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THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

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PART A. INTRODUCTORY COMMENTARY

1 Introduction

The South African Human Rights Commission (SAHRC) has been a model for other human rights institutions, not only in Africa but around the world, given its achievements since the advent of the democratic dispensation. This chapter examines its mandate of protecting human rights, promoting a culture of human rights and monitoring the observance of human rights in South Africa. The analysis demonstrates that the SAHRC is discharging its constitutional mandate, notwithstanding the challenges it faces. The chapter begins with a historical overview of human rights in South Africa to contextualise the SAHRC's mission, vision and values, which are intrinsically linked to the reversal of historical injustices. Thereafter, it considers various aspects of the SAHRC, such as its structure, reporting obligations, and protection of socio-economic rights. A conclusion draws together the points raised in this discussion.

1.1 Historical overview

It is difficult to understand the evolution of South Africa's human rights-centric legislation and institutions in South Africa without having a grasp of the legacy of apartheid and colonialism. The country's legislation,

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jurisprudence and legal scholarship give ample recognition to past injustices as the defect that the new dispensation seeks to cure. Indeed, most of South Africa's socio-economic challenges are a consequence of apartheid and colonialism, which utilised race as the deciding factor in the observance of fundamental human rights. The system of apartheid segregated people along racial lines and denied socio-economic and political rights to non-whites. The Constitutional Court, in one of its first decisions after its establishment, aptly stated, "Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life".¹

The institutionalisation of segregation through "grand apartheid" in 1948 under the National Party saw the promulgation of draconian laws, such as the Population Registration Act of 1950 which provided for the registration of people according to their ethnicity and race. Similarly, the Group Areas Act of 1966 sought to segregate residential areas on racial lines and confine black people to so-called homelands or *bantustans*. The only basis on which blacks could leave the *bantustans*, which were far from sources of employment, and go anywhere else within the borders of South Africa was for the industrial and agricultural advancement of the white population.² Even then, they did so under the shackles of racist legislation and administration.³

The legacy of apartheid is evident in the socio-economic dynamics of contemporary South Africa. Today, only Brazil ranks higher than South Africa in terms of income inequality.⁴ Half of South Africa's population receives 11 per cent of the total income, while 7 per cent of it receives 40 per cent of the total income. Income inequality is especially pronounced along racial lines. In 2017, the SAHRC stated that white households earn four times what black households earn.⁵ South Africa does not fare well in comparison to some other comparable middle-income economies. Statistics released by the World Bank in 2018 ranked South Africa as the country with the highest economic inequality in the world.

It was not only socio-economic rights that were violated under the apartheid system. Successive apartheid governments ensured that the

1 *Ex parte* Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC), paragraph 7.

2 J Dugard, *Human Rights and the South African Legal Order New Jersey*, New Jersey, Princeton University Press (1978), p 73.

3 *Ibid.*

4 World Inequality Report, available at <https://bit.ly/2N5WNzG> (accessed 20 March 2019).

5 SAHRC Research Brief on Race and Equality in South Africa 2013-2017 (2017), p 14.

majority of the African population and others who were opposed to the repressive system were subjected to torture and unjustly deprived of liberty and life thanks to the unfettered, arbitrary powers of the executive and state security apparatus. Almost everything provided under today's regime of human rights was at that time merely an abstract concept that had no place in South Africa's governance and legislative framework.

1.2 The end of apartheid

With the fall of apartheid, there was an urgent need to entrench and promote a human rights culture. In 1993, South Africa enacted a new constitution, the Interim Constitution,⁶ propelling the Republic into an era of governance founded on the rule of law and respect for human rights. It was by virtue of section 115 of the Interim Constitution that the SAHRC was established and inaugurated on 2 October 1995 under the Human Rights Commission Act,⁷ which gave effect to the Interim Constitution's provisions on the establishment of the Commission.

The Interim Constitution was repealed in February 1997 when the Constitution of the Republic of South Africa of 1996 (hereafter Constitution) came into effect. It is safe to say that, more than two decades later, South Africa is, in terms of its human rights culture, in a much better position today than at any other point in its history. This is not to suggest that human rights are not being violated, sometimes in similar fashion as during apartheid, but the establishment of various institutions as custodians of human rights is clearly a welcome, signal development.

2 The establishment of the SAHRC

Bodies such as the SAHRC are commonly referred to as "Chapter 9 institutions".⁸ They are established with the aim of ensuring that South Africa's constitutional democracy is strengthened. They must exercise their powers without fear, favour or prejudice, be impartial in the execution of their mandates, and be independent and subject only to the country's constitution and the law.⁹ Chapter 9 institutions are accountable

6 Constitution of the Republic of South Africa Act 200 of 1993.

7 Act 54 of 1994.

8 Other Chapter 9 institutions are the Public Protector, Electoral Commission, Commission for Gender Equality, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission), and the Auditor-General.

9 Section 181(2) of the Constitution.

to the Republic's National Assembly and must submit annual reports of their activities to it.¹⁰

The SAHRC is mandated by Chapter 9 of the Constitution to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic.¹¹ As noted, the Commission was inaugurated on 2 October 1995 under the Human Rights Commission Act 54 of 1994, which was subsequently replaced by the South African Human Rights Commission Act 40 of 2013 (SAHRC Act)¹² and as provided for by the Constitution of the Republic of South Africa Act 200 of 1993.¹³

The Constitution gives the SAHRC a general and wide array of powers with regard to the protection of human rights.¹⁴ The institution has 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 people on human rights.¹⁵ These powers are given effect by the SAHRC Act,¹⁶ which sets out, inter alia, the composition of the Commission, the powers of the Commission, and matters pertaining to its accountability. The powers and functions of the SAHRC are described in detail below.

2.1 Powers and functions of the SAHRC

The SAHRC has broad powers that make it a quasi-judicial institution, one which is allowed to make investigations, subpoena persons, including members of the executive, institute hearings, and make recommendations. Section 13 of the SAHRC Act spells out the powers and functions of the institution.

10 *Ibid*, section 181(5).

11 *Ibid*, section 184(1)(a)-(c).

12 See note 14.

13 The Interim Constitution was promulgated to effect the transition from apartheid to non-racial democracy and, in particular, to authorise the democratically elected parliament to form a constituent assembly that would adopt a final constitution.

14 Section 184(2) of the Constitution states that: “[t]he Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power: (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate”. The language used is broad, thus showing the drafters’ intent to ensure that the Commission’s work is not impeded by a restrictively narrow formulation.

15 See section 184(2) of the Constitution.

16 Act 40 of 2013 (hereafter SAHRC Act).

While the SAHRC's general mandate is the protection of all human rights,¹⁷ it has a special mandate for the protection and realisation of socio-economic rights.¹⁸ This special mandate has its root in the importance attached to addressing the socio-economic disadvantages suffered by the majority of South Africans during the apartheid era, when the systematic marginalisation of millions of black people resulted in huge economic disparities.¹⁹

To realise its objectives, the SAHRC has several other powers in addition to the powers conferred by the Constitution, the SAHRC Act and other laws. These include making recommendations to organs of state on measures to promote human rights and undertaking such studies on human rights as it deems fit within the parameters of the Constitution to further its objectives.²⁰ The Commission may also request that any organ of state furnish it with information on any executive or legislative measures the organ of state had taken in relation to human rights.²¹ The measures required of organs of state may relate to health care,²² water,²³ housing,²⁴ social security,²⁵ education,²⁶ the environment,²⁷ and food.²⁸ The information provided by organs of state is used for monitoring and evaluation purposes in order to assess progress made in the realisation of human rights.

Furthermore, the SAHRC has additional functions and powers derived from certain legislative obligations, including the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA), or

17 Section 184(1)(c) of the Constitution.

18 See D Horsten, "The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa", 2 *Potchefstroom Electronic Law Journal* (2006), pp 1-21.

19 L C Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", 13 *Harvard Human Rights Journal* (2000), pp 1-69.

20 Section 13(1)(a)(i) and (ii) of the SAHRC Act.

21 *Ibid*, section 13(1)(a)(iii).

22 Sections 27(1)(a) and 28(1)(c) of the Constitution.

23 *Ibid*, section 27(1)(b).

24 *Ibid*, sections 26 and 28(1)(c).

25 *Ibid*, sections 27(1)(c) and 28(1)(c).

26 *Ibid*, section 29.

27 *Ibid*, section 24.

28 *Ibid*, section 27(1)(b) and 28(1)(c).

the Equality Act)²⁹ and the Promotion of Access to Information Act (PAIA).³⁰ Through these pieces of legislation and its broad powers, the SAHRC is instrumental in ensuring adherence to the values enshrined in the Bill of Rights as well as the defence and promotion of the rights therein. PEPUDA and PAIA are central pieces of legislation in that equality and access to information are preconditions for a functional democracy. The SAHRC is also obligated to foster public understanding and awareness of the Bill of Rights of the Constitution, the SAHRC Act and the role of the Commission by developing, conducting and managing education and information programmes.³¹

The SAHRC has overlapping mandates with other institutions, bodies and authorities within the Republic. The Public Protector, other Chapter 9 institutions, and non-governmental organisations (NGOs) have similar mandates as those within the jurisdiction of the SAHRC. Numerous NGOs work within the human rights space in South Africa. These include the Legal Resources Centre (LRC), the Foundation for Human Rights (FHR), Lawyers for Human Rights (LHR), the Institute for Security Studies (ISS) and the Centre for Human Rights (CHR), to mention but a few.

In essence, human rights are not the monopoly of one institution: a range of bodies have an interest in advancing them. The SAHRC is thus obliged to liaise with such bodies to ensure that policies and practices are synchronised as far as possible to achieve common objectives or where circumstances warrant cooperation.³² It appears that the SAHRC has done well in engendering cooperation with other organisations, such as the Centre for the Study of Violence and Reconciliation (CSVr) and the LRC, in pursuit of shared aims and objectives.³³

29 Act 4 of 2000. PEPUDA is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, according to its preamble, the Act recognises the need to address systemic discrimination and specifically aims to achieve the “eradication of social and economic inequalities”.

30 Act 2 of 2000. The Commission promotes compliance with the PAIA and produces an annual report in this regard, in line with sections 83 and 84 of the PAIA. Key prescripts of the PAIA are to develop transparency frameworks and to increase the institutional responsiveness to information requests, with a view to promoting access to information.

31 Section 13(1)(b)(i) of the SAHRC Act.

32 Section 13(1)(b)(ii) of the SAHRC Act.

33 The SAHRC and the LRC, for example, are on the verge of signing a memorandum of understanding which will see them working together towards the implementation of the National Preventative Mechanism, in line with the Optional Protocol to the Convention Against Torture and other Cruel or Inhuman or Degrading Treatment or Punishment, 2002 (OPCAT).

The SAHRC may also consider recommendations on the promotion of human rights from other sources which it deems useful in the achievement of its mandate.³⁴ Furthermore, it may review government policies on the promotion of human rights and monitor compliance with international and regional instruments which have a bearing on the Commission's purports and objects.³⁵ In this way, the Commission maintains a system of checks on the relevant bodies to ensure that a culture of human rights prevails.

The protocols sent by the SAHRC to the various government departments are necessary for at least two reasons. According to McClain, they are a source of information on the steps taken by the government towards the realisation of socio-economic rights. They also serve as a tool for raising the awareness of the relevant government authorities of their socio-economic rights obligations. The protocols are designed to encourage government departments to set goals and make projections to determine future performance. Protocols are in the form of self-administered questionnaires, which the state department or organ completes and submits timeously to the Commission. The protocols are, basically, adaptations of the international reporting instruments on human rights and seek the following kinds of information:

- a description of the system for monitoring and gathering information about the implementation of social and economic rights;
- details of education and awareness programmes designed to increase access to information and recourse in the event of a violation;
- a list of the legislation, policies, and other measures that were introduced to enhance the realisation of social and economic rights; and
- an interpretation of the obligations emanating from the Constitution, on the realisation of socio-economic rights.

Furthermore, the SAHRC is empowered to make legislative inputs. The SAHRC Act states that the Commission may recommend to Parliament or any other legislature the adoption of any legislation which would give impetus to the promotion of human rights.³⁶ One of the milestones the SAHRC attained in this regard is the March 2019 ratification of the Optional Protocol to the Convention Against Torture (OPCAT)³⁷ by the South African parliament,³⁸ which came after years of pressure from the SAHRC and others.

34 Section 13(1)(b)(iv) of the SAHRC Act.

35 *Ibid*, section 13(1)(b)(v).

36 *Ibid*, section 13(2)(a).

37 OPCAT.

38 Parliament ratified the OPCAT in April 2019 after signing it 13 years prior.

The treaty requires the establishment of a National Preventative Mechanism (NPM) to monitor places of detention to combat torture. The OPCAT establishes such mechanisms internationally and domestically, and these entail that regular visits are made to places of detention to prevent torture and other cruel, inhuman, degrading treatment or punishment.

Likewise, if the Commission is of the view that a proposed law is contrary to the Bill of Rights or any norm of international human rights law which is law in the Republic, it may report that fact to the legislature concerned.³⁹ Section 13(4) of the Act also enjoins all organs of state to afford the SAHRC the support and assistance that it may reasonably require to effectively execute its constitutional mandate and perform its functions.

2.2 Conducting investigations of human rights issues

The SAHRC is not only reactive but proactive in its role to promote a culture of human rights. It is notable that the SAHRC Act endows the Commission with broader powers than those found in the Constitution. In terms of section 13(3) of the SAHRC Act, the Commission may commence an investigation of its own accord or upon a complaint being filed with it. If after investigation the Commission is of the view that the complaint made to it has substance, it may assist in obtaining redress for the complainant or any other persons adversely affected by the cause of the complaint. Where the matter is one that warrants being heard by a court of law, the Commission may assist the aggrieved persons in securing the necessary funds for the proceeding to take place.⁴⁰

In carrying out its investigation, the SAHRC may subpoena any person to appear before it. He or she may be requested to submit documents or articles that may be necessary for the conduct of such investigation. Such person is competent and compellable to answer all questions put to him or her, and the answers may be used for investigation notwithstanding that they may incriminate him or her.⁴¹ Should a person subpoenaed by the Commission give an incriminating statement or answer during investigations, it is not admissible as evidence in criminal proceedings against such person before a court of law, except where he or she is charged with perjury in terms of section 22(b) of the SAHRC Act⁴² or section 319(3) of the Criminal Procedure Act of 1955.⁴³

39 Section 13(2)(b) of the SAHRC Act.

40 *Ibid*, section 13(3)(a).

