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**SUMMARY AND ANALYSIS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
BILL [B5-2013]**

1. Introduction

The South African Human Rights Commission Bill (the Bill) has recently been tabled in Parliament, and the Department of Justice & Constitutional Development will be briefing the Portfolio Committee on Justice & Constitutional Development on this Bill. Below we provide some background against which the Bill needs to be understood, outline relevant aspects of the Report of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions (the Asmal Report), and provide a summary and clause-by-clause analysis of the Bill. Key issues for possible consideration by the Committee will also be raised.

2. Background

The Interim Constitution of the Republic of South Africa (the 1993 Constitution) provided for the establishment of the Human Rights Commission, to promote the observance of, respect for, and the protection of human rights through a variety of means elaborated under Section 116.

The Human Rights Commission Act (the Act), based on section 115 of the 1993 Constitution, paved the way for the subsequent establishment of the Human Rights Commission in October 1995, which was officially launched on the 21st March 1996, and the 1996 Constitution was launched in the same year.

The Commission's mandate was originally derived from the following pieces of legislation:

- The 1996 Constitution: Section 184
- Human Rights Commission Act 54 of 1994, which forms the basis of the Commission's work.
- Promotion of Access to Information Act 2 of 2000 {PAIA} (although the Protection of Personal Information Bill once enacted will impact significantly on the Commission's role in respect of this Act)
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 {PEPUDA}

The Act clothes the Commission with wide powers to carry out its responsibilities, which include the promotion of human rights through education, the monitoring and evaluating of human rights, and the protection of the rights of people through investigation of complaints and subsequently mediating or litigating to obtain redress.



The 1996 Constitution provides the Commission with a unique mandate to monitor the progressive realisation of socio-economic rights. Additional mandates also come from the above-mentioned Acts. The Commission also monitors international obligations under binding treaties in the field of human rights, which include the Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Elimination of All Forms of Discrimination.

3. Asmal Report findings

The Asmal Report made general findings regarding Chapter 9 institutions on various aspects, which included appointment procedures, independence and internal challenges. There were specific findings relating to the Commission, which included the following:

- The reality that the Human Rights Commission Act is outdated in that it was consistent with the provisions of the 1993 Interim Constitution, which differs from the 1996 Constitution. This discrepancy has implications for the Commission's mandate and functions, especially with regard to the Commission's additional mandate in the 1996 Constitution to monitor the progressive realisation of socio-economic rights contained in the Bill of Rights.
- Regulations promulgated in terms of section 19 of the Human Rights Commission Act relating to staff matters, including salaries, appointments, codes of conduct, transport and legal liability are outdated.
- More resources and energy need to be devoted to the protection of rights of children and disabled persons.
- The Commission needs to take a more proactive approach in assisting persons affected by unfair discrimination, especially in rural areas and isolated townships.
- The Commission was commended for interpreting its mandate to include the monitoring of how South Africa fulfils its obligations in terms of international human rights treaties.
- The 1993 Constitution provided for the appointment of eleven commissioners, and the Act provides that no fewer than five commissioners may be appointed. The recommendation from the Ad Hoc Committee was that at least a minimum of seven commissioners should be appointed.
- The Ad Hoc Committee encouraged the involvement of commissioners in non-governmental organisations, as this could strengthen relationships with such organisations and build the capacity and knowledge of commissioners, provided this did not detract from the Commissioner's core functions and responsibilities to the Commission.
- With regard to institutional governance arrangements, the hierarchical relationship between the Chief Executive Officer and the Chairperson of the Commission and the lines of authority were confusing, with the provisions of the PFMA¹ and the silence of the Act in that regard compounded the problem. The divisions of roles and

¹ The PFMA assigns the role of the chief accounting officer to the CEO



responsibilities amongst commissioners and between commissioners and staff were also found not to be clear.

- The determination of the remuneration and conditions of service of commissioners, in the absence of the necessary legislative framework contemplated in Section 219 (5) of the Constitution, by the President in consultation with the Cabinet and Minister of Finance, creates the impression that the independence of the commissioners is not fully guaranteed.
- Regulation of pecuniary and other interests of commissioners and other senior officials is needed and the disclosure of interests in a register that is kept available to interested parties is recommended.
- The budget process and funding model of the Commission adversely affects its accountability and its independence, and improvements in the budget process and funding model are recommended.

