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MEMORANDUM

TO: Chairperson: Mr MS Motimele, MP
Portfolio Committee on Defence and Military Veterans

COPY Secretary to Parliament

DATE: 30 August 2011

SUBJECT: Is the Office of the Military Ombudsman established in terms of the Military Ombudsman Bill [B9 of 2011] adequately independent?

LEGAL ADVISER: Ms SS Isaac

REFERENCE: 168/11



MEMORANDUM

To: Honourable, Mr MS Motimele, MP
Committee on Portfolio Committee on Defence and Military Veterans

Copy: Secretary to Parliament

From: Legal Services Office

Date: 30 August 2011

Subject: Is the Office of the Military Ombudsman established in terms of the Military Ombudsman Bill [B9 of 2011] adequately independent?

1. Our Offices was requested by the Chairperson of the Portfolio Committee on Defence and Military Veterans to advise on whether or not the Office of the Military Ombudsman (MO), established in terms of the Military Ombudsman Bill [B9 of 2011] (the Bill), is a body with adequate independence to meet any legal requirements that may exist to determine independence. Further to advise, in the event that the MO is found not to be adequately independent, on ways in which its independence may be improved.
2. This opinion consists of two sections: The first provides an overview of the legal meaning of independence in respect to the office of an Ombud and the second part applies these criteria to the Bill to assess the level of independence given to the MO.

GENERAL OVERVIEW

3. The office of an ombud is defined as:¹

'an office provided for by the Constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved person against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective actions, and issue reports.'

¹ Baxter, L. Administrative Law. p279. Baxter endorsing the definition of the International Bar Association.

4. Historically, an Ombud is an office established to protect citizens from government action,² especially where such action is inappropriate or illegal. The South African Constitution establishes various independent bodies that follow in the tradition of an Ombud with the office of the Public Protector and the Auditor-General being the most traditional forms of ombuds.³

5. Hoexter notes the following general characteristics of the office of an Ombud:⁴

- It is not a private office but an official one, a constitutional mechanism designed to monitor the use of government power.
- Its incumbent is an independent, high level public official who is responsible to the legislature and not the executive.
- The jurisdiction of the ombudsman is to receive and investigate complaints from the public about government maladministration. But while the institution is primarily designed to provide the individual with a mechanism to air complaints against the government, the ombudsman also has an important policing function. An ombudsman should therefore also be empowered to investigate suspected cases of maladministration on his own initiative.
- The investigations of the ombudsman are officially sanctioned and enforced. It is essential for the success of the institution that the ombudsman be backed by the authority of the state and equipped with powers of investigation and inspection.
- The ombudsman takes no remedial action but rather issues reports and makes recommendations, usually to the legislature.

6. The United States Ombudsman Association⁵ provides guidelines to be followed in establishing an office of an Ombud. These are:⁶

- Independence: The Ombudsman's office, in structure, function and appearance, should be free from outside control or influence. This standard enables the Ombudsman to function as an impartial and critical entity that reports findings and makes recommendations based solely on a review of facts and law, in the light of reason and fairness.
- Impartiality and Fairness: The Ombudsman should receive and review each complaint in an objective and fair manner, free from bias, and treat all parties without favour or prejudice. This standard instils confidence in the public and agencies that complaints will receive a fair review, and encourages all parties to accept the Ombudsman's findings and recommendations.
- Credibility of the Review Process: The Ombudsman should have the privilege and discretion to keep confidential or release any information related to a complaint or

² Hoexter, C. Administrative Law in South Africa. p 85

³ Hoexter. p85. Also see Chapter 9 of the Constitution.

⁴ Hoexter. p84. Hoexter adapts the criteria mentioned by Baxter The criteria mentioned by Baxter was originated with the International Bar Association in 1978:⁴

- Its is an official office
- Its incumbent is an independent, senior officer who is responsible to the legislature;
- The ombudsman receives and investigates complaints against the government, and he investigates suspected cases of maladministration on his own initiative;
- His investigations are officially sanctioned and enforced;
- The ombudsman takes no remedial action himself, but instead makes recommendations and reports.

⁵ According to information on its website: 'The United States Ombudsman Association is the national organisation for public sector ombudsman professionals. Founded in 1977, USOA is North America's oldest national ombudsman association with members from ombudsman offices in local, state, and federal governments, and affiliated ombudsman offices.' Accessed at: <<http://www.usombudsman.org/>>

⁶ United States Ombudsman Association, Governmental Ombudsman Standards October 2003. Accessed at: <http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf>

investigation. This standard balances the need to protect sensitive information so that a complainant can come forward, and witnesses and subjects can speak openly, with the need to disclose information as part of an investigation or public report.

