, apart from providing funds, the government shall not have a say in the financial dealings of the Commission and hence not interfere with its financial autonomy.

### **3.5 Professional skills and knowledge**

Due to its limited composition of only three members, the Commission, when it finally commences, is likely to have a fairly limited base of professional skills and knowledge. Furthermore, limiting it to three members will not ensure a pluralist representation of society. The minimum standard in the Paris Principles as far as pluralism is concerned is that an NHRI must have representation from CSOs and religions and also represent academics and experts.<sup>54</sup> Such diversity certainly cannot be achieved with only three members. The LHRC's limited composition thus creates the risk of confining representation to academics with no practical experience, or to practitioners with no expertise in human rights.

### **3.6 Relations with civil society organisations**

The Human Rights Commission Act provides that the LHRC shall, *inter alia*, develop and maintain working relations with organisations and representatives of civil society in Lesotho.<sup>55</sup> The extent of the pressure CSOs have exerted on the government to initiate the Commission is an indication of how eager they are to forge relationships with the Commission. This is also reflected in their proposal of amendments to the laws regulating the Commission, as was the case in the DPE and TRC case discussed earlier.<sup>56</sup>

53 *Ibid*, section 35(2).

54 Paris Principles, principle 1 on Composition and guarantees of independence and pluralism.

55 Human Rights Commission Act, section 7(i).

56 See note 36.

Many of Lesotho's CSOs engage in the field of human rights, some in human rights in general<sup>57</sup> and others with a focus on specific themes or the rights of specific groups.<sup>58</sup> The work of these organisations includes human rights education, advocacy for legislative reform, and holding government accountable for human rights violations, for example by litigating to obtain redress for the victims of such violations.<sup>59</sup> As such, collaboration between the Commission and CSOs would go a long way in addressing the human rights challenges in Lesotho.

Because most of these organisations have direct connection with the public at grass-roots level through chiefs, councillors, teachers and other stakeholders, they could be an entry-point for the Commission's decentralisation of its functions.<sup>60</sup> The Commission could also draw on pre-existing research conducted by various organisations and thereby enhance its understanding of human rights trends in Lesotho.<sup>61</sup>

### 3.7 Accessibility

The Human Rights Commission Act provides that the headquarters of the Commission shall be in Maseru, which is the capital city of Lesotho.<sup>62</sup> The Act also mandates the Commission to ensure that its activities are decentralised throughout the country. For obvious reasons, a concrete analysis of the Commission's accessibility cannot be made at the moment. However, it should be noted that decentralisation is a major challenge in Lesotho. Many institutions which protect human rights, such as Legal Aid

57 For instance, Transformation Resource Centre, Development for Peace Education, and Catholic Commission for Justice and Peace.

58 For instance, Federation of Women Lawyers (FIDA), Women and Law in Southern Africa (WILSA), Gender Links and others focus on women, while the Lesotho National Federation of Organisations of the Disabled (LNFOD) and other organisations under it work in the field of the human rights of persons with disabilities.

59 For instance, LNFOD joined as an applicant in the case of *Koali Moshoeshe & Other v Director of Public Prosecutions and Others High Court of Lesotho Constitutional Case No 14 of 2017*, which challenged the denial of legal capacity to persons with intellectual disability on the basis of their mental capacity. FIDA and WILSA joined as *amicii curiae* in the case of *Senate Gabasheane Masupha v Senior Resident Magistrate for the district of Berea and Others C of A (CIV) 29/2013 [2014] LSCA*, which challenged the exclusion of female children in succession to chieftainship.

60 S Shale, "Can Civil Society Organizations Make the Human Rights Commission Effective and Relevant?", 30(2) *Work for Justice* (2012), p 17.

61 For instance, the TRC has published a documentary on torture, WILSA has published research on human trafficking, and the Lesotho National Council of Non-Governmental Organisations (LCN) has published research on the status of women in the country.

62 Human Rights Commission Act 2016, section 5.

Counsel, the Master of the High Court, DCEO and PCA are present only in the capital city and absent in the other nine districts. It would be imperative for CSOs to collaborate with the Commission to ensure that it extends its services to rural areas in order to advance the full promotion and protection of human rights in Lesotho.

