EXECUTIVE SUMMARY

A REPORT TO THE NATIONAL ASSEMBLY 2007

EXECUTIVE SUMMARY

1. Background to review

With the advent of democracy in South Africa in 1994, a human rights culture was made the cornerstone of the new constitutional dispensation and a wide-ranging set of human rights, including socio-economic rights, was inscribed in a Bill of Rights and incorporated in the Interim Constitution of 1993 and repeated in the final Constitution of 1996.

From the outset the leadership in South Africa was determined that those rights would not just remain rights on paper, but would be actively realised, promoted and entrenched in the interests of all the people and particularly of the poor and the marginalised and those whose human rights had been consistently violated and abused for generations. The object was the complete transformation of our society from a culture that was oppressive, secretive and profoundly disrespectful of basic human rights into a human rights based culture in which the human dignity of all is both respected and celebrated.

In order to achieve this goal, a range of institutions were established in the Constitution itself and in national legislation, the purpose of which was to strengthen constitutional democracy in South Africa by the active promotion of a culture of human rights and the protection, development and attainment of those rights, including monitoring and assessing their implementation and observance. Each of the institutions was meant to focus on a particular sector of society where the need for transformation was felt to be greatest. Reflecting the government's determination to achieve this transformation, these institutions

uniquely were made independent of government so that they could exercise their powers and perform their vital functions without fear, favour or prejudice, being accountable only and directly to the people's democratically elected representatives in the National Assembly.

Ten years into the new democracy, the government thought it was opportune to assess the extent to which society had been transformed and human rights entrenched through the operation of these institutions. Such a review would identify their effectiveness and relevance, individually and collectively, and the requirements to strengthen them further to ensure that they were best able to achieve their objectives.

2. Appointment of Committee

As the institutions had specifically been made independent of government, the Executive felt it to be inappropriate for it to undertake such a review itself and therefore requested the National Assembly to conduct a review. Accordingly, the National Assembly on 21 September 2006 by resolution appointed a multi-party *ad hoc* committee for this purpose.

The Committee, which was to report by 30 June 2007, a date subsequently extended to 31 July 2007, was given detailed terms of reference. It was required to review the state institutions supporting constitutional democracy as listed in Chapter 9 of the Constitution (the so-called Chapter 9 institutions) as well as the Public Service Commission as established in Chapter 10 for the purpose, in the first instance, of broadly assessing whether the current and intended constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy, and whether a

rationalisation of function, role or organisation is desirable or will diminish the focus on important areas. The Committee was further also to conduct its review with reference to other organs of state of a similar nature whose work related closely to the work of the aforementioned institutions.

Turning to the individual institutions, the Committee was also specifically tasked with –

• reviewing the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability;

• reviewing institutional governance arrangements in order to develop a model of internal accountability and efficiency;

• improving the co-ordination of work between the institutions covered in this review, as well as improving co-ordination and co-operation with government and civil society;

• recognising the need for a more structured oversight role by Parliament in the context of their independence; and

• reviewing the funding models of the institutions, including funding derived from transfers and licences and other fees, with a view to improving accountability, independence and efficiency.

3. Institutions reviewed

The Committee in accordance with its terms of reference conducted a review of the Chapter 9 institutions, namely the Public Protector, the Human Rights Commission, the Commission for Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission, as well as the Public Service Commission.

In addition, the Committee included in its review the Pan South African Language Board, the Financial and Fiscal Commission, the Independent Communications Authority of South Africa and the National Youth Commission. All of these, with the exception of the last-mentioned, are covered in the Constitution itself and enjoy special status. All eleven are in their different spheres engaged in strengthening the fabric of our constitutional arrangements.

These institutions were established at different times and are at different stages of development. The Committee took this into account.

4. Approach and methodology

The approach and methodology of the Committee are set out in detail in Chapter 1 of this report. The Committee engaged extensively with the relevant institutions themselves, relevant Ministries and departments, relevant parliamentary committees and the public and civil society. The Committee also commissioned a public opinion survey, based on a questionnaire developed by it, to get a general sense of public awareness of the institutions.

In order to ensure consistency in the Committee's approach to its work, it elaborated a range of guiding principles and criteria against which the institutions were measured, namely the aspects guaranteeing their independence, accountability mechanisms and practices, and the effectiveness of

the institutions. All of these were examined within the framework of the indivisibility, interdependence and interrelatedness of human rights.

Each of the institutions was examined in respect of its constitutional and legal mandate and the institution's understanding and interpretation of that mandate; its powers and functions; appointment procedures for office-bearers; public awareness of the institution; its relationship with Parliament, the Executive, and (other) Chapter 9 and associated institutions; its institutional governance arrangements; and its financial arrangements. A separate chapter in the report is accordingly devoted to each institution in which these issues are reported on in detail, which is followed by general conclusions and findings, and recommendations specific to the institution aimed at resolving identified problems and shortcomings and generally strengthening the institution.

5. Findings and recommendations on common issues

Pursuant to its mandate to assess in broad terms whether the current and intended legal mandates of the institutions are suitable for the South African environment, whether their consumption of resources is justified in relation to their outputs and contribution to democracy and whether a rationalisation of function, role or organization is desirable or will diminish the focus on important areas, the Committee in Chapter 2 examines a range of broad issues in respect of which common difficulties and lack of consistency and coherence in approach were identified. The Committee then, in this all important Chapter, makes fully motivated findings and recommendations, which respond to its broad mandate on these issues. The findings and recommendations can be summarized in outline as follows:

5.1. FINANCIAL MATTERS AND BUDGET ALLOCATIONS

Noting that the different institutions follow different and inconsistent funding processes and recognising that their financial independence is an important indicator of their true independence, the Committee recommends that their budgets should be contained in a separate programme in Parliament's Budget Vote, the required processes to this end to be negotiated with National Treasury.

