



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA



**WORKSHOP ON REPORT OF THE AD HOC COMMITTEE  
ON THE REVIEW OF CHAPTER NINE AND  
ASSOCIATED INSTITUTIONS**

**REPORT**  
11 SEPTEMBER 2015





**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

OFFICE ON INSTITUTIONS SUPPORTING  
**DEMOCRACY**



## VISION

An activist and responsive people's Parliament that improves the quality of life of South Africans and ensures enduring equality in our society.

## MISSION

A vibrant people's assembly that intervenes and transforms society and addresses the development challenges of our people;

Effective oversight over the Executive by strengthening its scrutiny of actions against the needs of South Africans;

Participation of South Africans in the decision-making processes that affect their lives;

A healthy relationship between the three arms of the State, that promotes efficient co-operative governance between the spheres of government, and ensures appropriate links with our region and the world; and

An innovative, transformative, effective and efficient parliamentary service and administration that enables Members of Parliament to fulfill their constitutional responsibilities.

## VALUES

Openness

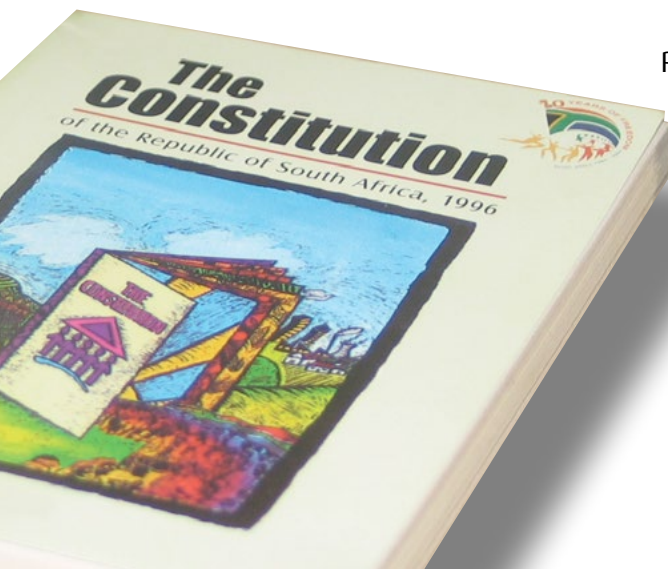
Responsiveness

Accountability

Teamwork

Professionalism

Integrity



## INSTITUTIONS SUPPORTING DEMOCRACY

1. Auditor-General of South Africa (AGSA)
2. Commission for Gender Equality (CGE)
3. Commission for the Promotion & Protection of the Rights of Cultural, Religious & Linguistic Communities (CRL Commission)
4. Electoral Commission (IEC)
5. Financial & Fiscal Commission (FFC)
6. Independent Communications Authority of South Africa (ICASA)
7. National Youth Development Agency (NYDA)
8. Pan-South African Language Board (PanSALB)
9. Public Protector of South Africa (PPSA)
10. Public Service Commission (PSC)
11. South African Human Rights Commission (SAHRC)





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# EXECUTIVE SUMMARY

## 1. EXECUTIVE SUMMARY

On 11 September 2015, a workshop convened by Ms Baleka Mbete, the Speaker of the National Assembly, took place at the Constitutional Court of South Africa - between the Presiding Officers of the National Assembly, Institutions Supporting Democracy (ISDs) and Members of the Executive associated with the ISDs.

Convened for the purpose of discussing and processing the recommendations contained in the 2007 Report of the Ad Hoc Committee on Chapter 9 and Associated Institutions, the meeting was attended by: the Deputy Speaker, Mr Lechesa Tsenoli; the Chairpersons of ISD related Portfolio



Committees, the Chairpersons or representatives of all the ISDs (with the exception of the National Youth Development Agency); the Minister of Justice and Correctional Services, Adv. T M Masutha; Minister of Communications, Ms A F Muthambi; Minister of Telecommunications, Mr S Cwele; Deputy Minister of Justice and Correctional Services Mr J Jeffery, Deputy Minister of Cooperative Governance and Traditional Affairs, Mr A Nel; the Deputy Minister of Home Affairs, Ms F I Chohan; and a House Chairperson from the National Council of Provinces, Mr A J Nyambi.

Mr Cecil Burgess, a former Member of Parliament who was part of the Ad hoc Committee that presented the report under discussion, facilitated the workshop together with the Deputy Speaker of the National Assembly. And, former United Nations High Commissioner - Justice Navi Pillay, and UKZN Law Professor, Karthy Govender were invited as guest speakers.