## **4 The mandate of the Commission**

The LHRC has a broad mandate, ranging from monitoring the rights of detainees, investigation and litigation of human rights violations, and education and training on human rights to advocating for the ratification and domestication of human rights treaties and developing working relations with national and international organisations in the field of human rights.<sup>63</sup> The list is not exhaustive as the Commission is mandated too to “undertake any other activities or responsibilities that are consistent with the spirit of the promotion and protection of human rights”.<sup>64</sup> The Commission also has a mandate to receive, investigate and make decisions on allegations of human rights violations, with its decisions being binding.<sup>65</sup>

As far as the law on paper is concerned, the Commission’s broad mandate is in line with the Paris Principles and addresses challenges that face the other human rights oversight bodies, such as the PCA and Ombudsman, whose recommendations are not binding. The only problem is that the Commission is mandated to perform its functions in line with the Constitution, and the Constitution renders socio-economic rights unjusticiable.

## **5 Public accountability**

The Human Rights Commission Act seeks to ensure that the Commission is accountable to the public in relation to its finances as well as the cases, investigations and complaints it handles. Section 37 requires the Commission to submit to Parliament, at the end of each financial year, an annual report of its activities that provides accurate and transparent information on its financial affairs, complaints, findings and interventions, promotional activities, cases lodged in courts, and any other matters relating to human rights which the Commission believes warrant discussion and are of interest to Parliament and the public.<sup>66</sup> The

63 Human Rights Commission Act 2016, section 7(a)-(j).

64 Human Rights Commission Act 2016, section 7(k).

65 Human Rights Commission Act 2016 sections 16-22.

Commission is also given leave to submit a special report where necessary; in turn, Parliament has the power to request that the Commission furnish it with a relevant report at any time,<sup>67</sup> that is, should the Commission not perform its duty as mandated, as might be reflected in the annual report or a report requested by Parliament. The Act thus keeps the Commission accountable to the public through annual and special reports that are filed by the Commission or requested by Parliament.

## 6 Conclusion

In view of the limitations of existing human rights institutions such as the Ombudsman, PCA and DCEO, there is an urgent need to speed up the launch of a fully-fledged NHRI in Lesotho. Nevertheless, various weaknesses in the LHRC's legal framework, in particular the failure to comply with minimum standards in the Paris Principles regarding pluralism and appointment procedures, raise serious doubts about the ability of the Commission to function independently. Restricting the Commission to three members also risks limiting its pool of expertise and making its commissioners more susceptible to intimidation and political manipulation than they would be if they were greater in number.

The model of NHRI that Lesotho has opted for will complement the already existing oversight bodies in that their mandates are limited to investigation and they lack the power to take legal action against persons or entities alleged to have violated human rights. By enabling the Commission to have a broad spectrum of support staff by way of direct employment, secondment or consultancy, the Act presents an opportunity for addressing the challenges of limited expertise which the Commission is likely to encounter. Vested with the power to receive and decide on complaints, the Commission also offer hope for victims of human rights violations whose cases before the High Court are stuck in a backlog.

As noted, then, it is necessary that the government speed up the process of operationalising the Commission. In the meantime, the sections of the Human Rights Commission Act governing appointment procedures and the composition of the Commission need to be revised to ensure that Commission is recognised at both the national and international level as a credible human rights institution. This may assuage concerns among the public that the Commission is nothing more than one of those government

66 Human Rights Commission Act 2016, section 37(1) and (2).

67 Human Rights Commission Act 2016, section 37(3) and (4).

agencies in whose presence human rights violations will continue with impunity.

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## **PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS**

### **B.1 Constitutional framework**

The amended 1993 Constitution of Lesotho provides for both a Human Rights Commission and an Ombudsman, both of whom have powers to deal with human rights issues. The relevant provisions state as follows:

#### **CHAPTER XIA: HUMAN RIGHTS COMMISSION**

##### **133A. Establishment of the Human Rights Commission**

There is established a Human Rights Commission (in this Chapter referred to as “the Commission”) which shall be independent and free from interference and subject only to this Constitution and any other law.

##### **133B. Composition**

The Commission shall consist of the chairman and two other members who shall be appointed by the King acting in accordance with the advice of the Prime Minister.

##### **133C. Qualification for appointment**

A person shall not be qualified to be appointed a member of the Commission if he is a public officer, and the Prime Minister shall not advise the King to appoint a person as a member unless he or she is satisfied that the person –

- (a) has extensive experience in human rights and related disciplines;
- (b) is of high moral character and integrity and possesses such qualities of mind as to enable him to discharge his duties impartially, fairly and free from bias or prejudice; and
- (c) does not take an active part in, or has retired from, the party politics or political party activity.

