

CRITICALLY REFLECTING ON AN INSTITUTIONAL JOURNEY

2002
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The South African Human Rights Commission





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acronyms

ALP	AIDS Law Project
CASE	Community Agency for Social Enquiry
CEO	Chief Executive Officer
CGE	Commission for Gender Equality
CRL	Commission for the Promotion and Protection of the rights of Cultural, Religious and Linguistic Communities
CSAP	Civil Society Advocacy Programme
CSO	Civil society organisation
DCEO	Deputy Chief Executive Officer
DD	Deputy Director
DG	Director-General
EO	Education officer
ESR	Economic and social rights
ETP	Education and Training Programme
EU	European Union
FHR	Foundation for Human Rights
HoP	Head of Programme
HR	Human resources
HRC Act	South African Human Rights Commission Act, 54 of 1994
IAA	Internal audit activity
ICC	International Coordinating Committee
ICP	Information and Communications Programme
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
LCM	Legal Committee meetings

LO	Legal officer
LSP	Legal Services Programme
MoU	Memorandum of Understanding
NACHRET	National Centre for Human Rights Education and Training
NHRI	National Human Rights Institution
NGO	Non-governmental organisation
OPP	Office of the Public Protector
OHCHR	Office of the High Commissioner for Human Rights
OSD	Occupation Specific Dispensation
PAIA	Promotion of Access to Information Act, 2 of 2000
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
PFMA	Public Finance Management Act, 1 of 1999
PIAP	Parliamentary and International Affairs Programme
PM	Provincial manager
RDP	Research, Documentation and Policy Analysis Programme
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SANEF	South African National Editors' Forum
TAC	Treatment Action Campaign
TRC	Truth and Reconciliation Commission
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNDP	United Nations Development Programme

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Foreword and key
achievements

The language of human rights has been gaining prominence, with the values of human rights becoming more pronounced in both state and private matters. As states seek to define their commitment to human rights in a variety of ways, the establishment of national human rights commissions has become increasingly popular. South Africa followed this path when it made the transition to democratic government and the interim Constitution provided for the creation of independent constitutional bodies such as the South African Human Rights Commission.

While the United Nations-endorsed Paris Principles provide the broad framework for the independence and operational efficiency of these institutions, all of them have to function within a national context that determines individual challenges and priorities. Each of these relative newcomers to the democratic landscape has to negotiate and overcome a myriad of obstacles in order to find its own niche and make its own unique contribution in supporting democracy.

As the current team of Commissioners, reappointed for a second term in October 2002, approach the end of their term of office, the South African Human Rights Commission can look back over a remarkable institutional journey during its fourteen years of existence. In this period the Commission has had to deal with the following significant external as well as internal challenges.

Identity and location: The Commission belongs to neither Government nor civil society, despite often being referred to as part of both. It would need to find a place and fit into the rubric of the Constitutional State, having regard to its unique role and powers.

Mandate: An increasingly wide mandate in respect of subject matter and the need to extend this mandate beyond traditional boundaries to cover non-state actors as well demands that the Commission think strategically about the use of its limited resources.

Independence: Its linkage to Government in relation to both its appointment and its resources and the obvious need to work in partnership with various stakeholders requires a nuanced understanding of independence.

Governance and accountability: Ensuring both legal and social accountability and implementing systems of internal

governance that recognise different and complementary roles has always been central to the credibility of the institution and its social relevance.

Relationships: The content and scope of its relationships with the Executive, Parliament, the courts, civil society and the media are determining factors in the effectivity of the institution in discharging its mandate.

Getting the work done: In all of the above, the Commission has had to demonstrate that human rights extend beyond slogans and that strategic interventions requiring both proactive and reactive responses are vital in bringing its mandate to bear in a social context of heightened expectations.

While over the past seven years the Commission has dealt with the above mostly in a focused and practical manner, at times it has been necessary to act on the spur of the moment. In the process, valuable lessons have been learned that may be of benefit to a new team – not least through the mistakes that were inevitably made and the errors of judgment that occurred. As we take leave of office, there is a collective sense amongst us of having been privileged to serve in such an important institution. There is also the sense that we have a legal and ethical obligation to share our experiences and document, to the extent that this is possible, some of the key issues that have been at the heart of the Commission during this time.

This publication is foremost not meant to be a celebration of the achievements of the Human Rights Commission – others should do that if it is warranted. What this publication seeks to provide is a reflective, robust and honest assessment of the work and the challenges of an important public institution. It is our view that the conclusions we draw and the recommendations we offer can contribute significantly to the strengthening of the Commission. We offer them with humility as the collective experience of a diverse group of Commissioners who were able to come together effectively to advance a common mandate.

This commissioned report reflects the consensus of the outgoing Commissioners and CEO. Our thanks and appreciation go to all who contributed to the making of the report, including my colleague Leon Wessels for overseeing the project, all the respondents, internal and external, who agreed to be interviewed, those who participated in the Report Indaba (a pre-launch workshop on the report held on 21 July 2009) and provided valuable insights and suggestions on the

draft report, those responsible for the layout, editorial work and printing of the report and, finally, a special thanks to Dr Yvonne Erasmus, who undertook the task of writing this report with great professionalism, determination, understanding and empathy and who made it possible for us to take a hard look at ourselves, even when we did not always quite like what we saw.

On behalf of all my colleagues, I wish to say that it has been a singular honour to serve in an institution that is at the cutting edge of the society so many have fought and sacrificed for, a society premised on the recognition of a shared humanity even in the diversity that both enriches and challenges us. Our thanks also goes to all our former colleagues at the Commission, all staff, both past and present, for their contribution in building the institution over the years, and the people of South Africa, who gave us the opportunity to be of service to them. In conclusion, I would like to take this opportunity to reflect on what some of the Commission's key achievements have been during the course of the second term.

Key achievements

South Africa's transition to democracy was underpinned by a strong constitutional and legal commitment to human rights, as evidenced by its interim and final Constitutions and the legal framework that followed. The practise of human rights was never institutionalised nor internalised, however, largely due to our apartheid past and the legacy it left behind. The role of the Commission has in many ways been about translating the human rights vision, values and commitments in the Constitution into practice and reality; about contributing to a consciousness where people became aware of their rights and accepted their responsibilities; and about ensuring that, in policy, programmes and practice, human rights were at the core of developments in our young democracy.

In the years since it came into being, the Commission has made considerable strides in this regard by discharging what has been a wide and often contested mandate. Shortly after the commencement of the second term of the Commission in October 2002, it decided on the dual focus areas of poverty and equality, recognising the centrality of education and awareness as the key to changing behaviour.

The work done in this regard in collaboration with the National Department of Education has ensured that human rights now form part of the mandatory school curriculum. Through its outreach and community visits, it has taken human rights to the rural and remote corners of the country, thus ensuring that poor and marginalised communities also became the beneficiaries of the new rights order – from Andriesvale and Springbok in the far Northern Cape to Ga Phasha in deep Sekukune, Musina on the Zimbabwean border and villages in rural Transkei. It has articulated in a principled and consistent manner the human rights norms and standards expected of all, and it has sought to hold the actions of all within society to those standards. It has done the following effectively:

- In discharging its equality mandate, the Commission has highlighted the rights of those who are most vulnerable. Its joint Roll Back Xenophobia Campaign and its ongoing work in relation to migrants and asylum seekers focus on the plight of the large and vulnerable community of foreign nationals. It facilitated the coming together of older persons in the country, was the midwife of the South African Older Persons Forum and has put the rights of older persons firmly on the national agenda. It has supported the rights of gay and lesbian people through litigation, law reform and advocacy, and its work with the Khomani San community served to highlight the neglect of indigenous people and the challenge that modernism has created for communities whose lifestyle and values are deeply steeped in the ancient practices of our society.
- Using its statutory powers and its socio-economic rights mandate to work in the area of addressing poverty through regular socio-economic rights reports and public inquiries. The socio-economic rights reports have provided a critical assessment of Government's compliance with its constitutional obligations. The reports have also become a useful resource to civil society and Parliament, focusing as they do on policy, legislation, budget and programmes in the context of the progressive realisation of socio-economic rights relating to housing, health care, food, water, social security, education and the environment.
- The public inquiries have proven to be perhaps the most effective method of intervention and use of the Commission's powers. Not only do they provide a mechanism for public education and public accountability, they also represent a monitoring tool that advances dialogue between state and citizen in a robust but non-

adversarial environment. They are structured to allow academic, civil society and government input as well as reflecting the lived experiences of ordinary South Africans. The subject matter of most of these inquiries has been related to matters that largely impact on the poor and the millions for whom rights remain elusive. These include the rights of farm workers, access to basic education, access to health care services, violence in schools, housing and evictions, hearings on the Millennium Development Goals, boom gates and closed communities, and the rights of the Khomani San Community. The reports and recommendations produced at the conclusion of each inquiry have contributed to policy dialogue, law reform, advocacy and improved service delivery, and have generally contributed positively to improvements in the area of the subject matter of each inquiry.

- In the discharge of its protection mandate, the Commission has effectively litigated in the equality courts to create legal precedent, advancing jurisprudence and popularising the equality courts; again, the cases it has taken have ranged from access for persons with disabilities to discrimination based on race, sexual orientation, ethnic origin and disability. The processes and outcomes of those cases have contributed significantly to public education around human rights and have succeeded in converting broad human rights philosophy into practical action. In the context of its complaints handling system the Commission has, through mediation, settled hundred of matters, securing redress ranging from an apology to the payment of damages. Its findings have been regarded as important enough to warrant reporting in the Constitutional Law Reports, thereby contributing to the exciting growth of South Africa's constitutional jurisprudence. It has litigated in its own name as well as on behalf of others in the High Courts and has entered as *amicus* in groundbreaking cases that include the Grootboom matter.
- The Commission was the first national institution to develop a special focus on business and human rights, seeking to advance the argument for greater business compliance with human rights. Its submissions to the Competition Commission Tribunal on bread and medicine price fixing and its major report on mining and its human rights impact in the Limpopo Province have been its first significant interventions in this new but important area.

- The Commission has also enjoyed great recognition outside South Africa by working closely with structures such as the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human Rights (OHCHR) and the Commonwealth as partner in joint projects and as expert resource to new national institutions. It has furthermore contributed to the work of the United Nations (UN) Human Rights Council and Treaty Bodies.
- With limited resources, it has succeeded in becoming what could be termed the most significant and credible focal point for human rights discourse in the country. Working closely with civil society and having established its independence, which enables it to work with Government while still holding it accountable, it has contributed substantially to the advancement of the idea that human rights talk is capable of being converted into human rights work in principled as well as practical ways.



Jody Kollapen

Chairperson, South African Human Rights Commission



Executive
summary

Background to the report

South Africa has a complex and well documented pre-apartheid and apartheid history, informed by colonialism, imperialism, struggles for independence, systemic human rights abuses, and racism. All of these influences have shaped the way in which South Africans view themselves and others. With the dawn of democracy in 1994, South Africa had the opportunity to re-imagine and reposition itself as an open, transparent, inclusive, and non-racial constitutional democracy. Part of this process of re-imagination involved the building of a human rights culture, the protection of human rights, and the monitoring of the implementation of human rights – all of which fall within the ambit of the South African Human Rights Commission (SAHRC). By taking on these functions, the SAHRC joined a network of global national human rights institutions (NHRIs) tasked with the universal protection of human rights. At the same time, it joined forces with other institutions established in terms of Chapter 9 of the South African Constitution to support constitutional democracy.

The SAHRC has come a long way since its establishment in September 1995. During its first term, from October 1995 to September 2002, the institution had to be built up while at the same time having to address human rights violations head-on. In its second term, from October 2002 to September 2009, the Commission perhaps had more time to find its feet and strategically focus on systemic human rights abuses. The Commission had to function with a substantially reduced complement of Commissioners, however (from 11 in the first term to five for most of the second term), which seriously impacted on its work. Despite this challenge, though, the Commission has registered some major achievements, reflected on in the Foreword. These include highlighting the rights of the most vulnerable in discharging the Commission's equality mandate; using its statutory powers and its socio-economic rights mandate to publish regular economic and social rights reports; using public inquiries as a highly effective intervention and mechanism for public education, public accountability, monitoring, and advancing the dialogue between state and citizen; litigating in the equality courts and creating legal precedent, advancing jurisprudence and popularising the equality courts; being the first NHRI to have developed a special focus on business and human rights; enjoying recognition outside South Africa's borders and working closely with regional and international human rights

bodies; with limited resources, becoming probably the most significant and credible focal point for human rights discourse in the country.

While taking cognisance of these substantial achievements and advances in the field of human rights, at the end of the second term it is also appropriate for the Commission to reflect critically on the challenges that it faces. It is necessary to document the different views on some of the Commission's achievements and challenges around themes that are critical to the Commission's work. This is part of an ongoing debate on the work of the Commission and on how it can best give effect to its constitutional mandate. It is these often diverse views that are captured in this critical reflective report on the SAHRC.

Aim of the report

This is a critical reflective report on the nature, work, achievements and challenges of the SAHRC, based on interviews with current and former staff members and Commissioners as well as with representatives from external stakeholders. This commissioned report focuses on the Commission's second term (October 2002 – September 2009), but incorporates key events from the first term that influenced the second term.

In addition to the interviews conducted, a full draft of the report was presented to external stakeholders and discussed at a pre-launch workshop on the report held on 21 July 2009. Participants were generally struck by the frankness of the report, which means that the report has succeeded in one of the aims set out for it, namely to be critical and reflective, but balanced.

One of the strengths of the report lies in the variety of voices and opinions that it captures, illustrating the nuances around each of the themes that are reflected upon. The document is also the first of its kind at the SAHRC to capture so many views on such a variety of issues in one document.

Overview of the report

Apart from the introductory chapter, the critical reflections are presented around themes across five chapters. Recommendations are presented at the end of each of the chapters, but are drawn together in Chapter 6 of the report

to act as a concise point of reference. Here they are grouped to relate to five specific themes: legal, policy and mandate; independence and funding; relationships; organisational structure, capacity, skills and roles; and the effective discharge of the mandate. The remainder of the Executive Summary provides an overview of the key issues emanating from each of the chapters and the concomitant recommendations.

Establishment by law and understanding of the mandate

Chapter 2 considers the Commission's establishment by law and understanding of its mandate. Inconsistencies exist across the national legislation (the interim and final Constitutions, the SAHRC Act, and the PFMA) that determines the Commission's structure and functioning. This includes inconsistency regarding the number of Commissioners to be appointed, the entrenchment of the different socio-economic rights that the Commission must monitor, and the functions and powers of the Commissioners and CEO. The Commission's work is influenced by a number of founding principles, such as the political neutrality of the Commissioners, the unity of the Commission in speaking with one voice, and the Commission's openness and accessibility. The Commission has received conflicting messages from others about what its role should be – a watchdog over Government, an institution supportive of Government, or a service delivery agent. The Commission's mandate was expanded substantially with the introduction of the Promotion of Access to Information Act, 2 of 2000 (PAIA) and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA), without due consideration of the impact of this legislation on the Commission's workload and the financial resources required. Challenges in interpreting its broad mandate include the Commission's inability to say 'no', finding the correct balance between being reactive and proactive, and working with limited financial resources. There exists some overlap in the mandate of the Commission and those of other Chapter 9 institutions. Partnerships between these institutions seem to be sporadic, although they do exist; and there is some evidence of 'forum shopping' and 'forum ignorance' by members of the public. During its second term, the Commission focused strategically on poverty and equality. It seems to approach some of its strategic thinking from a very quantitative perspective, while the link between some of its work and the concomitant impact thereof has not always been sufficiently made. The Commission is involved at a number of levels outside South

African borders, and while this role is regarded as important, the extent to which the Commission has the resources and mandate to keep this up has to be kept in mind.

Full **recommendations** for this chapter are set out on page 42. These include, *inter alia*, the urgency of making the necessary amendments to the SAHRC Act; pursuing with Parliament and the Executive the recommendation of the *ad hoc* Committee on the Review of Chapter 9 and associated institutions to set up a super-structure for human rights institutions; the appointment of an Information Commissioner for PAIA; better coordination across the Chapter 9 institutions; recommending that the Commission's budget should fall under Parliament's budget vote rather than that of the Department of Justice and Constitutional Development; involving civil society in the Commission's strategic planning sessions; and developing and adopting a clear policy position outlining the Commission's international work.

Looking to the outside: independence and external relationships

In Chapter 3, the focus turns outward to the Commission's independence and its external stakeholder relationships. Independence is indispensable, but the challenge lies in finding the balance between isolation and working with stakeholders. Concern was raised about the Commission's financial independence, because of its budget allocation from Government; while not being financially capacitated to do its work similarly impacts on independence. While the Commission has done reasonably well in guarding against undue influences on its work, there might have been examples of such instances, although these are open to interpretation. The Commission's relationship with Government is multi-faceted and has not always been adversarial, although Government often does not respond to requests and letters from the Commission. This relationship has been influenced by the individual Ministers of Justice and Constitutional Development, and how they have understood the role of the Commission. Although the Commission's relationship with Parliament has improved, the Commission has generally found its reporting to Parliament disappointing, because the time allocated and the interrogation of the Commission's work were seen to be insufficient. Taking cognisance of the Commission's resource constraints and the capacity of provincial legislatures, the Commission should find appropriate ways to extend its

engagement with these bodies. The public is the Commission's key constituency, and the Commission can improve its relationship with the public by better communicating the nature of its work and the outcomes of its findings and by being physically more accessible, albeit within the parameters of existing resource constraints and the implications of any additional work. As regards its relationship with the courts, the Commission has done significant work in the equality courts, with limited interventions in the Constitutional Court. Despite having the legal power to litigate, the question to be answered is whether litigation should form a substantial part of the Commission's work. Different opinions exist on whether the Commission has strong relationships with civil society organisations (CSOs), although some of the lessons learned include that engagement with CSOs does not necessarily compromise independence; that the Commission needs to draw on the specialist knowledge of these organisations; and that it is important to think through how the Commission would like to utilise Section 5 committees to engage CSOs. The Commission has had limited experience with donor funding, and in deciding whether it wants to pursue this more actively, it should take cognisance of the implications for its independence and of its ability to manage donor funds. The Commission has had a reasonably good relationship with the media, although it could take a more proactive stance in its engagement with them. The Commission has previously tried to engage political parties to facilitate a greater understanding of the work that it does, but has had limited response in this regard.

Full **recommendations** for this chapter are set out on page 67. These include that the Commission should do the following: develop and adopt a policy position on its independence, incorporating benchmarks on how this will be monitored and maintained; develop a policy on the involvement of Commissioners and staff in the realm of party politics; aspire to have a Memorandum of Understanding (MoU) with the Executive to ensure regular meetings and briefings in the spirit of cooperative governance; together with other Chapter 9 institutions, actively engage the Speaker's office in the process of setting up a proposed new unit for Chapter 9 institutions in Parliament; endeavour to reach out and extend its services to all parts of the country, and all constituencies, in particular those areas that were not previously reached or served; develop and adopt a policy on the establishment and functioning of its Section 5 committees, as it recognises the value of and need for

such committees; develop a clear position on donor funding, while ensuring that Government remains responsible for the funding of its core activities; generally be more proactive in terms of interaction with the media; and continue the process of engaging political parties so that they understand the Commission's mandate and the way it is being discharged.

Looking to the inside: internal organisational structure and corporate governance

In Chapter 4, the focus turns inward to how the Commission's internal organisational structure and corporate governance relate to the discharging of its mandate. The departure of five Commissioners raises concerns about institutional memory and the handover of work. It is necessary to appoint those people who are most ably qualified and furthermore are independent, have experience in human rights, and have human resource and management skills, while some should also have legal qualifications. Appointing part-time Commissioners might open up a bigger pool of skills and ensure greater geographic representation. Currently, the Chairperson is chosen by his or her peers, and this approach has some support, but an alternative would be a recommendation by the Parliamentary Selection Committee. There is great value in the Commissioners being responsible for specific thematic areas or portfolios, but differences of opinion exist on the desirability of Commissioners being based in, or responsible for provinces. The relationship between the Commissioners and Secretariat is foremost a legal one. A strong, although not unanimous opinion exists that the Commissioners should be involved in the hands-on work of the Secretariat, although it is necessary that lines of responsibility and accountability are clear. Communication was cited as a challenge, as was overlap in the handling of high-profile complaints. The relationship between the Commissioners and the Chief Executive Officer (CEO) is informed on the one hand by legislation, to which amendments are being proposed, and on the other hand by people's expectations, the coming together of personalities, and how individuals manage power. How the Secretariat should be structured is an ongoing discussion on the Commission's journey to a more integrated approach. The relationship between the Commission's head office and provincial offices faces challenges of multiple reporting lines, the clarifying of roles, and communication. Challenges faced by provincial offices were captured in the 2008 *Provincial Visits Report*, and what was reiterated in interviews for this report

was resource constraints, the centralisation of administrative and financial processes through head office, recruitment processes, and lack of human resources. Lack of staff capacity affects the entire Commission, although it is important for current staff to be effective and for the Commission to quantify the capacity it needs. Similarly, the staff skills required need to be set out clearly. Although, for reasons of calculation and ambiguity in internal and external benchmarks, it is difficult to make conclusive statements about the Commission's staff turnover rates, there is a strong, albeit not unanimous, opinion that the Commission has a high staff turnover. The 2007 *Organisational Health Survey* captured some staff concerns, but concerns mentioned in the interviews for this report related to staff recognition, organisational culture, and leadership and management style.

Full **recommendations** for this chapter are set out on page 92. These include that, while Commissioners should continue to take responsibility for policy developments, a policy unit or department should be set up to provide the necessary technical and legal support; there should be greater communication to the Secretariat about how the Commissioners' work relates to the advancing of the Commission and its mandate; a document should be drawn up on the relationship between the Commissioners and the Secretariat, and what the roles and limits of each of these groups are; greater alignment is needed between the Commission's strategic focus and its structure; the Commission should develop a strategic approach with regard to how it will incrementally build the capacity of its provincial offices; and a skills audit should be conducted to determine the skills and staff capacity of the SAHRC.

Discharging the mandate: reflections on some achievements and challenges

Chapter 5 approaches the discharging of the Commission's mandate from a reflective perspective. In terms of the Commission's promotion mandate, it remains difficult to assess the impact thereof, despite existing information on the quantity of interventions, the topics presented on, and the reach of these interventions. An achievement has been the Commission's ability to put human rights issues on the agenda and explain the meaning of human rights terms to the general public. Some challenges exist in relation to the Commission's e-Learning intervention, such as administrative challenges in

working with outside experts; technical challenges; and slow buy-in. In terms of its protection mandate, the Commission has done significant work in the equality courts, with limited interventions in the Constitutional Court. The Commission has been commended for its involvement in mediation and conciliation. The Commission's public inquiries have been an achievement, although post-report follow-up on the recommendations is a challenge. Some of the challenges that the Commission faces in the discharging of its protection mandate include challenges in its complaints handling process and lack of cooperation by Government. Some achievements in the Commission's discharging of the PAIA mandate include increased training and awareness; law reform victories; and the creation of partnerships to overcome resource constraints. Some challenges include the need for even greater leadership in the Commission regarding PAIA, and resource constraints. Challenges relating to the Commission's monitoring function include getting Government to respond to requests for information, and devising appropriate methodology in order to monitor the progressive realisation of rights over time. In terms of PEPUDA, the Commission still gives effect to the monitoring part of the mandate; this is done at provincial level. The Commission's discharging of its mandate is further influenced by the capacity, skills and functioning of support programmes such as human resources, finance, administration, and the Information and Communications Programme (ICP). It is also crucial for the Commission to balance its compliance requirements (for example, in terms of the PFMA) with its Constitutional mandate and ensure that the former does not become a hindrance to the latter. Looking to the future, it is important for the Commission to continue to guard and build its legitimacy, develop a long-term strategy for its work and be prepared to deliver at even higher levels than it currently does.

Full **recommendations** for this chapter are set out on page 105. These include working closer with non-governmental organisations (NGOs) and universities to supplement the staff capacity and skills that the SAHRC might be lacking; developing a strategy to assess more accurately the impact of the Commission's work, including its educational work; developing a clear litigation strategy; capturing the findings of complaints more systematically by developing a database of findings and jurisprudence; and developing indicators and methodology to consistently measure the progressive realisation of economic and social rights over time.

Key aspects for future consideration

Chapter 6 of the report draws the recommendations together around five specific themes: legal, policy and mandate; independence and funding; relationships; organisational structure, capacity, skills and roles; and the effective discharge of the mandate.

Personal reflections of some of the outgoing Commissioners

The report ends with Chapter 7, which contains the personal reflections of some of the outgoing Commissioners.



1

Introduction

This is a critical reflective report on the nature, work, achievements and challenges of the South African Human Rights Commission (SAHRC). It is written from the perspective of those currently working at the Commission,¹ some previous staff members and Commissioners, and select representatives from external stakeholders. The report focuses on the Commission's second seven-year term (October 2002 – September 2009), while highlighting and incorporating key events in the first term² that influenced the direction the Commission took during its second term. Like any report, this report is written in a particular context; at a particular time; for a specific purpose; within very real constraints; and from a particular methodological perspective. This introductory chapter will discuss each of these aspects in turn.

1.1 Context and timing

The SAHRC forms part of a broader international network of national human rights institutions (NHRIs) whose aim is the independent promotion and protection of human rights.³ On a national level, the Commission is one of a number of institutions written into Chapter 9 of the final Constitution, with the aim of strengthening constitutional democracy.⁴ With the start of the first term on 1 October 1995, the Commission had no national predecessors to draw on for ideas about structure and how to best discharge its mandate.⁵ Since its inception, various publications have in some way or another discussed

the structure, functions, and work of the Commission.⁶ One of the most recent of these discussions took place in 2007 at the proceedings of the *ad hoc* Committee for the Review of Chapter 9 and Associated Institutions, which in its report commended the SAHRC for its work and suggested the amalgamation of some of the Chapter 9 institutions into a bigger human rights structure.⁷ Although the recommendations from this review have yet to be robustly debated by Parliament, a year and a half has passed, and the terms of five of the six current SAHRC Commissioners are coming to an end on 30 September 2009.⁸ This has substantial implications for the work and institutional memory of the Commission. At the same time, while acknowledging the inroads made, South African society continues to be faced with vast human rights challenges on its path of transformation,⁹ and within this context the Commission has a very important role to play in fulfilling its Constitutional mandate to promote, protect and monitor human rights.

1 With 'Commission' is meant the entire South African Human Rights Commission, including both the Commissioners and the Secretariat. Where necessary, a distinction will be made between Commissioners and Secretariat staff. The words 'Commission' and 'SAHRC' will be used interchangeably.

2 The Commission's first term was from October 1995 – September 2002.

3 United Nations (UN). 1993. *Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights*. New York: United Nations.

4 The other Chapter 9 institutions are the Public Protector; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and the Broadcasting Authority.

5 On an international level, NHRIs differ in structure and the detail of their specific functions. See, for example, Human Rights Watch. 2001. *Protectors or Pretenders? Government Human Rights Commissions in Africa*. New York: Human Rights Watch.

6 Where appropriate, the report refers to other work that has been written on the Commission. A careful reading of this will indicate how the Commission has changed and/or what some of the longstanding issues have been. See, for example: Sarkin, J. 1999. "Current development: Reviewing and reformulating appointment processes to Constitutional (Chapter nine) structures". *SAJHR*, 15(4):587-613; Glaser, D. 2000. "The media inquiry reports of the South African Human Rights Commission: A critique". *African Affairs*, 99:373-393; Pityana, N.B. 2000. "South Africa's inquiry into racism in the media: The role of National Institutions in the promotion and protection of human rights". *African Affairs*, 99:525-532; Human Rights Watch 2001; Matshekga, J. 2002. "Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence". *African Human Rights Law Journal*, 2(1):68-91; Murray, R. 2003. *Draft Report – Lessons from the South African Commission on Human Rights: An examination of National Human Rights Institutions*. Unpublished; Govender, K. 2007. "The reappraisal and restructuring of Chapter 9 Institutions". *SAPR/L*, 22:190-209.

7 Parliament of the Republic of South Africa. 2007. *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*. A report to the National Assembly of the Parliament of South Africa: Cape Town, South Africa.

8 These are Jody Kollapen (Chairperson), Zonke Majodina (Deputy Chairperson), Leon Wessels, Tom Manthata, and Karthy Govender (part-time Commissioner). Commissioner Pregs Govender was appointed for a seven-year term with effect from December 2008.

9 Some of these challenges have been highlighted in the Commission's public inquiries or hearings, its reports on economic and social rights (ESR), and other Commission reports. Some examples include: SAHRC. 2000. *Faultlines: Inquiry into racism in the media*; SAHRC. 2003a. *Final Report on the Inquiry into Human Rights Violations in Farming Communities*; SAHRC. 2004a. *Report on the inquiry into human rights violations in the Khomani San community*; SAHRC. 2004b. *Report on open hearings on road closures/boom gates*; SAHRC. 2005a. *The exclusionary policies of voluntary associations: Constitutional considerations*; SAHRC. 2006a. *Report on the public hearing on the right to basic education*. SAHRC. 2006b. *Report on the public hearing on school-based violence*; SAHRC. 2006c. *6th Economic and Social Rights Report*; SAHRC. 2008a. *Report on mining-related observations and commendations: Anglo Platinum, affected communities and other stakeholders in and around the PPL mine, Limpopo*; SAHRC. 2008b. *Report on the public hearing on Housing, Evictions, and Repossessions*; SAHRC. 2009a. *Public Inquiry: Access to Health Care Services*. (See www.sahrc.org.za for additional reports.)

It is at this juncture of continuing human rights challenges; possible future changes in the structure of Chapter 9 institutions; the nearing of the end of the Commission's second term; and the departure of all five Commissioners who served during the second term and some of the first term, that this report is written. It is written as a reflection, from different viewpoints, on the nature, work, achievements and challenges of the Commission – it is as much a reflection on the past as it is a collection of current views and a basis for future and further discussion.

1.2 Purpose, scope and parameters

The purpose of the report is to capture some of the achievements and challenges that the Commission has faced in the discharging of its mandate during its second term, and to reflect on the nature of the Commission and its work. Although the report focuses on the second term, there is some discussion of key events during the first term that influenced the direction of the Commission during its second term.

The report is reflective and self-evaluative, and offers recommendations on lessons learned from the past. Reflections are offered on what kind of human rights institution the Commission has become, why, and what could have been different. After finishing reading the report, the reader should therefore have a sense, from the often conflicting perspectives of respondents¹⁰, of the nature of the Commission and what some of its achievements and challenges have been. This should also give the reader a sense of the kind of debates that the Commission is having internally and the fact that there are many differing viewpoints and voices.

When this report was commissioned by the outgoing Commissioners, it was intended to form part of a hand-over from these Commissioners to the incoming Commissioners and to the Secretariat. The report will supplement other existing documents to preserve the institutional memory of the SAHRC. The report was primarily written with this purpose and audience in mind, but will be of interest more generally to anyone following the work of the Commission, and any external stakeholders. It is different from what has been written

on and by the Commission to date, as it synthesises material over the last seven years; it is written from the perspective of the Commission; it takes a more narrative form, as opposed to the more statistical reporting form of the annual reports; and it is critical and reflective of the work done by the Commission.

In clearly setting out the scope and parameters of the report, it is necessary to spell out what the report does **not** intend to do. Firstly, the report is not a historical overview of the SAHRC over the past seven years. Although the report focuses on a clearly demarcated historical period, it does not aim to document events exhaustively or in any chronological way. Rather, it offers reflections around certain pre-identified themes. Secondly, this is not a comparative report comparing the achievements of the SAHRC with similar institutions nationally or abroad. Although the report does contain a discussion on the differences between and the overlap in mandate of the Chapter 9 institutions, it does not compare the work of the SAHRC with similar or related institutions, except where reference to other institutions is pertinent to illustrate a point about the structure or functioning of the Commission. Thirdly, although the report was commissioned by the outgoing Commissioners, it does not focus exclusively on them, being a report about the SAHRC in general. Fourthly, this is not an objective report, although it aims to be balanced. Although the report is critical of the work of the SAHRC, it is essentially a report about the Commission, by the Commission, with some input from outside stakeholders.

1.3 Constraints and limitations

The most important constraint in producing this report was the delivery time. Between the Commissioners and the Chief Executive Officer (CEO) agreeing to the structure of the report and the launch date lay eight months for a single researcher to do data collection, analysis, writing, and editing and for the report to go to print. A second constraint was the availability of space – in other words, to produce as credible and comprehensive a report as possible within a page extent that the reader would still find accessible. The report was designed to cover maximum scope without compromising on depth. Although the report did not aim to be exhaustive, it did aim to convey information about the most important aspects that relate to the working of the SAHRC. A third factor, which is at the same time the report's greatest strength and limitation,

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¹⁰ In all cases in this report the word 'respondent(s)' is used to mean 'interviewee(s)'.

was the degree to which people were willing to participate in the research process and see the report to completion. This is always the case with qualitative research and commissioned work; and while the report could not have been completed without the extensive participation and incredible support from those at the Commission, it has to be recognised that in some cases participation was limited.

The possible limitation of the report as it stands relates specifically to the number and range of people who participated in the study. This was mediated through careful sampling techniques, explained below.

1.4 Methodology and ethics

1.4.1 Research approach

In producing this report, the research has essentially been based on what has been called a “toolkit approach”¹¹ to research – an approach which is pragmatic and focuses on using the methods that will enable the researcher to best answer the research questions at hand, regardless of whether these are quantitative or qualitative.¹² In writing a critical reflective report, the primary source of data would necessarily be interviews,¹³ which by its very nature makes this a qualitative study. Although the basis and usefulness of the distinction between qualitative and quantitative research as two distinct ways of viewing the world has been questioned,¹⁴ by qualitative research in the context of this report is meant “a naturalistic, interpretative approach concerned with understanding the meanings which people attach to phenomena (actions, decisions, beliefs, values, etc.) within their social world”¹⁵. The research used semi-structured in-depth interviews in order to obtain reflections from

respondents on the nature and work of the Commission.¹⁶ The interviews combined some explicit structure (in order to permit some level of comparability between the data produced) and a degree of flexibility (to allow respondents to pursue subjects that they felt were important)¹⁷. As in-depth interviews not only allow the respondents to elaborate on their answers, but also allow for those answers to be probed, this method seemed more appropriate than other methods (such as questionnaires) to obtain the depth of information necessary to study experiences, attitudes and the meanings that people attributed to events¹⁸, which is what the research aimed to do. The interview data were analysed by using thematic analysis, which is a method of analysis that identifies “increasing levels of abstraction in the data”¹⁹. In order to identify themes and ensure that the themes are grounded in the data, a very close reading of the data is necessary²⁰. It is especially because of the closeness of the themes and interpretations to the text and the ability of thematic analysis to synthesize large amounts of qualitative data that it was chosen as a method of analysis for this report.

Reliability refers to “the replicability of research findings and whether or not they would be repeated if another study, using the same or similar methods, was undertaken”²¹. The related concept of validity refers to the “correctness or precision of a research reading”²², in other words, whether “[a measure] measures what it is intended to measure”²³. Although there is substantial disagreement in the literature on the applicability

11 Snape, D. and Spencer, L. 2003. “The foundations of qualitative research”. Ritchie, J. and Lewis, J. (eds.) *Qualitative research practice: A guide for social science students and researchers*. London: SAGE, p. 15.

12 Silverman, D. 2006. *Interpreting qualitative data: Methods for analysing talk, text and interaction*. 3rd edition. London: SAGE.

13 Although documentary sources and other literature were also used.

14 See, for example, Oakley, A. 1999. “Paradigm wars: some thoughts on a personal and public trajectory”. *International Journal of Social Research Methodology*, 2(3):247-254; Oakley, A. 2000. *Experiments in knowing: Gender and method in the social sciences*. New York: The New Press.

15 Snape and Spencer, 2003, p.3.

16 In order to determine the themes around which respondents would be interviewed, an initial literature search was done on the Commission and NHRIs, and exploratory meetings were held with all outgoing Commissioners and a number of staff members to get a sense of issues that they thought were important to include in the report, and what people’s expectations were of the report.

17 Legard, R., Keegan, J. and Ward, K. 2003. “In-depth interviews”. Ritchie, J. and Lewis, J. (eds.) *Qualitative research practice: A guide for social science students and researchers*. London: SAGE, p. 141.

18 Byrne, B. 2004. “Qualitative interviewing”. Seale, C. (ed.) *Researching society and culture*. 2nd edition. London: SAGE, pp.179-192.

19 Salmon, G. and Rapport, F. 2005. “Multi-agency voices: A thematic analysis of multi-agency working practices within the setting of a child and adolescent mental health service”. *Journal of Interprofessional Care*, 19(5):432.

20 Ritchie, J., Spencer, L. and O’Connor, W. 2003. “Carrying out qualitative analysis”. Ritchie, J. and Lewis, J. (eds.) *Qualitative research practice: A guide for social science students and researchers*. London: SAGE, p. 221.

21 Lewis, J. and Ritchie, J. 2003. “Generalising from qualitative research”. Ritchie, J. and Lewis, J. (eds.) *Qualitative research practice*. London: SAGE, p. 270.

22 Ibid p. 272.

23 May, T. 2001. *Social research: Issues, methods and process*. 3rd edition. Buckingham: Open University Press, p. 92.

of reliability and validity to qualitative research²⁴, these issues remain important. Greater reliability and validity are achieved by providing as transparent as possible an account of how the data were collected and analysed so that the reader would be able to judge the credibility of the interpretations against the methods used and the data available. A high level of reliability is also achieved by using the idea of “low-inference descriptors”²⁵, which involves “recording observations in terms that are as concrete as possible, including verbatim accounts of what people say...”. In order to ensure greater validity, the report used what is referred to as “comprehensive data treatment”²⁶ – not being satisfied with the storyline or generalisation of the data, unless it applies to all data collected.

1.4.2 Sampling

This project made use of purpose sampling to identify the most appropriate respondents²⁷. Sampling for the interviews at the Commission was done such as to, as far as practically possible, have respondents across three different categories: the different employment brackets and programmes, from Commissioners, to senior management, to more junior staff members – this was done in order to get a collection of views on the Commission’s operation across programmes and at different levels; the different geographic locations of the SAHRC – this was done to get a sense of how the Commission operates at head office and the provincial offices, and how these offices interact; and the number of years of employment at the Commission – this was done in order to get views on how the Commission and its work have changed over time²⁸. It is regretful that it was impossible for one researcher to interview everyone at the Commission in the available time, and the sample therefore had to be carefully chosen. Who the possible respondents might be was initially decided after consultation with the Commissioners. This was also necessary

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24 Silverman 2006 p. 282.

25 Seale in Silverman 2006 p. 283.

26 Silverman 2006 p. 298.

27 “In purposive sampling, each sample element is selected for a purpose, usually because of the unique position of the sample elements...it can be exactly what is needed in a case study of an organization, community, or some other clearly defined and relatively limited group.” Chambliss, D.F. and Schutt, R.K. 2006. *Making sense of the social world: Methods of investigation*. 2nd edition. Thousand Oaks: Pine Forge Press, p.101.

28 In identifying whom to interview through purposive sampling, it is important to identify those who are knowledgeable about the situation or experience under investigation, those who are willing to be interviewed, and those who would represent diverse viewpoints (Rubin and Rubin in Chambliss and Schutt 2006 p. 101).

in view of the fact that the researcher still had to become familiar with staff and the organisation. But the researcher was allowed to interview anyone in the Commission without seeking approval from the Commissioners, or making known who was interviewed, which helped to ensure the anonymity of more junior staff members. Telephonic interviews were conducted with some respondents not based at head office, and others were provided with a list of questions to respond to in their own time. Decisions on whom to interview outside of the Commission were made in consultation with the Commissioners, and the choice was based on people who were familiar with the work of the Commission and who would be able to provide critical reflections. In these cases, introductions were first made by either the Chairperson or Commissioner Wessels. In total, face-to-face interviews were conducted with 36 people, 10 of whom were interviewed on three different occasions on the different themes covered in the report. This amounts to more than 60 interview hours. In addition, one telephonic interview was conducted and three written responses were received²⁹. Most interviews were recorded to make data analysis easier, but in some cases respondents preferred not to be recorded.

1.4.3 Research ethics and reflexivity

Part of the ethical responsibility of a researcher is to protect participants from harm and not to put them at risk in any way³⁰. This is especially relevant in a study such as this, where respondents comment about their work environment and where it might be difficult to disguise their identity if sensitive or specialised information is discussed. The study operated on the basis of confidentiality and informed consent, and respondents were informed about the nature of the report before the interview was conducted. In the presentation of the data in the report, the data were treated in different ways. Commissioners and the CEO gave consent that quotes and data be directly attributed to them by name. Staff at senior management level were given the choice of quotes being either attributed by name or anonymised, while still being

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29 In sampling, it is recommended that the selection of respondents take place until two criteria are met: completeness, where “what you hear provides an overall sense of the meaning of a concept, theme, or process”; and saturation, where “you gain confidence that you are learning little that is new from subsequent interview[s]” (Rubin and Rubin in Chambliss and Schutt 2006 p. 101).

30 Lewis, J. 2003. “Design issues”. Ritchie, J. and Lewis, J. (eds.) *Qualitative research practice*. London: SAGE, pp. 47-76; Creswell, J.W. 2003. *Research design: Qualitative, quantitative, and mixed method approaches*. Thousand Oaks: SAGE.

attributed to 'a senior staff member'. For other more junior staff, such as those at middle management level and below, the default position was to anonymise and as far as possible remove all identifying markers, but still attribute the quote to 'a staff member'. Those interviewed outside the Commission were given the choice of attribution by name or anonymisation. In all cases, respondents were afforded the opportunity to check their quotes and comments and how these were used.

Authors that have written on reflexivity in research³¹ have pointed out that researchers have a potential impact on all parts of the research process, from formulating the questions, to data analysis and the presentation of findings. A vast literature exists on how the (dis)similarity between the researchers and respondents (or keepers of data) influences the data collected and the process of analysis³². A lot of this literature focuses on the binary division of insider versus outsider, with the former often being seen as the most appropriate position from which to collect meaningful data. However, for this particular research project the position is held that "there is no singular insider or outsider position that researchers occupy during the course of fieldwork"³³. Instead, there are a number of different "positions and statuses"³⁴ held by the researcher that can be interpreted by interviewees and those providing access to data as that of either an insider or an outsider. These interpretations are furthermore contextual and can vary as circumstances permit³⁵. In the process of writing this report, the researcher was in the beneficial position of being an outsider, in the sense of being employed specifically to do this project, while also becoming an insider through having an office at the SAHRC and being an employee. This has assisted the researcher in gaining a better understanding of the nature and work of the institution.

1.4.4 The pre-launch workshop

Once the full draft of the report had been completed, a number of key individuals were identified to read the report and give comments for possible inclusion. Although the report

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31 See, for example, Woolgar, S. 1988. *Knowledge and reflexivity: New frontiers in the sociology of knowledge*. London: SAGE; Finlay, L. and Gough, B. (eds.) 2003. *Reflexivity: A practical guide for researchers in health and social sciences*. Oxford: Blackwell Science.

32 Young, A. 2004. "Experiences in ethnographic interviewing about race: The inside and outside of it". Bulmer, M. and Solomos, J. (eds.) *Researching race and racism*. London: Routledge, pp.187-202.

