THE CONSTITUTIONAL STATUS AND ROLE OF SELECTED CHAPTER 9 INSTITUTIONS

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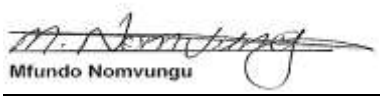
DECLARATION

I hereby declare that this is my own work. It is submitted for the degree of Master of Philosophy in Law at the University of the Western Cape. I further confirm that it has not been submitted before for any other degree or examination to any other university or institution of higher learning, and that all sources that I have used or quoted have been indicated and acknowledged as complete references.

Signature: 

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Dated this 30th day of November 2022

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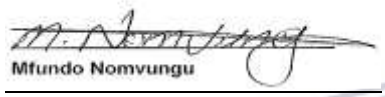
DEDICATION

This study is dedicated to all students who are studying part-time basis while employed fulltime. The journey is not so easy, it is financially, physically, and emotionally challenging. This study is also meant to inspire and motivate all the people who did not finish their studies either undergraduate or postgraduate because of different reasons you too can achieve this goal. I also want to challenge those who grew up in rural areas, poverty, and hopeless situation that you have unimaginable potential to succeed in anything that you want to do. Be courageous and persistent in pursuing your dream. This is also an opportunity for me to make contribution to the academic space.

Signature: 

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ACRONYMS/ABBREVIATIONS

Abbreviation	Definition
AG	Auditor-General
ALIU	Anti-Land Invasion Unit
ANC	African National Congress
CGE	Commission for Gender Equality
COO	Chief Operations Officer
CPPRC	Commission for the Promotion and Protection of the Rights of Cultural
DA	Democratic Alliance
EFF	Economic Freedom Fighter
GANHRI	Global Alliance of National Human Rights Institutions
HSRC	Human Sciences Research Council
IEC	Independent Electoral Commission
ISD	Institutions Supporting Democracy
ISS	Institute for Security Studies
JSC	Judicial Services Commission
LSU	Legal Services Unit
NA	National Assembly
NCOP	National Council of Provinces
NGO	Non -Governmental Organisation
OHCHR	Office of the United Nations High Commissioner on Human Rights
OPP	Office of the Public Protector
PP	Public Protector
RLC	Religious and Linguistic Communities
SABC	South African Broadcasting Corporation
SAHRC	South African Human Rights Commission
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
UN	United Nations
UNCHR	United Nations Commission on Human Rights

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CHAPTER 1: INTRODUCTION

1.1 Background to the research problem

The centuries of colonialism and apartheid that preceded the democratic transition in South Africa were characterised by such large-scale violations of human rights that the United Nations declared apartheid an international crime against humanity.[1] Against this background, it is not surprising that Principle II of the 34 principles which guided the negotiated transition to democracy provided that 'everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched *and justiciable* provisions in the Constitution'.[2] Principle II was supplemented by Principle VII which mandated the drafters of the current Constitution to create a post-apartheid judiciary with *strong* review powers,[3] typical of post-World War II constitutionalism,[4] in order to enforce the constitutionally entrenched human rights.[5] Both the interim and current Constitution gave full effect to the two constitutional principles by establishing a Constitutional Court with strong review powers. It is the duty of the Constitutional Court to ensure that the state complies with section 7(2) of the Constitution to 'respect, protect, promote, and fulfil the rights in chapter two (2) "the Bill of Rights" of the Constitution by reviewing the rationality and reasonableness, as defined by section 36 of the Bill of Rights, of all public power.[6]

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Since the introduction of strong judicial review in the mid-1990s, constitutional scholars of the global north have expressed doubts whether strong judicial review is an essential part of constitutional democracy and the best way to promote, protect, respect, and fulfil human rights obligations. Waldron has formulated an influential 'case against judicial review' in which he

[1] Art 1 of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976).

[2] Principle II of Schedule 4 of the interim Constitution Act 200 of 1993 (my emphasis).

[3] By 'strong review powers' I mean the judicial power under section 172 of the Constitution to declare executive and legislative conduct, policies, and legislation, constitutionally invalid. See further Tushnet M 'The rise of weak-form constitutional review' in Ginsburg T and Dixon R (eds) *Comparative Constitutional Law* (2011) 321-333.

[4] Perry MJ 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest L Rev* 635.

[5] Principle VII of Schedule 4 of the interim Constitution Act 200 of 1993: 'The judiciary shall be appropriately qualified, independent, and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

[6] In terms of section 8(2) of the Bill of Rights, the entrenched human rights also regulate the exercise of private power to the extent that it is applicable.

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depicts judicial review as a pathology and favours the parliamentary pursuit of human rights.[7] Gardbaum has argued that, whatever else can be said about judicial review, it is not always a good thing in young democracies, such as that of South Africa, where judicial independence is under constant threat.[8] Gardbaum advocates what he calls the 'commonwealth model of judicial review instead.[9] These debates about the role of courts in the enforcement of human rights have now also reached South African shores, where the strong review powers of the Constitutional Court are increasingly being questioned as undemocratic,[10] or colonial,[11] or subject to factionalism and capture.[12]

As the debate about the powers of constitutional courts in democracies continues and heats up, the focus has gradually shifted towards other ways of protecting human rights, such as empowering non-governmental or independent institutions generally known as National Human Rights Institutions (NHRIs). As Elmendorf explains:[13]

> 'In recent years, legal scholars have paid a great deal of attention to the emergence of constitutional courts and judicial review in democracies worldwide, yet an intriguing parallel development in democratic constitutionalism has gone largely unnoticed: the establishment of independent bodies which, like constitutional courts, are concerned with foundational commitments of liberal democracy, but which advance these commitments mainly through investigations and advice-giving'.

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[7] Waldron J 'The core of the case against judicial review' (2005-2006) 115 *Yale Law Journal* 1346. Waldron defends the virtues of a parliamentary democracy over those of a constitutional democracy under ideal conditions. He accepts that judicial review might be necessary under pathological conditions, such as those that arguably apply in South Africa.

[8] Gardbaum S 'Are Strong Constitutional Courts Always a good thing for new democracies?' (2014) 53 *Columbia Journal of Transnational Law* 285.

[9] Gardbaum S 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707.

[10] Merten M 'KwaZulu-Natal premier's dangerous call for a return to apartheid-style governance' Daily Maverick 23 March 2022 (available online at https://www.dailymaverick.co.za/article/2022-03-23-kwazulu-natal-premiers-dangerous-call-for-a-return-to-apartheid-style-governance/ (last accessed 20 October 2022)).

[11] Mngxitama A 'Constitutional delinquency is a precondition for black liberation' in Meiring J (ed) *South Africa's Constitution at Twenty-One* (2017) 150.

[12] Minister Lindiwe Sisulu recently claimed that the Court had been captured by the Ramaphosa faction of the ANC as it being used to fight the political war against the RET faction. She went as far as calling the black judges on the Court 'House negroes'. See Sisulu L 'Whose law is it anyway?'. Mail and Guardian, 8 January 2022 (available online at https://mg.co.za/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/ (last accessed 20 October 2022)

[13] Elmendorf CS 'Advisory Counterparts to Constitutional Courts' (2007) 56 *Duke Law Journal* 953.

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Before 1993, when the Paris principles were endorsed by the United Nations (UN) General Assembly,[14] there had only been eight independent NHRIs worldwide, although the concept of NHRIs can be dated back to at least 1946.[15] Today there are hundreds of NHRIs constitutionally recognised around the world, including in most of the leading African democracies.

Fombad explains the rise of NHRIs in the African context.[16] In post-colonial Africa, Constitutions are often compromises after protracted periods of conflict. Many compromises are framed in general terms that require further formalisation after the constitution-making process. The threat of democratic erosion is ever present, and the effective enforcement of the Constitution is a key concern. Traditionally, the supremacy of the written Constitution as a source of law meant that Constitutional Courts served as the key enforcement institution. However, as Fombad observes,

> 'Since the 1990s, a number of independent constitutional institutions and commissions with a specific mandate to enhance accountability, good governance and effective implementation of the constitution have become common'.[17]

Fombad points out that the South African Constitution of 1993 was the first on the continent to give NHRIs the special constitutional status that has now been replicated in some of the more recent Constitutions, particularly the Kenyan Constitution of 2010 and the Zimbabwean Constitution of 2013.[18]

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South Africa, therefore, serves for many as a textbook example of the 'intriguing parallel development' of NHRIs in the recent history of constitutional democracy and human rights protection. Chapter 9 of the current South African Constitution established several NHRIs, or what is known in the South African context as 'State Institutions Supporting Democracy'

[14] The Paris Principles are international standards and serve as minimum conditions that a NHRI must meet to be considered credible and potentially effective within the UN human rights system. United Nations General Assembly Resolution A/RES/48/134, 20 December 1993, on National Institutions for the promotion and protection of human rights. See below chapter two.
[15] Guo, S 'Effectiveness of National Human Rights Institutions in International Human Rights Law: Problems and Prospects' (2008) 14 *Asian Yearbook of International Law* 101 101.
[16] Fombad CM 'Designing Institutions and Mechanisms for the Implementation and Enforcement of the Constitution: Changing Perspectives in Africa' (2017) 25 *African Journal of International and Comparative law* 66.
[17] Mubangizi J 'A Comparative Discussion of the South African and Ugandan Human Rights Commissions' (2015) 48 *Comp & Int'l LJ S Afr* 124 125.
[18] Fombad (2017) 73.