- Confidentiality: The Ombudsman should perform his or her responsibilities in a manner that engenders respect and confidence and be accessible to all potential complainants. This standard is necessary for the work of the Ombudsman to have value and to be accepted by all parties to a complaint.

7. The above characteristics and guidelines may be useful to the Committee in determining whether the MO meets a standard of being adequately independent to discharge its mandate.

Assessing Independence

8. There is no objective or pre-defined criteria of what constitutes an independent body. An entity may be as independent as Parliament intends for it to be. However, we submit that once the mandate of the entity is determined, the level of independence given to it must enable the entity to fulfill its mandate.⁷ Hence if an independent entity is established, the structure; powers and functions of the body must give effect to the envisaged independence. Some factors that may be considered in determining whether an entity is adequately independent to fulfill its mandate include: context, form and structure and public perception.

Context

9. Independence is contextual and depends on the mandate and purpose of the body. The degree of independence required by the Judiciary differs⁸ immensely from the independence required of a presiding officer in a disciplinary hearing.⁹

10. In *the First Certification Judgment* the Constitutional Court noted that, in respect of the independence of the Chapter 9 institutions, independence tested against the relevant constitutional principle was contextual to the mandate of that body. The Court stated:¹⁰

⁷ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC). While the fact of the Glenister matter differ greatly from the consideration before the Committee the Court's conclusion must be taken into account. The Court found that there was a constitutional obligation on Parliament to create an independent anti-corruption entity. However the Act that created the DPCI was invalid as it failed to secure adequate independence for the DPCI.

⁸ *Van Rooyen v The State* 2002 (5) SA 246 (CC). In this case the Constitutional Court ruled against the applicants' contention that Regional Magistrate's Courts lacked the necessary institutional independence required by section 165(2) of the Constitution.

⁹ *Ouyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C). This case dealt with the independence of Refugee Officials. Declaring the decision by the first respondent to appoint, in terms of s 10(2) of the Refugees Act 130 of 1998 (the Refugees Act), the members of the Standing Committee for Refugee Affairs, established in terms of s 9(1) of the Refugees Act, to be unlawful, as being *ultra vires* and inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and invalid. ss 9 and 10 of the Refugees Act. These sections read: B

'9. Standing Committee for Refugee Affairs

(1) There is hereby established a Standing Committee for Refugee Affairs.

(2) The Standing Committee must function without any bias and must be independent.

Now, it is alleged by the first applicant, and not denied by the respondents, that the third, fourth, fifth and sixth respondents are all employees of the Department of Home Affairs. It is contended by the applicants that the committee as presently B constituted cannot function without bias and cannot be regarded as independent. The appointment of the third, fourth, fifth and sixth respondents to it by the first respondent was consequently *ultra vires* the Act, unlawful and inconsistent with the Constitution, and should be reviewed and set aside as invalid, they argue.

¹⁰ *First Certification Judgment*, para 160.

The functions and powers of each institution need to be understood to determine whether the particular provisions governing its independence and impartiality meet the test in CP XXIX. Factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence. Against the background of the nature of the particular institution, these factors must, when considered together, ensure independence and impartiality.

11. We therefore submit that in considering whether or not the MO is adequately independent, the mandate and the context in which it operates must be complemented by its form and structure. This evaluation will enable the practical level of independence that the entity will enjoy to be measured.

Form and Structure

12. As stated above, independence is also determined by form and structure of the entity.
13. Independence and impartiality although closely related, have different meanings.¹¹ To be impartial means to act without bias, prejudice or unfairness¹² and refers to the "a state of mind" of the officials performing a mandate.¹³ To be independent means to act free of control in action or judgment or to act autonomously.¹⁴ Independence refers to both the independence of the officials and the institution.
14. Institutional independence is a question of what form and structure an entity takes in its relationship to the Executive.¹⁵ Institutional independence also refers to the quality of this relationship between the MO and the Executive.¹⁶ Hence, it is submitted that while an individual appointed to this office may conduct their investigations impartially and independently, the institutions may not enjoy institutional independence.
15. Consideration to the manner of appointment and removal of the head of the entity, the appointment of staff to the entity, the security of tenure of

¹¹ The Constitution, in reference to both the Judiciary and the Chapter 9 institutions, refers to both 'independence' and 'impartiality' as separate criteria. Section 165(2) and section 181(3). *Ruyobeza And Another V Minister Of Home Affairs And Others* 2003 (5) SA 51 (C) at p60 cited the following Canadian case regarding the distinction between independence and impartiality. Canadian case of *R v Valente* (1986) 19 CRR 354 (SCC) ((1986) 24 DLR (4th) 161) at 361:

'Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial", connotes absence of bias, actual or perceived. The word "independent" in s 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, A particularly to the executive branch of Government, that rests on objective conditions or guarantees.'