5.2. APPOINTMENTS

Allowing for variation depending on the different mandates, powers and functions of the institutions, a reasonable degree of consistency in appointments is required and appointment procedures should be consistent with upholding and protecting the independence of these institutions. Specifically –

- selection criteria should be adjusted;
- the role of Ministers in appointments should be removed;
- appointments should be staggered to enhance continuity;
- chairpersons should be appointed either by the institutions themselves or by the relevant parliamentary committee; and
- public involvement in appointment processes should be enhanced.

5.3. RELATIONSHIP WITH PARLIAMENT

The Committee notes that the institutions are accountable to the National Assembly, but stresses that they also complement and are supportive of Parliament's oversight function. The Committee examines both aspects of the institutions' interaction with Parliament and finds that Parliament's engagement with the institutions currently is wholly inadequate. Recommendations are made to effect improvements. In particular, a unit on constitutional institutions and other statutory bodies should be set up in the office of the Speaker to co-

ordinate all interactions with these institutions, and the capacity of portfolio committees to engage with substantive reports of these institutions should be significantly enhanced.

5.4. INSTITUTIONAL GOVERNANCE ARRANGEMENTS

The Committee finds that internal tensions have been experienced in most of the institutions. This is often the result of the absence of clear lines of authority between the members of the institution, its head and the secretariat.
The Committee recommends that enabling legislation be reviewed to clarify lines of authority where necessary.

The Committee finds further that there is no uniformity concerning the determination of the remuneration and conditions of service of the members of the institutions. However, section 219(5) of the Constitution provides for the establishment of a framework by national legislation for determining these. Such legislation should be adopted urgently and be made applicable to all the affected institutions. This could possibly be achieved by amending the Independent Commission for the Remuneration of Public Office-Bearers Act.

Present arrangements for the regulation of conflicts of interest differ widely between the institutions. The Committee recommends that the enabling legislation should be amended to provide a coherent and comprehensive framework is this regard.

5.5. ACCESSIBILITY

The Committee finds that the institutions are largely urban-based and recommends that they should be innovative to ensure they become more accessible to the public, especially in rural areas. At the same time, it could not

confirm the usefulness of provincial offices where such have been established and holds that such offices should be established only where a demonstrable need can be shown.

5.6. A SINGLE HUMAN RIGHTS BODY

The Committee finds that the multiplicity of institutions created to protect and promote the rights of specific constituencies in South Africa has in practice resulted in an uneven spread of available resources and capacities, with implications for effectiveness and efficiency. This has created fragmentation, confounding the intention that these institutions should support the seamless application of the Bill of Rights.

The Committee therefore proposes the establishment of an umbrella human rights body to be called the South African Commission on Human Rights and Equality, into which the National Youth Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board) and the Commission for Gender Equality should be incorporated together with the Human Rights Commission.

The Committee accepts that this process of amalgamation will neither be easy nor speedy, but it should be finalised within a reasonable time. It therefore recommends that as a first step a task team be set up consisting of the heads of the relevant institutions and a number of members of the National Assembly to produce a roadmap to guide the process, the task team to report to the National Assembly within 12 months.

6. Findings and recommendations on individual institutions

In the context of the Committee's findings and recommendations on identified issues common to all the institutions under review and the proposed establishment of an umbrella human rights commission in the medium term, the Committee in separate chapters examines and makes findings and recommendations on the individual institutions with a view to resolving specific problems and generally strengthening their effectiveness and efficiency. These would be interim and immediate measures in the case of those institutions, which would in due
course be amalgamated into the umbrella body.

The full findings and recommendations are detailed in the respective chapters. For purposes of this summary a few are highlighted:

1. Co-ordination and co-operation between the institutions in a revived Forum of Independent Statutory Bodies should be actively encouraged.

2. Relevant institutions should publish the number, nature and outcomes of complaints they have received. Where complaints are referred to another body, progress should be tracked.

3. The legal mandate for engagement in international work, where applicable, should be clarified.

4. Codes of conduct and registers of financial interest should be kept and be made accessible.

5. Innovative ways must be found to promote public awareness of the respective institutions.

6. The failure of state departments and other organs of state to respond to recommendations made by the respective institutions should be pertinently brought to the attention of Parliament.

7. Motivated recommendations are made to alter the composition of specified institutions.

8. Formal agreements should be entered into between relevant institutions to prevent any possibility of duplication or overlap of functions.

9. The institutions need to develop strategies to attract and retain staff.

10. The National Youth Commission's mandate should be widened to encompass both children and the youth.

11. Concerning the Pan South African Language Board, its lexicography units should be transferred to the Department of Arts and Culture, and the Board itself should be incorporated in the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as a joint activity in a relatively short period. According to legal advice this could be achieved without necessarily amending the Constitution.

12. For purposes of ensuring a smooth transition to a consolidated body, the Committee recommends that a task team be set up consisting of three members of each of the affected bodies together with six members of the National Assembly, preferably from the relevant portfolio committee. The task team should report within 12 months.

13. Regarding the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, see the recommendation above relating to the Pan South African Language Board.

14. The Commission on Gender Equality Act, which is out of date, should be amended as soon as possible to bring it into line with the Constitution.

15. For purposes of coherence and consistency, the oversight and accountability of the Commission for Gender Equality should be located with the National Assembly component of the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, which should for that purpose also be formalised in the Assembly rules as a separate committee of the Assembly.

16. Concerning the Human Rights Commission, pending the establishment of the proposed umbrella human rights commission the Department of Justice and Constitutional Development should without delay introduce amending legislation to bring the Human Rights Commission Act into line with the Constitution and in the process make provision for other specified issues.

17. Further, Parliament should initiate the speedy appointment of at least two more Commissioners to the Human Rights Commission, one of whom should be designated to deal with the rights of disabled persons and the other with the right of access to information.

18. The Independent Communications Authority of South Africa Act should be amended to make the President rather than the relevant Minister responsible for the appointment of Councillors. Other specified issues should also be covered in the amending legislation.