33 Ibid p. 191-192.

34 Ibid.

35 Ibid.

remained one commissioned by the SAHRC, there was some scope, albeit limited, for reflection and discussion with these readers and outgoing Commissioners and the CEO before the final version was sent to print. A small workshop was held at the Commission's offices on the 21st of July 2009, and readers' comments were consequently incorporated in the report and are referenced in the footnotes³⁶.

1.5 Report structure

What follows are critical reflections grouped around five different themes. **Chapter 2** starts out broadly by considering the SAHRC's establishment by law and a broader understanding of its mandate. It considers the position of the Commission in international and national law; how the Commission understands its mandate; how the mandate has been expanded; how the Commission interprets its mandate and makes sense of its broadness and its overlap with those of other Chapter 9 institutions; how the Commission thinks strategically and is able to measure its performance; and how it sees its role outside South African borders. In **Chapter 3**, the focus turns outwards, and reflections are presented on the Commission's independence and how it sees its relationships with external stakeholders. The chapter first discusses the SAHRC's general understanding of independence and its ability to do its work without undue influence. Then the focus turns to some of the SAHRC's external relationships, including those with government, national Parliament and provincial legislatures, the public, courts, civil society organisations, donors, the media, and political parties. In **Chapter 4**, the focus turns inward to reflect on the SAHRC's internal organisational structure and corporate governance and how these relate to the effective discharging of its mandate. The discussion considers the different layers in the SAHRC's structure, and after presenting a short description of the Commission's structure as it currently stands, starts by discussing the Commissioners – their appointment process, the skills they bring to their work, their thematic areas of responsibility, and the arguments for and against having Commissioners based in, or responsible for provinces. This is followed by a discussion of the relationship between the Commissioners and the Secretariat, including

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36 Readers who attended the meeting included: Pansy Tlakula (Independent Electoral Commission); Yasmin Sooka (Foundation for Human Rights); Prince Mashele (Institute for Security Studies); Eddie Makue (South African Council of Churches); Sibongile Luwaca (Office of the Public Protector); Pregs Govender (Commissioner, SAHRC); and Naledzani Mukwevho (DCEO, SAHRC).

the CEO. The chapter finally turns to the Secretariat and its current structure, the relationship between the head office and provincial offices, and issues of staff skills, capacity and staff turnover. **Chapter 5** approaches the discharging of the Commission's mandate from a reflective perspective. It considers how the Commission has done in terms of its mandate to promote, protect and monitor human rights. It very briefly reflects on the influence of the Commission's supporting programmes (such as administration, finance, and human resources) on the discharging of the mandate, as well as the Commission's compliance requirements. The chapter

ends by reflecting on the future work of the Commission. Each of the chapters discussed so far has its own section of conclusions and recommendations. This was done to make it easier for the reader to link recommendations with the text of the report. The recommendations are drawn together in **Chapter 6** of the report. The report ends with **Chapter 7**, which is a final word from some of the outgoing Commissioners. Here they add to their contributions in the rest of the report by offering their own personal reflections on their work at the Commission.

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2

Establishment by law
and understanding
of the mandate

2.1 Introduction

*Whatever their type, NHRIs should be established by law; preferably their existence should be entrenched in the Constitution, thus ensuring their long-term existence. This statutory basis is the most secure way to guarantee the institution's independence, as well as defend its legal powers if these are challenged.*³⁷

The establishment and existence of the SAHRC must be viewed against both the international and the national legislative and policy frameworks that gave effect to it and within which it operates. This chapter answers a number of questions in this regard, such as: Has this framework been sufficiently enabling for the clear structuring and functioning of the Commission? And what are the key amendments needed to the legislation for it to be more facilitating? In addition to enabling legislation, establishing an NHRI involves setting out 'founding principles' to guide its operation. Faced with a clean slate in 1995, the SAHRC set out a number of founding principles. This chapter will discuss three of those principles that in many ways influenced the way in which the Commission approaches its work.

With the legislative framework and founding principles as its background, the SAHRC has to interpret and give effect to its mandate. The chapter will discuss how the Commission understands and interprets its mandate as set out in the legislation; what some of the key challenges are that the Commission has faced in interpreting its mandate; how the mandate has broadened since the Commission's inception; and what the practical implications of this are.

Making the leap from a broad understanding of the mandate to discharging the mandate with the limited resources available requires strategic thinking, setting measurable objectives, and assessing the effect and impact of programmes and interventions. It is therefore important to investigate both to what extent the Commission has been successful in thinking strategically, and what influences the priorities it sets.

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37 International Council on Human Rights Policy (ICHRP) and Office of the United Nations High Commissioner for Human Rights (OHCHR). 2005. *Assessing the effectiveness of National Human Rights Institutions*. Versoix, Switzerland: ICHR, p.13.

Although its mandate is a national one, the SAHRC operates within an international human rights context. This necessitates a discussion on the nature and extent of the SAHRC's involvement outside South African borders. This involvement ranges from engagement with regional and international human rights bodies and institutions, to the perhaps more contentious question of commenting on human rights abuses outside South African borders. Does the SAHRC have a legal mandate for involvement outside its national jurisdiction, and is it clear about what it wants to achieve through this? The chapter will conclude with recommendations on how a more enabling legislative framework can be created, and how to address some of the challenges faced in interpreting the mandate.

2.2 The position of the SAHRC in international and national law

2.2.1 Establishing the SAHRC and setting out its purpose

It is common cause that the establishment of the SAHRC must be seen against the backdrop of the internationally determined NHRI framework, or Paris Principles,³⁸ within which it operates. Conceptually, an NHRI is a

*body whose functions are specifically defined in terms of the promotion and protection of human rights...they are neither judicial nor law-making [and] have on-going, advisory authority in respect of human rights at the national and/or international level.*³⁹

NHRIs "vary considerably in composition and structure", but are set up by national legislation, are usually to some degree state sponsored, and should enjoy autonomy from the state.⁴⁰

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38 What have become known as the Paris Principles were the recommendations of the First Workshop on National Human Rights Institutions held in Paris in 1991. The Paris Principles were endorsed by 171 states in 1993 at the World Conference on Human Rights held in Vienna. Pohjolainen, A. 2008. "The Evolution of National Human Rights Institutions: The role of the United Nations" in Kaersvang, D. "Synergy between international and domestic at the South African Human Rights Commission". *The Human Rights Journal*, 1 (1):20-21.

39 UN 1993 p. 3.

40 Smith, A. 2006. "The unique position of National Human Rights Institutions: A mixed blessing". *Human Rights Quarterly*, vol. 28 (4):909.



High Commissioner for Human Rights, Navi Pillay, addressing a seminar at Human Rights House on topical national and international human rights trends.

One of the multiple roles of NHRIs is to provide “a means through which international law could be brought home, adapted to domestic issues, and made attractive to domestic advocates.”⁴¹ This implies a constant interaction between the international framework, human rights issues as they manifest in the domestic sphere, and NHRIs’ own constantly developing capacity to address human rights matters.⁴² Although the Paris Principles have not escaped criticism,⁴³ they are universally regarded as the authoritative enabling framework against which NHRIs are established and measured.⁴⁴

It is worth noting that, as the Paris Principles were being endorsed at the World Conference on Human Rights in Vienna in 1993, “at that moment South Africa was negotiating its own Constitution” and “there was no question” of South Africa not being in line with the “international principles and approaches.”⁴⁵

The establishment of the SAHRC at that point in time – with the change from an oppressive system of government to one based on constitutional democracy – meant that the Commission was an NHRI, provided for as part of a negotiated settlement.⁴⁶ It is therefore quite appropriate that, in addition to its monitoring role, the Commission was given a strong human rights protection and promotion mandate.⁴⁷ Indeed, in the build-up to the interim Constitution, going into the final Constitution, was the principle that everyone was entitled to all universally accepted human rights.⁴⁸ Part of giving effect to this principle was the setting up of institutions supporting and strengthening constitutional democracy, also known as Chapter 9 institutions, of which the Commission is one.⁴⁹ The purpose of the SAHRC was therefore to strengthen democracy, and embedding its existence in the Constitution was a route to “ensuring its long-term existence”⁵⁰ as one of the mechanisms to guarantee that people can access and defend the Bill of Rights and that there will be public education and awareness about rights.⁵¹

41 Kaersvang 2008 p. 19.

42 Interview with staff member, Christine Jesseman, Head of Programme (HoP) Research, Documentation and Policy Analysis Programme (RDP).

43 See Parlevliet, M. 2006. *Review Meeting. Role of human rights in peace agreements, Belfast, March 7-8, 2005. National Human Rights Institutions and peace agreements: Establishing national institutions in divided societies.* International Council on Human Rights Policy, p. 5-7.

44 For other literature on the structure and functioning of NHRIs, see, for example, Parlevliet, M., Lamb, G. and Maloka, V. (eds.) 2005. *Defenders of human rights, managers of conflict, builders of peace? National Human Rights Institutions in Africa*; Burdekin, B. assisted by Jason, N. 2007. *National Human Rights Institutions in the Asia-Pacific Region.* Leiden: Martinus Nijhoff.

45 Interview with Commissioner Leon Wessels.

46 Parlevliet 2006 p. 8,10. Countries that included the establishment of NHRIs as part of peace agreements include Bosnia-Herzegovina and Rwanda.

47 Ibid.

48 Interview with Commissioner Leon Wessels.

49 The other Chapter 9 institutions are the Public Protector; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and the Broadcasting Authority.

50 ICHRP and OHCHR 2005 p. 13.

51 Interview with Prof. N. Barney Pitso, Chairperson of the SAHRC, October 1995 – December 2001.



SAHRC staff consulting with displaced persons during the 2008 xenophobic attacks in Alexandra.

If one considers the mandate of the SAHRC against this backdrop, as well as the country's apartheid past, then

there were things that...determined the agenda of the [SAHRC's] mandate...it was crucial to transform our society from one which was authoritarian, secretive...to one which embraced a culture of human rights. And this body was seen to be a partner in that process of transformation.⁵²

Fifteen years after the change to democracy and nearly fourteen years since the inception of the SAHRC one may ask whether the purpose of the Commission remains the same. It is a widely held opinion amongst those interviewed for this chapter of the report that this transformation or "reconstruction"⁵³ of South African society and the strengthening of democracy in the country remains the driving force behind the work of the Commission. The strategies for achieving this could differ, but the general purpose remains the same. The "[c]onstitutionalisation and the democratisation of the new South Africa had to be more than what was on paper in terms of the Constitution"; it had to be "believed and experienced in the lives of people"⁵⁴ It is the purpose of the Commission to work towards

52 Interview with Commissioner Leon Wessels.

53 Interview with former staff member, Sello Hatang, HoP Information and Communications Programme (ICP).

54 Interview with Prof. N. Barney Pitso, Chairperson of the SAHRC, October 1995 – December 2001.

transforming society, monitoring the observance and compliance with human rights norms and standards in terms of the broad imperatives that the society has set for itself...such as transforming it, improving the quality of life of people, fulfilling the potential of its citizens.⁵⁵

This transformational purpose remains as relevant today as it was when the SAHRC was established in 1996, as "there is no finish line in this matter"⁵⁶ and this purpose "remains valid for all seasons."⁵⁷ This is not an admittance that transformation is impossible to achieve, but rather an acknowledgement of some of the challenges that the Commission and others working in the field of human rights have faced in achieving this objective. The first of these challenges is the magnitude of transformation required and the extent of reach necessary to achieve this. As one respondent⁵⁸ noted: "We can have an office in each and every little town and there will be work"⁵⁹ The second challenge is that, notwithstanding the struggle for human rights during the apartheid era, South Africa entered the post-1994 dispensation with a "culture of a complete deficit

55 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

56 Interview with Commissioner Leon Wessels.

57 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

58 In all cases in this report the word 'respondent(s)' is used to refer to 'interviewee(s)'.

59 Interview with Commissioner Leon Wessels.

of rights;⁶⁰ which meant that the work of the Commission and others started within the context of previous large-scale human rights abuses. Starting from a negative, it has been important and challenging to try and create a culture of human rights and highlight some forms of human rights abuses, as previously “we would never even talk about them [some types of discrimination]”.⁶¹ A third important challenge to the transformation goal is the constantly changing nature of South African society, which invariably brings new challenges to the fore. An example of this is the xenophobic crisis of May 2008 which, as it was “business unusual”,⁶² created new challenges and additional priorities that needed to be addressed in the quest to transform South Africa into an inclusive and tolerant society.

Two questions are central to achieving these transformation aims. The first of these is to what extent the legislation through which the SAHRC was established has been sufficiently clear and enabling, allowing it to function as seamlessly as possible. The second question is to what extent the Commission has been enabled to give effect to the functions and mandate set out for it in the legislation. The following section will discuss the first of these questions by looking at the national legislative framework within which the Commission operates.

2.2.2 The SAHRC and the national legislative framework

On a national level, there are five pieces of legislation that have direct relevance to the establishment, structure, functions and powers of the SAHRC. The first of these is South Africa’s interim Constitution Act, 200 of 1993, specifically ss 115-117, through which the Commission was established. The existence of the Commission was affirmed in the final Constitution of the Republic of South Africa Act, 108 of 1996, where s 184 (1) set out the three main functions of the Commission, namely 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.

These powers and functions were set out in more detail in the South African Human Rights Commission Act, 54 of 1994 (HRC Act), where s 7 (1) provides that:

In addition to any powers, duties and functions conferred on or assigned to it by section 116 of the Constitution, this Act or any other law, the Commission –

- a. shall develop and conduct information programmes to foster public understanding of this Act, Chapter 3 of the Constitution and the role and activities of the Commission;*
- b. shall maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices and to promote cooperation in relation to the handling of complaints in cases of overlapping jurisdiction;*
- c. may consider such recommendations, suggestions and requests concerning fundamental rights as it may receive from any source;*
- d. shall carry out or cause to be carried out such studies concerning fundamental rights as may be referred to it by the President and the Commission shall include in a report referred to in section 118 of the Constitution a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate;*
- e. may 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.*

(2) All organs of state shall afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its duties and functions.

In speaking to the clarity of the enabling legislative framework in setting out the structures, functions and powers of the SAHRC, it must be noted that, although the legislation has largely facilitated the Commission’s work,⁶³ respondents have pointed out a number of inconsistencies and ambiguities across the enabling legislation. A “major flaw”⁶⁴ has been that the HRC Act was designed in terms of the interim Constitution and that there are some provisions in the interim Constitution

60 Interview with Commissioner Karthy Govender.

61 Interview with Commissioner Tom Manthata.

62 Interview with Commissioner Leon Wessels.

63 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

64 Interview with Commissioner Karthy Govender.

that are not consistent with the final Constitution. One example of this is the question of the position of Deputy Chairperson in the Commission. While the interim Constitution refers to such a position and the election of the Deputy Chairperson,⁶⁵ the final Constitution does not; and the HRC Act merely alludes to it.⁶⁶ There is also inconsistency between the different Chapter 9 institutions about how the Chairperson and Deputy Chairpersons are to be appointed.⁶⁷ These discrepancies occur because the legislation was developed separately over different time frames and there were “no checks and balances”⁶⁸ to ensure consistency; but this also points to a larger issue, namely the “lack of thought that often went into these institutions”⁶⁹ The position that the Commission has taken on such inconsistencies between the interim and final Constitutions is that provisions of the interim Constitution that are not inconsistent with the final Constitution must be read to give context and colour and a fuller picture to the HRC Act.⁷⁰ Another such discrepancy between the interim and final Constitutions is that some of the socio-economic rights were not as entrenched in the interim Constitution as they were in the final Constitution,⁷¹ and according to s 183 (3) of the final Constitution, the Commission must

Each year...require relevant organs of state to provide the Commission with information on the

65 Republic of South Africa. 1993. Interim Constitution Act, 200 of 1993 s 115 (5).
 66 Republic of South Africa. 1994. South African Human Rights Commission Act, 54 of 1994 s 12 (2).
 67 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. An example of this is that, at the SAHRC, the Chairperson and Deputy Chairperson are elected by their peers (see s 115 (5) of the interim Constitution), while the Chairperson of the CGE is appointment by the President and its Deputy Chairperson is elected by his or her peers (www.cge.org.za). A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the importance of standardising the way in which Chairpersons and Deputy Chairpersons are elected across the different Chapter 9 institutions.
 68 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 69 Ibid.
 70 Interview with Commissioner Karthy Govender.
 71 Interview with Commissioner Leon Wessels. A cursory comparison of the rights contained in the interim Constitution versus the final Constitution illustrates that, for example, the rights to housing, healthcare, food, water, and social security are absent. Basson (1995:19) noted how “The interim Constitution places great emphasis upon first generation human rights...[while] second generation human rights (socio-economic rights or red rights) as well as third generation rights (environmental rights or green rights) receive scant attention in contrast to the attention given to such rights in a Constitution such as that of Namibia...” Basson, D. 1995. *South Africa's Interim Constitution – text and notes*. Revised edition. Kenwyn: Juta.

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.

Although these inconsistencies between the interim and final Constitutions do not have material application and consequences for the Commission’s work, they point to the broader issue that there are inconsistencies in the legislation that apply to the Commission.

An area of vagueness in the legislation that has had a direct impact on the effectiveness of the SAHRC and the discharging of its mandate is the question of the number of Commissioners to be appointed. Section 115 (1) of the interim Constitution states that “There shall be a Human Rights Commission, which shall consist of a chairperson and 10 members who are fit and proper persons”, while the HRC Act in s 3 stipulates that “not less than five members are appointed on a full-time basis”. However, as the interim Constitution is no longer in place, there is some uncertainty about the number of Commissioners that should be appointed. At the start of the second term, a complement of six Commissioners were appointed, of whom five had full-time positions.⁷² Bearing in mind that a full complement of eleven Commissioners were appointed in the beginning of the first term, and considering the Commission’s extensive mandate, the “effect on the effectiveness of the Commission [of appointing only six Commissioners] must have been just enormous”⁷³ When Commissioner McClain resigned in the 2006/2007 financial year,⁷⁴ the vacancy was only filled in December 2008 with the appointment of Commissioner Pregs Govender, and it might therefore be helpful to clarify in the legislation what the timeframe is for filling a Commissioner’s vacancy.⁷⁵

72 They were Jody Kollapen (Chairperson), Zonke Majodina (Deputy Chairperson), Leon Wessels, Tom Manthata and Charlotte McClain. Commissioner Karthy Govender was appointed as part-time Commissioner.
 73 Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001. However, it has to be noted that the Commission’s staff complement and the budget increased significantly over this time (comment by Tseliso Thipanyane, Chief Executive Officer (CEO) of the SAHRC, May 2006 – current). These increases are reflected in the Commission’s annual reports: in 2002 the “SA Government grant” received was R21,899,000 (SAHRC. 2003b. *Annual report, April 2002 - March 2003*, p. 57) while for the 2007/2008 financial year the MTEF baseline allocation was R55,281,000 (SAHRC. 2008c. *Annual report, April 2007 - March 2008*, p.93). The staff complement increased from 88 at the beginning of the 2002/2003 financial year (SAHRC 2003b p.35) to 121 at the end of the 2007/2008 financial year (SAHRC 2008c p. 78).
 74 This was after a period of absence of more than a year from the Commission.
 75 Comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

The HRC Act has created two additional challenges that need mentioning here; they will be discussed in greater detail in Chapter 4 of this report, which looks at the Commission's internal organisational structure and issues of corporate governance. The first of these challenges is the question of the salary structures and scales of the Commission. From the time of the Commission's inception, there has been ambiguity in the Commission's salary structures.⁷⁶ Regulations issued under the HRC Act that applied to the salaries of staff of the Commission created uncertainty about whether staff salaries are in fact aligned with those in the public service. This longstanding issue has again demanded attention with the government's introduction of the Occupation Specific Dispensation (OSD), applicable to those in the Commission with legal qualifications, and was further highlighted by the Hay Group Report, commissioned by the SAHRC to evaluate the different positions in the Commission and determine appropriate grading and remuneration. The second challenge relates to the SAHRC's internal organisational structure where, for some, perceived ambiguity exists between the HRC Act and the Public Finance Management Act, 1 of 1999 (PFMA) regarding the functions and powers of the Commissioners and the CEO. The PFMA is vague on this matter.⁷⁷

These are only a few of the inconsistencies that exist between different pieces of legislation. Considering the potential implications of such inconsistencies for the structure and functioning of the Commission, those interviewed for this chapter of the report saw it as important that the necessary amendments be made to the HRC Act. However, considering the longstanding nature of these issues,⁷⁸ it needs to be asked why the necessary amendments have still not been made. To its credit, the Commission has been functioning at its current level in spite of these legislative ambiguities. However, precisely because of the long-standing nature of some of these issues, the SAHRC has grappled with the same problems over a number of years, and these have still not been resolved.

76 Chapter 4 will specifically discuss the salary structure of the Commissioners.

77 While the PFMA provides that the CEO is accountable to the Executive Authority, it falls short by failing to define who the Executive Authority is in relation the Commission, only doing so indirectly in Treasury regulations (comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current).

78 The commencement date of the HRC Act was as far back as 15 September 1995.

Despite discussion with previous Ministers of Justice and Constitutional Development⁷⁹ to have the HRC Act amended, the SAHRC has perhaps “not really taken the fight all the way”,⁸⁰ and efforts to pursue these amendments have often been overtaken by other priorities and therefore not kept high on the agenda. It is a widely held opinion that a different approach was taken to the amendments to the HRC Act by the previous Chairperson of the Portfolio Committee on Justice and Constitutional Development, Mr Yunus Carrim, who more actively pursued these amendments with the Executive.⁸¹ Following this, a new draft amendment bill was prepared by the Department of Justice and Constitutional Development and sent to the SAHRC in September 2008. The SAHRC sent through its comments in November 2008 and is awaiting further developments.⁸² However, considering the fact that 2009 is an election year, and that there might be other legislative priorities with the commencement of the new Parliament, it seems increasingly likely that these amendments will at the earliest only be made in 2010. The uncertainty of Government's response to the recommendations of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions,⁸³ which suggested the amalgamation of some of the Chapter 9 institutions and the establishment of “an umbrella human rights commission”,⁸⁴ might cause a further delay in the amendment of the HRC Act. However, as was suggested at the SAHRC's 2009 strategic planning session, it might be imperative that these amendments be actively pursued by the Commission, and this responsibility may need to be assigned to a Commissioner.⁸⁵

79 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

80 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

81 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009, interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 - current. For example, in Portfolio Committee for Justice and Constitutional Development. 2007. *Report of the Portfolio Committee for Justice and Constitutional Development on the South African Human Rights Commission's Annual Report 2006/2007* it is cited that: “The Committee feels that the Bill and the amended staff regulations should be introduced to Parliament by the end of May 2008 – and will raise this with the Department [of Justice and Constitutional Development]. The Committee will process this Bill expeditiously.” p.9.

82 Email correspondence between the SAHRC and the Department of Justice and Constitutional Development.

83 Parliament of the Republic of South Africa 2007.

84 *Ibid* p. 37.

85 See, for example, SAHRC. 2009b. *Strategic Plan Meeting Report*, 2009, p.9.

2.2.3 Above and beyond the legislation – setting up some ‘founding principles’

[When we started at the Commission] we didn't know one another very closely...We were coming from different backgrounds, experiences, professions... it meant developing new relationships within a situation where we all had to find each other and say as individuals 'how can we each make a contribution to the important task ahead of us'...we agreed that we were going to...come up with procedures and processes that would guide our contribution... using our individual strengths and experiences to inform our approach as a team to ensure that South Africans enjoy their human rights in terms of the Constitution.⁸⁶

Finding a common purpose as incoming Commissioners and agreeing on ways to approach the work of the Commission does not only apply to the inaugural Commissioners; it is relevant at the start of each term. Although not contained in any legislative provisions for the establishment of the SAHRC, there were three overall principles that were adopted in the first term that in many ways influenced the operation of the Commission and were carried over into the Commission's second term. The first of these was the political neutrality of the Commissioners. Although it was not contained in any law, being seen rather as a “discipline that we felt was necessary and compatible with the office we had”⁸⁷ it was agreed that none of the Commissioners should be seen to be participating in party political activities. This was in part to strengthen the independence of the Commission and enhance its standing and credibility as a neutral and objective promoter and protector of human rights. This stance was also indirectly a result of the different political persuasions of Commissioners during the first term and the different ways in which they approached human rights. Although these appointments needed to represent different constituencies and this was considered by some to be a strength of the Commission,⁸⁸ this diversity in political opinion in part led to “Commissioners

86 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

87 Interview with Prof. N. Barney Pitso, Chairperson of the SAHRC, October 1995 – December 2001.

88 Ibid.

[who] tended to want to represent their political ideology in their so-called minority views as if they are a sort of opposition within the Commission.”⁸⁹ Therefore, instead of the Commission being seen as partisan to a particular political view or party, the decision of non-affiliation was taken. This relates to the second adopted principle, namely the unity of the Commission – it was decided that the Commission must function as one and come to things with a common mind. When the opinions of the Commission were put together, “we discouraged the idea that each and every Commissioner can have a separate opinion... there is in fact one Commission...there can't be a minority view of the Commission as if we were a court of law.”⁹⁰ The opinion does not necessarily have to be based on consensus – it can be a majority view; but it was seen as important that the SAHRC speaks with one voice. Although the strength of such a stand has been the presentation of a uniform Commission, and clarity in the decisions it presents to the outside, the process of reaching a consensus or majority opinion within the Commission is often time-consuming and a cause for delay.⁹¹ Finally, the idea of not having minority opinions, as in a court of law, also relates to the third founding principle, namely that it was important for the Commission

not to structure itself as if it is a court of law...the Commission and its processes had to be in large measure not rigidly procedural, important as that would be...they had to be enabling, facilitating, inviting and assisting.⁹²

This relates strongly not only to the question of accessibility to the public, which will be discussed in Chapter 3 of this report, but also to how the Commission approaches its work and what procedures it puts in place internally.

89 Ibid.

90 Ibid.

91 It has not in all cases been possible for the Commissioners to reach consensus, as indicated by the Commission's withdrawal from the TAC Constitutional court case that concerned the provision of antiretroviral medication (nevirapine) to prevent mother-to-child transmission of HIV. This was one of only two occasions where Commissioners voted on a matter, the other being whether to withdraw subpoenas against journalists during the inquiry into racism in the media (see SAHRC 2000).

92 Interview with Prof. N. Barney Pitso, Chairperson of the SAHRC, October 1995 – December 2001.

2.3 Understanding the mandate of the Commission

2.3.1 Watchdog, lapdog or institution supporting constitutional democracy – how others see the mandate of the SAHRC

During the constitutional negotiations and the run-up to the interim Constitution, there was a need for institutions supporting democracy and a push for a human rights organisation. However, it is unclear how much thought went “into what exactly it would do”, because there “continues to be different understandings of that”.⁹³

In addition to its own interpretation of its mandate, the Commission must come to terms with what others understand its role to be. Part of the potential difficulty of understanding what the role of the Commission should be is that it “doesn’t fit neatly in the architecture – it’s not a legislature or a court”.⁹⁴ At a conceptual level, different assumptions have been made about what the Commission should do. For example, the “idea of an institution supporting democracy is often seen by the Executive [of Government] as not supportive of democracy, but supportive of Government”.⁹⁵ This has been borne out in the relationship with Government; for example, one respondent commented

*In terms of pure law I think they [Government] would not seek to refute an argument that part of the mandate of the Commission is to check and hold Government accountable, but I think politically they want to see differently...and the idea of us working together is a logical thing.*⁹⁶

Along a similar line, Government has approved of the Commission’s assertiveness when it holds business to account,

.....
93 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 – September 2009.
94 Interview with Commissioner Leon Wessels.
95 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 – September 2009.
96 Ibid.

but does not always see it as the Commission’s “job to name and shame”⁹⁷ when it comes to Government itself. However, the Commission has also received “mixed signals”⁹⁸ from the Executive, as there have been some Ministers who have made it clear that they expect the Commission to hold Government accountable. An example of this is when former Minister of Justice and Constitutional Development, Penuell Maduna, urged bodies such as the SAHRC to play a watchdog role as far as Government is concerned: “Rights bodies have the right to say to us (the Government) ‘show us your figures, why didn’t you reach 100 percent?’ and thereby hold Government accountable for delivery on its mandate.”⁹⁹

From interaction with the public it would seem that the Commission is sometimes viewed as a “delivery agency”, or point of last resort. For example, where there is a lack of housing, the public might expect the Commission to press Government for delivery.¹⁰⁰ Furthermore, the SAHRC’s marketing and “brand creation” might be in part responsible for creating the impression that the Commission deals with all possible aspects of human rights, as it comments on “anything and everything” in the media.¹⁰¹

As the Commission said in its submission to the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions: “unpacking what an ‘institution supporting constitutional democracy’ means requires some thought”.¹⁰² The Commission has interpreted this as

*a role that is located within an understanding of the political, social and economic context, incorporating a watchdog role but also a supportive role working with Government and civil society and interpreting the constitutional and legal mandate in a manner that is responsive to the social, political and economic reality.*¹⁰³

.....
97 Interview with Commissioner Leon Wessels.
98 Ibid.
99 Sowetan. 2002. “Watchdogs, take on Govt – Maduna”. *Sowetan*, 15 October 2002.
100 Interview with Commissioner Leon Wessels.
101 Interview with former staff member, Sello Hatang, HoP ICP.
102 SAHRC. 2007a. *South African Human Rights Commission (Report). Review of Chapter 9 and associated institutions. Response to questionnaire*, p. 5.
103 Ibid p. 5-6.

2.3.2 Broadening the mandate – the introduction of PAIA and PEPUDA

In addition to the functions and powers set out in the 1996 Constitution and the HRC Act, the mandate of the Commission has subsequently been extended twice through national legislation. The first of these is the Promotion of Access to Information Act, 2 of 2000 (PAIA), which gives effect to s 32 (2) of the Constitution.¹⁰⁴ Section 83 of PAIA stipulates that, apart from a host of discretionary functions, the Commission must perform such functions as compiling a guide on the use of the Act; include in its annual reports detailed information in relation to each public body on the implementation of PAIA, such as the number of requests for access to information received, granted, and so forth (s 32 of the Act requires all public bodies to submit a report annually to the SAHRC with this information); and run educational programmes to enhance the understanding of the Act. Sections 14 and 51 of PAIA require public and private bodies respectively, on an annual basis,¹⁰⁵ to provide the Commission with manuals acting as a guide to the nature of the bodies, records kept by them and how to access them.¹⁰⁶ The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) places duties on the Commission to promote the achievement of equality.¹⁰⁷ Furthermore, s 25 (2) provides that the SAHRC may “request any other component falling within the definition of the State or any other person to supply information on any measures relating to the achievement of equality”, and s 28 (2) stipulates that the Commission must assess the “extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the problems”.¹⁰⁸

As can be appreciated from this brief description of the PAIA and PEPUDA mandate, these provisions add significantly to the workload of the Commission. Although the SAHRC was consulted in the early stages of the drafting of these laws,¹⁰⁹ the concern of “dumping on the Commission”¹¹⁰ seemed to have been present at the time. A similar concern was expressed in the reflections of some of those interviewed for the report, who felt that Parliament did not sufficiently understand what the implications of the additional work were for the Commission.¹¹¹ There was some suggestion at the time that the budget would be increased or that, as far as PAIA was concerned, costs could be defrayed by Government,

*but no one worked out exactly how that was going to work...would we be sending a bill every year to Parliament to say this is what it cost us...from Government's side the thinking seemed to have been that as long as you increase the Commission's budget incrementally over the years, it will be fine.*¹¹²

This lack of resources and inadequacies in the legislation itself have led to a number of challenges in implementing the PAIA mandate. During the inquiry of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, it was also mentioned that the PAIA mandate was not being implemented sufficiently, and the Commission was for the first time engaged at some length and depth about why that is – an interaction which it welcomed.¹¹³ A great concern is the resources that the SAHRC has available to dedicate to the discharging of the PAIA mandate. To give an indication of the workload involved in just addressing s 51 requirements – close to the deadline of private bodies submitting s 51 manuals on 1 September 2005, the Commission “began to receive tens of thousands of manuals”¹¹⁴ which had to be catalogued. Although the Commission’s budgetary allocation from Government has been increased incrementally, no additional resources have been received from Government to discharge this mandate. However, the

104 SAHRC. 2006d. *Annual Report, April 2005 - March 2006*, p. 5-6.

105 For example, s 14 (2) of PAIA states: “A public body must, if necessary, update and publish its manual referred to in subsection (1) at intervals of not more than one year.”

106 Section 83 (3) (g) of PAIA provides that the SAHRC may consult with others on matters relating to the functions of the Commission in relation to PAIA. In line with this provision and s 83 (3) (a) (i), which provides that the SAHRC may make recommendations to Parliament on the improvement, modernisation, development or amendment of PAIA; the Commission hosted a workshop on PAIA in 2003. (See SAHRC. 2003c. *Report on the Proceedings of the PAIA Indaba, 22 and 23 May 2003*).

107 SAHRC. 2006d. *Annual Report, April 2005 - March 2006*, p. 5-6.

108 Note that s 28 has not come into effect yet.

109 Commissioner Wessels was asked to make representations on PAIA on behalf of the Commission, and PEPUDA was drafted by a research unit sponsored by the Department of Justice and Constitutional Development, the researchers of which initially worked from the Commission’s offices.

110 Interview with Commissioner Karthy Govender.

111 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with Commissioner Leon Wessels.

112 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

113 Interview with Commissioner Leon Wessels.

114 SAHRC 2006d p.83-84.

question must also be asked why, as s 85 of PAIA provides for the defraying of costs by Parliament, the Commission has never put in such a request. PAIA is also flawed in that there is no Information Commissioner,¹¹⁵ a recommendation also put forward by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions. Currently, people have to approach the courts to get information matters resolved while an Information Commissioner could make recommendations to public bodies to release information, which would be in line with international best practice.¹¹⁶ Furthermore, decisions to disclose information are complex, and it is important to have people who are able to exercise the necessary judicial discretion.¹¹⁷ But there is also an opinion within the Commission that there is reluctance from Government for political reasons to make PAIA more effective. As one respondent explained: "It's a piece of legislation that doesn't give you power, it constrains the exercise of power, so it is not likely that they will say let's make it easier for people to get the information"; furthermore, Government might view (not necessarily for nefarious purposes)

having to deal with all these requests for information as a distraction from their work, and we [the SAHRC] see it in a broader sense as acting transparently and moving towards the values of the Constitution... Finding a veer medium between the two is critical.¹¹⁸

PEPUDA seems to be an example of legislation that is essential while at the same time being aspirational, as the Commission has not been empowered to give effect to the whole of the mandate assigned to it.¹¹⁹ This is because s 28 of the Act, which requires the Commission to produce reports on unfair discrimination on the basis of race, gender and disability, has not come into effect yet. The Commission still gives effect to the monitoring part of the mandate in relation to PEPUDA through monitoring of the equality courts, and furthermore included a section on equality in the Human Rights Development Report.¹²⁰ Even if s 28 does come into effect, the requirement to write a report on unfair gender discrimination might be potentially contentious, as this would overlap strongly with the

115 Interview with Commissioner Karthy Govender.

116 Interview with former staff member, Sello Hatang, HoP ICP.

117 Interview with Commissioner Karthy Govender.

118 Ibid.

119 Interview with staff member, Christine Jesseman, HoP RDP.

120 Ibid. See SAHRC. 2008d. *Human Rights Development Report*.

mandate of the Commission for Gender Equality (CGE).¹²¹ The reason that Government has given for the delay in announcing a commencement date for s 28 is that it still has to do the costing for the promotional section of the Act,¹²² this, despite the fact that the Act was assented to in 2000 and the date of commencement was 16 June 2003. Although the Commission has raised this issue in Parliament on numerous occasions, it has perhaps not fought hard enough for this by, for example, putting Government on terms and litigating.¹²³

2.3.3 Interpreting the mandate – some achievements and challenges

Having a wide mandate was understandable both politically and in terms of the broad purpose of the Commission...The width of its mandate corresponded to the broader socio-economic, political challenges we faced in the society. On one level it was positive, but on the other hand...I'm not sure how much thought was given to what precisely this institution would do in relation to other institutions. On the one hand its mandate was wide enough to cover everybody else...but on the other hand, was its mandate a residual one – that it would do what everybody else couldn't do plus what you gave it specifically?¹²⁴

In many ways, the above statement points to some of the major challenges that the SAHRC has had to grapple with in terms of interpreting its mandate, and that this section will discuss. These include coming to terms with the broadness of the mandate, finding the balance between being reactive and proactive, discharging the mandate with limited resources, and finding its niche in relation to other Chapter 9 institutions.

The broadness of the mandate

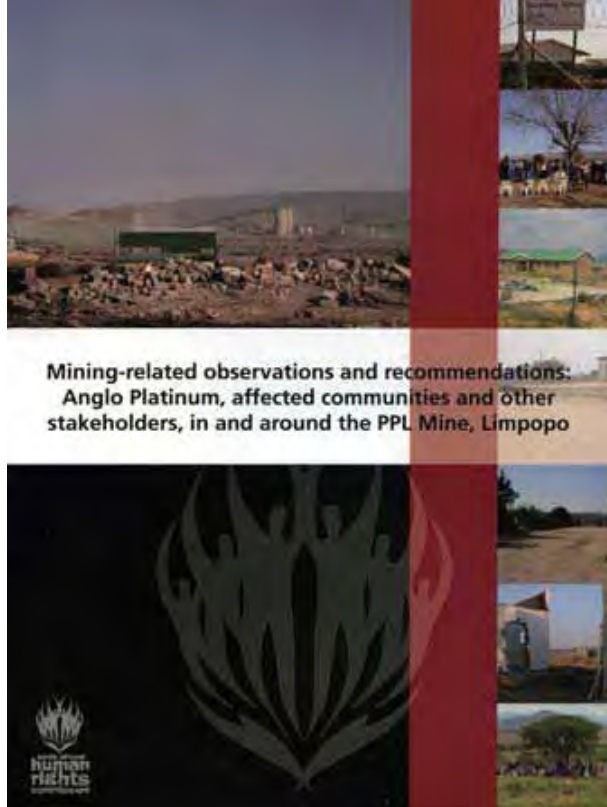
A notable feature at the time of the Commission's inception was, firstly, the inclusion of the realisation of socio-economic rights in the 1996 Constitution and, secondly, the monitoring

121 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

122 Ibid.

123 Ibid.

124 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.



The first major report on business and human rights launched by the Commission in 2008.

of Government's realisation of these rights in the mandate of the Commission.¹²⁵ The inclusion of these rights seemed crucial at the time, as "South Africa cannot have a Human Rights Commission as if nothing went before democracy";¹²⁶ in other words, it was necessary to acknowledge the social and economic disparities created during apartheid. The Commission is seen as one of the tools in the realisation of these rights.¹²⁷

But the monitoring of socio-economic rights is only one aspect of the Commission's mandate. Although there seems to be agreement amongst those interviewed that the mandate is clearly set out in the legislation, and that the mandate is very broad, there seems to be less consensus about the merits of having such a broad mandate. The broadness of the mandate

125 Interview with Commissioner Leon Wessels.
 126 Ibid.
 127 Ibid.

has given rise to a number of challenges of interpretation that this section will briefly highlight. Furthermore, it is necessary to ask to what extent the Commission has been responsible for broadening its own mandate, for example through its focus on environmental rights, and human rights and business.¹²⁸ The context within which the Commission operates therefore requires it to broaden its mandate, but it needs to be asked whether the Commission thinks through these expansions carefully enough.¹²⁹

While some within the SAHRC feel that the mandate is "too broad,"¹³⁰ there is also the acknowledgement that the broadness of the mandate is almost inevitable, as the mandate is "premised on...us coming from a very turbulent history... therefore we inherited very complex sets of problems";¹³¹ Similarly, there is the acknowledgement that it is "imperative"¹³² that the mandate be broad, and that the mandate is necessarily broad because it is determined by the Bill of Rights.¹³³ A motivating factor for having such a broad mandate is that

*You don't want a Human Rights Commission to be having debates on whether it has the mandate to deal with a complaint or inquiry, but you really want to move on to whether there has been a violation of a right...else you are replicating a court too much.*¹³⁴

From an international perspective, the Paris Principles also speak of the necessity of NHRIs having broad mandates.¹³⁵ However, one respondent was of the opinion that one of the challenges of a broad mandate is that there is "no specialisation. We are jacks of all trades and the danger is that we might end up not having mastered anything".¹³⁶

For the SAHRC, it seems that it might be less a question of the broadness of the mandate, and more a question of how the Commission prioritises and thinks strategically within this

128 Meeting with Commissioners 23 March 2009.
 129 Ibid.
 130 Interview with Commissioners Tom Manthata and Zonke Majodina.
 131 Interview with Commissioner Zonke Majodina.
 132 Interview with Commissioner Karthy Govender.
 133 Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001.
 134 Interview with Commissioner Karthy Govender.
 135 Paris Principles, Annex s 2.
 136 Interview with staff member.

framework.¹³⁷ This sentiment was expressed by a respondent who was of the opinion that the parameters of what the SAHRC would and would not do, within its available budget and with accompanying time frames, was not clearly set out in the beginning; instead, the Commission keeps taking on more work that is beyond its carrying capacity, to its own detriment.¹³⁸

It was therefore in part a combination of the broadness of the mandate and the difficulty in saying 'no' that meant that the Commission was often "here, there and everywhere...you almost couldn't stay ahead of the running".¹³⁹ The Commission has found it extremely difficult to say 'no'. It even remains a question within the Commission whether it can in fact say 'no' and not take on certain work or complaints; as one respondent stated:

People say you also have to look at the humanitarian issues. At the end of the day we are also partly a public institution, but on the other hand, for example at Home Affairs they do have their daily targets and if you're not within the quota then you have to come back the next day...[but] for some reason we haven't learnt that yet, we've just been the human rights commission, the last resort.¹⁴⁰

But perhaps it is almost inevitable that there will be tension between what the Commission does and does not do,¹⁴¹ because outsiders also have different opinions on what the Commission should be focusing on. For example, when the Commission was focusing on the human rights of prisoners there was an "outcry", with people accusing the Commission of

thinking that the rights of prisoners are of greater importance than those of other South Africans.¹⁴² What is perhaps necessary is the need for more strategic thinking and prioritising – for example, in terms of litigation, not turning away complaints, but basing decisions to litigate on the Commission's own focus and priorities.¹⁴³ Furthermore, the Commission could perhaps comment more broadly on human rights issues, but limit what it does operationally.¹⁴⁴ During its first term, one of the ways in which it managed the broadness of the mandate was to have specialist Commissioners, who were able to address particular issues and pay attention to their specialist areas and how the Commission should respond.¹⁴⁵ This was possible because, at the time, the Commission had eleven Commissioners.¹⁴⁶ This has proved much more difficult during the second term, however, because of the substantial reduction in the number of Commissioners. In this sense, the second term of the Commission was "not a normal term", and from the time of the appointment of only six Commissioners "we were grappling to make ends meet – this was the hallmark of this [the second] term".¹⁴⁷

It seems possible that the mandate of the Commission might expand even further. There is the opinion that "an area of our mandate which probably was not reckoned upon, which is going to become quite important, is the whole issue of enforcing structural interdicts".¹⁴⁸ This is, for example, where a court not just says that a government department's policy is inconsistent with the Constitution, but orders what has to be done over a specific time, with a requirement that the department reports back. It is possible that the courts might wish for greater involvement from the Commission in overseeing such implementation as part of its monitoring mandate, and it is "critical that we are able to perform it... [and] that the Commission should ask for costs orders".¹⁴⁹

.....
137 A related question is whether the Commission is enabled to give effect to its mandate in terms of financial resources and staff. This question will receive greater attention later in this chapter, as well as in Chapter 4 of the report.