¹² See Collins English Dictionary

¹³ *R v Valente* (1986) 19 CRR 354 (SCC) ((1986) 24 DLR (4th) 161) at 361:

¹⁴ See Collins English Dictionary

¹⁵ Van Rooyen footnote 22. Chaskalson J referring to the Canadian judgment of Le Dain J in *Valenete* (at page 169-170) wherein a contrast was drawn between individual independence with institutional independence: According to Le Dain J, judicial independence "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees."

¹⁶ Van Rooyen. para 31. Discusses institutional independence in respect of the judiciary.

the head, financial security, conditions of service, the reporting lines and mechanism of funding the entity¹⁷ determine whether it has real institutional independence in its functioning.¹⁸

16. Bodies such as the MO may be established in accordance with divergent forms and be structured according to different criteria depending on the context within which it operates. However, we are of the opinion that the test remains that the form and structure of an entity must ensure that it is adequately independent to fulfill its mandate.¹⁹
17. An appointment by the Executive of a person to a body does not automatically imply that the appointee will not act independently or impartially.²⁰ The Constitutional Court commented that 'there is a difference between being nominated by the executive to perform a duty which calls for an independent decision and being chosen by the executive to perform that duty in accordance with its wishes.'²¹
18. In our constitutional scheme no branch of government, and by implication no public body, exists completely independently of the other branches of government. The doctrine of separation of powers is premised on a system of checks and balances. This means that one branch will impose restraints, within the parameters of the Constitution, on the exercise of power by another branch.²²
19. Therefore adequate independence does not mean 'insulation from political accountability' but a degree of insulation from 'management by political actors' that may threaten the 'independent functioning' of the entity.²³ It is hence our view that the greater the need for an entity to be institutionally independent, the greater the need for protection from political management that may interfere with this independence.
20. We are further of the view that the form and structure of the entity must be such that it ensures protection from potential political interference in proportion to the adequate level of independence required for the functioning of the entity.²⁴ Therefore, where the Executive does make appoint the head or members of the entity, there must be counter-balancing safeguards that prevent any real or perceived threats of interference with the operations of the entity.

Public Perception

¹⁷ *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C) 1999. p174 quotes *Bryan v United Kingdom* (1995) 21 EHRR 342 with approval. Here the European Court of Human Rights notes when it was considering the right vouchsafed by art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to 'a fair and public hearing by an independent and impartial Tribunal. 'In order to establish whether a body can be considered to be independent, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.'

¹⁸ *Van Rooyen v The State*. para 17

¹⁹ *Glenister*. para 197

²⁰ With regard to the appointment of Judges, see *First Certification Judgment*. para 123 -124

²¹ *Van Rooyen v The State*. para 92

²² *First Certification Judgment*. para 108-109

²³ *Glenister*. para 216

²⁴ *Glenister*. para 208

21. While the actual functional independence (form and structure) of the body is important, the public's reasonable perception of an entity's independence is also of great importance.²⁵ The Constitutional Court has stated that the test to determine the public perception of the independence of an entity is an objective test.²⁶ The Court also cautioned the any objective test for institutional independence must bear in mind the diversity of our society.²⁷

22. The Constitutional Court has stated that: 'appearance or perception of independence plays an important role in evaluating whether independence in fact exists.'²⁸ There must be 'reasonable perception of impartiality.'²⁹

23. The Constitutional Court in the *Glenister* case³⁰ made the following comments regarding public perception of how independent a body is:³¹

By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

24. The public's perception of independence therefore plays an important part in determining if an entity is independent.

THE MILITARY OMBUDSMAN BILL

25. The Bill seeks to create a statutory Ombud in the form of the office of the MO. This is a 'special purpose ombudsman'³² mandated to investigate complaints from members and former members regarding their service benefits and complaints from members of the public regarding the conduct of the Defence Force.³³

²⁵ *Van Rooyen v The State*, para 32. Discusses the public perception of the independence in respect of the judiciary. The Court quoted *Valente v The Queen* where Le Dain J held that: "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."

