

NOTICE 817 OF 2007**SOUTH AFRICAN HUMAN RIGHTS COMMISSION****DETERMINATION OF THE PROCEDURE CONTEMPLATED IN SECTION 9
(6) OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION ACT. No.****54 of 1994**

Under section 9 of the South African Human Rights Commission Act, No. 54 of 1994 (hereinafter referred to as the "Act"), the South African Human Rights Commission (hereinafter referred to as the "Commission") hereby determines the procedures contemplated in section 9 (6) of the said Act, to be followed in conducting an investigation, which is contained in the regulations hereto.

These procedures have been published to assist the Legal Services Programme of the Commission in achieving and realising its mandate and shall be interpreted in that spirit.

COMPLAINTS HANDLING PROCEDURES**Article 1 - Definitions**

1. In these procedures, any word or expression to which a meaning has been assigned in the Act, shall have that meaning unless assigned another meaning in these procedures and unless the context indicates otherwise –

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- 1.1. "Act": The South African Human Rights Commission Act No. 54 of 1994 (as amended);
- 1.2. "Appeal":
- 1.2.1. Challenge against a rejection or referral on any of the grounds stated in article 4; or
- 1.2.2. Challenge against a decision or finding made by the Head of the Legal Services Programme, or the person to whom this task was delegated;
- 1.3. "Assessment": A preliminary decision made by the Head of the Legal Services Programme or any member of the Legal Services Programme who has been delegated the said task regarding a complaint submitted to the Commission to determine whether the complaint falls within the jurisdiction of the Commission and whether, *prima facie*, it constitutes a possible violation of a fundamental right. Assess, assessing and screening shall have corresponding meanings;
- 1.4. "Chairperson": The Chairperson of the Commission referred to in the Act or a person duly authorised by the Chairperson;
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- 1.5. "Commission": The South African Human Rights Commission established by section 184 of the Constitution;
- 1.6. "Complaint": A communication addressed to the Commission or which the Commission observes in the media alleging conduct or omissions, which constitutes a *prima facie* violation of a fundamental right;
- 1.7. "Complainant": Person, group or class of persons, organisation and/or association as defined in article 2 of these procedures and whose fundamental rights, it is alleged, have been violated or threatened;
- 1.8. "Conciliation": A process through which parties in dispute use the services of a third person to assist in bringing the parties together in an effort to ascertain the facts of the case and to effect a mutually acceptable solution;
- 1.9. "Constitution": Constitution of the Republic of South Africa, Act No. 108 of 1996 (as amended);
- 1.10. "Day": Shall mean any calendar day excluding weekends and public holidays;
- 1.11. "Decision": A conclusion reached or determination made or resolution taken regarding a complaint;

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- 1.12. "Finding": A statement or document containing the full reasoning of the decision reached by the Commission, after an investigation of a complaint or an inquiry or a hearing of allegations of violation of fundamental rights;
- 1.13. "Fundamental rights": Any right contained in Chapter 2 of the Constitution;
- 1.14. "Head Office": Seat of the Commission as determined by the President of the Republic of South Africa under section 2 of the Act;
- 1.15. "High risk matters": are those matters that represent a particular level of institutional and operational risk to the Commission;
- 1.16. "Investigation": An investigation as envisaged in terms of section 9 of the Act and shall include all steps taken by the Commission;
- 1.17. "Judicial Review": The power of a court to review an official decision for constitutionality or for the violation of basic principles of justice;
- 1.18. "Legal Committee": The Legal Committee shall be a committee tasked to assist or provide guidance to the Legal Services Programme in the handling high risk

complaints and shall consist of the following members, namely:

- 1.18.1. Any 3 (THREE) Commissioners, one of which shall be the Chairperson of the Legal Committee;
 - 1.18.2. The CEO of the Commission;
 - 1.18.3. The Deputy CEO: Operations of the Commission; and
 - 1.18.4. The Head of Department Legal Services Programme.
- 1.19. "Legal Opinion": A reasoned position reached or a statement of reasons for reaching a conclusion after an assessment of a complaint and application of the law to the facts of a complaint;
- 1.20. "Legal Services Programme": The programme of the Commission which has the primary function of handling complaints;
- 1.21. "Litigation": Litigation as envisaged by section 7 (1) (e) of the Act;
- 1.22. "Mediation": Process through which the parties in dispute use the services of a third person who controls

the process without having any influence on the content, to help resolve a dispute or produce an agreement or conciliation, which dispute shall only be mediated if both parties have mutually agreed to such mediation in writing;

1.23. "Negotiation": The reaching of an agreement through discussion and compromise;

1.24. "Panel": As envisaged by article 6.8 below, shall consist of no less than:

1.24.1. the Chairperson of the Commission or any Commissioner designated by him or her;

1.24.2. an additional Commissioner or Commissioners ; and

1.24.3. another natural person (s) appointed by the Commission and which may include any member of staff in the Commission;

1.25. "Person": Save for article 1.24. 3 person shall mean both a natural as well as a juristic person;

1.26. "Public Hearing": An enquiry as envisaged in article 10 of the Regulations;

- 1.27. "Registrar": The person who receives and records complaints;
- 1.28. "Respondent": The person, group or class of persons, organ of state, association or organisation whom it is alleged violated or threatened to violate a fundamental right; and
- 1.29. "Subpoena Hearing": An enquiry as contemplated in terms of section 9 (1) (c) of the Act.

Article 2 – Locus Standi

- 2. The following persons who allege an infringement or a threat of a fundamental right may lodge complaints with the Commission –
 - 2.1. anyone acting in their own interest;
 - 2.2. anyone acting on behalf of another person who cannot act in their own name;
 - 2.3. anyone acting as a member of, or in the interests of a group or class of persons;
 - 2.4. anyone acting in the public interest; and
 - 2.5. an association acting in the interest of its members.

Article 3 – Receiving and Recording of Complaints

3.

- 3.1. Any complaint submitted to the Commission for consideration shall be submitted in writing and shall be accompanied by all relevant supporting documents that substantiate the complaint: Provided that such documents may be furnished to the Commission or a member of the staff of the Commission at a later stage but before a finding is made.
 - 3.2. A member of the Commission's staff may assist any person who is unable to reduce the complaint in writing to do so and the Commission may at any stage require that the complaint be made under oath or affirmation.
 - 3.3. Save for those complaints that are received by post or by electronic mail, same shall be lodged on the prescribed form.
 - 3.4. Upon receipt of the complaint the Registrar shall ensure that a reference number has been allocated to the complaint and that such complaint has been recorded in the Register of Complaints.
 - 3.5. The Registrar will acknowledge receipt of the complaint within 14 (FOURTEEN) days and advise the
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complainant of the reference number allocated to the complaint.

- 3.6. Complaints may be lodged at the Head Office or at any Provincial Office of the Commission in whose jurisdiction the complaint arose.
- 3.7. The Head Office shall handle complaints from those provinces in which there is no Provincial Office and any complaint submitted to an incorrect office of the Commission shall be duly forwarded within 7 (SEVEN) days to the correct office and the complainant shall be notified thereof.
- 3.8. The complaint shall be lodged no later than three years after the complainant had notice of the violation or could reasonably be deemed to have notice thereof, provided that the Commission may, on good cause shown grant condonation for non-compliance with this article.
- 3.9. There shall be no charge for the handling of all complaints.
- 3.10. All complaints received and recorded by the Registrar, shall within 3 (THREE) days be allocated to a member of the Legal Services Programme of the Commission who has been tasked with screening and assessing complaints.