41 *Ibid*, section 15(2)(a).

The SAHRC's investigative procedures closely mirror those of courts of law. This is apparent in the rules relating to privilege, which apply in a similar manner to a witness summoned by the Commission as to a witness before the courts.⁴⁴ Furthermore, a person appearing before the Commission is entitled to the services of a legal representative and to peruse any documents admitted as evidence for the purpose of the investigation.⁴⁵ In instances where a person not present to be examined is implicated during the course of the investigation, such person may be given an opportunity to appear in person or through the intermediary of a legal representative so as to have his or her side heard. The person so implicated may be granted the opportunity to question witnesses. The SAHRC Act also provides that where a person who is not in the public service appears before the Commission as a witness, such person is entitled to receive witness fees at the rate he or she would have been entitled to when appearing before the High Court in criminal proceedings.⁴⁶

The Commission determines the procedure to be followed in an investigation on the basis of the circumstances of each case. However, it must ensure that the particulars of any procedure it decides to use are made public. Whatever procedure the Commission chooses, the Commission must ensure that, if it is in the interests of justice, any person whose presence at the investigation could prejudice any aspect of the investigation is not present during such an investigation.⁴⁷

Apart from the investigation of complaints, the SAHRC may also protect people's rights through mediation, conciliation and negotiation,

42 This provision states that "any person who after having been sworn or having made an affirmation contemplated in section 15(1)(d) gives false evidence before the Commission on any matter knowing such evidence to be false or not knowing or believing it to be true is guilty of an offence and is liable upon conviction to a fine or imprisonment for a period not exceeding six months".

43 Act 56 of 1955 (amended by the Criminal Procedure Act 51 of 1977). Section 319(3) is the only section that was not repealed. It states: "If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements; and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true".

44 Article 15(3)(b) of the SAHRC Act.

45 *Ibid*, section 15(4).

46 *Ibid*, section 17.

47 *Ibid*, section 15(9).

with the aim of reaching equitable solutions without resorting to more adversarial methods such as court proceedings.

2.3 Composition of the SAHRC

2.3.1 Structure

The SAHRC has a binary structure made up of the Commission, whose function is to set out policy, and the secretariat, whose purpose is policy implementation. The secretariat is subdivided into a number of departments: research, legal services, human resources, media and communications, finance and administration, and education and training. The Commission is subdivided into strategic focus areas to ensure a structured approach to the promotion of human rights. These focus areas are access to justice and housing; the environment; natural resources and rural development; basic services and health care; children's rights and basic education; migration and equality; human rights law enforcement and prevention of torture; and, lastly, disability and older persons.⁴⁸

To ensure the accessibility of its services, the SAHRC has offices in each of the country's nine provinces. These offices are tasked with implementing the mandate of the SAHRC at provincial level, with due cognisance given in so doing to a province's distinctive challenges. Provincial offices are managed by provincial managers, who report to the chief operations officer (COO). Each provincial manager is supported by an administration officer, human rights advocacy and research officer, legal officers, and an intake officer.

The overall head of the SAHRC is the chairperson, who has a deputy chairperson.⁴⁹ The chief executive officer (CEO)⁵⁰ heads up the secretariat and oversees the Commission's fiscals as well as taking responsibility for the employment of its personnel. Furthermore, section 11 of the SAHRC Act empowers the Commission to establish standing committees, which are chaired by commissioners.⁵¹

2.3.2 The chairperson and deputy chairperson

The chairperson and the deputy chairperson of the Commission are appointed by the President on the recommendation of the National

48 See SAHRC, available at <https://www.sahrc.org.za/> (accessed 31 March 2019).

49 Advocate Bongani Majola is the current chairperson of the SAHRC.

50 Advocate Tseliso Thipanyane is the current CEO of the SAHRC.

51 Section 11 sets out the procedure for the establishment of committees.

Assembly.⁵² While the chairperson is the Commission's overall head and executive authority,⁵³ the deputy chairperson assumes the role of the chairperson in his or her absence or if for any given reason the chairperson is unable to perform his or her functions.⁵⁴ In cases where both the chairperson and the deputy are absent, the commissioners⁵⁵ may among themselves elect one of them to act as chairperson.⁵⁶ A commissioner acting as chairperson performs all the functions of that office.

2.3.3 Commissioners

The composition of the SAHRC is regulated by section 5 of the SAHRC Act. This provision states, first, that the Commission must have eight commissioners who must be South African citizens, fit and proper persons to hold office in the institution as contemplated in section 193(1) of the Constitution, and be appointed by the President in terms of section 193(4) and (5) of the Constitution.⁵⁷

However, the SAHRC Act states that the following categories of persons may not be appointed as commissioners: persons who are serving the state in any capacity in which they receive remuneration for the service; unrehabilitated insolvents; persons declared to be of unsound mind; and persons sentenced to terms of more than 12 months for a crime inside or outside South Africa where the said conduct would have been a crime in the Republic.⁵⁸ The other category of ineligible persons includes Members of Parliament (MPs), employees of provincial legislatures and municipal councils, as well as employees of political parties.⁵⁹ Should a serving commissioner accept nomination or appointment for any of the posts stated above, such commissioner is deemed to have resigned.⁶⁰

Commissioners of the SAHRC are appointed either on a full-time or part-time basis for a period not exceeding seven years. There may not be less than six permanent commissioners appointed at any given time, and there may not be more than two part-time commissioners.⁶¹ Should a

52 Section 6(1) of the SAHRC Act.

53 *Ibid*, section 7(5).

54 *Ibid*, Article 6(2).

55 See below on commissioners.

56 Section 6(3) of the SAHRC Act.

57 These provisions state, among other things, that "[t]he President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of the South African Human Rights Commission".

58 Section 5(1)(b)(i-iv) of the SAHRC Act.

59 *Ibid*, section 5(1)(b)(v).

60 *Ibid*, section 5(5)(b).

vacancy occur in the office of a full-time commissioner, the President may appoint a part-time commissioner to fill that vacancy for the duration of the period that remained of such part-time commissioner's tenure.⁶² Commissioners whose initial term has expired may be appointed for one additional term.⁶³

The appointment of SAHRC commissioners should be on merit and competence, though this is open to doubt given the penchant of the African National Congress (ANC) government for political appointments. The process as provided for in section 193(4) of the Constitution seems transparent and thorough, but in practice MPs are accountable to their political parties, not the public, and will usually want to have fellow cadres appointed as commissioners.

The most recent outgoing SAHRC chairperson, Lawrence Mushwana, who is also a former Public Protector, openly professed his ANC membership.⁶⁴ In fact, a significant number of SAHRC chairpersons and commissioners past and present who have or have had ties to the ANC. The former part-time commissioner Janet Love is a former ANC anti-apartheid operative whose appointment was heavily criticised by some in the media and political circles.⁶⁵ The ANC has a tradition of cadre deployment, one steeped in the notions of democratic centralism associated with its Marxist-Leninist ideology. The danger of deploying loyal cadres to strategic positions in which they are simultaneously expected to be impartial cannot be overemphasised. It is highly unlikely that a loyal cadre, regardless of his or her opinion on the matter, would be deployed without the expectation of furthering the party's interests even if this were to mean engaging in conduct which is in direct conflict with the Constitution.

2.3.4 Removal and suspension of commissioners

Serving commissioners of the SAHRC may be removed from office in accordance with section 194(1) and (2) of the Constitution.⁶⁶ These sections provide a *numerus clausus* of grounds for the removal or suspension

61 *Ibid*, section 5(2).

62 *Ibid*, section 5(3).

63 *Ibid*, section 5(4).

64 NGO Pulse, "Do or Die for Chapter 9 Institutions" (18 June 2008), available at <https://bit.ly/2FUSv9c> (accessed 9 April 2019).

65 G Davis, "An Independent Cadre is a Contradiction in Terms Amid Party Loyalty", *Mail & Guardian*, available at <https://bit.ly/32aPcVe> (19 November 2010) (accessed 9 March 2019).

66 Section 5(6) of the SAHRC Act.

of a member of the Commission. Such grounds include misconduct; incapacity;⁶⁷ or a resolution by the National Assembly supported by a majority of members of the Assembly,⁶⁸ or by a revocation by the President upon the National Assembly's voting in favour of such person's removal.⁶⁹ The process for the removal or suspension of commissioners is therefore a one with in-built safeguards against arbitrariness. The SAHRC has never had a commissioner removed since its inception.

3 The institutional independence of the SAHRC

An institution's credibility and legitimacy hinge significantly on its independence, which has a direct bearing on its effectiveness and efficacy. The law setting up the SAHRC provides for its appointment mechanisms, powers, mandate, funding as well as accountability measures. Independence means that the law makes it difficult for the SAHRC to be undermined.

Section 184(2) of the Constitution provides that Chapter 9 institutions are independent and subject only to the constitution and the law.⁷⁰ The entrenchment of the SAHRC in the Constitution ensures its long-term existence and longevity, but, above all, it guarantees its independence. With independence comes legitimacy, which is a crucial characteristic of any institution having such broad powers. Where an organ exercises certain powers, those who are subjects of such powers must perceive that such power is being rightly exercised over them.

The legitimacy of the SAHRC derives from its entrenchment in the country's first constitution in the democratic dispensation. "Legitimacy" encompasses formal guarantees of independence, the institution's status in law, and its public reputation. According to some, the SAHRC has its shortcomings but its legitimacy is unquestionable given its achievements over the years.

To uphold the independence of the SAHRC, the law ensures security of tenure and makes provisions for members to be appointed through mechanisms that are transparent. The SAHRC Act provides that commissioners are appointed on a fixed term determined by the National Assembly, although the terms may not exceed seven years.⁷¹ Such terms

67 Section 194(1)(a) of the Constitution.

68 *Ibid*, section 194(1)(c) and (2)(b).

69 *Ibid*, section 194(3)(b).

70 *Ibid*, section 184(2).

71 Section 5(2) of the SAHRC Act.

may be renewed for one more term upon expiry. Even though these terms are not as definite as those of judges, in that they are determined by Parliament from time to time, they do ensure, thanks to their fixed nature, that a commissioner need not fear being arbitrarily removed from office should he or she not conform to the demands of those in power.

3.1 Financial autonomy

One of the core tenets of the Paris Principles⁷² concerns the need for national human rights institutions (NHRIs) to be independent of the government and avoid being subject to its financial control. The Principles underline the importance of adequate financing as a way of ensuring independence. Financial autonomy is thus pivotal to the independence of the SAHRC. That being said, the model used to fund the Commission may not be conducive of genuine independence, since such funding is controlled by an executive body.

The SAHRC is funded through a vote of the Department of Justice and Constitutional Development (DOJCD), in addition to which the funding is barely adequate, given that nearly 75 per cent of the budget is spent on salaries, as the table below indicates.⁷³ The implications of this funding model thus make the Commission susceptible to financial control, in direct conflict with the Paris Principles (discussed more fully below).

It can thus be said that while the SAHRC's design is a good model for the rest of the continent, the lack of financial independence adds to the several predicaments of the Commission. In recent years, the South African government has found some of its leaders, for example its President, under scrutiny for conduct that amounts to constitutional delinquency. The failure by the government to recognise that the Commission is in need of financial autonomy to execute its mandate could be construed as a deliberate attempt to render it ineffective: if the Commission has insufficient funding, it is not able to employ enough competent staff, launch investigations and institute proceeding in courts on behalf of victims of human rights violations. This would mean in turn that the SAHRC becomes a white elephant, one with no shortage of laws and powers yet without the ability to turn these paper powers into practical such powers that can be put to use in the execution of its mandate.

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

73 See J Van Dyk, "Does South Africa Need a Human Rights Commission?", *Bhekisisa Centre for Health Journalism* (4 July 2018), available at <https://bit.ly/2JfnK0W> (accessed 9 April 2019).

Table 4: The budget allocation of the SAHRC, 2018/2019

Budget cost centre	MTEF allocation (ZAR)
Personnel cost	128,900,621
Commissioners' unit	796,434
CEO's office	107,998
COO's office	134,069
Strategic support and governance	437,291
Legal services unit	246,582
Research unit	486,123
Advocacy and communication	486,123
Provincial offices	856,444
Human resources	2,477,933
Information and communication technology	5,841,288
Finance	3,218,541
Administration and supply chain management	35,107,878
Internal audit	90,528
Total baseline allocation	178,830,000

Source: <https://www.sahrc.org.za/home/21/files/Final%20SAHRC%20Annual%20Performance%20Plan%20201819.pdf>

In 2018 the Commission reported to Parliament that it received ZAR 178 million in 2018/2019 but that after paying all its expenses, only 1.8 per cent of the budget, which translates to ZAR 3.3 million, remained for its core business. The problem was compounded by the reduction of the Commission's budget, by a significant ZAR 5 million, from the previous year.

Indeed, the Commission has cited inadequate funding as the reason for its failure to ensure that some of its recommendations were implemented,⁷⁴ a situation that could worsen in the coming years. Treasury data reveal that from 2018-2021, the SAHRC's budget could be cut by as much as ZAR 5 million per annum to cater for shortfalls in other sectors of government, such as the funding of free education as well as the National Health Insurance Scheme.⁷⁵ Proposals to cut the Commission's budget have been criticised as a strategy for those in power to stifle the Commission in order to avoid accountability.⁷⁶

74 *Ibid.*

75 See Estimates of National Expenditure 2018, available at <https://bit.ly/2BU3iLA> (accessed 9 April 2019).

76 See note 74.

With the SAHRC having made efforts to increase impact litigation, there is a likelihood that it will avoid the courts in the coming years to accommodate the budget deficiencies. This will likely see a number of persons who should be held accountable escape with impunity for human rights violations, a development that presents a some retrogression given the milestones achieved until now. According to the SAHRC's CEO, it is not worthwhile to spend two years and a large portion of the Commission's budget on a single case. This means the SAHRC will have to rely almost entirely on its own internal investigative processes to obtain remedies for complainants. It is commendable, however, that the SAHRC has for years maintained a clean audit despite severe budgetary constraints.⁷⁷

4 Protection of socio-economic rights

South Africa has gross race-based inequalities in wealth emanating from structural injustices that find their origins in the laws and policies of the apartheid era. According to the National Income Dynamics Study (NIDS), the average black household has about four per cent of the wealth of the average white household, while the average coloured household has about six per cent of that wealth.⁷⁸ South Africa remains a highly unequal country in terms of both wealth and income. According to the SAHRC's assessment, poverty levels have soared exponentially over the years, with a general slow-down of economic growth curtailing the achievement of National Development Plan goals.