²⁶ *Van Rooyen v The State*, para 33 - 34

²⁷ *Van Rooyen v The State*, para 34. The Court stated that 'Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.'

²⁸ *Glenister* para 201, quoting *S v Van Rooyen* 2002 (5) SA 245 (cc). This case dealt with the appointment of magistrates.

²⁹ *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C), p175

³⁰ This case dealt with the establishment of the Directorate of Priority Crimes Investigations.

³¹ *Glenister*, para 207

³² Baxter, p288

³³ Clause 1, Military Ombudsman Bill [B9 of 2011]

Is there a legal obligation to make the MO independent?

26. There is no constitutional duty or legal obligation on Parliament to create an independent MO to deal with the nature of complaints specified in the Bill. This decision is a policy decision that must be made by together by the Department and Parliament.
27. However, it is clear that the introduction of this Bill is an indication of an intention to create an independent MO. The next question that arises is whether the provisions of the Bill create an MO that is adequately independent to fulfill its mandate? In order to answer this question we look at each clause of the Bill to determine whether, in our view, the MO is adequately independent.

Clause 1: Definition of Complaint

28. The Bill defines complaint as 'a grievance lodged in writing a member regarding his or her service benefits; a former member regarding his or her services benefits; or a member of the public regarding the conduct of a member of the Defence Force'. The Bill does not have a clause that clearly defines the MO's jurisdiction area. Jurisdiction must be deduced from the definition of complaint. However, in contrast, the limitation to the MO's jurisdiction is set out in detail in clause 7. A clear expression of the mandate of the MO will enable it to exercise its authority over a clearly defined area and will help entrench the independence of the body.
29. The MO may only investigate individual complaints. However, there may be instances where the MO may need to investigate complaints regarding systemic issues. Systemic issues are issues that may involve groups or segments of the Defence Force. The MO should be empowered to investigate complaints of this nature. This restriction may severely curtail the proper functioning of the MO and may have an impact on the independence of the office.
30. The MO is also not empowered to initiate investigations.³⁴ This greatly curtails the independence of the MO and only enables the office to react to individual complaints. The MO is not empowered to proactively investigate matters within its jurisdiction when the need for such an investigation arises. Empowering the MO to initiate investigations 'where information warranting an investigation comes to his or her attention in the absence of a willing complainant'³⁵ will enable the MO to better fulfill its mandate.
31. Further, while not impacting on independence we make the following observation as an aside issue. From an interpretation perspective,

³⁴ See for instance the Public Protector Act (as amended). Section 7(1) of the Act empowers the Public Protector to initiate her own investigations regarding matters that fall within her mandate.

³⁵ M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. p7

reading the definition of 'complaint' into Clause 7 makes the meaning of the clause unclear or confusing.

Clause 3: Objects of the Office

32. 'The objective of the Office is to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner.'³⁶ Independence and impartiality are not included as an object of the office. Clause 8 directs that 'the Ombudsman and staff members must serve independently and impartially...' It may therefore be more consistent with the intention of Bill and also to assist with entrenching the objectives of the MO that independence and impartiality are included as objectives of the Office of the MO.

33. Guidance may also be taken from the Constitution which mentions independence as one of the main characteristics of the Chapter 9 bodies.³⁷

Clause 5: Appointment of Military Ombudsman and Deputy Military Ombudsman

Appointment to Office

34. Clause 5(1) directs that the President appoints the MO. In terms of Clause 5(2) the Deputy MO is also appointed by the President but in consultation with the MO.

35. It is suggested that an Ombud should not be appointed by the body that it reviews.³⁸ While the Minister of Defence and Military Veterans does not appoint the MO, the appointment by the President may still create a perception that the MO is not independent and may have a bias towards the Executive.³⁹ It is therefore our view that it may be more appropriate for Parliament to have some role in the appointment process.

36. The appointment process for the Chapter 9 bodies may provide some guidance in this regard.⁴⁰ The heads or members of Chapter 9 institutions

³⁶ Independent is defined as 'free from control in action, judgment, etc; autonomous.'

³⁷ Section 181(2) The Constitution states that institutions supporting democracy must be: 'independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'

³⁸ Dean M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. p2

³⁹ There are examples of President being empowered to appoint people to independent offices. In terms of section 174 the President appoints the Chief Justice. However this is done after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly. The President therefore may only make this decision within these constraints which in turn act as a check or limit on Executive power.