138 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

139 Interview with Commissioner Leon Wessels.

140 Interview with staff member, Danaline Franzman, HoP Legal Services Programme (LSP). A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the broadness of the Commission's mandate and how the Commission decides what its strategic thrust is. The question was raised whether the Commission does in fact have the luxury to identify a few strategic areas of focus. This was seen as a very challenging issue, taking into consideration all the different demands on the Commission. While on the one hand it is necessary to have a component that reacts to the demands made on the Commission, it is also necessary to keep the context and focus areas of poverty, equality and racism in mind and ask how the Commission can best use its powers to address such issues.

141 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

.....
142 Ibid.

143 Interview with Commissioner Karthy Govender.

144 Meeting with Commissioners 23 March 2009.

145 Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001. The Commissioners' specialist areas are discussed in greater detail in Chapter 4.

146 Ibid.

147 Interview with Commissioner Leon Wessels.

148 Interview with Commissioner Karthy Govender.

149 Ibid. By costs orders is meant that if, for example, a government department's policies are inconsistent with the Constitution, and the Commission has to oversee the implementation of a structural interdict, part of the punitive measures for the department could be the payment of the Commission's costs of overseeing this process. (Interview with Commissioner Karthy Govender)

In terms of the interpretation of the Commission's broad mandate, one respondent expressed the concern to what extent the interpretation of the mandate addresses issues of poverty

I have had a problem with a Commission who says that it is not there to do things but to get the people to perform. As far as poverty is concerned...we haven't suggested to people what it is they can do to address issues of poverty, because some people believe that when you suggest to people what to do it is as good as you doing it, and we are not a 'doing' organisation. This makes me uneasy...What does that contribute to alleviating poverty?¹⁵⁰

Perhaps this relates to how the Commission sees its work as similar to or different from that of Government and civil society organisations, and to how the Commission makes the link between its mandate and addressing poverty.

One of the ways of perhaps having a narrower focus is to be clear, at the beginning of a term, about what the Commission is not willing to do – such as dealing with complaints from prisoners and police – and then be disciplined enough to keep to these decisions.¹⁵¹

Proactive vs reactive: finding the balance

An overwhelming opinion amongst those interviewed for this chapter of the report was that the Commission has been very reactive in how it approaches its work. But despite this consensus, there are differences of opinion about the merits of being reactive and how to strike the balance between being reactive and proactive. It is possible that this might be a simplistic characterisation of one dimension of the SAHRC's work, as almost every issue that the Commission is involved in originates from some ill within society and is therefore to some extent reactive.¹⁵² It is also difficult to say at an abstract level whether the Commission should be reactive or proactive.¹⁵³

150 Interview with Commissioner Tom Manthata.

151 Meeting with Commissioners 23 March 2009. Complaints by prisoners are referred to either the Legal Aid Board or the Judicial Inspectorate, while complaints against the police are referred to the Independent Complaints Directorate.

152 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

153 Interview with Commissioner Karthy Govender.

However, the proactive/reactive debate points to a number of aspects regarding how the Commission approaches its work and the societal context within which it operates, as "other NHRIs might not be as reactive as us because other societies aren't as volatile as ours".¹⁵⁴

In the period after the establishment of the Commission, the approach was initially proactive, as the Commission at that time did not have a great influx of complaints.¹⁵⁵ However, although the "first set of Commissioners said that the agenda of the Human Rights Commission was never going to be complaints-driven, the basis for the subsequent focus on racism was systemic complaints".¹⁵⁶ During the second term, "we also said we don't want to be determined and defined by complaints", but a number of the public inquiries held were in fact complaints-driven; for example, the farming and health inquiries were all complaints that became systemic.¹⁵⁷ In one respondent's opinion, the

biggest mistake the first group made was to position themselves as an organisation whose agenda was not going to be complaints-driven. It's been one of the successes – people call you because they know you will attend to it.¹⁵⁸

The result of all this has been that the Commission perhaps has not sufficiently acknowledged how important complaints and lawyers are in the Commission.¹⁵⁹

During its second term, the Commission has still been very reactive.¹⁶⁰ However, although the general view amongst those interviewed for this chapter was that the Commission's work should have a proactive dimension to it, it need not necessarily be of equal weight.¹⁶¹ The Commission's need to have a reactive capacity is implicit in its mandate, for example with regard to providing redress and handling complaints.¹⁶²

154 Interview with Commissioner Leon Wessels.

155 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

156 Interview with Commissioner Leon Wessels.

157 Ibid.

158 Ibid.

159 Ibid.

160 Ibid.

161 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

162 Ibid.

Although there are opportunities to be more proactive, such as during the 2009 cholera outbreak in South Africa's northern provinces, these opportunities are not sufficiently made use of.¹⁶³ This might be because the risks are greater when taking a proactive approach, as one has to innovate and there is no set procedure to follow.¹⁶⁴ Being more proactive would not only involve saying 'no' to certain things to free up space and time; it would also require a mindset change.¹⁶⁵ A proactive approach is risky, because "how do you justify what you are looking at?"¹⁶⁶ Furthermore, it is possible to have both a reactive and a proactive response to the same incident. For example, the Commission's initial response to the 2008 racist attack in Skielik¹⁶⁷ was reactive, but it has also compiled a socio-economic report on the conditions in the area that can be used in monitoring developments there and in the process of reflecting on events that took place there.¹⁶⁸ Being proactive is not necessarily restricted to questions of discharging the mandate, but could also apply to other aspects of the Commission's work. For example, in its relationships with external stakeholders it could approach stakeholders on potential projects and interventions, without waiting to be approached by them.

Having a proactive element to the Commission's work is of importance, considering that reactivity assumes that members of the public are able to access the Commission's services. The Commission "doesn't have the same legal and constitutional pressure as a court to be reactive",¹⁶⁹ and this gives the Commission the flexibility to say, we see a potential conflict in an area and want to resolve it.¹⁷⁰

The reactive/proactive debate seems equally relevant at a programme level, and the programmes address this differently, for example, in the Research, Documentation and Policy Analysis Programme (RDP), the economic and social rights reports are largely proactive, and each of the different portfolios has identified only two to five key issues to focus on in order to leave time and space to be able to respond to

unplanned events as they occur.¹⁷¹ The Education and Training Programme (ETP) equally struggles with finding a balance between being proactive and reactive, because of the high number of training requests it receives and that are acceded to without due consideration being given to the implications for plans that have already been drawn up.¹⁷² In the view of the Legal Services Programme (LSP), being reactive is "not a bad thing".¹⁷³ In fact, "if there were no complaints you could ask if there is a need for the Commission".¹⁷⁴ Nevertheless, there is some room for a more proactive approach in the LSP, for example, "strategically focusing on certain cases that are in line with the Human Rights Commission's own objectives of poverty and equality".¹⁷⁵ The proactive/reactive balance therefore seems difficult to find, because in many respects the Commission "doesn't determine the events, but we are defined by the events".¹⁷⁶

This raises the question of what extent the Commission is able to plan to, or make provision for unforeseen events in its planning for the year. One respondent was of the opinion that

*a weakness of the Commission has been to plan for the unplanned, and to put together a plan that makes provision for both the proactive and the reactive. Over the years we [the SAHRC] had patterns of unplanned activities which could be used to anticipate what might happen.*¹⁷⁷

Funding

An issue that is related to the broadness of the mandate and the setting of priorities is whether the SAHRC is enabled, through the financial resources that it receives, to discharge its mandate effectively. There is a constant tension between the Commission's obligation to do everything, but within limited resources.¹⁷⁸ Effectively discharging the mandate is therefore

163 Ibid.

164 Ibid.

165 Ibid.

166 Interview with staff member, Danaline Franzman, HoP LSP.

167 For details of the incident, see, for example, Groenewald, Y., Donnelly, L. 2008. "Sudden death in Skielik" *Mail and Guardian*. 18 January 2008.

168 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

169 Interview with Commissioner Karthy Govender.

170 Ibid.

171 Interview with staff member, Christine Jesseman, HoP RDP.

172 Interview with staff member, Victoria Maloka, HoP Education and Training Programme (ETP).

173 Interview with staff member, Danaline Franzman, HoP LSP.

174 Ibid.

175 Ibid.

176 Interview with Commissioner Leon Wessels.

177 Interview with former staff member, André Keet, Deputy Chief Executive Officer (DCEO).

178 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

“not just about technical legislation, but how you interpret that and whether you are empowered to act.”¹⁷⁹

While taking cognisance of the budgetary increases since the establishment of the Commission,¹⁸⁰ there are many within the Commission who feel that, considering the extent of its mandate and how the mandate and staff complement have grown, the Commission is underfunded, yet delivers output far beyond the resources it receives. A respondent commented as follows: “If you look at NHRIs in Africa, we are well funded. But if you look at the sophistication of our legislation and the Constitution, and compare it with...Australia, then we are very poorly funded”¹⁸¹ There is also the sense that, compared to the mandates of and money received by other Chapter 9 institutions, the Commission is underfunded. Asked why the Commission receives less money than others and whether this was a political decision, one respondent replied:

*Of course. The IEC has a separate budget in the Department of Home Affairs. But this doesn't explain the Public Protector that was also based in the Justice Department. The mechanism for funding the HRC and the CGE was flawed in terms of its independence. Government thought they could have a reputable human rights institution on the cheap. The Human Rights Commission is very dependent on the Minister of Justice and their commitment to the Commission.*¹⁸²

On a practical level, inadequate funding requires strategic thinking about priorities. In terms of identifying additional money, the Commission seems to have three options, each of which has different advantages, disadvantages, implications, and possibilities of success. Although the Commission has “tried lobbying,”¹⁸³ a first option would be to more actively pursue this route. One respondent felt that “we have not been as vocal as we should about not receiving adequate funding... [but] Government made it clear that there are other competing

priorities. Human rights are seen as luxuries,”¹⁸⁴ because other more urgent priorities exist. In this instance it would also help to “have a champion in cabinet to fight [in] our corner.”¹⁸⁵ A different option would be to consider the possibility of taking Government to court, but as one respondent said: “The courts are very reluctant though to say to Government that they have sliced their cake incorrectly.”¹⁸⁶ A third option would be to raise additional money outside of that received from Government; however, this might not sit well with Government, as they might be concerned about possible influence on the Commission’s independence.¹⁸⁷

The relationship between the SAHRC and other Chapter 9 institutions

A further challenge that the SAHRC faces in the interpretation of its mandate is the extent of overlap in jurisdictions between the Commission and other Chapter 9 institutions. A respondent commented as follows on the possible origin and consequences of this overlap:

*The mistake of the enthusiasm of the new South Africa was to create too many institutions that are doing the same or similar things...It is a recipe for overlapping of jurisdictions. So, for me the issue wasn't so much the broadness of the mandate, but what was intended to be specialisations; in reality, the Human Rights Commission had the right to do everything.*¹⁸⁸

Where other Chapter 9 institutions have very specific mandates, the SAHRC’s is very broad. This again relates to the problem of the amount of thought that went into the working of these institutions before they were established,

or was the thinking also that if any of the other Commissions don't work, you would still have this Commission [the SAHRC]? I'm not sure how much

179 Interview with staff member, Christine Jesseman, HoP RDP.

180 See footnote 73.

181 Interview with staff member, Christine Jesseman, HoP RDP.

182 Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001. Also see Chapter 3 for a discussion of the Commission’s relationship with Government.

183 Interview with Commissioner Karthy Govender.

184 Interview with former staff member, Sello Hatang, HoP ICP.

185 Interview with Commissioner Karthy Govender.

186 Ibid.

187 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002. See Chapter 3 of this report for the Commission’s relationship with donors and further discussion of whether, and how, it should more actively pursue donor funding, and examples of donor funding that the Commission has received.

188 Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001.

*thought was given to whether you would want a model that would work at the best and at the worst of times...this is still a significant problem in terms of how we see our mandate – there are still a lot of grey areas.*¹⁸⁹

The overlap in jurisdictions might also point to a “mixed political and human rights agenda” when these institutions were established, for example, during the constitutional negotiations there was a particularly strong gender lobby, while the setting up of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) was mostly an appeasement of the Afrikaner community.¹⁹⁰ Now, each of these organisations reports on its successes and has to justify its existence in order to get additional resources, while if these institutions worked well together it would strengthen the case for consolidating them¹⁹¹ – a suggestion put forward by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions. This is an idea that the SAHRC supports, as it “makes sense to have a much more coordinated response”,¹⁹² but some Chapter 9 institutions have opposed it.¹⁹³

Attempts were made to have regular meetings between the Commission and other Chapter 9 institutions through a forum for Chapter 9s,¹⁹⁴ but partnerships between the institutions seem to have been sporadic and unsystematic. On both strategic and operational levels, work across the different Chapter 9 institutions is not always “smooth-going”, as there are “structural and political issues...[and]...the processes in the different organisations make it difficult to work together”.¹⁹⁵

.....
189 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

190 Ibid.

191 Ibid.

192 Interview with Commissioner Karthy Govender.

193 See, for example, “Do or die for Chapter 9 Institutions” (www.ngopulse.org/article/do-or-die-chapter-9-institutions), that reports on a conference held in June 2008 by the Human Rights Institute of South Africa (HURISA) in collaboration with the Open Society Foundation of South Africa (OSF-SA), and the Konrad Adenauer Stiftung on the future of Chapter 9 institutions.

194 In the SAHRC’s submission to the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, it noted that “The heads of Chapter 9 institutions (SAHRC, CRL Rights Commission, IEC, Public Protector and CGE) meet on a quarterly basis to look at their various activities, discuss political issues that affect them, conditions of service and the co-ordination of joint events.” (SAHRC 2007a p.28)

195 Interview with staff member, Danaline Franzman, HoP LSP.

Since the establishment of these institutions there has been referral of work among the institutions.¹⁹⁶ Other efforts to collaborate across the different Chapter 9s have included stakeholder meetings during the 2008 xenophobic attacks¹⁹⁷ and joint training initiatives at a provincial level by some of the Chapter 9 institutions, when the SAHRC, the CGE and the Office of the Public Protector (OPP) realised they were independently presenting the same sort of workshops to communities, and communities were having difficulty distinguishing between them.¹⁹⁸ Attempts have been made to draw up more formal Memoranda of Understanding (MoUs), such as during the 2008 xenophobic attacks, but these were never finalised.¹⁹⁹ The most concerted effort at working together has probably been through the Civil Society Advocacy Programme (CSAP), which was an EU-funded initiative

*to facilitate the interaction between Chapter 9 institutions (especially the Commission for Gender Equality (CGE), the Office of the Public Protector (OPP) and the South African Human Rights Commission (SAHRC)) and civil society in order for communities to effectively claim and access their constitutional, democratic and socioeconomic rights, contributing towards more effective governance, reduction of poverty and improved living conditions for targeted communities.*²⁰⁰

However, how effective this programme was is still unclear, and it came to an abrupt halt in 2008 as a result of financial and administrative challenges.²⁰¹ The Commission also provides a supporting role to other Chapter 9 institutions such as the Independence Electoral Commission (IEC) by including voter education in its basic human rights education²⁰² and by

.....
196 For example, during the first term “there was an understanding that gender rights are human rights and this did at times cause a bit of tension, although there were referrals between the SAHRC and the CGE.” Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

197 SAHRC. 2007b. *Submission to the Justice Portfolio Committee* in response to the Committee’s report on the SAHRC’s 2006/07 annual report, p. 6.

198 Interview with staff member, Victoria Maloka, HoP ETP.

199 An example of an MoU between Chapter 9s that has been formalised is the Northern Cape Chapter 9 Institutions and Associates Forum where the institutions, although having worked together for a number of years, have entered into a Memorandum of Understanding (MoU) as to the support that they need to afford each other. (Communication with staff member)

200 www.csap.co.za

201 The CSAP initiative will be discussed in greater detail in Chapter 3 of the report.

202 Interview with staff member, Victoria Maloka, HoP ETP.

Commissioner Karthy Govender
of the SAHRC and the CEO of the
IEC, Adv. Pansy Tlakula.



assisting with investigations into human rights abuses during the election period, especially before the IEC's powers come into force when an election date is yet to be announced.²⁰³ More recent meetings between the Chapter 9 institutions have taken place this year, with aspects such as the report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, and the proposal of a new unit for Chapter 9 institutions in the Speaker's office being discussed.²⁰⁴

The optimal functioning of all Chapter 9 institutions is in the SAHRC's best interests. On one hand, there clearly exists 'forum uncertainty' or 'forum ignorance', as the public seems unsure which institution to approach and the Commission refers many enquiries and complaints elsewhere.²⁰⁵ But on the other hand, a certain amount of 'forum-shopping' exists, where complainants approach the Commission "about issues that we technically shouldn't be dealing with"²⁰⁶ because they see the SAHRC as a "Commission of last resort"²⁰⁷ or where their complaint will be most efficiently attended to.²⁰⁸ Therefore, if the different Chapter 9 institutions were to function efficiently, it would have a number of advantages, such as greater clarity amongst the public in terms of which institution to approach, less forum-shopping, less of a need to refer matters back to other institutions, and greater cooperation between the different institutions as there wouldn't be the impression that

the SAHRC is dominant and gets all the "mileage" from potential cooperation.²⁰⁹

2.3.4 Thinking strategically: reflections on the Commission's priorities during the 2nd term

Following on from discussions of the broadness of the mandate and the financial constraints within which the Commission operates, this section will focus on whether and how the SAHRC is able to follow a strategic approach in its work. It will do so by answering three interrelated questions: What were the Commission's priorities during its first term? How were these similar to or different from the priorities of the second term? How does the Commission choose its priorities, and what influences these choices?

During the first term, coming from the country's apartheid history, the Commission wanted to address as many issues as it could.²¹⁰ The Commission held a large workshop or strategic planning session in May 1997 to discuss the future work of the Commission and how it could best discharge its mandate.²¹¹ "Buzzwords like equality, dignity and transformation"²¹² influenced the discussions in those early years. However, the focus gradually shifted towards racism, because the number of complaints received indicated that it was a systemic problem;²¹³

.....

203 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 – September 2009.

204 Agenda, Chapter 9 institutions forum meeting, 13 May 2009.

205 Interview with staff member, Danaline Franzman, HoP LSP.

206 Interview with Commissioner Leon Wessels.

207 Interview with former staff member, Sello Hatang, HoP ICP.

208 However, operational problems at other Chapter 9 institutions is not a good enough reason for the Commission to deal with a case. (Meeting with Commissioners 23 March 2009)

.....

209 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

210 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

211 Interview with Commissioner Leon Wessels.

212 Ibid.

213 Ibid.

and “the issue of racism took centre stage, as the need to address the past imbalances and the need for transformation was very strongly felt.”²¹⁴ Not everyone agreed with this focus:

*People were asking why racism was so important if people had gone through democracy. We can never as a country say [that] racism disappeared with the dawn of democracy. Some people felt there were issues that were more important than racism.*²¹⁵

At the start of the second term, in 2002, the Commission invited external stakeholders to its strategic planning session and had an open, participatory meeting²¹⁶ about the strategic direction that the SAHRC should take.²¹⁷ At that stage, the theme of inequality was persistent in the Commission’s work, and work around socio-economic rights had always been seen as significant.²¹⁸ Poverty and equality therefore became the strategic focus of the Commission’s second term. This focus might therefore not have been a “total realignment”²¹⁹ but perhaps more a “sharpening” of what was already there.²²⁰ At the time, “poverty and equality was a fantastic focus. Involvement could then be decided by the Human Rights Commission, because you could ask whether the Commission’s core business was at stake.”²²¹ However, “we may now, in retrospect, say that it’s still too broad; but at that time it sounded smart from where we had come. Part of the problem was that we were never able to translate that into action”²²² One respondent felt that this focus on poverty and equality was not coming through in later strategic plans, such as the 2009 strategic planning session, which made mention of seven priority areas and held that it is “better to grade the seven priority areas, rather than focus on all”²²³ However, “equality is bigger than racism”²²⁴ which was the focus of the first term. Part of developing a strategic focus

.....
214 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

215 Ibid.

216 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

217 Despite the importance of this meeting, the documents of the meeting are missing.

218 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

219 Ibid.

220 Ibid.

221 Interview with Commissioner Leon Wessels.

222 Ibid.

223 Interview with former staff member, Sello Hatang, HoP ICP.

224 Interview with Commissioner Leon Wessels.

involves “knowing your sector well...each portfolio [in RDP] knows what it’s doing, how it fits in with other programmes, and how that helps the Commission carry out its mandate.”²²⁵

The SAHRC seems to approach some of its strategic thinking from a very quantitative perspective, for example setting out the number of interventions that it would like to achieve, but not stipulating the content;²²⁶ and one respondent was of the opinion that this might be a result of “performance assessments that were quantitative”²²⁷ in nature. Perhaps “chasing numbers”²²⁸ is also indirectly a result of the “government [compliance] framework”²²⁹ which requires very quantitative reporting. This mindset might furthermore be attributed to the numbers-driven approach taken at national level to, for example, the delivery of housing.²³⁰ Such a focus on quantity can easily lead to quality being compromised.²³¹ One respondent described this as the “knee-jerk nature of the Commission”²³² since its inception – not taking time out to think and carefully, strategically plan the work that the Commission must do; seeking quantitative outputs; and then outperforming itself. Instead, the focus should now be on the “sustainability” of the Commission.²³³

Considering the broadness of the SAHRC’s mandate, it is imperative that it is able to focus strategically, as one respondent explained:

In my view, the Commission has a mandate which can be quite overwhelming. It is therefore quite critical that it looks at the mandate from a strategic perspective, as it cannot do everything and do it well. It also occupies a special space and should therefore see its role as being different from that of Government and civil society organisations. The crucial question is how the Commission makes the link between its mandate and addressing poverty, given its specific mandate in terms of section 184 on socio-economic

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225 Interview with staff member, Christine Jesseman, HoP RDP.

226 This observation was tested with respondents in a number of interviews, and respondents offered some explanations for why this appears to be the case. See also the following section on the SAHRC’s ability to assess performance.

227 Interview with staff member, Christine Jesseman, HoP RDP.

228 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

229 Ibid.

230 Ibid.

231 Ibid.

232 Ibid.

233 Ibid.

rights, which is core to dealing with poverty and inequality. In fact, to date, the Commission has not in all the years of its existence used its powers in terms of section 184 (2) (b) in cases where organs of state have violated their obligations to 'take progressive steps,' or where organs have failed to provide information in terms of sub-section 3.²³⁴

The above discussion raises a number of issues regarding the SAHRC's ability to focus its work strategically: Is its strategic focus still too broad and unfocused? Are the Commission staff clear enough on how to hone in, on a practical level, on work within the strategic focus? When the strategic vision is translated into operational plans, does the focus on quantity and numbers take over? To what extent is the core vision communicated to new staff members and entrenched in the way the Commission approaches its work?²³⁵ To what extent are Commission staff enabled and equipped, after strategic planning sessions, to stay focused on the priorities set, considering all the external demands that the Commission is faced with? In the past, the Commission has relied quite a lot on "instinct and gut feeling", and although, "in hindsight, this was correct", it is not enough to provide organisational clarity; it is necessary to spell things out more clearly.²³⁶

2.3.5 Being specific and measuring performance

Related to the above discussion is the question of whether the SAHRC sets up measureable objectives and outputs to attain. Furthermore, does the Commission have clear indicators according to which it measures performance? These questions are central to the Commission's ability to evaluate its own work on a regular basis and realign priorities accordingly.

Although the SAHRC is able in its annual reports to account for what its objectives were and what outputs it has achieved, it again appears to be more a question of setting out what the quantitative output will be, rather than the qualitative

content.²³⁷ In an attempt to improve its overall monitoring and evaluation, the Commission appointed a senior member of staff dedicated to this. However, this person resigned and the vacancy has not been filled again.²³⁸ The kind of measurement the SAHRC uses is therefore not sufficiently reliable either to tell you whether you have discharged the mandate.²³⁹ It is difficult to assess impact, as illustrated by the following hypothetical example: Two education officers apply for a salary increase. One argues that his interventions have been effective because complaints decreased, and the other argues that his education interventions have been effective because complaints increased.²⁴⁰ The link between some of the SAHRC's work and the concomitant impact thereof has therefore not been sufficiently made. An aspect of the Commission's work that is difficult to quantify, but that the Commission is very good at, is how it has taken the broad principles in the Constitution and begun to make them real. For example, the Roll Back Xenophobia Campaign put the human rights of non-nationals onto the agenda and in the process managed to unpack quite a vague principle of equality.²⁴¹ Another difficulty in planning is that

we've reacted often to pressures...this is a difficult country to operate in. We don't completely have the luxury of planning and executing things like you want to. You have to accept that the nature of the beast is such, but we could plan a bit better.²⁴²

The different programmes in the Commission find it difficult, to varying degrees, to measure impact. For example, it is more difficult in the RDP, although the programme will be producing more written output besides its advocacy focus.²⁴³ The ETP has quite a "narrow interpretation of monitoring,"²⁴⁴ as it evaluates at the end of the training workshops how the training was received, but not necessarily the impact the training has had on the community. In a bid to rectify some of these problems,

.....
234 Interview with Yasmin Sooka, Executive Director, Foundation for Human Rights (FHR).

235 At the pre-launch workshop on the report (held on 21 July 2009) it was mentioned how important it is to ensure that new staff are made aware of the vision and mission of the SAHRC during their induction.

236 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

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237 Interview with staff member, Victoria Maloka, HoP ETP.

238 Ibid. An attempt was made to further pursue monitoring through the CSAP project, but this yielded little result. The current position at the Commission is that each programme must do its own monitoring (comment by Tseliso Tseliso Thipanyane, CEO of the SAHRC, May 2006 - current).

239 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

240 Ibid.

241 Ibid.

242 Interview with Commissioner Karthy Govender.

243 Interview with staff member, Christine Jesseman, HoP RDP.

244 Interview with staff member, Victoria Maloka, HoP ETP.

the ETP two years ago implemented a strategy where it would 'adopt a community' for a month and do multiple interventions with different stakeholders.²⁴⁵ In addition, the ETP would train a core group of at least ten people from the community who would continue the SAHRC's work with their support. This initiative took off, "but because it required a bit of coordination, people started falling off".²⁴⁶ In LSP, there is "lots of room for improvement" in terms of monitoring and evaluation, for example, performance measurement in LSP's complaints handling is largely numbers-driven in terms of the complaints resolved or litigated, and does not reflect other success factors such as the number of people advised, or cases mediated or informally resolved.²⁴⁷

Furthermore, "although it is possible to put down measurables and to try and keep people to it", it is equally necessary to "ask for justifications" when people deviate from their plans, and although "the new Commissioners can try and set measurables, [they] will have to understand that you will be diverted from the course quite often".²⁴⁸

2.3.6 Looking outside South African borders – the SAHRC's international role

International developments, including those on the African continent, have seen a greater centrality of human rights in international and regional forums. At the same time there has been a steady growth of national human rights commissions. This has provided an opportunity for sharing experience and collaborating on joint concerns and interests, including the common challenges around advancing socio-economic rights, assuring accountability of state and non-state actors with regards to their human rights obligations, and dealing with the causes and consequences of phenomena such as migration and climate change.

The main question that this section will address is whether the SAHRC has a vision for its involvement in the global field of human rights, both on the African continent and beyond.

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245 Ibid.

246 Ibid.

247 Interview with staff member, Danaline Franzman, HoP LSP.

248 Interview with Commissioner Karthy Govender. A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the suggestion of a mid-term reflection on the Commission's strategic focus and the goals and objectives that had been set.

The Commission is "often surprised how well acknowledged it is overseas compared to the criticisms we get internally. It may be that other NHRIs suffer from the same problems and therefore have greater appreciation".²⁴⁹

The Commission is involved at a number of levels internationally. For example, it has observer status at the African Commission on Human and People's Rights and is a member of the African Secretariat.²⁵⁰ At an African level, the "Commission's involvement was supposed to develop around the Secretariat for NHRIs in Africa".²⁵¹ In fact, the Commission hosted the inaugural seat of the African Secretariat for three years during the second term, however, this was fraught with operational difficulties, such as support for it being directed through the SAHRC Chairperson's office, and the seat moved to Nairobi.²⁵² At the level of the UN, the SAHRC is a member of the International Coordinating Committee (ICC), and the Commission's Parliamentary and International Affairs Programme (PIAP) office in Cape Town monitors Government's compliance with international treaty bodies. The Commission seems to have been more successful at the level of the United Nations (UN) than at the African level.²⁵³ One of the reasons for this may be that the "international mechanisms are comparatively more developed" and the "mechanisms are...weak at the African level", possibly due to lack of political commitment.²⁵⁴ Appreciation has been expressed for the Commission's international and regional role; as one respondent noted:

*I've appreciated that role and hope we can keep it up and extend it across borders...I would like to see a lot of countries coming here [to SA and the Commission] where there is work to be done in terms of strengthening NHRIs...the Commission is seen as a great partner, and I hope they continue to play that leadership role globally.*²⁵⁵

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249 Ibid.

250 The Secretariat of the Network of African National Human Rights Institutions (NANHRI).

251 Interview with Commissioner Leon Wessels.

252 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

253 Interview with Commissioners Zonke Majodina and Karthy Govender.

254 Interview with staff member, Judith Cohen, HoP Parliamentary and International Affairs Programme (PIAP).

255 Interview with David A. Johnson, Regional Representative, Office of the High Commissioner for Human Rights (OHCHR), Pretoria.



The Commission regularly receives international visitors. SAHRC staff with a delegation from different North African countries.

But this strengthening of NHRIs and learning from one another should not just be confined to the regional block within which each operates; it should be across regions.²⁵⁶ A potential project that the Commission could also be involved in on a regional level, that has been talked about but has not really gone forward, is the establishment of a Southern African Development Community (SADC) body for NHRIs in southern Africa.²⁵⁷

There seems to be consensus amongst those interviewed for this chapter that the Commission should, in one way or another, be involved in the human rights discourse outside its borders. But although one opinion was that the Commission's work done internationally might be "undervalued and under-reported",²⁵⁸ it is clear that the Commission's current international role is "fragmented",²⁵⁹ with some "ad hoc involvement and some continuous involvement",²⁶⁰ and with participation being much more in-depth and extensive in some cases than in others. One of the aims of such involvement would be to share best practice²⁶¹, for example in the field of human rights in business where the Commission is a forerunner.²⁶² Another level of involvement could be to influence Government in how it tables human rights issues at a regional level, and how

it engages with international human rights abuses.²⁶³ A further reason for the Commission having a strong role internationally is in terms of its independence, for as one respondent noted: "the more respect you have in and out of the country, the greater your independence will be and the more difficult it is to attack it [the institution]".²⁶⁴

However, the Commission's international involvement raises two questions. First, does the SAHRC have the financial and staff resources to be able to participate effectively internationally; and secondly, does it have the mandate to do so? The Commission's international involvement ties into the bigger discussion on whether the Commission "spreads itself too thin",²⁶⁵ as an international role is both time-consuming and financially costly.²⁶⁶ Yet as one respondent noted:

*We took the view that we had to be involved in Africa...it would be regrettable if the new Commissioners came in and saw the costs and don't want to continue...we must look at the effort that India and Australia put into NHRIs in their areas – they understand the importance of strengthening NHRIs in their region.*²⁶⁷

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256 Ibid.
 257 Ibid.
 258 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
 259 Interview with staff member, Christine Jesseman, HoP RDP.
 260 Interview with Commissioner Leon Wessels.
 261 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 262 Ibid.

.....

263 Interview with Commissioner Zonke Majodina; interview with former staff member, Sello Hatang, HoP ICP.
 264 Interview with staff member, Judith Cohen, HoP PIAP.
 265 Interview with former staff member, Sello Hatang, HoP ICP.
 266 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
 267 Interview with Commissioner Karthy Govender.

Prof. N. Barney Pityana (right), Chairperson of the SAHRC, October 1995 – December 2001, at the 3rd conference of African National Institutions in Lomé, Togo, March 2001.



However, it remains important to make the local linkage with the international work done; otherwise, people might legitimately ask whether it is the best use of the Commission's resources.²⁶⁸

On the question of whether the SAHRC has the mandate to be involved internationally, one respondent felt that sharing expertise at an international level is implicit in the mandate, because you are constituted in terms of the Paris Principles.²⁶⁹ Furthermore, just as international bodies have an obligation to assist national commissions, relatively strong national commissions have a responsibility to contribute, and it is in the Commission's best interests to be involved.²⁷⁰ Although this mandate is not clearly set out in the national legislation, "there is nothing in the legislation that can be interpreted to prevent this work."²⁷¹ Commenting on human rights abuses elsewhere seems to be a much more contentious issue, and although there is acknowledgement that the SAHRC's mandate gives it national jurisdiction, some of the respondents were of the view that the Commission has a "moral" obligation to comment.²⁷² The 2008 "xenophobic crisis is a clear example of why the Commission cannot ignore what is happening on other parts of the continent – it impacts on South Africa and *vice versa*."²⁷³

One way of getting around the dilemma of having a national mandate but still commenting on regional developments is, for example, in the case of Zimbabwe, to pronounce on Zimbabweans in South Africa, who would fall within the national jurisdiction.²⁷⁴ What there does seem to be consensus on, however, is that the Commission's international role should be much more strategically thought through so that there is focus, consistency, and a longer-term strategy.²⁷⁵

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268 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

269 Ibid.

270 Interview with Commissioner Karthy Govender.

271 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

272 Interviews with staff member, Victoria Maloka, HoP ETP. Similar view expressed in interview with staff member, Christine Jesseman, HoP RDP.

273 Interview with staff member, Victoria Maloka, HoP ETP.

.....
274 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

275 A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the importance of the Commission's current role internationally, and the recommendation that the Commission's work should be even more substantive, especially at regional level.

2.4 Conclusion and recommendations

In this section of the report the focus was on the SAHRC's position in international and national law, its general understanding of the mandate, and its role outside South African borders. While the larger transformation aim of the Commission remains the same, the Commission has faced a number of challenges in giving effect to its purpose. Some of these challenges relate to amendments that need to be made to the HRC Act. This chapter of the report has highlighted some of the issues that the Commission struggles with in giving effect to its broad mandate. Although a clear strength of the Commission has been its flexibility and ability to be reactive and respond to issues of the day, some challenges have been to find the balance between this reactive role and its ability to plan strategically, to translate this strategy into smaller strategic objectives, and to measure the impact of its work. Perhaps the challenge to be more strategic is also to be found in how it sees its international role. For although the Commission undoubtedly has much to offer in terms of international participation, it is without a clear focus and plan. These are challenges that the Commission has been grappling with to a lesser and greater extent during the second term, and some of these challenges already had their origins in the first term. It is important for the Commission to address some of these issues in order for it to achieve greater long-term sustainability and consistency in the way that it approaches its work.

Through the course of the interviews, respondents gave a number of recommendations, endorsed by the Commissioners and the CEO, with regard to the SAHRC's national legislative framework and its mandate. These are mentioned thematically below and follow the order of the discussion in this chapter, rather than being listed in order of priority.

National policy and legislative framework

- The necessary amendments to the HRC Act should be given priority by the Department of Justice and Constitutional Development and the Legislatures.
- The setting up of a super-structure of human rights institutions, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, should be pursued with Parliament and the Executive.

PAIA

- The Commission should pursue the defraying by Parliament of costs incurred in respect of its PAIA mandate, as provided for in the Act.
- The appointment of an Information Commissioner for PAIA, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, should be pursued with Parliament and the Executive.

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- The Commission should intensify its dialogue with the Executive and Parliament on the outstanding measures required in giving effect to s 28 of the Act.

Relationships with other Chapter 9 institutions

- In striving for better coordination between the different Chapter 9 institutions, task teams should look into working across the operational areas of the respective organisations, in particular the areas of advocacy, protection, monitoring, training and education.

Funding/Finances

- The SAHRC's budget should fall under Parliament's budget vote, as opposed to that of the Department of Justice and Constitutional Development, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions.

Strategic planning

- The Commission's strategic planning process should regularly involve external stakeholders, and should include an interrogation of the Commission's role and mandate in the context of prevailing national and international circumstances.
- The SAHRC's objectives should be re-evaluated and realigned more regularly. Although this is done on an annual basis, it should be done even more frequently in response to the impact of unforeseen and unplanned events.

International role

- The Commission should develop and adopt a clear policy position regarding its international work.



3

Looking to the outside:
independence and
external relationships

3.1 Introduction

It is widely held that the independence and impartiality of NHRIs is crucial for their effective functioning and legitimacy.²⁷⁶ Yet, the “notion of independence is a difficult one to define.”²⁷⁷ This chapter will discuss the notion of independence in relation to the SAHRC. It will explore the Commission’s general understanding of independence and the importance thereof to the Commission, and it will investigate areas of concern, such as its financial independence – an issue raised by a number of respondents. In any discussion of independence, the question that is inevitably posed is whether an institution has been able to function without undue influences on its independence, and whether it is able to withstand any such pressures. This chapter will present some opinions from inside and outside the Commission on whether there have been pressures, and how the Commission has dealt with these.

Discussions of the SAHRC’s independence almost invariably relate to a discussion of the Commission’s external relationships, as it is necessary to ask what the Commission must be independent from. However, this linkage between independence and stakeholder relations is not taken for granted by everyone, and this section will present some of the arguments against such a link.

The SAHRC engages in a number of different external stakeholder relationships, such as with Government, national Parliament and provincial legislatures, the public, the courts, civil society organisations (CSOs), donors, the media, and political parties. This chapter will discuss these relationships and, where relevant, relate the discussion to the notion of independence.²⁷⁸ The chapter will conclude with some recommendations on how the Commission can continue to preserve its independence, and how it can build strong stakeholder relationships.

276 See, for example, Matshekgga 2002.

277 Murray, R. 2007. *The role of national human rights institutions at the international and regional levels – The experience of Africa*. Oxford and Portland Oregon: Hart Publishing, p.5.

278 The SAHRC interacts with a wide range of stakeholders, and it is not possible to discuss all of these relationships in detail in this chapter and report. In addition to the Commission’s relationship with Chapter 9 institutions and with international human rights bodies, as discussed in Chapter 2, the relationships that the current chapter focuses on are ones that are seen as the most prominent. Other relationships that are not discussed in this report are those with other statutory bodies such as the Independent Complaints Directorate, the Judicial Inspectorate, the CCMA, and the Equality Review Committee.

3.2 Independence

3.2.1 General understanding of independence

In any discussion of independence, “you always have to unpack what [it] is.”²⁷⁹ Clear frameworks exist against which to look at independence, such as the Paris Principles and the South African Constitution.²⁸⁰ In addition, “all of us in this country [must] ensure that the [SAHRC] is independent...without that independence...the consequences are just frightening.”²⁸¹ However, although the international and national legislative frameworks make it clear that independence is central to the structure and functioning of the Commission, one respondent, without implying that independence is not crucial, felt that it is perhaps necessary to justify and remind ourselves why it is important for NHRIs, and the Commission in particular, to be independent.²⁸² The human rights discourse has to respond to the way in which power is distributed in society, and it has therefore become necessary to protect the vulnerable against the power of both state and non-state actors.²⁸³ The “logical conclusion” in the establishment of an NHRI for the protection of the rights of the vulnerable is that the body should be able to withstand pressures from these sources of power, because “how do you protect persons in situations of vulnerability, how do you hold powerful institutions accountable, if you are not able to be independent?”²⁸⁴ This, in a sense, answers the question other respondents posed, namely what these institutions should be independent from,²⁸⁵ and relates to the constitutional provision that the Commission should act without “fear, favour or prejudice.”²⁸⁶ As an NHRI, “independence is *sine qua non*,”²⁸⁷ because it is only when an institution such as the SAHRC is independent that “the public has confidence in you and will participate in your activities, knowing that you

279 Interview with David A. Johnson, Regional Representative, OHCHR, Pretoria.

280 Interview with Commissioner Zonke Majodina.

281 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

282 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

283 Ibid.

284 Ibid.

285 Interview with Justices from the Constitutional Court, Chief Justice Pius Langa and Justice Yvonne Mokgoro.

286 Republic of South Africa. 1996. Final Constitution of the Republic of South Africa Act, 108 of 1996 s 181 (2).

287 Interview with Prof. N. Barney Pitso, Chairperson of the SAHRC, October 1995 – December 2001.

will discharge your mandate without fear or favour".²⁸⁸ The Commission's credibility is dependent on its independence,²⁸⁹ and the Commission therefore has fought hard to establish and secure its independence over the last fourteen years.²⁹⁰ On the other hand, "no one will give a damn whether you are independent or not if you are ineffective",²⁹¹ as independence and effectiveness are "flipsides of the same coin".²⁹² It is possible that

independence may suggest an aloofness, a distance, and a necessary one, but it cannot be a distance without a connection, and that's in a sense the contradiction sometimes of independence – you can be so independent that you are so far removed from the context of your society, that you live in what is called 'splendid isolation'.²⁹³

The danger of 'splendid isolation' raises the question whether the Commission has in the past placed too much emphasis on its independence, and may still be doing so. One respondent felt that it was "foolishness to say we take independence too seriously",²⁹⁴ while another felt that sometimes the Commission's "effectiveness may have been blunted by this almost obsession about independence",²⁹⁵ which might have prevented it from working more closely with others. But the possible overemphasis on independence has been necessary,²⁹⁶ because with the SAHRC's inception there was "no knowledge of the role of the Commission, and so you really wanted to be almost pristine about it and... make sure that you are at arm's length with everyone"²⁹⁷ – this was because of a concern that people would try and act in the name of the Commission and do things that were inconsistent with the Bill of Rights.²⁹⁸

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288 Interview with Commissioner Leon Wessels.

289 Interview with Prof. N. Barney Pitjana, Chairperson of the SAHRC, October 1995 – December 2001.

290 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

291 Interview with Commissioner Karthy Govender.

292 Ibid.

293 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

294 Interview with Prof. N. Barney Pitjana, Chairperson of the SAHRC, October 1995 – December 2001.

295 Interview with Commissioner Karthy Govender.

296 Interview with former staff member, Sello Hatang, HoP ICP.

297 Interview with Commissioner Karthy Govender.

298 Ibid. Similar sentiment expressed in interview with Commissioner Tom Manthata.

One respondent felt that the Commission's defense of its independence in the way that it was set up was crucial for its legitimacy and reputation:

You have now a new commission on the block, with a new government and courts. You establish parameters and modes of operation very clearly from the onset, which strategically was the best thing that that Chairperson [Barney Pitjana] could have done at that particular point. It is the focus on that form of independence that has pulled the Commission through.²⁹⁹

It is perhaps possible to see how the notion of independence has developed over time in the Commission with different kinds of leadership.³⁰⁰ For example, one respondent felt "towards the latter part of Barney's [Pityana] chairpersonship, we started reappraising things, and certainly when Jody [Kollapen] became Chair we were a lot more open and amenable to join projects",³⁰¹ and "Jody Kollapen in his own leadership style has looked at independence in a great balancing way, trying to moderate this idea of independence with the necessity of having to work with these various government agencies".³⁰² This does not necessarily signal a different interpretation of independence, but because the Commission's independence was strongly established early on, Chairpersons Shirley Mabusela and Jody Kollapen "found it a bit easier and a bit more strategic to open up more pathways for working with Government. The Commission's history of independence protected it from any undue influences".³⁰³

The protection of independence through these different ways has lent legitimacy to the Commission, and at the start of the SAHRC's third term it might be necessary to take cognisance of the way in which the Commission has asserted its independence and consider how it wants to protect and build on this legacy in a constantly changing political and social environment.