The main areas of discussion in the Workshop included the following:

- Background to the establishment of the Ad hoc Committee
- A summary of the key themes and recommendations contained in the Ad hoc Committee Report
- Consideration of the Ad hoc Committee Report recommendation on a single human rights body
- Consideration of the Ad hoc Committee Report recommendation on the de-linking of the budgets of ISDs from associated departments
- Consideration of the Ad hoc Committee Report recommendation on standardised appointment procedures
- Resolutions and the way forward

In summary, the workshop resolved that the following key issues require further attention:

1. Consideration of the establishment of a single human rights body.
2. Further assessment of the societal impact of the work conducted by the ISDs.
3. Current resource limitations.
4. Processing of Ad hoc Committee Report recommendations by ISDs.
5. How the ISDs challenge private power.
6. Oversight and collaboration between Parliament and ISDs.



# BACKGROUND

## 2. PROVISION OF BACKGROUND BY THE DEPUTY SPEAKER

The Deputy Speaker, Mr Lechesa Tsenoli, explained the background to the establishment of the Ad hoc Committee on the Review of Chapter 9 and Associated Institutions, as summarised below.

Approximately ten years into democracy, the Government found it opportune to assess the extent to which society had been transformed and human rights entrenched through the operations of the Institutions Supporting Democracy. The National Assembly was accordingly requested to conduct a review.

Thus, in 2006, the Ad hoc Committee on the Review of Chapter 9 and Associated Institutions, chaired by the late Prof Kader Asmal, was tasked to assess:

- the suitability of the constitutional and legal mandates of the ISDs for the South African environment;
- whether the consumption of resources by them was justified in relation to their outputs and contribution to democracy; and
- whether a rationalisation of function, role or organisation was desirable or would diminish the focus on important areas.

In short, the Ad hoc Committee was to assess the ISDs' effectiveness and relevance – approximately ten years after their establishment – as well as the requirements to strengthen them further.

The Ad hoc Committee Report covers the following five major themes:

- Financial matters and budget allocation
- Appointment procedures
- Relationship between the Institutions and Parliament
- Institutional governance and accessibility
- A single human rights body

At a meeting held in February 2015, between the Presiding Officers and ISDs, the Speaker indicated that the Fifth Parliament would take it upon itself to process the Ad hoc Committee Report in one way or another. This would contribute to strengthened relationships between Parliament and the ISDs, and would enhance understanding amongst all stakeholders of the challenging areas that need to be addressed.



# THE FIVE MAJOR THEMES

## 3. SUMMARY OF THE FIVE MAJOR THEMES AND RECOMMENDATIONS

Former MP and workshop facilitator, Mr Cecil Burgess, presented a summary of the five key themes and recommendations contained in the Ad hoc Committee Report.

### 3.1 Financial Matters and Budget Allocation

The Ad hoc Committee notes that the ISDs follow different and inconsistent funding processes. The budgets of all of the ISDs are located within the budget appropriations of various national government departments. The national government departments act as a conduit for the transfer of the budget funds. And, whilst most of the ISDs submit their budgets directly to National Treasury, they are not able to defend their budget submissions.

The Ad hoc Committee concludes that the location of the ISDs' budgets within the budget allocations of specific government departments negatively impacts on the perceived independence of the ISDs and creates a false impression that the Institutions are accountable to the government departments for the use of their finances.

Therefore, the Committee recommends:

- That the budget process of the ISDs should be revised.
- That the budgets of all the ISDs should be part of Parliament's budget vote as this will afford the ISDs a greater degree of standardisation and protect the independence of the institutions.

### **3.2 Appointment Procedures**

The Ad hoc Committee reports that there are vast differences in the appointment procedures of commissioners and members of the various ISDs. The Committee recognises that due to their different mandates, powers and functions, their composition and appointment procedures cannot be identical. Nevertheless, in terms of the report, a reasonable degree of consistency in appointment procedures is required whilst a measure of variation therein must be accommodated. In terms of continuity, the Ad hoc Committee concludes that the simultaneous expiry of the terms of office of all, or even a large number of commissioners or members negatively impacts on the effectiveness and efficiency of ISDs.

Therefore the Ad hoc Committee makes the following recommendations regarding appointment procedures:

- That Ministers should play no role in the appointment procedures for independent institutions, as this role can be seen as infringing on the independence of those institutions.
- That the President's non-discretionary role in making appointments must be fully appreciated.
- That the principle of staggering should apply to all ISDs, except for the Auditor-General and Public Protector.
- That there must be uniformity in the appointment of Chairpersons, in that they should be appointed by the institutions themselves or by the relevant portfolio committee.
- That public involvement in the appointment process should be enhanced.

### 3.3 Relationship between the Institutions and Parliament

The Ad hoc Committee report states that there is inadequate engagement between Parliament and the ISDs. In addition, there is little in terms of legislation to guide Portfolio Committees in holding ISDs to account while simultaneously respecting their independence. As a result, committees are often unclear on how or to what extent they should respond to work conducted by ISDs.