⁴⁰ Section 193

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

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

(5) The National Assembly must recommend persons

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

are appointed by the President on the recommendation of the National Assembly. The process followed is that the National Assembly recommends persons nominated by a committee of the Assembly. This Committee is proportionally composed of members of all parties represented in the Assembly. The National Assembly must approve the nomination by a resolution adopted by at least 60% for the Public Protector or a majority of its members in respect of the other Chapter 9 bodies.

37. Another example is provided by the recently passed Independent Police Investigative Directorate Act 1 of 2011.⁴¹ The Act provides that the Executive Director of the IPID is nominated by the Minister and the nomination must be confirmed by relevant Parliamentary Committee.⁴²

38. Clause 5(1) has been criticized in some of the public submissions received by the Committee.⁴³ The public perception that the MO is an executive appointment may greatly undermine the legitimacy of this office. An inclusion of a role for the National Assembly in the appointment process must therefore be considered. By including all political parties in the process via the NA, the perception of political bias may be reduced.⁴⁴ This may also assist the office in gaining legitimacy in the eyes of the public if the NA undertakes an open and transparent appointment process.⁴⁵

39. This perception may be countered by amending the clause to provide for a greater role for Parliament in the appointment process. We therefore suggest an alternative appointment procedures:

- The President appoint after consultation with the National Assembly⁴⁶

-
- i. of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
 - ii. of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

⁴¹ 2. The objects of this Act are-

- a. to give effect to the provision of section 206(6) of the Constitution establishing and assigning functions to the Directorate on national and provincial level;
- b. to ensure independent oversight of the South African Police Service and Municipal Police Services;
- c. to align provincial strategic objectives with that of the national office to enhance the functioning of the Directorate;
- d. to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and Municipal Police Services;
- e. to make disciplinary recommendations in respect of members of the South African Police Service and Municipal Police Services resulting from investigations conducted by the Directorate;
- f. to provide for close co-operation between the Directorate and the Secretariat; and
- g. to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution.

⁴² Independent Police Investigative Directorate Act 1 of 2011

6. Appointment of Executive Director

- (1) The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.
- (2) The relevant Parliamentary Committee must, within a period of 30 parliamentary 5 working days of the nomination in terms of subsection (1), confirm or reject such nomination.
- (3) In the event of an appointment being confirmed-
 - a. (a) the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and
 - b. (b) such appointment is for a term of five years, which is renewable for one additional term only.

⁴³ UNISA Submission by Prof Moses Montesh and Advocate Boitumelo Mmusinyane. 15 August 2011.

⁴⁴ Hoexter. p85

⁴⁵ Dean M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. P2

⁴⁶ For example section 174(3) of the Constitution similarly provides that: 'The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief

- The President appoints the MO on the recommendation of the National Assembly.⁴⁷

Term of Office

40. The Ombud is appointed for a non-renewable term of five years.⁴⁸ A fixed term ensures that the incumbent has security of tenure and is able to perform their duties 'efficiently, fearlessly and impartially,'⁴⁹ free from the pressure of seeking a renewal to their office. The pressure of renewal may influence the incumbent to act in a manner that may seek to win the favour of the person that has the discretion to reappoint the incumbent.⁵⁰
41. In comparison, the Public Protector is appointed for a non-renewable period of seven years.⁵¹ The term in office for the judges of the Constitutional Court judges is fixed for twelve years.⁵² Other Chapter 9 institutions have renewable fixed term appointments.⁵³

Remuneration

42. Clause 5(4) of the Bill provides that the remuneration and terms and conditions of service of the MO and Deputy MO are determined by the President with the concurrence of the Minister of Finance. The MO salary is fixed to that of a judge in the High Court and the remuneration of the Deputy MO is fixed to 85% of the MO remuneration. The remuneration is determined according to section 2(1) of the Judges Remuneration and Conditions of Employment Act 47 of 2001.
43. Fixing the salary of the officer bearer to that of a judge is in line with international standards.⁵⁴ Similarly the salary of the Public Protector is fixed to a salary of a judge of the High Court. Further, fixing the salary of the incumbent during their term in office protects the Ombud from undue Executive influence that may occur where there are threats/fears of a reduction in salary or an inducement of a salary increase.
44. International guidelines also suggest that the service conditions be fixed for the duration of the Ombud's term in office.⁵⁵ For example, the Public Protector remuneration and terms and conditions of employment may not

Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.'

⁴⁷ Section 193(4)-(5), Constitution, 1996. The heads and members of the Chapter 9 bodies are appointed by the President on the recommendation of the National Assembly.