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(ISDs) or, in short, 'Chapter 9 institutions.' These institutions include the Auditor-General (AG), the Commission for Gender Equality (CGE), the Electoral Commission (IEC), the Public Protector (OPP), the South African Human Rights Commission (SAHRC), and the Commission for the Promotion and Protection of the Rights of Cultural (CPPRC), Religious and Linguistic Communities (RLC).[19]

With the proliferation of NHRIs since the 1990s, the question of their effectiveness in the promotion and protection of human rights has gained increasing attention among scholars and activists.[20] How effective has the NHRIs been in the 30 years since the Paris Principles were adopted by the UN in 1993? How does one measure the effectiveness of the NHRIs? Wolfsteller explains the difficulties involved:[21]

> 'Scholars agree that there is no single factor which alone determines the effectiveness of an institution, but that its impact and performance is influenced by a range of factors: every NHRI "operates within an environment of constraints and opportunities, some of which the [institution] has greater capacity to influence than others". Factors that are largely outside of an NHRI's control, but which have significant impact on its performance concern the political, economic, and societal environment in which an NHRI is established and in which it operates. These contextual factors comprise the potential for violence in a country, the regime type, the existence, or absence of a functioning judicial system and of a strong civil society, but also the structural conditions of the institution's operation, such as the NHRI's mandate and powers, funding, independence, and accountability arrangements. Factors that are largely within the body's control include efficient management and leadership, staff expertise, a clear strategic plan and vision, as well as accessible and transparent communication with stakeholders.

Questions about the effectiveness of the ISDs in South Africa were officially raised as far back as September 2006 when Parliament appointed a multi-party ad hoc committee to investigate the role of the ISDs. This committee was chaired by Professor Kader Asmal hence the committee is widely referred to as the Asmal's committee. The Asmal's committee made both

[19] See sections 181 to 194 of the Constitution, 1996.
[20] Langtry D *National Human Rights Institutions: Rules, Requirements, and Practice* (2021).
[21] Wolfsteller R 'The Unrealized Potential of National Human Rights Institutions in Business and Human Rights Regulation: Conditions for Effective Engagement and Proposal for Reform' (2022) 23 *Human Rights Review* 43 48.

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general as well as specific recommendations on ISDs.[22] The following key recommendations were made:

> (i) To establish a unit on constitutional institutions and other statutory bodies in the office of the Speaker, to co-ordinate all interactions with these institutions, and to enhance the capacity of portfolio committees to engage with the substantive reports of the ISDs.[23] The committee expressed concern that Parliament was not 'making full use of the institutions to complement its oversight of the Executive and to brief members of Parliament on various matters of public interest on which the institutions may have reported'[24]
>
> (ii) The introduction of innovative measures to ensure that the ISDs, which were largely urban based, become more accessible to the public, especially in rural areas.[25]
>
> (iii) The establishment of an umbrella human rights body to be called the South African Commission on Human Rights and Equality, that will include all human rights commissions such as 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.[26]

The Asmal's report resulted in the establishment of the Office on Institutions Supporting Democracy within the office of the Speaker in September 2010. The other recommendations remain to be implemented.[27] Since the Asmal's report was released in 2007, the status and effectiveness of the ISDs of our constitutional democracy has again been pushed into the limelight by several highly publicised controversies, including the sage involving the report of the Public Protector into upgrades to President Zuma's homestead in Nkandla,[28] the

[22] Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. (2007) xi.
[23] (2007) xi.
[24] Parliament of the Republic of South Africa (2007). Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa. Available at http://www.parliament.gov.za.
[25] (2007) xi.
[26] (2007) xii.
[27] On 14 May 2017 the Speaker's office asked for submissions on the feasibility of establishing a single human rights body. The closing date was 25 May 2017 but after civil society and some opposition parties objected to this deadline, it was extended to 30 June. The speaker's invited submissions which were due to be submitted in June 2017. See further https://issafrica.org/iss-today/is-a-single-human-rights-body-in-sas-best interest?utm_source=BenchmarkEmail&utm_campaign=ISS+Weekly&utm_medium=email (access on the 15 June 2017).
[28] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).

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establishment of the Zondo Commission into state capture as recommended by the Office of the Public Protector, and the impeachment proceedings currently in Parliament against the current Public Protector (Adv. Busisiwe Mkhwebane) after a series of damning judgments by the High Court.[29] Partly due to some of these controversies, the then Deputy Minister of Justice and Correctional Services, John Jeffery, remarked that there was 'more public interest than ever before' in the Chapter 9 institutions or ISDs, and that the public had become deeply invested in who was appointed to lead them.[30] On the other hand, the Human Sciences Research Council (HSRC) has reported that citizens remain generally unaware of the existence of the ISDs, and are poorly educated on their purpose, powers, and functions.[31] Ordinary citizens do not know where these institutions are situated or how to access them.[32]

1.2 Aim of the research and research questions

While research into the effectiveness of NHRIs are growing globally,[33] Calland and Pienaar point out that in South Africa, there is still 'a rather surprising gap in the academic literature' on the topic.[34] The aim of this research paper is to make contribution to the body of knowledge towards closing this gap in the academic literature by taking a fresh look at the constitutional role and status of two of the chapter 9 institutions or ISDS: the Public Protector (OPP) and the South African Human Rights Commission (SAHRC). Secondly, I intend to use this research paper as a tool to educate ordinary citizen about ISDs.

It is impossible in a research paper of limited scope to provide a detailed overview of all the activities of the ISDs over the past twenty-five (25) years and to comprehensive conclude about the effectiveness or not of the ISDs, with a view to future reform. The aims of this research paper are, therefore, far more modest. Given that it is unsound to begin any discussion about the effectiveness of the ISDs or any ISD without a clear understanding of the constitutional status and role of the ISDs, the first aim of the paper is to clarify the constitutional status and role of the ISDs as enshrined in the Constitution of South Africa. The first research question is

[29] *Public Protector v Speaker of the National Assembly* 2020 (12) BCLR 1491 (WCC).
[30] https://www.businesslive.co.za/bd/national/2016-12-08-parliament-thanks-former-chiefs-of-chapter-9-bodies-for-reinforcing-democracy/ (accessed 6 March 2017).
[31] Musuva C 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: South Africa's Public Protector and Human Rights Commission' (2009) *EISA Research Report No 41* . Available online at https://www.eisa.org/pdf/rr41.pdf (accessed on 20 October 2022).
[32] Musuva C (2009) 37.
[33] See, for example, Jensen S L*essons from research on national human rights institutions: a desk review on findings related to NHRI effectiveness* (2018) Danish Institute for Human Rights (available online at https://www.humanrights.moj.gov.tw/media/12957/52618090516286b55c.pdf?mediaDL=true. Accessed 27 October 2022).
[34] Calland R & Pienaar G 'Guarding the guardians: South Africa's Chapter Nine institutions' in Plaatjies D (ed) *State of the Nation South Africa 2016: who is in charge?* 65 67.

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thus, what is the role and status of the Office of the Public Protector (OPP) and South African Human Rights Commission (SAHRC) within South Africa's constitutional democracy? Rather than merely restating that role and status, the paper also seeks, within its limited scope, to identify how far that constitutional role and status measures up to international conceptions of the effectiveness of NHRIs in implementing the United Nations (UN) human rights regime. This is the second research question. Both these questions will be dealt with in chapter two (2) below. In answering these questions, I identify four constitutional principles or preconditions of effectiveness; a clearly defined mandated, independence, availability, and accessibility.

Having clarified the constitutional role and status of the selected ISDs, the research paper further explores two additional research questions. The first is dealt with in chapter three (3) and explores how successful the statutory frameworks under which the OPP and SAHRC operate have been in operationalising the constitutional role and status of the OPP and SAHRC respectively, measured against the effectiveness indicators identified above. The second aim of the paper is to establish whether the statutory frameworks within which the ISDs operate meet the four constitutional requirements and so empower the ISDs to effectively perform their constitutional roles?

The last research question is dealt with in chapter four (4) and asks how effective the OPP and SAHRC have been over the past 25 years, measured against the availability and accessibility of these institutions. The third and final aim of the paper is to explore how far the legal framework for effectiveness (independence, availability, and accessibility) has been implemented or realised in practice, measured against the range of services that is actually available, and accessible to the public.

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1.3 Importance of the research

Looking into the constitutional ideal and the reality of the ISDs it is important because the future of the rule of law is closely tied to the future of the ISDs. The rule of law is a fundamental value of the new constitutional dispensation.[35] Accountability starts with compliance with the rule of law. This is in sharp contrast with the apartheid government where there was no public accountability. The apartheid state became a law unto itself and disregarded the proper and effective application of the rule of law.[36] Accountability is one of the most fundamental values for good governance in the prevention of state power which may undermine the promotion of

[35] Ntlama, N 'The brewing tug of war between South Africa's Chapter 9 institutions: The Public Protector vs the Independent Electoral Commission' (2015) *10 Journal of International Commercial Law and Technology* 13.
[36] Ntlama (2015) 13.

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basic principles of the new constitutional dispensation.[37] The Constitution spells out that accountability is essential for upholding the goal of South African's democracy.[38]

ISDs are deeply rooted in the constitutional value of accountability. For example, as will see later, the Public Protector may investigate, among other things, any alleged improper conduct or dishonest conduct regarding public money and any alleged offence but cannot declare any action unconstitutional or enforce legal actions. The OPP is empowered to recommend remedial actions while Courts are empowered to declare action unconstitutional and enforce legal actions. The Constitutional Court declared that OPP remedial actions are in fact binding and enforceable, *Nkandla* judgment.[39] This serves as an example of a Court enforcing legal action while OPP makes recommendations. The aim of the ISDs is to provide a legitimate and authoritative account of government's record, which can be used by citizens (civil society in general) and Parliament to scrutinizing the government's performance.

1.4 Structure of the research paper

The research paper consists of five chapters, each divided into smaller sections. Introduction (chapter 1) the constitutional status and role of the ISDs from a historical and international law perspective (chapter 2). The chapter derives four effectiveness criteria from the Paris Principles, namely, a constitutionalised mandate, availability, accessibility, and independence and then proceed to investigate how far these criteria have been incorporated into the constitutional role and status of the ISDs, as contained in chapter nine (9) of the South African Constitution. Chapter three (3) focuses on the statutory frameworks under which the OPP and the SAHRC operate and how far the four effectiveness factors are embodied in these frameworks. Chapter four (4) contains a brief analysis of the annual reports of the OPP and SAHRC to establish an initial audit of the ISDs availability and accessibility. The research paper concludes in chapter five (5) with a summary of the research project and recommendations for the future.