##### **133D. Tenure of office**

Subject to the provisions of this section, the office of a member of the Commission shall become vacant –

- (a) at the expiration of seven years, in the case of the chairman and five years in the case of other commissioners, from the date of his appointment; or
- (b) if he becomes a public officer; or

- (c) if he becomes a member of either House of Parliament, a local authority, a candidate for election to Parliament or a local authority, or an officer of a political party.

### **133E. Removal from office**

1. A member of the Commission may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) incompetence in the performance of the functions of his office or misbehaviour (including failure to discharge his duties in a fair manner free from prejudice) and shall not be removed except in accordance with this section.

2. A member of the Commission shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the King that he ought to be removed from office for inability, incompetence or misbehaviour.

3. If the Judicial Service Commission, in the case of either the Chairman of the Commission or any other member, represents to the King that the question of removing a member of the Commission under this section ought to be investigated, then –

- (a) the King shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Prime Minister from among persons who hold or have held high judicial office; and
- (b) the tribunal shall enquire into the matter and report on the facts of the enquiry to the King and recommend to him whether the member ought to be removed under this section.

4. If the question of removing a member of the Commission has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend that member from the exercise of the functions of his office and any such suspension may, at any time, be revoked by the King, acting in accordance with such advice as Prime Minister and shall in any case cease to have effect in the tribunal recommends to the King that the member should not be removed.

### **133F. Functions of the Commission**

The Commission shall perform the following functions –

- (a) monitor the state of human rights throughout Lesotho;
- (b) monitor the human rights situation of detainees;
- (c) investigate violations of human rights and, if necessary, be responsible for instituting proceedings against such violation in the courts of law;
- (d) sensitise the public on its work, the nature and meaning of human rights;

- (e) develop and deliver education and training programmes as necessary to the general public;
- (f) submit opinions, recommendations, propositions and reports to public institutions on human rights issues, using the media and other means;
- (g) advocate for ratification, and recommend the domestication of international and regional human rights instruments;
- (h) promote and monitor the harmonisation of national laws and practices with international and regional human rights instruments ratified by Lesotho;
- (i) develop and maintain working relations with organisations and representatives of civil society in Lesotho;
- (j) work in cooperation with the United Nations, regional mechanisms, national human rights institutions of other countries, in the areas of the promotion and protection of human rights, and
- (k) undertake any other activities or responsibilities that are consistent with the spirit of the promotion and protection of human rights.

### **133G. Assistance to the Commission**

The Government shall accord such assistance as the Commission may require to enable it to protect its independence, dignity and effectiveness, subject to this Constitution and any other law.

### **133H. Annual report of the Commission**

1. The Commission shall prepare, submit and present an annual report of its activities to Parliament.
2. If it considers it necessary, in case of an urgent and specific issue, the Commission may submit a special report to Parliament at any time, which will be treated by Parliament in the same manner as an annual report.

## **B.2 Legislative and regulatory instruments**

The legislation regulating the Human Rights Commission is Act No 2 of 2016, the Human Rights Commission Act, 2016. It states as follows:

### **Arrangement of Sections**

#### **Section**

#### **PART 1 – PRELIMINARY**

- 1) Short title and commencement

- 2) Interpretation

## **PART II – THE HUMAN RIGHTS COMMISSION**

- 3) Objectives of the Commission
- 4) Status of the Commission
- 5) The headquarters of the Commission
- 6) Composition of the Commission
- 7) Functions of the Commission
- 8) Qualification for appointment
- 9) Tenure of office
- 10) Removal from office
- 11) Meeting of the Commission
- 12) Remuneration and allowances of members of the Commission
- 13) Oath of office
- 14) Assistance to and cooperation with the Commission
- 15) Duty to disclose

## **PART III – INVESTIGATIONS**

- 16) Jurisdiction of the Commission
- 17) Procedures for filing a complaint
- 18) Complaints process
- 19) Enquiries by the Commission
- 20) Duty to investigate
- 21) Entering and searching of premises and attachment and removal of articles
- 22) Decisions of the Commission
- 23) Protection against obstruction
- 24) Mediation, conciliation and negotiation
- 25) Institution of legal proceedings by Commission
- 26) Communication of decision or finding
- 27) Human Rights Court

## **PART IV – SPECIAL POWERS FOR INSPECTING PLACES OF DETENTION**

- 28) Inspection of places of detention

## **PART V – ADMINISTRATIVE PROVISIONS**

- 29) The director general
- 30) Tenure of office
- 31) Qualification for appointment of director general
- 32) Removal of staff of the Commission
- 33) Appointment of the Commission
- 34) Secondment of staff

## **PART VI – FINANCIAL PROVISIONS**

- 35) Funds and gifts received by the Commission
- 36) Accounts, funds and audit

## **PART VII – GENERAL PROVISIONS**

- 37) Annual report
- 38) Regulations

## **SCHEDULE – OATH**

### **ACT No2 OF 2016**

#### **Human Rights Commission Act, 2016**

An Act to provide for the administration and regulation of the Human Rights Commission of Lesotho as established by the Constitution and for related matters.