⁴⁸ Clause 5(3). The term of office may be extended to a longer period of time to ensure that the incumbent is able to have sufficient time in office to fulfill his mandate. One of the submission suggested that the term be extended to 7 years.

⁴⁹ Devenish, Govender and Hulme. The authors' use this phrase to describes fixed non-renewable term of office of the Auditor General as set out in section 189 of the Constitution.

⁵⁰ Dean M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. p2

⁵¹ Section 183

⁵² 176(1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

⁵³ Human Rights Commission Act, section 3. Gender Commission Act, section 3.

⁵⁴ Dean M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. p3

⁵⁵ Dean M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. p3

be reduced during the term of office.⁵⁶ The Bill does not provide this protection for the MO. In clause 5(4) the service terms and conditions of the MO's are determined by the President with the concurrence of the Minister of Finance. The independence of the MO may therefore be further protected from any possible interference if the service conditions of the incumbent are fixed for the duration of the term of office.⁵⁷

Removal from Office

45. In terms of Clause 5(6) the President has the sole discretion to remove the Ombud or Deputy Ombud from office on the grounds of misconduct, incapacity or incompetence, after affording the person concerned a reasonable opportunity to be heard, and subject to applicable legislation.⁵⁸ As this discretion lies solely with the President, it may at the very least create the perception that the MO may act without independence or impartially out of a fear that the President may remove the MO from office. At the very most, this may create pressure on the MO to take into account political consideration to safeguard their tenure in office.

46. As with the appointment process, the inclusion of a role for the National Assembly may assist in reducing any perception that a process to remove an incumbent MO is tainted by political bias.⁵⁹

47. In comparison, the removal of the head or member of a Chapter 9 institution provides for a critical role for the NA.⁶⁰ The President does not

⁵⁶Section 2(2) of the Public Protector Act provides:

The remuneration and other terms and conditions of employment of the Public Protector shall from time to time be determined by the National Assembly upon the advice of the committee: Provided that such remuneration—

- a. shall not be less than that of a judge of a High Court; and
- b. shall not be reduced, nor shall the terms and conditions of employment be adversely altered, during his or her term of office.

⁵⁷ The salary of the MO and the Deputy MO are linked to the salary of a High Court judge. As the salary of a judge may

⁵⁸ Section 194 provides for the removal from office of the Public Protector, the Auditor-General and a member of the SAHRC:

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

⁵⁹ Hoexter, p 85

⁶⁰ Constitution 1996, Section 194: Removal from office

1. The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on
 - a. the ground of misconduct, incapacity or incompetence;
 - b. a finding to that effect by a committee of the National Assembly; and
 - c. the adoption by the Assembly of a resolution calling for that person's removal from office.
2. A resolution of the National Assembly concerning the removal from office of
 - a. the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
 - b. a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.
3. The President

have discretion in the matter and must remove the incumbent from office after the NA has made a recommendation to this effect.

48. We submit that the Committee may consider alternative removal procedure including:

- The President removes the MO on the recommendation of the National Assembly⁶¹

Clause 6: Powers and functions of Ombudsman and Deputy Ombudsman

49. Clause 6(6) empowers the MO to order the Department to comply with the determination or the MO's alternative resolution within the time period determined by the MO. This goes beyond the traditional power of an Ombud. An Ombud is usually empowered to make recommendations to the Executive but not to compel the Executive to act on its recommendations.⁶² The Public Protector's powers are limited to making recommendations to the Executive.⁶³

50. This clause may have the effect that the recommendation of the MO is elevated to a binding order on the Department. However, this power may be countered by the lack of sanction against the Department if it fails to comply with the MO's determination.

51. Clause 6(9) provides that 'the Minister may assign to the Ombudsman any other additional functions which are not inconsistent with the Act.'

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- a. may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
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⁶¹ Section 194 provides that :

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 - a. the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
 - b. a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

⁶² Dean M. Gottenhrer and Michael Hostina. Essential Characteristics of Classic Ombudsman. p7

⁶³ Section 6(4)(c)-(d) of the Public Protector Act provides that:

The Public Protector shall, be competent—

- a. to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by—
 - i. mediation, conciliation or negotiation;
 - ii. advising, where necessary, any complainant regarding appropriate remedies; or
 - iii. any other means that may be expedient in the circumstances;
- b. at a time prior to, during or after an investigation—
 - ii. if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority; and charged with prosecutions; or
 - iii. if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority; and affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting there from or make any other appropriate recommendation he or she deems expedient to the affected public body or authority; and
- c. on his or her own initiative, on receipt of a complaint or on request relating to the operation or administration of the Promotion of Access to Information Act, 2000, endeavour, in his or her sole discretion, to resolve any dispute by—
 - i. mediation, conciliation or negotiation;
 - ii. advising, where necessary, any complainant regarding appropriate remedies; or
 - iii. (iii) any other means that may be expedient in the circumstances.