.....
299 Interview with former staff member, André Keet, DCEO.

300 Ibid.

301 Interview with Commissioner Karthy Govender.

302 Interview with former staff member, André Keet, DCEO.

303 Ibid.



Former Chairpersons N. Barney Pitso (October 1995 – December 2001) and Shirley Mabusela (January 2002 – September 2002).

3.2.2 The composite nature of independence and some problematic areas

In line with literature on NHRIs and independence,³⁰⁴ respondents generally acknowledged that independence is a “composite idea”³⁰⁵ that refers to financial independence; whether the Commission is “empowered to function operationally, substantively”,³⁰⁶ the manner in which Commissioners are appointed;³⁰⁷ the political neutrality of Commissioners and staff;³⁰⁸ lack of interference from Government and having one’s decisions respected;³⁰⁹ the Commission determining its own priorities;³¹⁰ and so forth.

An aspect of this composite notion of independence that was of concern to a number of those interviewed for this chapter, albeit not everyone, is the question of the Commission’s financial independence. There appear to be two matters of particular concern here, although there are differences of opinion about whether both have the potential to compromise the Commission’s independence, or only one. The first is the fact that the Commission “is funded through the Department of Justice [and Constitutional Development]”.³¹¹ Some felt that

this was not something to be concerned about as far as the Commission’s independence is concerned:

*This is where people might say the Commission might not be independent, because we get money from Government. That’s hogwash. Our courts get money from Government. There’s no issue of independence there.*³¹²

Although moving the Commission’s budget allocation away from the Department of Justice and Constitutional Development to Parliament is a more appropriate and preferred option, getting the budget allocation from the Justice Department does not imply a lack of independence.³¹³ Others felt that “financial independence” is “a big problem” and agreed that “it should be a direct vote from Parliament” instead of the Commission receiving its budget allocation through the Department of Justice.³¹⁴ The question of how the Commission receives its funding appears to impact on how people view the Commission’s relationship with Government and its independence; as one respondent commented:

The issue of independence of the Commission kept coming up between the Commission and Government. Government would say: ‘Government set up the institution, how can you say the Commission is independent from Government’... others would say: ‘If the Commission is funded by Government, how can you say it is independent from

304 See, for example, Matsheka 2002.

305 Interview with Commissioner Karthy Govender.

306 Interview with staff member, Christine Jesseman, HoP RDP.

307 See Chapter 4 of the report for a discussion of the Commissioners’ appointment process.

308 Interview with Commissioner Leon Wessels.

309 Interview with Commissioner Karthy Govender.

310 Interview with Commissioner Leon Wessels.

311 Murray 2003 p. 27.

312 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

313 Ibid.

314 Interview with former staff member, André Keet, DCEO.

Government?' What people forget is that that money belongs to all South Africans who pay taxes.³¹⁵

The second aspect relating to financial independence that some felt was problematic was the amount of money received. Here, independence is linked to how the Commission is capacitated to do its work. One respondent noted: "The fact that the money comes from [the Department of] Justice [and Constitutional Development] does not undermine how we do our work in terms of decisions...If the Commission could not get money to do its core work, then that would be undermining"³¹⁶ The amount of money received also affects whether the Commission can discharge its mandate with dignity:

At times the Human Rights Commission has not been able to discharge this mandate with dignity, because of limited resources...you then cut your jacket according to the size of the cloth...[an opposition Member of Parliament] on one occasion said, when Government wants us to do something then there are funds.³¹⁷

However, if the Commission is in fact hugely underfunded, then

that points to a problem, which is not just a problem for the Human Rights Commission, that's a constitutional problem. The fact that the institution that is vested with constitutional responsibility for its own efficient functioning says nothing publicly about the fact that it is being denied the

funds necessary to carry out that responsibility is a problem. They haven't said that.³¹⁸

However, in order to provide a balanced representation of respondents' views in relation to the Commission's finances, it is necessary to point out that, internationally, the Commission is seen as "well funded from Government"³¹⁹ while another respondent felt that

of course we could do with more money, but it is difficult for me to take that position, since I'm still not sure whether we are really using the money we get properly and whether we are not doing more than we should be doing and then come and say we don't have money.³²⁰

3.2.3 The SAHRC's ability to do its work without fear, favour or prejudice

A discussion of the SAHRC's independence inevitably leads to the question of whether there have been undesirable or undue influences on the Commission's independence, and how the Commission can and should be guarding against this. According to one respondent,

the threat to the independence of the Commission, of any Commission, is a permanent feature of the design of these organisations...I don't think there is something wrong for it being a permanent threat. That is how politics plays itself out in everyday life...The deeper issue here is how the Commission responds to these contradictions and permanently resident threats in the work that it does.³²¹

However, respondents were of the opinion that it is not only external factors or stakeholders that might influence the Commission's independence; there are some internal factors that also come into play. It might therefore be helpful to distinguish between "institutional independence and the

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315 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002. The debate about the SAHRC being a state institution and therefore a government institution was also raised at the *ad hoc* Committee for the Review of Chapter 9 and Associated Institutions – interview with former staff member, Sello Hatang, HoP ICP. Other authors have engaged with this debate on how the SAHRC receives its financial allocation. Murray 2003 p.29 noted that "it is believed that it would be helpful if Parliament, as the body to oversee the Commission, were to engage with the Commission and discuss whether the budget requested was too much, or whether the projects or issues for which it requested money were appropriate." Corder et al. (1999:54) furthermore argued that providing the budget for institutions such as the SAHRC through government departments "is fundamentally problematic and its constitutionality well open to question." Corder, H. et al. 1999. *Report on Parliamentary oversight and accountability*.

316 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

317 Interview with Commissioner Leon Wessels.

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318 Interview with Mark Heywood, Director, AIDS Law Project (ALP).

319 Interview with David A. Johnson, Regional Representative, OHCHR, Pretoria.

320 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

321 Interview with former staff member, André Keet, DCEO.

personal independence by incumbents,³²² although the two are, of course, related.

Although there were some respondents who were of the opinion that it would be “difficult...to say”³²³ whether there have been undue influences on the SAHRC’s independence, there were others who felt that the Commission has “done reasonably well”³²⁴ in managing undue influences, and that there have been “instances where the Commission may well have allowed external factors to unduly influence it.”³²⁵ One respondent felt that there were

*one or two instances where the encroachment [on independence] was uncalled for and undesirable... such as around the publication of the socio-economic rights reports; we are always in a tussle with Government around that...and noises about influencing the timing of the publication of our reports.*³²⁶

Another possible example of undue influence is the SAHRC’s decision to withdraw from the Treatment Action Campaign’s (TAC) HIV case in the Constitutional Court.³²⁷ The Commission initially took a decision to participate as *amicus curiae* in the litigation, but then retracted that decision. The decision to withdraw from the case was based on a four to three majority vote of the Commissioners at the time.³²⁸ One respondent was

not convinced that that decision [to withdraw] was one purely based on the legal merits or otherwise of participating in that case. It may well have been outside considerations that could have influenced

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322 Interview with staff member, Victoria Maloka, HoP ETP.

323 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

324 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

325 Ibid.

326 Interview with former senior staff member. This relates to the bigger question of what constitutes an undue influence on independence.

327 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. This case concerned the provision of antiretroviral medication (nevirapine) to prevent mother-to-child transmission of HIV, *Constitutional Court judgment*, 5 July 2002.

328 This was one of only two occasions where Commissioners voted on a matter, the other being whether to withdraw subpoenas against journalists during the inquiry into racism in the media.

*that decision...and that decision will forever, if I could call it, ‘haunt’ the Commission.*³²⁹

Speaking about the possibility of influence in this case, one respondent held the view that the

*kind of outside influence wasn’t overt and visible, but one could feel that you were participating in a process where, in a sense, outside of the Commission forces were lining up on one side or the other on a very important issue – an issue which was at the heart of not just the health of the nation, but about participation, accountability, governance, democratic process...[the decision was not influenced by] overt political affiliations, but in terms of how people sometimes position themselves. In independence, that is a factor which we can’t often exclude – even when people come here and we all say that we disconnect in a sense from our previous political past, it’s easier said than done, and sometimes those emerge, if not consciously, then certainly subconsciously.*³³⁰

Another respondent equally acknowledged that “one of the major mistakes we [the SAHRC] made was withdrawing from the Treatment Action Campaign case”, but that there was “no pressure from Government, as some people suspected.”³³¹ Instead,

part of the thinking was that we were being in a sense led by the Treatment Action Campaign, which was a very well organised and able NGO. They were determining our agenda...the view was, we ought to focus much more on people who are completely marginalised and not represented to that extent. It fed into the argument that we should be seen to be divorced from any particular interest group or organisation. The decision was a poor decision – this was a case of poor African women receiving nevirapine so that their children would survive – you

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329 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

330 Ibid.

331 Interview with Commissioner Karthy Govender.

*don't get more marginalised than that. The decision focused on the wrong issue.*³³²

Another sign by which to measure the Commission's independence is whether or not it seems reluctant to investigate certain parties or issues. It was felt that the Commission has

*by and large been able to discharge its mandate effectively and with dignity, and the variety of subpoena hearings which we've had over the years, where we have subpoenaed cabinet ministers, and senior government officials, or [threatened] the private sector...with subpoenas during the media inquiries, is proof of that.*³³³

One of the tests to its independence is that "it [the SAHRC] is seen...publicly to be fiercely independent and not afraid of taking on anybody".³³⁴

*classification of complaints into ordinary and high-profile complaints means that different measures are extended in the handling of complaints, depending on the profile of the complainant. Complaints are handled by order of importance, which in most cases relates to who the complainant is and not what the complaint is about. Classification poses an eminent threat to independence in that this approach means that certain people receive special treatment because of their status in society.*³³⁵

However, once a case has been elevated through the media and is in the public eye, it appears to be difficult not to attempt to address it expeditiously. An example cited where the Commission has been perceived from outside to have been too soft is that of the Malema case³³⁶. "[the] Malema thing, I felt, was a cop-out. That he was let off the hook in the way he was, was from pressure, that's what it felt like",³³⁷ and the Commission was "too polite and too nice."³³⁸ Also internally



Staff member Jennifer Joni (Deputy Director Complaints Coordination, LSP) addressing a subpoena hearing presided over by Commissioner Leon Wessels.

Photo courtesy of Beeld.

Perceptions of undue influence or pressure or of the Commission being too soft perhaps increase with high-level complaints that are more visible to the public eye. One respondent noted about high-profile complaints that the

it is felt that for the Commission to not be seen as biased it needs to follow through when someone is seen as breaking an agreement that was reached, as in the Malema case, else

332 Ibid.

333 Interview with Commissioner Leon Wessels.

334 Interview with Jovial Rantao, Chairperson of South African National Editors' Forum (SANEF).

335 Communication with staff member.

336 This refers to ANC Youth League President Julius Malema's 'kill for Zuma' statement in 2008.

337 Interview with Adila Hassim, Head: Litigation and Legal Services, ALP.

338 Interview with Jovial Rantao, Chairperson of SANEF.

Some of the cartoons following the Commission's intervention on the Malema and Vavi utterances.



people start questioning what the Commission can really do if agreements aren't kept.³³⁹ The "problem is if you are going to allow one person to show disrespect to the Commission, you are discouraging the next person from coming to you."³⁴⁰

However, it is also felt that, despite the controversy surrounding these issues, and despite them being "politically quite controversial", the Commission has made progress since the TAC case³⁴¹

in terms of at least developing a team of people who are perhaps able with more success to find common ground with regard to what we have to do in terms of mandate and our mission, and to put sufficient space in a sense as a result of that collective exercise

339 Interview with former staff member, Sello Hatang, HoP ICP. When Julius Malema subsequently used the word 'eliminate', the Commission wrote to seek clarification on his comments and to raise concerns that the word could be interpreted to mean 'kill'. No response was received. However, where with the initial use of the word 'kill', the Commission was decisive that using the word 'kill' was wrong, with the use of 'eliminate', there wasn't a unanimous view that 'eliminate' could only be interpreted to mean 'kill'. At the time other utterances were being made by politicians and the Commission wanted to address all of these systemically, but this never came together. In retrospect it would be desirable to have a clearly formulated strategy when dealing with such complaints. The case of the Vavi complaint was dealt with differently, as Mr Vavi brought a submission providing an explanation for the phrase used and expressed regret that the language used was inappropriate. The Commission was of the opinion that regret could be interpreted as remorse, although the Commission received some criticism from those who attempted to draw a sharp distinction between what would constitute an apology, and whether an expression of regret is substantively different from an apology. (comment by Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.)

340 Interview with Jovial Rantao, Chairperson of SANEF.

341 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

*between those influences that will always be there and those connections that will always be there.*³⁴²

On an internal level, the Commission also needs to guard against influences on its independence, as "the independence of this Commission rests to a large extent on the integrity of the people who are in it."³⁴³ It was mentioned in Chapter 2 of this report that one of the founding principles of the Commission was that the Commissioners would refrain from actively participating in party politics. One respondent was particularly concerned about the potential implications of staff at Secretariat level actively participating in party politics, and this raises the question of how active Commission staff members can be politically.³⁴⁴ However, others felt that the net can also be thrown wider and that, in addition to political party affiliation, it is theoretically equally possible for religious and cultural affiliations to influence the work people do;³⁴⁵ one could therefore ask whether you should elevate political association and participation above the influence of religion and culture.³⁴⁶ Although some were of the opinion that a policy decision should be taken about staff involvement in politics,³⁴⁷ others felt that you can't legislate or regulate religious or

342 Ibid.

343 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

344 Interview with former staff member, Sello Hatang, HoP ICP.

345 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with staff member, Danaline Franzman, HoP LSP.

346 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

347 Interview with former staff member, Sello Hatang, HoP ICP.

cultural affiliations,³⁴⁸ and that it is necessary to “lead from the top...and say to people, the work we do here transcends, in a sense, our affiliations.”³⁴⁹ However, you can be “firmer where the spillover has a prejudicial effect.”³⁵⁰

3.3 The SAHRC's relationships with external stakeholders

3.3.1 Independence vs external relationships?

Although independence is often discussed in relation to the Commission's external relationships, the link between these two aspects is not seen by all to be unambiguous; in other words, having strong relationships does not necessarily mean a compromise on independence.³⁵¹ One respondent commented accordingly:

*I don't think that an understanding of the notion of independence has anything to do with relationships... You can adhere to concept 'A' of independence and have a good relationship with Government. You can adhere to concept 'B' of independence and still have a good relationship with Government. There is not necessarily a causal link between your understanding of institutional independence and your relationship with Government...The danger of this logic is that you will have to sell out on independence to have a good relationship with Government...That should not be the case.*³⁵²

There was also the suggestion that one should take the words 'good' and 'reasonable' out of the discussion of relationships and use the terms 'strong' and 'weak,' as a good or amicable relationship

operates on different kinds of assumptions about patronage and favours...you have a strong

*relationship because of your constitutional mandate. Whether you have a strong relationship as antagonists or one that is characterised by tension, you have a strong relationship.*³⁵³

In its relationships, the Commission has a

*variety of roles to play – at times we have to act as people who defend and protect human rights against the state, but on the other hand the state also has to assist us to promote our activities and participate in our activities. If you do that with integrity, you can play both those roles.*³⁵⁴

While ultimately the Commission must determine and interpret its mandate itself, in reality it has to accept that, in doing this, it must be open to the views and arguments of civil society; and where these are made, it should not automatically assume that civil society seeks to unduly influence or shape the Commission's mandate.³⁵⁵

The rest of this chapter will focus on some of these external relationships and the different roles that the SAHRC plays. It is interesting to note that some of these relationships are discussed by respondents specifically in terms of how they relate to the Commission's independence, for example the relationship with Government and civil society, while with other relationships, such as that with the media, independence plays a lesser role. It should also be noted that the nature of the Commission's relationships with different stakeholders may differ, and it therefore does not need to have the same kinds of relationships with everyone.³⁵⁶

3.3.2 Relationship between the SAHRC and Government

This section of the report will present the relationship between the SAHRC and Government from the perspective of the Commission and other stakeholders, as Government failed to participate when approached to be interviewed for

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348 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
349 Ibid.
350 Ibid.
351 Interview with former staff member, André Keet, DCEO.
352 Ibid.

.....
353 Ibid.
354 Interview with Commissioner Leon Wessels.
355 Interview with former staff member, André Keet, DCEO.
356 Meeting with Commissioners, 23 March 2009.



Former Minister of Justice and Constitutional Development, Enver Surty, with some of the SAHRC Commissioners and the CEO.

the report.³⁵⁷ The relationship between the Commission and Government is a multi-faceted one, some aspects of which have already been touched on – the question of funding was discussed earlier in this chapter as well as in Chapter 2, as was Government’s understanding of the SAHRC’s role and mandate and the possible conflation of roles.³⁵⁸ The Commission interacts with Government at different levels – national, provincial and local – as well as across different government departments.³⁵⁹ Government has an “obligation to support”³⁶⁰ the SAHRC as set out in the Constitution, where it is specified that Government should support the Commission so that it will be able to do its work with dignity and without fear and favour.³⁶¹ Reflecting on support from Government, one respondent said that “At certain times...I would have anticipated a bit more support

from Government in terms of ensuring the Commission is promoted, certainly in the early years.”³⁶²

Although it is difficult to answer “generally speaking”³⁶³ what the SAHRC’s relationship with Government has been like, the relationship “hasn’t been consistent.”³⁶⁴ There are individual instances of positive interaction, such as with government representatives on the Section 5 Committee for Older Persons.³⁶⁵ The Commission’s relationship with Government has not always been adversarial. For example, before and during the Commission’s public hearing on the right to basic education³⁶⁶ there were a number of meetings between the Commission and the Department of Education to iron out procedural aspects of the hearing, and the Deputy Minister and Director-General (DG) attended the hearings.³⁶⁷ Similarly,

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357 After extensive follow-up from the SAHRC, then Minister of Social Development, Zola Skwiyiya, declined to participate because of a busy schedule in the run-up to the elections. An appointment was made for an interview with then Deputy Minister of Justice and Constitutional Development, Advocate Johnny de Lange, to whom interaction with Chapter 9 institutions had been delegated. An appointment was made and interview questions sent through; however, the Deputy Minister’s office postponed the appointment the day before it was due to take place and has failed to propose an alternative date.

358 Interview with Commissioner, Zonke Majodina.
 359 Ibid.
 360 Ibid.
 361 Republic of South Africa 1996 s 181 (2) and (3).

.....

362 Interview with Commissioner Karthy Govender. See also Govender 2007 pp.208-209, where it is argued that “Governments, in general, respond to institutions like the Commission in a variety of ways. At the one end of the continuum, there may be active, unequivocal and complete institutional support and at the other end, there can be open or indirect hostility and regular and sustained undermining of the institution. In between, there is an attitude similar to that of passivity or circumscribed compliance with constitutional and statutory demands...With some notable exceptions, the present administration’s attitude towards the SAHRC has been closer to that of passivity or circumscribed compliance rather than that of active and unequivocal support.”

363 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 364 Ibid.
 365 Interview with staff member, Christine Jesseman, HoP RDP. Section 5 committees are discussed later in this chapter.
 366 SAHRC 2006a.
 367 Comment by Commissioner Leon Wessels.

with the Commission's inquiry into the public health system,³⁶⁸ both the Minister and the DG attended.³⁶⁹

On a national level, this relationship has been dependent on individual Ministers of Justice and Constitutional Development and how they have understood the role of the Commission,³⁷⁰ although ideally the change of government and Ministers should not affect this relationship.³⁷¹ During its first term, the SAHRC attempted to draw up an MoU with the office of the President in order to ensure the cooperation and support needed from the Executive. However, this could not be finalised, largely because Government at the time was not convinced of the need for or value of such an MoU.³⁷²

In the interaction of the LSP and RDP with Government, one of the difficulties experienced has been the delayed response or non-response to letters sent.³⁷³ In this regard, the Commission could perhaps have used its subpoena powers more.³⁷⁴ Along similar lines, a respondent from a civil society organisation commented that:

I don't think there is ever a time more than now that we need to use those powers of subpoena and investigation. They [the SAHRC] are the only Chapter 9 body that has that power. We have to look to them

368 SAHRC. 2009a. *Public Inquiry: Access to Health Care Services*.

369 Comment by Commissioner Leon Wessels. Also, at provincial level there are examples of provincial offices that have good working relationships with government departments and municipalities (communication with staff member), and of provincial offices engaging government departments on a number of human rights issues, such as HIV/AIDS, human rights and crime, and older persons (communication with staff member).

370 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. An example of this is the Commission's relationship with former Minister Bridgette Mabandla. The Minister never officially met with the Commission (comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 - current). Different Ministers of Justice have made available different amounts of time to meet with the Commission, and differed in their willingness to understand the mandate and powers of the Commission. During the processing of presidential pardons for IFP prisoners who never used the TRC process, the Commission made a finding that the Minister's failure to process applications constituted a violation of the rights of applicants to have their applications expeditiously dealt with. Minister Mabandla expressed the opinion that the Commission didn't have the authority to make this kind of decision, and thereby expressed a lack of understanding of the mandate and powers of the Commission. (comment by Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.)

371 Interview with Commissioner Leon Wessels.

372 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

373 Interview with staff members Danaline Franzman, HoP LSP; and Christine Jesseman, HoP RDP.

374 Interview with Commissioner Karthy Govender.

to use it. If they don't get a response, then...if it's not going to be the Human Rights Commission that says we will take you to court, then who will?³⁷⁵

In the compilation of the SAHRC's Economic and Social Rights (ESR) reports, too, poor response is received from Government, with the most recent example being the postponement of the 2009 public hearings on the Millennium Development Goals, for which only a small number of submissions were received from Government.³⁷⁶ In some cases there has been "malicious compliance", where Government sends a response on time, but does not provide any substantial information that is of use.³⁷⁷ Despite the Commission's ability to take a matter to court, a final difficulty that the Commission experiences in its relationship with Government results from its lack of enforcement powers, as it is difficult to get feedback from Government on the recommendations that the Commission proposes in its reports. However, one respondent commented as follows on one of the ways in which the Commission could act on this:

The Commission has to be frank, transparent with the South Africa public, and if it's not receiving the required cooperation from any government department, then the South African public must know. The upshot of not communicating is that the blame will be left fairly and squarely at the door of the Commission, and if the public doesn't know any better, they will be entitled to do that.³⁷⁸

This sentiment was echoed by a member of a civil society organisation, who commented that "Government can be made to listen, and particularly the Human Rights Commission has a much better opportunity of getting Government to listen than we do, for example."³⁷⁹

Another aspect of the Commission's interaction with Government is the monitoring of its compliance with international treaties through the PIAP in Cape Town. This

375 Interview with Adila Hassim, Head: Litigation and Legal Services, ALP.

376 Interview with staff member, Christine Jesseman, HoP RDP. The hearings were postponed from March to 8-12 June 2009.

377 Interview with staff member, Christine Jesseman, HoP RDP.

378 Interview with Jovial Rantao, Chairperson of SANEF.

379 Interview with Mark Heywood, Director, ALP. A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the importance of the Commission fully utilising its existing legislative powers, as this affords it additional reach and access that other organisations do not have.

programme also interacts with Government on the drafting of legislation, and one of the challenges that have been experienced in the past is obtaining timeous and reliable legislative programmes for the year from the different government departments.³⁸⁰

In the Commission's interaction with Government in relation to compliance with PAIA, some worrying trends have emerged in terms of government departments submitting s 32 reports annually to the Commission:

The submission of section 32 reports over a five-year period has revealed worrying trends in relation to the implementation of PAIA... Compliance with section 32 for all levels of public bodies has been consistently low... Marginal increases in reporting is evidenced at the national level, but provincial government reporting has declined by approximately 50% since the 2002/03 reporting period... local government structures have notably and consistently underreported since 2002.³⁸¹

Part of the reason for Government generally not meeting its responsibilities or replying to requests for information from the Commission might be a result of its workload,³⁸² or because it sees requests from the SAHRC as not being part of its core function, and more of an external obligation.³⁸³ However, as one respondent commented: "You are available for those things you find important."³⁸⁴ A number of suggestions have been made on how to improve the relationship with Government. This includes trying to set up regular meetings with the Ministry of Justice and Constitutional Development,³⁸⁵ and to appear before Cabinet once a year.³⁸⁶ The Commission could also investigate how the SAHRC's requests for information from Government relates to Government's other reporting

obligations, as there might be an overlap or slight differences in information required.³⁸⁷ Furthermore, the Commission could attempt to be more coordinated and detailed in letters sent to government departments in order to make it easier for Government to identify the specific complaints or cases and issues referred to, thereby facilitating a quicker response.³⁸⁸ The Commission is already attempting to assist Government to comply with its reporting requirements by providing training to government departments on specific issues that they might need to report on later. In this sense, the Commission is linking its education function to monitoring and compliance.³⁸⁹ There is also the opinion that, in addition to finding ways to have a stronger relationship with Government, the SAHRC should become more assertive in its interaction: "I think for fourteen years we've been massaging it [the relationship with Government]. It's time to have some toughness in the language that's used."³⁹⁰



The Commission reprimanding former Minister of Sport and Recreation, Ngconde Balfour, for undesirable speech. Rapport, 24 November 2002.

380 Interview with staff member, Judith Cohen, HoP PIAP.

381 SAHRC. 2008c. *Annual Report, April 2007 - March 2008*, p.139-140.

382 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

383 Interview with staff member, Christine Jesseman, HoP RDP.

384 Ibid.

385 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 - current.

386 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. In 2005, the Commission was advised through the Justice Ministry that Cabinet wished to receive a presentation from it. A draft was prepared in cooperation with the Ministry, but nothing came of the invitation.

387 Ibid.

388 Interview with staff member, Danaline Franzman, HoP LSP.

389 Interview with staff members Victoria Maloka, HoP ETP, and Christine Jesseman, HoP RDP.

390 Interview with former staff member, Sello Hatang, HoP ICP.

3.3.3 Relationship between the SAHRC and the Legislature

The SAHRC appears annually before Parliament's Portfolio Committee on Justice and Constitutional Development. The Commission's relationships with Government and Parliament are very different, being

two elements that must always be kept separate. The Commission is accountable to the fiscus...for the use of state resources. In terms of executing its mandate, the Commission must be independent and must only be held accountable by Parliament, not the Department of Justice. [While the Commission reports and accounts to Parliament, and may be open to suggestions from Parliament] it does not take instruction from Parliament [in relation to its interpretation of its mandate].³⁹¹

The Commission has generally found this reporting process to Parliament lacking in a number of ways, although it has improved in recent years. For a long time, the relationship was seen as "really non-existent"³⁹² or "disappointing,"³⁹³ and the Commission's concerns included that the time allocated for reporting was too short;³⁹⁴ no minutes were taken until more recent years, which had implications for follow-up on issues discussed in these report-back sessions;³⁹⁵ the delegation from the SAHRC often outnumbered the number of Portfolio Committee members in attendance; and some Portfolio Committee members were not always sufficiently prepared for meetings, which impacted on the level of questioning on the Commission's work.³⁹⁶

In an interview with the previous Chairperson of the Portfolio Committee on Justice and Constitutional Development, Mr Yunus Carrim, some of the Commission's concerns about the reporting process were tested – this was also done to inquire

whether the Commission's expectations of the kind of oversight that Parliament should provide were realistic. Mr Carrim felt that the SAHRC "is largely correct" in its criticisms, but

to answer it simply, do I think there's legitimacy [in the criticisms]? Yes. Do I think that the failures they attribute to the members are justified? Partly yes, partly no. What you have to understand is that this [committee] is absurd [in terms of its workload]. And given the workload, it's understandable that members don't always look at reports, but we were very fortunate to have two excellent researchers... in fact we picked up a lot of things [from the annual report] which we asked [the Commission], but there were things that [the Commission] couldn't answer. So I don't know whether [some of the criticisms] can apply to the last 15 months... You have to contextualise the difficulties. Should they [the SAHRC] be given more time? Yes. Does the committee have more time? No. Will it have more time, yes, if it's split into a legislative committee and an oversight committee, as we are suggesting.³⁹⁷

Other ways in which the Commission interacts with Parliament is through the PIAP in Cape Town, that up until 2005 consisted of one full-time member of staff, and therefore, despite its achievements, has been limited in its capacity to engage with Parliament.³⁹⁸ The programme interacts with Parliament at different levels, for example in a more *ad hoc* way by doing briefings on different topics and issues.³⁹⁹ One of the concerns of the programme has been how the Commission is treated by Parliament in relation to CSOs, as one respondent explains:

As the Human Rights Commission, you are sometimes, just by virtue of the way things are done... treated the same as an NGO... for example...

391 Interview with Prof. N. Barney Pitso, Chairperson of the SAHRC, October 1995 – December 2001.

392 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

393 Interview with Commissioner Karthy Govender.

394 Ibid.

395 Ibid.

396 Interview with Commissioners Leon Wessels and Karthy Govender; interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

397 Interview with Mr Yunus Carrim, Chairperson of the Portfolio Committee on Justice and Constitutional Development, September 2007 – April 2009. In its report on the SAHRC's 2006/2007 annual report, one of the questions that the Portfolio Committee raised with the Commission for clarification was the compilation of its complaints-handling statistics: "The Committee finds it difficult, however, given the way the Annual Report records the statistics, to evaluate the Commission's success in processing complaints." (Portfolio Committee for Justice and Constitutional Development 2007 p.8). In its response, the SAHRC acknowledged discrepancies in these statistics, and it has consequently established a Statistics Committee and put together Guidelines for Legal Statistics that came into effect in March 2008. (SAHRC 2007b)

398 Interview with staff member, Judith Cohen, HoP PIAP.

399 Ibid.

when there are public hearings [on legislation], one is treated like any other NGO and allotted a space on the programme...one would expect that, as a national institution, something on the side of Parliament is devised in terms of which it is clear that as an NHRI your role is separate from NGOs.⁴⁰⁰

Another concern is that Parliament is a “highly contested environment, a very political environment, it is a high-risk environment for the Commission” because of the media presence and because “majority parties and opposition parties will often ask questions for political point-scoring and try and get the Commission to make a statement on an issue.”⁴⁰¹ To protect the Commission’s independence from Parliament, this programme has drawn up guidelines for the Commission’s interaction with Parliamentarians.⁴⁰²

Another example of the Commission’s interaction with Parliament is at the level of provincial legislatures. One respondent felt that the Commission’s interaction with provincial legislatures has been inadequate and that it would be important for every one of the SAHRC’s provincial offices to engage with provincial legislatures.⁴⁰³ However, according to another respondent, these institutions are quite “weak” and a policy decision was taken “that you can’t duplicate what you’ve got at a national level with the monitoring of Parliament at a provincial level...that is not resources well spent.”⁴⁰⁴ This does not mean that the Commission should not interact with provincial legislatures, as the Commission is keen to do this through, for example, developing oversight manuals for provincial legislatures, but

where it will become an enormous challenge to the Commission is if provincial parliaments recognise the Commission as a resource and we start getting the same number of invitations to provincial parliaments as we do to national Parliament...and there isn’t the capacity to respond.⁴⁰⁵

.....

400 Ibid.
401 Ibid.
402 See Nijzink, L. 2007. *Code of Good practice – Guiding Chapter 9 institutions in their interactions with the South African Parliament*. Report prepared for the Civil Society Advocacy Programme (CSAP) by Lia Nijzink, Democratic Governance and Rights Unit, Faculty of Law, University of Cape Town.
403 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
404 Interview with staff member, Judith Cohen, HoP PIAP.
405 Ibid.

In asking what kind of oversight relationship the Commission would like to have with national Parliament, there were a number of suggestions.⁴⁰⁶ While the Commission is mindful of the constraints of Parliament,⁴⁰⁷ and also of the fact that Parliament is a new institution that has to learn and establish how to relate to other bodies,⁴⁰⁸ it would like to see more frequent and/or longer appearances⁴⁰⁹ and more in-depth engagement,⁴¹⁰ based on a better reading of the Commission’s annual report,⁴¹¹ in order that the Commission’s effectiveness may be more meaningfully tested.⁴¹² There is consensus that a new unit being proposed for Chapter 9 institutions in the Speaker’s office would be a substantial step forward in terms of oversight over and the accountability of these institutions.⁴¹³ The other Chapter 9 institutions have mandated the SAHRC to seek a meeting with the Speaker’s office in order to discuss the structure and functioning of the unit.⁴¹⁴ Such a unit might also help address the disjuncture or non-alignment between the SAHRC’s mandate and that of the Portfolio Committee, as some of the Commission’s reports fall outside the jurisdiction of the Portfolio Committee, or are relevant to a number of committees⁴¹⁵ and need to be distributed to other relevant committees or stakeholders.⁴¹⁶ How the SAHRC interacts with Parliament “is an area which is still being developed and explored.”⁴¹⁷

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406 For more general reading on Parliament’s oversight role, see Corder, H. et al. 1999, and Parliament of the Republic of South Africa. 2009. *Report of the independent panel assessment of Parliament*.
407 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
408 Interview with staff member, Judith Cohen, HoP PIAP.
409 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with former staff member, André Keet, DCEO. Between October 2007 and September 2008, under the Chairpersonship of Mr Yunus Carrim, the Commission appeared before the Portfolio Committee more than once a year (October 2007 and June 2008) - Interview with Mr Yunus Carrim, Chairperson of the Portfolio Committee on Justice and Constitutional Development, September 2007 – April 2009.
410 Interview with Commissioners Leon Wessels and Karthy Govender; interview with former staff member, André Keet, DCEO.
411 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
412 Interview with Commissioner Karthy Govender.
413 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with Commissioner Karthy Govender; interview with former staff member, André Keet, DCEO; interview with former staff member, Sello Hatang, HoP ICP.
414 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
415 Interview with staff member, Judith Cohen, HoP PIAP.
416 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
417 Interview with staff member, Judith Cohen, HoP PIAP.

3.3.4 Relationship between the SAHRC and the public

The public is the Commission's "key constituency",⁴¹⁸ and the Commission is "only really scratching the surface [in its relationship with the public]...we are not communicating enough and as effectively as we should and could".⁴¹⁹ This raises the questions of how familiar the public is with the Commission's work, what expectations it holds and whether these are reasonable. A national survey done by the Community Agency for Social Enquiry (CASE)⁴²⁰ assessed the public's awareness of Chapter 9 and 10 institutions and found that 65% of respondents had heard of the SAHRC.⁴²¹ The survey also found a relationship between awareness and the level of education of respondents – the higher their level of education, the more aware people were of the institutions.⁴²² Depending on how it was calculated, between 62% and 96% of respondents thought that the SAHRC was important – the first percentage is calculated on the percentage of the total study population and the latter is calculated based on the percentage of those who were aware of the institution.⁴²³ Between 44% and 67% of respondents thought that the SAHRC was effective – again, the first percentage is calculated based on the total study population and the latter is based on the percentage of those who were aware of the institution.⁴²⁴

The public's expectations of the SAHRC are seen as "very high and unrealistic...we are expected to be at every corner of the country",⁴²⁵ although the Commission has also had a hand in creating these expectations through its exposure in the media.⁴²⁶ Furthermore, there are

418 Interview with Commissioner Karthy Govender.

419 Interview with Commissioner Leon Wessels.

420 CASE was commissioned by Parliament in 2007 to conduct a national household survey to assess the public's awareness of and contact with Chapter 9 and 10 institutions, as well as perceptions of effectiveness and importance.

421 "It is important to note that a question that asks whether respondents have heard of an institution is likely to overestimate the number of people who are familiar with the institution, as respondents may confuse the institution with other bodies or simply fall into a pattern of positive responses". CASE. 2007. "Report on Public Opinion Survey", Annexure 7 in Parliament of the Republic of South Africa. 2007. *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*. A report to the National Assembly of the Parliament of South Africa. Cape Town: South Africa, p.259.

422 CASE 2007 p.260.

423 CASE 2007 p.260-261.

424 CASE 2007 p.262.

425 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 - current. See also interview with staff member, Danaline Franzman, HoP LSP.

426 Interview with former staff member, Sello Hatang, HoP ICP.

*various levels of public expectation, but in the main...that [the SAHRC is an institution that] can do lots of things, and an institution that has lots of power, which it doesn't have...It has power in terms of its processes, what it can investigate and taking a matter to court, but ultimately, where it matters, it doesn't have the power on its own to direct people to do certain things...For many people there's a sense of disillusionment when they are confronted with that reality.*⁴²⁷

The public's knowledge of the SAHRC raises the question as to what extent the Commission has been successful in communicating to the public what the nature and scope of its work are, and whether the public sees the Commission as separate and independent from Government. For example, the LSP has raised the concern that

*sometimes people come to us and say they were referred by a Commissioner, or by a colleague, or a staff member from ETP to assist them with this matter, and then you think to yourself, we don't deal with this, so is the right message being put out there as to what it is that we do?*⁴²⁸

It was held that the public generally sees the Commission as independent from Government

*because they keep on coming with their complaints against poor performance of Government; however, when we make a finding in Government's favour, then...they question our independence, which I don't think is correct.*⁴²⁹

A key part of the SAHRC's relationship with the public is the clear communication of its decisions, as well as responding to criticisms of its work. It is necessary to take criticisms of the Commission's work seriously⁴³⁰ and to communicate clearly to the public. However, an example where the Commission perhaps did not communicate effectively to the public,

427 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

428 Interview with staff member, Danaline Franzman, HoP LSP.

429 Interview with Commissioner Leon Wessels.

430 Ibid.



Members of the Khomani San community attending the public hearing in the community hall in Andriesvale in 2004.

Photo: Steve Lawrence, The Star.

and even internally to its staff members, was the Malema complaint.⁴³¹

Also central to the SAHRC’s interaction with the public is its accessibility. This can relate to a number of aspects, such as the accessibility of the Commission’s reports and findings, as well as its physical accessibility in both urban and rural areas. A number of challenges are faced in making the SAHRC’s reports more accessible: despite the potential of using the website to communicate with the public and thereby making information more freely available,⁴³² there exists a lack of internet access on the part of the public,⁴³³ in addition to high illiteracy rates and language barriers.⁴³⁴ In terms of its physical accessibility, the Commission has made considerable progress since its inception by incrementally establishing the provincial offices.⁴³⁵ However, a number of respondents felt that, although the Commission can be more accessible,⁴³⁶ the resource and other implications of such a decision will need to be taken into account, including the ability to follow through on additional work created.⁴³⁷ But one respondent felt that:

To me, the overriding reason for the provinces [provincial office] was to serve the masses, and the masses are all over the country...As provincial offices were being structured, they were saying that the

Commission must be seen to be ‘rural community friendly.’⁴³⁸

One of the SAHRC’s successes in interacting with the public has been its public hearings or inquiries. Public hearings have been described as a “wonderful tool”, as a public hearing “creates an opportunity to act with a systemic set of complaints in a very professional manner, it is open, it is transparent, [and] complainants and respondents participate in the process.”⁴³⁹ However, where the Commission could do more is in bringing out the reports in good time, following up on recommendations,⁴⁴⁰ and communicating the outcome to those stakeholders who had made submissions.⁴⁴¹

Another example of a key achievement in the SAHRC’s relationship with the public relates to the passing of the Older Person’s Bill.⁴⁴² As part of the Commission’s visits to provinces to explain to people what the Bill would mean and to get people’s comments, some individuals and communities were empowered to draft their own submissions to be presented in Parliament.⁴⁴³ One of the outcomes of this process was an individual who prepared a hand-written one-page submission; based on that submission, a change was made to the legislation so that there will be programmes to assist

431 Interview with staff member, Danaline Franzman, HoP LSP.

432 Interview with staff member, Christine Jesseman, HoP RDP.

433 Interview with Commissioner Leon Wessels.

434 Interview with staff member, Christine Jesseman, HoP RDP.

435 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

436 See, for example, interview with Commissioner Karthy Govender; interviews with staff members.

437 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

438 Interview with Commissioner Tom Manthata.

439 Interview with Commissioner Leon Wessels.

440 Ibid.

441 Interview with staff member, Danaline Franzman, HoP LSP.

442 Now the Older Persons Act, 13 of 2006.

443 Interview with staff member, Judith Cohen, HoP PIAP.



Commissioner Tom
Manthata on a visit to a
farm in Mpumalanga.

and support grandmothers who care for their HIV-positive grandchildren.⁴⁴⁴

3.3.5 Relationship between the SAHRC and the courts

Considering the SAHRC's litigation history, the Commission has had a much better track record in taking cases to the equality courts than to high courts or the Constitutional Court.⁴⁴⁵ There exists a strong, albeit not unanimous opinion both inside and outside of the SAHRC that the Commission has not litigated enough since its inception⁴⁴⁶ and that litigation has been a

“very big weakness”⁴⁴⁷ of the Commission. However, such a statement needs to be preceded by the question of whether litigation “should be a substantial part of the Commission’s work.”⁴⁴⁸ On this there is divided opinion, as there is on what the implications of such a decision would be. This question goes to the heart of the Commission’s mandate and how the SAHRC sees its role as an institution focusing on dispute resolution, with the emphasis on non-judicial means. According to some, it has always been quicker to mediate than to refer cases to court, and the Commission has been commended for its dispute resolution in this regard.⁴⁴⁹ Similarly, there are those who feel that, although the Commission’s role has been valuable where it has been involved in litigation and that it can litigate more, its role should rather be at intervention level as mediator, while litigation should be a last resort.⁴⁵⁰ While it is undisputed that litigation is part of the Commission’s mandate, the complaints that the Commission receives also often lend themselves to resolution through “non-litigious mechanisms.”⁴⁵¹ However, according to others, it is “crucial that the Commission should litigate more often,”⁴⁵² as it will also help with how the Commission and human rights violations are perceived, because

444 Ibid. A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was that although the Commission has a pro-poor approach to its work, this does not come across in the report, as poor people are not reflected in the report. The Commission refers to its pro-poor approach in a number of ways in this report, such as its strategic focus on poverty and equality during its second term; its reach in rural areas through the provincial offices; and in the example just discussed in the text, ensuring public participation in legislative processes. In obtaining the public’s view on the Commission, it was decided to make use of the CASE survey mentioned in this discussion, as it would be much more comprehensive and reflective of a broader public view than interviewing one or two members of the public.