Therefore, the Committee recommends:

- The establishment of a business unit to co-ordinate all interactions between ISDs and Parliament. This Unit was established in 2010 and is called the Office on Institutions Supporting Democracy (OISD).
- The capacity of Portfolio Committees to engage with the substantive reports (Special Reports) of ISDs should be significantly enhanced.
- The establishment of subcommittees within committees to focus on specific matters emanating from reports of ISDs.
- Adopting an adapted version of the “Accountability and Independence of Constitutional Institutions Act”, which was never adopted by Parliament, or crafting some other accountability legislation to regulate the interrelationship between Parliament and ISDs.

### 3.4 Institutional Governance and Accessibility

The Committee recommends:

- Legislative amendments to enabling legislation to clarify lines of authority between Chairpersons and Commissioners, and between Commissioners and the Secretariat.
- That enabling legislation should also be amended to include minimum standards for the disclosure of interest.
- That uniform procedures be developed for determining salaries and conditions of services of commissioners and heads of institutions.
- That enabling legislation should be amended to provide a coherent and comprehensive framework for the regulation of conflict of interests.

### 3.5 A Single Human Rights Body

The Ad hoc Committee expresses the view that the present institutional framework of the human rights related institutions has created fragmentation which confounds their mandates. The Committee refers to overlaps with regards to the mandates of several of the human rights related institutions, and consequently proposes the establishment of a single human rights body through the amalgamation of the following institutions: Commission for Gender Equality (CGE), the South African Human Rights Commission (SAHRC), the Pan-South African Language Board (PanSALB), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) and the then National Youth Commission (NYC). *(The NYC has since been converted to the National Youth Development Agency, NYDA, with a different mandate.)*

The Ad hoc Committee proposes that such a unitary, umbrella body be called the South African Commission on Human Rights and Equality. It recommends that this Commission should have dedicated commissioners for each of the following areas: gender, children and youth, and people with disabilities.

According to the Ad hoc Committee, amalgamating these institutions would simplify the oversight task of the National Assembly and in turn enhance the level of parliamentary oversight provided.

The Ad hoc Committee is of the view that there are three main advantages to the establishment of an umbrella human rights commission:

- The avoidance of duplication of effort
- Administrative efficiency and more effective use of resources
- Greater accessibility and promotion of public awareness of the Bill of Rights

The Ad hoc Committee recommends as a first step that a Task Team be set up consisting of the heads of relevant ISDs and a number of members of the NA to produce a roadmap and guide the process.



# SINGLE HUMAN RIGHTS BODY

## 4. CONSIDERATION OF AD HOC COMMITTEE RECOMMENDATION ON A SINGLE HUMAN RIGHTS BODY

### 4.1 Response to the recommendation by a representative of the human rights related ISDs

Discussions on this subject were introduced by a presentation by the Chairperson of the CRL Rights Commission, Ms. Thoko Mkhwanazi-Xaluva, delivered on behalf of the human rights related institutions affected by the Ad hoc Committee's amalgamation recommendation, namely CGE, PanSALB, the CRL Rights Commission and the SAHRC.



The ISDs emphasised the importance of contextualising the Ad hoc Committee's recommendations, considering the fact that the landscape has in the meantime changed. It was pointed out that during the review by the Ad hoc Committee, some of the Institutions had not been in existence for long. The CRL Rights Commission, for example, was being assessed after barely a year of being established. As such, whether or not it was fulfilling its mandate could not be fully explored. Others were still developing effective internal structures and processes.

The ISDs asserted that if a similar enquiry were to be undertaken today, the outcome in terms of this particular recommendation would be different.

The view was expressed there had all along been inadequate funding to support their constitutional mandates. Whilst appreciating budgetary constraints, the ISDs' appeal is that financial considerations should not be the sole deciding factor in deciding whether or not to implement the amalgamation recommendation.

Ms Mkhwanazi-Xaluva indicated that the four Institutions agree that presently the establishment of a single human rights body is not advisable. They asserted the current debates and dialogues in the country in the broad human rights sector need to be given space to happen and should not be stifled through amalgamation. The tensions and contestations of a broad array of rights should be allowed to continue separately as a part of celebrating the diversity in the country.

However, there is also consensus among the four Institutions that the existing issues of overlap must be addressed through co-operation and collaboration. According to the CRL Chairperson, the location of the institutions within the same precinct – with the exception of PanSALB – assists with this, allowing complainants easy access to all the Institutions.

The Chairperson further indicated that in an attempt to address the issues of overlap, there is a deliberate move by the institutions to collaborate and co-operate with each other, particularly when conducting investigations. An example was given that presently the CRL Commission is co-operating with SAHRC and CGE to investigate the commercialization of religion, as this matter deals with crosscutting issues that affects these other two institutions.

Ms Makhwanazi-Xaluva asserted that in addressing the overlaps, the institutions must find commonality in their investigations and work together to find solutions. The Chairperson also stated that a further issue that needs to be addressed is that of a system of referral, the institutions need to develop a proper referral system between themselves, which will also assist with the tracking, and monitoring of investigations.

The manner in which the country arrives at a decision about the issue of whether or not to create a single human rights body is considered to be of utmost importance.

