



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

INPUTS TO THE HUMAN RIGHTS COMMISSION BILL [B5-2013]: RESPONSES TO QUESTIONS RAISED BY THE PORFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

October 2013

The South African Human Rights Commission (the Commission) welcomes the opportunity to provide additional input on specific clauses in the Human Rights Commission Bill [B5-2013]. The Committee may recall the inputs provided by the Commission when it presented its views on the Bill on 14 August 2013. The Commission has been closely monitoring discussions between the Committee and the Department so as to keep abreast of the developments in the draft legislation.

On 22 September 2013, the Commission received an email request from the Department, indicating that the Committee requires the SAHRC to provide the following information amongst others: motivation for the retention of Clause 17 i.e. *Entering and search of premises and attachment and removal of articles*.

Search and seizure powers

The Commission's search and seizure powers should be assessed within the context of its mandate and that of other institutions tasked with similar powers. It should also be viewed in light of international best practice for national human rights institutions.

1. The South African Human Rights Commission

The constitutional mandate of the SAHRC

Section 184 of the Constitution provides that,

"184. (1) The Human Rights Commission must

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.”¹

The powers needed to fulfil this mandate are provided in section 184(2) of the Constitution and are necessary to perform the function of the Commission. Section 184(2) therefore provides,

- “2. The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power
- a. to investigate and to report on the observance of human rights;
 - b. to take steps to secure appropriate redress where human rights have been violated;
 - c. to carry out research; and
 - d. to educate.”

Additionally, section 184(3) requires that,

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

Embedded in the mandate of the Commission is the power to investigate on the observance of human rights. It should however be noted that powers in relation to executing its investigative mandate and recourse to search and seizure are covered by section 10 of the Human Rights Commission Act 54 of 1994 (‘HRC Act’). The provisions contained therein mirror section 29 the National Prosecuting Act 32 of 1998 (‘NPA Act’) as discussed below under points 4 and 5.

2. International Best Practice

As a national human rights institution (NHRI) the Commission is additionally guided by the *Principles Relating to the Status of National Institutions* (the Paris Principles), adopted by United Nations General Assembly Resolution 48/134 in 1993, to direct NHRIs in their duties and responsibilities.

The authority to accept, and investigate specific complaints from individuals or groups is a specific power vested with numerous NHRIs. As an NHRI with powers to investigate, the Commission can draw guidance from the methods of operation provisions as stated in the Paris Principles as,

“Within the framework of its operation, the national institution **shall**:

¹Chapter 9, Section 184 of the Constitution of the Republic of South Africa Act 108 of 1996.

a) Freely **consider any question** falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of **any petitioner**,

b) **Hear any person** and **obtain any information and any document** necessary for **assessing** situations falling within its competence". (Emphasis added).

International opinion on the matter defines, "the authority to hear any person" as implying that NHRIs should have powers to compel a person to give evidence or testimony and to protect individuals from potential retaliation for having done so.² Further, that the authority to "obtain any information and any document" implies that the institution has the authority to compel the production of documents and is able to use or access search and seizure powers, as well as to apply penalties to those refusing to produce, for destroying or for falsifying information and documents.³

In the Commonwealth Best Practice Guide for NHRIs, it specifically recommends that in countries where a NHRI has search and seizure powers, that these should only be exercised through, "obtaining a judicially approved warrant and implemented in co-operation with law enforcement authorities".⁴

2.1 The SAHRC and the International Coordinating Committee's Sub-Committee on Accreditation

In November 2012, the SAHRC appeared before the International Coordinating Committee of NHRIs Sub-Committee on Accreditation. The SAHRC was measured for its compliance with the Paris Principles and as such was regarded as fully compliant and afforded A status at the United Nations. The Sub-Committee on Accreditation specifically noted the quasi-judicial and investigative powers of the Commission and commended the SAHRC for its powers of search and seizure as an example of international best practice.

2.2 Comparative Jurisdictions

The Commission draws the Committee's attention to comparative jurisdictions where the national human rights institutions are equipped with powers of search and seizure. Below are examples of the provisions as contained in the respective legislation.

² UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions (published December 2010 by the United Nations Development Programme and the Office of the High Commissioner for Human Rights). Available at, <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>

³ *ibid*

⁴ Commonwealth Best Practice Guide for NHRIs, available at http://www.asiapacificforum.net/members/international-standards/downloads/best-practice-for-nhris/nhri_best_practice.pdf

2.2.1 India (National Human Rights Commission of India)

Section 13(3) of the Protection of Human Rights Act, 1993 provides for the power of search and seizure and states,

"The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies there from...."

2.2.2 Tanzania (Commission for Human Rights and Good Governance)

The Commission for Human Rights and Good Governance Act 7 of 2001 contains provisions of this power under section 25 and states,

"The Commission shall for the Purpose, of Performing its functions Special powers of under the Act, have power-

- (e) subject to any other law, to enter upon, and inspect any premises relevant to in investigation and to seize any relevant document, record or anything; and
- (f) to cause, any person contemptuous of its proceedings or orders to be prosecuted before a competent court."