7. Conclusion

The Committee expresses the hope that the institutions that have been reviewed will use the information contained in this report, and particularly the detailed recommendations, for the primary purpose of strengthening them and enhancing their efficiency and effectiveness.

The Committee agreed to the report unanimously.

CHAPTER 1

CONTEXT

1. Introduction

Emerging from a racially divided and oppressive past, where basic human rights were violated in the extreme by an illegitimate government that failed to honour even the most basic tenets of the rule of law, South Africa crafted a Constitution that is unique and far reaching in its provisions. Amongst others, it established an array of constitutionally protected institutions created to strengthen democracy and to promote respect for human rights in our society.

The new, democratically elected government inherited a state, which was farcically bureaucratic, secretive and unresponsive to the basic needs of the majority of its citizens. Most of the state institutions had little or no credibility and were profoundly distrusted by the majority of the people.

For some constitutional negotiators it was therefore clear that in order to transform South African society from an intensely oppressive society into an open and democratic society based on human dignity, equality and freedom would require more than a change in the system of government. It would be necessary to create a set of credibly independent institutions whose task it would be to strengthen constitutional democracy.

It was envisaged that these independent institutions would support constitutional democracy because they would, amongst others, help to:

1. Restore the credibility of the state and its institutions in the eyes of the majority of its citizens;

2. Ensure that democracy and the values associated with human rights and democracy flourished in the new dispensation;

3. Ensure the successful re-establishment of, and continued respect for, the rule of law; and

4. Ensure that the state became more open and responsive to the needs of its citizens and more respectful of their rights;

Many civil society groups who had come to distrust the apartheid State and its institutions more broadly or who were eager to see new institutions emerge that would be tasked to attend to the particular concerns of constituents, strongly advocated for the establishment of independent institutions that would look after their particular concerns about, for example, language rights, gender rights or human rights in general.

At the time, a widely shared belief emerged that at least some of these institutions were necessary to enhance democracy and, more importantly, to empower the citizens of South Africa. Many South Africans are poor and marginalised and will not be able to enforce their rights without assistance from independent bodies such as those established by the Constitution. These institutions are of fundamental importance to democracy exactly because they have been empowered to act on behalf of those who would not otherwise gain access to courts or other mechanisms for enforcing their rights.

To guarantee their independence and protection from undue influence and interference, the constitutional negotiators deemed it appropriate to afford these institutions maximum protection by providing for their establishment and independence under the Constitution. To that end Chapter 9 of the Constitution established six key institutions, the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality, the Auditor General, the Electoral Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to strengthen constitutional democracy in South Africa. Our Constitution also makes provision

for the establishment of an independent authority to regulate broadcasting in Chapter 9. Certain other related institutions, such as the Public Service Commission and the Financial and Fiscal Commission and the Pan South African Language Board were established in other Chapters of the Constitution.

These institutions have come to play a vital role in the development and consolidation of democracy in South Africa. Yet, almost as a testimony to the robustness of the developing South African democracy and the enormous expectations of a liberated South African society, these institutions have been the subject of criticism by politicians and civil society, including the media.

Nine years after the adoption of the final Constitution and ten years after the attainment of democracy in South Africa, the Executive considered it necessary to evaluate the progress made towards the consolidation of democracy and the promotion and protection of constitutional rights, values and principles in South Africa.

As part of this national process, the Government recognised the necessity to review the effectiveness and relevance of the institutions created during the constitution-making process to gain a better understanding of how they could be further assisted and supported with a view to strengthening them. Cabinet therefore tasked the Minister of Public Service and Administration in February 2005 with conducting a review of Chapter 9 institutions and the Public Service Commission.

The correct location of this review received particular attention early in the review process, given the constitutionally guaranteed independence of these institutions. It soon became clear that it was not the Executive but the National Assembly of Parliament, which was the appropriate body to conduct such a review.

Section 181(5) specifically states "these institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year". It was therefore appropriate that the National Assembly should undertake the task of reviewing these institutions. The Constitution in fact compels the National Assembly to do so. Therefore on 18 July 2006 the Cabinet Committee on Governance and Administration recommended that Parliament conduct the review.

Section 181(3) of the Constitution requires all other organs of state to assist and protect these institutions and to ensure their independence, impartiality, dignity and effectiveness and the Executive initiated the review process, in part, to give effect to these constitutional duties.

As a result, on 21 September 2006, the National Assembly adopted a resolution establishing an *ad hoc* committee to review State institutions supporting constitutional democracy (the so-called "Chapter 9" institutions) and the Public Service Commission established in Chapter 10 of the Constitution[1]. The resolution included terms of reference mandating the Committee to review these institutions, for the purpose of:

1. Assessing whether the current and intended constitutional and legal mandates of these institutions are suitable for the South African environment, whether the consumption of resources by them is justified in relation to their outputs and

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[1] Composition of the *ad hoc* Committee: Members: Hon. Prof. Kader Asmal (Chairperson), Hon. Mr. S L Dithebe, Hon. Ms. C Johnson, Hon. Adv. T M Masutha - replaced by Hon. Mr C V Burgess, Hon. Mrs. M J J Matsomela, Hon. Dr. J T Delport – replaced by Hon. Ms. SM Camerer, Hon. Ms. M Smuts, Hon. Mr J H van der Merwe, Hon. Mrs. S Rajbally, Hon. Mr S Simmons. Parliamentary support staff: Dr. L Gabriel, Mr. M Philander, Ms. C Silkstone, Mr. T Molukanele, Adv. A Gordon (Adv. M Vassen as alternate), Ms. T Sepanya, Ms. L Monethi, Ms. J Adriaans, Mr T Schumann, Mr E Nevondo. Additional technical support staff: Prof. P De Vos (UWC), Mr. A Kamieth (intern), Mr. K Hahndiek (former Secretary to the National Assembly)

contribution to democracy, and whether a rationalisation of function, role or organisation is desirable or will diminish the focus on important areas;

2. Reviewing the appropriateness of the appointment and employment arrangements for commissions and their secretariats with a view to enhanced consistency, coherence, accountability and affordability;

3. Reviewing institutional governance arrangements in order to develop a model of internal accountability and efficiency;

4. Improving the co-ordination of work between the institutions covered in this review, as well as improving co-ordination and co-operation with government and civil society;

5. Recognising the need for a more structured oversight role by Parliament in the context of their independence; and

6. Reviewing the funding models of the institutions, including funding derived from transfers and licences and other fees, with a view to improving accountability, independence and efficiency.