It is worth noting that the SAHRC has suggested that with the manifestation of inequality comes the recent surge in incidents of racism and hate speech. The Commission states in its 2018 report that certain surveys have identified inequality, as opposed to race, as the most divisive factor in South African society. The report goes on to state that economic inequality erodes social cohesion and social stability. It is on this basis that the SAHRC, recognising that inequality is an affront to meaningful participation both in democratic processes and in the mainstream economy, has devoted much of its resources to eliminating inequality.⁷⁹

As mentioned, among the most notable features of the Constitution are its comprehensive provisions dealing with the protection of socio-economic rights, which are set out in South Africa's Bill of Rights.⁸⁰ The

77 SAHRC, Annual Report 2017, available at <https://bit.ly/2xuW1CN> (accessed 21 March 2019).

78 *Ibid.*

79 See note 78.

Constitution endows the SAHRC with tremendous powers in this regard, stating that:

[e]ach year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.⁸¹

In discharging its mandate to ensure that socio-economic rights are protected, the SAHRC publishes regular reports in this regard. Since its first report covering the period 1997/1998,⁸² it has submitted several others that document violations with a view to ensuring that policy-makers take steps to prevent them from recurring. In its latest report on equality, the SAHRC states:

In contrast to vertical, economic inequality between households or individuals, human rights practitioners have traditionally focused on horizontal inequality between different groups that share characteristics such as sex, gender, sexual orientation or race. International, regional and South African human rights provisions aim to eliminate status inequality resulting from direct or indirect discrimination. In this context, equality can be thought of in a “formal” or “substantive” sense.⁸³

There has been debate about whether the SAHRC’s violations approach is appropriate for the realisation of socio-economic rights, given that the question in South Africa’s context is not whether but how these rights are justiciable.⁸⁴ Characteristics of the violations approach are the identification, specification and documentation of violations of human rights; however, in South Africa the issue is not primarily whether justiciable rights are being violated, but how those responsible for violations should be held accountable.

Indeed, the view that the SAHRC should not adopt a violations model is sound in that where violations occur, the Constitutional Court has ensured that its jurisprudence guards against such violations by providing

80 Constitution, Chapter 2.

81 *Ibid*, section 184(3).

82 SAHRC, Economic and Social Rights Report: Baseline Information 1997-1998 (1999), available at www.sahrc.org.za/esr_Report_1997_1998.htm (accessed 20 Mar.2019).

83 SAHRC, Equality Report, available at <https://bit.ly/2XpMyHv> (accessed 9 March 2019).

84 See J Klaaren, “Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights”, 27 *Human Rights Quarterly* (2006), pp 539-561.

relief where such relief was warranted.⁸⁵ In the *Grootboom* case, the Court extended support to the SAHRC in this regard when it offered the Commission a role of reporting on violations of socio-economic rights by government bodies.⁸⁶ The Commission could therefore go the extra mile and step up its efforts in monitoring and promoting socio-economic rights, as these continue to be violated.

4.1 The SAHRC's reporting procedure on socio-economic rights.

The SAHRC may collect reports from various government organs and institutions, with such information being utilised for the purposes of the Commission's reporting obligations by way of reports on social and economic rights. The SAHRC uses these reports in the monitoring of policy and legislative frameworks as well as budget allocated for bringing about the results intended by the measures taken. The Commission develops protocols relating to the various socio-economic rights and sends questionnaires to the government departments. Each questionnaire is supposed to be completed by the relevant authority in the department and returned to the Commission.

Through its regular socio-economic rights reports, the SAHRC has made efforts in addressing poverty as part of its broad mandate.⁸⁷ These reports have played a significant role as a means of critical assessment of the government's commitment to meet the obligations entrenched in the Constitution. They have served additionally as a self-assessment tool for civil society and the state in the quest for a continued and sustained realisation of these rights.⁸⁸ At least seven socio-economic rights reports have been released since the SAHRC came into being. These were compiled from information sourced from government institutions and presented in such a way as to be easily understood by ordinary citizens, who are the SAHRC's constituency.

Grootboom was South Africa's landmark socio-economic rights case, and it is no surprise that the judgement influenced the design of the SAHRC's protocols in monitoring human rights. The *Grootboom* and *TAC*

85 See *Government of the Republic of South Africa v Grootboom* 2001 SALR 46 (CC) (hereafter *Grootboom*): this was a socio-economic rights case in which the Constitutional Court held that these rights are justiciable.

86 See note 97.

87 Visit the SAHRC's website at www.sahrc.org.za to view the Commission's socio-economic rights reports.

88 SAHRC, Human Rights Advocacy Programme, available at <https://bit.ly/2FRFRI3> (accessed 21 March 2019).

cases⁸⁹ both utilised the test of whether the government has put in place unreasonable policies or acted unreasonably as a yardstick to determine whether the government has violated socio-economic rights.⁹⁰

A more recent case in which the SAHRC was *amicus curiae* also confirmed the justiciability of socio-economic rights. This is the case of *Residents of Arthurstone Village v Amashagana Tribal Authority and Others* (17978/15) [2016] ZAGPPHC 408. In the *Arthurstone* decision, the North Gauteng High Court found in favour of about 150 applicants who were illegally evicted from a piece of land – the Arthurstone Farm – located in Bushbuckridge, Mpumalanga. After the eviction, the residents' homes were demolished at the instruction of the traditional council, known as the Amashagana Tribal Authority. The effects of the eviction, as well as the demolition of the residents' homes, had an adverse impact on the applicants, who included women, children and elderly persons. It is a given that such endemic evictions are traumatic to the victims, who have to contend with the loss of their homes, being rendered destitute, and a plethora of socio-economic hardships.

The Court held further that the eviction order and processes did not meet the requirements of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 and section 26(3) of the Constitution.

4.2 Notable achievements

Over the years, the SAHRC has established itself as a reputable custodian of human rights and a model on which other countries base their NHRIs. The United Nations (UN) has accredited the SAHRC as an “A” status NHRI.⁹¹ It was indeed a milestone that from 2013-2016, the SAHRC chaired the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. Furthermore, the Commission's mandate aligns with the Paris Principles, which were adopted in 1993 by the UN as guidelines for NHRIs in carrying out their mandates,⁹² while the African Union Commission on Human and People's Rights ranked the SAHRC as the second-best NHRI in Africa after the Uganda Human Rights Commission at its 52nd

89 *Minister of Health v Treatment Action Campaign* 2002 1 SA 342 (CC).

90 See D G Newman, “Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda”, 19 *SAJHR* (2003), pp 189-216.

91 “A” status, which means that an NHRI is fully compliant with the Paris Principles.

92 United Nations General Assembly Resolution 48/134 (1993).

Ordinary Session in 2012. This is in recognition of the work the SAHRC has done in the promotion of human rights in the country.⁹³

The SAHRC's track record since its inception has been widely recognised and applauded, with the most prominent accolade being found in the report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions.⁹⁴ The report concludes:

It appears to the Committee that the SAHRC more than adequately satisfies requirements as identified in the Committee's terms of reference with regard to professionalism, efficiency and effectiveness. The Committee believes that the work done by the SAHRC is of vital importance for South Africa and makes an important contribution to the deepening of democracy and the achievement of a human rights culture in this country.⁹⁵

Indeed, the SAHRC has earned a reputation as a highly effective institution, a defender and promoter of human rights of note.⁹⁶ The Ad Hoc Committee's report shows that at least 50 per cent of South Africa's population is aware of the existence of the SAHRC.⁹⁷ The reasons for this public awareness lie in part in its easy accessibility, education programmes and outreach initiatives, all which have gone a long way in cementing its credibility. Through its human rights advocacy programme, the SAHRC has conducted widespread advocacy workshops, seminars, campaigns and conferences.⁹⁸ Its human rights advocacy unit stems from this programme, one which the Commission established to promote human rights awareness.

It is trite that human rights abuses by corporate entities are one of the areas that are highly neglected due to the tremendous influence and power of such bodies; as a result, they get away with violations with impunity. To mitigate this phenomenon, the SAHRC has in the past six years undertaken initiatives to raise awareness of the impact of business entities on human rights.⁹⁹ As part of these efforts, it has been engaging in dialogue to progressively strengthen the responsibility that business carries in respect of human rights. This dialogue seeks to further the SAHRC's mandate in promoting and protecting human rights by improving

93 J C Mubangizi, "A Comparative Discussion of the South African and Ugandan Human Rights Commissions", 48 *Institute of Foreign and Comparative Law* (2015), pp 124-143.

94 Report of the ad hoc Committee on Chapter 9 and Associated Institutions, available at <https://bit.ly/2xwbHWz> (accessed 19 March 2019).

95 *Ibid.*

96 *Ibid.*

97 See note 94, p 30.

98 See note 89.

99 See note 84.

collaboration between the state, business and civil society on pressing business and human rights issues in South Africa.

The SAHRC has also been involved in the development of a human rights curriculum and has consistently lobbied education departments at the national and provincial level, facilitated teacher training and the development of course material for the teaching of human rights subjects.¹⁰⁰ The Commission has also regularly provided sponsorship for human rights-oriented activities in schools, including events such as Human Rights Day, a public holiday in South Africa.¹⁰¹ Moreover, the Commission has committed to providing training on human rights for selected occupations such as law enforcement, social work and nursing.

The achievements of the SAHRC can be measured objectively if juxtaposed against the constitutional provisions which give the Commission its essence. Over the years it has litigated in several cases of public interest and entered the fray as *amicus curiae* in some ground-breaking cases, such as the *Grootboom* case referred to earlier. In early 2019, the SAHRC took the decision to challenge the law on end-of-life decisions before the Constitutional Court, arguing for the legalisation of euthanasia and physician-assisted dying. Should the relief sought by the Commission be realised, this will be one of the SAHRC's greatest achievements in recent years, given the highly contentious nature of the subject matter.

Additionally, over the years the Commission has launched inquiries into various matters, such as issues surrounding the trade in fake foods in the townships, xenophobia, and the rights of minorities such as immigrants,¹⁰² the lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning community (LGBTIQ), people with disabilities, and asylum seekers. These inquiries not only serve as a monitoring and intervention tool but also educate and ensure accountability. It is thus incumbent upon the SAHRC to ensure a consistent and sustained use of its broad powers to ensure accountability at all levels of governance as a way to promote a culture of human rights which continues to be violated both by public and private bodies.

The most recent milestone is securing the country's ratification of OPCAT. The treaty is in essence an appendage to the Convention against

100 See note 74, p 132.

101 See note 95.

102 Gauteng Investigative Report – Lindela GP/2012/0134. The Commission received a complaint from human rights NGOs that it investigate the poor health conditions of undocumented migrants at Lindela Detention Facility.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT). As mentioned, it provides for the implementation of NPMs through a system of regular visits to places of detention, the aim of which is to prevent torture and other ill-treatment. South Africa signed the OPCAT in 2006 but did not ratify it until 28 March 2019. For years, the SAHRC put pressure on the government to ratify the treaty in view of the high prevalence of torture and other ill-treatment of persons deprived of their liberty in South Africa.¹⁰³ The SAHRC is currently in the process of ensuring that South Africa's NPM is established and working in concert with other stakeholders to ensure that this mechanism is effective and attains its objectives.

4.2.1 High-profile litigation and investigation

Over the years, the Commission has received numerous complaints: what is notable is the impressive turnover of cases brought to it. The top five complaints lodged with the Commission relate to equality; section 27 of the Constitution (health care, food, water, and social security); arrested, detained, and accused people; labour relations; and just administrative action.¹⁰⁴ In respect of the right to equality, the highest number of complaints received concerned racism. Complaints related to health have soared by more than 40 per cent since 2016. In an effort to ensure accountability, the Commission has upped its litigation efforts by 32 per cent, which saw it involved in more than 60 litigations in 2016/2017.

The increase in the number of cases involving the SAHRC can be interpreted in various ways. On one hand, it could mean that the SAHRC is doing well as a custodian of human rights in South Africa by using the courts to hold those who violate human rights accountable. On the other hand, it could mean that human rights violations are on the increase and more work needs to be done. Whatever the case may be, the Commission needs to ensure that whatever human violations occur in the Republic, it is able to harness the confidence of the vulnerable people who look to it for the protection of their fundamental rights.

The table below shows the number of cases reported to the Commission from 2012/2013-2017/2018 and the case-completion rate for the same period.

103 SAHRC, "SAHRC Urges Government to Ratify OPCAT", available at <https://bit.ly/2L4M08e> (accessed 8 April 2019).

104 See note 78.

Table 5: Number of cases reported to the SAHRC and completion rates, 2012/2013-2016/2017

Financial year	Com-plaints	Enquiries	Total caseload	Year-on-year change	Finalised and once-off enquiries	% achieve-ment
2012/13	4,947	3,972	8,919	-22%	7,047	79%
2013/14	4,980	4,237	9,217	3%	8,550	93%
2014/15	3,685	4,494	8,179	-11%	7,337	90%
2015/16	4,613	4,625	9,238	13%	8,200	89%
2016/17	4,938	4,792	9,730	5%	8,498	87%

Source: www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202017%20HR.PDF

Given the resource constraints, the SAHRC's case completion statistics are impressive. It can thus be said that, should the call for more resources to be allocated to the Commission be heeded, its efficiency could be greatly enhanced.