2.2.3 Kenya (Kenya Human Rights Commission)

The Kenya National Human Rights Commission Act 14 of 2011, contains a search and seizure provision under Section 26 dealing with the general powers of the Commission. It provides,

" In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to-

- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;"

3. Chapter Nine Institutions

Chapter Nine institutions such as the Public Protector and the Commission for Gender Equality are also equipped with powers of search and seizure.

3.1 Public Protector

Section 7 of the Public Protector Act of 1994 gives the Public Protector the right to initiate investigations. It vests the Public Protector with powers of search and seizure as well as powers to subpoena persons to appear before him/her or produce any document that has a bearing on a matter under investigation. Section 7(1) specifically states:

"(1) The Public Protector shall be competent to enter, or authorise another person to enter, any building or premises and there to make such investigation or inquiry as he or she may deem necessary, and to seize anything on those premises which in his or her opinion has a bearing on the investigation."⁵

3.2 Commission for Gender Equality (CGE)

The Commission for Gender Equality Act 39 of 1996 allows for the CGE to exercise its functions through the powers conferred upon it. For the purposes of investigation, Section 13 of the CGE Act allows for the '[e]ntering and search of premises and attachment and removal of articles. It accordingly provides the following:

"Entering and search of premises and attachment and removal of articles

13.) 1. Any member of the Commission or a police officer authorized thereto by a member of the Commission may, for the purposes of exercising the powers and performing the functions mentioned in section 11, on the authority of a warrant issued in terms of subsection (5), search any person or enter and search any premises on which anything connected with an investigation is or is suspected to be.

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

- a. respect for his or her dignity;
- b. freedom and security; and
- c. his or her personal privacy."

⁵ To be read with subsection (2) which states that, "The premises referred to in subsection (1) may only be entered by virtue of a warrant issued by a magistrate or a judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified. Subsection (3) goes further and states that, "A warrant contemplated in subsection (2) may only be issued if it appears to the magistrate, or a judge from information on oath or affirmation, stating-

- (a) the nature of the investigation or inquiry;
- (b) the suspicion which gave rise to the investigation or inquiry; and
- (c) the need, in regard to the investigation, for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

4. The National Prosecuting Authority Act

The NPA Act details the search and seizure powers of the Prosecuting Authority. Section 29 provides,

"29 Entering upon premises by Investigating Director

(1) The Investigating Director or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an investigation at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that investigation is or is suspected to be, and may-

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the investigation in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Investigating Director, at his or her request be allowed, at his or her own expense and under the supervision of the Investigating Director, to make copies thereof or to take extracts there from at any reasonable time."

Importantly, section 29 (2) of the NPA Act stipulates that the search and seizure must be conducted in a manner that gives due respect to the rights to privacy, dignity, freedom and security.

5. The HRC Act

Section 10 of the HRC Act sets out the Commission's power of search and seizure and provides,

"Entering and search of premises and attachment and removal of articles

10. (1) Any member of the Commission, or any member of the staff of the Commission or a police officer authorised thereto by a member of the Commission, may, subject to the provisions of this section, for the purposes of an investigation, enter any premises on or in which anything connected with that investigation is or is suspected to be."

Similarly to section 29(2) of the NPA Act, an obligation is placed on the Commission to ensure that rights are upheld when entering and searching premises. Section 10(2) provides,

- “(2) The entry and search of any premises under this section shall be conducted with strict regard to decency and order, which shall include regard to-
- (a) a person's right to respect for and protection of his or her dignity;
 - (b) the right to freedom and security of the person; and
 - (c) the right to his or her personal privacy.”

Section 10(5) of the HRC Act further stipulates that entry to premises may only be allowed upon the receipt of a search warrant by a magistrate, regional magistrate or judge in whose jurisdiction the premises lies.⁶

6. The HRC Bill Clause 17: Entering and Search of premises and removal of articles

The Commission notes that section 10 of the HRC Act has been amended in Clause 17 of the HRC Bill. This clause extends the powers of the Commission to search both premises and persons in its performance of an investigation.⁷ This provision is welcomed as the initial wording of the existing Act does not make reference to the search of persons.

The Commission notes the Committee's extensive discussions on whether this clause ought to be removed from the legislation. As previously communicated to the Committee, the Commission has not been using its powers of search and seizure *per se*, although the *threat* of search and seizure (and subpoena), is used regularly in the ordinary course of an investigation. On a practical level, the Commission's Legal Services Programme uses the *threat* of the search and seizure powers during investigations, particularly in instances where respondents fail to reply to an initial allegation letter sent by the Commission. In these instances and in order to compel cooperation, a second allegation letter is then sent pointing out the relevant sections of the Act.⁸ (Annexure A serves as an example of a second allegation letter sent to a municipality.⁹) Additionally, during *in loco / site* inspections, the Commission quotes the

⁶ Section 10 of the HRC Act stipulates that evidence has to be given to the magistrate, regional magistrate or judge as to the existence of articles fundamental to an investigation on the premises concerned. This existence has to be determined on reasonable grounds.