This discretion is very wide, is done without the consultation of the Ombud and without any legislative oversight. We are of the opinion that the functions of the Ombud must be clearly defined and not be easily altered. This will protect of the office from interference or the perception of interference and accordingly ensure its independence.

Clause 7: Limitation on jurisdiction

52. Clause 7 sets out in detail the areas that fall outside the jurisdiction of the MO and matters which the MO may refuse to investigate. It is submitted that a similar clause detailing the jurisdiction will assist the MO in better understanding and fulfilling its mandate.

Clause 8: Independence and impartiality

53. Clause 8(1)-(4) provides important protections to ensure the independence of the MO.

54. Clause 8(4) provides that members and employees of the Department must cooperate with the Ombud in the performance of its function. Clause 8(5) provides that the Ombud must preserve the confidentiality of this information. These clauses must be read together with clause 14(2). Clause 14(2) makes a contravention of Clause 8(5) an offence with a possible sentence of 12 months imprisonment or a fine.

55. These clauses while promoting cooperation and protecting confidentiality become onerous on the office of the MO due to the penalty attached if these provisions are breached. While it is necessary for the Ombud to respect confidentiality there is also a need to ensure that investigations are conducted in a transparent and open manner.

56. It is our view that criminalizing the failure to maintain confidentiality may serve to curtail the manner in which the Ombud is able to conduct investigations. It may also create a perception amongst the public that the Ombud may be obliged to conceal information and thus will protect the Department.

57. It must also be borne in mind that any classified information that is given to the Ombud in the course of an investigation may be protected by legislation dealing with the classification of state information.

Clause 9: Staff

58. The appointment of staff is undertaken by the Ombud after consultation with the Minister. The degree of involvement of the Minister in this decision would vary according to the Ministers and the MO's interpretation of this section. Issues may arise in instances where the Minister and Ombud do not agree on a particular candidate. This clause may also enable the Minister to influence the appointment of staff. This

may negatively impact on the independence of the Ombud and create the perception of political interference.

59. The ability to appoint staff is a factor used to determine the administrative independence of an institution.⁶⁴ In our view giving the Ombud the sole power to appoint and remove staff may better protect the independence of the Office of the MO and is in line with international guidelines for securing the independence of such offices.⁶⁵ Further allowing the MO to choose their own staff will enable the MO to build better working relationships and create a sense of confidence and trust between the MO and staff.⁶⁶ This is important as the office may deal with complaints of a sensitive nature and the need for trust⁶⁷ and loyalty is therefore very important.

Clause 10: Finances

60. Funding for the Office of the MO must be appropriated by Parliament as part of the budget vote for the Department. This means that the budget of the MO will fall under the Budget Vote of the Department Defence and Military Veterans. This gives the Department direct control over the budget of the MO and following from that, it may give the Department indirect control over the manner in which the MO exercises its function.

61. The financial dependence of offices such as the Office of the Public Protector 'has been recognized... as the greatest threat to [i]ts efficacy... Some commentators have gone so far as to say that its current reliance on the executive is 'inconsistent with independence.'⁶⁸

62. The Constitutional Court has viewed both financial and administrative independence as factors relevant to independence.⁶⁹ Citing the *New National Party v Government of the Republic of South Africa & Others*, Bishop and Woolman point out that the Constitutional Court identified two essential elements for financial independence: 'Firstly, the Chapter 9 Institution must have sufficient funding to fulfill its constitutional mandate. Secondly, the funds must come from Parliament and not from the executive.'⁷⁰

63. The commentators further state that:

'Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise.'⁷¹

⁶⁴ See *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191, para 99. In this case the Court commented in passing that the ability of the IEC to appoint its own staff was part of its administrative independence.

⁶⁵ Dean M. Gottenhrer and Michael Hostina. *Essential Characteristics of Classic Ombudsman*. P3

⁶⁶ Dean M. Gottenhrer and Michael Hostina. *Essential Characteristics of Classic Ombudsman*. P3

⁶⁷ Dean M. Gottenhrer and Michael Hostina. *Essential Characteristics of Classic Ombudsman*. P3

⁶⁸ Michael Bishop & Stuart Woolman Chapter 24A Public Protector. P5

⁶⁹ *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191. para 98

⁷⁰ Michael Bishop & Stuart Woolman Chapter 24A Public Protector.