## 4.2 Ministerial input

The Minister of Justice & Correctional Services, Adv. Michael Masutha, the Deputy Minister of Cooperative Governance & Traditional Affairs, Mr. Andries Nel, and Deputy Minister of Justice and Correctional Services, Mr. John Jeffery, responded to the recommendation under discussion from the perspective of the Executive. The following important points and questions emerged from their presentations:

- The Preamble of the Constitution emerged from the story of our country's past and remains an ideal for the future, thus providing critical guiding principles.
- The issue of a single human rights body must be viewed from the perspective of assessing the extent to which we have been able to live up to this constitutional ideal over the past 20 years and whether the ISDs have assisted in achieving these standards.
- The salient question, two decades into democracy, is where we are as a country. Have we as a nation through these institutions supporting democracy achieved the ideal of gender equality, a human rights culture and all other values espoused in the Constitution? How, in the current framework, have the ISDs achieved the advancement of human rights? Answering these questions is pivotal when considering whether or not a single human rights body should be established.
- In answering this question we should be guided by empirical evidence, considering the interrelated nature of issues and the delineation of ISDs on a practical level.
- A case could be made that since 50% of citizens are women, and that this category cannot be subsumed into a single human rights body.
- Objectivity is needed when dealing with this issue and the focus should not be on retention of budgets and positions. If there is empirical evidence that the establishment of a single human rights body would better serve the goal of advancing a human rights culture, then it should be explored.
- As a point of departure, there should be agreement about which parts of the Ad hoc Committee Report can be acted upon. Many of the recommendations contained in the approach have already been adopted and acted upon. Examples of the establishment of the Office on Institutions Supporting Democracy (OISD) in the Office of the Speaker, and progress with regards to the standardisation of appointments and the remuneration of commissioners.
- It is important to address the issue of follow-up mechanisms and to get feedback on what has been done out into the public domain so that South Africans would understand how matters have been dealt with.

- The availability or ease of access to a single human rights body as opposed to separate bodies is important and global perspectives can guide us.
- When considering the matter of merging the institutions, the resource constraints issue is one that needs to be looked at fundamentally. For the reason that, if there is no money to fund the institutions as they are currently constituted, then they will be unable to fulfil their mandates. Presently, a common concern amongst the Institutions is that they do not receive enough money and on account of the resource constraints facing the country, the funding of these institutions cannot be readily increased.
- The Remuneration Act, which deals with the remuneration of Commissioners (excluding PanSALB), results in discrepancies. Furthermore, significant increases in the remuneration of Commissioners are anticipated with the implementation of the Act, however due to the countries resource constraints, we cannot afford to do that.
- It is inadvisable as pointed out by Justice N Pillay, to reduce the number of Commissioners, because we need different voices in the discourse of human rights.
- A formulation of a single human rights body could be constructed to have different chambers within the single institution. For example, there could be a chamber dealing with matters surrounding gender, another for language etc.
- Currently there is duplication of resources nationally, which is repeated provincially; the most serious duplication is that of staff, such as the CEO's. One administration would provide significant cost savings, which cannot be ignored.
- It must be noted however, that gender issues and women's issues require special attention. Strides have been made, but more still needs to be done. Similarly, with linguistic matters. A great deal of engagement is needed, and any formulation of a single human rights body must accommodate this need.

### **4.3 Comparative perspective on human rights related models by guest speaker, Justice Navi Pillay**

*Former United Nation High Commissioner of Human Rights*

Drawing upon her international experience as a UN High Commissioner for Human Rights during 2008-2014, Justice Pillay provided background on the various models of national human rights institution, their powers and examples of the countries in which they are used. She mentioned that there are also hybrid institutions with multiple mandates; and that the decision regarding which model to use rests with each country, based on a variety of factors, including: social, legal, historical and regional factors as well as cost and economic circumstances.

In her presentation, Justice Pillay highlighted a number of the recommendations contained in the

Ad hoc Committee Report, and commented on the fact that the collaboration and coordination of activities of the Chapter 9 and associated institutions are currently perceived to be non-existent. She also emphasised the importance of increasing the visibility of the lesser-known institutions supporting democracy.

She added that CEDAW, the Convention on the Elimination of all forms of Discrimination against Women, does not argue for a separate gender commission but made clear its expectations. The Convention “expects national human rights institutions to ensure that their work is based on the principles of non-discrimination and of formal and substantive equality between men and women, and that women have easy access to all services for the protection of their rights. Furthermore, the Convention expects that the composition of members and staff of national human rights institutions is gender balanced at all levels.

In conclusion, Justice Pillay said that a single Commission would be able to give proper attention to all human rights, but would have to have a chambers-type approach, as no single body would have the expertise to deal with different types of discrimination. “Resources, training, expertise, accountability and political will would be necessary.”