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- 3.11. The screening and assessing of the complaint shall be done in consultation with the Head of the Legal Services Programme or any of the duly authorised Provincial Manager of the Commission or by any member of the Legal Services Programme who has been delegated the said task and shall complete such screening and assessing within 7 (SEVEN) days of being duly allocated therewith.
- 3.12. If the Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the Commission or any member of the Legal Services Programme who has been duly delegated the task of screening and assessing complaints is satisfied that the complaint should be rejected or referred it shall within the 7 (SEVEN) days referred to in article 3.11 *supra* and subject to the *proviso* stated in article 4.2 below inform the Complainant in writing of the decision taken by the Commission to reject or refer the complaint, giving full reasons therefore and advising the complainant of his or her right of appeal the said decision to reject or refer the complaint in terms of article 8 hereof.
- 3.13. If the Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the Commission or any member of the Legal Services Programme who has been duly delegated the task of screening and assessing complaints is satisfied that the

complaint does constitute a *prima facie* violation of a fundamental right, it shall forward the complaint to the Registrar who shall within the 7 (SEVEN) days referred to in article 3.11 *supra* inform the complainant in writing of the decision taken by the Commission to accept the complaint and shall advise the complainant of the reference number allocated to the complaint.

- 3.14. Where any of the time limits prescribed in articles 3.5, 3.7, 3.10, 3.11, 3.12 and 3.13 *supra* cannot for whatever reason be met then in that case the complainant shall be advised of same accompanied by reasons for such failure.

Article 4 – Complaints that the Commission shall not deal with

4.

- 4.1. The Commission may reject any complaint, which is –

- 4.1.1. based on hearsay, rumour or reports disseminated through the media, provided that the Commission may conduct an enquiry to verify any allegation of a violation of fundamental rights that is reported in the media or obtained from any source; and upon verification, such alleged violation shall be

dealt with in terms of the Act and these Procedures;

4.1.2. couched in language that is abusive, insulting, rude or disparaging, provided that the Commission may consider a complaint if such language is removed;

4.1.3. the subject of a dispute before a court of law, tribunal, any statutory body, any body with internal dispute resolution mechanisms or settled between the parties, or in which there is a judgement on the issues in the complaint or finding of such court of law, tribunal or statutory body, provided that the Commission may consider any complaint regarding the process and manner in which the hearings are conducted at such court of law, tribunal or statutory body and if such complaint amounts to a violation of fundamental rights;

4.1.4. an anonymous complaint, provided that the Commission may in its discretion make enquiries to ascertain the allegations of possible human rights violations and if ascertained, it may deal with the complaint in terms of the Act

and these Procedures. Notwithstanding what has been stated aforesaid the Commission may consider a complaint in which the complainant requests to keep his or her identity confidential;

4.1.5. is viewed to be frivolous, misconceived, unwarranted, incomprehensible, and manifestly incompatible with fundamental rights or does not comply with the provisions of these regulations; or

4.1.6. unattended due to the conduct of the complainant in failing to respond to the Commission's request for information or documents in terms of a written request to do so by the Legal Services Programme of the Commission within a period of 1 (ONE) calendar month of transmitting such request, provided that on good cause shown by the complainant, the complaint may be reinstated. The request shall be addressed to the last known address of the complainant.

4.2. If in the opinion of the Head of the Legal Services Programme, any of the duly authorised Provincial Managers of the Commission or any member of the Commission who has been duly delegated to do so, the

complaint does not fall within the jurisdiction of the Commission, or could be dealt with more effectively or expeditiously by another organisation, statutory body or institution created by the Constitution or any other piece of legislation it shall within 7 (SEVEN) days refer the complainant to such an appropriate body and;

4.2.1. shall be entitled to request and receive periodic reports on the status of such referred complaint if it is of the view that the complaint constitutes a *prima facie* violation of, or a threat to, a fundamental right; or

4.2.2. if it is of the view that the complaint does not constitute a *prima facie* violation of, or a threat to, a fundamental right shall close the complainant's file accordingly.

Article 5 – Accepted Complaints

5.

5.1. The Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the Commission or any duly authorised member of the Legal Services Programme of the Commission shall, after determining that the complaint does constitute a *prima facie* violation of a fundamental right, determine

the procedure to be adopted by the Commission in dealing with the complaint.

5.2. Such a determination will be made taking into account the mandate of the Commission and may include but not be limited to mediation, negotiation, conciliation, hearings and litigation.