⁷¹ Michael Bishop & Stuart Woolman Chapter 24A Public Protector.

64. While not a Chapter 9 body the financial independence of the MO is a factor that contributes to its overall independence and is a factor we suggest that the Committee consider.

Clause 11: Reporting

65. Clause 11(1) requires the MO to submit an annual report to the Minister at the end of the financial year. Clause 11(3) requires the Minister to provide the Public Protector with the MO's annual report and table the report in Parliament. It is unclear what purpose submitting the MO's annual report to the Public Protector serves and how this will assist the office of the MO.

66. Clause 11(2) requires that the MO report directly to the Minister on its activities, as and when requested by the Minister. This may be construed as interference by the Minister into the activities of the MO. The level of political accountability of the MO will impact on its actual independence and the public perception of its independence. Allowing the MO to report to the Minister may make the office of the MO and the decisions taken by the MO vulnerable to political interference.⁷²

67. Conversely, this provision may be construed as a mechanism by which the Minister may legitimately enquire into the work of the work of the MO. If one were to err on protecting independence, the powers of the Minister to request the MO to report may be more carefully couched. In our opinion, at present the Minister has unfettered discretion to demand that the MO report to her and this may have a negative impact on the independence of the MO. It is therefore important to limit the exercise of this power.

Clause 12: Disestablishment, judicial management and liquidation

68. The Bill provides that only an Act of Parliament may disestablish the Office of the MO or place it under judicial management or liquidation. This, to a large extent, safeguards the office from being disestablished without considered reasons being put forward. Any Act of Parliament must pass the normal legislative processes including the requirement of public involvement before it becomes law. This will ensure that any decision under this clause receives a great degree of scrutiny.

Clause 14: Offence and penalties

69. The Bill makes it a criminal offence to hinder or obstruct the MO or a member of staff from performing its functions. The offence is punishable by a fine or imprisonment not exceeding a period of 12 months.

⁷² *Baxter (op cit, at 240 - 1)* cited in *Ouyobeza and Another v Minister of Home Affairs and Others and Watchenuka*

70. The Bill protects the MO from any person hindering or obstructing the office of the MO in the performance of its functions.⁷³ It is suggested that to further protect the independence of the MO, clause 14 also prohibits interference in the activities of the MO. It is submitted that the meaning of 'interfere' is broader and inclusive of 'to hinder or obstruct.'⁷⁴

71. In line with this, clause 8(3) provides that no person may interfere with the functioning of the MO. However, no sanction is attached to this prohibition. In our view that it would therefore be appropriate to include a sanction for any interference with the work of the MO.

72. As discussed above, clause 14(2) sanctions a contravention of clause 8(5). Clause 8(5) provides that the confidentiality of information obtained by the Ombud from members and employees of the Department must be respected by the MO. This clause may impact on the ability of the MO to make public its findings that may breach the confidentiality provisions. A balance between protecting confidentiality and ensuring the MO carries out its functions in a transparent manner must be struck.⁷⁵

Clause 15: Regulations

73. Regulations may be made by the Minister, after consultation with the Ombud. The regulations will include the procedure for complaints, method and conduct of investigating a complaint and will determine the extent to which the MO can properly function. The Regulations will determine the everyday functioning of the office and have great impact on the work of the MO. It is therefore our view that Parliament considers exercising oversight over the Regulations. This can be done by the Regulations being tabled and approved by Parliament.

Conclusion

74. The current Bill seeks to create a MO that is independent and impartial. To ensure that the Bill gives effect to this intention, the Committee may consider further entrenching this independence. It is submitted that special consideration is given to the appointment and removal procedure of the MO, the appointment of staff, the reporting lines between the MO and the Minister as well as the exercise of oversight over regulations.



Ms SS Isaac
Parliamentary Legal Adviser

⁷³ Clause 14(1)

⁷⁴ Interfere is defined as: to interpose, esp. meddlesome or unwarrantedly; intervene; to come between or in opposition; hinder; obstruct. Collins English Dictionary.

⁷⁵ The Governmental Ombudsman Standards suggest the following consideration in protecting confidentiality: 'The Ombudsman should have the privilege and discretion to keep confidential or release any information related to a complaint or investigation. This standard balances the need to protect sensitive information so that a complainant can come forward, and witnesses and subjects can speak openly, with the need to disclose information as a part of an investigation or public report.' United States Ombudsman Association. Governmental Ombudsman Standards. p2