4. Clause-by-clause summary and analysis of the South African Human Rights Commission Bill

The Department advises that the numerous amendments to the Act essentially mean that the Act is being redrafted, and consequently it becomes more appropriate to repeal the Act and replace it with this Bill, instead of promoting a comprehensive Amendment Bill. The Department and the Commission have been engaging on the Bill for some time.

Below the provisions of the Bill are summarised:

Ad Long Title and Preamble

The existing Long Title and Preamble are substituted to bring them in line with the relevant provisions of the Constitution.

Ad clause 1

Clause 1 contains definitions of expressions used in the Bill and is similar to the existing section 1 of the Act. However, consequential amendments are effected to some of the existing definitions whilst definitions of certain expressions, for example, "chief executive officer", "Deputy Chairperson", "member", "member of staff", "Minister" and "warrant" are added.

Ad clause 2

Clause 2 provides for the objects of the Commission as provided for in section 184(1) of the Constitution. While a view exists that national legislation should not repeat what is stated in the Constitution, the Department deems a repetition in the objects clause appropriate.

Ad clause 3



Clause 3 provides for the seat of the Commission and is similar to the existing section 2 of the Act that provides that “[t]he seat of the Commission shall be determined by the President.”

Ad clause 4

Clause 4 deals with independence and impartiality and is, apart from certain amendments, similar to the existing section 4 of the Act. Provision is made that the Commission is independent. Provision is further made that a member of the Commission or a member of staff of the Commission

- (a) may not use the position or privileges of a member of the Commission or a member of staff of the Commission for private gain or to benefit another person improperly
- (b) may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission; and
- (c) who contravenes or fails to comply with any of the matters referred to above is guilty of misconduct.

Comment

- The Asmal Report fleshes out the content of independence in the context of Chapter 9 Institutions, and provides some guiding principles and relevant jurisprudence², as well as other relevant aspects eg the meaning and content of financial and administrative independence³. The Bill does not substantially deal with the independence of the Commission as an institution and does not seem to address the concerns raised in the Asmal Report, and only the independence of the Commissioners is discussed in some measure of detail.

Ad clause 5

The repealed section 115 of the Interim Constitution provided for the establishment, constitution, and the appointment of members, of the Commission. Section 193 of the Constitution now provides for the requirements for appointment as members of the Commission (and other Chapter 9 Institutions), as well as the procedure to be followed in appointing such members, whilst section 194 of the Constitution regulates the suspension and removal from office of such members. Clause 6 provides for the composition of the Commission and is, to some extent, similar to the existing section 3 of the Act (that provides for the term of office of the members of the Commission). Clause 5, among others:

- (a) provides for the composition of the Commission (the Commission will consist of 11 members)

² Van Rooyen and others v S and others 2002(8) BCLR 810 (CC), Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC)

³ At pages 9-15



- (b) further regulates the qualifications, appointment, suspension and removal from office of members of the Commission and provides that the term of office of the full-time members of the Commission may not expire simultaneously.
- (d) increases the number of full-time members from the present five to seven.
- (e) provides for the appointment of acting members of the Commission and matters related thereto.
- (f) further regulates the resignation from office by members of the Commission by providing that such a member will be regarded as having resigned if that member, for example, accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council or if he or she is appointed as an office-bearer of a political party; and
- (g) empowers the Commission to take appropriate steps, where necessary, against a member of the Commission for the recovery of remuneration and allowances, if any, that were paid to him or her if he or she, for example, failed to give the required three months' written notice of his or her resignation to the National Assembly.

Comment

- This clause goes a long way in addressing some of the concerns raised in the Asmal Report regarding the number of commissioners to be appointed, as well as the recommendation of staggering appointments to ensure that the terms of commissioners do not end simultaneously.

Ad clause 6

Clause 6 provides for the mandatory designation of two of the full-time members of the Commission as Chairperson and Deputy Chairperson of the Commission by the President and regulates matters related thereto.

Comment

- The PC on Justice & Constitutional Development, which is responsible for the appointment/recruitment process involving Commissioners should be given the option to choose and recommend to the Presidency members who may be designated as Chairperson and Deputy Chairperson of the Commission.

Ad clause 7

Clause 7 regulates the powers and functions of the Chairperson, Deputy Chairperson and other members of the Commission. Provision is further made that:

- (a) the Chairperson is, for the purposes of exercising or performing his or her powers and functions, accountable to the Commission.