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[37] Klug H 'Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions' (2015) 60 *New York Law School Law Review* 153.
[38] Section 41 of the Constitution, 1996.
[39] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).

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CHAPTER 2: THE CONSTITUTIONAL ROLE AND STATUS OF THE SOUTH AFRICAN ISDs

2.1. Introduction

The Constitution refer to a body of fundamental principles or established precedents according to which a state or organisation is governed. A Constitution sets out how all the elements of government are organised and how power is carved up among different political units. It contains rules about what power is wielded, who wields it and over whom it is wielded in the governing of a country. The ISDs are then, established under this important document in a South African context. ISDs are empowered and entrusted with specific roles and empowered as articulated in the Constitution.[40]

In this chapter I discuss the constitutional role and status of the ISDs in general and the OPP and SAHRC. The aim of the discussion is to clarify what it would mean to say that an ISD is effective in playing its constitutional role or fulfilling its constitutional mandate by deriving four preconditions for operational effectiveness from the Constitution: a specified mandate, independence, availability, and accessibility. These criteria will then be used in the next chapter to provide a tentative assessment of the statutory frameworks within which the OPP and SAHRC operate.

As mentioned in the Introduction, South Africa's experiment with ISDs must be understood against the rise of the role and status of NHRIs within the UN human rights system. For this reason, the chapter starts with a discussion of the so-called Paris Principles which defines that role and status (section 2.2). Thereafter I explore the generic provisions in Chapter 9 of the South African Constitution (section 2.3) and some of the academic scholarship on the constitutional status of the ISDs (section 2.4). Klug regards them as a fourth branch of government, Du Plessis as part of civil society or the open community of constitutional interpreters, while Murry sees them as intermediaries between the state and civil society. Whatever the correct view might be, the ISDs can only play an effective role if their mandate is properly defined, their independence is constitutionally and statutorily guarded, and their services are publicly available and accessible. I conclude the chapter by exploring the specific constitutional mandates of the OPP and the SAHRC considering these criteria (section 2.5).

[40] Section 181.

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2.2 The Paris Principles and the international accreditation of NHRIs

Since the beginning of the 1990s, the UN has paid particular attention to the establishment and accreditation of NHRIs as an alternative strategy to ensure the domestication and implementation of international human rights norms.[41] This is in line with a shift in focus from international standard setting to domestic implementation.[42] The UN High Commissioner organised the First Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris in 1991. The Workshop adopted a set of principles to regulate the establishment of NHRIs as part of the third wave of democratisation that was sweeping across the globe at the end of the Cold War. These principles became widely known as the Paris Principles and were officially endorsed by the UN General Assembly in 1993.[43] The Paris Principles are international standards and serve as minimum conditions that a NHRI must meet to be considered credible and potentially effective within the UN human rights system.[44] The Global Alliance of National Human Rights Institutions (GANHRI) oversees the accreditation of NHRIs within the UN human rights system in conformity with the Paris Principles. In 2018, GANHRI issued general observations on common and interpretive issues on the implementation of the Paris Principles which today serve as the most authoritative interpretation of the Paris Principles.[45] A full discussion of the Paris Principles and these authoritative observations is beyond the scope of this research paper. However, it is important to highlight one or two points about the role and status of NHRIs, as understood within the UN human rights regime.

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The Paris Principles ascribe five distinct obligations to NHRIs. A well-functioning and effective NHRI must promote human rights, protect human rights, advise the government and Parliament on human rights issues, monitor human rights compliance, and play a cooperative and coordination role among human rights institutions and programmes.[46]

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[41] For an overview see Office of the United Nations High Commissioner on Human Rights (OHCHR) *National Human Rights Institutions: History, principles, roles, and responsibilities* (2010) 7-10.
[42] Guo, S 'The effectiveness of national human rights institutions in international human rights law: problems and prospects' (2008)14 *Asian Yearbook of International Law* 101 101.
[43] United Nations General Assembly Resolution A/RES/48/134, 20 December 1993, on National Institutions for the promotion and protection of human rights.
[44] Office of the United Nations High Commissioner on Human Rights *National Human Rights Institutions: History, principles, roles, and responsibilities* (2010) 30.
[45] Global Alliance of National Human Rights Institutions (GANHRI) 'General Observations of the Sub-Committee on Accreditation', adopted by the GANHRI Bureau at its Meeting held in Geneva on 21 February 2018 (available online at https://ganhri.org/wp-content/uploads/2019/11/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf.; accessed 10 October 2022)
[46] Office of the United Nations High Commissioner on Human Rights *National Human Rights Institutions: History, principles, roles, and responsibilities* (2010) 55-135.

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The *promotion mandate* of NHRIs enables information and knowledge about human rights to be disseminated to the public and to specific target groups. Ultimately, it creates a culture of human rights so that every individual in society shares the values that are reflected in the international and national human rights legal framework, and acts accordingly.[47] Institutions may undertake a variety of initiatives to promote human rights, such as human rights education and training, public awareness initiatives, press conferences, press releases and newspaper inserts; radio and television interviews and public service announcements; publications, including general information pamphlets, annual and special reports, documentation centres and website material; and the hosting of seminars or workshops.

The *protection mandate* of NHRIs includes the power to investigate and monitor human rights compliance and to accept and investigate individual complaints, provide a means of alternative dispute resolution through conciliation rather than litigation, and conduct independent inquiries.[48]

The *advisory mandate* of NHRIs provides for the independent review of existing or proposed legislation, policies, and practices.[49] According to the Paris Principles, NHRIs are responsible for advising the Government on human rights matters. NHRI recommendations contained in annual, special, or thematic human rights reports should normally be discussed within a reasonable amount of time, not to exceed six months, by the relevant government ministries as well as the competent parliamentary committees.[50]

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The *monitoring mandate* of the NHRIs provides for the activity of observing, collecting, cataloguing, and analysing data and reporting on a situation or event.[51] Monitoring is a key aspect of the general protection mandate and includes issues-based monitoring, incident-based monitoring, and the monitoring of places (such as prisons) to ensure that human rights standards are respected.

Finally, all NHRIs have a *cooperation and coordination mandate*.[52] Every NHRIs must cooperate with and where necessary coordinate its activities with each of the three branches of government, other human rights institutions, and civil society generally. This means that under the Paris Principles and within the UN human rights system, the NHRIs are conceived as

[47] (2010) 55.
[48] (2010) 75-100.
[49] (2010) 101-106.
[50] (2010) 104.
[51] (2010) 111-124.
[52] (2010) 125-135.

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unique and independent state institutions not located within government or civil society. The Office of the United Nations High Commissioner on Human Rights explained the generic role and status of the NHRIs as follows:[53]

> 'National human rights institutions are unique and do not resemble other parts of government: they are not under the direct authority of the executive, legislature, or judiciary although they are, as a rule, accountable to the legislature either directly or indirectly. […] National human rights institutions are not NGOs. National human rights institutions have a statutory legal basis and particular legal responsibilities as part of the State apparatus. The differences between NGOs and NHRIs are perhaps most pronounced regarding the investigation of complaints. National human rights institutions are neutral fact finders, not advocates for one side or another. An NHRI must be, and be seen to be, independent of the NGO sector, just as it must be independent of the Government. […] National human rights institutions are not only central elements of a strong national human rights system: they also "bridge" civil society and Governments; they link the responsibilities of the State to the rights of citizens, and they connect national laws to regional and international human rights systems'.

Having identified the comprehensive mandate of NHRIs under the UN human rights system, it is necessary to ask how effective the NHRIs are in executing this mandate? As Guo points out, it is extremely difficult to conceptualise and measure the actual effectiveness of NHRIs as such.[54] However, the Paris Principles identify six *effectiveness factors* or preconditions for any potentially effective NHRI:[55]

> (1) Mandate and competence: a broad mandate, as discussed above, to promote, protect, advise on, monitor, and coordinate human rights protection.
>
> (2) Autonomy from Government.
>
> (3) Independence guaranteed by statute or constitution.
>
> (4) Pluralism, including through membership and/or effective cooperation.
>
> (5) Adequate resources; and

[53] (2010) 13.
[54] Guo, S 'Effectiveness of National Human Rights Institutions in International Human Rights Law: Problems and Prospects' (2008) 14 *Asian Yearbook of International Law* 101 121.
[55] Office of the United Nations High Commissioner on Human Rights (OHCHR) *National Human Rights Institutions: History, principles, roles, and responsibilities* (2010) 31.

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(6) Adequate powers of investigation.

These effectiveness factors from the basis of the international system of accreditation that was developed and is administered, with support of the OHCHR, by the Global Alliance of National Human Rights Institutions (GANHRI).[56] As mentioned above, the subcommittee on accreditation has further clarified these factors in its General Observations.[57] General Observation 1.1 clarifies that the NHRIs must have a constitutionally entrenched role and status:

> 'An NHRI must be established in a constitutional or legislative text with sufficient detail to ensure the NHRI has a clear mandate and independence. It should specify the NHRI's role, functions, powers, funding, and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members. The establishment of an NHRI by other means, such as an instrument of the Executive, does not provide sufficient protection to ensure permanency and independence'.

General observation 1.2 deals more specifically with the mandate of NHRIs and clarifies the five-fold mandate set out above in the following terms:

> 'All NHRIs should be legislatively mandated with specific functions to both promote and protect human rights. The SCA understands 'promotion' to include those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy. 'Protection' functions may be understood as those that address and seek to prevent actual human rights violations. Such functions include monitoring, inquiring, investigating, and reporting on human rights violations, and may include individual complaint handling'.

[56] As of July 2022, GANHRI is composed of 120 members, with 88 A listed NHRIs and 32 B listed NHRIs (information available online at the website of GANHRI at https://ganhri.org/membership/ (last accessed 20 October 2022)). According to the UN Paris Principles and the GANHRI Statute, an A rated NHRI is fully compliant with the Paris Principles while a B rated NHRI is partially compliant with the Paris Principles. South Africa is a member of the Global Alliance, and the SAHRC is accredited as fully compliant with the Paris Principles.