The Committee was also authorised to conduct its review with reference to other organs of state of a similar nature whose work was closely related to the work of the institutions specifically mentioned in the resolution.

At its first meeting on 10 October 2006 the Committee therefore decided that in addition to the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission referred to in Chapter 9 of the Constitution and the Public Service Commission referred to in Chapter 10 of the

Constitution it would include in its review the Pan South African Language Board established in Chapter 1 of the Constitution, the Financial and Fiscal Commission referred to in Chapter 13 of the Constitution, the Independent Communications Authority of
South Africa also covered in Chapter 9 of the Constitution and the National Youth
Commission. The review therefore covered 11 institutions in all.

For ease of reference, the Committee agreed to be officially referred to as the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions.

The Committee was required to submit its report to the National Assembly by 30 June 2007. This was subsequently extended to 31 July 2007. The Terms of Reference are contained in annexure 4 of this report.

The Committee elected Professor Kader Asmal as Chairperson.

2. Approach and Methodology

2.1. APPROACH

Given the national importance of the review and the public interest in the institutions under review, the Committee placed great emphasis on devising a methodology and approach that would maximise public input and awareness of its work.

Engagement with the institutions themselves was considered to be necessary and a priority. It was considered important that there was a shared understanding and appreciation of the terms of reference of the Committee

between the Committee and the institutions under review, amongst the institutions themselves and amongst the public at large. The Committee accordingly commenced its work with a meeting with the heads of the eleven institutions.
The Committee highlighted the fact that its review would focus specifically on the institutional matters and political considerations specified in the terms of reference. The institutions all pledged their collaboration with the Committee and support for the review process.

In formulating an approach to its work, the Committee emphasised the following key considerations:

1. With the exception of the National Youth Commission all institutions under review were products of the constitution-making process and therefore the relevant provisions of the Constitution, read together with the terms of reference of the Committee, should be the point of departure for the deliberations and recommendations.

2. Given the major challenges facing the developmental state, the Committee agreed that even thirteen years after the advent of the new constitutional order, the work done by the various institutions was vital for deepening democracy and promoting a human rights culture in South Africa. Emphasis would thus be placed on whether the institutions were effective in fulfilling their mandates. Where they were not, remedial action to ensure that the laudable and important goals set for these institutions would be achieved in a cost-effective, efficient and people-centred manner would be recommended.

3. The institutions are at different stages of development due largely to them being established at different times.

4. Each institution fulfilled a different function and no two institutions could be said to have exactly the same constitutional status. The Committee therefore wishes to underscore the fact that the institutions had each to be treated according to its particular merits.

5. Distinction could be drawn, for example, between institutions that strengthen constitutional democracy through the promotion and protection of human rights, and the investigation and settlement of complaints regarding the violation of these rights, such as the Human Rights Commission, the Commission for Gender Equality and the Pan South African Language Board and those whose purpose lies in occupying key democratic institutional positions and fulfilling fundamental democratic roles and functions, such as the Auditor-General, the Electoral Commission and the Financial and Fiscal Commission.

6. In crafting recommendations, a focus on strengthening the institutions should be paramount. In forwarding recommendations for immediate consideration, the Committee recognised the challenge for Parliament in amending legislation. However some of the Acts pertaining to the institutions are out of date and do not accurately reflect the constitutional order.

7. The Committee feels that constitutional amendments should be avoided. Recommendations requiring constitutional amendments and/or radical institutional reorganisation should be considered for future implementation.

8. Public participation processes should ensure as much public access and opportunity for input into the work of the Committee as is possible.

2.2. METHODOLOGY

2.2.1. Engagement with institutions under review

To ensure the completeness of information received from the institutions under review, the Committee developed a questionnaire based on its terms of reference. The questionnaire consisted of 25 questions organised into five sections: the role and functions of the institutions, their relationships with other bodies, institutional governance, their interaction with the public, and financial and other resource matters. A copy of the questionnaire is presented in annexure 5 of this report.

On 20 October 2006 the Committee met with the heads of all institutions under review to apprise them of the terms of reference of the Committee and to inform them about administrative aspects of the questionnaire. The Committee commends the institutions for submitting their responses to the questionnaire within the stipulated deadline.

Responses to the questionnaire, annual reports of the institutions, special reports published by the institutions, media reports, public submissions and submissions from civil society organisations formed the basis of interactions between the Committee and individual institutions held between 24 January and 14 March 2007. During these encounters, the Committee requested the institutions to clarify further certain aspects of the matters raised in their responses to the questionnaire since some of the reports appeared to be too general.

The Institutions were also afforded the opportunity to inform the Committee of any relevant information that might not in their view have been adequately covered in the questionnaire.

The Committee invited the institutions to make supplementary written submissions where necessary.

The Committee was pleased to note the interest of Members of Parliament in its interactions with the institutions under review. Chairpersons of the Portfolio Committee on Justice and Constitutional Development, the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Children, Youth and Disabled Persons were present during the Committee's encounter with the National Youth Commission. The Chairperson of the Standing
Committee on the Auditor-General was present and gave a presentation during the Committee's encounter with the Auditor-General. The Acting Chairperson and several members of the Portfolio Committee on Communications were present during the Committee's encounter with the Independent Communications Authority of South Africa. Members of Parliament attended the Committee meeting with the Commission for Gender Equality.