(b) the Deputy Chairperson and any other member of the Commission are, for the above purposes, accountable to the Chairperson and

(c) the Chairperson is, for the purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (the PFMA), the executive authority of the Commission.

Comment

- This clause seeks to deal with the hierarchical relationship problems regarding the positions of the CEO and the Chairperson, and makes it clear that the Chairperson, not the CEO, is, for the purposes of accountability under the PFMA, the executive authority of the Commission.

Ad clause 8

Clause 8 deals with vacancies in the Commission and is, apart from certain amendments, similar to the existing section 11 of the Act. In terms of the existing section 11 a vacancy in the Commission occurs, for example, when a member of the Commission dies, he or she is removed from office or his or her resignation takes effect. The amendments seek to:

- (a) create a further scenario when a vacancy in the Commission will occur, namely when a member's resignation, as contemplated in the new section 6(8)(b), takes effect and
- (b) provide that a vacancy in the Commission must be filled within a maximum period of six months after it has occurred.

Ad clause 9

Clause 9 regulates the determination of the remuneration, allowances and other terms and conditions of office and service benefits of members of the Commission and is, apart from certain consequential amendments, similar to the existing section 13 of the Act. Provision is now made that the allowances and other terms and conditions of office and service benefits of those members may not be adversely altered during their continuation in office.

Comment

- The Asmal Report raised a concern regarding the determination of remuneration and conditions of service of commissioners by the President in consultation with the Cabinet and the Minister of Finance, stating that such arrangements are unsatisfactory, as they create an assumption that the independence of the commissioners is not fully safeguarded. To this end, the Report recommended the amendment of the legislation on Independent Commission for the Remuneration of Public Office-Bearers Act 92 of 1997, to include Chapter 9 and associated institutions.

Ad clause 10



Clause 10 regulates matters relating to meetings of the Commission and is, apart from certain consequential amendments, similar to the existing section 12 of the Act. Further provision is, however, made that the Commission must, in determining its own procedure, give due regard to “the principles of transparency, openness and public participation”. In terms of the existing section 12(6) the Commission must from time to time by notice in the *Gazette* make known the particulars of the procedure which it has determined in terms of subsection (5)(a). That subsection is amended to give the Commission a discretion regarding the matter.

Ad clause 11

Clause 11 regulates matters relating to committees of the Commission and is, apart from a few minor amendments, similar to the existing section 5 of the Act.

Ad clause 12

Clause 12 provides for the conferment of powers and assignment of functions. This clause provides that the Commission may, subject to such conditions and directions as it may impose, confer the exercise of any of its powers or assign the performance of any of its functions to a member of the Commission, a member of staff of the Commission or a committee of the Commission and regulates other matters incidental to such conferment or assignment.

Ad clause 13

In terms of the existing section 6 of the Act, the Commission may, at any time, “approach either the President or Parliament with regard to any matter relating to the exercising of its powers or the performance of its functions”. Clause 13 is similar to the existing section 6 of the Act, except for the fact that—(a) the word “Parliament” has been substituted with “National Assembly” because the Commission is, in terms of section 181(5) of the Constitution, accountable to the National Assembly and (b) the words “other relevant body” have been added

Ad clause 14

The repealed section 116 of the Interim Constitution provided for certain powers and functions of the Commission. The existing section 7 of the Act provides for powers and functions of the Commission, in addition to what was set out in the repealed section 116 of the Interim Constitution. Clause 14 provides for the powers and functions of the Commission and is, apart from certain amendments, similar to the existing section 7 of the Act. Clause 14, among others

- (a) inserts the provisions of the repealed section 116 of the Interim Constitution (subject to certain minor changes) in section 7
- (b) aligns the powers and functions of the Commission with some of those of the Commission for Gender Equality (provision is, among others, made that the Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights)
- (c) provides that the Commission must (i) develop, conduct or manage education programmes to foster public understanding of Chapter 2 of the Constitution, the Act and



the role and activities of the Commission and (ii) review government policies relating to human rights and

- (d) provides that all organs of state must consult with the Commission on all major policy matters affecting the promotion, protection and enforcement of human rights. Section 184 of the Constitution also confers certain powers on, and assigns certain functions to, the Commission. The words “regional”, “treaties” and “monitor the implementation” have also been inserted in subsection (1)(b)(vi). The insertion of those words broadens the scope of the duty assigned to the Commission.