Enacted by the Parliament of Lesotho.

### **PART I – PRELIMINARY**

#### **Short title and commencement**

1. This Act may be cited as the Human Rights Commission Act, 2016 and shall come into operation on the date of its publication in the Gazette.

#### **Interpretation**

2. In this Act, unless the context otherwise requires –  
“Commission” means the Human Rights Commission established under section 133A of the Constitution;

“human rights” includes all rights guaranteed in the Constitution, and in the international and regional human rights instruments to which Lesotho is a State Party;

“Chairperson” means the Chairperson of the Commission appointed under section 133B of the Constitution;

“Deputy Chairperson” means the Deputy Chairperson of the Commission appointed under section 133B of the Constitution;

“member” means a member of the Commission appointed under section 133B of the Constitution;

“Minister” means the minister responsible for human rights;

“prescribed” means prescribed by regulations made under section 38(1).

## **PART II – THE HUMAN RIGHTS COMMISSION**

### **Objectives of the Commission**

3. The main objectives of the Commission are to promote, protect, monitor and sustain human rights in Lesotho in accordance with –

- (a) the Constitution and other laws of Lesotho; and
- (b) regional and international human rights instruments to which Lesotho is a State Party

### **Status of the Commission**

4(1) The Commission –

- (a) subject to the Constitution and this Act, shall be independent, and impartial in the performance of its functions and exercise of its powers;
- (b) shall be a body corporate with perpetual succession and a common seal;
- (c) may sue or be sued in its own name;
- (d) may, subject to and for the purposes of this Act –
  - (i) enter into contracts, acquire, purchase, take hold of and own movable property of every description;
  - (i) convey, assign, surrender, yield, charge, mortgage, demise, re-assign, transfer or otherwise dispose of, or deal with any movable or immovable property or any interest in the property vested in the Commission upon such terms as it considers necessary; and
  - (iii) make any other undertakings it considers necessary.

(2) The common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

### **The headquarters of the Commission**

5(1) The offices of the Commission shall be situated at Maseru, the capital city of Lesotho, which shall be its headquarters.

(2) The Commission shall, in the exercise of its mandate, make its services accessible to the entire population and may open district offices as and when such a need arises

### **Composition of the Commission**

6. Subject to section 133B of the Constitution, the Commission shall consist of the following members whose appointment shall be gender sensitive –

- (a) Chairperson;
- (b) Deputy Chairperson who shall act in the absence of the Chairperson; and
- (c) Commissioner.

and shall, in accordance with the Constitution, be appointed by the King acting on the advice of the Prime Minister.

### **Functions of the Commission**

7. The Commission shall perform the following functions –

- (a) monitor the state of human rights throughout Lesotho;
- (b) monitor the human rights situation of detainees;
- (c) investigate violations of human rights and, if necessary, be responsible for instituting proceedings against such violations in the courts of law;
- (d) sensitise the public on its work, the nature and meaning of human rights;
- (e) develop and deliver education and training programmes as necessary to the general public;
- (f) Submit opinions, recommendations, propositions and reports to public institutions on human rights issues, using the media and other means;
- (g) advocate for ratification, and recommend the domestication, of international and regional human rights instruments;
- (h) Promote and monitor the harmonisation of national laws and practices with international and regional human rights instruments to which Lesotho is a State party;
- (i) develop and maintain working relations with organizations and representatives of civil society in Lesotho;
- (j) work in cooperation with the United Nations, regional mechanisms, national rights institutions of other countries in the areas of the promotion and protection of human rights; and

- (k) undertake any other activities or responsibilities that are consistent with the spirit of the promotion and protection of human rights

### **Qualification for appointment**

8. A person shall not be qualified to be appointed as a member of the Commission if he is a public officer, and the Prime Minister shall not advise the King to appoint a person as a member unless the Prime Minister is satisfied that the person –

- (a) has extensive experience in human rights and related disciplines;
- (b) is of high moral character and integrity and possesses such qualities of mind as to enable him to discharge his duties impartially, fairly and free bias or prejudice; and
- (c) does not take an active part in party politics or has since retired from active party politics.