2.2.2. Engagement with the public and civil society

During November and December 2006 and January 2007, the Committee advertised for submissions from the public in various national and regional newspapers. Members of the public were invited to share their experiences relating to the institutions under review. The Committee received a number of submissions from individuals.

Furthermore, the Committee invited nearly 150 civil society organisations, including groups focusing on human rights, labour and business, and academic and legal institutions to make written submissions. After consideration of the written submissions, the Committee invited several civil society organisations and research institutions to make oral submissions on the institutions under review.
In order to get a general sense of the extent of public awareness of the institutions, the Committee commissioned a research institute to conduct a

public opinion survey. The survey was based on a questionnaire developed by the Committee. The questionnaire was administered to 2500 respondents nationally. The outcomes of the survey are presented in a full report contained in annexure 7 of this report.

2.2.3. Engagement with relevant Ministries and Departments

The Committee addressed letters to the appropriate Ministers, which were copied to the corresponding Departments, to draw their attention to the mandate of the Committee and to invite written submissions on the institutions with which they are associated. The following Ministries were requested for information: Arts and Culture, Communications, Education, Finance, Home Affairs, Justice and Constitutional Development, Minister in the Presidency, Provincial and Local Government and Public Service and Administration.

After consideration of the written submissions received, the Committee invited the Ministers of Communications, of Finance and of Justice and Constitutional Development to make oral submissions. The oral submissions to a lesser or greater extent covered matters such as the independence of Chapter 9 and associated institutions, the proposed funding model for Chapter 9 and associated institutions, the role of the directorate responsible for Chapter 9 institutions in the Department of Justice and Constitutional Development and the proposed constitutional and legislative amendments relating to the Independent Communications Authority of South Africa.

2.2.4. Engagement with relevant Parliamentary Committees

Letters were also sent to a number of Chairpersons of parliamentary committees to invite them to submit written comment on the institutions. Information was requested from the following Committees: Portfolio Committee on Arts and Culture, Portfolio Committee on Communications, Portfolio Committee on

Education, Portfolio Committee on Finance, Portfolio Committee on Home Affairs, Portfolio Committee on Justice and Constitutional Development, Portfolio Committee on Provincial and Local Government, Portfolio Committee on Public Service and Administration, Standing Committee on the Auditor-General, Standing
Committee on Public Accounts, Joint Monitoring Committee on the Improvement of Quality of Life and Status of Children, Youth and Disabled Persons, and Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women.

The Chairperson of the Portfolio Committee on Justice and Constitutional Development and the Chairperson of the Standing Committee on the Auditor-General were invited to make oral submissions to the Committee.

A full list of submissions is contained in annexure 8 of this report.

3. Guiding Principles

To ensure consistency in the approach of the Committee to each institution, and to maintain its focus, it was necessary to identify a set of guiding principles derived from the terms of reference of the Committee, the relevant provisions of the Constitution including the authoritative Constitutional Court interpretations of some of the Constitutional provisions and international literature on related institutions.

These guidelines provided the framework within which the institutions were reviewed.

The Committee adopted the following guiding principles:

3.1. INDEPENDENCE

Sections 181, 191, 196 and 220 of the Constitution guarantee the independence of most of the institutions under review. Section 181(2) furthermore provides that the Chapter 9 institutions "must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice". Moreover section 181(3) requires other organs of state to "assist and protect these institutions" to ensure their "independence, impartiality, dignity and effectiveness". Section 181(4) furthermore states that "no person or organ of state may interfere with the functioning of these institutions".

The Constitution also guarantees the independence of other institutions, such as the Public Service Commission (section 196(2), (3)), the Broadcasting Authority (section 192) and the Financial and Fiscal Commission (section 220(2)).

It is noteworthy that there is no explicit constitutional provision for the independence of the Pan South African Language Board. The independence of the Board is provided for in the Act pertaining to the Board.

In the two Constitutional Court judgments directly dealing with Chapter 9 Institutions, and another decision dealing with the concept of independence in more general terms, the Constitutional Court provided some helpful guidelines for looking at the notion of independence of these institutions. These guidelines have been duly factored in and are referred to in greater detail below.

3.1.1. General test for independence

The Constitutional Court set out a general test that could be used to judge the independence of an institution in its judgement in *Van Rooyen and Others v S and Others*[2]. According to the Constitutional Court, the determining factor is whether, from the objective standpoint of a reasonable and informed person,

[2] 2002 (8) BCLR 810 (CC)

there will be a perception that the institution enjoys the essential conditions of independence.

The judgement said that in determining independence consideration should be given to the perception of independence by a well-informed and objective person. Such person should be guided by the social realities of South Africa and the Constitution, particularly the values contained in the Constitution and the differentiation it makes between the different institutions.

The factors such an observer may look at to determine whether an institution is independent or not are: financial independence; institutional independence with respect to matters directly related to the exercise of its constitutional mandate, especially relating to the institution's control over the administrative decisions that bear directly and immediately on the exercise of its constitutional mandate; appointments procedures and security of tenure of appointed office-bearers.

3.1.2. Not part of government

The Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality*[3] that, although a Chapter 9 institution such as the Electoral Commission is an organ of state as defined in section 239 of the Constitution, these institutions cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority. These institutions are state institutions and are not part of the government. Independence of the institution refers to independence from the government.

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[3] 2001 (9) BCLR 883 (CC)

The Court could not agree that these institutions would be subject to the constitutional provisions of co-operative government when they are in fact independent from government[4]. This means that Chapter 9 institutions are *not* (Committee's emphasis) subject to the co-operative government provisions set out in Chapter 3 of the Constitution. These institutions perform their functions in terms of national legislation, but "are not subject to national executive control"[5]. They are part of governance but not part of government.