An important attribute of the SAHRC is its power to institute litigation either in its own name or upon a complaint being lodged with it. Accordingly, it found itself involved in a number of cases over the past few years. A selection of these are summarised below.

South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198

The SAHRC challenged the detention some 39 foreign nationals at the Lindela Repatriation Centre on the ground that they had been held for longer than the period of 30 days provided for under section 34 of the Immigration Act 13 of 2002. In this case, the detained persons were placed in custody for more than four months without a warrant. The court found that the protracted detention period was unlawful and unconstitutional,¹⁰⁵ and ordered that reasonable steps be taken by the respondents to terminate such detention practices.¹⁰⁶

The court further ordered that the respondents provide a regular written report to the SAHRC setting out, inter alia, (1) the steps taken to comply with the judgement to ensure that no person is detained in

105 *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198*, paragraph 52.2

106 *Ibid*, paragraph 52.3.

contravention of the order;¹⁰⁷ and (2) full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.¹⁰⁸ Additionally, the respondents were ordered to ensure that the SAHRC has regular access to the Lindela Repatriation Centre and persons detained at the facility.¹⁰⁹

SAHRC & 19 Others v Madibeng Municipality, MEG for Local Government & Human Settlement, Minister of Water and Sanitation & Minister of Health – Case No 21099/17 (Gauteng High Court Division, Pretoria)

On 9 May 2017, the Pretoria High Court granted an interim order directing the Madibeng Local Municipality to increase water supply to the approximately 3,500 households of Klipgat C. This success not only vindicated the rights of the residents to have access to sufficient water in terms of section 27(1)(b) of the Constitution, but also enforced the positive obligations imposed by section 27(2) for reasonable measures to be taken in giving effect to the right to have access to sufficient water.

South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services (EQ44/2009; EQ13/2012) [2017] ZAGPJHC 218

On 18 August 2017, the Gauteng High Court Division in Johannesburg, sitting as the Equality Court, granted judgment against Jon Qwelane, a journalist and South Africa's ambassador to Uganda. In a newspaper column in 2008, Qwelane uttered words to the effect that homosexuality amounts to a rapid degradation of values and traditions. He suggested that the Constitution's acceptance of gay marriage would lead to "some idiot demanding to marry an animal". Furthermore, Qwelane voiced an opinion that he also endorsed the views on homosexuality of Zimbabwe's then president, Robert Mugabe.

The Court declared Qwelane's comments as amounting to hate speech in terms of section 10 of the PEPUDA. It ordered him to apologise to the LGBTI community. The Court also ordered the Registrar of the Court to refer the matter to the Commissioner of the South African Police Service for investigation in terms of section 21(4) of the Equality Act.

107 *Ibid*, paragraph 52.4.1.

108 *Ibid*.

109 *Ibid*, paragraph 52.5.

South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (EQ0112012)

On 29 June 2017, the Gauteng High Court Division in Johannesburg, sitting as the Equality Court, granted judgment against Bongani Masuku of the Congress of South African Trade Unions (Cosatu), who had made comments against the Jewish community. The Court found that Masuku's comments, which contained threats, were not only hurtful and harmful but also propagated hatred. The Court declared Masuku's comments as amounting to hate speech in terms of section 10 of the Equality Act, and ordered him to apologise to the Jewish community.

Investigation of alleged hate speech by Julius Malema

In March 2019, the SAHRC released its findings on complaints lodged with it against Julius Malema, leader of the Economic Freedom Fighters, a political party.¹¹⁰ The complaints alleged that Malema uttered words amounting to hate speech on different occasions between 2016 and 2018. In the investigation, the SAHRC engaged the services of a legal expert who concluded that although the utterances were emotive and hurtful to white South Africans, they failed to reach the threshold of "hate speech". The SAHRC chairperson, Advocate Bongani Majola, said that hate speech was an emerging field of law and thus still murky, hence the long time taken in completing the investigation.

In an ongoing case in which the Nelson Mandela Foundation has made an application seeking relief in the form of banning the display of the apartheid flag, the respondents, Afriforum, have sought to rely on the decision in the Malema hate speech investigation to invoke freedom of expression as the reason why the flag should not be prohibited. In response, Wim Trengove, counsel for the SAHRC, which is intervening as *amicus curiae* in the case, stated that the facts of the Malema case do not bear any relevance to the facts in the apartheid-flag case.¹¹¹

4.3 The SAHRC's relationship with other Chapter 9 institutions and civil society

The protection of human rights in South Africa is not the monopoly of one institution. In a country with a history like South Africa's, it is only

110 SAHRC, "SAHRC Finds Julius Malema's Comments Not Hate Speech", available at <https://bit.ly/2LDRlmw> (accessed 10 April 2019).

111 BC Simelane, "Court Reserves Judgement in Apartheid Flag Saga", *Daily Maverick* (30 April 2019), available at <https://bit.ly/2L3srNn> (accessed 2 May 2019).

plausible that a multi-pronged approach to the protection and promotion of human rights be adopted. The SAHRC therefore collaborates with other Chapter 9 institutions as well as NGOs to ensure a concerted effort towards engendering a human rights culture.

In cases before the courts, the SAHRC has acted as *amicus curiae* alongside other organisations or litigated in concert with them. A recent example is in the case of *Geneva Claasen and Two Others v The MEC for Transport and Public Works, Western Cape Provincial Department and Other* (WCHC Case No 23595/2015), in which the LRC filed heads of argument on behalf of the SAHRC in a case involving the illegal eviction of women and children from a shelter for destitute persons.

The SAHRC and other state institutions regularly collaborate in holding training seminars and workshops to synergise their efforts against human rights violations. An example is the Commission's commitment to collaborate with the Commission for Gender Equality and the Department of Basic Education in the creation of a safe learning environment. This is in line with the SAHRC Act, which provides that as far as possible the Commission must liaise closely with institutions and organisations with similar objectives to it to foster common policies and practices and to promote cooperation on issues of mutual concern or overlapping jurisdiction.

Over the years the Commission has indeed managed to foster these working relationships, as is evidenced by its regular engagement with various institutions and government bodies. Such consistent collaboration is a step in the right direction in avoiding the fragmentation of efforts to promote a human rights culture.

4.4 Challenges and criticism facing the SAHRC

4.4.1 Funding

Given that a large portion of the SAHRC's funding comes from the state,¹¹² its independence and accountability may be negatively impacted by this model of funding – in the absence of a budget vote specifically for the SAHRC, the DOJCD is responsible for its budget allocation. This means in essence that while the Commission is accountable to the National Assembly, it is also largely accountable to the DOJCD, contrary to the Constitution's stipulations. The arrangement holds the risk that

112 EISA, "South African Human Rights Commission", available at <https://bit.ly/2NJzNYu> (accessed 19 March 2019).

governmental actors could exploit the budgetary mechanism to interfere in the Commission's agenda and how it functions. Glaser, for example, contends that the SAHRC has not been hard enough on the government in seeking to enforce implementation of its recommendations.¹¹³ It is on this basis that the report of the Ad Hoc Committee¹¹⁴ recommended that the SAHRC's budget form part of Parliament's budget vote instead of that of the DOJCD.

4.4.2 Accessibility

A criticism of the SAHRC is that the country's marginalised communities and rural population have limited access to its services. Most of South Africa's population does not have access to information and usually little, if any, awareness of human rights and human rights institutions. This is compounded by the Commission's urban focus when launching its human rights awareness campaigns.¹¹⁵ Limitations of accessibility can be linked to the limited resources the Commission has at its disposal notwithstanding the broadness of its mandate. Due to its limited resources, the Commission's reach is in turn significantly limited, which then denies the rural population access to its services.

The Commission has nonetheless taken deliberate steps to mitigate issues of accessibility. As part of its outreach initiatives in 2016/2017, it introduced a pilot project to train community trainers. The aim is to build capacity for community focal points as well as establish sustainable working relationships with communities. The SAHRC's various provincial offices identified key persons within communities who are engaged or interested in social justice and human rights and have a heart for their communities. The identified persons are then empowered through basic training programmes in issues of human rights and social justice.

The idea to ensure that, with time and experience, these trainers add value to the Commission's work by identifying the broader community's human rights needs and assisting in the SAHRC's community engagements. They will also assist in the mobilisation of community members so as to enhance participation levels in outreach activities. The project seeks to ensure that the necessary tools and skills to convey information about the mandate of the SAHRC are provided. It also provides the tools for rendering basic advice, responding to queries,

113 D Glaser, "The Media Inquiry Reports of the South African Human Rights Commission: A Critique", 99 *African Affairs* (2000), pp 373-393.

114 The Ad Hoc Committee on Chapter 9 and Associated Institutions.

115 See note 77.

reinforcing education in human rights, making referrals of possible human rights violations to the SAHRC, directing communities to relevant institutions where necessary, and creating an enabling environment for communities to work towards a culture of human rights.

4.4.3 *Limited resources and capacity*

As noted, the SAHRC has a broad constitutional and legislative mandate yet limited human and material resources to carry it out. Due to this imbalance between its powers and resources, the SAHRC has been limited to dealing with socio-economic rights and public bodies.¹¹⁶ It has not extended its reach to private bodies even though human rights violations occur within that space, with the result that there is growing impunity for corporate human rights violations.

Probably in part due to its financial constraints, the SAHRC has consistently limited the number of its permanent commissioners to the minimum of five as stated in the Constitution, even though the latter does not restrict it to this number.¹¹⁷ Since it is vital that the Commission is adequately resourced in terms of personnel and other requirements, one of the ways it could maximise its potential efficacy is by doing away with the appointment of part-time commissioners to ensure that all its commissioners give their undivided attention to fulfilling the Commission's mandate.

5 Improving the SAHRC's efficacy

The SAHRC has continually sought to remedy its shortfalls and enhance delivery on its constitutional mandate. In its 2017 annual report it stated that it had recognised the imperative to implement, develop and strengthen an integrated, comprehensive monitoring and evaluation system.¹¹⁸ In the monitoring and evaluation system the SAHRC subsequently developed, the planning framework included elements to ensure that the recommendations of the Commission and court orders emanating from litigation are implemented. The Commission also resolved that it would engage regularly and meaningfully with executive stakeholders, participate in government engagement fora, and devise effective monitoring instruments.

116 CM Peter, "Human Rights Commissions in Africa – Lessons and Challenges", in A Bösl and J Diescho (eds) *Human Rights in Africa: Legal Perspectives and their protection and Promotion*, Namibia, Macmillan Education (2009), pp 351-374.

117 See note 113.

118 See note 78.

The implementation of a sound monitoring and evaluation mechanism should see the Commission's work becoming easier by creating an environment which enables it to accurately assess institutional responses, thus enabling it to act accordingly.

Furthermore, the framework allows the SAHRC to utilise surveys and evaluations to gauge the realisation of outcomes and the achievement of the envisaged impact. Aspects of the monitoring and evaluation framework have been used to assess the effectiveness, relevance, and impact of identified SAHRC processes, including the implementation of recommendations, engagements through provincial visits, engagements with the advisory committee as well as legislative submissions.

The Commission, spurred on by the Constitutional Court's decision in *Economic Freedom Fighters v Speaker of the National Assembly and Others (EFF case)*¹¹⁹ which stated that the Public Protector's remedial action is binding unless the court overrules them, has sought to ensure that the same weight is accorded to its recommendations. In the *EFF* case, the Court stated that:

[t]he Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) (of the Constitution) must accordingly be taken to mean what it says.¹²⁰

The Court also stated that:

[i]f compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy.¹²¹

A textual and purposive reading of the *EFF* judgment warrants that the SAHRC's recommendations be accorded the same binding effect as those of the Public Protector. First, the two bodies are both Chapter 9 institutions established with the purpose of strengthening democracy. Secondly, they both depend on their independence and impartiality for their effectiveness. There has not been any case where the binding effect of the SAHRC's recommendations has been an issue, but such cases may arise in future. Nonetheless, the point of departure is that it will not be rational to deny the SAHRC recommendations binding effect while granting the same to

119 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

120 See note 120, paragraph 68.

121 *Ibid*, paragraph 56.

another institution with an overlapping mandate. If the recommendations of the Commission are ignored willy-nilly, the work of the Commission will continue to be undermined in some quarters.

Succinctly put, the provisions of the SAHRC Act that spell out the Commission's powers, functions and investigative powers, namely sections 13 and 15, must be construed to a large extent as endowing binding powers, given the penchant of some government organs and persons to ignore the Commission's recommendations. It is encouraging that the SAHRC has been engaging with the DOJCD and Department of Correctional Services in this regard, and if its recommendations are acceded to, the efficiency of the SAHRC may be enhanced.

6 Conclusion

South Africa has a dark past, the ramifications of which continue to be felt in the present day. With the advent of constitutional democracy, a resolute commitment to reversing the effects of apartheid had to be made. In the transition from an era when the rights of the majority of the people were flagrantly violated to a dispensation where South Africans have recourse for violations of their fundamental human rights, the establishment of the SAHRC was a milestone event in the history of South Africa. Twenty-four years after its establishment, the Commission continues to champion the promotion and realisation of a culture of human rights, monitoring compliance, issuing reports and educating the populace about human rights. Appointed with a broad mandate, the Commission has ensured that it works with other government agencies, the international community and NGOs in serving as the constitutional custodian of human rights in South Africa. It cannot be said that it has been a smooth sailing: the SAHRC still faces considerable challenges in the form of political pressure and limited resources and funding.

Whether the Commission has done well in the fulfilment of its mandate is something that can be determined only by juxtaposing the results on the ground with the provisions of the Constitution. It would be too bold a statement to claim that the Commission has arrived where it should be. More could certainly be done: as it is with most NHR, conditions do not always favour the SAHRC's making uninterrupted progress towards a dispensation where the respect and promotion of human rights is a national priority. Moreover, the Commission is but one of a number of actors in the South African human rights arena, which makes measuring its specific contribution a complex undertaking.

When all is said and done, one can only appreciate that there is still more to achieve in the total realisation of human rights in South Africa; this feat can be realised with commitment from all stakeholders in government and civil society, coupled with the unwavering support of those who subscribe to the notions of human rights, democracy and the rule of law.