#### **4.4 Discussion**

During the discussion on this theme, the following diverse range of views/ concerns were expressed:

- The ISDs were all created purposely when the Constitution was crafted.
- A lot can be done to enhance the effectiveness of the human rights related ISDs without amalgamation.
- Debating the issue as to whether or not to establish a single human rights body is necessary to improve the quality of decisions that will ultimately be taken.
- Gender issues will always need special attention.
- Cultural, religious and linguistic issues might receive less attention should amalgamation occur.
- Amalgamation might not yield the best results.
- When it comes to implementing programmes, it is beneficial to have more rather than fewer commissioners.
- Not enough resources are currently allocated to the ISDs, and that most commissioners are poorly paid.

- There is a need to manage resources more efficiently and that amalgamation would be more cost efficient; and, an integrated approach, from an impact point of view, will be more effective and less costly.
- Would a single CEO manage to deliver, should amalgamation take place?
- Sometimes some ISDs collaborate anyway, but it is never publicised.
- Sometimes duplication (with regards to some of the work done by the ISDs) should not be seen as a negative – but rather as reinforcement.
- The Ad hoc Committee report is out-dated. A new investigation should be conducted.
- A number of recommendations in the Ad hoc Committee Report have already been acted upon.
- ISDs need more time to discuss the implications of a merger, and alternatives to a merger.



# DE-LINKING OF THE BUDGETS

## **5. CONSIDERATION OF AD HOC COMMITTEE REPORT RECOMMENDATION ON DE-LINKING OF THE BUDGETS OF ISDS FROM ASSOCIATED DEPARTMENTS**

The Ad hoc Committee reports on the fact that the ISDs have different and inconsistent funding processes. The budgets of all the ISDs are located within the budget appropriations of various national government departments. Thus, the budgets of the national government departments act as a conduit for the transfer of their funds.

While most of the ISDs submit their budget proposals directly to National Treasury, with the exception of the Financial and Fiscal Commission, they are not able to defend their budget submissions.

The Ad hoc Committee concludes that the location of the ISDs' budget within the budget allocations of specific government departments negatively impacts on the perceived independence of the institutions and creates a false impression that they are accountable to the government departments for the use of their finances.

The ISDs as a collective were given the first opportunity to present their views in this regard.

### **5.1 Presentation by Forum for Institutions Supporting Democracy (FISD)**

Having given a brief overview of the governance structure in South Africa, and the constitutional provisions with respect to the Institutions Supporting Democracy, the current FISD Chairperson, Mr Bongani Khumalo touched on the fact that the ISDs are required to comply with the terms of the Public Finance Management Act, 1999 (PFMA). Treasury regulations in terms of the use of public finances and the attainment of their performance mandates apply. For example, the accounting officers of the Institutions also need to comply with the responsibilities of such officers, as set out in Chapter 5 of the PFMA.

Mr Khumalo pointed to challenges identified by the ISDs and the Constitutional Court that are caused by the current funding arrangements, as follows:

- Different budgeting processes are followed with some ISDs enjoying more autonomy than others
- Institutions may not be able to function and exercise their duties without fear, favour or prejudice if the Executive has control over the funding
- The lack of a platform to defend their budgets (whilst recognising that financial independence does not mean that ISDs have the right to set their own budgets)

Mr Khumalo indicated that a total of just more than R3 billion is currently transferred to the ISDs. This is also the approximate amount that will have to be transferred to Parliament or transferred from the revenue fund directly, depending on future decisions that are taken in respect of funding arrangements. Transfers currently range between R36.6 million and R1.6 billion, and are made from nine different departments. Mr Khumalo, on behalf of the ISDs, expressed the view

that alternative arrangements would simplify this process; also, that having one transferring department of vote could reduce administrative costs.

Two alternative options for funding arrangements were put forward:

- **Option one:** Separate Votes for the ISDs within the National Treasury budget process and with ISDs remaining accountable to the National Assembly.
- **Implications:** Additional administrative requirements on the part of National Treasury because of the expansion of the number of Votes, and additional MTEC discussions for the ISDs
- **Option two:** ISDs' allocations located within Parliament's structure and budget
- **Implications:** (1) Legislative implications, including an amendment of the Financial Management of Parliament and Provincial Legislatures Act, specifically section 35 dealing with transfers. The inclusion of a chapter is recommended to address the responsibilities of a Chief Executive Officer, Director, Manager, etc; (2) Budget implications, and readiness by Parliament to manage an additional R3 billion in terms of PFMA requirements, implying a review of Parliament's budget structure and processes and additional personnel requirements, with related costs; (3) Organisational implications, in that additional structures might be required to include a budget process for ISDs.

## 5.2 Perspective, presented by Prof M Jahed, Director: Parliamentary Budget Office

Recognising that ISDs need financial independence from the Executive, the Parliamentary Budget Office (PBO) presentation by Prof Mohamed Jahed looked at the current ISD funding arrangements, and the challenges associated with these arrangements. Reference was made to the fact that economics and politics are two sides of the same coin, and cannot escape from each other. The PBO presentation also looked at alternative options for funding arrangements, and what those options would mean for National Treasury and Parliament.

