



30 January 2014

**MEMO:**  
**DETERMINATION OF REMUNERATION OF MEMBERS OF CONSTITUTIONAL  
INSTITUTIONS LAWS AMENDMENT BILL [B31 – 2013]**

**1. Introduction**

For some time there has been dissatisfaction at the disparities in the salaries of office bearers at Chapter 9 institutions, as well as with the procedures to revise salaries and conditions of service. The President, in consultation with Cabinet, for example, determines the salaries of members of the South African Human Rights Commission; while the National Assembly is charged with determining the remuneration and conditions of service for the Auditor-General, Public Protector and Deputy Public Protector.

In 2007, the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions noted that Parliament's tardiness in carrying out its obligation in terms of section 219(5) of the Constitution explained, to some degree, the disparities in the determination of remuneration and conditions of service amongst the Chapter 9 and associated institutions. It noted eccentricities, especially relating to how increases are determined, and was concerned that the salaries and benefits of commissioners and heads of institutions may not be commensurate with the role that they are expected to perform.

Section 219(5) provides for national legislation, which must establish the framework for determining the salaries, allowances and benefits of, amongst others, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the Broadcasting Authority referred to in section 192. The envisaged framework legislation would guide the approach to all bodies.

The Bill, therefore, seeks to address this challenge by providing for a uniform procedure to determine the remuneration, allowances and other terms and conditions of employment and service benefits of the Public Protector, Deputy Public Protector; Auditor General and commissioners of the South African Human Rights Commission, Commission for Gender Equality and Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

This paper provides

- An overview of how the remuneration, allowances and other terms and conditions of employment and service benefits of the effected office-bearers are determined at present.
- A summary of the Bill's provisions, with commentary.

## 2. Summary of existing position

### 2.1. Summary of procedure to determine remuneration/conditions of service

Public Office bearer	Legislation	Procedure to determine remuneration/conditions of service	Salary level	No. of office bearers
Auditor-General	Public Audit Act, 2004 section 7(1) and (2)	Standing Committee on the Auditor-General must, in consultation with the Auditor General, recommend the salary and other conditions of employment for the Auditor-General designate.	? (This is negotiated with the incumbent after a process of benchmarking)	1
Public Protector	Public Protector Act, section 2 (PP) and section 2A (DPP)	National Assembly determines the remuneration and conditions of service on the advice of the relevant parliamentary committee (NA)	PP pegged at level of SCA judge. DPP as per NA resolution.	2
South African Human Rights Commission	Human Rights Commission Act, 1994 section 13*	President in consultation with Cabinet and the Minister of Finance determines the remuneration and conditions of service	Category S institution	5 full-time and 2 part-time
Commission for Gender Equality	Commission on Gender Equality Act, 1996 section 8	President determines the remuneration, allowances and conditions of service of both full and part-time members	Category A2 institution	7-11 commissioners (between 2-7 on full-time basis)
Electoral Commission	Electoral Commission Act, 1996 section 7	President after consultation with the Commission on the Remuneration of Public Office-Bearers determines the remuneration and conditions of service.	Not categorised	5 commissioners, one a judge
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 – section 15	Minister of Arts and Culture in consultation with the Minister of Finance determines the conditions of service.	Category A1 institution	12 – 17 commissioners

## 2.2. **Remuneration of Public Office-Bearers Act 92 of 1997**

At present, the Independent Commission for the Remuneration of Public Office-Bearers Act 92 of 1997 provides for a Commission, appointed by the President, to recommend salaries of any member of the National or Provincial Cabinets and legislatures, as well as other bodies such as the Council of Traditional Leaders, and members of the Judiciary. This is an advisory body and the President has the discretion to accept or reject its recommendations.

Although the legislation permits this body to conduct an inquiry into any matter in respect of which it is authorised by section 219 of the Constitution, it does not provide the requisite remunerative framework for the Auditor-General, the Public Protector, and other commissions established in terms of the Constitution, including the Broadcasting Authority established in terms of section 192 of the Constitution.

### **Comment**

- The Financial and Fiscal Commission is higher than a 'S' category institution (9 commissioners, Chair and Deputy Chairperson appointed full-time but the Act is silent on the number to be appointed as full or part-time).
- The IEC is not categorised (5 members, one a judge).
- ICASA and Municipal Demarcation Board are both 'S' category institutions (ICASA has 9 councillors appointed on full-time basis).
- PanSALB is categorised as a B1 institution (11-15 members).
- Public Service Commission is not included in this system of categorisation as it is a department within a Vote (Public Service and Administration).