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The basic framework of the South African Human Rights Commission is elaborate stated in Chapter 9 of the Constitution, which has as title, “State institutions supporting constitutional democracy.” It provides as follows:

Establishment and governing principles

181.(1) The following state institutions strengthen constitutional democracy in the Republic:

- (a) The Public Protector.
 - (b) The South African Human Rights Commission.
 - (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - (d) The Commission for Gender Equality.
 - (e) The Auditor-General.
 - (f) The Electoral Commission.
- 2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- 3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- 4) No person or organ of state may interfere with the functioning of these institutions.
- 5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

South African Human Rights Commission

Functions of South African Human Rights Commission

185.(1) The South African Human Rights Commission must –

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights;
and
- (c) monitor and assess the observance of human rights in the Republic.

2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;
- (c) to carry out research; and
- (d) to educate.

3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

General Provisions

Appointments

193.(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who –

- (a) are South African citizens;
- (b) are fit and proper persons to hold the particular office; and
- (c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of –

- (a) the South African Human Rights Commission;
- (b) the Commission for Gender Equality; and
- (c) the Electoral Commission.

(5) The National Assembly must recommend persons –

- (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
- (b) approved by the Assembly by a resolution adopted with a supporting vote –

- (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
 - (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.
- (6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

Removal from office

194.(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on –

- (a) the ground of misconduct, incapacity or incompetence;
 - (b) a finding to that effect by a committee of the National Assembly; and
 - (c) the adoption by the Assembly of a resolution calling for that person's removal from office.
- (2) A resolution of the National Assembly concerning the removal from office of –
- (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
 - (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.
- (3) The President –
- (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
 - (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

B.2 Legislative and regulatory instruments

The main regulatory instrument is Act No 40 of 2013, the South African Human Rights Commission Act, 2013. It is described as an Act to provide for the composition, powers, functions and functioning of the South African Human Rights Commission; to provide for the repeal of the Human Rights Commission Act, 1994; and to provide for matters connected therewith.

Preamble

SINCE sections 181(1)(b) and 184 read with item 20 of Schedule 6 to the Constitution of the Republic of South Africa, 1996, provide that the South African Human Rights Commission, established in terms of section 115 of the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993), continues to function in terms of the legislation applicable to it; and for the conferring of certain powers on and the assignment of certain functions to the Commission;

AND SINCE the Constitution provides that the South African Human Rights Commission must –

- promote respect for human rights and a culture of human rights;
- promote the protection, development and attainment of human rights;
- monitor and assess the observance of human rights in the Republic; and
- annually require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment;

AND SINCE the Constitution provides that the South African Human Rights Commission –

- has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to 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; and
- has the additional powers and functions prescribed by national legislation,

1. Definitions

1. In this Act, unless the context otherwise indicates –

“Chairperson” means the chairperson of the Commission referred to in section 5 6(1);

“chief executive officer” means the chief executive officer referred to in section 19(1);

“Commission” means the South African Human Rights Commission referred to in sections 181(1)(b) and 184 of the Constitution;

“commissioner” means a commissioner referred to in section 5(1)

“committee” means a committee established under section 11;

“Constitution” means the Constitution of the Republic of South Africa, 1996;

“Deputy Chairperson” means the deputy chairperson of the Commission referred to in section 6(1);

“human rights” means the human rights contained in Chapter 2 of the Constitution;

“investigation” means an investigation contemplated in section 15;

“member of staff” means the chief executive officer and any person appointed in terms of section 19(3)(a);

“Minister” means the Cabinet member responsible for the administration of 10 justice;

“organ of state” means an organ of state as defined in section 239 of the Constitution;

“premises” includes land, any building or structure, or any vehicle, conveyance, ship, boat, vessel, aircraft or container;

“private dwelling” means any part of any building or structure which is occupied as a residence or any part of any building or structure or outdoor living area which is accessory to, and used wholly or principally for, the purposes of residence;

“Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No 1 of 1999); and

“warrant” means a search warrant or an entry and search warrant, as the case may be, issued in terms of section 16(5).

2. Objects of Commission

- (2) The objects of the Commission are –
- (a) to promote respect for human rights and a culture of human rights;
 - (b) to promote the protection, development and attainment of human rights; and
 - (c) to monitor and assess the observance of human rights in the Republic.

3. Seat of Commission

- 3(1) The seat of the Commission must be in the province of Gauteng.
- (2) The Commission may establish such offices as it may consider necessary to enable it to exercise its powers and to perform its functions conferred on or assigned to it by the Constitution, this Act or any other law.

4. Independence and impartiality

4(1) A commissioner as well as a member of staff –

- (a) must serve impartially and independently and exercise or perform his or her powers and functions in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law;
- (b) may not use the position or privileges of a commissioner or a member of staff for private gain or to benefit another person improperly; and
- (c) may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission.

(2) All organs of state must afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission and in pursuit of its objects.

(3) No organ of state and no member or employee of an organ of state nor any other person may interfere with, hinder or obstruct the Commission, any commissioner, a member of staff or a person appointed under section 11(1) or 19(5) in the exercise or performance of its or his or her powers and functions.

(4) No commissioner or member of staff may conduct an investigation or render assistance with regard thereto in respect of a matter in which he or she has any pecuniary or any other interest which might preclude him or her from exercising or performing his or her powers and functions in a fair, unbiased and proper manner.

(5) If any commissioner or member of staff fails to disclose an interest contemplated in subsection (4) and conducts or renders assistance with regard to an investigation, while having an interest so contemplated in the matter being investigated, the Commission may take such steps as it deems necessary to ensure a fair, unbiased and proper investigation.

(6) In the interest of transparency and accountability, a commissioner must, in the manner determined by the Commission, annually disclose his or her financial interests and any other interests determined by the Commission, which information must be accessible to the public.

(7) A commissioner or a member of staff who contravenes or fails to comply with subsection (1)(b) or (4) is guilty of misconduct.

5. Composition of Commission

5(1)(a) The Commission consists of eight commissioners, who must –

- (i) be South African citizens and fit and proper persons to hold office of the Commission, as contemplated in section 193(1) of the Constitution;
- (ii) have a record of commitment to the promotion of respect for human rights and a culture of human rights;
- (iii) be persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission; and

- (iv) be appointed by the President in accordance with section 193(4) and (5) of the Constitution.
- (b) Subject to paragraph (a), any person is eligible to be appointed as a commissioner, except –
- (i) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service;
 - (ii) unrehabilitated insolvents;
 - (iii) anyone declared to be of unsound mind by a court of the Republic;
 - (iv) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; or
 - (v) anyone who is an office-bearer or a staff member of a political party, a member of the National Assembly, a permanent delegate to the National Council of Provinces, a member of a provincial legislature or a member of a municipal council or who is on a candidate list for any of those positions.
- (2) The commissioners referred to in subsection (1) may, on the recommendation of the National Assembly, be appointed as full-time or part-time commissioners and hold office for such fixed term as the National Assembly may determine at the time of such appointment, but not exceeding seven years: Provided that not fewer than six commissioners are appointed on a full-time basis and not more than two commissioners are appointed on a part-time basis.
- (3) The President may, on the recommendation of the National Assembly, appoint a part-time commissioner as a full-time commissioner for the unexpired portion of that part-time commissioner's term of office if a vacancy in the office of a full-time commissioner occurs.
- (4) Any person whose term of office as a commissioner has expired, may be reappointed for one additional term.
- (5)(a) A commissioner may resign from office by submitting at least three calendar months' written notice thereof to the National Assembly, unless the National Assembly by resolution allows a shorter period in a specific case.
- (b) A commissioner is regarded as having resigned if that commissioner –
- (i) accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council; or
 - (ii) is elected or appointed as an office-bearer of a political party.
- (c) The Commission must take appropriate steps, where necessary, against a commissioner –
- (i) who fails to give notice in terms of paragraph (a); or
 - (ii) who gives such notice, but fails to comply with the prescribed period referred to in that paragraph, for the recovery of any remuneration and allowances, if any, that were paid to that commissioner in the case of –

- (aa) subparagraph (i), for the three months immediately preceding the date on which his or her resignation took effect; and
 - (bb) subparagraph (ii), for the period that was less than the prescribed period referred to in paragraph (a).
- (6) A commissioner may be removed from office in accordance with section 194(1) and (2) of the Constitution.
- (7) The President may suspend a commissioner from office in accordance with section 194(3)(a) of the Constitution.
- (8) The President must remove a commissioner from office in accordance with section 194(3)(b) of the Constitution.

6. Chairperson and Deputy Chairperson of Commission

- 6(1) The President must, on the recommendation of the National Assembly, appoint 10 a Chairperson and Deputy Chairperson of the Commission, respectively.
- (2) Whenever the Chairperson is absent or for any reason unable to exercise or perform the powers and functions vested in the office of the Chairperson, or whenever the office of Chairperson is vacant, the Deputy Chairperson may exercise all the powers and must perform all the functions of the Chairperson.
- (3)(a) Whenever both the Chairperson and the Deputy Chairperson are absent or for any reason unable to exercise or perform the powers and functions vested in the office of Chairperson, or whenever both offices are vacant, the remaining commissioners must from their number elect an acting Chairperson.
- (b) Any commissioner acting as Chairperson of the Commission by virtue of the provisions of paragraph (a) may, while so acting, exercise all the powers and must, while so acting, perform all the functions of the Chairperson.

7. Powers and functions of Chairperson, Deputy Chairperson and other commissioners

- 7(1) The Chairperson is vested with all the powers and functions conferred on or assigned to him or her by the Commission, this Act or any other law.
- (2) The Deputy Chairperson and any other commissioner are vested with all the powers and functions conferred on or assigned to him or her by the Commission or delegated to him or her by the Chairperson.
- (3) The Chairperson is, for the purposes of exercising the powers and performing the functions conferred on or assigned to him or her by the Commission, this Act or any other law, accountable to the Commission.
- (4) The Deputy Chairperson and any other commissioner are, for the purposes of exercising the powers and performing the functions –
- (a) conferred on or assigned to him or her by the Commission, accountable to the Commission; or

- (b) delegated to him or her by the Chairperson, accountable to the Chairperson.
- (5) The Chairperson is, for the purposes of the Public Finance Management Act, the executive authority of the Commission.

8. Vacancies in Commission

- 8(1) A vacancy in the Commission occurs –
- (a) when a commissioner's term of office expires;
 - (b) when a commissioner dies;
 - (c) when a commissioner is removed from office in accordance with section 194 of the Constitution; or
 - (d) when a commissioner's resignation, submitted in accordance with section 5(5)(a) or as contemplated in section 5(5)(b), takes effect.
- (2) A vacancy in the Commission does not affect the validity of the proceedings or decisions of the Commission.
- (3)(a) The Commission must, as soon as a vacancy occurs, in writing inform the National Assembly of such vacancy.
- (b) A vacancy in the Commission must, as soon as practicable after the National Assembly becomes aware thereof, be filled in accordance with section 193(4) and (5) of the Constitution.

9. Remuneration and allowances of commissioners

- 9(1) The remuneration, allowances and other terms and conditions of office and service benefits of the full-time and part-time commissioners are determined by the President in consultation with the Cabinet and the Minister of Finance.
- (2) The remuneration of the commissioners may not be reduced, nor may the 5 allowances and other terms and conditions of office and service benefits be adversely altered, during their continuation in office.
- (3) A part-time commissioner may, for any period during which that commissioner, with the approval of the Commission, performs additional functions, be paid such additional remuneration as may be determined by the President in consultation with the 10 Cabinet and the Minister of Finance.

10. Meetings of Commission

- 10(1) The meetings of the Commission must be held at the times and places determined by the Commission: Provided that the chief executive officer must, in the absence of the Chairperson, convene the first meeting of the Commission.
- (2) If the Chairperson is absent from a meeting of the Commission, the Deputy Chairperson acts as chairperson, and if both the Chairperson and

Deputy Chairperson are absent from a meeting of the Commission, the commissioners present must elect one from among their number to preside at that meeting.

- (3) The quorum for any meeting of the Commission is a majority of the total number of commissioners.
- (4) The decision of the majority of the commissioners present at a meeting thereof is the decision of the Commission and in the event of an equality of votes concerning any matter, the commissioner presiding has a casting vote in addition to his or her deliberative vote. The Commission must –
 - (a) determine its own procedure: Provided that due regard must be given to the principles of transparency, openness and public participation; and
 - (b) cause minutes to be kept of its proceedings.
- (5) The Commission may from time to time by notice in the *Gazette* make known the particulars of the procedure which it has determined in terms of subsection (5)(a).

11. Committees of Commission

11(1) The Commission may establish one or more committees consisting of one or more commissioners designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it for the purposes of advising the Commission, or make recommendations to it, in respect of the matter for which the committee has been established.

- (2) The Commission may extend the period of an appointment made by it under subsection (1) or withdraw such appointment during the period referred to in that subsection.
- (3) The Commission must designate a chairperson, who must be a commissioner, for every committee and, if it deems it necessary, a deputy chairperson, who must also be a commissioner.
- (4) Subject to the directions of the Commission, a committee –
 - (a) may exercise such powers of the Commission as the Commission may confer on it; and
 - (b) must perform such functions of the Commission as the Commission may assign to it, and must follow such procedure during such exercising of powers and performance of functions as the Commission may direct.
- (5) On completion of the functions assigned to it in terms of subsection (4), a committee must submit a written report thereon, including recommendations, if any, for consideration by the Commission.
- (6) The Commission may at any time dissolve any committee.