There is a need for these institutions to "*manifestly be seen to be outside government*" (Committee's emphasis). The judgement lays down that a very clear and sharp distinction must be drawn between these institutions and the Executive authority and no legislative provision or action by the Executive that would create an impression that the institution is not manifestly outside government would be constitutionally acceptable.

The relationship between Parliament and the institutions is different since they are accountable to the National Assembly. The independence of the institutions must, however, be maintained.

3.1.3. Organs of state must assist and respect

Another aspect of independence can be found in section 181(3) which provides that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the *independence, impartiality, dignity and effectiveness* (Committee's emphasis) of these institutions and section 181(4) which states that no person or organ of state *may interfere* (Committee's emphasis) with the functioning of these institutions. Similar provisions for the Public Service Commission are contained in section 196(3) of the Constitution

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[4] Ibid. par 28-29.
[5] Ibid. par 31.

and are made in legislation pertaining to other bodies such as the Independent Communications Authority of South Africa.

From these provisions a few conclusions can be drawn. Firstly, independence is not synonymous with impartiality. Just because a body is able to exercise its duties impartially does not necessarily mean that its independence has been safeguarded. Independence is in essence a more encompassing concept than impartiality. The specific aspects of independence are elaborated later in this chapter.

Secondly, other organs of state have a constitutional duty to ensure the dignity of the Chapter 9 and Chapter 10 institutions. In various judgments dealing with dignity in other contexts the Constitutional Court has argued that dignity will be impaired when action sends a signal that the institution is not worthy of respect. This does not mean institutions should not and cannot be criticised and subjected to questioning, but such questioning should be done with due regard to the independence of these institutions.

Lastly, organs of state have a duty to ensure the effectiveness of these institutions. This is done as part of the accountability and oversight mechanisms established by Parliament and within the context of the independence of the institutions.

3.1.4. Financial independence

The Constitutional Court affirmed the basic principle that Chapter 9 and Chapter 10 institutions must have some degree of financial independence in order to function independently and to be able to exercise their duties without fear, favour or prejudice. At the same time the Constitutional Court made it clear that this did not mean that these institutions could set their own budgets. What was

required was for Parliament to provide a reasonable amount of money that would enable the institutions to fulfil their constitutional and legal mandates. It is important to note that this task is clearly one to be exercised by Parliament. As the Court indicated: "*It is for Parliament, and not the executive arm of government* (Committee's emphasis), to provide for funding reasonably sufficient to enable the [Chapter 9 institutions] to carry out [their] constitutional mandate." The Court accepted that there would inevitably be a tension between the government/Parliament on the one side and the independent institution(s) on the other about the reasonableness of the amount of money to be provided to ensure the effective fulfillment of its constitutional mandate. To determine the reasonable amount of money an institution requires is, however, easier said than done.

It is incumbent upon the parties to make every effort to resolve that tension and to reach an agreement by negotiation and acting in good faith. This, according to the Constitutional Court, would no doubt entail considerable meaningful discussion, exchange of relevant information, a genuine attempt to understand the respective needs and constraints and the mutual desire to reach a reasonable conclusion[6]. Hence, when Parliament engages in this process it must deal with requests rationally, in the light also of other national interests.

This means the institutions must be afforded an adequate opportunity to defend their budgetary requirements before Parliament or its relevant committees. Thus "no member of the executive or the administration should have the power to stop transfers of money to any independent constitutional body without the existence of appropriate safeguards for the independence of that institution."

In the light of the indication in the Treasury submission to the Committee of the National Treasury's acceptance of the role of Parliament in the determination of

[6] ***New National Party par 97***

budgets, the Committee will have to determine what mechanisms should be put in place to ensure that the budget process safeguards the independence of these institutions.

3.1.5. Administrative independence

In the case of the *NNP v Minister of Home Affairs*, the Constitutional Court laid down that the independent bodies supporting democracy require more than financial independence. For these institutions to operate independently and for them to fulfill their respective tasks without fear, favour or prejudice, the Constitutional Court said that the administrative independence of these institutions should be safeguarded. This implies that these institutions must have control over those matters that are directly connected with their functions under the Constitution and the relevant legislation.

No matter what arrangements Parliament or the Executive might make, it is important that the institutions retain the ability to maintain operational control over their core business. What is required, therefore, is that no such arrangements should equate to interference with the constitutional mandate of the bodies to perform their duties impartially.

In the *New National Party* case the Constitutional Court made it clear that section
181(3) requires the Executive to engage with the bodies in a manner that would ensure that the efficient functioning of the Commission is not hampered.

The Constitutional Court further indicated that a failure on the part of the Executive to comply with such obligations "may seriously impair the functioning and effectiveness of those State institutions supporting constitutional democracy and cannot be condoned". This means that neither Parliament nor the Executive

can interfere directly in the day-to-day running of these institutions, can instruct the institutions on day- to-day matters regarding their programmes and implementation, or can get directly involved in the employment or management of staff by these institutions.

At the same time Parliament and the Executive have a duty to support these institutions and, if institutional problems are of such magnitude or seriousness that they make it difficult or impossible for an institution to fulfill its constitutional and legislative tasks, Parliament can – indeed must - assist such institutions to resolve such problems. There was cause for such occasion in July 2006 when Parliament appointed an *ad hoc* Committee to resolve operational issues arising from an alleged dispute within the office of the Public Protector.

Such assistance must not, however, have the effect of removing control over matters directly connected with an institution's functions and must not hamper the efficient functioning of the institution.

In short, while Parliament and the Executive can engage with these institutions to assist them to improve their performance, they cannot do so in a way that would remove control over the administration from the institutions or that would result in interference in the functioning of these institutions.

The Constitutional Court referred to the fact that the Department of Home Affairs cannot tell the Electoral Commission how to conduct registration, whom to employ, and so on. If the Commission asks the government to provide personnel to assist in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be provided with adequate funds to enable it to do what is necessary.