[57] Global Alliance of National Human Rights Institutions (GANHRI) 'General Observations of the Sub-Committee on Accreditation', adopted by the GANHRI Bureau at its Meeting held in Geneva on 21 February 2018 (available online at https://ganhri.org/wp-content/uploads/2019/11/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf.; accessed 10 October 2022).

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The general observations deal with a variety of related matters and touch on some of the factors that would ensure the accessibility of the NHRIs. General Observation 1.7 reads as follows:

> 'A diverse decision-making and staff body facilitates the NHRI's appreciation of, and capacity to engage on, all human rights issues affecting the society in which it operates and promotes the *accessibility* of the NHRI for all citizens. Pluralism refers to broader representation of national society. Consideration must be given to ensuring pluralism in the context of gender, ethnicity, or minority status. This includes, for example, ensuring the equitable participation of women in the NHRI'.

Finally, the general observations also cover the employment of staff. General 2.4 stipulates the following:

> 'NHRIs must be provided with sufficient resources to permit the employment and retention of staff with the requisite qualifications and experience to fulfil the NHRI's mandate. Such resources should allow for salary levels, and terms and conditions of employment, equivalent to those of other independent of State agencies'.

Many scholars have tried to build upon and to reclassify the Paris Principles under new categories designed to serve as indicators of effectiveness. Guo uses the categories of independence (including a clear mandate of available services and powers), internal factors (including accessibility) and external factors.[58] The independence of the NHRIs is the key to their effectiveness. According to Guo, four factors affect the independence of NHRIs. First, a clear and constitutionally entrenched mandate is essential to keeping NHRIs independent from other governmental organs.[59] Second, the importance of strong and uncorrupted leadership is widely recognised, which makes the appointment and dismissal procedures of the NHRIs' leading members crucial.[60] Pluralism or a diversity of members is one way of ensuring independence. Third, financial independence is equally important.[61] Finally, a close link between the NHRIs and other networks of human rights organisations might be crucial to insulate a NHRIs from state capture.[62] Among the internal factors affecting the effectiveness of NHRIs, Guo lists a qualified and professional staff, strategic plans and priorities, and

[58] Guo, S 'Effectiveness of National Human Rights Institutions in International Human Rights Law: Problems and Prospects' (2008) 14 *Asian Yearbook of International Law* 101 121-126.
[59] Guo (2008) 122.
[60] Guo (2008) 123.
[61] Guo (2008) 123.
[62] Guo (2008) 123.

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accessibility.[63] Accessibility requires the establishment of local and regional locations, a consultative approach to the general public and the use of multiple languages in multi-cultural contexts.[64]

Murray likewise builds on the Paris Principles and lists some eighteen (18) effectiveness factors within three different categories:[65] capacity (including independence), performance (including available powers and resources) and legitimacy (including the need to be accessible) of relevance is her discussion of the need to be accessible.[66] According to Murray, this means access to the most vulnerable in society.[67] Accessibility can be measured according to public attitudes and awareness of the work of the NHRIs. Accessibility is affected by the location of offices, whether services can be obtained for free, and the background and profile of an NHRI's members.[68] Members must be trusted to be objective and independent. Plurality of membership can play a role in establishing trust towards an NHRI.[69]

2.3. Chapter 9 of the South African Constitution

The drafters of the 1996 Constitution dedicated the complete Chapter (9) nine of the Constitution to the establishment and constitutional demarcation of several NHRIs. Chapter nine (9) carries the title 'State institutions supporting constitutional democracy' and appears between the chapter dealing with the judiciary and administration of justice [Chapter eight (8)] and the chapter dealing with public administration [Chapter ten (10)]. Chapter nine (9) contains three general sections dealing with all the ISDs (sections 181, 193 and 194) and specific sections dealing with each of the six ISDs individually (section 182 regulates the Public Protector and section 184 the Human Rights Commission). These provisions are detailed enough to comply with the Paris Principles and the first standard of effectiveness (a constitutionalised mandate). The Constitution provides the ISDs with a clearly defined mandate and specified roles, functions, powers, funding, and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members.

Section 181(1) makes clear that the purpose of the Chapter (9) nine institutions is to 'strengthen constitutional democracy' in South Africa. Whatever the specific mandate of an ISD might be,

[63] Guo (2008) 124.
[64] Guo (2008) 125.
[65] Murray R 'National Human Rights Institutions: Criteria and factors for assessing their effectiveness' (2007) 25 *Netherlands Quarterly on Human Rights* 189.
[66] Murray (2007) 216.
[67] (2007) 216.
[68] (2007) 217.
[69] (2007) 218.

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the Constitution accepts that the ISDs can only fulfil their constitutional obligation to 'strengthen constitutional democracy' if the ISDs are allowed to operate without interference. According to section 181(2), the ISDs are 'independent, and subject only to the Constitution and the law, and they are impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Section 181(3) provides that all organs of state, through legislative and other measures, must assist and protect these institutions to ensure the 'independence, impartiality, dignity, and effectiveness' of the institutions. Section 181(4) confirms that no person or organ of state may interfere with the functioning of the ISDs.

The fact that the ISDs are established as independent institutions does not mean that they are not accountable to anybody. While the ISDs are not accountable to a Minister and government Department, they are directly accountable to Parliament. Section 181(5) confirms this principle as follows:

> 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.

The independence of the NHRIs, guaranteed by section 181 of the Constitution, is reinforced by the manner in which the Constitution regulates the appointment and dismissal of the PP and members of the SAHRC. The processes are constitutionally entrenched, as is required by the Paris Principles, they are less prone to political manipulation. While the President appoints the members of the SAHRC,[70] and the PP for a non-renewable term of seven years,[71] the President is restricted in his or her choice of candidates. First, section 193(1) provides that the PP and the members of the SAHRC must be women or men who are South African citizens and who are fit and proper persons to hold the particular office. Second, the President must consider that the ISDs 'reflect broadly the race and gender composition of South Africa'. The Constitution seeks to depoliticise the appointment of the PP and members of the SAHRC by, firstly, permitting the involvement of civil society in the process,[72] and secondly, by giving minority parties in Parliament a say in the nomination of candidates. In this regard section 193(5) reads as follows:

> The National Assembly must recommend persons (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the

[70] Section 193(4) of the Constitution, 1996.
[71] Section 183 of the Constitution, 1996.
[72] Section 193(6) of the Constitution, 1996.

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Assembly; and (b) approved by the Assembly by a resolution adopted with a supporting vote (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector; or (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

Once appointed by the President, the PP and all members of the SAHRC are relatively secure in their positions and insulated against political victimisation.[73] The PP or a member of the SAHRC may be removed from office only on the grounds of misconduct, incapacity or incompetence, after a finding to that effect by a committee of the National Assembly, and the adoption by the Assembly of a resolution calling for that person's removal from office.[74] In the case of the PP, that resolution must in addition be adopted with a supporting vote of at least two thirds of the members of the Assembly,[75] and in the case of a member of the SAHRC, with a supporting vote of a majority of the members of the Assembly.[76] The President must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.[77]

In summary, the Constitution establishes several constitutional principles for all the ISDs:

(i) The ISDs must act impartially and exercise their powers, and perform their functions without fear, favour or prejudice.
(ii) Other organs of state must ensure the independence, impartiality, dignity, and effectiveness of the ISDs.
(iii) No person or organ of state may interfere with the functioning of the ISDs; and
(iv) The ISDs are accountable only to the National Assembly.

In this way the generic provisions in ISDs in my view are compliant with the Paris Principles as far as the independence of the ISDs are concerned. Scholars have expressed reservations on this point. Fombad welcomed the fact that the status of the ISDs is constitutional entrenched

[73] For many critics of President Ramaphosa, the dismissal proceedings involving the Public Protector currently underway in the National Assembly, suggests the opposite. The proceedings have given rise to several high-profile legal judgements. See for example *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector* 2022 (6) BCLR 744 (CC).
[74] Section 194(1) of the Constitution, 1996.
[75] Section 194(2)(a) of the Constitution, 1996.
[76] Section 194(2)(b) of the Constitution, 1996.
[77] Section 194(3) of the Constitution, 1996.

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but, given the political contentious nature of this status, argued that these principles must be further supplemented.[78] Firstly, Fombad suggested that principle two (2) must be enhanced to give fuller legal recognition to the findings made by ISDs.[79] Secondly, the fourth (4) principle must be enhanced to ensure that quarterly reports are 'submitted to a Special Parliamentary Committee on Governance and accountability which is constituted in a manner that limit the possibility of the governing party frustrating the process'.[80] Thirdly, a new principle 'should address the critically important issue of appointments of the heads and senior officials of these institutions. Although appointments should still be made by the President, the procedure to be followed as well as the requirements for appointment must be expressly stated in the Constitution'.[81]

The minor reservations about the lack of detail in the constitutional provisions aside, the fact that the ISDs were established to strengthen South Africa's multi-party democracy, and that they are not located within government departments, and that their role and status is constitutionally entrenched, are all crucial to their effectiveness. However, generic principles do not sufficiently clarify the mandate and powers of the various ISDs as is required by the Paris Principles. To this end, section 182 and 183 of the Constitution of the Republic of South Africa set out in more detail how the OPP and the SAHRC must strengthen constitutional democracy in South Africa.

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2.4 The specific constitutional mandates of the OPP and SAHRC

Given the status of the ISDs as independent, available, and accessible state institutions situated outside government departments, or as intermediaries or bridges between government and civil society, the Constitution of the Republic of South Africa defines the specific mandates of the OPP and SAHRC. This immediately raises the question whether the powers and functions of the OPP and SAHRC, as defined in sections 182 and 183 respectively, from the Constitution of the Republic of South Africa, are sufficient to ensure its effectiveness as an ISD?

[78] Fombad CM 'Designing Institutions and Mechanisms for the Implementation and Enforcement of the Constitution: Changing Perspectives in Africa' (2017) 25 *African Journal of International and Comparative Law* 66 87.
[79] Fombad (2017) 87.
[80] Fombad (2017) 88.
[81] Fombad (2017) 89.