Finally, section 10 of the HRC Act stipulates that a search and seizure without a warrant may only be performed if a competent person on the premises gives consent or if the Commission thinks, on reasonable grounds, that it will obtain the warrant and a delay in obtaining the warrant will negate the necessity of the search and seizure.

⁷ It is clear that the wording of the new expansive clause is a combination of the wording of section 29 of the NPA Act and section 22 of the Criminal Procedure Act 51 of 1977 which allows a search without a warrant only with the consent of a person, or if the state believes a search warrant would be issued for the search and the delay in getting the warrant would frustrate the purpose of the search.

⁸ The SAHRC provincial offices report using the threat of the power in 90% of matters involving government departments to encourage compliance with an investigation. It has also recently been used in allegations letters sent out to universities, private parties, corporations/state entities – large retail stores/airport based companies etc.

⁹ For confidentiality purposes, reference to the parties and province has been omitted.

relevant section pertaining to the powers of search and seizure so as to encourage voluntarily access.

The SAHRC has, on several occasions, used its power to compel government departments to comply with investigations and requests for information. The perception that the Commission may exercise its powers in this regard has resulted in enhanced cooperation and in the seriousness of the Commission's power of investigation.¹⁰ The Committee may recall the Commission's investigative activities during the 2008 xenophobic incidences which occurred nationwide. In those instances, the Commission often used the *threat* of search and seizure to enter premises and obtain information. This was integral in compiling the SAHRC report on xenophobia.¹¹ Additionally, the Commission's Research Programme has used the power in gathering information, investigating and gaining access to unregistered, community-based drug rehabilitation centres in order to research whether the alleged human rights violations which occur in these centres are systemic or isolated incidences. In conducting the empirical research, and as standard good practice, Commission staff read out and explains the relevant sections of the Act which pertains to its independence, mandate and powers. This often strengthens the public perception of the Commission's constitutional purpose and result in parties willingly and voluntarily complying with the Commission.¹²

Whilst the Commission is aware that the Human Rights Commission Act served as a matrix for the legislation establishing the CGE and Public Protector, removing the powers from such bodies would impact severely on the investigative mandates of the institutions. In its deliberations on 1 October 2013, the Committee questioned whether the power of search and seizure was used by other Chapter 9's. The Commission brings to the Committee's attention, the fact that the CGE, in its quarterly report (1 April to 30 June 2013) to the Portfolio Committee on Women, Youth, Children and People with Disabilities, reported that it used its power of search and seizure in a case of underage / forced marriage where a 57 year old man was cohabiting with a 15 year old girl.¹³

The powers of search and seizure are regarded as essential tools in the Commission's investigation arsenal and a necessary requirement to fully fulfill the mandate of the Commission.¹⁴ Removal of the clause would severely hinder the work of the Commission and

¹⁰ The Committee may further recall that the Commission has previously communicated that it will, in future, provide the Committee with information as to the number of occasions it has exercised its powers of search, seizure and subpoena, particularly in instances where government departments have reneged on its commitment to comply / provide the Commission with information (particularly in relation to section 184(3) of the Constitution as discussed above).

¹¹ Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals

¹² The Committee should also note that if a Respondent is able to prove that the Commission has acted irresponsibly and abused the powers in utilising our powers to search and seizure and subpoena, then the Respondent has legal remedies available and has the right to apply to court to have it set aside.

¹³ The CGE appeared before the Portfolio Committee on Women, Youth, Children and People with Disabilities on 14 August 2013. See <http://www.pmg.org.za/report/20130814-commission-for-gender-equality-1st-quarter-201314-performance-report-briefing>

¹⁴ The draft legislation also aligns to international best practice and complements the investigative mandates of other Chapter Nine bodies such as the Public Protector and the Commission for Gender Equality

weaken the execution of its investigative mandate. The Commission plays a crucial role in the protecting the rights of the most vulnerable in society. Thus, removing the power from the legislation could potentially result in respondents' completely disregarding the *gravitas* of a complaint and may further aggrieve the sense of justice and redress for the applicant. The SAHRC therefore supports the retention of this clause.

7. Conclusion

The Commission notes the extensive deliberations which the Committee has had on the Bill and appreciates the in-depth analysis of various clauses. This legislation indeed provides an opportunity to reflect on the strengths and weakness of the existing Act and how, in practice, the Act has been used within the Commission. The Commission is therefore available to further engage with the Committee on this matter.