12. Conferment of powers and assignment of functions

12(1)The Commission may, in writing, confer the exercise of any of its powers or assign the performance of any of its functions to –

- (a) a commissioner;
 - (b) a member of staff; or
 - (c) a committee of the Commission.
- (2) A conferment or assignment in terms of subsection (1) –
- (a) is subject to such conditions and directions as the Commission may impose; and
 - (b) does not divest the Commission of responsibility for the exercise of the power or the performance of the function.
- (3) The Commission may confirm, vary or revoke any decision taken in consequence of a conferment or assignment in terms of this section, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

13. Powers and functions of Commission

13(1)In addition to any other powers and functions conferred on or assigned to it by section 184(1), (2) and (3) of the Constitution, this Act or any other law and in order to achieve its objects –

- (a) the Commission is competent and is obliged to –
 - (i) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights;
 - (ii) undertake such studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission; and
 - (iii) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to human rights; and
- (b) the Commission –
 - (i) must develop, conduct or manage information programmes and education programmes to foster public understanding and awareness of Chapter 2 of the Constitution, this Act and the role and activities of the Commission;
 - (ii) must as far as is practicable maintain close liaison with institutions, bodies or authorities with similar objectives to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction or other appropriate instances;

- (iii) must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission;
- (iv) may consider such recommendations, suggestions and requests concerning the promotion of respect for human rights as it may receive from any source;
- (v) must review government policies relating to human rights and may make recommendations;
- (vi) must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission;
- (vii) must prepare and submit reports to the National Assembly pertaining to any such convention, treaty, covenant or charter relating to the objects of the Commission; and
- (viii) must carry out or cause to be carried out such studies concerning human rights as may be referred to it by the President, and the Commission must include in a report referred to in section 18(1) a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate.

2(a) The Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights.

(b) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.

(3) The Commission is competent –

- (a) to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and
- (b) to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.
- (4) All organs of state must afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its functions.

14. Mediation, conciliation or negotiation by Commission

14. The Commission may, by mediation, conciliation or negotiation endeavour –

- (a) to resolve any dispute; or
- (b) to rectify any act or omission, emanating from or constituting a violation of or threat to any human right.

15. Investigations by Commission

15(1) Pursuant to the provisions of section 13(3) the Commission may, in order to enable it to exercise its powers and perform its functions –

- (a) conduct or cause to be conducted any investigation that is necessary for that purpose;
- (b) through a commissioner, or any member of staff duly authorised by a commissioner, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;
- (c) require any person by notice in writing under the hand of a commissioner, addressed and delivered by a member of staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice must contain the reasons why such person's presence is needed and why any such article or document should be produced; and
- (d) through a commissioner, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in that paragraph, irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation.

(2)(a) Any person questioned under subsection (1) must, subject to the provisions of paragraph (b) and subsections (3) and (4) –

- (i) be competent and compelled to answer all questions put to him or her regarding any fact or matter connected with the investigation of the Commission notwithstanding that the answer may incriminate him or her; and be compelled to produce to the Commission any article or document in his or her possession or custody or under his or her control which may be necessary in connection with that investigation.
- (b) A person referred to in paragraph (a) is only competent and compelled to answer a question or compelled to produce any article or document contemplated in that paragraph if –
 - (i) the Commission, in consultation with the Director of Public Prosecutions who has jurisdiction, issues an order to that effect;
 - (ii) the Commission is satisfied that to require such information from such person is reasonable, necessary and justifiable in an open and democratic society based on freedom and equality; and
 - (iii) in the Commission's judgement, such person has refused or is likely to refuse to answer a question or to produce any article or

document on the basis of his or her privilege against self-incrimination.

3(a) Any incriminating answer or information obtained or incriminating evidence 15 directly or indirectly derived from a questioning in terms of subsection (1) is not admissible as evidence against the person concerned in criminal proceedings in a court of law or before any body or institution established by or under any law, except in criminal proceedings where the person stands trial on a charge of perjury or a charge contemplated in section 22(b) of this Act or in section 319(3) of the Criminal Procedure 20 Act, 1955 (Act No 56 of 1955).

(b) Subject to the provisions of subsection (2)(a)(i), the law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law applies in relation to the questioning of a person in terms of subsection (1).

(4) Any person appearing before the Commission by virtue of the provisions of subsection (1)(c) and (d) may be assisted at such examination by a legal representative and is entitled to peruse such of the documents referred to in subsection (1)(c) or any other relevant documents.

(5) If it appears to the Commission during the course of an investigation that any person is being implicated in the matter being investigated, the Commission must afford 30 such person an opportunity to be heard in connection therewith by way of the giving of evidence or the making of submissions and such person or his or her legal representative is entitled, through the Commission, to question other witnesses, determined by the Commission, who have appeared before the Commission in terms of this section.

(6) Subject to the provisions of this Act, the procedure to be followed in conducting 35 an investigation must be determined by the Commission with due regard to the circumstances of each case.

(7) The Commission must make known publicly the particulars of the procedure which it has determined in terms of subsection (6).

(8) If it is in the interests of justice or if harm to any person might otherwise ensue, the 40 Commission or a commissioner may direct that any person or category of persons or all persons the presence of whom is not desirable may not be present at the proceedings during the investigation or any part thereof.

(9) Notwithstanding anything to the contrary contained in any law, no person may disclose to any other person the contents of any document in the possession of a 45 commissioner or a member of staff or the record of evidence given before the Commission during an investigation, unless the Commission determines otherwise.

16. Entering and search of premises and attachment and removal of articles

16(1) Any commissioner, or any member of staff or a police officer authorised thereto by a commissioner, may, subject to the provisions of this section, for the purposes of exercising the powers and performing the functions mentioned in section or conducting an investigation, search any person or enter and search any premises on or in which anything connected with an investigation is or is suspected to be.

(2) The entry and search of any person or premises under this section must be conducted with strict regard to decency and order, including the protection of a person's right to –

- (a) respect for and protection of his or her dignity;
- (b) freedom and security; and
- (c) his or her personal privacy.

(3) A commissioner or member of staff or police officer contemplated in subsection may, subject to the provisions of this section –

- (a) inspect and search the person or premises referred to in that subsection, and there make such enquiries as he or she may deem necessary;
 - (b) examine any article or document found on the person or on or in the premises;
 - (c) request information regarding such article or document from the owner or person in control of the premises or from any person in whose possession or control that article or document is, or who may reasonably be expected to have the necessary information;
 - (d) make copies of or take extracts from any book or document found on the person or on or in the premises;
 - (e) request from any person whom he or she suspects of having the necessary information, an explanation regarding that article or document;
 - (f) attach anything on the person or on or in the premises which in his or her opinion has a bearing on the investigation concerned; and
 - (g) if he or she wishes to retain anything contemplated in paragraph (f) for further examination or for safe custody, against the issue of a receipt, remove it from the person or premises: Provided that any article that has been so removed, must be returned as soon as possible after the purpose for such removal has been accomplished: Provided further that if there is no person present to receive the receipt when it is issued, it must be affixed to a prominent place on the premises.
- (4) Any person from whom information is required in terms of subsection (3)(a), (c) and (e) may be assisted at such enquiry by a legal representative, and must at the commencement of such enquiry be so informed.
- (a) The person referred to in subsection (1) may only be searched or the premises referred to in the said subsection may only be entered and searched, by virtue of a search warrant or an entry and search warrant issued by a magistrate, or judge of a High Court, if it appears to such

magistrate or judge from information on oath that there are reasonable grounds for believing that any article or document, which has a bearing on the investigation concerned, is in the possession or under the control of any person or on or in any premises within such magistrate's or judge's area of jurisdiction and cannot reasonably be obtained in any other manner.

- (b) The functions referred to in subsection (3) may only be performed by virtue of a warrant issued by a magistrate, or judge of a High Court, if it appears to such magistrate or judge from information on oath that there are reasonable grounds for believing that an article or document referred to in paragraph (a) is in the possession or under the control of any person or on or in any premises within such magistrate's or judge's area of jurisdiction.
 - (c) A warrant must authorise any commissioner or any member of staff or a police officer to perform the functions referred to in subsection (3) and must to that end authorise such person to search any person or to enter and search any premises identified in the warrant.
 - (d) A warrant must be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night at times which are reasonable in the circumstances.
 - (e) A warrant may be issued on any day and is of force until –
 - (i) it is executed; or
 - (ii) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or
 - (iii) the expiry of one month from the day of its issue; or
 - (iv) the purpose for the issuing of the warrant has lapsed,
 - (v) whichever may occur first.
 - (f) A person executing a warrant under this section must, at the commencement of such execution, hand the person referred to in the warrant or the owner or the person in control of the premises, if such a person is present, a copy of the warrant: Provided that if such person is not present, he or she must affix a copy of the warrant to the premises at a prominent and visible place.
 - (g) A person executing a warrant under this section or an entry or search under subsection (6) must, at the commencement of such execution, identify himself or herself and if that person requires authorisation to execute a warrant under this section, the particulars of such authorisation must also be furnished.
- (6) Subject to the provisions of subsections (2), (4), (5)(g), (7) and (8), any commissioner, or any member of staff or a police officer upon request by a commissioner, may, without a warrant, enter and search any premises, other than a private dwelling, for the purposes of attaching and removing, if necessary, any article or document –
- (a) if the person or persons who may consent to the entering and search for an 10 attachment and removal of an article or document consents or consent to such entering, search, attachment and removal of the article or document concerned; or
 - (b) if he or she, on reasonable grounds, believes –

- (i) that a warrant will be issued to him or her if he or she applies for such 15 warrant; and
- (ii) that the delay in obtaining such a warrant would defeat the object of the entry and search.

(7) An entry and search in terms of subsection (6) must be executed by day unless the execution thereof by night is justifiable and necessary.

(8) A person who may lawfully under this section enter and search any premises may use such force as may be reasonably necessary to overcome any resistance against such entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter and search such premises.

(9) If during the execution of a warrant in terms of subsection (5) or a search in terms of subsection (6), a person claims that an article or document found on the person or on or in the premises concerned contains privileged information and refuses the inspection or removal of such article or document, the person executing the warrant or search must, if he or she is of the opinion that the article or document contains information that has a bearing on the investigation and that such information is necessary for the investigation, request the registrar of the High Court which has jurisdiction or his or her delegate, to attach and remove that article or document for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

17. Compensation for expenses

17. Any person appearing before the Commission in terms of section 15(1)(c) who is not in the public service, is entitled to receive from monies appropriated by law for such purpose, as witness fees, an amount equal to the amount which he or she would have received as witness fees had he or she been summoned to attend criminal proceedings in the High Court held at the place mentioned in the written notice in question.

18. Reports by Commission

18(1) The Commission must report to the National Assembly at least once every year on its activities, the performance of its functions and the achievement of its objectives.

(2) In addition to the report contemplated in subsection (1), the Commission must, as soon as possible, submit to the National Assembly reports on the findings in respect of functions and investigations of a serious nature which were performed or conducted by it: Provided that the Commission may, at any time, submit a report to the National Assembly if it deems it necessary.

(3) The Commission may, subject to the provisions of subsection (5), in the manner it deems fit, in writing, make known to any person, the head of the organisation or institution, or the executive authority of any national or

provincial department, any finding, point of view or recommendation in respect of a matter investigated by it.

(4) If the Commission makes any finding or recommendation in respect of a matter investigated by it known to the head of the organisation or institution or the executive authority of any national or provincial department concerned, the head of the organisation or institution or the executive authority of any national or provincial department concerned must within 60 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating whether his or her organisation, institution or department intends taking any steps to give effect to such finding or recommendation, if any such steps are required.

(5) The findings of an investigation by the Commission must, when it deems it fit but as soon as possible, be made available to the complainant and any person implicated 10 thereby.

19. Staff of Commission

19(1) The Commission must appoint a suitably qualified and experienced person as chief executive officer of the Commission for the purpose of assisting the Commission in the performance of its financial, administrative and clerical functions.

(2) The chief executive officer –

(a) is appointed on such terms and conditions and receives such remuneration, allowances and other employment benefits as the Commission may determine; and

(b) must enter into a performance agreement with the Commission on acceptance of the appointment.

(3) The chief executive officer –

(a) must, subject to the approval of the Commission and the provisions of subsection (4), appoint such staff as may be reasonably necessary to assist him or her with the work incidental to the performance by the Commission of its functions;

(b) is the head of the administration of the Commission;

(c) is responsible for –

(i) the management of the affairs and operations of the Commission;

(ii) the formation and development of an efficient administration;

(iii) the organisation and management of, and administrative control over, all the members of staff appointed in terms of paragraph (a) and all the persons contemplated in subsection (5);

(iv) the maintenance of discipline in respect of the members of staff; and

(v) the carrying out of the decisions of the Commission, and is for those purposes accountable to the Commission and must report thereon to the Commission as often as may be required by the Commission; and

- (d) may exercise the powers and must perform the functions which the Commission may from time to time confer upon or assign to him or her in order to achieve the objects of the Commission, and is for those purposes accountable to the Commission.
- (4) The other members of staff contemplated in subsection (3)(a) are appointed on such terms and conditions and receive such remuneration, allowances and other employment benefits as the chief executive officer may, subject to the approval of the Commission, determine.
- (5) The Commission may in the exercise of its powers or the performance of its functions by or under the Constitution, this Act or any other law, for specific projects, enter into contracts for the services of persons having technical or specialised knowledge of any matter relating to the work of the Commission, and determine the remuneration, including reimbursement for travelling, subsistence and other expenses, of such persons.
- (6) A member of staff must exercise his or her powers and perform his or her functions –
 - (a) conferred upon him or her by or under this Act or any other law; and
 - (b) conferred upon or assigned to him or her by the Commission or the chief executive officer, as the case may be, subject to the general or special directions and instructions that the Commission may, from time to time, issue to him or her.

20. Accountability

20. The chief executive officer is, in accordance with section 36 of the Public Finance Management Act, the accounting officer of the Commission and is charged with the responsibilities referred to in that Act.

21. Legal proceedings against Commission

- 21(1) The Commission is a juristic person.
- (2) The State Liability Act, 1957 (Act No 20 of 1957), applies with the necessary changes, in respect of the Commission, and in such application a reference in that Act to “the Minister of the department concerned” must be construed as a reference to the Chairperson.
 - (3) No –
 - (a) commissioner;
 - (b) member of staff;
 - (c) person contemplated in section 19(5); or
 - (d) member of any committee, not being a commissioner, is liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to the National Assembly or made known in terms of this Act.