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2.4.1 The specific constitutional mandate of the OPP

The specific constitutional mandate of the OPP is set out in section 182(1) of the Constitution. The section explicitly deals with the availability and accessibility of the OPP as defined above. As far as the available mandate or powers of the OPP are concerned, the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct, and to take appropriate remedial action in connection with that conduct.[82] These powers must be regulated by national legislation, which legislation may prescribe additional powers and functions to the OPP.[83] The Constitution regulates the relationship between the courts and the OPP in the sense that it precludes the OPP from investigating court decisions.[84] The Constitution also addresses the accessibility of the OPP, by providing that the OPP 'must be accessible to all persons and communities',[85] and stipulating that any report issued by the OPP 'must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential'.[86]

The constitutional status and role of the OPP was described in winged language by Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly*:[87]

> The Public Protector is thus one of the most invaluable constitutional ISDs to our nation in the fight against corruption, unlawful enrichment, prejudice, and impropriety in state affairs and for the betterment of good governance. The tentacles of poverty run far, wide, and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the drafters of our Constitution were conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly through the office of the Public Protector. The OPP is an embodiment of a biblical David, that can fight the most powerful and very well-resourced Goliath, that impropriety and corruption by

[82] Section 182(1) of the Constitution, 1996.
[83] Section 182(2) of the Constitution, 1996.
[84] Section 182(3) of the Constitution, 1996.
[85] Section 182(4) of the Constitution, 1996.
[86] Section 182(5) of the Constitution, 1996.
[87] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (5) BCLR 618 (CC) para 52.

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government officials are. The Public Protector is one of the true crusaders and champions of anticorruption and clean governance.

2.4.2. The specific constitutional mandate of the SAHRC

The specific constitutional mandate of the SAHRC is set out in sections 184(1) to (4) of the Constitution. The Constitution entrenches the promotion, protection, and monitoring mandates of the SAHRC. The SAHRC must promote respect for human rights and a culture of human rights.[88] The SAHRC must also promote the protection, development and attainment of human rights.[89] Lastly, the SAHRC must monitor and assess the observance of human rights in the Republic.[90] In order to perform these functions effectively, the SAHRC has the powers, as regulated by national legislation,[91] including the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate.[92] The SAHRC has the additional powers and functions prescribed by national legislation.[93] In addition to these generic powers, the Constitution ascribes the specific duty to the SAHRC to monitor the progressive realisation of socio-economic rights under the Constitution. The SAHRC must every year require relevant organs of state to provide the Commission with information on the measures that they the organ of state has taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education, and the environment.[94]

2.5. Theories about the status and role of the ISDs

The ISDs have not received the academic attention they deserve. There have been discussions and a few brief comments on ISDs in journals and research papers. In general, there has been a lack of knowledge of ISDs due to availability and accessibility of ISDs in all communities. The existing literature on ISDs is dominated by Asmal's report which is mainly meant to review the existence of ISDs. There are three academic theories about the status and role of the ISDs in the South African Constitution that I intend to discuss below. The three theories that will be discussed in this research will help provide a better understanding of ISDs. The first theory perceives the ISDs collectively as a fourth branch of government. The second theory regards

[88] Section 184(1)(a) of the Constitution, 1996.
[89] Section 184(1)(b) of the Constitution, 1996.
[90] Section 184(1)(c) of the Constitution, 1996.
[91] Section 184(2) of the Constitution, 1996.
[92] Section 184(2) of the Constitution, 1996.
[93] Section 182(4) of the Constitution, 1996.
[94] Section 184(3) of the Constitution, 1996. See further Horsten D 'The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa' (2006) *PER* 12.

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the ISDs as an apex civil society organisation. The third theory characterises the ISDs as intermediaries or bridges between the branches of government and civil society.

2.5.1 The fourth branch of government

The relationship between the ISDs and the three branches of government (National, Provincial and Local) is complex. For an example the SAHRC advises the executive on policy while the OPP assists parliament in its oversight function of the executive. Both examples show the active involvement at the executive and parliament structures which then, suggest a fourth branch element of ISDs. The SAHRC has quasi-judicial functions but also participate in and supports the judiciary as litigants, friends of the court, and in monitoring compliance with structural interdicts. Should the SAHRC not be perceived as part of the judiciary by virtue of participating? Geldenhuys pointed out that South Africa did not follow a clear separation between an Ombud and a Commission but adopted a hybrid model in which the SAHRC has the power to investigate individual complaints. In this sense, both the OPP and the SAHRC have quasi-judicial powers:[95]

> The functions performed by South Africa's human rights commission as a quasi-judicial institution, which includes dealing with individual complaints, are sometimes more closely related to what is done by the Ombudsman in other jurisdictions. […] South Africa follows a hybrid Ombudsman model, as it has an Ombudsman, the Public Protector, and a Human Rights Commission.

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Geldenhuys argued that recommendations and findings by the SAHRC are not binding on branches of government.[96] However, the opposite applies with the office of the Public Protector. The Constitutional Court has conclusively answered the question in the affirmative[97] in a case of the President of the Republic of South Africa who was bound to institute a commission of enquiry as stipulated in the final report on state capture by the office of the Public Protector. Parliament was bound to act on the findings and remedial action in the Nkandla Report of the Public Protector.

[95] Geldenhuys J 'The South African Human Rights Commission: A Last Lifebuoy or Pulling the Plug' (2019) *Journal of South African Law* 640 659.
[96] Geldenhuys (2019) 658.
[97] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) para 71.

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NHRIs fit uncomfortably within the classical separations of powers doctrine. According to Wolfsteller, the constitutional position of NHRIs is inherently 'paradoxical'.[98] Brodie speaks in this regard about a constitutional 'tension'.[99] The point is that NHRIs are established and funded through the state, yet are expected to function as independent institutions monitoring, preventing, and regulating rights abuses, mostly by actors associated with the state. The tension arising from this position between government and civil society, and the inherent tendency to create political opposition through their work, renders NHRIs particularly vulnerable to manipulation by the government. At the same time, the close links of the NHRIs with the state complicated the relationship between the NHRIs and civil society organisations. Several constitutional scholars and commentators have attempted to resolve this tension. The fact that the ISDs are funded by government departments i.e., Department of Justice and Constitutional Development (DOJCD) funding South African Human Rights Commission (SAHRC) perfectly fits in this theory "fourth branch of government"

According to Klug the relationship between the ISDs and the other branches of government is sufficiently formalised to regard the ISDs as a fourth branch of government.[100] Klug argued that although traditional approaches to the separation of powers doctrine focuses on the checks and balances between the legislature, executive, and judiciary, the problem of political and legal accountability is no longer contained within these institutional parameters. Constitutional designers have created additional mechanisms and institutions in their efforts to ensure the achievement of their desired goals of accountability, responsiveness, and openness in the exercise of governmental authority. The ISDs according to Klug, serves as a fourth branch of government within the checks and balances view of the separation of powers.

Most scholars disagreed with this characterisation. Fombad makes a helpful distinction between ISDs, such as the SAHRC, and other constitutional commissions, such as the Judicial Services Commission (JSC) which is not a Chapter 9 institution:[101]

[98] Wolfsteller R 'The Unrealized Potential of National Human Rights Institutions in Business and Human Rights Regulation: Conditions for Effective Engagement and Proposal for Reform' (2022) 23 *Human Rights Review* 43 45.
[99] Brodie M 'Uncomfortable truths: protecting the independence of national human rights institutions to inquire' (2015) 38 *University of New South Wales Law Journal* 1215 1217.
[100] Klug H 'Transformative constitutions and the role of integrity institutions in tempering power: The case of resistance to state capture in post-apartheid South Africa' (2019) 67 *Buffalo Law Review* 701 727.
[101] Fombad (2017) 75.

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> 'The location of these independent constitutional institutions vis-a-vis the other three branches of government is sometimes significant and varies from one constitution to another. This ranges from those situations where the institution is independent in the sense of being located completely outside the three branches, the most frequent example in many African constitutions being the ombudsman and some of the anti-corruption agencies, and those where they operate within one of the branches of government. Under the 1996 South African Constitution, all the Chapter 9 institutions are independent and located outside the three branches of government, while the others which are regulated by other provisions in the Constitution are located within one or the other of the three branches, most often the executive. Increasingly, the trend is in favour of locating institutions dealing with issues such as maladministration, corruption, human rights investigations, elections, and minority rights outside the ordinary branches of government whereas institutions dealing with accountability issues within the public, judicial, security, military and police services, and national prosecution are often located within the government. There are, however, no fixed rules on this'.

De Vos likewise suggests that the argument by Klug that the ISDs are indeed part of government takes to narrow a view of the degree of independence that is required if the ISDs are to be effective.[102] For example, De Vos insists that the ISDs are not courts and need not have the same level of independence as courts. De Vos concludes that, in law, the ISDs under the South African Constitution 'enjoy sufficient independence [from government] to play their watchdog role effectively'.[103]

South African courts also do not agree with Klug's characterisation of the ISDs as a fourth branch of government. In *Independent Electoral Commission v Langeberg Municipality* the question was whether the Municipality had to exhaust all other remedies under section 41(3) of the Constitution before it could approach the Court in its dispute with the Electoral Commission.[104] The answer depended on whether the Electoral Commission and other ISDs are bound to the principles of intergovernmental relations, that is, whether the ISDs form part

[102] De Vos P 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' in Chirwa D and Nijzink L *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2011) 160 166.
[103] De Vos (2011) 174.
[104] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC).