### **Tenure of office**

9. Subject to the provisions of this section, the office of a member of the Commission shall become vacant –

- (a) at the expiration of seven years, in the case of the chairman and five years in the case of other commissioners from the date of his appointment; or
- (b) if he becomes a public officer or resigns from office; or
- (c) if he becomes a member of either House of Parliament or a local authority, or an officer of a political party;
- (d) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified to be appointed as such under section 8.

### **Removal from office**

10(1) A member of the Commission may be removed from office only for inability to exercise the functions of his office, (whether arising from infirmity of body or mind or any other cause) incompetence in the performance of the functions of his office or misbehaviour, (including failure to discharge his duties in a fair manner free from prejudice) and shall not be removed in accordance with this section.

(2) A member of the Commission shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (3) and the tribunal has recommended to the King that he ought to be removed from office for inability, incompetence or misbehaviour.

(3) If the Judicial Service Commission represents to the King that the question of removing a member of the Commission under this section

ought to be investigated, the King shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Prime Minister from among persons who hold or have held high judicial office, and the tribunal shall enquire into the matter and report on the facts of the enquiry to the King and recommend to him whether or not the member ought to be removed under this section.

(4) If the question of removing a member of the Commission has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend that member from the exercise of the functions of his office and any such suspension may, at any time, be revoked by the King, acting in accordance with the advice of the Prime Minister, and shall in any case cease to have effect if the tribunal recommends to the King that the member should not be removed from office.

### **Meetings of the Commission**

11(1) The Commission shall meet, at least, every month or when it is necessary and shall keep minutes of all its meetings.

(2) The meetings of the Commission shall be attended by all commissioners and any senior staff that the Commission may instruct to attend.

(3) The quorum for the meetings shall be two Commissioners.

(4) The meetings of the Commission shall be chaired by the Chairperson or Deputy Chairperson in the absence of the Chairperson.

(5) The Commission shall regulate its own rules of procedure.

### **Remuneration and allowances of members of the Commission**

12. A member of the Commission may be paid such a salary and allowances as may be prescribed under the Statutory Salaries Act, 1972

### **Oath of office**

13(1) A member shall, before assuming the duties of his office, take and subscribe to an oath of office before the Chief Justice as set out in the Schedule.

(2) A member of staff of the Commission shall maintain secrecy as stipulated in the terms and conditions of service in respect of matter that come to their knowledge in the exercise of their functions.

### **Assistance to and cooperation with the Commission**

14(1) The Government shall accord such assistance as the Commission may require to enable it to protect its independence, dignity and effectiveness, subject to the Constitution, this Act and any other law.

(2) State organs, civil societies and private entities shall, when so requested by the Commission, assist and cooperate fully with the Commission in its investigations.

### **Duty to disclose**

15(1) A member shall not, in any way, directly or indirectly, be involved in a matter which he has financial or any other personal interest.

(2) Where a member has an interest, the member shall declare the nature and extent of the interest to other Commissioners in accordance with subsection (3).

(3) The declaration shall be made –

- (a) in a meeting of the Commissioners; or
- (b) by notice, in writing, to the Chairperson

## **PART III – INVESTIGATIONS**

### **Jurisdiction of the Commission**

16(1) The Commission shall have jurisdiction on all citizens of Lesotho, including those living outside Lesotho, and non-citizens of Lesotho living in Lesotho who use services offered by an embassy or a consular of Lesotho

(2) The Commission shall have jurisdiction over any act or omission in violation of a human right

### **Procedures for filing a complaint**

17. The procedure and form for filing a complaint in a violation of human rights shall be as prescribed

### **Complaints process**

18(1) The Commission shall upon receipt of a complaint filed under section 17 and subject to its jurisdiction, determine the admissibility of the complaint

(2) In all cases in which the Commission decides not to intervene or end an intervene, or end an intervention, the Commission shall, within 30 days

of making the decision, notify a complainant of its decision and advise the complainant of other potential remedies available and of how may be accessed.

(3) Where in its judgment the Commission finds it necessary, appropriate and potentially beneficial, it may decide to use mediation or conciliation to seek amicable solution between the parties to a complaint or potential complaint

### **Enquiries by the Commission**

19(1) The Commission may, on its own motion or on a complaint to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of a person or group of persons.