## 2.3. **Present service benefits**

2.3.1. The South African Human Rights Commission is regarded as a **Category S institution**. Service benefits packages, as from 1 April 2013, are:

<b>South African Human Rights Commission with effect from 1 April 2013</b>				
<b>Category S</b>	<b>R.p.a</b>		<b>R.p.d</b>	<b>R.p.h.</b>
	2012	<b>2013</b>	2013	2013
Chairperson	1 039 392	<b>1 097 598</b>	4 360	545
Vice-Chairperson	883 146	<b>932 604</b>	3 704	463
Member	808 119	<b>853 374</b>	3 392	424

2.3.2. The Commission on Gender Equality is regarded as an A2 institution. Service benefits packages, as from 1 April 2013, are:

<b>Commission for Gender Equality with effect from 1 April 2013</b>				
<b>Category A2</b>	<b>R.p.a</b>		<b>R.p.d</b>	<b>R.p.h.</b>
	2012	<b>2013</b>	2013	2013
Chairperson	870 171	<b>918 900</b>	3 648	465
Vice-Chairperson	739 508	<b>780 921</b>	3 104	388
Member	686 831	<b>725 295</b>	2 880	360

2.3.3. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is categorised as an A1 institution. The Service benefits packages, as from 1 April 2013, are:

<b>Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities</b>				
<b>Category A1</b>	<b>R.p.a</b>		<b>R.p.d</b>	<b>R.p.h.</b>
	2012	<b>2013</b>	2013	2013
Chairperson	979 956	<b>1 034 454</b>	4 112	514
Vice-Chairperson	832 388	<b>879 003</b>	3 496	437
Member	728 657	<b>769 461</b>	3 056	382

2.3.4. Auditor-General's remuneration package: The Standing Committee on the Auditor-General is in the process of considering proposals for the revision of the Auditor-General's salary.

### **3. Determination of Remuneration of Members of Constitutional Institutions Laws Amendment Bill [B31-2013]: Overview of provisions**

Broadly, the Bill proposes to amend those provisions that regulate the remuneration and conditions of service of the office bearers appointed to the State Institutions Supporting Constitutional Democracy established in terms of Chapter 9 of the Constitution.

The legislation that the Bill proposes to amend are as follows:

- Public Protector Act, 1994;
- Human Rights Commission Act. 1994;
- Commission on Gender Equality Act, 1996;

- Electoral Commission Act, 1996;
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002; and
- Public Audit Act.

Accordingly, the office bearers, whose salaries and conditions of service are affected, are the Public Protector, the Auditor-General; and the Commissioners appointed to the Independent Electoral Commission, the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

### ***The proposed mechanism***

Briefly, the Bill proposes a mechanism whereby the **Independent Commission for the Remuneration of Public Office Bearers** investigates and makes recommendations to the **President** on the salaries, allowances and conditions of service of the various office bearers. When making its recommendations, the Independent Commission shall consult with the **relevant Ministers** and the **Minister of Finance**.

The President makes a determination by way of notice, which **Parliament** must either approve (in whole or part) or disapprove. If approved the notice is gazetted. The determination is made from time to time. The commencement date set out in the Notice may not backdate that of the date of publication by more than one year.

### **3.1. Summary by clause**

#### **3.1.1. Clauses 1, 2 and 3: Public Protector Act 23 of 1994 – sections 1, 2 and 2A**

#### **Office bearers: Public Protector and Deputy Public Protector**

##### **Clause 1:**

- Substitutes a revised definition of the Constitution in section 1 of the Public Protector Act, 1994, to correct the reference to Act 108 of 1996; and
- Inserts a definition of the 'Independent Commission', which refers to the Independent Commission for the Remuneration of Public-Office-bearers established by section 2 of the Independent Commission for the Remuneration of Public Office-bearers, 1997 (Act No. 92 of 1997).

**Clause 2** inserts the proposed mechanism to determine the remuneration and service benefits of office bearers of constitutional institutions (from here on referred to as "the mechanism"):

- The **Independent Commission for the Remuneration of Public Office Bearers** investigates and makes recommendations to the **President** on the salaries, allowances and conditions of service of the various office bearers.
- When making its recommendations, the Independent Commission shall consult with the **relevant administrating Ministers** and the **Minister of Finance**.
- The President makes a determination by way of notice, which **Parliament** must either approve (in whole or part) or disapprove.
- If Parliaments approves the determination, the notice is gazetted.