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of government.[105] The Court ruled as follows as far as the Electoral Commission is concerned:[106]

> The Commission exercises public powers and performs public functions in terms of the Constitution, and it is therefore, an organ of state as defined in section 239 of the Constitution. The question then is whether it is part of government in that, as an organ of state, it falls within a sphere of government contemplated by chapter 3 of the Constitution. It was created by chapter 9 of the Constitution which is headed "State Institutions Supporting Constitutional Democracy". Section 181(1) provides that it is to strengthen constitutional democracy in the Republic.
>
> […]
>
> It is now possible to address the question whether the Commission is an organ of state which can be said to be within the national sphere of government. It is not, for the reasons that follow. In the first place, the Commission cannot be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with section 85(2) of the Constitution. Secondly, the Constitution, in effect, describes the Commission as a state institution that strengthens constitutional democracy, and nowhere in chapter 9 is there anything from which an inference may be drawn that it is a part of the national government. The term "state" is broader than "national government" and embraces all spheres of government. Thirdly, under section 181(2) the Commission is independent, subject only to the Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air, and the chapter intends to make a distinction between the state and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial, or national.
>
> […]

[105] *Langeberg Municipality* para 19: 'The dispute would be intergovernmental only if the Commission *is in some way part of government* as contemplated in chapter 3 of the Constitution. This must be determined by having regard to the chapter as a whole'.
[106] *Langeberg Municpality* paras 25, 27, 31.

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> Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chapter 9 bodies - was so that they should be and *manifestly be seen to be outside government*. The Commission is not an organ of state within the national sphere of government.

Much the same position applies to the Public Protector as the Court confirmed in *Minister of Home Affairs v Public Protector of the Republic of South Africa*:[107]

> The Office of the Public Protector is not a department of state or administration, and neither can it be said to be part of the national, provincial, or local spheres of government: it is an independent body that is answerable only to the National Assembly.
>
> […]
>
> First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. Secondly, it is a purpose-built watchdog that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, although the State Liability Act 20 of 1957 applies to the Office of the Public Protector to enable it to sue and be sued, it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and, hence constituting administrative action.

In this regard our Courts have on several occasions clarified what is meant with the constitutional principle of independence with it comes to the ISDs relative to 'other organs of

[107] *Minister of Home Affairs v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) paras 34 and 37. Also see *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA) para 25.

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state' under sections 181(2) and (3) of the Constitution. In *New National Party v Government of the Republic of South Africa* Langa DP distinguished between financial and administrative independence and reasoned as follows:[108]

> 'In dealing with the independence of the [Independent Electoral] Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. […] The second factor, "administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires "to ensure (its) independence, impartiality, dignity and effectiveness".'

In *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* the independent status of the OPP was clarified in light of the historical tradition of the ombud:[109]

> The Public Protector, which is the first on the list of Chapter Nine institutions, has its historical roots in the institution of the Swedish Parliamentary Ombud. That office was established with the adoption of the Swedish Constitution Act of 1809 and is said to have been a response to the King's authoritarian rule. The task assigned to the Swedish Ombud, which had been conceived as far back as 1713, was to ensure that public officials acted in accordance with the law and discharged their duties satisfactorily in other respects. If the Ombud found this not to be the case, he was empowered to institute legal proceedings for dereliction of duty.
>
> […]
>
> The independence, impartiality and effectiveness of the Public Protector are vital to ensuring accountable and responsible government. The office inherently entails

[108] *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) paras 98 and 99.
[109] *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA) paras 26-29.

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> investigation of sensitive and potentially embarrassing affairs of government. In terms of s 182(2) of the Constitution the Public Protector also 'has the additional powers and functions' prescribed by national legislation. The national legislation that is referred to in s 182 is the Act, which makes it clear that, while the functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that. The office of the Public Protector provides '. . . what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation.' It follows that in fulfilling its constitutional mandate that office will have to act with courage and vigilance.

Klug's characterisation of the ISDs as a fourth branch of government can thus not be fully supported. Furthermore, the ISDs exercise public power relatively independent of the three traditional branches, or at least have a degree of constitutionally protected decisional autonomy and independence that is at odds with our traditional notions of the trilateral structure of government.

2.5.2 Civil society or an open community of constitutional interpreters

Civil Society Organisations (CSOs or NGOs) often play a key role in the struggle for human rights against the state. The history of the struggle in South Africa against the apartheid state is a good example. Considering this history, it is tempting to see the ISDs as accredited or state sanctioned, but they are independent, super civil society organisations funded by the state. Like the CSOs, the ISDs ensures accountability outside elections (political review of executive and legislative action or inaction) and litigation (judicial review of executive and legislative action or inaction). The ISDs provide a means for civil society to call the formal and often less accessible parliamentary and judicial oversight and accountability mechanisms into action. The OPP does so by recommending remedial action; the SAHRC by making findings, referring complaints to courts, and instituting actions. In this sense the ISDs operate within civil society alongside CSOs, the media, academia, and the legal profession. The success of the ISDs depends on its penetration of civil society.

Du Plessis's idea of civil society as an 'open community of constitutional interpreters' might be useful here.[110] According to Du Plessis, the public sphere in a constitutional democracy can

[110] Du Plessis L 'Legal academic and the open community of constitutional interpreters' (2006) 12 *SAJHR* 214.

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be likened to an orchestra or jazz ensemble in which various musicians interpret the same piece of sheet music.[111] A plurality of interpretations is possible and needed for the performance to have any depth. In Du Plessis's metaphor, the Constitutional Court should not be the only privileged interpreter of the human rights norms in the Bill of Rights but the exercise should be inclusive of other role players such as academics, civil society organisations, and the ISDs. It is in the nature of the community of interpreters to transcend the closed legal fraternity system as the only tool to interpret the constitution. Openness, as a valued judgement, connotes a free and rational society receptive to a pluralist interplay of forces and ideas shaping its destiny.[112]

Du Plessis's vision of the ISDs as active part of civil society, corresponds with what Guo calls 'the interpretive mandate' of NHRIs: whether NHRIs give advice on policy, review existing laws, handle individual complaints, or promote human rights through public awareness campaigns 'they generate new meanings and interpretations' of human rights norms in society.[113]

In other countries the link between ISDs and civil society is constitutionally established and protected.[114] ISDs can be mandated to 'encourage', 'engage with'; or even 'consult with' civil society organisations. This not the case in South Africa, where the constitutional mandate of the OPP and SAHRC do not include any reference to civil society.[115] This is excepting relevant stakeholders' engagement which does not directly affect ISDs mandate. The South African position reflects the situation in the majority of commonwealth countries, where the mandates of commonwealth NHRIs make no mention of civil society at all.[116] In line with this state of affairs, the Commonwealth Human Rights Initiative does not see ISDs as belonging to civil society, but rather as *sui generis* organs of state.[117] The Commonwealth Human Rights Initiative summarises the difficult working relationship between ISDs and civil society organisations as follows:[118]

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[111] (2006) 12
[112] (2006) 12
[113] Guo (2008) 115.
[114] Commonwealth Human Rights Initiative 'Civil Society and National Human Rights Institutions' (2011) 13 *International Journal of Not-for-Profit Law* 5 23.
[115] Section 193(6) is the only exception. The section provides that the 'involvement of civil society' in the appointment of the PP and members of the SAHRC 'may be provided for' as envisaged in section 59(1)(a) of the Constitution.
[116] Commonwealth Human Rights Initiative (2011) 27.
[117] Commonwealth Human Rights Initiative (2011) 28.
[118] Commonwealth Human Rights Initiative (2011) 28.

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> 'Civil society actors frequently cite their reservations about working with NHRIs because, inter alia, they sometimes perceive them as negatively motivated entities propped up by the state or guarded by its agents; lacking in ability, commitment, and/or resources; and overcautious in responses to human rights violations. On the other hand, the large number and variety of civil society actors sometimes causes NHRIs to be reasonably cautious about with which actors they want to engage. NHRIs can be aloof about their involvement with civil society groups because they sometimes perceive them to be politically partisan, prone to inaccurate or exaggerated reporting of violations, too confrontational, lacking in adequate expertise themselves, and unrepresentative or driven by external/donor agendas. […] Even under the very best of circumstances, concerns about co-option, retention of functional autonomy, and independence of action mean that both civil society and NHRIs too often approach each other gingerly for fear that engagement may verge on encroachment'.

Dinokopila likewise points out that NHRIs were in the past abused by the state to displace and neutralise the critical role of CSOs in the struggle for human rights, often resulting in distrust and tension between NHRIs and CSOs.[119] To lessen the tensions between NHRIs and CSOs, the Commonwealth Humans Rights Initiative suggests that civil society should be involved in the creation of NHRIs from the start, and thereafter, remain involved in the appointment of their members.[120] In addition, the Initiative advocates for the establishment of formal platforms of cooperation between ISDs and CSOs. Without such formalisation, much of the engagement between NHRIs and civil society remains ad hoc, being limited to workshops, training programs, seminars, and human rights advocacy initiatives.[121]

The point to be made is that attempts to conceptualise ISDs as part of civil society and to formalise the relationships between ISDs and CSOs has failed. These attempts nevertheless highlight the fact that the potential of an NHRI to implement its constitutional mandate is underpinned by meaningful civil society engagement. The preconditions of such engagement

[119] Dinokopila (2010) 38. Also see Renshaw CS 'National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional, and International Levels' (2012) 18 *Global Governance* 299 300: 'where CSO/NHRI relations are strained or non-existent, NHRIs inevitably suffer a crisis of legitimacy'.
[120] Commonwealth Human Rights Initiative (2011) 34.
[121] Commonwealth Human Rights Initiative (2011) 35.

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are trust or legitimacy, which depends on the independence of the ISDs as mentioned above, supplemented by the availability and accessibility of the ISDs. We cannot deny all the challenges raised above in South African context. These challenges range from pollical influence to patronage appointment in ISDs particularly the OPP in South Africa. However, recent development in our caselaw shows that civil society has been involved in the appointment of heads of ISDs even prior the appointment, comments are welcome by a portfolio committee. The ideal of characterising ISDs as civil society would be replacing an already existing structure in the name of Non-Profit Organisations (NPOs) or Non-Governmental organisations (NGOs). I would argue that ISDs should not be perceived or regarded as civil society organisations rather, be seen as a community of open interpreters which bring inclusivity in a closed traditional legal system.