(2) The Commission shall not inquire into any complaint relating to any allegation of the infringement of human rights which –

- (a) is the subject matter of any proceedings pending in any court, including any appeals;
- (b) has been finally determined by any court; or
- (c) is a matter involving the relations or dealings between the Government of Lesotho and any other Government or an international organisation or an organisation granted immunity under any law.

(3) If the Commission inquires into an allegation under subsection (1) and during the pendency of the allegation becomes the subject matter of any proceedings in any court, the Commission shall immediately cease to do the inquiry.

(4) The Commission may refuse to commence or discontinue an enquiry which has commenced if, in the opinion of the Commission –

- (a) the matter is trivial or vexatious or the alleged violation of human rights is manifestly unfounded;
- (b) the person making the request has insufficient interest in the matter.

and that matter may be more appropriately dealt with by a tribunal or other person vested with powers to award redress or grant relief in respect of the matter.

(5) The Commission shall prescribe the procedures for conducting an enquiry under this section

### **Duty to investigate**

20(1) The Commission shall investigate complaints against any person, group of persons, public or private authority or agent of that agency determined admissible under section 19(1) and filed with the Commission, if the alleged violation occurred after the coming into operation of this Act.

(2) Without limiting the generality of subsection (1), the Commission shall not handle a complaint that has been decided upon by or is being considered in a court of law.

### **Entering and searching of premises and attachment and removal of articles**

21(1) Any member of the Commission or any member of the staff of the Commission or a law enforcement officer authorised to do so by the Commission in consultation with the Commissioner of Police, shall, subject to the provisions of subsection (2) and the Criminal Procedure and Evidence Act 1981 for the purpose of an investigation, enter any premises on or in which anything connected with that investigation, is or is suspected to be

(2) The entry and search of any premises under this section shall be conducted with strict regard to decency and order, which shall include regard to –

- (a) a person's right to respect for and protection of his dignity;
- (b) the right to freedom and security of the person; and
- (c) the right to his personal privacy.

### **Decisions of the Commission**

22(1) The Commission shall make binding decisions.

(2) The Commission may, based on the facts and evidence presented before it, make decisions to a relevant public authority and the authority shall –

- (a) within 30 days of receiving the decision and in writing, inform the Commission of the steps taken to effect the decision; and
- (b) thereafter keep the Commission so informed quarterly until the decision is fully effected.

### **Protection against obstruction**

23(1) A person who, by his act, omission or any other means hinders or obstructs or attempts to obstruct the Commission in the performance of its duties and functions or exercise of its powers, in particular, its investigation responsibilities, commits an offence and shall, upon conviction, be liable to a fine not exceeding M10,000.00 or 1 year imprisonment or both

(2) The following acts of an administrative authority or agent of public administration constitutes obstruction –

- (a) to knowingly not provide, within a fixed time period, a document, information, a register or any other specific evidence requested by the Commission;
- (b) to refuse to cooperate in any investigation;
- (c) to provide testimony in bad faith;
- (d) to refuse to provide articles, objects or documents requested by the Commission
- (e) to make a false or deliberately misleading declaration to the Commission.

### **Mediation, conciliation and negotiation**

24. The Commission may, when it considers it necessary, endeavour to –
- (a) resolve a complaint amicably through mediation, conciliation or negotiation in a manner established by regulations;
  - (b) rectify any act or omission, emanating from or constituting a violation of or threat to any fundamental right

### **Institution of legal proceedings by Commission**

25(1) The Commission may institute proceedings in the High Court for the purpose of obtaining a relief in respect of –

- (a) any matter concerning the human rights of a person or class of persons;
- (b) enforcement of its decisions.

(2) The relief the Commission may seek to obtain in such proceedings may include a relief by way of a declaration that a statute or a provision of the statute is invalid having regard to the provisions of the Constitution.

### **Communication of decision or finding**

26. Without limiting possible actions, the following actions, insofar as they relate to improvements in the human rights situated or the prevention of violations, may be included in a recommendation by the Commission –

- (a) an improvement judged useful for the better functioning of the Public Service or private enterprises implicated in the violation;
- (b) an amendment to a law, regulation, policy or procedure;
- (c) an action that should be taken to prevent further abuse of human rights;
- (d) a disciplinary procedure against a manager who directed or ignored violations or who refused to take corrective action once he became aware of or should have known that an abuse had occurred;
- (e) criminal proceedings against a perpetrator if necessary given the nature and severity of the violation;

- (f) monetary or other reparations against the damages suffered by a victim;
- (g) any other action that the Commission considers necessary and appropriate in the circumstances.