22. Offences and penalties

22. A person who –

- (a) without just cause refuses or fails to comply with a notice under section 15(1)(c) or refuses to take the oath or to make an affirmation at the request of the Commission in terms of section 15(1)(d) or refuses to answer any question put to him or her under section 15(1)(d) or refuses or fails to furnish particulars or information required from him or her under that section;
- (b) after having been sworn or having made an affirmation contemplated in section 15(1)(d) gives false evidence before the Commission on any matter, knowing such evidence to be false or not knowing or believing it to be true;
- (c) wilfully interrupts the proceedings at an investigation or misbehaves himself or herself in any manner in the place where such investigation is being held;
- (d) in connection with any investigation does anything which, if such investigation were proceedings in a court of law, would have constituted contempt of court;
- (e) anticipates any findings of the Commission regarding an investigation in a manner calculated to influence its proceedings or such findings;
- (f) does anything calculated improperly to influence the Commission in respect of any matter being or to be considered by the Commission in connection with an investigation;
- (g) contravenes any provision of section 4(3) or 15(9);
- (h) fails to afford the Commission the necessary assistance referred to in section 4(2) or 13(4); or
- (i) acts contrary to the authority of a warrant or, without being authorised thereto under section 16, enters or searches any premises or attaches any article or document or performs any act contemplated in section 16(3), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

23. Regulations

23(1) The Minister may, after the Commission has made a recommendation, make regulations regarding the following matters in relation to the members of staff:

- (a) (i) The requirements for discharge and disciplinary steps; and
- (ii) the procedure and manner of and criteria for evaluation, and the conditions or requirements for the purposes of promotion;
- (b) the powers, duties, conduct and discipline;
- (c) the creation of posts on the establishment of the Commission;
- (d) the training of members of staff, including financial assistance for such training;

- (e) a code of conduct to be complied with by members of staff;
 - (f) subject to section 21, the legal liability of any member of staff in respect of any act done in terms of this Act or any other law and the legal liability emanating from the use of official transport;
 - (g) the circumstances under which and the conditions and manner in which a member of staff may be found to be guilty of misconduct, or to be suffering from continued ill-health, or of incapacity to carry out his or her duties of office efficiently;
 - (h) the procedure for dealing with complaints and grievances of members of staff and the manner in which and time when or period wherein and person to whom documents in connection with requests and communications of such members of staff must be submitted;
 - (i) the membership or conditions of membership of a particular pension fund and the contributions to and the rights, privileges and obligations of members of staff or their dependants with regard to such a pension fund;
 - (j) the membership or conditions of membership of a particular medical aid scheme or medical aid society and the manner in and the conditions on which membership fees and other monies which are payable or owing by or in respect of members of staff or their dependants, to a medical aid scheme or medical aid society, may be recovered from the salaries of such members of staff and paid to such medical aid scheme or medical aid society;
 - (k) the contributions to and the rights, privileges and obligations of members of staff or their dependants with regard to such a medical aid scheme or medical aid society; and
 - (l) in general, any matter, other than a matter relating to the regulation of the terms and conditions of service of members of staff, which is not in conflict with the Constitution or this Act and which the Minister considers reasonably necessary or expedient to prescribe in order to achieve an efficient administration.
- (2) Any regulation made under this section –
- (a) relating to state expenditure, must be made in consultation with the Minister of Finance; and
 - (b) must, after publication thereof in the *Gazette*, be submitted to the National Assembly.

24. Repeal of law and transitional arrangements

24(1) The Human Rights Commission Act, 1994 (Act No 54 of 1994), is hereby repealed.

(2) Any person who, immediately before the commencement of this Act, has been appointed to a post in or additional to the fixed establishment of the South African Human Rights Commission or is otherwise dealt with in terms of the Human Rights Commission Act, 1994, is deemed to have been so appointed or dealt with under the corresponding provisions of this Act.

(3) Anything done, including any regulation made or instruction issued or other administrative measure taken or any contract entered into or any obligation incurred under the Human Rights Commission Act, 1994, which could be done under this Act and which was in force immediately before the commencement of this Act, is deemed to have been so done, issued, taken, entered into or incurred, as the case may be, under this Act until amended, withdrawn or repealed under this Act. Any reference in any law to the Human Rights Commission Act, 1994, must, unless the context otherwise indicates or if clearly inappropriate, be construed as a reference to this Act, or to the corresponding provision thereof, as the case may be.

25. Short title and commencement

25. This Act is called the South African Human Rights Commission Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

B.3 Internal rules and regulations

What follows below are some extracts from the South African Human Rights Commission's Employee Handbook regulating certain internal processes.

B.3.1 CODE OF CONDUCT

A. PURPOSE

A.1 All employees are expected to comply with the Code of Conduct of the SAHRC in order to give practical effect to the relevant constitutional provisions relating to the Commission.

A.2 The Code should act as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct & in their relationship with others. Compliance with the Code can be expected to enhance professionalism & help to ensure confidence in the Commission.

B. INTRODUCTION

B.1 The need exists to provide direction to employees with regard to their relationship with the legislature, political & executive office-bearers, other employees & the public & to indicate the spirit in which employees should perform their duties, what should be done to avoid conflicts of interests & what is expected of them in terms of their personal conduct in public & private life.

B.2 The Code of Conduct is not an exhaustive set of rules regulating standards of conduct. However, line managers, by virtue of their responsibility

for the efficient management & administration of their programmes, provinces or units & the maintenance of discipline, are, inter alia, under a duty to ensure that the conduct of their employees conform to the basic values & principles governing the Commission & the norms & standards prescribed by the Act. Line managers should also ensure that their staff is acquainted with these measures, & that they accept & abide by them.

B.3 The primary purpose of the Code is to promote exemplary conduct. Any employee who contravenes any provision of the Code of Conduct or fails to comply with any provision is guilty of misconduct, & will be subject to disciplinary action.

C. CODE OF CONDUCT

C.1 Relationship with the Legislature & the Executive

An employee-

- C.1.1 is faithful to the Republic & honours & abides by the Constitution in the execution of her or his daily tasks;
- C.1.2 puts the public interest first in the execution of her or his duties;
- C.1.3 loyally executes the policies of the Commission in the performance of her or his official duties;
- C.1.4 strives to be familiar with & abides by all statutory & other instructions applicable to her or his conduct & duties; &
- C.1.5 co-operates with public institutions established under legislation & the Constitution in executing the work of the Commission.

C.2 Relationship with the Public

An employee-

- C.2.1 promotes the unity & well-being of the South African nation in performing her or his official duties;
- C.2.2 will serve the public in an unbiased & impartial manner to create confidence in the Commission;
- C.2.3 is polite, helpful & reasonably accessible in her or his dealings with the public, at all times treating members of the public as customers who are entitled to receive high standards of service;
- C.2.4 has regard for the circumstances & concerns of the public in performing her or his official duties & in the making of decisions affecting them;
- C.2.5 is committed through timely service to the development & upliftment of all South Africans;
- C.2.6 does not unfairly discriminate against any member of the public on account of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language;
- C.2.7 does not abuse her or his position in the Commission to promote or prejudice the interest of any political party or interest group;

C.2.8 respects & protects every person's dignity & her or his rights as contained in the Constitution; &

C.2.9 recognizes the public's right of access to information, excluding information that is specifically protected by law.

C.3 Relationships Among Employees

Employees shall-

- C.3.1 co-operate fully with other employees to advance the Commissions interest;
- C.3.2 execute all reasonable instructions by persons officially assigned to give them, provided these are not contrary to the provisions of the Constitution &/or any other law;
- C.3.3 refrain from favouring relatives & friends in work-related activities & never abuse her or his authority or influences another employee, nor is influenced to abuse her or his authority;
- C.3.4 use the appropriate channels to air grievances or to direct representations;
- C.3.5 show commitment to the optimal development, motivation & utilization of her or his staff & the promotion of sound labour & interpersonal relations;
- C.3.6 deal fairly, professionally & equitably with other employees, irrespective of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language; &
- C.3.7 refrain from party political activities in the workplace.

C.4 Performance of Duties

An employee shall -

- C.4.1 strive to achieve the objectives of the commission cost-effectively & in the public's interest;
- C.4.2 be creative in thought & in the execution of duties, seek innovative ways to solve problems & enhance effectiveness & efficiency within the context of the law;
- C.4.3 be punctual in the execution of duties;
- C.4.4 execute duties in a professional & competent manner;
- C.4.5 not engage in any transaction or action that is in conflict with or infringes on the execution of official duties;
- C.4.6 recuse herself or himself from any official action or decision-making process which may result in improper personal gain, & this should be properly declared by the employee;
- C.4.7 accept the responsibility to avail herself or himself of ongoing training & self development throughout her or his career;
- C.4.8 be honest & accountable in dealing with the Commission's funds & use the Commissions property & other resources effectively, efficiently, & only for authorized official purposes;
- C.4.9 promote sound, efficient, effective, transparent & accountable administration;
- C.4.10 report to the appropriate authorities, fraud, corruption, nepotism, maladministration & any other act which constitutes an offence, or which is prejudicial to the Commissions interest;

C.4.11 give honest & impartial advice, based on all available relevant information, to higher authority when asked for assistance of this kind; &

C.4.12 honour the confidentiality of matters, documents & discussions, classified or implied as being confidential or secret.

C.5 Personal Conduct & Private Interests

An employee shall -

C.5.1 during official duties, dress & behave in a manner that enhances the reputation of the Commission;

C.5.2 not use alcoholic beverages or any other substance with an intoxicating effect during official business hours;

C.5.3 not use her or his official position to obtain private gifts or benefits during the performance of her or his official duties nor does she or he accept any gifts or benefits when offered unless declared & approved by the CEO, as these may be construed as bribes.

C.5.4 not use or disclose any official information for personal gain or the gain of others; &

C.5.5 not, without approval, undertake remunerative work outside her or his official duties or use office equipment for such work.

C.6 Communication with the Media

C.6.1 An employee shall direct all media enquiries to the Office of the CEO.

C.6.2 An employee, in her or his official capacity, shall not irresponsibly criticize the Commission at a public gathering or in a publication, or in any printed or other public media.

B.3.2 SAHRC POLICIES – DELEGATIONS & AUTHORISATION

1. PRINCIPLES

1.1 The CEO shall provide divisional managers with appropriate powers & authority to manage that division effectively & efficiently as recorded in the delegation of authority framework. In turn, a divisional manager may authorise delegations of authority to heads of department, business unit managers & certain other employees in the Division where necessary.

2. DELEGATIONS & AUTHORISATIONS

2.1 The CEO shall record a delegation or authorization in writing & may incorporate it in an employment contract for a Divisional Manager.

2.2 The delegation of a power by a CEO or Divisional Manager does not prevent her or him from exercising the power personally.

3. RESPONSIBILITIES

3.1 The CEO shall uphold the principles & measures set out in these policies & may not require or permit heads of business units or any other employee to engage in an activity or take a decision in breach of these Policies.

3.2 A Divisional Manager shall-

3.2.1 ensure that the employees within her or his division comply with these Policies, collective agreements & any other statutory obligations; &

3.2.2 deal immediately & effectively with any breach thereof.

3.3 The CEO or divisional manager shall exercise her or his powers, perform her or his duties & carry out her or his obligations under these Policies subject to the Labour Relations Act & the relevant collective agreements.

4. CONFLICT OF INTEREST IN EMPLOYMENT ACTS OR DECISIONS

4.1 Where a possible conflict of interest arises in the making of any decision relating to employment, the CEO or an employee to whom any power or duty has been delegated or assigned, shall perform the act or make the decision only after considering a recommendation of an independent panel consisting of at least two persons appointed by the CEO, unless the possible conflict of interest concerns the CEO, in which case the panel is appointed by the executive authority.

4.2 Where the CEO or the employee to whom a power or duty has been delegated or assigned, deviates from the panel's recommendations, she or he shall record the reasons for the deviation in writing.

4.3 The CEO or employee shall not accept or seek material recompense or compensation of any kind from an employee or a prospective employee in return for performing an act or making a decision relating to employment.

5. HANDLING OF OFFICIAL INFORMATION & DOCUMENTS

5.1 An employee shall not release official information to the public unless she or he has the necessary authority from the CEO.

B.3.3 SAHRC STAFF POLICIES – PERFORMANCE MONITORING, EVALUATION & REPORTING

PRINCIPLES

The Commission commits to a strong performance management culture that provides a target driven, motivating, & open work environment for all.

Effective performance management includes a high standard of performance planning, monitoring, evaluation & reporting.

1. PURPOSE

1.1 The primary objective of the Performance Monitoring, Evaluation & Reporting (PMER) Strategy, Policy & System is to provide the framework for the Commission to:

- 1.1.1 deliver on its mandate in an effective, efficient, economical & accountable manner;
- 1.1.2 achieve its strategic performance objectives in terms of its service delivery to stakeholders & within the framework of its legislative mandate;
- 1.1.3 align the performance management system from the most specific level of internal performance monitoring & evaluation to the highest level of external performance reporting; &
- 1.1.4 report regularly within stipulated times on progress to facilitate effective performance monitoring, evaluation & corrective action.

2. POLICY

2.1 Legislative Compliance

The PMER Policy seeks to ensure that the SAHRC:

- 2.1.1 has & maintains an effective, efficient & transparent system & internal controls regarding performance management, which describe & represent how the institution's processes of performance planning, monitoring, measurement, review & reporting will be conducted, organised & managed;
- 2.1.2 has effective performance reporting procedures for:
 - 2.1.2.1 internal monthly reporting,
 - 2.1.2.2 monthly financial reporting to National Treasury; &
 - 2.1.2.3 quarterly reporting to the Executive Authority to facilitate performance monitoring, evaluation & corrective action & to fairly present its performance against predetermined objectives in its annual report;
- 2.1.3 provides Parliament with full & regular reports concerning matters under their control as required by the South African Constitution.