If the ISDs should neither be understood as a fourth branch of government nor as an apex civil society organisation, how should they then be understood? Murray suggests a third alternative.

2.5.3 The ISDs as intermediaries

Murray argued against Klug's conceptualisation of the ISDs as a fourth branch of government.[122] In her view the ISDs are intermediary institutions between the state and civil society which should not be approached as if they operate as a separate branch of government. Although they are state institutions, they are located outside government as Fombad also points out. ISDs are intermediaries that provide a link between the public and government.[123] As Fombad explains:

> 'Under the traditional framework of separation of powers, government is divided into three 'branches' within which all government institutions fall. However, the chapter 9 institutions are not legislative, judicial, or executive organs – they are not 'a branch of government'. And they do not exercise power in the same way as the executive, legislature or Parliament do. Although they all have some form of investigatory power and certain administrative powers, they do not 'govern'.

[122] Murray C 'The human rights commission et al: What is the role of South Africa's chapter nine institutions?' (2006) 9 *Potchefstroom Electronic Law Journal* 122.
[123] Murray (2006) 126.

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Murray pointed out that the ISDs operate outside and independent of the executive, the legislature, and the judiciary. These branches and all organs of state have the constitutional duty to protect the ISDs and to ensure their independence, impartiality, dignity, and effectiveness. In Murray's view, the ISD are best understood as intermediaries *between* the governed and the government outside the formal structures of representative democracy:[124]

> 'The chapter 9s are what might be called "intermediary institutions", providing a different opportunity for public participation in public life to that provided in political processes. Located between citizens and the government, they provide a way in which the needs of citizens can be articulated outside the loaded environment of party politics. If the chapter 9s are truly independent they can provide a reliable voice for people, unburdened by the political exigencies of the day or vested interests.

This view shows close resemblance to the 'interaction mandate' identified by Guo, who claims that NHRIs are first and foremost to be conceptualised as 'good bridges between the government and NGOs'.[125] According to Guo, an NHRI is effective, first, to the extent that it ensures effective interaction between various human rights actors, including governmental organs and civil societies, at domestic, regional, and international levels.[126]

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2.6 Conclusion

The trend within the UN human rights system to promote the establishment and accreditation of NHRIs as mechanisms to monitor compliance with international human rights norms has also taken hold in post-apartheid South Africa. Chapter nine (9) of the Constitution effectively domesticated the international understanding of the role and status of NHRIs. In my view, Murray's characterisation of the ISDs as bridges between government and the people provides the best understanding of the constitutional role and status of the ISDs in South Africa. To effectively fulfil the role as a bridges or intermediaries, the ISDs must be independent, be available and accessible to all.

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[124] Murray C 'The human rights commission et al: What is the role of South Africa's chapter nine institutions?' (2006) 9 *Potchefstroom Electronic Law Journal* 122 127-128.
[125] Guo (2008) 113.
[126] Guo S 'Effectiveness of National Human Rights Institutions in International Human Rights Law: Problems and Prospects' (2008) 14 *Asian Yearbook of International Law* 101 113.

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Having established that the ISDs are constitutionally mandated to play a role of intermediaries between the government and citizens, the question arises whether the legislative frameworks under which the OPP and the SAHRC operates sufficiently empowers these ISDs to effectively fulfil their respective constitutional mandate. This question will be addressed in the next chapter.

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CHAPTER 3: LEGISLATIVE FRAMEWORKS

3.1. Introduction

Legislative framework includes different types of laws that make it possible, also called the "enabling" law or framework or law of concession. In South African context, this refers to the Constitution, the highest law of the land. While on the other side there is a law that makes an impact project and his is derived from the Constitution. In South African context this refers to the Acts derived from the Constitution. This chapter will look at the legislative framework that govern both the OPP and SAHRC. I intend to look into the statutory frameworks which regulate the powers and activities of the Public Protector (OPP) and South African Human Rights Commission (SAHRC). central to this exercise is whether the constitutional mandates established in chapter two (2) have been sufficiently translated by Parliament into an empowering legislative framework to give effective effect to the constitutional role and status of the two ISDs.

3.2. South African Human Rights Commission

The Human Rights Commission (SAHRC) operates under the South African Human Rights Commission Act 40 of 2013 (hereafter in the section 'the Act'). Section 54(1) of the current Act repealed the old Human Rights Commission Act 54 of 1994. The long title of the Act states that the purpose of the Act is to 'provide for the composition, powers, functions and functioning of the South African Human Rights Commission' and 'to provide for matters connected therewith'. The preamble confirms the quasi-constitutional nature of the Act, as an attempt to give effect to the provisions of section 184 of the Constitution, discussed in Chapter two above. How successful is the Act in giving effect to the constitutional principles of independence, availability, and accessibility?

3.2.1. Composition

The Act establishes the SAHRC in line with section 193 of the Constitution.[127] The Commission consists of eight commissioners, who must be South African citizens and fit and proper persons to hold office of the Commission,[128] with a record of commitment to the promotion of respect for human rights and a culture of human rights.[129] It is open to debate whether eight commissioners is enough to ensure the availability and accessibility of the

[127] Section 5(1)(a) of the Act.
[128] Section 5(1)(a)(i) of the Act.
[129] Section 5(1)(a)(ii) of the Act.

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Commission, given nature of the work expected of the commission. The work of the commissioners is supported and supplemented by additional staff, appointed in terms of section 19 of the Act. This issue will be further discussed below in chapter four.

3.2.2. Seat and offices

The seat of the Commission must be in the province of Gauteng, but the Commission may establish such offices as it may consider necessary to enable it to exercise its powers and to perform its functions.[130] The Act does not specify where and how many offices must be established or what criteria must be used to determine the need for an office. This gap in the legislation could bring a positive impact on the geographic accessibility of the Commission. I will return to this observation in chapter four (4) and five (5) below.

3.2.3. Independence and impartiality

The independence and impartiality of the Commission is expressly regulated in section 4 of the Act. A commissioner must serve impartially and independently and exercise or perform his or her powers and functions in good faith and without fear, favour, bias, or prejudice and subject only to the Constitution and the law.[131] To enhance the independence and impartiality of the Commission, certain citizens are disqualified from serving on the Commission. The list of disqualified persons is dominated by persons whose ability or capacity to act impartially cannot be trusted, such as anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service,[132] unrehabilitated insolvents,[133] anyone who has been convicted of an offence and sentenced to more than twelve (12) months' imprisonment without the option of a fine,[134] or anyone who is an office-bearer or a staff member of a political party, a member of the National Assembly, a permanent delegate to the National Council of Provinces, a member of a provincial legislature or a member of a municipal council, or who is on a candidate list for any of those positions.[135]

The independence of the Commission is further protected by the appointment process of commissioners. Eligible persons are appointed to the Commission by the President in accordance with section 193(4) and (5) of the Constitution.[136] We saw above that according to

[130] Section 3(2) of the Act.
[131] Section 4(1)(a) of the Act.
[132] Section 5(1)(b)(i) of the Act.
[133] Section 5(1)(b)(ii) of the Act.
[134] Section 5(1)(b)(iv) of the Act.
[135] Section 5(1)(b)(v) of the Act.
[136] Section 5(1)(a)(iv) of the Act.

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these constitutional provisions, the President, on the recommendation of the National Assembly, may appoint the members of the South African Human Rights Commission.[137] The National Assembly may only recommend persons who were nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly, and approved by the Assembly by a resolution adopted by a majority vote. The national assembly must further recommend to the President who must be appointed as chairperson and deputy chairperson of the Commission.[138] To further enhance independence, the involvement of civil society in the recommendation process 'may' be provided for,[139] but seemingly this is not a requirement.[140]

Once appointed, Commissioners have some security of tenure. Commissioners are appointed for a fixed term of seven years,[141] and may serve for two such terms.[142] A Commissioner may only be removed from office before the expiry of this term, if a committee of the National Assembly makes a finding of misconduct, incapacity or incompetence on the part of that Commissioner.[143] Thereafter, the National Assembly must adopt a resolution with a majority vote calling for that person's removal from office.[144] The President must remove a Commissioner from office upon adoption by the National Assembly of the resolution calling for that person's removal.[145] Furthermore, the independence of the Commission is bolstered by the fact that the salary of commissioners may not be reduced, nor may the allowances and benefits be adversely altered, during their term of office.[146] Finally, section 4(2) of the Act mirrors section 165(4) of the Constitution by imposing the same obligation on all organs of state to support the Commission as applies in the case of the courts:

> All organs of state must afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality, and dignity of the Commission and in pursuit of its objects.

[137] Section 193(4) of the Constitution.
[138] Section 6(1) of the Act.
[139] Section 193(6) of the Constitution.
[140] In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) the Constitutional Court controversially found that involvement of civil society in the legislative process is a validity requirement for the passing of legislation. The same provision regulates participation of civil society in the appointment process of Commissioners.
[141] Section 5(2) of the Act.
[142] Section 5(4) of the Act.
[143] Sections 194(1)(a) and (b) of the Constitution.
[144] Section 194(2) of the Constitution.
[145] Section 194(3)(b) of the Constitution.
[146] Section 9(2) of the Act.

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3.2.4. The mandate and powers of the Commission

Section 2 of the Act states that the objectives of the Commission are to promote respect for human rights and a culture of human rights, to promote the protection, development, and attainment of human rights; and to monitor and assess the observance of human rights in the Republic. This provision mirrors those in section 184 of the Constitution. These objectives can usefully be paraphrased as a *protection mandate* and a *monitoring mandate*. The Act regulates each of the mandates separately.

3.2.4.1 The monitoring mandate

As far as the monitoring mandate is concerned, the Commission has statutory obligations towards other branches of government (in line with Klug's the idea of a fourth branch of government). In this regard it might be tempting to call the SAHRC the 'advisory branch' of government. As far as the Commission's involvement in government is concerned, the Act stipulates that the Commission is both competent and obliged to make recommendations to organs of state where advisable for the adoption of progressive measures for the promotion of human rights.