Ad clause 15

Clause 15 provides for mediation, conciliation or negotiation by the Commission and is, apart from one consequential amendment, similar to the existing section 8 of the Act.

Ad clause 16

Clause 16 regulates the procedures applicable to investigations to be conducted by the Commission and is, apart from certain amendments (mainly consequential/technical in nature), similar to the existing section 9 of the Act. Provision is, among others, made—(a) that the Commission or a member of the Commission may direct that any person or category of persons or all persons the presence of whom is not desirable, may not be present at the proceedings during an investigation or any part thereof “if it is in the interests of justice or if harm to any person might otherwise ensue” and (b) that no person may disclose to any other person the contents of any document in the possession of a member of the Commission or a member of staff of the Commission or the record of evidence given before the Commission during an investigation, unless the Commission determines otherwise.

Ad clause 17

Clause 17 regulates the powers of members of the Commission, members of staff of the Commission or authorised police officers regarding the entering and search of premises and the attachment and removal of articles by virtue of a search warrant or an entry and search warrant issued by a magistrate or a judge of a High Court and is, apart from certain amendments, similar to the existing section 10 of the Act. Provision is, among others, made to—(a) empower members of the Commission, members of staff of the Commission or authorised police officers to exercise those powers not only in the case of an investigation, but also in the exercising of the powers and the performing of the functions of the Commission (b) extend those powers to include the search of persons and premises and (c) further regulate matters incidental to the exercise of those powers.

Ad clause 18

Clause 18 provides for the payment of compensation for certain expenses incurred by persons in the course of or in connection with investigations by the Commission and is, apart from certain amendments, similar to the existing section 14 of the Act. Provision is further made that the Commission may only after consultation with the Cabinet member responsible for the administration of justice and in consultation with the Minister of Finance order that such expenses be paid. Furthermore, the reference to “State funds” has been substituted with a reference to “the National Revenue Fund”.



Ad clause 19

In terms of the repealed section 118 of the Interim Constitution the Commission had to report to the President annually on its activities and the Senate. The existing section 15 of the Act provides for additional reports to be submitted to the President and Parliament by the Commission. However, in terms of section 181(5) of the Constitution the Chapter 9 Institutions, which includes the Commission, are accountable to the National Assembly and must report on their activities and the performance of their functions to the National Assembly at least once a year. Clause 19 deals with reports by the Commission and is, apart from certain amendments, similar to the existing section 15 of the Act. Provision is, among others, made

- (a) for the insertion of the provisions of section 181(5) of the Constitution in order to confirm the requirement contained in that section.
- (b) that the Commission must, in such a report to the National Assembly, also report on the achievement of its objectives
- (c) that the Commission must "as soon as possible" (and no longer on a quarterly basis as the case is at present), submit to the National Assembly (and no longer to the President and Parliament as is presently the case) reports on the findings in respect of functions and investigations of a serious nature which were performed or conducted by it, and
- (d) that if the Commission makes any finding or recommendation in respect of a matter investigated by it known to the organisation or institution concerned, that organisation or institution must within 30 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating the steps that it has taken to give effect to such finding or recommendation, if any such steps are required.

Ad clause 20

The existing section 16 of the Act contains provisions pertaining to the staff, finances and accountability of the Commission. As a result of clause 21 below and the proposed amendments to the existing section 19 of the Act, section 16 has to be amended in order to provide only for matters relating to the staff of the Commission. The other provisions of the existing section 16, pertaining to the finances and accountability of the Commission, have been included in the proposed new section 21. Clause 20 is, apart from certain amendments, similar to the existing section 16 as far as it pertains to matters relating to the staff of the Commission. Provision is, among others, made

- (a) to further regulate the appointment, term of office, terms and conditions of appointment and the remuneration, allowances and other employment benefits of a chief executive officer (CEO) of the Commission and to provide for the entering into a performance agreement between the Commission and the CEO.
- (b) to prescribe the responsibilities, accountability, powers and functions of the CEO.
- (c) to further regulate the appointment, terms and conditions of appointment and the remuneration, allowances and other employment benefits of the other members of staff of the Commission.
- (d) regarding the remuneration, allowances and other employment benefits of the CEO and the other members of staff of the Commission as determined by the Commission which determination must be tabled in the National Assembly for approval.