### **Human Rights Court**

27. The High Court shall sit as a Human Rights Court and shall handle matters of violations of human rights as may be referred to it by the Commission.

## **PART IV – SPECIAL POWERS FOR INSPECTING PLACES OF DETENTION**

### **Inspection of places of detention**

28. In discharging its responsibility of monitoring human rights situated of detainees and investigating violations of human rights under section 7(1)(a) and (c) by inspecting places of detention, the Commission shall have the powers to –

- (a) enter a place of detention freely and without advance notice;
- (b) examine all documents necessary to establish the actual situation in the place of detention, including prison registries;
- (c) see all detainees freely, if necessary in private;
- (d) require that a detainee be produced.

## **PART V – ADMINISTRATIVE PROVISIONS**

### **The Director General**

29(1) There shall be a Director General of the Commission who shall be appointed by the Commission in consultation with the minister, and who –

- (a) shall be the chief accounting officer responsible for the general management of and administrative control over the staff, the monies received or paid out of the account of the Commission and business of the Commission;
- (b) shall be responsible for the implementation of the determinations of the Commission;
- (c) shall cause the necessary accounting and other records to be properly kept;
- (d) shall be answerable to the Commission in the performance of his functions and the implementation of the policies of the Commission, and may exercise the powers and shall perform such functions and duties as may be conferred upon or assigned to him by the Commission in order to achieve the objects of the Commission;

- (e) shall provide to the Commission such information in relation to the performance of his functions, including information on the performance of those functions insofar as they relate to the financial affairs of the Commission, as the Commission may require;
- (f) may, from time to time, with the consent of the Commission, authorise one or more of the staff of the Commission to perform a specified function of the Director General and such a member who is or members who are so authorised may perform that function accordingly.

(2) The Director General shall be the secretary to the Commission.

(3) The functions of the Director General may be performed, during his absence or when the position of the Director General is vacant, by a member of the staff of the Commission as may, from time to time, be designated for that purpose by the Commission

### **Tenure of office**

30. The Director General shall hold office for a period of 3 years.

### **Qualification for appointment of Director General**

31. A person shall be qualified to be appointed for the position of Director General if the person –

- (a) is a citizen of Lesotho;
- (b) holds a recognised degree in law;
- (c) has at least 5 years at managerial level;
- (d) is of proven integrity and leadership

### **Removal of Director General**

32. The Director General may be removed from office by the Commission in accordance with the terms and conditions of service, for –

- (a) inability to perform the functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct or misbehaviour;
- (c) incompetence or negligence of duty;
- (d) any other ground that would justify removal from office under the terms and conditions of service.

### **Appointment of staff of the Commission**

33(1) The Commission shall, in consultation with the Minister, appoint an appointments committee the appointment of which shall be gender sensitive –

- (a) the Director General who shall be the chairperson;
  - (b) a person with recognised qualifications in law;
  - (c) a person with recognised qualifications in finance or economics;
  - (d) a person with recognised qualifications in human resource management, wage and salary administration.
- (2) The appointments committee shall be responsible for the appointment of such other members of staff of the Commission as are necessary for the proper and effective performance of the functions of the Commission.
- (3) A member of the committee may be paid such an allowance as may be determined by the Director General in consultation with the Commission.
- (4) The terms and conditions of service remuneration, allowances and other service benefits to be paid by the Commission and received by a member of staff of the Commission including a grade at which a member of staff serves shall be determined by the Commission with the consent of the Minister in consultation with the Minister responsible for public service.
- (5) The Commission, in determining the remuneration or allowances for expenses to be paid to members of its staff or the other terms or conditions subject to which such members hold or are to hold their employment, shall have regard to Government or nationally agreed guidelines which are for the time being extant and to Government policy concerning remuneration and conditions or employment which is so extant and, in addition to the foregoing, the Commission shall comply with any directives with regard to such remuneration, allowances, terms or conditions which the Minister may give to the Commission with the consent of the Minister responsible for finance.

### **Secondment of staff**

- 34(1) In addition to the staff appointed by the Commission, the Government may upon the request by the Commission, second to the Commission such number of public officers as may be necessary for the purpose of functions of the Commission, or direct public officers to give assistance to the Commission.
- (2) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the directions of the Commission.
- (3) The Commission may engage the services of advisers or consultants.