445 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. As reported in the Commission’s 2007 submission to the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, since PEPUDA came into effect in 2002, the SAHRC has litigated 15 cases in the equality courts (p.17). During its second term, the SAHRC has been involved in different capacities in three cases before the Constitutional Court: *Bhe and Others in 2003/2004*, that challenged the system of male primogeniture, as contained in s 23 of the Black Administration Act; *M v The State in 2006/2007* on the impact of the imprisonment of women on their children; and *Brummer v The Minister of Social Development, Director General of Social Development and the Minister of Justice and Constitutional Development, Case No: 25/2009*, which was an application to the Constitutional Court for the confirmation of an order of unconstitutionality of s 78(2) of PAIA by the High Court (WC). In this matter, the Constitutional Court also had to consider an application to appeal against the non-condonation of the late referral of a request for access to information by a journalist to the Western Cape High Court.

446 For example, interview with Jody Kollapen, Chairperson of the SAHRC, October 2002-September 2009; interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current; interview with Commissioner Karthy Govender.

447 Interview with Adila Hassim, Head: Litigation and Legal Services, ALP.

448 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. The question of whether and how the Commission should be involved in litigation has been debated for some time; see, for example, Murray 2003 p.10-11. Although the Commission has the power to take a matter to court in its own name, or on behalf of another person or group (HRC Act s 7 (e)), and PEPUDA states that “proceeding under this Act may be instituted by...the South African Human Rights Commission” (PEPUDA s 20 (f)), this does not answer the question of how much litigation the Commission should, or would like to do, or whether it has the capacity to do so.

449 Interview with Commissioner Tom Manthata.

450 Interview with Justices from the Constitutional Court, Chief Justice Pius Langa and Justice Yvonne Mokgoro.

451 Interview with staff member Danaline Franzman, HoP LSP.

452 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.



Deputy Chairperson of the Commission, Zonke Majodina, presiding over a public dialogue on diversity and constitutional values in Bloemfontein. Also Dr Danny Titus (left) and Adv. Mothusi Lepheana, the SAHRC's Free State provincial manager (second from right).

fourteen years later the perception is that if you violate human rights, the Commission comes after you, you apologise, you get into a deal, you walk away and therefore we might inadvertently be creating a culture of impunity...people need to be more aware that violating human rights is a serious issue.⁴⁵³

Another reason for the Commission to play a bigger role in litigation would be to provide “access [to legal services] for those who don’t normally have it, but it’s also [about assisting people to] navigate through...quite complex pieces of law” such as the Equality Act, PAIA and PAJA.⁴⁵⁴ Furthermore, the SAHRC is one, if not the only, Chapter 9 institution to have the power to litigate outside of the Equality Act (PEPUDA);

453 Ibid.

454 Interview with Adila Hassim, Head: Litigation and Legal Services, ALP. PAJA is the Promotion of Administrative Justice Act, 3 of 2000.

and it should therefore use this power subject to its carrying capacity,⁴⁵⁵ and has been invited by the courts to do so.⁴⁵⁶

If a strategic decision is taken that the SAHRC should be more involved in litigation, there needs to be consideration of the kind of skills and expertise that are necessary to be involved in and run big socio-economic cases.⁴⁵⁷ The SAHRC is “not structured currently to do that”, and if it “wants to be more substantially involved in socio-economic rights litigation, it has to internally structure itself differently”.⁴⁵⁸ As one respondent explained:

Litigation is an art, it's a demanding activity. Those who shout 'litigate', 'litigate' in the Commission, some of them have never really litigated and they don't know how demanding it is, and you can't litigate effectively if you are overloaded. I believe the legal department still doesn't know how many cases it can or should carry.⁴⁵⁹

But instead of litigating by itself, partnering with others to discharge this aspect of the Commission’s mandate could be a strategic option,⁴⁶⁰ as could be appearing more often as *amicus curiae*, which the Commission would like to be invited to do more often.⁴⁶¹

However, as has already been discussed in Chapter 2 of the report, the Commission’s interaction with the courts need not be restricted to litigation. It could also play a role in the monitoring of structural interdicts.⁴⁶² Yet taking on such a role would not only have resource implications; the Commission would also have to consider to what extent such a role might be in potential conflict with taking on a strong litigation

455 Interview with staff member, Danaline Franzman, HoP LSP.

456 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current. And “a Constitutional Court judge has stated that it would like to see the greater involvement of the SAHRC in litigation before it” (Murray 2003 p.10).

457 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

458 Ibid.

459 Interview with Commissioner Leon Wessels.

460 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

461 Interview with Commissioner Leon Wessels.

462 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with Commissioner Karthy Govender.

strategy.⁴⁶³ Whatever strategic position the Commission decides on, though, “striking the balance and finding that happy compromise where different people in the Commission have different ideas is challenging.”⁴⁶⁴

3.3.6 Relationship between the SAHRC and CSOs

Respondents had varied opinions about whether the SAHRC has strong relationships with CSOs.⁴⁶⁵ It is also necessary to ask what constitutes effective engagement⁴⁶⁶ and to consider how these relationships have been managed by both the Commission and CSOs.⁴⁶⁷ As discussed in the section on the SAHRC’s relationship with the courts and the TAC case, there might have been an initial reluctance on the part of the Commission to engage too actively with CSOs in an attempt to guard its independence. However, as one respondent acknowledged, one of the “lessons learnt” has been that independence “does not mean aloofness...it means interacting with people in the community and understanding that...NGOs know so much more about specialist things than we [the SAHRC] do.”⁴⁶⁸ In this sense, some respondents felt that although the SAHRC works with CSOs across its different programmes and across provinces, the Commission can and should be working more with CSOs in the discharging of its broad mandate.⁴⁶⁹

One of the ways of simultaneously working closer with CSOs and addressing the SAHRC’s financial shortfall would be to seek funding for joint projects. The Foundation for Human Rights (FHR), a donor who has funded the SAHRC, explained that

In their first programme, the FHR had not been permitted in terms of its own rules to fund the SAHRC’s activities directly, but could only fund joint activities with civil society. A major aspect of the first programme was spent strengthening the relationship

between the Chapter 9s, including the SAHRC, and civil society. The FHR was only permitted to fund the Chapter 9s directly in the second programme. The FHR endeavoured in both the first and second programmes to foster a relationship with civil society, which often proved very difficult...In the new programme we will only fund partnerships between the Chapter Nines and civil society. This is a prompt to the Commission to give particular attention to Section 5 of the Human Rights Commission Act.⁴⁷⁰

Part of the initial reluctance to work with CSOs might also relate to the question of mandate and ‘territory’ and guarding against the Commission encroaching on the work of CSOs. But as one respondent commented, encroachments on territory in this regard should perhaps not be a big concern, as the need in the communities is so great and the Commission in “guarding against doing the wrong thing, if ever it is wrong at all...have not even asked themselves, ‘if we do it, what?’”⁴⁷¹ But although there is an opinion that the SAHRC has had a “reasonably good relationship with civil society organisations”⁴⁷² and that there is some “healthy interaction,”⁴⁷³ there is also the acknowledgement that there is an

expectation from civil society in [the] relationship with the Commission to do more. One has picked up a level of discontent, or unrealised expectations on the part of civil society...Perhaps that goes back to the issue of independence and how we work...[when] civil society see themselves and us in a relationship, they often do not permit themselves to see that relationship going beyond us and them and involving Government. It’s almost a mindset that we are on the same side in opposition to Government.⁴⁷⁴

The HRC Act provides for a more systematic way of interacting with CSOs through the establishment of what is referred to

.....
463 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

464 Interview with staff member, Danaline Franzman, HoP LSP.

465 ‘Civil society organisations’ is used as a broad term to include, for example, community-based organisations, non-government organisations, faith-based organisations, and so forth.

466 Interview with staff member, Christine Jesseman, HoP RDP.

467 Interview with Commissioner Zonke Majodina.

468 Interview with Commissioner Karthy Govender.

469 Interview with Commissioners Tom Manthata and Zonke Majodina.

.....
470 Interview with Yasmin Sooka, Executive Director, Foundation for Human Rights (FHR). Section 5 committees are discussed in greater detail later in this section.

471 Interview with Commissioner Tom Manthata.

472 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

473 Ibid.

474 Ibid.

as Section 5 committees.⁴⁷⁵ There is divided opinion in the Commission about the effectiveness of Section 5 committees, and these forums seem to have worked better in different programmes and sectors.⁴⁷⁶ The uncertainty of the SAHRC regarding the effectiveness of these committees can be traced as far back as the first term, when “in 1999 the Commission was disbanding the Section 5 committees. To me, I was new then, there was no apparent reason and I am still struggling to understand why the Commission didn’t continue.”⁴⁷⁷ One of the reasons for the discontinuation of the committees was that although they are

*a very good idea [but]...to the extent that it became understood as permanent standing committees it created a problem. We correctly then said we don’t need these kind of permanent standing committees. And the idea has moved to still using Section 5 committees, in some cases time-bound...in other cases a committee that could be constituted as and when you need them for a specific purpose...I don’t think we’ve [made enough use of these committees], but at the same time one may raise the question of whether that same information that you would get through a formal process like a committee isn’t already being obtained by the Commission through its own informal interactions.*⁴⁷⁸

Another respondent commented on the discontinuation of Section 5 committees:

*We had Section 5 committees that were dissolved because they were not really working out...I support them – they are in the [HRC] Act, but...[would rate them]...4 out of 10 in terms of their rating of benefit to the Commission...If they were to disappear today I wouldn’t miss them, but that is not to say they are not important.*⁴⁷⁹

.....

475 Section 5 (1) of the HRC Act states that: “The Commission may establish one or more committees consisting of one or more members of the Commission 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.”

476 Currently there are Section 5 committees on Older Persons, Disability, Torture, and Parliamentary and Government Liaison.

477 Interview with Commissioner Zonke Majodina.

478 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

479 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

However, the Chairperson on one of the more established Section 5 committees, on Older Persons, felt that these committees do have a real benefit, although they are

*nothing revolutionary, but it does create a nice framework for taking things further...it’s a set commitment for dealing with...issues. Often, most of these parties just won’t come together in any sort of formal setting...[between meetings] there will be ongoing communication...[it is a] nice chance to get everyone together and on the same page...there are also specific action items that we take.*⁴⁸⁰

But Section 5 committees might not be effective in all sectors, as “you don’t want to replicate existing structures which might be elsewhere”, and in sectors that are large, “how do you validate who you have and don’t have?”⁴⁸¹ According to one respondent external to the SAHRC, the Commission has not used the full potential of its Section 5 committees, and “this is problematic, as it is a vehicle to bring in the voice of civil society”.⁴⁸²

Other CSOs have had mixed experiences in their interaction with the SAHRC; they might have a good relationship with one individual in the Commission, such as the Chairperson who has acted as entry point to the Commission, but direct contact with the rest of the Commission has resulted in a “consistently disappointing” experience.⁴⁸³ This relates to the question of how CSOs think the SAHRC has done in discharging its mandate, and it is possible that some organisations might, or have become disillusioned and disaffected with the SAHRC.⁴⁸⁴

3.3.7 Relationship between the SAHRC and donors

As mentioned in Chapter 2 of the report, one of the routes that the SAHRC could pursue to address its financial shortcomings is raising money from donors. NHRIs’ use of donor funding is not unheard of, as some institutions receive external funding for project-based work, or because the money they receive from

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480 Interview with staff member, Christine Jesseman, HoP RDP.

481 Ibid.

482 Interview with Yasmin Sooka, Executive Director, FHR.

483 Interview with Mark Heywood, Director, ALP.

484 Interview with staff member.

their governments for their core functions is inadequate.⁴⁸⁵ Foreign government-specific project funding also occurs; in particular, they look kindly on such sectors as human rights and business.⁴⁸⁶

The SAHRC has had limited experience with donor funding, all of which has been project-based;⁴⁸⁷ and this relationship was more vibrant in the earlier years.⁴⁸⁸ Reasons why the Commission has not more actively sought donor funding include that the money received from Government is perceived by some as having been reasonably good;⁴⁸⁹ donor funding did not always match what the Commission's priorities were;⁴⁹⁰ and the Commission does not want to be seen to compete with CSOs for funding, especially as the latter do not have the advantage of government funding.⁴⁹¹

There are differences of opinion about whether the SAHRC should be actively seeking donor funding. There are those who feel that seeking donor funding is important⁴⁹² and should be pursued,⁴⁹³ perhaps even through creating a vacancy for a fund raiser.⁴⁹⁴ Donor funding brings its own challenges, though,

particularly insofar as independence is concerned,⁴⁹⁵ and of course must be well managed.⁴⁹⁶

In addition to aspects of independence that need to be considered when receiving donor funding, there is also the risk of becoming dependent on such funding. As one respondent reflected, seeking donor funding is a "dangerous route", especially considering current global cutbacks in the funding of "democracy projects", which would have left the SAHRC "very vulnerable" if it was "dependant on foreign funding".⁴⁹⁷

A final consideration in the SAHRC's relationship with donors is the Commission's ability to manage donor funds, either on its own or in partnership with others. It has had a varied track record so far of managing funds successfully, while in some cases not entirely meeting donor requirements. In the main, the Commission has successfully managed funds received from the FHR, although there have been occasions when the FHR has had to point out that, once a financing agreement has been signed, funds have to be spent in accordance with the agreement and reports furnished in terms thereof. There is often a need to point out the details of the agreement. However, that is not an uncommon occurrence for South African organisations.⁴⁹⁸

Another example of the management of donor funds is the European Union (EU) funded CSAP project mentioned in Chapter 2 of this report. CSAP was formed as a programme structure with delegations from the SAHRC, CGE and OPP to receive and manage the money received from the EU.⁴⁹⁹ While the final project report is being prepared and the project is in the process of being wound down, there have been numerous challenges, two of which warrant mention at this stage. Firstly, working within the exacting and often rigid technical requirements of the project has created challenges. Secondly, working with other partners and managing a project of such magnitude from a distance has also brought its own challenges, as respondents explained, the CSAP was a "convoluted exercise

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485 Interview with former staff member, Sello Hatang, HoP ICP; interview with Yasmin Sooka, Executive Director, FHR. Also see Human Rights Watch 2001 p. 21-23 .

486 Interview with Yasmin Sooka, Executive Director, FHR.

487 Examples of funding received include funding from the Mott Foundation; and twice from the Foundation for Human Rights. One of these FHR-funded projects focused on training paralegals with the objective of promoting equality, non-discrimination and public participation in equality courts. The Commission has also received grants from the New Zealand Government for a Vryburg police project, as well as an Australian Aid Grant from the Australian Government (SAHRC 2008c p. 120). During its first term the Commission, for example, raised funds for its work in the children's rights sector (interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002). The SAHRC early on also set up a trust fund to enable it to raise money, but this has been largely ineffective (Murray 2003 p.29-30); and with the controversies surrounding the subpoenaing of the media during the Inquiry into Racism in the Media, trust members resigned (comment by Commissioner Leon Wessels). For more detail on donors that have funded the SAHRC during its first and second terms, refer to the annual reports.

488 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

489 Ibid.

490 Ibid.

491 Ibid; interview with Tseliso Thipanyane, CEO of the Commission, May 2006 – current.

492 Interview with Commissioner Tom Manthata.

493 Interview with former staff member, Sello Hatang, HoP ICP.

494 Ibid.

.....
495 Interview with Yasmin Sooka, Executive Director, FHR.

496 Interview with former staff member, Sello Hatang, HoP ICP; interview with Yasmin Sooka, Executive Director, FHR.

497 Interview with Commissioner Karthy Govender. However, the extent of this dependence probably also depends on the size and proportion of the budget that comes from donor funds.

498 Interview with Yasmin Sooka, Executive Director, FHR.

499 Interview with Commissioner Karthy Govender; interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

in multiple levels of accountability that didn't quite work,⁵⁰⁰ and it "demonstrates what problems you have when you go into partnerships at the level of being accountable for huge amounts of money."⁵⁰¹

3.3.8 Relationship between the SAHRC and the media

The SAHRC has not had trouble gaining media attention. Yet the manner in which it has engaged the media and the subjects on which it chose to focus, particularly early on in its history when, arguably, it needed the media on [its] side, did not necessarily cultivate a positive image of the Commission in media circles.⁵⁰²

Although the SAHRC has had an "up and down"⁵⁰³ relationship with the media, especially during the time of its inquiry into racism in the media during its first term,⁵⁰⁴ there was a general view amongst respondents interviewed for this chapter that this relationship has only improved since then and that the Commission has had a reasonably good relationship with the media.⁵⁰⁵ The Commission's media coverage naturally varies, with some cases elevating the SAHRC's profile, after which media coverage normalises again.⁵⁰⁶ However, there remains room for improvement in the manner in which the SAHRC engages the media, as well as the topics it engages it on, and one respondent commented that in some instances the Commission is not "hundred per cent media-savvy in terms of our strategy."⁵⁰⁷ The relationship between the SAHRC and the media has two important dimensions: on the one hand, the Commission "communicates its messages to the public via the media", and on the other hand there exists the relationship between the "Commission as a Chapter 9 institution and the

media as a member of civil society.⁵⁰⁸ Reporting on the SAHRC's work plays an educative function and helps to create a human rights culture.⁵⁰⁹ However, some respondents felt that some of the good work of the Commission is going unreported.⁵¹⁰ This may be for a number of reasons, such as that the Commission is very reactive⁵¹¹ in its interaction with the media; it can be much more proactive in its approach by, for example, writing opinion pieces, targeting specific journalists,⁵¹² and making journalists aware of a bigger or different story, if relevant, when approached for comment.⁵¹³ Some Commissioners are also seen as being too silent in the media, and there is "a need to up the communication ante a bit and get the Commissioners who are working on the different portfolios some kind of a profile."⁵¹⁴ This could be easily done, and has happened in the past, where a Commissioner would email a newspaper with an article or opinion piece and ask if the paper would publish it.⁵¹⁵ In addition to providing a 'reader service' to the public on who to approach regarding a particular human rights issue or abuse, such media coverage also increases the profile of the Commissioners and the SAHRC in general, in addition to promoting the profile of the Chairperson⁵¹⁶ and the CEO. Other ways in which the Commission could further extend its media profile in a proactive manner is through greater engagement with the provincial offices in order for the media to cover what is happening there, and greater communication to the public through the media of the SAHRC's decisions on complaints.⁵¹⁷

Many of these proactive interactions may improve with the establishment of the media engagement strategy that is currently being developed by the Commission's media relations officer.⁵¹⁸ It might also be necessary for coordination and communication in the SAHRC's to improve by letting the media office know about events, projects, complaints, and so forth that people are working on – in other words, people

500 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002-September 2009.

501 Interview with Commissioner Karthy Govender.

502 Murray 2003 p.17.

503 Interview with Commissioner Leon Wessels.

504 SAHRC 2000; Glaser 2000; Pityana 2000.

505 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009; interview with Tseliso Thipanyane, CEO of the Commission, May 2006 - current; interview with staff member, Victoria Maloka, HoP ETP.

506 Interview with staff member, Victoria Maloka, HoP ETP. See the SAHRC's annual reports for statistics on its coverage in national and international print media.

507 Interview with staff member, Christine Jesseman, HoP RDP.

508 Interview with Jovial Rantao, Chairperson of SANEF.

509 Interview with Commissioner Leon Wessels; interview with staff member.

510 Interview with Commissioner Leon Wessels; interview with Jovial Rantao, Chairperson of SANEF.

511 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

512 Ibid.

513 Interview with Jovial Rantao, Chairperson of SANEF.

514 Ibid.

515 Ibid.

516 Ibid.

517 Interview with staff member.

518 Interview with staff member.

should share their work.⁵¹⁹ While keeping in mind that the media constitutes an “audience”⁵²⁰ with which the SAHRC needs to communicate effectively, it is important that the necessary internal consultation takes place to ensure that clear messages reach the media – something that has not always happened in the past.⁵²¹ This is to provide the media with a fuller understanding of issues so that they do not only report from their own perspective.⁵²² It is also necessary to educate the media on the work of the Commission.⁵²³ Finally, it needs to be kept in mind that information provided to the media should be packaged appropriately and should be accompanied by a summary.⁵²⁴

3.3.9 Relationship between the SAHRC and political parties

The relationship between the Commission and political parties is linked to its independence. Political parties play a role in the choice, selection and appointment of Commissioners; is central to how it is held accountable; and contributes to its legitimacy in the public domain. This relationship is therefore of critical importance from the viewpoints of not only independence but also support and effectiveness. The Commission furthermore often receives complaints from political parties that it is required to respond to and act upon. It is therefore essential for the Commission to have a suitable policy with regard to its independence from and its effectiveness in interacting with political parties. This will ensure, on the one hand, that there is no undue pressure from political parties, especially government ones; and on the other hand, that it is alive to the reality that political parties may raise issues that fall within the Commission’s mandate and might have to be dealt with.

One respondent felt that, in terms of guarding its independence, the SAHRC goes out of its way to show its independence from political parties, as this can easily become a point of external criticism.⁵²⁵ When accepting invitations from political parties to speak at events, the Commission is careful to accept

invitations across the political spectrum and not be drawn into electioneering. As one respondent commented:

*The view that I’m taking is that I’m not going to be used for their electoral advantage, but if they want me to talk about the Constitution I am happy to talk about the case law and how the cases have been interpreted...We’ve just got to be cautious about it.*⁵²⁶

The SAHRC took this caution a step further by drafting resolutions for its interaction with political parties in the run-up to the April 2009 general election. These included “[that,] except with the consent of the Chairperson or CEO, the Commission should not address party political election rallies”; impressing upon those who invite the SAHRC “the necessity of respecting the impartiality and independence of the Commission”; assigning “senior staff and commissioners” to attend these meetings; and starting presentations “with a brief description of the Constitutional role and responsibilities of the Commission and the need for it to discharge its responsibilities and duties impartially and independently.”⁵²⁷ Guarding against the “politicisation of the mandate of the Commission” is also relevant in complaints-handling, as one respondent commented, “A lot of them are genuine complaints”, but sometimes the parties use the Commission as a platform for furthering their own agendas, and for political point-scoring, especially during pre-election times.⁵²⁸

In view of the above, the SAHRC does not have a “substantive relationship” with political parties, and “beyond wanting them to have an understanding of what we do, why we do what we do, how we choose the work we do, I’m not sure there is scope for much more than that.”⁵²⁹ The Commission wrote to the major political parties in February 2008, requesting a meeting at which, amongst other things, to brief parties on the Commission’s work.⁵³⁰ Despite follow-up by the Commission’s offices, the parties’ response was very poor, with only the

519 Interview with staff member.

520 Interview with staff member, Christine Jesseman, HoP RDP.

521 Interview with Commissioner Leon Wessels.

522 Interview with Commissioner Tom Manthata.

523 Interview with staff member.

524 Interview with Commissioner Karthy Govender.

525 Interview with staff member, Victoria Maloka, HoP ETP.

526 Interview with Commissioner Karthy Govender.

527 “Draft resolution” for interaction with political parties in the run-up to the April 2009 elections, Karthy Govender, SAHRC, 2009b.

528 Interview with staff member, Danaline Franzman, HoP LSP.

529 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

530 Letter to the leaders of SA political parties, 21 February 2008.

Inkatha Freedom Party (IFP) indicating its willingness to meet.⁵³¹ Similarly, the SAHRC sent a letter to political parties represented in Parliament on PAIA to inform them that they have to include in their new manifestos “issues of good corporate governance and openness” and again, responses were only received “from

two or three political parties.”⁵³² This interaction with political parties was aptly summarised by a respondent who reflected that “[w]hen they [political parties] want us to respond quickly when they lodge complaints it’s a different matter, but when they have to respond to us...they are pretty slow.”⁵³³

.....
531 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. This is not to imply that other political parties refused to meet, but rather indicates a lack of response.

.....
532 Interview with former staff member, Sello Hatang, HoP ICP. Letter dated 16 October 2008.
533 Interview with Commissioner Leon Wessels.

3.4 Conclusion and recommendations

This chapter of the report explored how the SAHRC views the notion of independence and how this understanding has developed over time. Of the many aspects that make up independence, the SAHRC is particularly concerned about its financial independence. Opinions vary as to whether the Commission has been unduly influenced in the discharging of its mandate in certain instances, but there seems to be consensus that the SAHRC has worked hard over its two terms to build a reputation as an institution that acts independently and without fear, favour or prejudice. The chapter also discussed the SAHRC's relationships with a number of stakeholders such as Government, national Parliament and provincial legislatures, the public, the courts, CSOs, donors, the media, and political parties. With regard to each of these relationships there are a number of things that the SAHRC has done right, but there are also a number of challenges, and it is perhaps necessary for the Commission to reflect on what it would like to see happen on strategic and operational levels in each of these relationships.

Through the course of the interviews, respondents made a number of recommendations, endorsed by the Commissioners and the CEO, on the independence and external relationships of the Commission. These are mentioned according to theme below and follow the order of the discussion in this chapter, rather than being listed in order of priority.

Independence:

- The Commission should develop and adopt a policy position on its independence that incorporates benchmarks on how this will be monitored and maintained.
- The Commission should develop a policy on the involvement of Commissioners and staff in the realm of party politics.

External relationships:

General:

- The Commission should devise a clear strategy with regard to external relationships. The CEO's office is currently devising a strategy for stakeholder management. This strategy could involve MoUs with relevant stakeholders.

Government:

- The Commission should pursue the establishment of a MoU with the Executive to ensure regular meetings and briefings in the spirit of cooperative governance.
- Every government ministry and the relevant departments should have a person responsible, or focal point, for human rights to ensure that constitutional obligations are observed at all times.
- There should be a mandatory requirement that any legislation with an impact on human rights must be referred to the Commission for its comments before the tabling thereof in Parliament.

The legislatures:

- The Commission, together with other Chapter 9 institutions, should actively engage the Speaker's office in the process of setting up a proposed new unit for Chapter 9 institutions in Parliament.
- Greater cooperation, involvement or engagement should be established with provincial legislatures.

Public:

- The Commission should communicate the findings of its inquiries more effectively to the relevant stakeholders, and in particular those who made submissions, as well as to the public at large.
- The Commission should endeavour to reach out and extend its services to all parts of the country and all constituencies, in particular those areas it has not previously reached or served.
- The Commission should have a clearer strategy on its work in rural areas.

CSOs:

- The Commission should develop and adopt a policy on the establishment and functioning of its Section 5 committees, as it recognises the value and need for such committees.
- The Commission should have a more structured approach to its relationship with CSOs.

Donors:

- The Commission should develop a clear position on donor funding, while ensuring that Government remains responsible for the funding of its core activities.

Media:

- In general, the Commission should be more proactive in terms of its interaction with the media through, for example, hosting regular information sessions, writing opinion pieces, and sharing its work with the national and provincial media in a more effective manner.

- The Commission should use its calendar of important human rights events and other times when it is scheduled to report to engage more proactively with the media.

Political parties:

- The Commission should continue the process of engaging political parties so that they understand the Commission's mandate and the way it is being discharged.



4

Looking to the inside:
internal organisational
structure and corporate
governance

4.1 Introduction

Where the previous chapter looked to the outside and the SAHRC's external stakeholder relations, this chapter will turn the focus inward and discuss the Commission's internal organisational structure and corporate governance. How the SAHRC should be structured to best give effect to its mandate is still an ongoing discussion in the Commission. Reflections offered by respondents in this regard must therefore be read as part of a continuing dialogue and engagement, and this chapter will present some of these, often opposing, viewpoints.

The discussion will commence with a brief presentation of the Commission's current structure in order to orientate the reader and provide some background to the rest of the chapter. This will be followed by reflections on the different layers in this structure and how they interact, starting with the Commissioners and ending with the workings of the Secretariat. Structural challenges and interaction between different parts of the Commission are key issues that are relevant to all levels – Commissioners to Commissioners, Commissioners to CEO, management to staff, programme to programme, and the national office to the provincial offices. This chapter will, in one way or another, touch on each of these levels, albeit not in equal depth.

The first point of discussion will be the Commissioners – their appointment process, the skills they bring to their work, their thematic areas of work, and their geographic location. This will be followed by reflections on how the Commissioners interact with the Secretariat, including the CEO. This relationship is first and foremost a legal one, as this chapter will underline. However, some reflections will be offered on how the legislation has been interpreted, and on the perception held by some that there are two centres in the SAHRC – the Commissioners and the Secretariat.

The focus will then turn to the internal structure and functioning of the Secretariat.⁵³⁴ Underlying the Commission's most recent organisational changes is a move away from a non-integrated approach to more integration across programmes and provinces. The section will discuss some of the challenges experienced in terms of the structure, before turning to the relationship between the Commission's head office and provincial offices. It is important to ask whether the SAHRC has the requisite staff capacity and skills to discharge its broad mandate, and the chapter will reflect on whether this is the case and what skills sets are most appropriate to the SAHRC's work. Issues of capacity are also affected by staff turnover, and the chapter will look at staff turnover numbers and people's reflections on this. The chapter will conclude with some recommendations offered by respondents.

4.2 Short description of the Commission's organisational structure

The SAHRC is composed of two interrelated structures – the Commissioners and the Secretariat. The SAHRC started its second term with six Commissioners,⁵³⁵ five of whom were appointed in a full-time and one in a part-time capacity. Commissioner McClain resigned in the 2006/2007 financial year,⁵³⁶ and in December 2008, Commissioner Pregs Govender was appointed as full-time Commissioner for a seven-year term. In terms of their location, all Commissioners are based at head office, with the exception of Commissioner Karthy Govender, who is based in Durban, and Commissioner Pregs

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534 What is outside the ambit of this report is a detailed discussion of the different models and structures of the Secretariat over the Commission's second term. Although this would be an interesting way to approach a discussion of the Secretariat, such detail (that can be found by perusing the Commission's annual reports and strategic planning documents) would be more relevant if this report were a descriptive history of the Commission. Instead, what this part of the chapter aims to do is to draw out a collection of views offered in the interviews on some of the achievements and challenges in the structure and functioning of the Secretariat as it currently stands.

535 They were Jody Kollapen (Chairperson), Zonke Majodina (Deputy Chairperson), Leon Wessels, Tom Manthata, Charlotte McClain, and Karthy Govender (part-time Commissioner).

536 This was after a period of absence of more than a year from the Commission.

Govender, who is based in Cape Town.⁵³⁷ The Secretariat is headed by the CEO and Deputy Chief Executive Officer (DCEO), and consisted of 128 permanent staff members and 32 interns at the time of writing. Secretariat staff are spread between the head office in Johannesburg and nine provincial offices, which were established incrementally.⁵³⁸ Apart from staff employed in the Commissioners' programme, the Office of the CEO, and the Internal audit activity (IAA), the Secretariat staff work across eight different programmes. These are the LSP; RDP, which also hosts the Commission's library; ETP; PIAP; ICP, in which the PAIA unit is located; Financial Management Programme; Administration and Supply Chain Management Programme; and Human Resources Programme. Each of these programmes is headed by a Head of Programme (HoP) and has varying numbers of Deputy Directors (DDs), depending on a programme's thematic or operational areas. At provincial level, positions exist for a provincial manager (PM), an administrative secretary, an education officer (EO), a legal officer (LO), and three interns (for education, research and legal).⁵³⁹

4.3 The Commissioners

This section will discuss a number of aspects relating to the Commissioners. Although the appointment process of the Commissioners has received much attention elsewhere,⁵⁴⁰ it is fitting to revisit this topic at the end of the SAHRC's second term and the start of the third. During the appointment process it will of course be necessary to appoint Commissioners with the appropriate skills sets, and this section provides some opinions on what these skills should be. Skills have to be relevant to the work that the Commissioners must do; and although the role of the Commissioners in relation to the Secretariat will

537 The arguments for and against having Commissioners based in provinces will be presented later in this chapter. Currently, Commissioners are not based in provinces because of a policy decision of the Commission. Commissioner Karthy Govender is a part-time Commissioner, and Commissioner Pregs Govender made herself available as Commissioner on the basis that she be based in Cape Town.

538 The Gauteng provincial office was the last to be established, in 2007, and is located at the same premises as the head office.

539 At the time of writing, not all vacancies in the Commission were filled. The provinces differ in the extent to which they make use of interns to supplement the staff complement. Murray 2003 p.13 noted about the Commission's structure and the different programmes: "Yet what is interesting is that these categories [e.g. LSP, ETP, RDP] reflect the particular powers that it [the SAHRC] possesses rather than any overall themes about issues or priorities that it will focus on. This may be the result of, or may indeed exacerbate, the separation with which the Commission seems to view its various powers. It is the powers that dictate its organization rather than chosen policies or issues."

540 See, for example, Sarkin 1999; Murray 2003.

be discussed later on, this section will explore the work of the Commissioners in relation to their specific thematic areas, as well as their work in provinces.

4.3.1 The appointment process

Section 193 of the Constitution sets out the criteria for the appointment of Commissioners, and stipulates that they must be "women or men who (a) are South African citizens; (b) are fit and proper persons to hold the particular office; (c) and comply with any other requirements prescribed by national legislation."⁵⁴¹ They should also "reflect broadly the race and gender composition of South Africa."⁵⁴² Commissioners are appointed through a special Parliamentary Committee that receives nominations, and their appointments are confirmed by the President.⁵⁴³

Concerns raised about the appointment process of the first set of Commissioners in 1996 included the relevance of the questions posed during the interviews; that the interviews were short; and that there was no consistency across interviews.⁵⁴⁴ In the case of both the 1996 and the 2002 appointment processes concerns were raised about the political nature of the appointments.⁵⁴⁵ For example, the fact that the Parliamentary Committee responsible for nominations consisted of representatives from different political parties, it was felt, might have meant that political considerations took precedence over more appropriate selection criteria.⁵⁴⁶ This short section of the report does not aim to reinterpret or substantially add to these debates. Rather, at the time of the appointment of Commissioners for the third term, it revisits some of these concerns from the perspective of the respondents. The term of the five remaining Commissioners who were appointed for the second term comes to an end on 30 September 2009. Commissioner Pregs Govender has been

541 Republic of South Africa 1996 s 193 (1).

542 Ibid sec 193 (2).

543 Ibid sec 193 (4).

544 See Sarkin 1999 p.593.

545 See Murray 2003.

546 See Sarkin 1999 p.593-594; Murray 2003 p.19. One of the most striking outcomes of the second round of appointments was that no new Commissioners were appointed – those who remained at the end of the first term were reappointed. This meant that the number of Commissioners was low in comparison to the first term. The *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions also commented on this in its report and stated that the appointment of so few Commissioners at the start of the second term, considering the SAHRC's extensive mandate, was "deeply problematic and wholly inadequate". (Parliament of the Republic of South Africa 2007 p.177.)

appointed for a seven-year term with effect from December 2008, and in April 2009 positions were advertised for five full-time Commissioners.⁵⁴⁷ Although the SAHRC has set out its operational plans for the 2008/2009 financial year,⁵⁴⁸ thereby providing future direction, the departure of five Commissioners and uncertainty about who will be appointed raise concerns about the preservation of the SAHRC's institutional memory and the handover of work. As one respondent commented, "even if we retain it [current project plans] as it is, there is going to be a gap, and people might not have been appointed – so there will have to be interim plans."⁵⁴⁹ Another respondent was of the opinion that it is important to get more "systems" in place at the Commission as the "biggest threat to the organisation is that we don't know who will be here next time."⁵⁵⁰ On an operational level, preparing for the incoming Commissioners and the new direction that the Commission might take involves keeping project plans broad enough for there to be a "sufficient base to work towards, whatever direction the new Commissioners want to take us in."⁵⁵¹

In terms of selection criteria that the Parliamentary Committee should focus on, respondents felt that although representivity (in terms of race and gender) was still important⁵⁵² as one had to take into account the country's history and diversity,⁵⁵³ it was equally important that the Parliamentary Committee "must select the most ably qualified people,"⁵⁵⁴ as it is crucial to have people who are effective.⁵⁵⁵ Furthermore, the independence of potential appointees must be seriously considered as, according to one respondent, a

difficulty the SAHRC has had over the years... [is] one or two Commissioners who have had links with the ANC in the past and might be seen as sympathetic,

*but you deal with that through transparency and your actions.*⁵⁵⁶

Equally "problematic" would be the appointment of former cabinet ministers "who are looking for positions to park them in."⁵⁵⁷ The best way to avoid some of the "political wrangling" associated with the appointment process and to ensure its rigour is "strong civil society participation, which hasn't really happened."⁵⁵⁸

A matter that has remained unresolved since the inception of the SAHRC and that has the potential to adversely affect the pool of nominees for Commissioners is the question of Commissioners' salaries.⁵⁵⁹ This already played a role in a 2008 selection process to fill a vacancy for the position of Commissioner, when one of the nominees withdrew after learning what the salary package of Commissioners was.⁵⁶⁰ Furthermore, apart from a letter of appointment that sets out the period of the appointment and an annual letter dealing with salary increments, no terms and conditions of service accompany the appointment of Commissioners.⁵⁶¹ This has created a legal *lacuna* in respect of Commissioners' individual accountability to each other and their collective accountability

547 For example in the *Mail and Guardian*, April 24 to 29, 2009.
 548 This includes a particular approach to the monitoring of socio-economic rights that had been previously discussed in the Commission but was proposed in a different form by Commissioner Pregs Govender.
 549 Interview with staff member, Danaline Franzman, HoP LSP.
 550 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
 551 Interview with staff member, Christine Jesseman, HoP RDP.
 552 Interview with Commissioner Zonke Majodina.
 553 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 554 Interview with Commissioner Zonke Majodina.
 555 Interview with Commissioner Karthy Govender.

556 Interview with Jovial Rantao, Chairperson of SANEF.
 557 Interview with Commissioner Karthy Govender.
 558 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. See also interviews with Commissioners Zonke Majodina and Karthy Govender.
 559 Interview with Commissioner Leon Wessels.
 560 The refers to Adv. Werner Krull's letter dated 11 November 2008 to the *ad hoc* Committee on the Filling of the Vacancy in the South African Human Rights Commission, withdrawing his nomination as SAHRC Commissioner. Therein he stated that he "was extremely shocked to note that the terms and conditions of employment of Commissioners, especially the level of remuneration, are not nearly commensurate with the work or status of the Commission as envisaged by the Constitution. I do not for one moment expect that public service is to be compensated at private sector levels, but the discrepancy even between the terms and conditions of employment of Commissioners on the one hand and of public servants and other public and elected officials on the other hand, with comparable duties and standing in public life, makes a mockery of the Constitution's enjoiner in section 181(3) that organs of state, through legislative and other measures, must assist and *protect* institutions such as the Commission to ensure their independence, impartiality, dignity and effectiveness." It is also worth noting that inconsistencies exist in the salary structures across Chapter 9 institutions. One respondent described this as follows: "As Chairperson of the Commission I was paid at the level of Deputy Director General. The Chairperson of the IEC is paid at the level of a judge. Members of the Commission were paid at the level of Chief Director, and the CEO at the level of [Chief] Director." (Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001.)
 561 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

to Parliament.⁵⁶² In the absence of terms and conditions, Commissioners have had to reach agreement amongst themselves on the “rules of the game”. This is unsatisfactory, particularly from a future perspective, because the possible failure to continue finding consensus and agreement could have potentially prejudicial consequences for the ability of the Commission to function as a coherent and cohesive entity.⁵⁶³ This underscores the need for urgent attention to be paid to putting in place proper conditions of service.⁵⁶⁴ However, this should not preclude the development of an appropriate code of conduct amongst Commissioners which would go beyond the legal provisions envisaged in the terms and conditions.⁵⁶⁵

Choosing the Chairperson

The appointment of the Chairperson of the SAHRC is a decision left to the Commissioners, and the Chairperson is consequently appointed by his or her peers. In addition to the more formal powers that the Chairperson holds, there is often also implicit power in this position by, for example, the Chairperson becoming “a majority”, as people might argue that “if the Chair doesn’t like it, what’s the point of going in that direction?”⁵⁶⁶

Those interviewed held different views about how the Chairperson should be elected.⁵⁶⁷ On the one hand there is the opinion that the *status quo* should be maintained and that the Chairperson should be appointed by his or her equals.⁵⁶⁸ One respondent felt that, although there is a risk of “sometimes... making a blind vote”, as you might not know much about the elected Chairperson, the “present system should stay” as it is a “vote of confidence” in the person.⁵⁶⁹ By enjoying the confidence of one’s peers, one is in a sense accountable

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562 Commissioners’ meeting, 23 June 2009. The accountability of the Commissioners was also raised as an important issue at the pre-launch workshop on the report (held on 21 July 2009). It was held that this accountability stretches across three levels – accountability of the Commissioners to the Chairperson, the Secretariat, and the public.

563 Ibid.

564 Ibid.

565 Ibid. A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the possibility of performance evaluations of Commissioners, which would also contribute to greater accountability.

566 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

567 A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the importance of standardising the appointment process for Commissioners across the different Chapter 9 institutions.

568 Interview with Commissioner Tom Manthata.

569 Interview with Commissioner Karthy Govender.

to them.⁵⁷⁰ A different viewpoint is that the Parliamentary Selection Committee should recommend a Chairperson, as they would be able to consider the skills and capabilities of the different candidates from the nominations received.⁵⁷¹ Such a recommendation might especially be preferable if there is a large number of Commissioners; otherwise, it might be unclear to some on what basis a Chairperson is chosen.⁵⁷² The Parliamentary Selection Committee could also interact with the Commissioners elect after deciding who they would like to propose as Chairperson and ask them to discuss the recommendation.⁵⁷³ Another respondent felt that

*for us it will be better if the Chairperson of the Commission is appointed by Parliament and the President...and would not be removed and would not serve on the whim of the other Commissioners. He sets the rules and takes responsibility.*⁵⁷⁴

A Chairperson appointed by the President has the assumed advantage of “recognition by the Executive of who the Chair is, and therefore the expectation that the Chair will enjoy a relationship with the President ... [although] I don’t see that working in practice with other institutions.”⁵⁷⁵ Another respondent did not find such a link between the Chairperson and the Executive desirable, as the Chairperson might think that he or she is therefore “above everybody in the Commission.”⁵⁷⁶ But irrespective of how the Chairperson is chosen, the leadership that is provided will depend on the individual Chairperson, and on the attitude of the Commissioners.⁵⁷⁷

4.3.2 Commissioners’ skills

Respondents saw it as important that a “balanced complement” of Commissioners with a “variety of skills” be appointed,⁵⁷⁸ and that it be considered how their skills are relevant to

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570 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

571 Interview with Commissioner Zonke Majodina.

572 Ibid. An opinion voiced at the pre-launch workshop on the report (held on 21 July 2009) was that Chairpersons across the Chapter 9 institutions should be appointed by the President on recommendation from the National Assembly.