At present, the institutions under review display a wide array of arrangements regarding the involvement of the Executive and/or Parliament in their

administration. For example, the Public Protector and the Commission for Gender
Equality must consult the Minister of Finance when appointing staff. While this might be a practical measure related to confirmation of financial resources, such arrangements should be framed within the purview of the independence of these bodies. This would avoid any perception that these arrangements infringe on the independence of these institutions.

Perhaps more serious is the example of the Public Service Commission in respect of which the Minister of Public Service and Administration has the power through legislation to appoint the Director General of the Commission.

The possible effect of such administrative arrangements on the independence of these bodies is unclear. Therefore, the Committee considered whether such arrangements are appropriate and if not what other arrangements should be put in place to ensure accountability without interfering with independence. This is discussed later in this report.

3.1.6. Independence and appointments/removals procedures

The general provisions in sections 193 and 194 of the Constitution provide for the appointment and removal of the Public Protector, the Auditor-General and the members of the various Commissions established in Chapter 9 of the Constitution. Similar provisions are made in Chapter 10 for the Public Service Commission and in Chapter 13 for the Financial and Fiscal Commission.

When required to certify whether the proposed Constitution of 1996 met the provisions of the values of the Constitution identified in the Constitutional principles laid down in the 1993 Constitution, the Constitutional Court found that the provision that would allow for a dismissal of the Auditor-General or the Public Protector by a simple majority of the members of the National Assembly

did not comply with the requirements of independence, given the fact that the Auditor-General would act as a watchdog over the government.

The appointment of the Auditor-General, the Public Protector and the various Commissioners (with the exception of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities) is assigned to a Committee of the National Assembly, proportionally composed of members of all parties represented in the Assembly[7].

This is mainly done through the establishment of *ad hoc* Committees. The Committee feels that given the nature and composition of *ad hoc* Committees and the specific knowledge required to effectively recommend appointments to a Commission or other constitutional body, a more appropriate mechanism is required. Recommendations are made in this regard later in this report.

The general provisions of the Constitution in section 193 do not specify the process for the appointment. However, section 193(6) read with section 59(1)(a) provides for the facilitation of the involvement of civil society in the recommendation process. The Committee considered whether the current practice of inviting civil society bodies to nominate candidates is sufficient or whether other practical and reasonable mechanisms should be devised to enhance the participation of civil society. The Committee makes a specific recommendation later in this report as to how this could be achieved.

Regarding removal from office, it is important to note that no general authority is in fact given to the National Assembly for the removal from office of the Auditor-General, the Public Protector or Commissioners. This can only be done on objective grounds, including "misconduct, incapacity and incompetence"[8].

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[7] Section 193(5).
[8] Section 19(1)(a), section 196(11)(a).

This means that these office-holders cannot be removed from office on any other ground without an amendment of the Constitution.

The Constitution does not contain any provisions for the appointment and dismissal of members of the Independent Broadcasting Authority that must be set up in terms of section 192 of the Constitution. The Constitution, section 192, does however require this authority to be independent and to act in the public interest.

Applying the general principle set out by the Constitutional Court, it is clear that members of the Authority should have some degree of protection against dismissal if, from the objective standpoint of a reasonable and informed person, the perception is to be supported that the institution enjoys the essential conditions of independence as described earlier. At the very least this should require that members of the Authority should not be subject to dismissal on non-objective grounds relating to choices they have made, but only on objective criteria such as incapacity, misconduct or incompetence. The 2000 Act provides for this.

It is interesting to note that in relation to the dismissals procedure the Constitution makes a distinction arising out of the nature and authority of the office. Regarding the Auditor-General and the Public Protector, the former requires a 60% vote of the members of the National Assembly for removal from office and the latter requires a simple majority. The Committee feels that the same arrangements for the Auditor-General should also have been applied to the Electoral Commission.

3.1.7. Limits to independence

In *Van Rooyen and Others v S and Others* (as well as in the *First Certification Case*), Constitutional Court made it clear that requirements of independence will not be same for all bodies whose independence is being guaranteed. Each institution should be approached differently. This means that, depending on the nature and mandate of the institution; the stringency of the requirements for independence may differ. An institution dealing with complaints against the legislature and Executive such as the Public Protector will require more vigorous protection of its independence to ensure the legitimacy of the institution in the eyes of the public.

Thus, some basic principles can be identified to establish the minimum requirements for independence. As indicated earlier, there is a constitutional imperative for these institutions to be seen not to be part of government. Thus, any involvement of the Executive in the daily operations or institutional arrangements of an independent institution would be constitutionally unacceptable. Even where the President is given a role like the power to appoint members of the various commissions, this is a formal role.

The National Assembly is given the constitutional authority to deal with the independent institutions and has a constitutional duty to hold these institutions to account. Again, this excludes any interference in the daily operations or institutional arrangements of these institutions. Parliament can - and indeed has a constitutional duty in this regard – enact legislation that will allow these institutions to fulfill their constitutional mandates in an *effective* (Committee's emphasis) manner. However, two essential requirements must be met in respect of any intervention by Parliament or the National Assembly: First, an intervention must not interfere with the final control over the finances or administration of the relevant institution; and, second, it must not give rise to a reasonable apprehension of interference amongst informed individuals.

The difference in the powers and functions of the Chapter 9 and associated institutions therefore determines the extent of authority of the National Assembly and touches on their independence.

3.2. ACCOUNTABILITY OF THE CHAPTER 9 AND ASSOCIATED INSTITUTIONS

In considering the concept of accountability, distinction must be drawn between accountability and the interrelated concept of oversight. Often, these concepts are used interchangeably, yet they have very distinct and precise purposes and functions. In a report prepared for the Joint Rules Committee of Parliament in July 1999[9], it is stated that accountability "implies a relationship [defined by] a hierarchy and a duty of a body to explain and justify its conduct to another body". The Constitution is specific regarding the accountability of Chapter 9 institutions, the Public Service Commission and the Financial and Fiscal Commission to the
National Assembly or Parliament in sections 181(5), 196(5) and 222 respectively.