5.3. The Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the Commission may at any stage determine that a complaint be investigated, in which case:

5.3.1. Any member of the Legal Services Programme of the Commission authorised in writing by a Commissioner of the Commission, may exercise any of the powers referred to in section 9 (1) (b) of the Act;

5.3.2. Any member of the Legal Services Programme of the Commission may issue a notice to the Respondent to attend meetings in pursuance of the investigation in consultation with and under the hand of a Commissioner in terms of section 9 (1) (c) of the Act; or

- 5.3.3. Any member of the Legal Services Programme of the Commission authorised by a Commissioner of the Commission, may exercise any of the powers referred to in section 10 of the Act.
- 5.3.4. The member of the Legal Services Programme of the Commission who is required to act in terms of provisions 5.3.1, 5.3.2 and 5.3.3 *supra* shall provide the Head of Legal Services Programme with a report from time to time detailing the outcome of any investigation.
- 5.3.5. The outcome of any investigation or hearing in terms of articles 5.3.1, 5.3.2 and 5.3.3 *supra* will be made known to the complainant and the respondent within 90 (NINETY) days of receipt of the complaint. The Commission may publish such outcome in the media.
- 5.3.6. Where any of the time limits prescribed in articles 5.3.1, 5.3.2 and 5.3.3 *supra* cannot for whatever reason be met then in that case the complainant shall be advised of same accordingly accompanied by reasons for such failure.

5.3.7. Nothing stated herein shall be inconsistent with the Act.

5.4. In the event of one or more of the processes referred to in article 5.3 *supra* failing to resolve the dispute the Head of the Legal Services Programme may in consultation with the Legal Committee decide on other ways of resolving same, which are not inconsistent with the Act, these Procedures or the Constitution.

5.5. The decision by the Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the Commission to adopt any process referred to in article 5.3 *supra* shall not be open to appeal.

Article 6 – Public Hearings

6.

6.1. The Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the Commission may in consultation with any relevant stakeholders, refer the complaint to the Commission for a hearing, which may be public. Such a hearing shall be in terms of section 9 of the Act.

6.2. The Head of the Legal Services Programme or any of the duly authorised Provincial Managers of the

Commission may in consultation with any relevant stakeholders determine that a class of complaints be handled together.

- 6.3. The Respondent shall be provided with a copy of the complaint and any other information relevant thereto. In the case of an investigation in terms of the *proviso* to article 4.1.1 *supra*, as much information as possible about the media report shall be provided to the Respondent.
- 6.4. Complainants and respondents may request the Commission, in terms of section 9 (1) (c) of the Act to notify in writing any witness who is reluctant to appear on their behalf, to appear at the hearing and to produce all information which, in the opinion of the Head of the Legal Services Programme is relevant to the hearing.
- 6.5. The hearing shall be set down on a day that is at least 30 (THIRTY) days after the publication of the notice in a national newspaper outlining the terms of reference of the hearing. However, if the Head of the Legal Services Programme in consultation with any relevant stakeholders determines that the matter is urgent, the hearing may be held on 7 (SEVEN) days written notice to the parties.

- 6.6. The Respondent shall within 14 (FOURTEEN) days, and in the case of urgent matters referred to in article 6.5 *supra*, within 4 (FOUR) days after the delivery of the publication of the notice outlining the terms of reference of the hearing, deliver in writing a reply to the complaint and in the event of the Respondent failing to deliver such a response the matter may be set down for a hearing without such response.
- 6.7. The Commission may request any person in possession of any information relevant to the hearing to appear at the hearing or to submit written statements to the Commission.
- 6.8. The Panel shall preside over the hearing.
- 6.9. The Chairperson at the hearing shall at the commencement of the hearing inform all persons appearing before it of the nature of the complaint and the purpose of the hearing.
- 6.10. The Panel and/or any member of the Legal Services Programme dealing with the complaint may put any questions relating to the purpose of the hearing to witnesses, and require such persons to answer such questions and to produce articles or information relevant to the purpose of the hearing.