573 Ibid.

574 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

575 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

576 Interview with Commissioner Tom Manthata.

577 Interview with Commissioner Leon Wessels.

578 Ibid.

the Commission's mandate;⁵⁷⁹ this might require greater "specificity" of the skills that are needed.⁵⁸⁰ It is also important for Commissioners to be able to provide strategic leadership.⁵⁸¹ One way of involving Commissioners with a wide variety of skills is to have part-time Commissioners, as this opens up a bigger pool of candidates and one could be very selective about the particular expertise or skills required.⁵⁸²

Experience was cited as another important skill, in other words to have "been practically there and [to have] had exposure to things",⁵⁸³ as was a strong understanding of the Bill of Rights.⁵⁸⁴ Commissioners should be able to interact widely; as one respondent explained,

When you become a Commissioner you have to interact with a lot of people...you must be able to interact with...the destitute, poor, illiterate, forsaken and forgotten, but you must also be able to stand up in argument, be that on television or radio, when you are confronted by academics and politicians.⁵⁸⁵

Notwithstanding having a balanced and diverse complement of Commissioners; a number of respondents also drew out the possession of legal skills as important. This does not necessarily translate into having a legal qualification – it could be merely some kind of "legal skill or exposure" in order that they will fully understand the mandate and (legislative) context.⁵⁸⁶ In giving effect to its mandate, the SAHRC has set up a number of internal processes in such a way that it is desirable for Commissioners to have a legal background. Examples of this are the complaints handling structure and appeals system, and subpoena hearings, which are traditionally presided over by a Commissioner.⁵⁸⁷ One respondent was of the view that a person with a legal background should be almost equally skilled in litigation and mediation.⁵⁸⁸ Trained lawyers are therefore a

necessary part of a diverse group of Commissioners, because "when you get people not reading the law, not understanding the law, but trying to pronounce on the law, they get it wrong".⁵⁸⁹ Therefore, it might be interesting to appoint a former judge as Chairperson of the Commission, as that might also give the Commission the "edge" it needs to be more respected by government departments.⁵⁹⁰

Skills that are often neglected in the appointment process are those that are appropriate to the Commissioners' oversight role, which would include financial and human resource management skills.⁵⁹¹ This is not with the intention of micro-management, but in the absence of those skills there is the risk that the Commissioners may merely "rubber-stamp things".⁵⁹²

4.3.3 Areas of work

Thematic areas

Respondents were unanimous on the value and desirability of the Commissioners being responsible for specific thematic areas or portfolios. This is an aspect of the Commissioners' work carried over from the first term,⁵⁹³ and in the second term coordinators were appointed to the Secretariat as part of the Commissioners' programme to work with Commissioners on these portfolios. However, these coordinators were moved to the RDP in 2008 as part of the broader structural changes in the Commission. There are multiple benefits to having Commissioners responsible for different thematic areas: the specialisation and depth of input provided,⁵⁹⁴ the "external... coherency" of the Commission's position on a topic;⁵⁹⁵ that there is a person responsible for driving policy in a specific identified area,⁵⁹⁶ and the assurance that issues stay on the SAHRC's agenda.⁵⁹⁷ However, it is necessary to remember that

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579 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

580 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

581 Interview with Commissioner Leon Wessels.

582 Interview with Commissioner Karthy Govender. The Commission would also be able to have a better geographic spread of Commissioners if some were appointed part-time. (comment by Commissioner Leon Wessels.)

583 Interview with staff member, Christine Jesseman, HoP RDP.

584 Interview with Commissioner Zonke Majodina.

585 Interview with Commissioner Leon Wessels.

586 Interview with staff member, Christine Jesseman, HoP RDP.

587 Interview with staff member, Danaline Franzman, HoP LSP.

588 Interview with Commissioner Tom Manthata.

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589 Interview with Commissioner Leon Wessels.

590 Interview with Commissioner Karthy Govender.

591 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

592 Ibid.

593 Some of the current thematic responsibilities include: Jody Kollapen for HIV; Leon Wessels for access to information; Tom Manthata for education and older persons; Zonke Majodina for equality and non-nationals; and Pregs Govender for human rights and business and for the poverty and equality strategy.

594 Interview with staff member, Christine Jesseman, HoP RDP. See also interview with Commissioner Leon Wessels.

595 Ibid.

596 Ibid.

597 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

human rights are “interdependent” and “cross-cutting”, and therefore responsibility for a thematic area should not imply working in silos.⁵⁹⁸

On a practical level, it is necessary to ask how specific thematic areas are assigned to Commissioners. This might seem a trivial question, but according to one respondent, Commissioners do not necessarily “live and dream their thematic areas” and this might come across in the work they do,⁵⁹⁹ raising the question of whether these areas match the Commissioners’ interests or have merely been assigned to them. In addition to looking at existing portfolios and the backgrounds of incumbents,⁶⁰⁰ “sometimes you may have to just journey beyond that comfort zone, and you are here for seven years...you can learn it.”⁶⁰¹ Whatever the specialist areas are that are chosen for the SAHRC, they should be based on deliberate choice and strategy, rather than there being too much to focus on and matters being excluded by default as a result.⁶⁰² Consequently, it would not be inappropriate to exclude certain thematic areas, especially where these are highly specialist and fast-developing. For example, in the area of DNA profiling there may be others in civil society who have a stronger knowledge base.⁶⁰³ Having Commissioners responsible for thematic areas works best when there is a substantial number of Commissioners.⁶⁰⁴ The changeover of Commissioners raises the question of which thematic areas will remain,⁶⁰⁵ but the existence of specific portfolios in the Secretariat will ensure some continuity.⁶⁰⁶

Geographic location

During the first term, Commissioners were assigned responsibility for a specific province, although they were not necessarily based there,⁶⁰⁷ and would visit the province regularly. During the second term, and especially considering the reduction in the number of Commissioners, this system fell

away, and it was only part-time Commissioner Karthy Govender who was based in KwaZulu-Natal.⁶⁰⁸ There exists a wide range of opinions amongst respondents about where Commissioners should be based and what the merits and challenges of the different options are. One of the arguments put forward in support of Commissioners being either based in provinces, or based at head office and responsible for a province, is that it strengthens and supplements the work of the Secretariat in that province; even Commissioners’ visits to provinces are felt to benefit them substantially.⁶⁰⁹ One of the benefits relates to the status and experience of Commissioners: “The provincial offices say that they do not have sufficient authority to engage with provincial and local leaders”,⁶¹⁰ the status and experience of Commissioners in working with communities, and the respect that communities and elders have for them, would strengthen the work of the Secretariat in rural areas.⁶¹¹ Furthermore, if Commissioners have oversight over a province, the province becomes a policy question and a site of policy development, rather than just being an operational centre.⁶¹²

Some respondents differentiated between the merits of having a Commissioner based in a province, as opposed to being based at head office and being responsible for a province:

If we went back to our initial argument that the substantive work of the Commission should happen out in the provinces, then there’s a logic in saying, in order to support and lead that work, to provide a political face to that work, there’s a strong argument that Commissioners are better placed in provinces to give support to provincial offices...We tried the model of being responsible [for provinces]. I’m not sure if it worked well, because it meant either going there when you are called, or going there once in six weeks...I was responsible for Limpopo, but I’m not sure if I really...got immersed into the issues.⁶¹³

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598 Interview with Commissioner Zonke Majodina.

599 Interview with staff member.

600 Interview with Commissioner Tom Manthata.

601 Interview with Commissioner Karthy Govender.

602 Interview with former staff member, Sello Hatang, HoP ICP.

603 Interview with Commissioner Karthy Govender.

604 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

605 Interview with staff member, Danaline Franzman, HoP LSP.

606 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

607 The only full-time Commissioner based in a province was Rhoda Kadalie in the Western Cape.

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608 Commissioner Pregs Govender, who was appointed for a seven-year term with effect from December 2008, is based in the Western Cape.

609 Interview with staff member.

610 Interview with Commissioner Zonke Majodina.

611 Interview with Commissioner Tom Manthata.

612 Interview with Prof. N. Barney Pityana, Chairperson of the SAHRC, October 1995 – December 2001.

613 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. Similar view expressed in interview with Commissioner Zonke Majodina.

Differences of opinion exist on whether having Commissioners based in provinces poses a risk of territorialism and creating the impression that there are different Commissions. One respondent stated that although he understood the possibility of the risk of territorialism, it has not occurred in the provinces where Commissioners have been based.⁶¹⁴ However, another respondent had a different view:

*At the beginning we had Commissioners who were assigned to a province. That also created problems, even amongst Commissioners, because issues of territorialism came in...the thematic approach is the way to go for the Commission. Although now I hear that the Commissioners are saying, well, maybe we should revisit it and have a Commissioner based in a province, without fully considering the consequences.*⁶¹⁵

Related to the issue of territorialism is consideration of the implications for reporting lines if a Commissioner is based in a province. For example, where at head office the reporting lines are quite clear, if a full-time Commissioner is based in a province there is a risk that he or she might be inclined to think that staff in the provincial office should report to them, rather than through the reporting lines already set up to head office.⁶¹⁶

If it is decided that the Commissioners should be based in provinces, then where they come from could also be considered in the appointment process.⁶¹⁷ It would also be helpful if part-time Commissioners were based in provinces.⁶¹⁸

Not all respondents feel strongly either for or against having Commissioners responsible for, or based in, provinces. An example of this was a respondent who had a “mixed opinion” that highlights the strengths of both arguments:

I do see the value in Commissioners being based at head office – there is equality, it is less costly,

*consultation is easy and more effective, they can respond to national issues...[but having a Commissioner based in or responsible for a province will] maybe also deal with the multiple reporting system and you will have a political head at provincial level and a provincial manager who works closely with that political head. And you will have somebody whom you can hold accountable for provincial matters.*⁶¹⁹

But the practicalities of having Commissioners based in provinces are often complex. As one respondent explained,

*Interacting with them [Commissioners] on video conferencing...is time-consuming, people talk a lot, they talk longer because people don't understand one another, the ones in the provinces don't know where we are coming from, and neither do we know where they are coming from.*⁶²⁰

However, to a large extent the decision to have Commissioners based in provinces or responsible for a province is dependent on the number of Commissioners; in other words, it is easier to do with a larger complement.⁶²¹

4.4 The relationship between the Commissioners and the Secretariat

4.4.1 The legal relationship and the idea of ‘two centres’

The relationship between the Commissioners and the Secretariat is first and foremost a “legal relationship determined by the legislation, the Human Rights Commission Act and the PFMA”.⁶²² The

Human Rights Commission Act provides for Commissioners appointing a CEO, who then

614 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

615 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

616 Interview with staff member.

617 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

618 Communication with staff member.

619 Interview with staff member, Victoria Maloka, HoP ETP.

620 Interview with Commissioner Leon Wessels.

621 Interview with Commissioner Karthy Govender.

622 Interview with Commissioner Zonke Majodina.

*manages the administration of the Secretariat, who is accountable to the Commissioners. The PFMA provides for the CEO to be the Chief Accounting Officer of the Commission, but appears to strip away that provision for accountability of the CEO to Commissioners...On the face of it...these two pieces of legislation are in conflict, which is why the amendment to the Human Rights Commission Act is needed...there then developed a practice, a tradition, within the Commission...this interpretation of the pieces of legislation led to the idea that the Secretariat and the Commissioners are separate entities.*⁶²³

It is necessary to ask whether the SAHRC “need[s] these two centres,”⁶²⁴ as this idea is not without consequence for how the Commission functions. As one respondent explained,

*Historically it provided lots of problems with regard to where does the buck stop, who has the power... [one] could have it separated quite artificially that you appoint the CEO, thereafter the CEO runs the show and reports to the Commissioners with the Commissioners not being involved in any way. The model didn't really work if you separate it as clinically as that.*⁶²⁵

Such a distinct separation can be linked to an analogy of “a pot of soup on the stove, and if you are the Commissioners – nose in, hands out.”⁶²⁶ In other words, the Commissioners get to see what is happening, but are not able to get involved in the work on a practical, hands-on level. A similar view was expressed that “you cannot have a divide in a body like the HRC”, and

You cannot say the Commissioners are like a Board of Directors, and the staff are like the management. That's a completely wrong parallel... the Commissioners and the staff are responsible for carrying out the mandate of the Commission. Within that you can assign certain responsibilities, that the CEO is responsible for the staff. In respect of carrying

*out the mandate, we are responsible to the Chairman of the Commission.*⁶²⁷

One of the points raised by some respondents is whether the current arrangement is in fact the most appropriate model along which to structure the SAHRC. Models used by other NHRIs include having a department headed by a Commissioner, and a Commissioner or Chairperson also being the CEO.⁶²⁸ Although the broad structure of the SAHRC is written into law, and there is the perception among some that ‘two centres’ exist, it is important to bear in mind that

*This is not a cast-in-stone situation where it's a no-no for Commissioners to be involved...We have made it so in our own minds and we have begun to believe that that is how it should be, and that led to this artificial separation, which I think has not served us very well.*⁶²⁹

4.4.2 Practicalities of the interaction between the Commissioners and Secretariat

On a practical level it is necessary to ask what the work of the Commissioners should involve and, consequently, what the relationship is between the Commissioners and the Secretariat in terms of discharging the SAHRC’s mandate. One opinion was that the

*Commissioners make policy and the Secretariat implements the policy. The Commissioners should not at any point be hands-on on anything that the Secretariat is doing. They have to direct us and give us guidance.*⁶³⁰

However, another respondent was of a different opinion and asked why the Commissioners should not do hands-on work at community level with the Secretariat.⁶³¹ One respondent did not think that, with the drafting of the legislation governing the work of the SAHRC, the drafters

623 Ibid.

624 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

625 Ibid.

626 Ibid.

627 Interview with Commissioner Karthy Govender.

628 Interview with Commissioner Zonke Majodina.

629 Ibid.

630 Interview with staff member.

631 Interview with Commissioner Tom Manthata.

*had in mind for Commissioners to be these wall decorations, to be the face of the Commission... Commissioners have every right to be involved in the day-to-day work of the Commission...I don't think there's any document that says this [that Commissioners shouldn't be involved]...whose interests does it serve?*⁶³²

Having full-time Commissioners only involved in policy writing might not be the best use of their time. As one respondent asked: "Can you develop policy for 12 months?"⁶³³ Furthermore, the creation of policy is seen by some as an interactive process where staff contribute to policy,⁶³⁴ and as a Commissioner "you are here not because you are a policy maker but because of your knowledge in a particular field" and you therefore also implement policy.⁶³⁵ Another argument against a hands-off approach on the part of the Commissioners is that the Commissioners are involved in reporting on the work of the SAHRC to Parliament and are therefore held accountable.⁶³⁶

In practice, the Commissioners are involved in the discharging of the mandate through activities such as the hearing of appeals,⁶³⁷ participation in workshops,⁶³⁸ and public inquiries,⁶³⁹ but not in staff matters, such as disciplinary hearings⁶⁴⁰ or staff policies.

Although the relationship between the Commissioners and Secretariat is a "highly interactive" one, the "only thing the Commissioners cannot do is to give staff members instructions. In terms of corporate governance they must instruct the CEO and they have the power to do so."⁶⁴¹ On a functional level it is therefore necessary to draw lines of "responsibility and accountability".⁶⁴² However, it is important that this process of communication with the Secretariat should not become

so bureaucratic that it prevents Commissioners from talking to staff about their work.⁶⁴³ This raises the question of how the Commissioners and Secretariat communicate with one another, which was a common theme raised by a number of respondents. One challenge is that the Commissioners and senior management do not meet and talk regularly enough.⁶⁴⁴ But communication also relates to how the Secretariat understands the relevance of the practical work that the Commissioners do, and one respondent commented accordingly:

*Sometimes for people on the ground there doesn't seem to be a clear link between what they [the Commissioners] do and how it relates to what we do, poverty and inequality. Most of the time things seem to be happening in silos...communication and information-sharing [internally] need to be improved.*⁶⁴⁵

Some of the work that the Commissioners do in relation to the Secretariat's work plan, for example public inquiries, research and workshops, might get lost, as it isn't clear where to report this.⁶⁴⁶ An additional aspect of communication that might need to be improved is communication between the Commissioners and provincial offices; one opinion was that head office is much more informed about the thinking and work of the Commissioners than the provincial offices.⁶⁴⁷

A forum where communication between the Commissioners and Secretariat takes place is the four plenary meetings and one strategic planning session that are held during the course of the year. A question posed was whether these meetings are sufficient: "If Commissioners can add strategy to what we are doing, should they wait for the strategic planning session or the next meeting with the CEO?"⁶⁴⁸ Also commenting on the nature of the plenary meetings, another respondent felt that

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632 Interview with Commissioner Zonke Majodina.
 633 Interview with former staff member, Sello Hatang, HoP ICP.
 634 Interview with Commissioner Karthy Govender.
 635 Ibid.
 636 Ibid.
 637 Ibid.
 638 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
 639 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002-September 2009.
 640 Interview with Commissioner Karthy Govender.
 641 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current. See also interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 642 Interview with staff member, Christine Jesseman, HoP RDP.

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643 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 644 Interview with Commissioner Leon Wessels.
 645 Interview with staff member, Danaline Franzman, HoP LSP.
 646 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 647 Communication with staff member.
 648 Interview with former staff member, Sello Hatang, HoP ICP.



The last plenary meeting of the outgoing Commissioners, July 2009.

“plenary used to be a place where decisions of the Commission are made. Now it’s a reporting session.”⁶⁴⁹

An area of overlap mentioned by a number of respondents where the roles of the Commissioners and the Secretariat appear to be unclear is the handling of high-profile or high-risk complaints. Currently such complaints are dealt with by specially set up Legal Committee Meetings (LCM).⁶⁵⁰ These cases therefore do not follow the normal complaints handling process through the LSP. One respondent explained what some of the challenges are in this regard.

Sometimes for reasons of expedience, for example communication about high-profile complaints, there would be communication between Legal (LSP) and the Chair to the exclusion of the CEO, who should be the office through which we communicate with the Chair. A lot of these communication protocols are flouted and not complied with in practice, and need to be adhered to by everybody. Everybody gets involved with everything...No decision can be made because so many people are involved... Sometimes it has advantages if the Commissioners are involved, because matters can be dealt with quickly rather than in the ‘mechanical’ way...But that sort of interference has caused tension in Legal

649 Interview with staff member.

650 See SA Government Gazette, ‘Complaints handling regulations’, 6 July 2007. One respondent held that this structure was set up after the Commission’s difficulties with Minister Bridget Mabandla, referred to in Chapter 3 (interview with staff member). For some critiques of LCM, see Chapter 5 of the report.

*(LSP), which is the programme mandated to deal with complaints.*⁶⁵¹

4.4.3 The relationship between the Commissioners and the CEO

A particular challenge that the SAHRC has historically faced, but that is not unique to this institution, is the relationship between the Commissioners and the CEO. It has already been discussed how this relationship is envisaged in law, and the question has also been asked whether this is the best model for the SAHRC to follow. One respondent hinted at some of the points that might create tension.

*The CEO is responsible for all resources of the organisation – the finances and otherwise, and is held personally liable – not the Commissioners – which then creates a problem already. The CEO has the power to contract, but not the Commissioners, except when they appoint the CEO, which also creates other problems. There have always been tensions between the CEO and the Commissioners... but less so in the last 3 years, 4 years.*⁶⁵²

It is perhaps pertinent to ask to what extent potential tension between the Commissioners and the CEO is related to the structure of the organisation (and the roles, powers and functions) as set out in legislation; and to what extent it can

651 Interview with staff member Danaline Franzman, HoP LSP. A similar opinion was expressed by another staff member, Victoria Maloka, HoP ETP.

652 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

be attributed to different personalities and leadership styles, and how people choose to interpret and apply the legislation and their powers and functions. On the structural aspect, one respondent commented that in a structure where you have a full-time Chairperson and CEO, “where does the buck stop... who is the boss”; and acknowledged that “who calls the shots” is related to issues of power.⁶⁵³ On the level of individual interpretation of the law and the influence of personalities, another respondent commented that this has caused some problems in the past and “it’s risky, because it almost then leaves it to the personalities of the Chair and the CEO, if those come together... if not, you are in trouble.”⁶⁵⁴

Although for some the legislation might not be unclear about the different roles, functions and powers of the CEO and the Commissioners, others felt that it might assist to further clarify this in legislation. For example, one respondent held that

*I would make sure that the new [HRC] Act would say that the Chairperson of the Commission is the head of [the] Commission. I think that’s implicit in the legislation... but I would put it in... We had a little bit of difficulty, but I think at some level we reached our own internal thing [arrangement] by saying the Chair is the head of [the] Commission and is ultimately responsible.*⁶⁵⁵

It may be asked, then, to what extent this relationship can be regulated through legislation. One respondent felt that although legislative amendments

*may help... at the end of the day I don’t think legislation is going to fix up the particular problem... having two centres of power that are able to understand the need to work together and to work out where the one’s authority stops and the other’s starts. That can never be spelled out explicitly in terms of law... To some extent you have to find this balance through a performance agreement that beyond the law spells out what your mutual expectations are.*⁶⁵⁶

653 Interview with Shirley Mabusela, Chairperson of the SAHRC, January – September 2002.

654 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

655 Interview with Commissioner Karthy Govender.

656 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

The relationship between the Commissioners and the CEO seems, in part, to be informed by the legislation guiding this relationship, to which amendments are being proposed. However, it is also informed by influences that are difficult to regulate, such as people’s expectations, the coming together of personalities, and how individuals manage power.

4.5 Inside the Secretariat

4.5.1 The SAHRC’s organisational structure and most recent changes

Providing the context

How the Secretariat should be structured to best give effect to the SAHRC’s mandate is still an ongoing discussion in the Commission. It must be seen against the bigger question of how the Commission, given the broadness of its mandate and the extent of its reach, maintains organisational coherence and effectiveness, while still balancing its structure and resources. It must be kept in mind that when the Commission started its first term in October 1995, it had no national predecessors to draw on for ideas about the best structure to suit its functions and powers. The Commission’s structure expanded with the establishment of the different programmes and the incremental setting up of provincial offices, the last of which was established in Gauteng in 2007. To some extent, the debate on the structure evolves as the structure itself evolves and new aspects of efficiency and coherency need to be discussed. This discussion is therefore part of a learning process in which it will be natural for people to have different opinions about how the SAHRC should be structured to best give effect to its mandate.⁶⁵⁷

The major influencing factor in the way in which the Commission is currently structured is a move from a non-integrated approach to a more integrated one.⁶⁵⁸ In this sense the Commission is on a journey from a situation where the different programmes, including the provinces, were operating in ‘silos’ towards a more integrated approach and

657 A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the important consideration that in any discussion of the Commission’s structure it should be kept in mind that the structure should follow the strategy, rather than the other way round.

658 Comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

the concomitant challenges.⁶⁵⁹ Although these challenges are bound to have impacted on the interaction between different layers in the Commission's structure, such as the relationships between programmes⁶⁶⁰ and between head office and the provincial offices, it was the latter relationship that came out strongly in the interviews and that will be discussed in greater detail in this section, while examples of how the different programmes interact are dispersed throughout the report. A discussion of the relationship between head office and the provincial offices is also apposite, considering that the bulk of the Commission's work is intended to happen at provincial level.

4.5.2 The relationship between head office and the provincial offices

As mentioned earlier in this chapter, each programme in the Commission⁶⁶¹ has a HoP and varying numbers of DDs responsible for thematic or operational areas.⁶⁶² Each of the provincial offices has a PM, an administrative secretary, a LO, an EO, and three interns.⁶⁶³ Central to the new integrated approach across provinces and programmes is a change in the relationship between head office and the provincial offices, with head office now playing more of a coordinating role. The structure is posing some challenges, such as the centralisation of administrative and financial powers at head office, multiple reporting lines, the clarification of roles, and communication, although some of these might just be teething problems after the introduction of the new structure.

On an operational level, not all the SAHRC's programmes are equally represented in the provinces. For example, apart from a research intern, the RDP does not have a permanent member of staff dedicated to research, and a respondent was of the

opinion that this was in part because research "hasn't been seen as a primary focus of provinces."⁶⁶⁴ Although research interns are used, they are not necessarily adequately skilled or capacitated to do field research.⁶⁶⁵ The provinces do not have human resource representatives and the PMs are seen as "an extension of human resources (HR),"⁶⁶⁶ while the centralisation of administrative and financial power means that requisitions and other requests go through head office and therefore take longer.⁶⁶⁷ The administrative secretaries in the provincial offices provide administrative support for the entire office and consequently do work for different programmes in the province,⁶⁶⁸ which in some cases might make them feel overwhelmed.

Since the move towards a more integrated approach, multiple reporting structures have come into being. For example, an EO in a province reports to the HoP of ETP at head office, and also to the PM. A provincial manager, in turn, has to report to all of the HoPs. HoPs, in turn, report to the DCEO. The DDs in the different programmes based at head office are supposed to play a coordinating and advisory role to the provinces in terms of their specific thematic or operational areas. However, a complicating factor is that PMs are also appointed at DD level. This complicates the way in which requests are passed to EOs and LOs; as one respondent explained,

It is challenging, because the DDs' work is also supposed to be done at provinces, but there is no reporting relationship between the person at the province doing the work and the DD. The PM and DD are at the same level, so you can't say the PM should report to the DD. But...the DDs...have to report [to HoPs] on what's being done at provinces...This causes tensions between us and the provinces.⁶⁶⁹

Another respondent held, though, that once delegation has happened, for example from a HoP to a DD, the DD acts on the authority of the HoP when interacting with PMs.⁶⁷⁰ But this also relates to the question of what the role of the HoPs should be,

659 Ibid.

660 The biggest challenge in this regard is getting the programmes to work with greater synergy and the effective management of programmes (comment by Tseliso Thipanyane, CEO of the SAHRC, May 1996 - current).

661 These are the Legal Services Programme (LSP); Research, Documentation and Policy Analysis Programme (RDP), which also hosts the Commission's library; Education and Training Programme (ETP); Parliamentary and International Affairs Programme (PIAP). Information and Communications Programme (ICP), in which the PAIA unit is located; Financial Management Programme; Administration and Supply Chain Management Programme; and Human Resources Programme.

662 With the exception of PIAP, which is based in Cape Town, all HoPs and DDs are based at head office.

663 One each for education, legal services and research.

664 Interview with staff member, Christine Jesseman, HoP RDP.

665 Ibid.

666 Interview with staff member.

667 Interview with staff member.

668 Interview with senior staff member.

669 Interview with staff member Victoria Maloka, HoP ETP.

670 Comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 - current.

as some of the functions that HoPs previously performed have been delegated to DDs. As one respondent explained,

There are queries about what exactly the role of the HoP is. Previously it was quite straightforward...[in terms of the LSP] the previous HoPs might have been more hands-on in terms of complaints handling; [now the focus is on] strategic management, compliance, risk management, HR, quality assurance...DDs perform some of the delegated functions of HoPs, but the question as to how they interact practically with the PMs is a subject requiring constant clarification and does create tension.⁶⁷¹

Another respondent commented as follows from the perspective of the provinces on the multiple reporting and communication between head office and the provincial offices:

The relationship [between head office and the provincial offices] is very poor in most instances. There is this feeling of 'they' and 'us'. My opinion is that everyone at head office feels that they are superior to those in the provinces...The communication is sometimes so poor and derogatory. Everyone gives instructions to the provincial offices. Staff at provincial level [are] instructed by anyone at head office without the knowledge of the provincial manager. Provincial managers report to nine HoPs. All of them instruct us [as] and when they please and always want responses as in yesterday! This system is not realistic.⁶⁷²

The reporting of PMs to HoPs affects the discharging of the mandate, as there is a lot of demand on them from different people.⁶⁷³ As one respondent noted,

In terms of prioritisation – I send requests to PMs, but at the same time others are also sending requests. But if you are last in line, you are unlikely to get the work. Not because the PMs don't want to, but because they are overwhelmed. And the deadlines for the different requests are more or less the same as the HoPs, who

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671 Interview with staff member, Danaline Franzman, HoP LSP.
672 Communication with staff member.
673 Interview with staff member.

request the information, report to the DCEO at the same time.⁶⁷⁴

However, a different perspective was offered on multiple reporting: "I ask colleagues, where on earth don't you get multi-reporting? It's a matter of how you manage it. This Commission itself gives multi-reporting when we are called by different portfolio committees of Parliament."⁶⁷⁵ The challenges experienced in terms of multiple reporting point to some broader aspects of organisational structure and functioning. Part of managing this reporting system relates to clarifying the provincial coordination role that head office plays.⁶⁷⁶ If one assumes that multiple reporting is necessary and almost inevitable, then is it correct to assume that such reporting necessarily has to be based on a hierarchical structure?⁶⁷⁷ Furthermore, is it multiple reporting *per se* that is problematic, or is it rather about better planning and integration of activities,⁶⁷⁸ and about how staff members communicate with one another?

Related to the reporting systems is the way in which head office and the provincial offices communicate about the work that has to be done and the priorities at provincial level. One respondent explained some of the challenges as follows:

Part of the tension has been whether provinces are simply expected to respond to what is decided here [at national office]...Provinces feel they are there to service the national office as opposed to servicing the province...I have not found the kind of strong thinking coming out of provinces that says 'hold on' [to plans proposed by national office]. The problem is two-fold, one a desire almost by national to determine what's best for the organisation and expecting everybody to fit into that model, but that has also been exacerbated by the absence of counter views [from provinces].⁶⁷⁹

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674 Interview with staff member, Victoria Maloka, HoP ETP.
675 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
676 Interview with staff member.
677 Comment by Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
678 Comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.
679 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

This view was shared by another respondent, who commented that there is the impression that provinces tend to look to the national office for guidance and do not tell head office what work they could have done if it were not for resource constraints.⁶⁸⁰ However, a member of staff, commenting on some of the reasons why some of the PMs do not seem to contribute in plenary and strategic planning sessions, felt that, as the PMs report through the HoPs, it is the HoPs who should present and articulate what is happening on a programmatic level in a province, and in this sense the PMs do not get to speak about the provinces.⁶⁸¹ Furthermore, the issues of concern that the PMs might want to talk about cannot be raised in these meetings, as it is said to not be the appropriate forum to raise them in.⁶⁸² Although the Commission's strategic objectives are decided through a series of meetings at programmatic level that also involve the provinces, and are finalised through the annual strategic planning sessions and reported on in four plenary sessions throughout the year, in the past, primarily for reasons of resources, the PMs have not always been invited to plenary sessions. The challenges expressed appear to relate again to broader issues of organisational communication and mutual expectations of the role that head office and the provinces should play.

Some of the challenges in the relationship between head office and the provincial offices go back to the question of how these structures were originally envisaged to work together and separately,⁶⁸³ and whether provincial offices would have been uniquely structured to address realities in the different provinces.⁶⁸⁴ Another respondent commented on the longstanding nature of these debates by saying

The Human Rights Commission mandate is national...How we then do our work...across the provinces and districts is not prescribed by law, but is a strategic decision which we have to take... the problem from the beginning was that when the Commission was set up I don't think there was sufficient discussions on exactly what kind of regional structures we should have and how they should relate

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680 Interview with Commissioner Tom Manthata.

681 Interview with staff member.

682 Ibid.

683 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

684 Ibid.

*to the national...That discussion has not fully taken place even 14 years later in the Commission.*⁶⁸⁵

When asked how the organisational structures between head office and the provincial offices might be set up differently, a number of different responses were elicited. These included having the programmes in the provinces directly accountable to the HoPs, and an office manager to help administratively;⁶⁸⁶ adopting a completely different strategy where there are no provincial offices, but rather satellite offices, and the head office is not duplicated in the provinces;⁶⁸⁷ provincial offices structuring their outreach work differently by, for example, visiting six areas in a province on a pre-determined date every month;⁶⁸⁸ reducing the gap between the PMs and the LOs by appointing a manager to oversee the office and a senior legal officer to run the legal department in the province;⁶⁸⁹ and having the provinces report directly to a DCEO, as was the case previously.⁶⁹⁰ However, one respondent was of the opinion that, while the provincial offices should be strengthened, it was important to still have a strong head office.

*Let's assume we dilute the national office, then it's possible that if the provinces don't perform, that the Commission as a whole then suffers. At the moment the national office and the staff here are carrying the Commission. The reputation of the Commission almost resides with this national office.*⁶⁹¹

In any event, an important consideration, should the Commission's structure be changed again in future, is to leave ample time for consultation and reflection on how the new structure will work. One respondent was of the opinion that even more consultation and reflection should have taken place, for instance, with the most recent organisational structure changes, despite these being discussed in a strategic planning session:

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685 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current. See also interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

686 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

687 Interview with former staff member, Sello Hatang, HoP ICP.

688 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

689 Interview with Commissioner Karthy Govender.

690 Communication with staff member.

691 Interview with Commissioner Karthy Govender.

The first time the new structure was discussed or even tabled was at the strategic planning at the end of 2007...[We] bought into it. Others appeared to buy into it. I don't think there was sufficient time to interrogate and really consider the rationale and pros and cons. After it was adopted at the January, February strategic planning meeting in 2008, things have been back to front. We had to make sense of the structure in practical terms and that transition has taken up most of the last year...Unfortunately we are now in a new financial year and still the issues are hanging and clouding what people understand they should be doing...and whether this is effective. On the one hand these difficulties might be related to issues other than the structure, such as staffing issues, but I do think it was more imposed rather than a product of a joint discussion and consultations... Sometimes I feel I was left with somebody else's idea. You want to ask how this was intended to be, but at the same time you are already in the position and you have to in a way make sense of the restructuring and make it work as the person accountable for the programme.⁶⁹²

In talking about the time when these organisational changes were first envisaged, a member of top management commented that

I think it was a good approach [to have one programme for the Commission per mandate that would stretch across provinces]...What probably we did not address adequately was the buy-in of this programme from people who used to be their own bosses...And the other danger which we didn't address adequately was that the PMs had anticipations of being at the same level as the Head of Programme at the national office (at Director level). The change meant then that they are now subserving to the people who they already saw as their equals...We might want to ditch a very good system, at least conceptually, due to unhappiness which should have been addressed.⁶⁹³

This discussion on some of the SAHRC's organisational challenges with regard to the Commission's head office versus the provincial offices offered some different perspectives in the

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 692 Interview with staff member, Danaline Franzman, HoP LSP.
 693 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

ongoing debate on how best to balance structure, coherency and the effective discharging of the mandate.

Some challenges at provincial level

The provincial offices have mentioned a number of challenges they face in discharging the mandate. These were captured in the *Provincial Visits Report* of 2008, which reported on visits to all of the provincial offices by the Commissioners, accompanied by at least one HoP. Some of the concerns and challenges raised in the *Provincial Visits Report* were also stressed in the interviews for this end-of-term report. One of the challenges mentioned in a number of interviews is the resource constraints experienced by the provincial offices, on which one respondent commented that

There has been a significant contradiction in the way in which we've structured and resourced provincial offices vis-à-vis national office, with our stated commitment and our recognition that indeed the substantive work of the Commission is to happen at provincial level...To reach the constituencies that need to be reached, the provincial offices need to be adequately resourced...But if you look at the budgeting and structure of those provincial offices, apart from the skills, they are hardly going to achieve that which is in our mind.⁶⁹⁴

Related to this is the centralisation of funds through head office and the requisition processes, which are not always conducive to activities that the provinces would like to undertake.⁶⁹⁵ But the support to the provinces, or lack thereof, is not just in terms of financial resources; the head office has greater support through the number of people that are there, including the Commissioners, and the provinces therefore often have to work in isolation.⁶⁹⁶

Another challenge faced by provincial offices has to do with the Commission's recruitment processes. One respondent stressed the importance of provincial offices raising potential vacancies with the Human Resources Programme in time,⁶⁹⁷ as the PMs are seen as an extension of HR. However, there

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 694 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
 695 Communication with staff member.
 696 Interview with Commissioner Karthy Govender.
 697 Interview with staff member, Siphelele Zulu, HoP Human Resources Programme.

was concern at provincial level about the time it took to fill vacancies,⁶⁹⁸ and the implications this has for the discharging of the Commission’s mandate.

A final challenge relates to a lack of human resources in terms of both capacity and skills, which will be discussed in the next section of the report. One respondent noted how this affected provincial offices and the discharging of the mandate:

Whilst we commend the impressive growth of the Commission in the past years, we are concerned about the nature and the manner in which this growth has manifested. It is alarming to note that provinces have remained stagnant in structure... this growth is not reflected at provincial level... It is pivotal to analytically look into the role of each staff member at provincial level and the extent to which such members can give effect to the expectations created in terms of the operational plans and whether they are realistic or idealistic.⁶⁹⁹

4.5.3 Staff capacity, skills and turnover

This section will discuss staff capacity and skills with relation to the Secretariat. The Commission’s staff capacity and skills have a direct impact on how, and how effectively, the SAHRC’s mandate can be discharged.

Capacity

Whether the SAHRC faces a challenge when it comes to issues of staff capacity and skills depends on how broadly the Commission’s mandate is interpreted.⁷⁰⁰ The general view amongst respondents was that the SAHRC does not have sufficient staff capacity to effectively discharge its mandate, although there are those who hold a different view. Respondents gave a number of reasons for feeling that the Commission might not have sufficient staff capacity; these included that the Commission may be taking on more responsibility than it can effectively manage.⁷⁰¹ Other factors said to influence staff capacity include being:

[U]nder-resourced – there are simply not enough people to do the work that we are required to do... I am not convinced our people are properly paid, and because of that we can’t afford to employ senior experienced people to deal with the complicated work we are challenged with. I am not convinced either that at the junior level we either through interns or association with universities, have enough people to deal with the volume of work. This can be overcome – it’s something that I’ve suggested – that we work closer with universities – that they assist us to do the quality research, assist us with drafting documents and position papers at a very high level.⁷⁰²

Issues of capacity and staff skills also seem to differ according to programmes and provinces. For example, the RDP is “well staffed”, but as it is quite a “flat structure”, consisting of one person per specialist area, “more support staff [such as junior researchers and interns] would help RDP be more effective.”⁷⁰³ The provincial offices seem particularly affected by issues of capacity; a member of staff commented that, although the number of programmes in the Commission has expanded, the provincial offices have not necessarily received more staff.⁷⁰⁴ Issues of staff capacity and skills are not just relevant to those SAHRC programmes directly involved in discharging the mandate; they apply to the SAHRC’s administrative, finance and human resources departments as well.⁷⁰⁵

One of the difficulties in providing a more scientifically accurate answer to the question of staff capacity at the SAHRC is that the Commission has never quantified what the required capacity is, despite this issue being longstanding; and it is unclear why this has not been done.⁷⁰⁶

Therefore, “as much as top management is saying it’s not just a question of having more staff [but also a question of effectiveness], it should be based on scientific proof or evidence that [for example in LSP] it takes ‘x’ amount of people to finalise ‘x’ amount of files.”⁷⁰⁷ The lack of detail about

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698 Interview with staff member.
699 Communication with staff member.
700 Interview with staff member, Christine Jesseman, HoP RDP.
701 Interview with former staff member, Sello Hatang, HoP ICP.

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702 Interview with Commissioner Leon Wessels.
703 Interview with staff member, Christine Jesseman, HoP RDP.
704 Interview with staff member.
705 Interview with senior staff members; interview with staff member, Sipehele Zulu, HoP Human Resources Programme; interview with staff member.
706 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
707 Interview with staff member, Danaline Franzman, HoP LSP.

the number of staff members required and the workload of existing staff does not mean that staff are not overworked; however, it might make it more difficult to support the argument because, as one respondent asked, how do people justify that they are shortstaffed?⁷⁰⁸ Proper engagement with issues of staff capacity therefore seems to be a combination of taking cognisance of the views expressed by staff in this section; quantifying the capacity needed; and addressing other aspects of organisational culture. As one respondent noted: “For me it is important to concentrate on the health of the organisation... When you have happy people, there will be better output.”⁷⁰⁹

Skills

Although having the appropriate skills is a “huge requirement”, one respondent felt that having “passion for human rights takes the cake”⁷¹⁰ and is the most important requirement. Compassion is another skill needed, but this refers to “both internal and external compassion. I can’t care more about the outside [those external to the organisation] before I care inside about the rights of colleagues.”⁷¹¹ Although staff at the Commission are very skilled, the institution does not cumulatively have the skills to discharge its mandate in full.⁷¹² This is not necessarily a negative, as the Commission must realise that there are many expert specialist groups and should instead determine what core skills are needed, and work better with other expert groups.⁷¹³ Being able to act independently is another important skills requirement; one respondent was of the opinion that the more junior a staff member is, the more difficult it is to stand up to pressure emanating from senior and influential people internal and external to the Commission.⁷¹⁴ As with staff capacity, it is important to set out the detail of the skills required in the Commission, and one respondent was of the opinion that when the Commission started there was no

clear idea of the skills that were required, and that this is still the case.⁷¹⁵

A question that needs to be asked in relation to people’s skills is whether the skills that people do have are best utilised through their job descriptions. At least one member of staff felt there was a mismatch between what they were qualified to do and their job descriptions, leading to feelings of under-utilisation and a lack of job satisfaction.⁷¹⁶

The “skills shortage in the country generally” also affects the SAHRC in terms of what one respondent called the “juniorisation of skills”, which relates to junior members of staff not having some of the requisite skills, such as letter writing, and senior staff members having to provide more oversight than is normally required.⁷¹⁷ Two other examples of the possible mismatching of skills were also mentioned by respondents. The first was that the national coordinators who worked with Commissioners on their thematic areas were moved to the RDP programme, which requires them to be senior researchers.⁷¹⁸ The second example refers to the question of whether provincial managers have been adequately equipped to manage provinces effectively, as the emphasis in their appointments was on their having legal qualifications so they could drive litigation, and not necessarily on their managerial skills.⁷¹⁹ This concern was also raised in relation to managers in general in the SAHRC, with a staff member asking whether all managers are conversant enough with issues of corporate governance.⁷²⁰ Similarly, speaking about management skills in the Commission, a respondent noted that:

Today, what is very clear is that we don’t have strong management skills, which are required to run the organisation...we are not adequately training managers at all levels.⁷²¹

708 Interview with staff member, Minnesh Rampersadh, Acting HoP Internal audit activity (IAA).

709 Here it is also important that “we as individuals must take responsibility for creating the very environment we want others to create”. Interview with former staff member, Sello Hatang, HoP ICP.

710 Interview with former staff member, Sello Hatang, HoP ICP.

711 Ibid.

712 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

713 Ibid.

714 Interview with Commissioner Leon Wessels.

715 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

716 Interview with staff members.

717 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009. Related to this is the question of whether the SAHRC has the professional skills needed for its work – this relates to skills, professional conduct and levels of experience. (comment by Commissioner Leon Wessels.)

718 Interview with staff member.

719 Interview with staff member, Minnesh Rampersadh, Acting HoP IAA.

720 Interview with staff member.

721 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

The matching of skills to job descriptions raises the question to what extent staff development support is offered at the Commission. Although one respondent felt that things are “slowly changing”, the SAHRC does not have “a culture of capacity-building (staff development) and a culture of scholarship supporting the educational interventions of staff. Our policies are not friendly towards this.”⁷²² Although there is a staff development policy in place, this is subject to serious budget constraints,⁷²³ and consequently “the skills and training that people may be exposed to are not necessarily what they want.”⁷²⁴

Staff mobility and turnover

There are differences of opinion about whether there is a high staff turnover in the SAHRC, and it is important to consider a number of aspects, not all of which fall within the scope of this report. These include how staff turnover is calculated; what standard is used to determine whether a high staff turnover

mobile and sought-after workforce as unhappiness about the institution as a workplace.

It is difficult to make conclusive statements about the Commission’s staff turnover rates over time for two reasons. First, it appears that the Commission has over time altered the way in which it calculates staff turnover. Second, there appears to be a lack of certainty internal and external to the Commission on what the appropriate benchmark is to assess staff turnover. This has led to inconsistencies between the benchmarks that the Commission uses to determine whether staff turnover is high, and how the staff turnover figures are interpreted in relation to this.