Currently, ISD budget allocations are located within the relevant government departments, meaning that different budgeting processes are followed. This results in some ISDs enjoying more autonomy than others. The PBO cautioned that it might be difficult for ISDs to function without fear, favour, or prejudice when they are financially dependent on the Executive. The PBO pointed out that it is actually Parliament's obligation to facilitate the provision of adequate funding to ensure that ISDs carry out their mandates, but that this is not possible within the current Parliamentary structures and procedures. It was explained that financial independence of the ISDs would not mean that they would be able to set their own budgets, but it would offer them a platform to negotiate and to defend their budgets.



As per the ISDs presentation, two funding options were offered as alternatives to the current funding model. The first option would allow the eleven ISDs their own Votes within National Treasury; and the second option would see the ISDs being funded from Parliament's structure and budget. Both options would require legislative, administrative and structural amendments.

He concluded by saying that with R3.1 billion currently being allocated to ISDs, moving it to Parliament would have huge implications.

### 5.3 Ministerial Input

The input provided in this regard by the Deputy Minister of Home Affairs, Ms Fatima Chohan, can be summarised as follows:

- The existing system holds two advantages for the ISDs: Firstly, their ring-fenced budgets can be championed by the relevant Minister at the level of the Ministerial Budget Committee and in Cabinet. Secondly, the current system enables collaboration with 'partner' state departments on service and governance programmes which otherwise would be challenging.
- If properly utilised, such collaboration presents a win-win outcome.
- Collaboration or non-collaboration is subject to the personal preferences of the leaders of these constitutional institutions, and deserves reflection in the broader context, with a view to further developing them to be truly responsive, open and transparent.
- The matter of independence has been an on-going and often hindering factor in the discourse between the Executive and ISDs. The fact that the ISDs receive their budgets through a government department need not pose a 'potential threat' to their independence, as stated in the FISD's presentation. The concern lies with the institutions themselves; not ordinary South Africans.
- Supporting democracy is a mandate that is carried by other organs of state too – the Executive in particular. It therefore naturally speaks to the need for collaboration among all state organs for the benefit of all South Africans.
- The Constitution is designed to delicately maintain checks and balances. It would be an inherent contradiction if Parliament were to champion the work of the ISDs and hold them to account for their administration of state funds. If Parliament does not robustly execute its mandate, "who will judge the judges?"
- Robust oversight and developing accountability mechanisms in Parliament is crucial to the independence of the bodies. Nonetheless, Parliament is able to propose amendments to the budget within certain parameters if it wishes to come to the aid of one or other institution.

- The collaborative opportunities relating to Parliament's oversight role and where that intersects with the work of some of the ISD have not been fully exploited. Again this would entail collaboration.
- There is great room to narrow duplication. The issue of overlaps – also in respect of mandates – is real and translates into a waste of precious state resources. Right sizing, integration, harmonising or streamlining of the ISDs is needed, without compromising on the substance of work done.



# APPOINTMENT PROCEDURES

## **6. CONSIDERATION OF AD HOC COMMITTEE RECOMMENDATION ON STANDARDISED APPOINTMENT PROCEDURES**

The Ad hoc Committee Report points out that there are significant differences in the appointment processes of the chairpersons and members of the various ISDs. However, due to the different mandates, powers and functions of the various institutions, their composition and appointment procedure cannot be identical.

## 6.1 Perspective presented by guest speaker, Prof Karthy Govender Professor of Law - University of Kwazulu-Natal

Former commissioner of the South African Human Rights Commission, and Advocate -Prof Govender's presentation can be summarised as follows:

- The Chapter 9 institutions were created to safeguard the key constitutional concepts as stated in the South African Constitution.
- According to the Ad hoc Committee findings, at the time of the production of the Report in 2007, the Institutions Supporting Democracy were not achieving some of the main objectives for their establishment, i.e. to restore the credibility of the state and its institutions amongst the majority of its citizens; to ensure that democracy and human rights flourish in the new democracy; to ensure the re-establishment of the rule of law; and to ensure that the state becomes more responsive to the needs of its citizens and respectful of their rights, However, changes have occurred between then and now.
- The Ad hoc Committee Report recommends institutional change. Change is welcome, provided that it matches and improves on what is already in place.
- To have independence, the ISDs need to enjoy the essential conditions of independence (as per Van Rooyen versus State and others): financial independence, institutional independence (especially relating to the exercise of their mandate), and control over administrative decisions that impact on the mandate and appointment procedures and security of tenure of office bearers.
- Following this, Prof Govender made the following recommendations:
- Assessed cumulatively, whatever new institutions are brought about, if any, must not be materially inferior in terms of mandate, effectiveness, competence and independence.
- New institutions must meet the essential criteria of independence referred to.
- If substantial changes are made, it would be good to put all the institutions on the same footing, with a 60% (or two thirds) majority in the case of appointments and removals, like what is currently applicable in the case of the Public Protector and Auditor-General. Institutions like the IEC and SAHRC arguably handle matters that are potentially as sensitive as those handled by the Auditor-General and Public Protector, and bringing down this margin would create various challenges.
- Constitutional and other provisions regarding appointment and removal should be standardised for all Chapter 9 institutions; so should the removal process. Furthermore, removal criteria must not be generalized. Instead, they must be linked to the disqualification criteria and relate, for example, to not meeting the objectives of the institution or failing to deliver on the institutional mandate.
- There should be clear selection criteria based on the mandate and constitutional objectives of the specific institutions.