2.2 Performance Planning & Budgeting

- 2.2.1 The performance planning documents will be drafted to comply with the requirements set out in the National Treasury regulations (2005) for the five-year Strategic Plan (section 5.2); & for the Annual Budget (section 6.2).
- 2.2.2 The format of the five-year Strategic Plan & the Annual Performance Plan will be guided by the National Treasury Framework for Managing Performance Information (2007) & the Framework for Strategic Plans & Annual Performance Plans (2010)

- 2.2.3 The five-year Strategic Plan will not be changed over the five-year period unless there are significant policy changes relating to the mandate or service delivery environment of the Commission.
 - 2.2.4 All operational plans, work plans & performance contracts will be aligned to the Annual Performance Plan which in turn will be aligned to the Strategic Plan.
- 2.3 Performance Monitoring & Evaluation
- 2.3.1 Performance will be monitored regularly at all levels as follows:
 - 2.3.1.1 Line managers monitor the performance of their team continuously;
 - 2.3.1.2 Business Unit Managers & Heads of Department monitor the performance of their programmes on at least a monthly basis;
 - 2.3.1.3 Divisional Managers monitors the performance of the organisation on a monthly basis; &
 - 2.3.1.4 Commissioners conduct a formal performance evaluation of the Commission on a quarterly basis.
 - 2.3.2 The Commission will ensure that time is allocated in formal meetings to critically & constructively engage on performance information in relation to the strategic plan & the annual performance plan.
 - 2.3.3 These engagements will not only inform managers on the status of implementation & reasons for deviations, but also provide a platform to put corrective measures in place where necessary.
 - 2.3.4 It is also important to note that these exercises will ultimately inform the strategic & annual planning processes within the Commission.
- 2.4 Performance Information
- 2.4.1 The Commission will produce & regularly review the performance information required to monitor & evaluate its performance against performance indicators & targets
 - 2.4.2 Performance information will be used to:
 - 2.4.2.1 plan;
 - 2.4.2.2 develop policies;
 - 2.4.2.3 monitor delivery against targets;
 - 2.4.2.4 measure the success or otherwise of the Commission's existing policies; responses & programmes;
 - 2.4.2.5 make informed decisions about the continuation, modification or abandonment of existing policies & programmes;
 - 2.4.2.6 hold programmes & individuals accountable; &
 - 2.4.2.7 contribute to/inform personnel development planning.
 - 2.4.3 The frequency, format, data source & responsibility relevant to producing performance information will be included in a Reporting Checklist that will be reviewed on an annual basis.
 - 2.4.4 The internal Reporting Cycle will include monthly submission & distribution deadlines & will be designed to ensure a cyclical flow of performance information throughout the Commission.
 - 2.4.5 Performance information should be readily available, & with proper systems in place, to produce performance reports within 15 days after the end of each month & consolidated organisation-wide performance reports by the 21st of each month which are consolidated into quarterly & annual reports.

- 2.4.6 Performance information will be assessed according to the following quality standards: consistency, relevance, measurability, validity, accuracy, timeliness & completeness.
- 2.5 Performance Reporting
 - 2.5.1 The Secretariat is accountable to the Commissioners as the executive authority of the Commission. Commissioners are in turn accountable to National Parliament & Treasury for performance planning, budgeting, monitoring & reporting.
 - 2.5.2 The secretariat provides to the Commissioners performance information that includes plans & budgets for the next year, implementation for the current year & reporting for the last years' performance.
 - 2.5.3 After consideration of this information, the Commission submits this information to the relevant bodies.

3. ROLES & RESPONSIBILITIES

- 3.1 Executive Authority/Commissioners
 - 3.1.1 The Commissioners are accountable to Parliament & are expected to provide Parliament with full & regular reports concerning matters under their control.
 - 3.1.2 They should:
 - 3.1.2.1 ensure that the Commission sets up appropriate performance information systems so that they are able to fulfil their accountability reporting responsibility.
 - 3.1.2.2 oversee such systems to ensure that they are functioning optimally & comply with the Performance Information Management Framework & other related standards & guidelines
 - 3.1.2.3 ensure that their performance contracts reflect these responsibilities.
- 3.2 Accounting Officer/CEO
 - 3.2.1 The CEO is accountable for establishing & maintaining systems to manage performance information.
 - 3.2.2 The performance agreement of the CEO should therefore reflect these responsibilities.
 - 3.2.3 The assistance of the Head of Strategic Support & Governance, the Chief Financial Officer & the Chief Operating Officer is critical to ensure appropriate capacity within the organisation & the management of performance information.
- 3.3 Divisional Managers & Line Management
 - 3.3.1 Line Managers are accountable for establishing & maintaining the performance information processes & systems within their area of responsibility.
 - 3.3.2 Management are accountable for the quality of the performance information & data & are responsible for using the audit finding & recommendations regarding identified weaknesses in data collection & storage systems to take corrective action.
 - 3.2.3 Their performance agreements should also reflect these responsibilities.
- 3.4 Staff

- 3.4.1 Officials are responsible for capturing, collating & verifying performance data related to their activities.
 - 3.4.2 The integrity of the institutions overall performance depends on how conscientiously they fulfil these responsibilities.
 - 3.4.3 Consequently, their performance agreements & assessments should deal explicitly with the quality aspect of their work.
- 3.5 Internal Audit
- 3.5.1 Internal Audit will assist management to:
 - 3.5.1.1 assess the quality of datasets;
 - 3.5.1.2 identify key risks with regards to the quality of information & weaknesses in data collection & storage; &
 - 3.5.1.3 include the identified risk areas in the internal audit plan for auditing the internal controls relating to data collection.

B.3.4 SAHRC STAFF POLICIES – PERFORMANCE MANAGEMENT & DEVELOPMENT

PRINCIPLES

The Commission is building a strong performance management culture that provides a target driven, motivating, & open work environment for all. The primary objective of the outcomes-based performance management system is to effectively integrate all elements of human resource management with the Commission's wider business to deliver on its vision, mission, & strategic objectives.

1. PURPOSE

The purpose of the Performance Management Policy is to:

- 1.1 ensure the Commission delivers on its mandate & strategic objectives;
- 1.2 develop & promote effective organisational performance;
- 1.3 promote & maintain a performance culture in the organisation at every level of operation;
- 1.4 provide a link between individual & team performance with the achievement of strategic performance objectives;
- 1.5 promote a common understanding of performance objectives & the role both managers & employees play in achieving them;
- 1.6 regulate the performance of all employees & recognise employee contributions to achieve sustainable improvements in organisational, team & individual performance;
- 1.7 develop constructive & open relationships between employees & their managers through continuing dialogue about the work done throughout the year;

- 1.8 ensure that employees are continuously aware of performance at all levels;
- 1.9 enable employees to develop the competencies required of them to perform their current jobs;
- 1.10 ensure the ongoing review of training & development progress;
- 1.11 provide opportunities for employees to express their work aspirations & concerns; &
- 1.12 provide a basis for rewarding people in relation to their contribution.

2. POLICY

The Commission's Performance Management Policy is to:

- 2.1 direct the Commission's resources towards fulfilling its mandate & achieving its strategic objectives;
- 2.2 align the Commission's performance objectives from the Strategic Plan, through the Annual Performance Plan & Operational Plans to the performance targets in individual Performance Agreements;
- 2.3 synchronise the Performance Management System & Cycle with the Commission's Performance Monitoring, Evaluation & Reporting System & Cycle;
- 2.4 review & revise annually the outputs, performance indicators, & targets to accommodate the changing needs of the organisation;
- 2.5 recognise actual performance against the annual targets in the Annual Performance Plan & Operational Plans throughout the Commission, i.e., at the organisational or divisional level, at the department or business unit level & at the individual level;
- 2.6 develop employees' competence to achieve the organisation's objectives;
- 2.7 ensure that the performance system is practical & easy to understand & implement; &
- 2.8 apply the policy consistently at all levels.
- 2.9 Individual Performance Management & Assessment
 - 2.9.1 Performance management at the individual level promotes a shared understanding of:
 - (a) the expected performance outputs & the targets associated with these;
 - (b) the achievement of those targets;
 - (c) performance monitoring & evaluation; &
 - (d) the value of identifying competency gaps to facilitate the mastery of required skills or knowledge.
 - 2.9.2 Performance assessment will be transparent & can be openly challenged & defended;
 - 2.9.3 Performance assessment is evidence based.

2.9.4 The final assessment ratings for the year will be moderated¹²² for fairness, consistency, & appropriate reward distribution across the organisation, in line with the assessment guidelines provided for the period under review.

2.10 Personal Development:

2.10.1 Personal development is monitored & managed using a personal development plan;

2.10.2 Ongoing coaching & mentoring is used to address gaps in the core competencies required in the job incumbent's position &

2.10.3 The minimum requirement is an informal discussion on PDP progress on a six-monthly basis.

2.11 Performance-Linked Rewards:

2.11.1 Performance-linked rewards in the form of incentive bonuses, &/ or salary increases &/or non-financial rewards may be issued:

- (a) annually after the performance stipulated in the performance agreement has been demonstrated at the appropriate level for the annual cycle; or
- (b) on a six-monthly basis for employees on formal development programmes, if they have successfully demonstrated the achievement of the level of performance required within the last six-month period of that programme.

2.11.2 Eligibility criteria for the annual performance bonuses & /or salary increases are that employees:

- (a) have been employed in the Commission for the full annual cycle;
- (b) excel in their contribution to the organisation's objectives;
- (c) are not on a development programme; &
- (d) are still in the employ of the Commission at the time that rewards are issued.

2.11.3 Eligibility criteria for six-monthly development programme performance-linked rewards are that the employee:

- (a) is on an approved development programme & has a signed personal development plan;
- (b) is assessed as competent in terms of the full set of performance standards stipulated in the development programme for the six-month period under review.

2.11.4 The value of the performance incentives will be determined annually depending on budget availability & the levels of performance achieved.

2.11.5 Employees who qualify for a salary increase but who have reached the ceiling of the salary band for their position will be paid a once-off performance bonus, equivalent to that increase.

2.12 Performance-Linked Sanctions:

2.12.1 Performance deficiencies will be managed by the line manager through corrective, progressive intervention.

122 This committee may be a sub-committee of the envisaged HR Committee. The Performance Management Committee conducts & co-ordinates the moderation process.

2.12.2 Persistent poor performance may result in re-deployment, demotion, or dismissal.

2.12.3 Sanctions will be levied against any line manager who does not follow the provisions of the Performance Management System.

2.13 Performance Management Disputes:

2.13.1 Where a dispute arises as to the interpretation of the content of the standard performance agreement for that position, the employee is entitled to take the matter to the next level of management within seven (7) days of the dispute arising, in the presence of the line manager, for a final interpretation.

2.13.2 Where the employee & line manager fail to agree on an annual performance rating:

- (a) the line manager must make a note to this effect on the Performance Assessment form submitted to the HR Department.
- (b) the Performance Management Committee will consider both the line manager & employee scores in the moderation exercise & provide guidelines for the re-evaluation & re-submission within seven (7) days by the line manager & employee.
- (c) In the event that the employee & the line manager have still failed to agree on the annual performance rating in the re-submitted evaluation, the Performance Management Committee will make note of this in their report. The Chief Operating Officer, Chief Financial Officer & Head of Strategic Support & Governance will make a final recommendation for consideration & a final decision by the CEO.

2.13.3 The grievance resolution procedure of the SAHRC will apply for any other disputes (allowing for reasonable response times), after which an employee should follow the provisions of the LRA.

2.14 Performance Management Responsibilities

2.14.1 Employees' responsibilities are to:

- (a) communicate to their line manager work-related aspirations & concerns;
- (b) deliver on their performance agreements;
- (c) deliver on their PDP;
- (d) prepare for, & participate in the performance contracting & evaluation meetings; &
- (e) submit valid evidence showing proof of achievement of set targets on each output contained in the performance agreement & PDP.

2.14.2 Line managers' responsibilities are to:

- (a) deliver on a performance agreement which comprises two components, namely:
 - I. their division, department or business unit's performance targets; &
 - II. generic Core Management Standards;
- (b) ensure that all new employees are orientated to the performance system in the first month of employment resulting in a:
 - I. signed performance agreement; &
 - II. PDP based on the initial competency evaluation;
- (c) manage their staff's performance on a daily basis;

- (d) address performance issues as & when these arise;
 - (e) develop standard performance agreements for each position that state the expected performance targets & performance indicators in measurable terms;
 - (f) ensure that the outputs & targets for each position are relevant to the grade level & job contents of the position in relation to the operational plan;
 - (g) ensure that the standard forms (Performance Agreement & Performance Evaluation Form, & PDPs) are used at all times during the planning & reviewing process;
 - (h) facilitate fair performance evaluation by ensuring that the performance information for their division, department or business unit is accurate, current & complete at all times;
 - (i) conduct formal performance reviews on a six-monthly basis, i.e. a mid-term evaluation in October & a year-end evaluation in April/May of each year;
 - (j) identify appropriate developmental interventions & training needs; &
 - (k) assess the effectiveness of the coaching, mentoring or training provided.
- 2.14.3 HR Department responsibilities are to:
- (a) advise, guide & train management & staff on the application of this policy & associated procedures;
 - (b) be the custodian of the Performance Management System, i.e., monitor, evaluate, review & revise the policy & procedures;
 - (c) keep accurate, current, & complete records for the Commission of all individual level performance management activities & outcomes.
- 2.14.4 Performance Management Committee responsibilities are to:
- (a) provide performance evaluation guidelines twice a year (mid-year & at year-end) based on the performance of the organisation, programmes & sub-programmes to provide the context to be considered by management & staff when preparing their evidence for their performance evaluation meetings;
 - (b) conduct an annual moderation exercise on the individual assessment ratings & make recommendations on the reward allocation for the year;
 - (c) provide guidance to employees & line managers on how to revisit the annual performance appraisal with a view to reaching consensus;
 - (d) review the performance indicators & targets in Performance Agreements & Performance Appraisal Forms against best practice criteria, e.g. SMART statements;
 - (e) monitor the progress & outcomes of all performance-linked disputes; &
 - (f) make recommendations to senior management concerning the improvement of the performance management system.
- 2.14.5 Senior Management responsibilities are to:
- (a) provide the performance monitoring, evaluation & reporting strategy & system within which performance at every level can be managed.

3. **Applicable/Referenced documents**

- 3.1 Performance Management Manual – Procedures
- 3.2 Performance Monitoring, Evaluation & Reporting Policy
- 3.3 Staff Development Policy
- 3.4 Strategic Plan
- 3.5 Annual Performance Plan
- 3.6 Operational Plans