- The commencement date set out in the Notice may not backdate that of the date of publication by more than one year.

The mechanism described above is to be followed when determining the remuneration and other terms and conditions of employment of the Public Protector.

Notably, the Bill provides that the determination is to be made *from time-to-time*. Also, clause 2(a) retains the proviso (presently in section (2)(2)) of the Principal Act which states that the Public Protector's remuneration shall not be less than that of a High Court judge (although, at present, the Public Protector is remunerated at the level of the judge of the Supreme Court of Appeal), and which shall not be reduced, nor the terms and conditions of service adversely altered, during his or her term of office.

**Clause 3** inserts a similar mechanism to determine the remuneration and other terms and conditions of employment of the Deputy Public Protector.

Although the Bill provides that the Deputy Public Protector's remuneration and other terms and conditions of service may not be reduced/altered during his or her term of office (this is new), there is no 'pegging' of the DPP's salary with that of judges' salaries as for the PP.

#### Comment

- The Bill provides that the review of remuneration is to occur from time-to-time, which is the present position, but has the potential to cause some dissatisfaction, in particular relating to annual cost of living increases.
- Although the proviso that the PP's salary should not be less than a high court judge creates a 'minimum' standard, is it strictly necessary to retain the qualification/condition? (Especially when the position at present is that the PP's salary is pegged much higher (with that of a judge of the SCA) and the Bill also provides that his or her salary cannot be reduced during his or her term of office)?

### 3.1.2. Clauses 4 and 5: Human Rights Commission Act 54 of 1994 – sections 1 and 13

#### Office bearers: Full and part- time commissioners of the SAHRC

**Clause 4**, like clause 1, inserts the definition of the Independent Commission in the relevant Principal Act, namely the Human Rights Commission Act, 1994.

**Clause 5** inserts the mechanism in section 13 of the Human Rights Commission Act that will determine the remuneration, allowances and other terms and conditions of office and service benefits of both full and part-time commissioners of the SAHRC. Again, the commissioners' remuneration and allowances may not be reduced, as well as the other terms and conditions of service may not be adversely altered, during their continuation in office.

*Part-time commissioners* - A further mechanism addresses a situation where a part-time commissioner is remunerated for additional duties and functions that he/she performs for any period with the approval of the Commission. In this case, the President makes a determination taking into account the recommendation of the Independent Commission. The

Independent Commission shall consult with the Ministers of Finance and Justice. Notably, Parliament does not approve or disapprove these determinations.

### **Comment**

The Human Rights Commission Act, 1994, is repealed by the South African Human Rights Commission Act 40 of 2013, which was assented to on 22 January 2014. However, the commencement date is still to be proclaimed.

#### **3.1.3. Clauses 6 and 7 Commission on Gender Equality Act 39 of 1996 – sections 1 and 8**

##### **Office bearers: Full and part-time commissioners of the CGE**

In **clause 6** a definition of 'Independent Commission' is inserted in section 1 of the Principal Act, namely the Commission on Gender Equality Act 1996.

The definition of 'Minister' is amended to refer to the Minister responsible for women, children and people with disabilities (and not the Minister of Justice, as was the case before the new Ministry was established).

**Clause 7** inserts a similar mechanism to that found in clauses 2, 3 and 5. The mechanism relating to the remuneration of part-time commissioners for additional work done is also inserted.

Again the remuneration and allowances may not be reduced, as well as the other terms and conditions of service may not be adversely altered during their continuation in office.

#### **3.1.4. Clauses 8 and 9: Electoral Commission Act 51 of 1996 – sections 1 and 7**

**Office- bearers:** Full and part-time commissioners of the Independent Electoral Commission (IEC)

**Clause 8**, inserts a definition of the Independent Commission in section 1 of the relevant Principal Act, namely the Electoral Commission Act, 1996, as amended.

**Clause 9** inserts the mechanism in section 7 of the Electoral Act, 1996, that will determine the remuneration, allowances and other terms and conditions of office other benefits of both full and part-time commissioners. Again the remuneration and allowances may not be reduced, as well as the conditions of service, allowances and other benefits may not be adversely altered during their continuation in office.

Clause 9(a) provides that the determination, which Parliament must approve or disapprove, may distinguish between full and part-time commissioners. (The Electoral Commission Act provides for five members, one of whom must be a judge, but it is only in section 7(2) which deals with remuneration that there is reference to commissioners appointed on a part-time basis).