The following table represents a collation of staff turnover figures as reported in the Commission’s annual reports.⁷²⁵

Table 1: Summary of staff turnover from the annual reports for the 2002-2003 to 2008-2009 financial years

	Appointments	Terminations	Turnover rate in annual report
2002/2003 ⁷²⁶	85	8	9%
	No. of permanent employees	Terminations and transfers out of the organisation	
2003/2004 ⁷²⁷	95	20	21%
2004/2005 ⁷²⁸	106	31	29%
2005/2006 ⁷²⁹	107	31	29%
	No. of employees at start of fin. year	Terminations and transfers out of the organisation	
2006/2007 ⁷³⁰	107	17	16.34%
2007/2008 ⁷³¹	121	24	19.83%
2008/2009 ⁷³²	125	22	17.6%

exists, and how the Commission compares with this; whether the turnover has differed over time; after how many years of service people leave; whether there is a high turnover in specific programmes; what the reasons are for a high staff turnover, if it exists; whether staff move to parallel jobs elsewhere; and whether the staff turnover is something to be concerned about, as a high staff turnover might be as indicative of a

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725 The table illustrates that, from the 2003/2004 to 2005/2006 financial years, staff turnover rates were calculated as follows: terminations and transfers out of the organisation / number of permanent employees x 100. In later years, turnover rates were calculated as follows: terminations and transfers out of the organisation / number of employees at the start of the financial year x 100. These differences might be attributed to changes in the reporting template.

726 In this year, turnover rates were calculated differently from subsequent years by using appointments and terminations. SAHRC 2003b p.35.

727 SAHRC. 2004c. *Annual report, April 2003 – March 2004*, p.49.

728 SAHRC. 2005b. *Annual report, April 2004 – March 2005*, p.47.

729 SAHRC 2006d p.50.

730 SAHRC. 2007c. *Annual report, April 2006 - March 2007*, p. 61.

731 SAHRC 2008c p.80.

732 SAHRC. 2009d. *Annual report April 2008 – March 2009*, p. 158.

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722 Interview with staff member, Victoria Maloka, HoP ETP.

723 Interview with staff member, Sipehelele Zulu, HoP Human Resources Programme; interview with staff member.

724 Interview with staff member, Danaline Franzman, HoP LSP.

A second aspect to be noted about the staff turnover figures is the apparent lack of certainty, internal and external to the Commission, about a 'hard and fast' benchmark against which to assess turnover. Internally, this has led to inconsistency between the benchmarks that the Commission uses to determine whether staff turnover is high, and how the staff turnover figures are interpreted in relation to this. In an interview with the Commission's Human Resources Department, the international benchmark for a high staff turnover was cited as being 10% or more, as illustrated by the following response: "By international standards, if you have people leaving the organisation above 10% annually, then it means that the percentage staff turnover is high."⁷³³ Another respondent commented that

I was told a high staff turnover has to be 15%. I was asking [HR]...I have been avoiding these discussions because people say high turnover, but what are the standards? I was told 15%. We're not at 15%....15% vacancy rate...anything above that then we are in trouble.⁷³⁴

What should be noted is that if it is assumed that it is appropriate to use 10% or 15% to indicate a high staff turnover, the figures from the annual reports (Table 1) show that according to the Commission's own standards it has in fact reached a high staff turnover – irrespective of whether a 10% or 15% benchmark is used, the Commission has had a high staff turnover since 2003.⁷³⁵ This does not necessarily indicate that staff are leaving because they are unhappy about working at the Commission, but could simply indicate a highly mobile and sought-after

workforce – in order to establish this conclusively, it would be necessary to do a detailed analysis of exit interviews.⁷³⁶

The Commission's staff turnover and vacancy rates at specific levels and in specific occupations were also mentioned by the Portfolio Committee on Justice and Constitutional Development when it noted that, for the 2006/2007 financial year,

The Commission had a staff turnover rate of 16.34%, with high turnover in higher salary bands. The highly-skilled supervision band (Level 9-12) had a turnover rate of 28%, Senior Management Service Band A 20%, and Senior Management Service Band B 20%. In terms of critical occupations, Research had a turnover rate of 34.61%, with an overall rate of 20.33% in critical occupations. Of the 17 people who left the Commission, 16 had resigned and 1 was dismissed for misconduct.⁷³⁷

In response, the Commission expressed the need to review its retention policies and stated that

Most people, who resign, are attracted to remuneration and other benefits available in both public and private sector. Further, the shortage of appropriate skills to replace key personnel has also contributed to the vacancy rate during the period under review.⁷³⁸

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733 Interview with staff member, Siphelele Zulu, HoP Human Resources Programme.

734 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current. The total vacancy rates at the Commission over the second term as taken from the annual reports have been: 2002/2003 = 8.9%; 2003/2004 = 19%; 2004/2005 = 12%; 2005/2006 = 12%; 2006/2007 = 17.05%; 2007/2008 = 17.05%. Sometimes vacancy rates and staff turnover rates are used interchangeably, although these are separate variables.

735 It should be noted that there appears to be uncertainty external to the Commission on what the public sector benchmark is for staff turnover. After extensive inquiry from both the Chairperson's office and the Human Resources Programme it was determined that there does not appear to be a set national benchmark for staff turnover in the public sector, but that a figure around 10% is generally seen as an appropriate benchmark.

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736 At the pre-launch workshop on the report (held on 21 July 2009) it was noted that the Commission has a high staff turnover. It was asked whether more analysis of these figures was possible. As mentioned in the text of the report, the next step in analysis would require a detailed study of exit interviews. Some additional information has been provided in the Commission's annual reports on staff turnover in specific salary bands and in critical positions – something the Portfolio Committee on Justice noted, and that is briefly discussed later on in the report.

737 Portfolio Committee for Justice and Constitutional Development 2007 p.7, 10.

738 SAHRC 2007b p.7. A different perspective on staff turnover in the public sector was offered by Chipkin (2008:145) "...the high level of attrition amongst managers in the public service are not a consequence of poaching by the private sector. This seems to suggest that only in a minority of cases are those in managerial positions leaving for better salaries outside the public sector. It is more probable that state departments are competing with one another for managerial personnel." Chipkin, Y. 2008. "Set-up for failure: racial redress in the Department of Public Service and Administration". Habib, A. and Bentley, K. *Racial redress and citizenship in South Africa*. Cape Town: HSRC Press.

In addressing issues of remuneration,⁷³⁹ the SAHRC commissioned a report to evaluate the different positions in the Commission to determine appropriate grading and market-related remuneration (the Hay Group report). The government also introduced OSD applicable to those in the Commission with legal qualifications. Despite challenges in reaching a decision to implement these standards, and finding the finances to do so, these policies are currently being implemented.⁷⁴⁰

From a qualitative perspective, it is interesting to note people's reflections on staff turnover. Although not unanimous amongst those interviewed, there is a strong perception amongst respondents that the SAHRC has a high staff turnover. But it "seems like there are ebbs and flows"⁷⁴¹ as far as the staff turnover is concerned; for example, one respondent commented that "there was a time when the Commission bled,"⁷⁴² although this is not necessarily always the case. Although, according to another respondent, there is a "high staff turnover" but it has "stabilised a little bit," and it might be necessary to "accept a little bit of that [turnover]":

It may be that we are losing more people than we ought to, but I think at the end of day, given the fact we have to work within the structures and that people are going to reach ceilings...What happens to the HRC is not unique to us, people come with limited skills, they acquire greater skills when they are here, then they become marketable and they leave. In a sense we become a training ground. I don't think that's going to change in any way.⁷⁴³

Another respondent was concerned about the "unscientific" basis on which issues of staff turnover are discussed, and "puzzled" because it is raised a lot:

That's a question that used to be raised every time by Parliament...You can't expect people to be at the same employment for the rest of their lives. People move all the time. At the same time we need to try and attract good staff members and keep them, but the intention is not to keep them forever.⁷⁴⁴

In comparing the staff turnover at the SAHRC with that of other employers, it is not clear

if it is higher [than other institutions], but it is high. I think that's part of the problem. People from the outside have certain expectations that this is an institution where they will grow as professionals... and make a contribution. Some of them are able to do that, but the kind of expectation they have and what they find is quite different. Their own ability to grow, to make a contribution is often stifled, in part perhaps by the bureaucracy.⁷⁴⁵

If a relatively high staff turnover is something that is likely to continue, it might need to be something that is planned for. As one respondent commented,

I am not too concerned about a high staff turnover, provided that you know that you have a high staff turnover and therefore, when somebody joins the Commission, you should almost sit down and plan an exit strategy with that individual.⁷⁴⁶

There were differences of opinion about the extent and nature of the impact of a possible high staff turnover on the continuity of the work of the Commission. On the one hand, part of the continuity rests in the hands of the Commissioners and senior management, and not with more junior staff.⁷⁴⁷ On the other hand, staff turnover affects the institutional memory of the Commission,⁷⁴⁸ and

part of the lack of continuity and the impact that has results in the fact that there is not a proper

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739 It will be remembered from Chapter 2 that the HRC Act and regulations issued thereunder have created uncertainty as to whether the Commission is and should be aligned to the public service salary scales.

740 In late 2008, some Commission employees declared a dispute with the Commission at the CCMA about supposed delays in the implementation of OSD (see Ngqiyaza, B. 2008. "Employees take action against SAHRC" *The Star*). However, the matter was suspended to seek an internal solution (comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.)

741 Interview with staff member, Danaline Franzman, HoP LSP.

742 Interview with staff member.

743 Interview with Commissioner Karthy Govender.

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744 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

745 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

746 Interview with Commissioner Leon Wessels.

747 Ibid.

748 Interview with Commissioner Zonke Majodina.



Chairperson, Jody Kollapen, with staff members from his office: Mamosadi Moletsane, Pandelis Gregoriou, Abigail De Bruin, Yvonne Erasmus.

induction programme; in other words, when you are welcomed into the Commission...you are not properly introduced to what went before you, and neither is the work that we do properly documented, as far as I know.⁷⁴⁹

Staff turnover also impacts on a practical level, for example with the turnover of interns – it takes time to train people, and when they leave it takes time to replace them - that creates a “constant accumulative backlog and gap, especially in the LSP, in relation to complaints-handling.”⁷⁵⁰ In cases where it is possible, it is necessary to hand over work as this is currently lacking.⁷⁵¹

Although it is fairly easy to determine staff turnover rates, what is almost impossible to assess because of the sensitive nature of the topic is the number of staff that are seeking other employment. However, amongst those respondents who speculated about this, the percentage was very high.⁷⁵² Although this cannot be confirmed, what is worth noting is that this suggests that respondents perceive their colleagues to be unhappy about working at the SAHRC for whatever reason, and believe they leave because they are unhappy.

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749 Interview with Commissioner Leon Wessels.

750 Interview with staff member, Danaline Franzman, HoP LSP.

751 Interview with staff member, Minnesh Rampersadh, Acting HoP IAA.

752 Interview with staff member.

In order to assess people’s reasons for leaving the SAHRC and determine where they move to, it would be necessary to do a detailed analysis of exit interviews. It is unclear why this has not indeed been done. Such a detailed study is yet to be conducted, and this report therefore cannot provide a comprehensive and justifiable answer to these questions. However, what was mentioned in the interviews is how staff perceive their work environment, which could be a contributing factor in some resignations. Again, this report cannot investigate the ‘truth’ behind people’s perceptions, but this does not invalidate their experiences and perceptions. As a respondent noted: “If there are these deep-rooted concerns, then they must come from somewhere and you have to deal with them.”⁷⁵³ How people perceive the SAHRC as a place of work was investigated in the *Organisational Health Survey Report* commissioned by the SAHRC in 2007, and some policies and programmes have been developed and implemented by the Human Resources Programme to addresses some concerns raised by staff.⁷⁵⁴ In order to assess to what extent people’s concerns have been addressed, it would be necessary to replicate this study at a later stage.

In addition to aspects already mentioned throughout this section, respondents mentioned a number of aspects in the interviews that were of concern to them more generally, some

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753 Interview with staff member, Danaline Franzman, HoP LSP.

754 Interview with staff member, Sipehelele Zulu, HoP Human Resources Programme.

SAHRC CEO, Tseliso

Thipanyane (centre), with staff
commemorating World AIDS

Day outside Human Rights
House, December 2009



of which were mentioned in the 2007 *Organisational Health Survey*. One of these aspects is the question of staff recognition, in other words recognising the contribution that people make and acknowledging when good work is done.⁷⁵⁵ A number of aspects related to the Commission's organisational culture and the nature of the Commission as a place of work and included the importance of staff being treated in a professional manner at all times;⁷⁵⁶ making the Commission a more pleasant environment to work in, in order for people to find greater enjoyment in working at the Commission;⁷⁵⁷ having an open and learning organisational culture as opposed to people being too busy to make time to discuss broader human rights issues, and thereby ensuring that all Commission staff share a common human rights knowledge and understand things in the same way;⁷⁵⁸ low job satisfaction;⁷⁵⁹ strengthening communication in the Commission, which is seen to be inadequate;⁷⁶⁰ having alternative forums to discuss staff concerns if current reporting lines are insufficient;⁷⁶¹ the fairness and transparency of the recruitment processes;⁷⁶² and the top-heavy and small nature of the SAHRC structure, which

makes upward mobility difficult.⁷⁶³ Some concerns also related to leadership and management style.⁷⁶⁴

Highlighting the importance of some of these issues, one respondent commented: "Our difficulties are so elementary, and because they are so very basic, the weaknesses that they result in are so significant, as they impact on every aspect of the Commission's delivery."⁷⁶⁵

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755 Interview with former staff member, Sello Hatang, HoP ICP.
756 Interview with staff member.
757 Interview with Commissioner Karthy Govender.
758 Interview with staff member.
759 Interview with staff member.
760 Interview with staff members.
761 Interview with staff member.
762 Interview with staff member.

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763 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.
764 Interview with staff member.
765 Interview with staff member.

4.6 Conclusion and recommendations

This section of the report has placed the emphasis internally on the SAHRC's organisational structure and corporate governance. The discussion first focused on the Commissioners and their appointment process, the skills they bring to their work, their thematic areas of work, and their geographic location. This was followed by a discussion of the relationship between the Commissioners and the Secretariat. The focus then turned to the internal structure of the Secretariat, its most recent organisational changes and the challenges associated with this. This was followed by a discussion of the relationship between the Commission's head office and its provincial offices. It was important, next, to ask whether the SAHRC has the requisite staff capacity and skills to discharge its broad mandate; issues of capacity are also affected by staff turnover, and this section of the report highlighted some of the viewpoints around the Commission's staff turnover rate, as well as how staff members experience the Commission as a place of work.

Respondents made some recommendations in relation to the above that were endorsed by the Commissioners and CEO. These are mentioned thematically below in the order in which they were discussed in this chapter, and not in order of priority.

The Commissioners:

- While Commissioners should continue to take responsibility for policy developments, a policy unit or department should be set up to provide the necessary technical and legal support.
- Greater interaction is needed between the Commissioners and their political counterparts, such as the Portfolio Committees and Provincial Legislatures, with the aim of advancing the interests of the Commission.
- There should be greater communication to the Secretariat about how the Commissioners' work relates to the advancement of the Commission and its mandate.
- The appointment of a dedicated Commissioner to advance the rights of disabled persons, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, should be pursued with Parliament and the Executive.

- The Commission should engage with Parliament on terms and conditions of service to accompany the appointment of Commissioners, thereby ensuring greater individual accountability of Commissioners to each other, and a collective accountability to Parliament.

Relationship between the Commissioners and the Secretariat:

- The Commission should draw up a document on the relationship between the Commissioners and the Secretariat, setting out the roles and limits of each of these groups.

Organisational structure:

- There should be greater integration and cohesion between the Commission's programmatic work, including its work in provinces.
- The Commission should develop a strategic approach with regard to how it will incrementally build the capacity of its provincial offices.
- There should be a review of the Commission's structure so as to ensure that it optimally supports the Commission's strategic focus.
- Regular quarterly reviews of strategic plans against performance should take place.
- The Commission should continue using existing forums, such as plenary, joint meetings and the strategic planning process to reflect on ideas for restructuring.

Staff capacity and skills:

- A skills audit should be conducted to determine the skills and staff capacity of the SAHRC.
- There should be dedicated funds, capacity and plans for staff development.
- Organisational capacity should be assessed against the capacity that would be required to discharge the Commission's legal mandate.



5

Discharging the
mandate: reflections on
some achievements
and challenges

5.1 Introduction

According to s 184 (1) of the Constitution, the functions of the SAHRC are to:

- 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.*

In this chapter of the report, these three functions will be used as focal points for qualitative reflections on how the mandate has been discharged during the Commission's second term. The chapter will not present quantitative assessments or indicators to measure performance, but rather the reflections of respondents on what they think some of the SAHRC's achievements and challenges have been.

The chapter will first offer general comments by respondents on how the SAHRC has discharged its mandate, and then go on to discuss each of the three main components (promotion, protection and monitoring) in turn, although these components are, of course, interrelated in practice. This will be followed by brief reflections on how the internal operational aspects of the Commission affect the discharging of the mandate. Before the chapter concludes with recommendations offered by the respondents, it will briefly look towards the future and how respondents see the further work of the Commission.

5.2 General comments on the discharging of the mandate

Any reflection on the discharging of the Commission's mandate must take cognisance of both the financial and staff resources that the Commission has. As one respondent noted,

Fourteen years later, in view of the broad mandate we have, the challenges we have, the resources we have, I think we have done quite well...if you look at

*the work we do with 130 staff members...with R68 million.*⁷⁶⁶

As the SAHRC's mandate is broad and complex, it is difficult to present a general assessment of how the Commission has done, although some respondents did hold, though, that the Commission has generally done well, but that there is room for improvement - for example, one respondent noted that "I vacillate often between feeling we've done well in terms of discharging the mandate and at times saying we've done okay but could have done much better";⁷⁶⁷ while another thought that "we [the SAHRC] keep patting ourselves on the back and saying we've done well. Yes, I guess we have, if you look at our annual reports."⁷⁶⁸ The SAHRC has received praise and criticism for its work from different quarters, such as the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, which concluded that,

*Over the past decade, the Commission has built up a reputation amongst human rights activists and members of the public as an active and passionate defender of human rights. With limited financial and human resources, the Commission has made a real difference to the promotion and protection of human rights in the areas it focused on.*⁷⁶⁹

However, the Parliamentary Portfolio Committee on Justice and Constitution Development has asked to what extent the SAHRC either sets its targets too low, or overstates its performance. As a previous Chairperson of the Committee noted,

We think most bodies that appear before us consciously or unwittingly exaggerate their performance. This is probably the case in parliaments generally all over the world. The more experienced MPs lop off 30 – 40% of what the representatives of these bodies say – that's spin – we judge them by

766 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current. It was discussed in Chapter 2 how the budget and staff complement have increased incrementally.

767 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

768 Interview with Commissioner Zonke Majodina.

769 Parliament of the Republic of South Africa 2007 p.172.

*the 60 – 70% of substance, really. But in your [the Commission's] case 80 – 85% was substance.*⁷⁷⁰

Despite criticisms of its work, the Commission appears to have established “a presence”:

*The fact that the Commission continues to be a point of reference for many within the society, whether it's in terms of people bringing complaints to it...or significant interest groups...who want to work with the Commission, is a recognition of not just its status as a Constitutional body...but a body that has... established its own reputation and credibility, subject to fair criticism that comes from various quarters... As an institution that is responsible for human rights it is well-known...and respected...and perhaps even trusted.*⁷⁷¹

However, as one respondent noted, it is one thing to present an assessment of the effectiveness of the Commission by those who are informed about human rights, but “The real test is if Joe Soap at the taxi rank down the road would be able to answer that question [of effectiveness] convincingly.”⁷⁷² The question of “whether we [the Commission] have benefitted the people” is something that needs to be interrogated continuously, but also with the handing over of power and responsibility from one set of Commissioners to another.⁷⁷³ One respondent was of the opinion that “we’ve done that [benefitted the people]... and I think the next lot now need to take it a step further, building on the foundation, the couple of stories that we have created.”⁷⁷⁴ However, internal to the Commission there were some harsh criticisms of its work,⁷⁷⁵ although one respondent commented that in the assessment of the Commission’s work “we tend to focus more on the negative... the Commission also needs to be more balanced...positive as well as negative.”⁷⁷⁶ When asked what some of the achievements have been in

their particular programmes, staff have said that while many interventions have been made, the question will always be what the impact of the Commission’s work has been, and there will always be room for improvement.

A criticism that the Commission has faced more generally, and that was discussed in Chapter 2 of this report, is its perhaps overly reactive approach to human rights issues. In some cases the Commission has been good in reacting because of its interaction with the media, but the Commission is not as proactive as it can be, because it gets “caught up in this reactive mode all the time.”⁷⁷⁷ However, at times the Commission has been “very successful” in its proactive role, for instance “when we discover a systemic pattern of human rights violations and... we do an inquiry...an Indaba...research.”⁷⁷⁸ A related criticism has been how the SAHRC decides what issues to become involved in. As one respondent noted:

*People might accuse us of picking our issues... but even if that is valid...in taking a position on all of those issues [Malema, Vavi, Schabir Shaik] you would find quite [a degree of] consistency in terms of the principle that the Commission has taken with regard to how it has understood the human rights norms and standards and how it has applied them to a particular set of facts, and whatever the outcome is, that's it.*⁷⁷⁹

A further challenge that the SAHRC faces in discharging its mandate is the external context in which it has to do its work, particularly with respect to making human rights issues relevant in a context of poverty. As a respondent explained: “People hear about rights, but they cannot even access the most basic right to health, to sending their children to school... People become cynical... How do we engage with service delivery points?”⁷⁸⁰

But overall, how the Commission chooses to discharge its mandate depends on how it understands the needs of the people that it serves, and one respondent noted that where the Commission has failed it has been

770 Interview with Mr Yunus Carrim, Chairperson of the Portfolio Committee on Justice and Constitutional Development, September 2007 – April 2009.

771 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

772 Interview with Jovial Rantao, Chairperson of SANEF.

773 Interview with Commissioner Karthy Govender.

774 Ibid.

775 Some respondents had serious reservations about the impact of their work. Although there might be justification in some of their criticisms, these should be viewed against the broader background of the Commission’s achievements and challenges.

776 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

777 Interview with Commissioner Leon Wessels.

778 Ibid.

779 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

780 Interview with Commissioner Zonke Majodina.

*because we never really understood the 40 million-plus market that we have to serve – the old, the young, the rich, the poor, the different divides... language, cultural divides, the rural, the urban; and the communication skills we must have when we serve this huge South African society.*⁷⁸¹

The following three parts of this chapter of the report will present reflections on how the Commission has served its constituency in terms of its mandate to promote, protect and monitor human rights.

5.3 Promote respect for human rights and a culture of human rights

One of the respondents was of the opinion that the contribution that the Commission's ETP has made to advance the mandate of the Commission has gone unnoticed:

*An honest opinion would suggest that there isn't recognition of the contribution we have made in advancing the mandate of the Commission. The recognition is lacking internally and externally... we've done a hell of a lot of work...[in terms of] the number [of workshops presented], where we have trained, and the thematic areas we have trained on.*⁷⁸²

The human rights training provided by the Commission is intended to impact on three levels: "knowledge, skills, and attitudinal level".⁷⁸³ However, a challenge that the Commission faces is assessing the impact of the educational work that is undertaken:

Despite what we have achieved in terms of the numbers [of workshops], we have got to look at the qualitative output – what has been the impact of our

*work – I'm not sure that we can say much about... impact.*⁷⁸⁴

Although the Commission uses workshop reports and focus groups to assess how the training has been received,⁷⁸⁵ the methodology to determine impact is still a big gap. However, the Commission was felt to be visible in communities in terms of the training that it provides, although there is insufficient capacity in the provinces, with one EO and intern per province.⁷⁸⁶

A concern was raised about how human rights education is presented in relation to the everyday realities of those attending the workshops. As a respondent explained,

*teaching people about the Constitution will never put food on the table...it is about how you contextualise the Constitution and make it relevant to people's everyday experiences...on its own, the legalistic approach to human rights education is not enough, as it doesn't translate into the realities of a particular context.*⁷⁸⁷

It is therefore important to "understand how [human rights] have been interpreted and...how you can apply it within a given context",⁷⁸⁸ rather than human rights being understood and presented as "very theoretical...and nothing to do with our day-to-day life".⁷⁸⁹

In addition to doing human rights education at grassroots level, part of the SAHRC's education mandate includes raising human rights awareness more generally amongst the public. On this, a respondent noted,

I am not one hundred per cent convinced that we have gone a long way towards entrenching human rights even among people who seemingly should know better...why should people want the death penalty back?..If we are going so many steps backward in terms of our understanding, then I don't

781 Interview with Commissioner Leon Wessels.

782 Interview with staff member, Victoria Maloka, HoP ETP.

783 Ibid.

784 Interview with Commissioner Zonke Majodina.

785 Interview with staff member.

786 Interview with staff member.

787 Interview with staff member, Victoria Maloka, HoP ETP.

788 Interview with Commissioner Karthy Govender.

789 Interview with Commissioner Zonke Majodina.

*know that we are doing our job well... That penalty is the ultimate violation of a person's right to life.*⁷⁹⁰

However, a different opinion was that one of the achievements of the Commission in discharging its mandate has been its ability to put human rights issues on the agenda and in “unpacking human rights terms” for the general public:

*One with time recognises how big the mandate is and how difficult it is to translate human rights terms into ordinary day-to-day life. Equality is a nice word, but what does it mean? At many levels the Commission has been successful in making that transition – in unpacking the sophistication of human rights terms into ordinary realities, whether we are dealing with the rights of gay and lesbian people, people with disabilities, with foreigners and non-nationals.*⁷⁹¹

A challenge faced in establishing a human rights culture is how communities perceive human rights and how important it is to take the whole community on board in rural areas when teaching human rights. One respondent noted that in some rural communities human rights education is blamed for children being individualistic and not taking instructions from adults anymore, such as to do menial jobs, as they argue that it violates their human rights.⁷⁹² One respondent was of the opinion that for human rights to become an area that children are better educated about, it should be a dedicated subject taught in school that could be examined.⁷⁹³ Another opinion was that the

*most effective way in which we have been able to establish a human rights culture is the different dialogues we've had... the inquiries, but also when we deal with recalcitrant respondents, when we hold them to account or where we explain that their conduct has been unacceptable.*⁷⁹⁴

However, a challenge in creating such a culture of human rights is that “we have encouraged a sense of entitlement [in the country] where everybody want their rights, but are not

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790 Ibid.

791 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

792 Interview with Commissioner Tom Manthata.

793 Ibid.

794 Interview with Commissioner Leon Wessels.

ready to respect these rights and protect them”, which means the Commission has to “devise much more innovative ways of putting our message across.”⁷⁹⁵

A component of the Commission’s promotional mandate that has received some criticism is e-Learning. This initially formed part of the concept and structure of the National Centre for Human Rights Education and Training (NACHRET) that preceded the ETP as it stands today. The rationale behind NACHRET was that the SAHRC would provide accredited human rights education training. However, this concept was eventually done away with in 2007 because of the complexity and perceived tediousness of the accreditation process, and because the courses did not have the required unit standards.⁷⁹⁶ E-Learning was part of this initial conceptualisation of providing accredited training and had a limited audience internal and external to the Commission. It currently consists of five non-accredited courses that are electronically available through a link from the Commission’s website to the server where it is hosted. It is recognised that if the Commission wanted to roll e-Learning out to various audiences, the design would have to be changed.⁷⁹⁷ Some challenges that can be noted include administrative challenges in working with outside experts;⁷⁹⁸ technical challenges;⁷⁹⁹ and slow buy-in.⁸⁰⁰

5.4 Promote the protection, development and attainment of human rights

One viewpoint was that the SAHRC has been successful in terms of its protection mandate and that the Commission has “done [its] work at times without fear or favour, but there have been times when we fall short.”⁸⁰¹ A potential challenge in assessing the achievements in terms of the Commission’s protection

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795 Interview with Commissioner Zonke Majodina.

796 Interview with staff member.

797 Commissioners meeting, 15 June 2009.

798 Interview with staff member.

799 Interview with staff member, Victoria Maloka, HoP ETP; interview with staff member.

800 Interview with staff member, Victoria Maloka, HoP ETP; interview with staff member.

801 Interview with Commissioner Leon Wessels.

mandate is that “in legal [LSP], you don’t have once-off projects that you can say ‘achieved’...the work is ongoing.”⁸⁰² However, in terms of the SAHRC’s litigation work, the “Commission has been marred [in terms of] dealing with missed opportunities – instances where we should have been involved, but chose not to [be], because we are scared of the unknown and not sure of the outcome.”⁸⁰³ A litigation highlight that was cited was an equality court case that involved a disabled attorney who could not access the court in a wheelchair. A complaint was lodged with the SAHRC and the matter was successfully taken to the equality court, where a settlement was reached with the Departments of Justice and Constitutional Development and Public Works, who were the respondents.⁸⁰⁴ Similarly, another respondent commented on the Commission’s work in the equality courts, describing it as “significant”, while the “failure to really be involved in Constitutional Court cases, even as an *amicus curiae*, has been worrying.”⁸⁰⁵

An aspect that is important to keep in mind when discharging the Commission’s protection mandate is that it has to be “exercised in a very wise manner to ensure that people are not labelled as human rights violators without affording them the opportunity to explain themselves.”⁸⁰⁶ But when it is established that a human rights violation has occurred, then the Commission “must be prepared to push the matter to finality...if your pronouncement is not respected, you must be prepared to make it a fight to the finish, either taking it to court, or doing a proper name-and-shame job.”⁸⁰⁷

The SAHRC’s public inquiries were cited by a number of respondents as a highlight:

The way in which we have used public inquiries has been quite valuable as a tool in terms of looking at each separate aspect of our mandate, but how we bring them all together in one intervention – an

educative role, a monitoring role, an accountability role.⁸⁰⁸

However, as mentioned earlier in this report, a weakness of the public-inquiry model is the Commission’s post-report follow-up on the recommendations.⁸⁰⁹ Related to this is how the Commission communicates the findings of its reports to the public, considering the high illiteracy rates in the country and the reports being in English – one way round this is that ETP could perhaps more often present some of the findings in their workshops.⁸¹⁰

As part of its protection mandate, the Commission has been commended for the role it plays in mediation and conciliation. This is also done in such a way as to give effect to the Commission’s mandate to bring about redress – this form of redress is different from what the courts provide and takes the character of bringing people and communities together.⁸¹¹

Some of the challenges that the Commission faces in discharging its protection mandate might be external to its complaints-handling procedures and include non-cooperation by government, and even “when we do use subpoena powers, in a few instances there has been no response, or subpoenas have been ignored.”⁸¹² It needs to be asked to what extent the Commission’s internal complaints-handling procedure is enabling the effective discharging of its protection mandate. It was already mentioned in the previous chapter of this report how high-profile complaints are dealt with in the Commission and some of the advantages and criticisms that respondents drew out. It was felt by a number of respondents that the LCM is not functioning optimally, and some criticisms include lack of clarity about which cases should go there,⁸¹³ disappointment that LOs are not more often able to present in person the cases that they are working on,⁸¹⁴ concern about how the structure will function if some of the incoming Commissioners and

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802 Interview with staff member, Danaline Franzman, HoP LSP.

803 Interview with staff member.

804 Interview with Commissioner, Leon Wessels. *In the Equality Court held in the Germiston Magistrates Court, The matter between Esthe Muller and the Department of Justice and Constitutional Development and the Department of Justice, 2004.*

805 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

806 Interview with Commissioner Leon Wessels.

807 Ibid.

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808 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

809 Ibid. A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the importance of the Commission referring to its past reports in future work, thereby showing the continuity of work done and drawing on these resources.

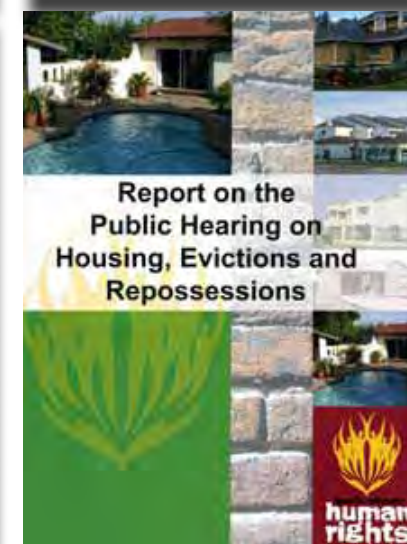
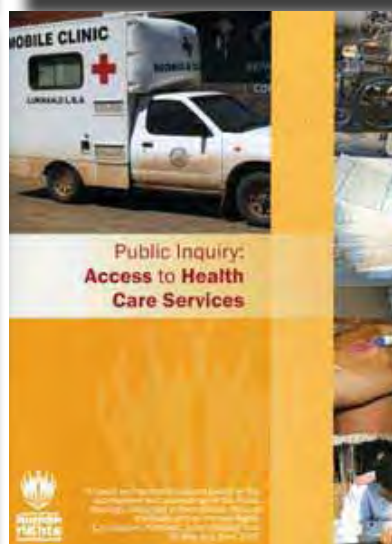
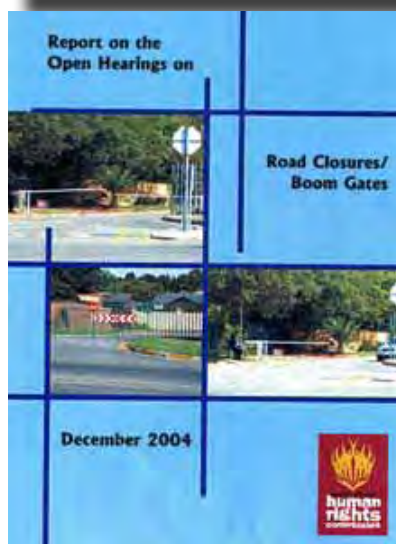
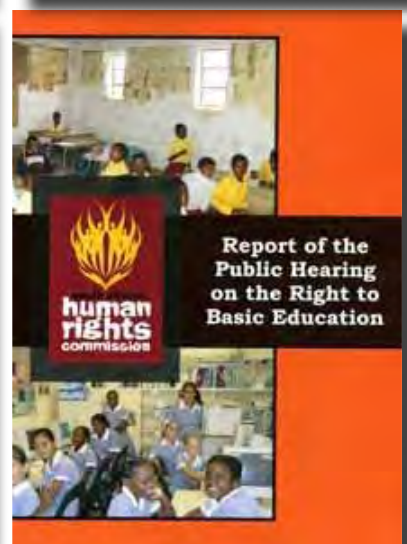
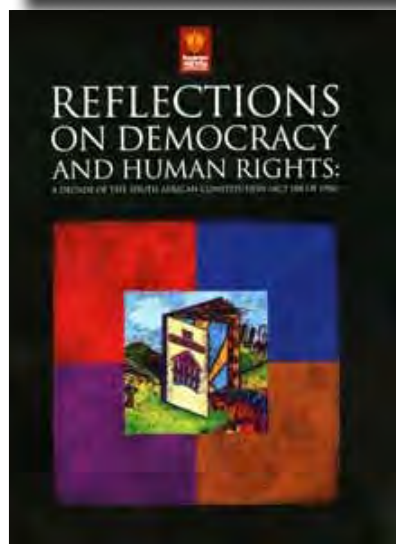
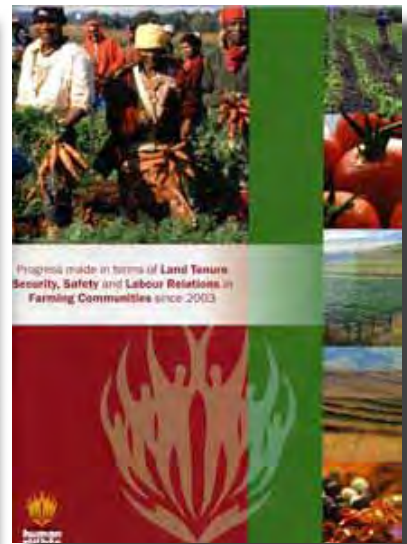
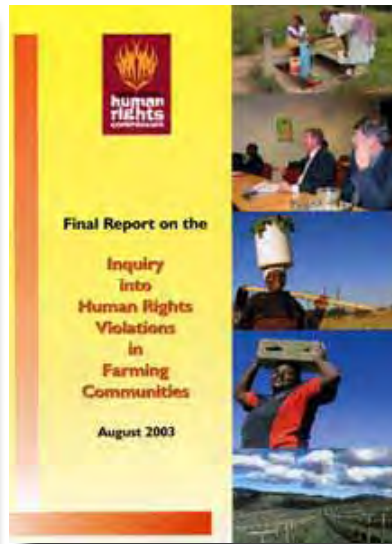
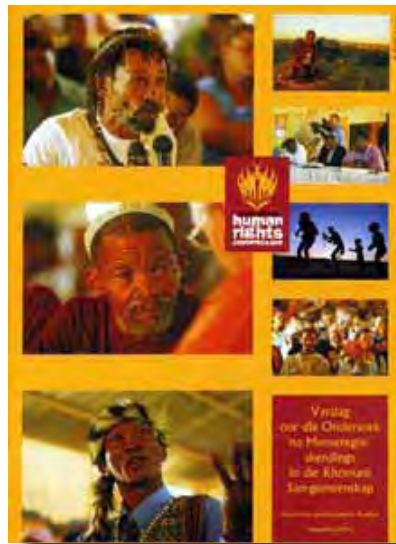
810 Interview with staff member, Christine Jesseman, HoP RDP.

811 See, for example, interview with Justices from the Constitutional Court, Chief Justice Pius Langa and Justice Yvonne Mokgoro.

812 Interview with staff member, Danaline Franzman, HoP LSP.

813 Interview with staff member.

814 Interview with staff member.



A selection of the Commission's public inquiry and other reports.

a future CEO do not have strong legal backgrounds;⁸¹⁵ and a remark by one respondent that there is a “sense of people being afraid to make decisions or to even offer opinions...I sometimes wonder whether we discourage that, not directly but indirectly.”⁸¹⁶ Notwithstanding the number of complaints that have been resolved at the Commission and its reputation for mediation and conciliation; on the level of dealing with complaints that are not high-profile, there are a number of challenges. Often, long delays occur before cases are resolved, and one respondent was concerned about turn-around time.⁸¹⁷ Delays in general might be in part due to the nature of complaints-handling, which involves letter writing and waiting for responses, and to the complexity of matters. It might also be due to the volume of complaints received, although “the way they used to compile statistics [on the number of complaints received] led to duplication of statistics.”⁸¹⁸ Lastly, it could also be related to issues of staff capacity; as one respondent noted, “my guess is that people source the information and don’t know what to do with the information”⁸¹⁹ – this means that the Commission sometimes acts simply as a conduit in the exchange of allegations and counter-allegations between parties, where sometimes what is required is to cut through the paper chase and get the issues resolved.⁸²⁰ When decisions are appealed to the Chairperson’s office, delays sometimes occur because files are not forwarded timeously from the provincial offices⁸²¹ and appeals cannot be considered or disposed of in the absence of such files. Some of these challenges were confirmed by a respondent external to the Commission who described interaction with the Commission’s complaints-handling system as poor, saying one had to “push” for progress with the complaint, and “propose what the next step should be.”⁸²²

A part of the SAHRC’s mandate that speaks to all three functions (promotion, protection and monitoring) is the Commission’s

PAIA mandate, discussed in Chapter 2 of this report. Under PAIA there have been

*Small achievements [such as] the outcome of the Asmal recommendations [ad hoc Committee on the Review of Chapter 9 and Associated Institutions]. There is increasingly some progress on rolling out training and awareness with the objective of increasing compliance. We have had some victories in law reform with regard to fees and exemptions of fees...We have not scored as many victories as we would like, but have been instrumental in reform and change...The Commission has been instrumental in monitoring the impact legislation can have on the access-to-information regime...and in causing some legislation to be stayed...One of the key successes has been creating more strategic alliances to overcome some of the resource constraints.*⁸²³

However, despite these achievements a number of challenges have been noted in relation to discharging the PAIA mandate. Notwithstanding the support that PAIA already enjoys in the Commission, some of the challenges might be related to the need for even more leadership in the Commission in terms of PAIA.⁸²⁴ These challenges include more “awareness of the substantive content of the right”;⁸²⁵ more active seeking of resources for discharging the PAIA mandate;⁸²⁶ and more assertive articulation on the part of the Commission’s leadership “[of] PAIA...at relevant platforms as part of their routine activities.”⁸²⁷

5.5 Monitor and assess the observance of human rights

It was discussed elsewhere in this report that one of the difficulties that the SAHRC has experienced in its role of monitoring Government’s progressive realisation of socio-economic rights has been getting Government to respond to requests for information.⁸²⁸ This goes back to how the

815 Interview with staff member.

816 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

817 Interview with staff member.

818 Interview with staff member.

819 Interview with staff member.

820 A matter raised at the pre-launch workshop on the report (held on 21 July 2009) was the importance of the Commission better capturing its complaints findings by, for example, developing a database of findings and jurisprudence.

821 Communication with staff member.

822 Interview with Adila Hassim, Head: Litigation and Legal Services, ALP.

823 Interview with staff member.

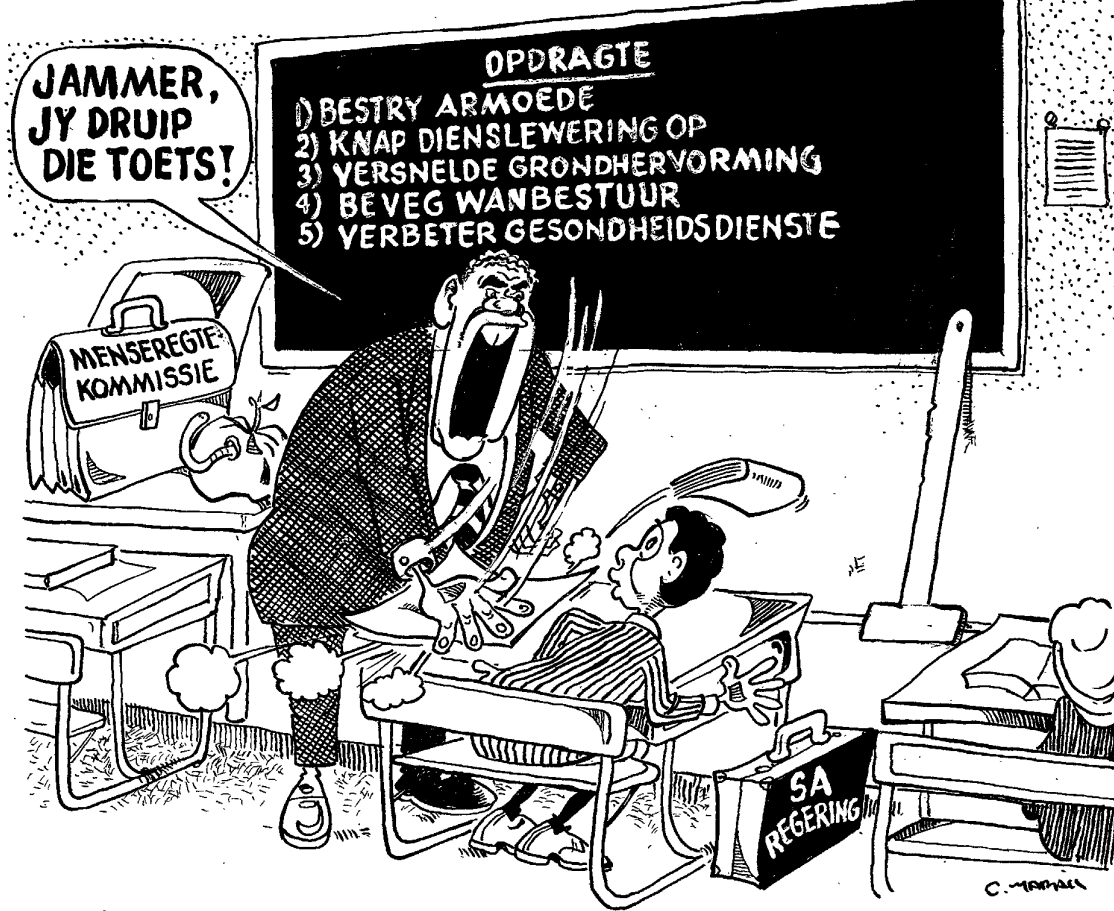
824 Interview with staff member.