- It goes without question that there should be timeous engagement by the NA with the selection and replacement processes, and proactive steps must be taken to ensure that citizens are able to utilise the space created to participate in these processes.
- The terms regulating the removal processes must be articulated clearly, including provision for a proper opportunity for the affected person to be heard, and for reasons to be given for the removal.
- The Chairperson or Deputy Chairperson of any merged body should be a person with legal expertise.

## 6.2 Ministerial input

The Minister of Communications, Ms. Faith Muthambi, and the Minister of Telecommunications, Mr Siyabonga Cwele, provided further input on this subject of standardising appointment procedures, with specific focus on the Independent Communications Authority of South Africa (ICASA), which has a close relationship with the two Ministries:

- The Constitution and relevant enabling Acts make it clear that the President, and in some instances Members of the National Executive vested with executive powers appoint the heads and other members of the ISDs. Parliament does not have the power to do so, but must continue to play a robust role during the process of nominating and recommending candidates for appointment.
- The independence of the ISDs is not based on who appoints them, but on the Constitution. As stated in section 181(2) these institutions are 'independent, and subject only to the Constitution and the law ...'.
- As required by section 192 of the Constitution, an independent authority had to be established to regulate broadcasting in the public interest and to ensure fairness and diversity. This was done in terms of the ICASA Act of 2000, as amended. Information was provided on powers granted to the Minister in terms of the Act, as well as limitations.
- Any standardisation of appointment procedures can only be considered within the parameters of the Constitution.
- It was highlighted that the Independent Communications Authority of South Africa (ICASA) started out as the Independent Broadcasting Authority but has moved far beyond that. Operating in a technologically driven environment, regulation needs to change frequently. Internationally this happens every four years. As a regulator, ICASA's placement under the Constitution, therefore involves certain challenges. There may therefore be a need to look at ICASA quite differently from the other ISDs.



# DISCUSSION

## 7. DISCUSSION

During the discussion that took place, the following points emerged:

- Parliament must assess the impact of the work of the ISDs, also looking at how much they are able to achieve their mandates. It is important to consider the role they are playing in bringing about social transformation and cohesion.
- It is important to remove the perception that Ministers interfere with or amend the ring-fenced budgets of the ISDs; in fact, it would be more accurate to say they fight for them as far as their budget allocations are concerned. There are also instances where Ministers transfer funds from their own departments to assist the ISDs.

- It was acknowledged that ICASA is somewhat of an anomaly among the ISDs and that more debate on that area is required.
- Considering that Portfolio Committees do not have sufficient time to exercise adequate oversight, the capacity of Members of Parliament needs to be strengthened further.
- In the light of uncertainty that existed in the past as to who should activate the filling of vacancies in the ISDs, the South African Human Rights Commission Act of 2013 has, for example, been amended to specify that the National Assembly initiates the appointment process. It might be useful to keep this in mind if any of the other enabling Acts were to be amended.
- When considering what would work best for the country, it would be helpful if the ISD Chairpersons were to view matters from a perspective of not being the incumbents.
- By way of response an explanation was provided stating that the ISDs had indeed adopted an objective perspective in preparing for the workshop and were keen to finalise matters related to the Ad hoc Committee Report. It was to be noted though that the Deputies of the Institutions and various other Commissioners have indicated that ideally they would have liked to be present at the discussions, as the decisions that are taken would ultimately affect them all.
- With reference to the Ad hoc Committee recommendation that there should be an Information Commissioner, it was noted that an Information Regulator was soon to be appointed.
- When it comes to dealing with overlapping mandates, it would assist if the ISDs were to suggest a workable model for South Africa – working together in a coordinated manner without compromising their mandates.



# RESOLUTIONS

## 8. RESOLUTIONS AND THE WAY FORWARD

The Speaker of the National Assembly, Ms Baleka Mbete thanked Mr Burgess for his role as facilitator, and for having provided insight into the way in which the Ad hoc Committee had approached matters. She also thanked everyone for their contributions, and acknowledged that the workshop had provided an opportunity for a meaningful exchange.