Again the Bill provides specifically that the remuneration may not be reduced, as well as the conditions of service, allowances and other benefits may not be adversely altered during their term of office.

### 3.1.5. **Clauses 10 and 11 Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997 – sections 1 and 8**

Clauses 10 and 11 contain consequential amendments to the Independent Commission for the Remuneration of Public Office Bearers Act, 1997.

**Clause 10** substitutes a revised definition of the Constitution in section 1 of the Independent Commission for the Remuneration of Public Office Bearers Act, 1997, to correct the reference to Act 108 of 1996.

The definition of 'office bearer' is expanded to include 'any member of a constitutional institution'. 'Constitutional institution', in turn, is defined as meaning 'the Public Protector, the Deputy Public Protector, the Auditor-General and any commission established by Chapter 9 of the Constitution'.

**Clause 11** makes consequential amendments to section 8 of the Independent Commission for the Remuneration of Public Office Bearers Act, 1997.

Clause 11(a) amends section 8(3). The Independent Commission is empowered to research or obtain information from relevant functionaries or officials, such as the Secretary to Parliament, secretary to the National House of Traditional Leaders; CEO of any municipality, and the Chief Justice or his/her designee. The amendment includes the CEO of any constitutional institutions in this list.

Clause 11(b) amends section 8(3A) to enjoin the Commission to have regard to the laws in terms of which the office bearers of the constitutional institutions are appointed when it performs its functions.

Clause 11(c) and (d) amend sections 8(4) and (6) respectively, Section 8(4) requires the Commission to publish its recommendations concerning the salary, allowances and benefits of office bearers; the upper limits of these; and the resources necessary for the office bearer to function effectively. The amendment in clause 11(c) ensures that the office bearers of the constitutional institutions are included. Section 8(6) requires that the Commission take into account various factors when it makes its recommendations. Clause 11(d) adds to these factors when the Commission makes its recommendations regarding the remuneration, etc, of the office bearers of constitutional institution: The additional factors are as follows:

- The remuneration, etc, of members of other constitutional institutions;
- Affordability in relation to the institutions responsibilities; and
- The level of experience and expertise required of the member of the relevant constitutional institution.



**3.1.6. Clause 12 and 13: Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 – section 1 and 15**

**Office- bearers:** Full and part-time commissioners of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

**Clause 12** inserts a definition of the Independent Commission in section 1 of the relevant Principal Act, namely the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

**Clause 13** inserts the mechanism in section 14 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002, that will determine the conditions of appointment of the Chairperson, Deputy Chairperson and other members of the Commission, provided that the conditions of appointment may not be adversely altered during their term of office.

**Comment**

- The administrating Minister is the Minister of Arts and Culture.
- Section 14 of the principal Act provides for the conditions of appointment of the office bearers simply providing that Minister with the concurrence of the Minister of Finance that determines the conditions of appointment of the Chairperson, the Deputy Chairperson and the other members of the commission, taking into account the conditions of appointment of other constitutional institutions.

**3.1.7. Clause 14 and 15 Auditor General – Public Audit Act 25 of 2004 – sections 1 and 7**

**Office- bearers:** Auditor-General

**Clause 14** inserts a definition of Independent Commission in section 1 of the Public Audit Act, 2004.

**Clause 15** inserts in section 7 of the Public Order Act the mechanism to determine the conditions of employment as well as appropriate salary, allowances and other benefits of the Auditor-General. The Independent Commission must consult the Minister of Finance when investigating or considering the AG's conditions of the employment.

Notably, there is **no** provision that prevents the AG's remuneration, allowances or other benefits from being reduced/altered adversely during his or her term of office.

**Comment**

It is unclear why a provision that prevents the AG's remuneration, allowances or other benefits from being reduced/altered adversely during his or her term of office has not been included, especially in light of the importance of protecting the independence of the institution.

**Clause 16 contains the short title and commencement.**

### **General**

The Chapter 9's enjoy constitutional independence and should operate free from interference or influence from other organs of state. It is possible to argue that the requirement that the Independent Commission consult with the relevant 'administering' Ministers/Cabinet members could be construed as impinging on that independence? Are there practical/administrative reasons for including the requirement?

The Bill requires that Parliament, and not just the National Assembly, approve the determinations yet the office bearers of these constitutional institutions are appointed on the recommendation of the National Assembly, can be removed on its recommendation, and account to the National Assembly?

### **Sources**

Parliament of the RSA. Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. 31 July 2007.

Constitution of the Republic of South Africa, 1996.