## **PART VI – FINANCIAL PROVISIONS**

### **Funds and gifts received by the Commission**

35(1) The Government shall provide the Commission with adequate funds annually to enable it to discharge its functions under this Act.

(2) The Commission may receive funds or gifts, movable or immovable property without any conditions from any lawful source only for the purpose of promoting awareness of and providing education in relation to human rights and any other institutional operations as may be approved by the Commission

(3) The Director General shall not, in the performance of his duties under this section, question or express an opinion on the merits of any policy of the Government or a Minister or on the merits of the objectives of such a policy,

### **Accounts, funds and audit**

36(1) The financial year of the Commission shall be a period of 12 months from the 1<sup>st</sup> day of April to the 31<sup>st</sup> day of March.

(2) The Director General shall keep proper books of accounts and other records relating to accounts of the Commission which shall be annually audited by the Auditor General and submitted to Parliament in accordance with the Audit Act 1973 or any subsequent Audit Act.

(3) The Commission shall be responsible for the preparation and submission of its annual budget to the Minister for presentation in Parliament and shall also be responsible for the transparent and effective management of its finances.

(4) Any expenses incurred by the Commission in any action or proceeding, civil or criminal, brought by or against the Commission before any court shall be paid out of the funds of the Commission.

(5) Any expenses incurred by any member, officer or servant of the Commission, in any civil action or proceedings, brought against him in any court in respect of anything which is done or purported to be done by him under this Act or on direction of the Commission shall be paid out of funds of the Commission, unless such expenses are recovered by him in such civil action or proceeding.

## **PART VII – GENERAL PROVISIONS**

### **Annual report**

37(1) The Commission shall, subject to subsection (2), prepare and produce an annual report of its activities which provides accurate and transparent information on –

- (a) financial affairs of the Commission including audited balance sheets and statements of income and expenditure;
- (b) complaints filed with the Commission
- (c) the findings and interventions taken by the Commission in support of individuals or entities;
- (d) the findings and recommendations made by the Commission to any authority to whom the findings and recommendations are made;
- (e) the feed-back obtained from the authority to whom the recommendations were made;
- (f) the obstacles encountered in investigation or in the implementation of recommendation proposed;
- (g) the situations where the Commission was obliged to go before the courts in pursuance of a resolution to a complaint, and the reasons why it considered that such an intervention was necessary;
- (h) the financial cost for carrying out the responsibilities referred to in the report;
- (i) the promotional activities undertaken during the year;
- (j) observations, findings and recommendations on the general situation and nature of human rights in the country;
- (k) observations and recommendations on the general situation of detainees in the country;
- (l) any other matter relating to human rights that the Commission thinks warrants a discussion and that would be of interest to Parliament and the public.

(2) Subject to section 133H of the Commission, the annual report of the Commission shall be submitted to Parliament within three months of the end of the financial year under review, and shall be made public at the time it is tabled in Parliament, or within 15 days of its transmittal, which occurs first.

(3) The Commission may, if it considers necessary, submit a special report to Parliament at any time, which shall be treated by Parliament in the same manner as an annual report.

(4) The Parliament may request the Commission to give relevant report at any time.

## **Regulations**

38(1) The Minister may, by notice published in the Gazette, make regulations for the efficient implementation of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may provide for the following –

- (a) rules of procedure for the conduct of an enquiry;
- (b) administrative and financial structures of the Commission;
- (c) management modalities and the exercise of responsibilities;
- (d) schedules of meetings
- (e) rules and procedures for, and the conditions under which, specialised sub-committees of the Commission may be appointed;
- (f) modalities and procedures for the selection, promotion, discipline and suspension of employees and conditions of service.

## **SCHEDULE**

### **OATH**

#### **(section 13)**

This Oath shall be administered to a Commissioner by the Chief Justice.

“I.....swear to fulfil my obligations as Commissioner as set out in the Constitution and the Human Rights Commission of Lesotho Act, and to carry out duties assigned me by the Commission to the best of my ability, to do so in complete independence and impartiality, and to respect the confidentiality accorded information and deliberations of the Commission”.

### **NOTE**

1. Constitution of Lesotho as amended by Act No 13 of 2011
2. Act No 8 of 1972 as amended by Act No 3 of 1994
3. Act No 9 of 1981 as amended by Act No 10 of 1991
4. Act No 12 of 1973