According to the Speaker, when the National Assembly formally considered the Ad hoc Committee Report in November 2008, the establishment of the Office on Institutions Supporting Democracy (OISD) was the only matter that was agreed upon. She pointed out, however, that other matters referred to in the report had subsequently been addressed and that an audit needed to be



conducted of what had been implemented. A compilation reflecting progress in this regard should be attached to the report on the day's discussions, which her Office would produce. It would then be possible to see what is still outstanding and to make recommendations.

The Speaker observed that she had not heard "any violent opposition being expressed to some level of rationalisation, even from the ISDs". She emphasised, however, that nothing in that regard could be finalised unilaterally and that the ISDs need to engage and provide further input on what is to be achieved in the best interest of South Africa.

Referring to the Speakers Forum meeting that took place in Durban in August 2015, the Speaker mentioned that the Forum for Institutions Supporting Democracy (FISD) had been afforded an opportunity to make a presentation on behalf of the ISDs. The reality that ISDs also operate in the provinces emerged there, and provincial Speakers raised a number of questions regarding their methods of operation and other issues that come up from time to time.

The Speaker indicated that it would be valuable to have a further meeting, as more discussion is needed. If the parliamentary and other programmes allow for that, such a meeting should take place before the end of the year, after the report on the workshop had been circulated.

## **8.1 Key issues requiring further attention**

The workshop in summary resolved that the following key issues require further attention:

1. Consideration of the establishment of a unitary single human rights body, recognising the importance of not losing sight of the guiding principles of the Constitution, and taking into account that international best practice suggests that a careful and informed approach be followed in assessing whether a unitary single human rights body is the best model.
2. Consideration and a further assessment, therefore, of the impact of work conducted by the ISDs on society and the value for money derived from that.
3. The cost implications of retaining the current model also need to be taken into account and limitations in respect of resources to sustain the current model.
4. Further discussion and gathering of new empirical evidence on the performance of the ISDs in the light of the Preamble and founding provisions in the Constitution.
5. An assessment of the extent to which the ISDs have to date acted upon the recommendations contained in the Ad hoc Committee Report.
6. An interrogation of how the ISDs challenge private power, which typically moves along racial and gender lines.
7. Consideration of the issue of oversight and collaboration between Parliament and ISDs.

## GUEST LIST

### WORKSHOP ON THE REPORT OF ADHOC COMMITTEE ON REVIEW OF CHAPTER 9 AND ASSOCIATED INSTITUTIONS

11<sup>th</sup> September 2015, Constitutional Court

CATERGORY	GUESTS
<b>Presiding Officers</b>	Ms Baleke Mbete: Speaker of NA
	Mr Lechesa Tsenoli: Deputy Speaker of NA
	Mr A J Nyambi: House Chairperson Committees; NCOP
<b>Ministries</b>	Mr A Nel: Deputy Minister of Cooperative and Traditional Affairs
	Ms Faith Muthambi: Minister of Communications
	Mr Michael Masutha: Minister of Justice and Correctional Services
	Mr Siyabonga Cwele: Minister of Telecommunications and Postal Services
	Ms Fatima Ismail Chohan: Deputy Minister of Home Affairs
	Mr J Jeffery , MP : Deputy Minister of Justice and Correctional Services
<b>Chapter 9 Institutions</b>	Ms T Ratsela : Deputy Auditor –General of SA ( AGSA)
	Mr Mfanozelwe Shozi Chairperson Commission for Gender Equality (CGE)
	Ms Thoko Mkhwanazi -Xaluva Chairperson (CRL Commission)
	Mr Bongani Khumalo Acting Chairperson Finance and Fiscal Commission (FFC)
	Councillor Katharina Pillay Independent Communications Authority of South Africa (ICASA)
	Mr T Tselane Acting Chairperson Independent Electoral Commission (IEC)
	Adv Kevin Malunga Deputy Public Protector, Public Protector SA
	Prof. Wannie Carstens Deputy Chairperson: Pan-South African Language Board (PanSALB)
	Adv RK Sizani : Acting Chairperson Public Service Commission (PSC)
	Adv M L Mushwana: Chairperson South African Human Rights Commission (SAHRC)

<b>CATERGORY</b>	<b>GUESTS</b>
<b>Chairpersons of Portfolio Committees</b>	Mr V G Smith Standing Committee on the Auditor-General
	Mr B L Mashile PC on Home Affairs
	Ms T Memela PC on Women in the Presidency
	Ms X S Tom PC on Arts and Culture
	Ms J C Moloji-Moropa PC on Communications
	Ms B P Mabe PC on Public Service & Administration as well as Monitoring, Performance, Planning & Evaluation
	Dr M Motshekga PC on Justice & Correctional Services
	Mr S J Mohai Select Committee on Appropriations
	Mr C J de Beer Select Committee on Finance
<b>Presenters / Academics</b>	Judge Navi Pillay
	Prof K Govender
<b>Presenter</b>	Prof M Jahed Parliamentary Budget Office
<b>Facilitator</b>	Mr Cecil Burgess
<b>Secretary to Parliament</b>	Mr G Mgidlana











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