825 Interview with staff member.

826 Interview with staff member.

827 Interview with staff member.

828 Interview with Commissioner Zonke Majodina.



Volksblad, 24 April 2003.

The Commission's 2003 ESR report found government wanting with regards to its socio-economic rights obligations.

Commission interacts with Government; as a respondent noted: "Now we resort to subpoenaing, which is not really the best way to engage, because we should be having this kind of partnership [with Government]."⁸²⁹

A question that was raised by one respondent is whether, in its earlier ESR reports, the Commission might not have set the bar too high and created unrealistic expectations of what it can do:

When the Commission started [its second term], we started with a major report on socio-economic rights that was very critical of Government and got them concerned. That was the report that was widely interpreted as the Government failing the poor, and it may have set a very high expectation of what the Commission could do.⁸³⁰

829 Ibid.

830 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

One of the concerns that some respondents raised about the SAHRC's monitoring function is the methods used to produce its ESR reports. On the topic of getting the information from Government, one respondent commented: "We produced all these reports and suddenly we realised that we are just turning out what Government is saying to us... That's not the spirit of monitoring a right. We have to devise very clever research methodology."⁸³¹ This viewpoint was shared by the submission of the Aids Law Project (ALP) to the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, where it stated the following on the ESR reports:

Whilst potentially a powerful mechanism for ensuring that socio-economic rights are indeed realised, this aspect of the SAHRC's work – in our view – is one of its most disappointing. The reports, which are not released every year and are ordinarily published very late, appear to rely too heavily on what government

831 Interview with Commissioner Zonke Majodina.

departments are prepared to divulge – with this information often taken simply at face value... [and]...indicate the absence of proper monitoring and evaluation tools and systems...⁸³²

Concerns about methodology were echoed by other respondents and include how methodologies for the monitoring of socio-economic rights are decided – one concern was that this is not done through enough consultation, but is instead more a decision of senior management without sufficient explanation for the reasons, or how the methodology necessarily relates to socio-economic rights.⁸³³ Related to this is the issue of the different methodologies that the Commission has used over time to monitor economic and social rights, which led one respondent to comment that the Commission “has never figured out what...it wants” in terms of how it monitors.⁸³⁴ This has implications for monitoring over time, as there is “no continuity over reports, so you can’t determine progressive realisation over time”.⁸³⁵ There were differences of opinion about who should determine what constitutes the progressive realisation of rights – one respondent was of the opinion that the Commission should determine progressive realisation,⁸³⁶ while another respondent commented that Government sometimes thinks that this should be determined by them.⁸³⁷ An important step forward in its mandate to monitor economic and social rights would be to come up with a framework for monitoring that will include indicators that the Commission could use over time; and the Commission should not be afraid to hold Government to account.⁸³⁸

Considering its challenges in methodology, and that “monitoring Government’s socio-economic performance is an impossible task for a small organisation like this”, it is necessary to work much smarter, for example by having the 2009 public hearings on the Millennium Development Goals and the new

strategy of more in-depth monitoring of the realisation of socio-economic rights in eight or nine communities around the country.⁸³⁹ However, following the concerns raised above it needs to be asked whether these are strategies that the Commission can use to monitor progressive realisation consistently over time.

One respondent asked to what extent the Commission, in addition to monitoring socio-economic rights, also monitors political rights, such as “freedom of speech, freedom of movement, the respect of property...” as the Bill of Rights goes beyond socio-economic rights.⁸⁴⁰

An aspect of the Commission’s mandate that relates to monitoring is its responsibilities under PEPUDA. In Chapter 2 of this report it was described how s 28 of the Act, which requires the Commission to produce reports on unfair discrimination on the basis of race, gender and disability, had not come into effect yet. However, the Commission still gives effect to the monitoring part of the mandate in relation to PEPUDA, although it is unclear how effective this has been. For example, one respondent asked in relation to the monitoring of the equality courts, for which a questionnaire was designed to assess aspects such as physical space, staffing, etc.: If you have gone once to the courts in the provinces to assess these things, what do you do then?⁸⁴¹ Currently, the Commission does not have a dedicated unit responsible for equality – it has co-ordinators in the RDP with the respective portfolios of racism and non-discrimination, and disability; and a Commissioner whose thematic area of responsibility is equality (although equality is, of course, cross-cutting). Furthermore, the equality courts are monitored at provincial level, and the ETP does training on PEPUDA.⁸⁴²

The Commission monitors Government’s compliance with international and regional treaties from the PIAP in Cape Town. The Commission has also participated in the UN’s Universal Peer Review process, with the activities carried out at domestic level being recognised as an example of best practice. In terms

832 AIDS Law Project. 2007. *Submission to the ad hoc Committee on the Review of State Institutions supporting Constitutional Democracy*, p. 7.

833 Interview with staff member.

834 Interview with staff member.

835 Interview with staff member.

836 Interview with staff member.

837 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

838 Interview with staff member. For additional reading on challenges that the Commission has experienced in the monitoring of socio-economic rights, see, for example, Institute for Human Rights. 2000. *Evaluation of Human Rights Institute of South Africa’s (HURISA) support services to the South African Human Rights Commission (SAHRC) for monitoring of social and economic rights. Final Report.*

839 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002-September 2009. This forms part of a particular approach to the monitoring of socio-economic rights that had been previously discussed in the Commission but was proposed in a different form by Commissioner Prengs Govender.

840 Interview with Commissioner Leon Wessels.

841 Interview with staff member.

842 Interview with staff member.

of treaty body monitoring, “the Commission is seen as one of the leading NHRIs in the field in the world. Even with the little we have done, we are leading.”⁸⁴³ However, in this regard a challenge is that

*what happens [in] the international arena is so far removed from a poor person's life – how do you make that connection...and at the same time make sure the government complies with its reporting obligation? It is important to hold Government accountable on both the domestic and the international level.*⁸⁴⁴

5.6 Supporting the discharging of the mandate

In other parts of this report, factors were mentioned that impact directly on how the Commission is able to discharge its mandate, such as the financial resources it has and its staff skills and capacity. Other influences include the Commission's support programmes, and although it is beyond the scope of this report to provide a detailed assessment and description of each of the programmes, such as the Human Resources Programme, the Financial Management Programme, the Administration and Supply Chain Management Programme, and the ICP, it must be kept in mind that their functioning and how they are capacitated in terms of staff numbers and skills directly impact on how the Commission is able to discharge its mandate. Although these programmes are developing and have listed their own achievements and challenges, the Commission has over time “underinvested” in aspects such as HR, IT, and finance,⁸⁴⁵ and this will always have consequences in terms of how the SAHRC is able to discharge its mandate. With regard to providing staff with access to human rights literature, an achievement has been the building up of the library over the past fourteen years, although in terms of further growth and keeping the library in line with more electronic and interactive technologies, financial resources remains its biggest challenge.⁸⁴⁶ Finally, since 2007 the Commission has had a small IAA unit that conducts audits and “evaluate[s] the effectiveness and contribute[s] to the improvement of the

843 Interview with staff member, Judith Cohen, HoP PIAP.

844 Ibid.

845 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

846 Interview with staff member.

risk management processes⁸⁴⁷ of the SAHRC. This could help the Commission assess and rectify some of its organisational risks and challenges. One respondent was of the view that the Commission should have a risk manager and that its audit committee should be more appropriately constituted, if possible⁸⁴⁸ – at the moment some members are not paid⁸⁴⁹ and are appointed by the Office of the CEO, which is provided for by the PFMA⁸⁵⁰.

Another development that might have had an impact on the discharging of the Commission's mandate is the introduction of the PFMA. The PFMA is binding, and the Commission is required to conform to this Act while giving effect to its mandate.⁸⁵¹ Some respondents felt that the PFMA provides administrative and financial structure for the SAHRC and that it ensures checks and balances, thus counteracting fraudulent activity.⁸⁵² However, other respondents found the organisational structure in this regard very bureaucratic,⁸⁵³ and there was an acknowledgement from management that “sometimes the structure poses a problem to people who want to utilise the money. If you were to follow processes, there might be delays in starting a project.”⁸⁵⁴ This does not mean that programmes do not and should not plan according to these compliance requirements, but merely that these processes might have an impact on how the mandate is discharged. One respondent commented as follows on the possible restrictions of compliance:

I sometimes wonder whether it's on the one hand the cost of compliance and how you put in place a structure that has to be compliant all the time (PFMA, HR, etc.), and whether the cost of compliance is such that we focus more on ensuring that we are compliant...because those are the things that

847 Institute of Internal Auditors, 2009 International Standards for the Professional Practice of Internal Auditing. (Revised Standard), p.9.

848 Interview with senior staff member.

849 Members who belong to the public sector are not paid, while those from the private sector are.

850 See s 76 (4) (d) and s 77 of the PFMA.

851 Comment by Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

852 Interview with senior staff member; interview with staff member, Sipehelele Zulu, HoP Human Resources Programme.

853 Interview with staff members.

854 Interview with senior staff member.

*have the potential to embarrass us more than not discharging the mandate.*⁸⁵⁵

This raises questions around how the SAHRC should balance its compliance requirements with its constitutional mandate and ensure that the former does not become a hindrance to the latter.

5.7 Looking to the future

During the interviews, respondents raised a number of points that might be relevant when looking to the Commission's future work beyond its second term. One of these aspects is the Commission's public image and the legitimacy and public confidence it enjoys. On the whole, the SAHRC enjoys great legitimacy and respect in South Africa as a constitutional body.⁸⁵⁶ However, "legitimacy and credibility should not be taken for granted; it should be used wisely and not squandered."⁸⁵⁷ Amongst other things, the Commission has received and acted upon complaints against the state,⁸⁵⁸ it has proactively taken up issues in the way of public hearings, and it has made public statements on human rights issues.⁸⁵⁹

Another issue commented on by one respondent is the fact that the Commission should not become complacent as a result of what it has achieved: "One thing I've learnt with institutions is, you can't be complacent."⁸⁶⁰ It is also important that the Commission does not hide behind its logo,⁸⁶¹ but takes time to think about key issues that need to be addressed, and takes time to address them.

Inevitably, some of the Commission's reputation is also tied to the Commissioners,⁸⁶² which might pose some risk when the Commissioners change hands. This is something which must be worked on in future and requires the appointment

of credible persons if the Commission's reputation is to be maintained.⁸⁶³ It is also important to build the institution.⁸⁶⁴

On a practical level, something that one of the respondents wanted to see developed is a long-term strategy: "I would like to see a process whereby what you are doing now feeds into a long-term strategy, thereby having a sense of building on what you have done previously."⁸⁶⁵ In staying true to its strategy and long-term plans, it would also be important for the Commission to look at developments in human rights discourse more globally: "We have to find a way of being progressive in terms of what is happening around the globe, for example xenophobia. We have to look at human rights through what is happening in the rest of the world."⁸⁶⁶

In one of the interviews, the question was raised of where South Africa's "moral compass" and "human rights compass is."⁸⁶⁷ It is therefore important that the Commission continues to act as the Constitution provides – without fear, favour or prejudice. It is also important for the Commission to keep its work relevant, "and that would probably be more so if an effort was made to consolidate some of the Chapter 9 institutions."⁸⁶⁸ But at the start of the Commission's third term, one respondent was of the opinion that "the demands on the new set of Commissioners are going to be a lot more than the demands were on us, because there's going to be a requirement that you continue delivery at a higher level!"⁸⁶⁹

855 Interview with Jody Kollapen, Chairperson of the SAHRC, October 2002 - September 2009.

856 Interview with Yasmin Sooka, Executive Director, FHR.

857 Ibid.

858 The Commission has equally worked with Government in certain cases such as the Commission's public hearing into the right to basic education (see Chapter 3 on the SAHRC's relationship with Government).

859 Interview with Yasmin Sooka, Executive Director, FHR.

860 Interview with Tseliso Thipanyane, CEO of the SAHRC, May 2006 – current.

861 Interview with former staff member, Sello Hatang, HoP ICP.

862 Interview with Commissioner Karthy Govender. See also interview with Yasmin Sooka, Executive Director, FHR.

863 Interview with Yasmin Sooka, Executive Director, FHR.

864 Ibid.

865 Interview with staff member, Christine Jesseman, HoP RDP.

866 Interview with staff member, Victoria Maloka, HoP ETP.

867 Interview with Mark Heywood, Director, ALP; and Adila Hassim, Head: Litigation and Legal Services, ALP.

868 Interview with David A. Johnson, Regional Representative, OHCHR, Pretoria.

869 Interview with Commissioner Karthy Govender.

5.8 Conclusion and recommendations

This chapter of the report offered some general reflections on how the Commission has discharged its mandate during its second term, followed by a focus on promotion, protection and monitoring. It was then pointed out how important it is that those systems and processes supporting the discharging of the mandate be in place. The chapter concluded by looking to the future and discussing considerations for the Commission's further work.

Respondents made some recommendations in relation to the above that were endorsed by the Commissioners and CEO. These are mentioned thematically below in the order in which they were discussed in this chapter, and not in order of priority.

General:

- In order to supplement the staff capacity and skills that the SAHRC might be lacking, it should work in closer cooperation with NGOs and universities. This could take the form of internships, academic exchanges, and the outsourcing of commissioned research.

Promotion:

- The Commission should develop a strategy for assessing more accurately the impact of its work, including its educational work.
- The Commission should make better use of community radio broadcasting, the Public Broadcaster, and CSOs in order to extend its reach.

Protection:

- The Commission should follow up on recommendations in reports from public inquiries, as well as other commission reports.
- The Commission should develop a clear litigation strategy.
- The Commission should undertake a substantive review of its complaints-handling system. Such a review should include issues around mediation versus litigation, and individual versus systemic complaints.

- The Commission should capture the findings of complaints more systematically by developing a database of findings and jurisprudence.

Monitoring:

- The Commission should continue using the mechanism of public inquiries in bringing together the various components of its mandate.
- The Commission should develop indicators and methodology that will allow the consistent measuring of the progressive realisation of economic and social rights over time.

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6

Key aspects for future consideration

Each of the data chapters in this report has a separate section on recommendations. These are drawn together here to act as a concise point of reference. It is recommended that these issues be reflected on in order for the Commission to continue discharging its mandate effectively. These recommendations should be read as guiding principles from the consensual perspective of the outgoing Commissioners and top management. It is the prerogative of those taking the Commission forward in its third term to further apply their minds and decide which issues to take forward, and how to do so.

6.1 Legal, policy and mandate

The following recommendations are made:

- The necessary amendments to the HRC Act should be given priority to by the Department of Justice and Constitutional Development and the Legislatures. (Chapter 2)
- There should be a mandatory requirement in respect of any legislation that has an impact on human rights that the relevant draft Bill be specifically referred to the Commission for its comments before being tabled in parliament. (Chapter 3)
- The formation of a super-structure of human rights institutions, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, should be pursued with Parliament and the Executive. (Chapter 2)
- The Commission should pursue the defraying by Parliament of costs incurred in respect of its PAIA mandate, as provided for in the Act. (Chapter 2)
- The appointment of an Information Commissioner for PAIA, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, should be pursued with Parliament and the Executive. (Chapter 2)
- The appointment of a dedicated Commissioner to advance the rights of disabled persons, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, should be pursued with Parliament and the Executive. (Chapter 4)
- The Commission should intensify its dialogue with the Executive and Parliament on the outstanding measures required in giving effect to s 28 of PEPUDA (Chapter 2).
- The Commission should develop and adopt a clear policy position, outlining its international work. (Chapter 2)
- The Commission should engage with Parliament on terms and conditions of service to accompany the appointment of Commissioners, thereby ensuring greater individual accountability of Commissioners to each other, and their collective accountability to Parliament. (Chapter 4)
- The Commission's strategic planning process should regularly involve external stakeholders, and such processes should interrogate the Commission's role and mandate in the context of prevailing national and international circumstances. (Chapter 2)
- The SAHRC's objectives should be re-evaluated and realigned more regularly. Although this is done on an annual basis it should be done even more frequently in response to the impact of unforeseen and unplanned events. (Chapter 2)

6.2 Independence and funding

The following recommendations are made:

- The Commission should develop and adopt a policy position on its independence that incorporates benchmarks on how this will be monitored and maintained. (Chapter 3)
- The Commission should develop a policy on the involvement of Commissioners and staff in the realm of party politics. (Chapter 3)
- The SAHRC's budget should fall under Parliament's budget vote as opposed to that of the Department of Justice and Constitutional Development, as recommended by the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions. (Chapter 2)
- The Commission should develop a clear position on donor funding, while ensuring that Government remains responsible for the funding of its core activities. (Chapter 3)

6.3 Relationships

The following recommendations are made:

General:

- The Commission should devise a clear strategy for external relationships. The CEO's office is currently devising a strategy for stakeholder management. This strategy could involve MoUs with relevant stakeholders. (Chapter 3)

Government:

- The Commission should aspire to establish a MoU with the Executive to ensure regular meetings and briefings in the spirit of cooperative governance. (Chapter 3)
- Every government ministry and the relevant departments should have a focal point or a person responsible for human rights to ensure that constitutional obligations are observed at all times. (Chapter 3)

The Legislatures:

- The Commission, together with other Chapter 9 institutions, should actively engage the Speaker's office in the process of setting up a proposed new unit for Chapter 9 institutions in Parliament. (Chapter 3)
- Greater cooperation, involvement or engagement should be established with provincial legislatures. (Chapter 3)
- There should be greater interaction between the Commissioners and their political counterparts, such as the portfolio committees and provincial legislatures, with the aim of advancing the interests of the Commission. (Chapter 4)

Public:

- The Commission should communicate the findings of its inquiries more effectively to the relevant stakeholders, and in particular those who made submissions, as well as to the public at large. (Chapter 3)
- The Commission should endeavour to reach out and extend its services to all parts of the country and to all constituencies, in particular those areas it has not previously reached or served. (Chapter 3)
- The Commission should have a clearer strategy on its work in rural areas. (Chapter 3)

CSOs:

- The Commission should develop and adopt a policy on the establishment and functioning of its Section 5 committees, as it recognises the value and need for such committees. (Chapter 3)
- The Commission should have a more structured approach to its relationship with CSOs. (Chapter 3)

Relationship with other Chapter 9 institutions:

- In striving for better coordination between the different Chapter 9 institutions, there should be task teams looking into working across the operational areas of the respective organisations, in particular the areas of advocacy, protection, monitoring, training and education. (Chapter 2)

Media:

- The Commission should generally be more proactive in terms of its interaction with the media through, for example, regular information sessions, the writing of opinion pieces, and sharing more effectively its work with national and provincial media. (Chapter 3)
- The Commission should use its calendar of important human rights events, or other times when it is scheduled to report, to engage proactively with the media. (Chapter 3)

Political parties:

- The Commission should continue the process of engaging political parties so that they understand the Commission's mandate and the way it is being discharged. (Chapter 3)

6.4 Organisational structure, capacity, skills and roles

The following recommendations are made:

The Commissioners:

- While Commissioners should continue to take responsibility for policy developments, a policy unit or department should be set up to provide the necessary technical and legal support. (Chapter 4)
- The way in which the Commissioners' work relates to the advancement of the Commission and its mandate should be communicated better to the Secretariat. (Chapter 4)

Relationship between the Commissioners and the secretariat:

- The Commission should draw up a document on the relationship between the Commissioners and the Secretariat, explaining what the roles and limits of each of these groups are. (Chapter 4)

Organisational structure:

- There should be greater integration and cohesion between the Commission's programme work, including its work in provinces. (Chapter 4)
- The Commission should develop a strategic approach with regard to how it will incrementally build the capacity of its provincial offices. (Chapter 4)
- There should be a review of the Commission's structure so as to ensure that it optimally supports the Commission's strategic focus. (Chapter 4)
- Regular quarterly reviews of strategic plans against performance should take place. (Chapter 4)
- The Commission should continue using existing forums, such as plenary, joint meetings and the strategic planning process to reflect on ideas for restructuring. (Chapter 4)

Staff capacity and skills:

- A skills audit should be conducted to determine the skills and staff capacity of the SAHRC. (Chapter 4)
- There should be dedicated funds, capacity and plans for staff development. (Chapter 4)
- The Commission should work in closer cooperation with NGOs and universities to supplement the staff capacity and skills that the SAHRC might be lacking. This could take the form of internships, academic exchanges, and the outsourcing of commissioned research. (Chapter 5)

- Organisational capacity should be assessed against the capacity required to discharge the Commission's legal mandate. (Chapter 4)

6.5 Effective discharge of the mandate

The following recommendations are made:

Promotion:

- The Commission should develop a strategy for assessing more accurately the impact of its work, including its educational work. (Chapter 5)
- The Commission should make better use of community radio broadcasting, the Public Broadcaster, and CSOs in order to extend its reach. (Chapter 5)

Protection:

- The Commission should follow up on recommendations in reports from public inquiries, as well as other commission reports. (Chapter 5)
- The Commission should develop a clear litigation strategy. (Chapter 5)
- The Commission undertakes a substantive review of its complaints handling system. This review should include issues around mediation versus litigation and individual versus systemic complaints. (Chapter 5)
- The Commission should capture the findings of complaints more systematically by developing a database of findings and jurisprudence. (Chapter 5)

Monitoring:

- The Commission should continue using the mechanism of public inquiries to bring together the various components of its mandate. (Chapter 5)
- The Commission should develop indicators and methodology that will enable it to measure consistently the progressive realisation of economic and social rights over time. (Chapter 5)



7

A final word: personal reflections of some of the outgoing Commissioners

In this final section of the SAHRC's end-of-term report, some of the outgoing Commissioners have taken the opportunity to write a short personal reflection on their time at the Commission.

7.1 A personal reflection by Jody Kollapen (Chairperson)

*Full-time Commissioner
(December 1996 – September 2002)*

*Chairperson
(October 2002 – September 2009)*



Chairperson Jody Kollapen

The decision on whether to make oneself available for nomination for the position of Commissioner on the SAHRC was never going to be a difficult one. Given the work I had done in private practice from 1981 to 1992, which focused largely on public interest work, and my time thereafter at Lawyers for Human Rights, having the opportunity to work at the Commission was perhaps quite logical in the sequence of events. Yet although it may have been an easy decision

to take, this does not detract from the tremendous sense of pride, privilege and honor I felt when I received the letter of appointment late in 1996.

Apart from one fleeting visit I had previously made to the Commission, I had very little knowledge of the people who worked there and the kind of work that was being carried out. There was certainly no manual in relation to what was expected of a Human Rights Commissioner, and starting work early in 1997 represented the start of quite an amazing journey for me, professionally as well as personally.

As colleagues on the Commission, we were far from a group of like-minded people who had chosen to come together, as in the case of many NGOs. The only objective thing we had in common was that we satisfied the criteria of being 'fit and proper' persons as was required by law. Yet this diverse group of people had to collectively interpret and discharge a mandate as a single united institution. Given our different life experiences it was indeed a very high and sometimes unreasonable expectation. Predictably, it would bring with it difficulties – on the one hand we started the process of getting to know one another, of identifying issues that we would take on and others that we would exclude and really of understanding and of accepting both the opportunities that being a Commissioner created as well as the limitations that working within a collective carried.

With the passage of time, the differences between us appeared fewer and the areas of common understanding larger – I imagine it became possible only because of the willingness of many to work as part of a collective, to seek and effect compromises and to accept that we were all on the path of learning.

Perhaps it was the experience of learning that was the most exciting for me – as Commissioner, later Deputy Chair and then finally Chair, I, like my colleagues, was expected to be an expert on a wide range of human rights issues. Even if it was an unreasonable expectation, there was tremendous pressure to live up to this expectation. After all, the Commission was meant to be the most important human rights institution in the country, and therefore should possess the necessary expertise. If we did not, then surely it would reflect on the standing of the Commission. The consequence of this was constant learning, sometimes self-taught and at other times with the assistance of colleagues. In this amazing institution

hardly a day goes by when one is not exposed to some new knowledge or experience that enriches, so much so that at times we really succeeded in coming across as experts – well, that is what many outside the institution sincerely believe.

The nature of the work, the people and the places we have been to, the human interaction both joyous and depressing, the accolades and the brickbats, the highs and the lows of working in an institution that statistically is likely to make as many friends as it does enemies, has been nothing short of exhilarating. The satisfaction of achieving a positive result, whether it is a successful verdict in an equality court or simply the bringing together of adversarial positions on the basis of a common human rights understanding, is hard to quantify – one has the real sense that you are dealing with matters that touch the heart and the soul of the nation and are making a small but significant difference. On the other hand, the intense frustration of being helpless to assist in the face of human misery and anguish is crushing and debilitating. Being privileged to do the work we do gives one an insight into the width and the depth of both the possibility of what we can be as well as the enormous obstacles we must overcome to get there.

It is the nature of the institution we nurture that will ultimately determine the success of how we do our work. While the PFMA and many other pieces of legislation create a sophisticated legal framework of what can be done and how it is to be done, at its core a Human Rights Commission must reflect the ethos of caring, of compassion, of integrity, and no legislation should be able to regulate or circumscribe that. The Commission is often a last port of call for many – sometimes all they seek is to have their story told, even if theirs is unlikely to be of any consequence. All it often requires of us is to hear their stories and to do so with a sense of humanity. It is those difficult and unfulfilled interactions which constantly remind me of what the right to be human is about.

As I take leave of the Human Rights Commission, I do so with the great joy that I was given the opportunity to be part of a vibrant and living institution. It has been at the cutting edge of so much that has happened. I do believe that even in the mistakes that it has made, in the errors of judgment that no doubt occurred, it works with integrity and honesty and has earned the respect of the nation.

7.2 A personal reflection by Commissioner Karthi Govender

*Part-time Commissioner
(October 1995 – September 2009)*



Commissioner Karthi Govender

Chapter 9 institutions have the pivotal mandate of strengthening constitutional democracy. Any person who holds office under the Constitution should, at the time of assuming responsibilities, objectively assess the inherited landscape. A snapshot of the vista must be taken and memorised. When responsibilities are handed to a successor, a similar process should occur. Not defensively under the glare of public scrutiny, but in the quieter and honest moments of silent introspection. If the conclusion is reached that the functionary has advanced the objectives of the institutions and contributed to the deepening of democracy and to improving the quality of life of people, then movement has occurred in the right direction, and perhaps some measure of self-satisfaction is permissible. The level of self-satisfaction must be commensurate with the extent of the movement in the right direction.

If what we leave to our successors is unenviable, requiring a 'fresh beginning' and the need to start the process of building the institution again, then we have failed completely.

The structural arrangements of the Chapter 9 institutions were the outcome of political compromises at the time that the interim Constitution was drafted. It represented the necessity of accommodating the pressing imperatives of the time. The separation of the SAHRC, the CGE and the CRL Commission, the Pan South African Language Board and various other bodies such as the Youth Commission may have been necessary at the time. The principle recommendation of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions,⁸⁷⁰ an all-party parliamentary committee tasked with the assessment of the Chapter 9 institutions, was that there should be a single human rights institution incorporating the mandates of all these bodies. The committee concluded that the uneven allocation of resources and capacities had an impact on effectiveness and efficiency.

Specialist bodies were set up to ensure that deficits in respect of marginalised and disadvantaged communities were prioritised. Their causes were to be advanced by a dedicated constitutionally sanctioned body, and the targeted communities were meant to be uplifted as a consequence of focused and sustained engagement. Implicit in the findings was the conclusion that some specialist bodies had failed to attain their primary objectives. There is no credible evidence that the initial objectives would be achieved if we persevere with the fragmented approach. There is overwhelming logic in the contention that a single body will allow a seamless and more effective enforcement of human rights in South Africa. The proposals of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions thus make eminent sense. It appears that, while the proposals may not currently be politically palatable, it is inevitable that it will be implemented at some stage. The sooner it happens, the better. When it happens, the better functioning and increased credibility of the institutions must be the bedrock and foundation on which the new amalgamated institution is based. Institutional continuity, recognition and respect are built over a period of time, and the successful brands must be preserved.

As part of an early effort to meet various role-players, the SAHRC met with senior judges in KZN shortly after it had been formed. One of the judges asked whether this body was unique and whether there were any other counterparts in the

world. It revealed two things to me. International isolation and parochial thinking had an impact on many, including the judges. At this time there were many viable human rights commissions functioning at national and regional levels. We had drifted far from the epicenter of human rights dialogue and debate. It also demonstrated the deficit in knowledge and understanding that we had to start from. Not only had we to establish the infrastructure of the organisation, but we had to establish a niche for the organisation in the psyche of South Africa. This was an unknown creature. It was not part of the Executive, had extensive powers to assist it coming to a decision, but it could not make binding decisions. The SAHRC could not make binding and directly enforceable decisions on whether provisions of the Bill of Rights had been infringed. To give the body such power may have infringed on the separation of powers doctrine, as the Constitution vests the adjudicative powers in the courts. However, this does not mean that the decisions of the SAHRC are of no consequence.

There is a direct constitutional duty on all organs of state to assist and protect Chapter 9 institutions to ensure their independence, impartiality and effectiveness.⁸⁷¹ There is a more generic responsibility to perform all constitutional obligations diligently and without delay. Cumulatively, these require, in my opinion, for state bodies to either respect the decisions of the SAHRC or have them overturned in a court of law. Not respecting the decisions of the SAHRC is uncommon, but has occurred. The most egregious example in my experience was a complaint that we received from a group of pensioners living in uMngeni Municipality in KZN.

After receiving detailed representations from lawyers representing the municipality and those representing the complainants, we made a set of findings. In some respects the uMngeni Municipality was exonerated and in others we found that it had acted contrary to the Constitution. Somewhat cynically, uMngeni accepted the exculpatory findings, but rejected the findings against the municipality. It appears to me that there must be some consequences for the councillors and staff who have been found to have acted contrary to the Constitution by the SAHRC, who take no action to remedy the situation and who do not challenge the decision in a court of law. The concepts of the supremacy of the Constitution, of legality, of limited government and constitutionalism require better from governmental representatives and officials. Staff should be held accountable in terms of their performance agreements for such failures, and provincial and national

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870 Parliament of the Republic of South Africa. 2007.

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871 Section 181(3) of the Constitution.

spheres exercising oversight over local governments should require explanations and take appropriate action in terms of the Constitution.

I wrote elsewhere in 2007 that:⁸⁷²

Governments, in general, respond to institutions like the Commission in a variety of ways. At one end of the continuum, there may be active, unequivocal and complete institutional support and at the other end, there can be open or indirect hostility and regular and sustained undermining of the institution. In between, there is an attitude similar to that of passivity or circumscribed compliance with constitutional and statutory demands. The drafters of the Constitution understood the necessity for active support and hence the constitutional obligations in Section 181 of the Constitution. With some notable exceptions, the present administration's attitude towards the SAHRC has been closer to that of passivity or circumscribed compliance rather than that of active and unequivocal support. While there has been no direct or indirect hostility to the Commission and no attempt to unconstitutionally influence the outcome of its decisions, Government's response has fallen short of the standard of complete and unequivocal support.

It is forlorn and unrealistic to expect every senior governmental official to appreciate the intricate, nuanced and important constitutional relationship between the spheres of government and the SAHRC. One way of ensuring that it is at the forefront of the deliberations is if the SAHRC signs memoranda of understanding with the national government and with each of the provincial executives. This will spell out the special relationship and define the parameters. This is something which we failed to achieve with the Mbeki administration. This may be an appropriate time to restart the dialogue on these memoranda of understanding.

Having served for about fourteen years as a part-time commissioner, it is perhaps forgivable if we draw some satisfaction from the conclusion of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions that the SAHRC

more than adequately satisfies requirements as identified in the Committee's terms of reference

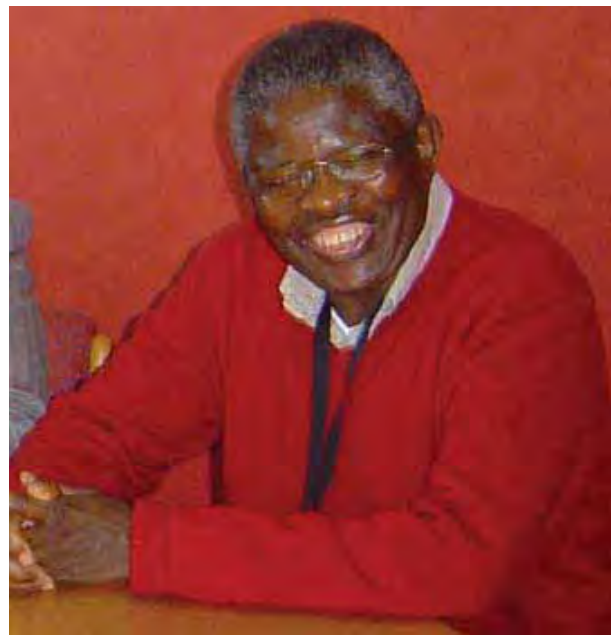
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872 Govender 2007 p.170.

*with regard to professionalism, efficiency and effectiveness. The Committee believes that the work done by the Commission is of vital relevance for South Africa and makes an important contribution to the deepening of democracy and the achievement of a human rights culture in this country.*⁸⁷³

But the abiding sentiment is one of being privileged at being afforded the opportunity to hold office under this Constitution and being able to work with very able colleagues profoundly committed to deepening the democracy and improving the quality of life of all. I will remain eternally grateful for this experience.

7.3 A personal reflection by Commissioner Tom Manthata

*Full-time Commissioner
(1 January 1999 – September 2009)*



Commissioner Tom Manthata

My desire is for the South African Human Rights Commission to initiate meaningful transformation to bring about lasting solutions to the socio-economic challenges facing our people in this country. This desire has been motivated by my short

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873 Parliament of the Republic of South Africa 2007 p. 184.

stint as the Commissioner of the Truth and Reconciliation Commission (TRC), which helped to investigate human rights violations visited upon our people by the apartheid laws and practices.

The apartheid laws of separate development, and the severity with which they were applied, affected all spheres of human existence in our country. This was achieved economically, politically, socially and culturally. The political violence that was perpetuated by the apartheid regime was used to create and promote division among black people, and division among black and white people.

The TRC was tasked to probe and investigate and deal with this phenomenon through asking the perpetrators of political violence: "Explain to us, why did you kill? Why did you violate the rights of so many black people?" These questions sought to help give the perpetrators of violence the opportunity to own up to their past human rights excesses.

If the TRC's role was to promote peace and reconciliation, I am of the view that the role of the Human Rights Commission needs to be more robust in addressing the injustices of the past, including current socio-economic violations and their unavoidable disastrous consequences.

While the lifespan and duration of the TRC's work was short, it is my view that with its broad mandate of investigating and reporting on the observance of human rights, the Human Rights Commission is best positioned to enhance the work that was first started by the Truth and Reconciliation Commission, and deal comprehensively with the socio-economic abuses and violations that still persist even to this day.

The long struggles by the many social movements, NGOs and countless human rights activists supportive of the liberation struggles and waged by liberation movements, have given the people of this country the dignity and the ability to enjoy freedom and speak to power without any fear of harassment. This is because of the freedom and the constitutional democracy that were ushered in by the 1994 dispensation. Today, the citizens of this country from all walks of life and different backgrounds and cultures are able to engage with one another, and together embrace the constitutional values that many struggled and died for.

This does not mean the country no longer faces problems. There is still mistrust and fear among communities from different backgrounds and cultures which are largely based on the age-old racial prejudices. These are further compounded by xenophobia as geographical borders in the continent are flattened and freedom of movement from one country to another is made easy by the globalising world. Of course, people leave their countries of birth for other reasons, including conflict, persecution, non-observance of human rights, and political turmoil and uncertainty. As we have seen in recent years, South Africa has become a home for many who flee their countries because of oppressive and totalitarian regimes in Africa and other countries.

The work of the TRC, including the human rights culture that is developing in South Africa, enhanced by the work of the Human Rights Commission, fills the people north of our borders with hope that peace and stability are a possibility even in their own country. The envy with which the work of political reconciliation has been received in countries facing conflict and warfare is a source of encouragement. Peace and reconciliation is a much sought after intervention in countries faced with conflict as they seek to bring about peace and stability in their own countries.

With the positives, there are also the negatives we have to contend with, including the fact that our own country also faces challenges, including unemployment and a great scourge of poverty. With scarce economic resources and high rates of unemployment, the majority of South Africans are living in abject poverty; many cannot even feed, educate, or clothe their children. Poverty is rampant; the battle for scarce resources is exacerbating incidents of poverty and corruption. It may be that the fault lies at our own doorstep, what with our own extravagant and conspicuous consumption tendencies. Like locusts, we seem to want to consume everything before us!

What about land and education?

We all have to appreciate the value of land, and how it is used for the good of all who live on it. Our education must focus on the importance of land, and how it should be used to be of service to all. We remain the stewards of the land; whatever wrong policies we adopt in the way the land is utilised will, in the long haul, come to haunt us. Our education system must be geared towards ensuring that we educate our young

people for the service and love of the land and its populace. Sadly, educators, learners and parents are still worlds apart. African learners are at the bottom of the pile. They were put there by the successive apartheid governments; and even the current education system continues to marginalise schools in the poorer areas of our country.

The answer to this problem is to work towards a common human development project. The resources of this land must be equitably distributed. Quality education must come to the townships, rural areas, and all other areas of the country, and must not be the exclusive right of the wealthy and more resourced. Education is a basic right that is protected in our Constitution.

As long as black learners continue to travel long distances from their homes to get quality education in former Model C schools while millions remain trapped in inadequately resourced schools in the townships, villages and rural areas, the rot will continue to afflict our education system. If education for black people continues to be of inferior quality, we all can rest assured that this country will not have the job skills that are necessary for rescuing our economy. If that continues to be the order of the day, whatever we do in trying to address the imbalances of the past will come to nothing; and whatever we do to address the socio-economic inequalities will be greatly undermined, resulting in a lack of skills which in turn will result in an unending poverty cycle.

To become a winning nation requires Herculean efforts; it requires willingness by the policy makers and government officials to be visionaries. Without such visionaries, many in our country will remain disadvantaged, and the dream of a better life will remain just a dream. More importantly, the efforts of the TRC and the Human Rights Commission in bringing about a just society and an end to socio-economic violations will be greatly undermined.

7.4 A personal reflection by Commissioner Leon Wessels

*Full-time Commissioner
(1 January 1999 – September 2009)*



Commissioner Leon Wessels

I received a fax on 24 September 1998, whilst doing research for my LLD thesis in Germany, that I had been appointed as a Human Rights Commissioner. This was exciting news, but a great surprise, because the telephone interview with the parliamentary select committee hadn't gone well – they were extremely hostile. I wasn't tested on my understanding of human rights or my ability to provide strategic leadership to the Commission. I guess they wanted to establish whether I was a "fit and proper person", because they asked strange questions. That night my German friends and I celebrated my appointment, German style, late into the night.

When I started work in January 1999, I was brimming with excitement. Much to my disappointment I discovered that I was an "affirmative action" appointment, because there had been a request that an Afrikaner be appointed to the Commission. This was done to realise the relevant legal

provision that demands that the Commission must reflect the racial and gender composition of the country. I was determined to prove that I had more arrows in my quiver than just being able to speak Afrikaans; that I understood human rights issues and could be a team player.

The line of questioning during the interviewing process for the second term on 7 June 2002 was fair. It tested one's ability to be a "fit and proper person" and human rights issues were also canvassed. This was indeed an enjoyable and memorable event. A further difference was that, this time, there was nothing speculative about the interview; one could now be judged on one's performance of the previous three and a half years. This Afrikaans thing still hadn't escaped me – as I was leaving the office to participate in the interview, my PA, Ms Lindiwe Zulu, said: "Just tell them that you are the only one here that can read and write Afrikaans." I had to suppress a chuckle and finally made peace with the fact that I would never have been able to work in the Commission, had I not been Afrikaans-speaking.

When Judith Cohen called on 21 June 2002 to tell us that Parliament had recommended that all the Commissioners be reappointed and that an additional five newcomers had also been recommended, I was just as excited as I had been the first time – there was work to be done. It was a disappointment that the President did not follow Parliament's recommendation and appoint the newcomers. This was a body blow to the Commission. We never recovered from that setback. There was always too much to do and never enough hands on deck. So much to talk about, so much to consider, so much to attend to, but never enough time.

During both interviews I had expressed a desire to help make our Constitution a living document, owned by all South Africans. This could only happen if citizens experience the promises of the Constitution in their daily lives. This proved to be quite a challenge, because often people expected the Commission to be the delivery agency. Our efforts to obtain more effective service from the state on behalf of complainants were not always met with the energetic-enthusiastic response required from organs of state.

The idea of giving content and meaning to finely crafted constitutional provisions by helping to develop jurisprudence on human rights was something that exited me. The Commission has played its part, but this challenge will continue and will always be present in any modern constitutional dispensation.

My interaction with staff members gave me a lot of joy. I found working with young people and living their dreams inspiring

and exciting; to hear their views about the Commission and the state of human rights in our country was an unexpected bonus.

The Commission is well placed to develop a clear understanding of South Africa's human rights challenges: the urban and the rural; the rich and the poor; the educated and the illiterate; the housed and the houseless; the old and the young; those with fresh water in abundance and those without clean water. One of the saddest experiences was when, during a walkabout, a colleague brought to my attention the difference in the 'housing' of some thoroughbred horses compared to the housing provided for the workers that attended to those horses, as well as the lack of health and educational opportunities for their children.

We are still faced with many challenges, and for many, the idea of a Constitutional State rings hollow – the finely crafted words on paper have not materialised. We are still a country where the gap between rich and poor is only comparable to that in Brazil.⁸⁷⁴

My greatest disappointment has been the reluctance (disdain?) of the Executive and Parliament to fully appreciate the importance of building a well resourced access-to-information regime. Because of a lack of resources and fatal flaws in the Act, the right of access to information has not yet taken its pride of place in our human rights dispensation.

A second disappointment was the poor relationship that the Commission has had with the Executive and Parliament at times. The Executive has been quick to react to criticism or the threat of criticism, but very slow to respond when their support is needed. Furthermore, their inability and unavailability – at least of some Cabinet ministers – to react when big human rights issues were brought to their attention is alarming.

The Constitution provides the rules and framework within which we are required to live. There is a tendency to applaud the Constitution and the Commission when it works in your favour and to criticise it when it works against you. The mandate and functions of the Commission must always be discharged impartially, without fear, favour or prejudice. The jury is out on whether we have always succeeded in achieving these objectives. Anthony D'Amato is correct in saying, "The most difficult issues in the enforcement of human rights are not issues of law, but of politics – and, ultimately, of morality."⁸⁷⁵

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