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- 6.11. Any person appearing before the panel shall be entitled to be represented by another person, including a legal representative, who shall be entitled to peruse all documentation in the possession of the Commission relevant to the purpose of the hearing and to cross-examine witnesses.
- 6.12. The panel shall afford any person who has been implicated in the matter before it, an opportunity to appear as a witness and such person shall have the same rights and obligations referred to in articles 6.9 and 6.10 *supra*.
- 6.13. The hearings shall be open to the public unless the panel determines that the public disclosure of evidence would:
- 6.13.1. prejudice the successful conduct of the hearings;
 - 6.13.2. threaten the security of any person involved in the hearing; or
 - 6.13.3. frustrate the successful functioning of the Commission.
- 6.14. The finding of the panel at a hearing shall be final and binding on the parties and on the Commission and both

the majority and the minority finding shall be made public.

- 6.15. The panel shall bear the responsibility of compiling and writing the report of the hearing.

Article 7 – Legal Proceedings

7.

- 7.1. At the discretion of the Head of the Legal Services Programme in consultation with the Legal Committee and after all other interventions have been considered, the Commission may institute legal proceedings at any stage after a complaint is received and accepted as a *prima facie* violation.

- 7.2. The legal proceedings referred to in article 7.1 *supra* may be instituted in any competent court in the name of the Commission or in the name of the complainant.

Article 8 – Appeals

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- 8.1. An appeal in terms of these Procedures shall be in writing and shall be lodged within 45 (FORTY FIVE) days from date of posting, delivering, faxing or emailing the rejection, referral or finding. Appeals lodged after
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the period referred to above may still be considered provided that the complainant has showed good reason for such failure to lodge within the time limits prescribed.

- 8.2. An appeal shall be lodged at the Chairperson of the Commission.
- 8.3. One or more Commissioners may assist the Chairperson in the task of considering the appeal.
- 8.4. Upon receipt of the appeal the Chairperson or any member of staff duly authorised to do so shall ensure that a reference number has been allocated to the appeal and that such appeal has been recorded in the Register of Appeals.
- 8.5. The Chairperson or any member of staff duly authorised to do so will acknowledge receipt of the appeal within 14 (FOURTEEN) days and advise the complainant of the reference number allocated to the appeal.
- 8.6. If the Chairperson or any member of staff duly authorised to do so is satisfied that the appeal should be rejected, he or she shall within 45 (FORTY FIVE) days inform the complainant in writing of the decision taken by the Chairperson or the said member of staff duly authorised, to reject the appeal, giving reasons

therefore and advising the complainant of his or her right of judicial review.

- 8.7. If the Chairperson or any member of staff duly authorised to do so is satisfied that the appeal should be upheld, he or she shall within 45 (FORTY FIVE) days inform the complainant in writing of the decision taken by the Chairperson or the said member of staff duly authorised, to uphold the appeal and shall advise the complainant, the Head of the Legal Services Programme and any of the duly authorised Provincial Managers of the Commission should the appeal have originated from one of the Provincial Offices of the Commission.
- 8.8. Where any of the time limits prescribed in articles 8.5, 8.6 and 8.7 *supra* cannot for whatever reason be met then in that case the complainant shall be advised of same accordingly accompanied by reasons for such failure.
- 8.9. The Head of the Legal Services Programme shall, within 30 (THIRTY) days of being requested to do so by the Commissioner, or Commissioners as the case may be, tasked to handle the appeal, provide the said Commissioner or Commissioners with additional reasons in writing for the decision taken that is the subject of the appeal.

- 8.10. Notwithstanding the above any appeal emanating from a high profile complaint shall not be dealt with by the Chairperson but by any other 2 (TWO) Commissioners who do not form part of the Legal Committee.

Article 9 – Conflict of Interest

9. Any Commissioner who was a party to the process of assessing or making any determinations or in decision making relating to a complaint shall not assist the Chairperson in any hearing of that complaint and shall not consider any appeal in such matter.

Article 10 – Amendment of Procedures

10. These Procedures shall remain in force for complaints handling until repealed or amended by the Commission and until such repeal or amendments are published in the Government Gazette.
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