While there is no constitutional provision for accountability of the Independent Communications Authority of South Africa, the Pan-South African Language Board and the National Youth Commission, the Acts establishing these institutions require their annual reports to be tabled in Parliament.

In terms of section 181(5) of the Constitution, state institutions supporting constitutional democracy "are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year'. This requires reporting to the National Assembly on the implementation of their mandates and expenditure of public funds. Similarly, the associated institutions report to the National Assembly or Parliament through

[9] Corder H, Jagwanth S, Saltau F (1999): Report on Parliamentary Oversight and Accountability

their annual reports. Parliament, and specifically the National Assembly, must provide for mechanisms to ensure such accountability. The crucial component of the accountability mechanism is the structures, systems and processes established by Parliament to engage effectively with the reports it receives.

Oversight refers to the role played by the legislature in assessing the performance and conduct of organs of state and recommending action for improvement. Section 55(2)(b) of the Constitution empowers the National Assembly to conduct oversight over any organ of State. The interrelatedness of accountability and oversight is evident in the types of reports issued by Chapter 9 and associated institutions that serve to inform and complement Parliament's oversight of specific matters. Such "special reports" would require different processes and exposure in Parliament.

While oversight is continuous, accountability refers to a particular instance, incident or event.

Furthermore, in the report mentioned above, reference is made to "*amendatory accountability*". This refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered.

As mentioned earlier, in the case of the Public Protector, the National Assembly conducted an inquiry in 2006 at the request of the Public Protector through the Office of the Speaker, arising out an alleged dispute in the Office of the Public Protector. It is important to note that the accountability mechanism put in place by the National Assembly in this instance *assisted* the Public Protector.

Due consideration must be given to ensuring that the oversight role of Parliament and the accountability mechanisms established do not infringe on the independence of Chapter 9 and associated institutions.

3.3. EFFECTIVENESS

Assessing the effectiveness and efficiency of Chapter 9 and associated institutions was a critical component of the terms of reference of the Committee. Effectiveness refers to more than a quantitative assessment of output, but rather a quantitative and qualitative assessment of outcomes. Section 181(3) of the Constitution compels other organs of state to assist and protect Chapter 9 institutions to ensure their effectiveness.

In addition, the Committee draws the special attention of all bodies established by the Constitution to the provisions of section 237, which is headed "diligent performance of obligations". This section states that all constitutional obligations must be performed diligently and without delay. The importance of examining effectiveness is that it shifts the focus from inputs and outputs to an outcomes-based assessment of the projects, programmes and policy implementation of the institutions. The assessment therefore goes beyond concerns about whether an institution is fulfilling its constitutional and legal duties efficiently and examines the relevance, impact and quality of the institutions. "Relevance" would elaborate on whether the institutions address a particular need and "impact" would assess the extent to which the need is addressed.

3.4. INDIVISIBILITY, INTERDEPENDENCE AND INTERRELATEDNESS OF HUMAN RIGHTS

Traditionally, a distinction was made between civil and political rights on the one hand and social and economic rights on the other. Social and economic rights were regarded as claims against the State and therefore not equal to civil and political rights.

The Bill of Rights in our Constitution contains both civil and political rights and social and economic rights. It is based on the widely accepted idea that all rights are universal, indivisible, interdependent and interrelated as affirmed in the Vienna Declaration and Programme of Action of 1993. Any assessment of the appropriateness and effectiveness of Chapter 9 and associated institutions must therefore take this into account.

Given our particular history, the indivisibility and interrelatedness between political and civil rights, on the one hand, and socio-economic rights, on the other, cannot be denied. Without socio-economic rights, political and civil rights cannot exist in a meaningful way and vice versa. With due recognition to the challenges faced by the State, our Constitution makes provision for the progressive realisation of social and economic rights, with the exception of basic education including basic adult education, which is peremptory.

What this means in practice is that a true constitutional democracy encompasses more than simply providing people the opportunity to vote. Socio-economic rights, such as the right to adequate housing, basic services, water and health care are fundamental rights in the sense as they go the heart of vulnerable groups' most basic survival needs.

Furthermore, providing for both civil and political rights, and also socio-economic rights in the Constitution, meant giving actual substance and content to the notion of equality. These rights aim to create a "minimum civic equality", which in turn allows people to fully exercise their political and civil rights. For example, a person would arguably be more willing and able to exercise their civil and political rights, when their basic needs of food, shelter, adequate health care and basic services have been met.

The drafters of our Bill of Rights realised the indivisibility and interdependence of human rights. Within the South African context, for our Constitution to have

“a meaningful place in the hearts and minds of the citizenry” it had to address the “pressing needs of ordinary people”. It could not be seen to “institutionalize and guarantee only political/civil rights and ignore the real survival needs of the people – it must promise both bread and freedom”[10].

The Committee thus had to assess whether the current and intended constitutional and legal mandates of the constitutional bodies enhanced the promotion and protection of human rights in general, given the interrelated nature of human rights.

It could be argued that because of the interdependence and indivisibility of rights, there could be a danger that a proliferation of human rights bodies could result in the creation of gaps in services and support to the public and furthermore could create tremendous confusion regarding public access to recourse for remedial action. Where there are various bodies dealing with human rights matters, well-structured and effective co-ordination amongst the bodies, efficient record-keeping and document management and compatible systems and processes are vital to ensure that services to the public are accessible, comprehensive and that duplication of work is kept to a minimum. The Committee had to assess whether one single “umbrella” human rights body would not be better suited to give content to the indivisibility and interdependence of human rights by creating a seamless and focused approach to human rights as a whole.

4. Conclusion

With due regard to its terms of reference and having established a set of principles to guide its work, the Committee now turns to the review of each of

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[10] Haysom 1992: 454

the institutions. The Committee begins with distilling the common issues and makes key recommendations in this regard.