The advice provided by the SAHRC to government is in large part based on the reporting obligation to the SAHRC which the Constitution imposes on organs of statue. Recall that section 184(3) imposes an obligation of organs of state to report on all the reasonable measures taken to progressively realise socio-economic rights. There is therefore, an extensive statutory framework of quasi constitutional legislation in place to support this information gathering power and mandate of the SAHRC.

3.2.4.2 The protective mandate

The protective mandate of the Commission arguably brings the Commission close to the powers of the courts and enhance the idea of the Commission as a fourth or advisory branch of government. The Commission is competent to investigate, on its own initiative or on receipt of a complaint, any alleged violation of human rights.[147] In the process of such an investigation, the Commission may search any person or enter and search any premises on or in which anything connected with an investigation is or is suspected to be,[148] require information from

[147] Section 13(3)(a) read with section 15(1)(a) of the Act.
[148] Section16(1) of the Act.

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any person,[149] require any person to appear before it,[150] and question any person under oath or confirmation.[151]

If, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress.[152] One option is to bring the matter to the attention of the courts. The Commission may arrange for or provide financial assistance to enable proceedings to be taken by a victim of a human rights abuse to a competent court for the necessary relief. The Commission may also decide to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons. Litigation is an important weapon in the arsenal of the SAHRC because the SAHRC is not a court of law, it can only refer matters for further action to a court of law.

The SAHRC has acted as applicant against various respondents in several different courts, ranging from the Equality Court to the Constitutional Court (either as applicant or as friend of the court (*amicus curiae*).[153] In this sense the Commission indeed plays the role of an advisory branch of government on human rights issues to the judicial branch.

3.2.5. Reciprocal reporting obligations

The role of the SAHRC as an advisory fourth branch of government finds support in the statutory reporting obligations of the Commission. Whether as part of its monitoring mandate, or as part of its protective mandate, the Commission must, as soon as possible, submit to the National Assembly reports on the findings in respect of monitoring functions or investigations of a serious nature which were conducted.[154] The Commission may report any finding, point of view or recommendation in respect of a matter investigated by to the executive authority of any national or provincial department. In that case, the executive authority must within 60 days after becoming aware of such finding or recommendation respond in writing to the

[149] Section 15(1)(b) of the Act.
[150] Section 15(1)(c) of the Act.
[151] Section 15(1)(d) of the Act.
[152] Section 13(3)(a) of the Act.
[153] See, for example, *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 (7) BCLR 850 (CC); *Qwelane v South African Human Rights Commission* 2022 (2) BCLR 129 (CC); *South African Human Rights Commission v The City of Cape Town* 2022 (5) SA 622 (WCC); *South African Human Rights Commission v Msunduzi Local Municipality* 2021 (6) SA 500 (KZP); *South African Human Rights Commission v City of Cape Town* 2021 (2) SA 565 (WCC); *South African Human Rights Commission v Khumalo* 2019 (1) SA 289 (GJ); *South African Human Rights Commission v Minister of Home Affairs* 2014 (11) BCLR 1352 (GJ); *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) BCLR 106 (CC); *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); and *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC).
[154] Section 18(3) of the Act.

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Commission, indicating whether his or her department intends taking any steps to give effect to such finding or recommendation, if any such steps are required.

3.2.6 Conclusion

In my view in the South African Human Rights Commission Act of 2013 sufficiently translates the constitutional role and mandate of the SAHRC into an enabling statutory framework. The conclusion seems to be confirmed by the fact that the SAHRC is an A-rated NHRI under the accreditation framework established by the Global Alliance of National Human Rights Institutions under the Paris Principles.[155]

3.3. The office of the Public Protector (OPP)

The office of the Public Protector operates under the Public Protector Act 23 of 1994 (hereafter in this section 'the Act'). The Act has been amended several times, most notably in 2003. The Act clearly states its purpose in the long title as providing 'for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, 1996' and 'to provide for matters connected therewith'. The preamble of the Act confirms the quasi-constitutional nature of the Act as an attempt to give effect to the provisions of section 182 of the Constitution.

3.3.1. Composition

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The Act establishes the OPP in line with section 193 of the Constitution.[156] The office of the Public Protector consists of two individuals, the Public Protector, and the Deputy Public Protector,[157] who must both be South African citizens and fit and proper persons to hold such an office,[158] with necessary qualifications and experience in the field of law as articulated in the Act.[159] Again, it is open to debate whether the Public Protector and the Deputy Public Protector have the ability to ensure the availability and accessibility, given the nature of work expected of this institution. This question is much more relevant in the era of state capture where government resources are frequently misused by politicians and public administrators. It must be noted that the work of the office of the Public Protector is supported and

[155] Information available online at https://ganhri.org/wp-content/uploads/2022/08/StatusAccreditationChartNHRIs_July-2022.pdf (accessed 20 October 2022).
[156] Section 1A of the Act.
[157] Section 2A of the Act.
[158] Section 1A(3) read with section 2A(4) of the Act.
[159] Section 3 of the Act.

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supplemented by additional staff, appointed in terms of section 3 of the Act. The staff composition of the OPP will be discussed in more detail below in chapter 4.

3.3.2. Seat and offices

The seat of the office of the Public Protector is not indicated in the Act. The Act does not specify where and how many offices must be established or what criteria must be used to determine the need for an office. This gap in the legislation could positively impact on the geographic accessibility of the Commission. I return to this issue in following chapter below.

3.3.3. Independence and impartiality

Independence and impartiality are entrenched in the Act. The Public Protector, Deputy Public Protector, and all members of the OPP are expected to serve impartially, independently and exercise or perform his or her powers and functions in good faith and without fear, favour, bias, or prejudice and subject only to the Constitution and the law.[160] The independence of the OPP is further protected by the appointment process of the Public Protector and the Deputy Public Protector. As noted above, eligible persons are appointed to the OPP by the President in accordance with section 193(4) and (5) of the Constitution.[161] According to the constitutional provisions, the President, on the recommendation of the National Assembly, must appoint the Public Protector.[162] The Act makes provision for appointment of the Deputy Public Protector on the same terms.[163] The National Assembly may only recommend persons who were nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly and approved by the Assembly by a resolution adopted by a majority vote. The national assembly must further recommend to the President who must be appointed as both the Public Protector and the Deputy Public Protector.[164]

Both the Public Protector and the Deputy Public are appointed for a fixed term of seven years,[165] like SAHRC commissioners. Public Protector may serve only one term unlike SAHRC commissioners while the Deputy Public Protector may serve two terms[166] like SAHRC commissioners.

[160] Section 3(13)(a) of the Act.
[161] Section 5(1)(a)(iv) of the Act.
[162] Section 193(4) of the Constitution.
[163] Section 2A(1) of the Act.
[164] Section 2(1)(A) of the Act.
[165] Section 2A(1) of the Act.
[166] Section 2A(2) of the Act.

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To enhance the independence and impartiality of the OPP, both the Public Protector and Deputy Public Protector may be removed from office only on (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by the committee; and (c) the adoption by the National Assembly of a resolution calling for his or her removal from office.[167] Thereafter, the National Assembly must adopt a resolution with a majority vote calling for that person's removal from office.[168] The President must remove both the Public Protector and the Deputy Public Protector from office upon adoption by the National Assembly of the resolution calling for that person's removal.[169] The rules applicable to the impeachment of the Public Protector were recently pushed into the limelight by a motion of the Democratic Alliance that the national Assembly investigate the fitness of the Public Protector, advocate Mkhwebane, to hold office. In *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector* the Constitutional Court approved the rules adopted by the National Assembly to regulate the process.[170] The Court summarised the main points of the process as follows:[171]

> 'The process commences when any member of the National Assembly gives notice by way of a motion to initiate removal proceedings of an office-bearer as contemplated in section 194 of the Constitution.
>
> […]
>
> If the motion is found to be compliant, the Speaker *must* immediately refer the motion to an independent panel that she has appointed to conduct a preliminary assessment of the matter. The independent panel is appointed after political parties represented in the National Assembly are afforded an opportunity to nominate persons to the panel. In respect of composition, the Rules provide that the independent panel must consist of three fit and proper South African citizens, one of whom may be a Judge. If the Speaker decides to appoint a Judge to the panel, the Speaker must do so in consultation with the Chief Justice.
>
> […]

[167] Section 2A(9) of the Act.
[168] Section 194(2) of the Constitution read with section 2A(10) of the Act.
[169] Section 194(3)(b) of the Constitution read with section 2A(10) of the Act.
[170] *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector* 2022 (6) BCLR 744 (CC). The Rules are in Part 4 of Chapter 7 of the Rules of the National Assembly and provide for a 17 step process for the removal of an office-bearer.
[171] *Speaker of the National Assembly* paras 17-19.

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> The report of the independent panel must be considered by the National Assembly. If the National Assembly resolves that a section 194 enquiry should be held, the matter must be referred to a committee, established in terms of rule 129AA, consisting of members of the National Assembly, for a formal enquiry.
>
> […]
>
> The committee must provide a report with its findings and recommendations, including reasons therefore, to the National Assembly. If the report recommends that the office-bearer must be removed, the removal must be put to the National Assembly to vote and if the requisite majority is achieved, in accordance with section 194(2) of the Constitution, the office-bearer must be removed from office'.

The Court ruled that the appointment of a judge to the independent panel does not violate the separation of powers or the independence of the Public Protector.[172] At the time of completing this research paper the impeachment hearing under section 194 of the Constitution was ongoing.

The independence of the OPP should not be overstated and does not mean that the Public Protector is not judicially accountable for misconduct. The Constitutional Court confirmed in *Public Protector v South African Reserve Bank* that punitive cost orders against the OPP does not undermine the independence of the OPP:[173]

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> 'Despite this clear authority that personal costs orders are constitutional and necessary to hold public officials to account when they fail, for example, to fulfil their constitutional obligations, the Public Protector argued for an exception in her case. There is no merit in the Public Protector's contention that the independence of her office and proper performance of her functions demand that she should be exempted from the threat of being mulcted with adverse personal costs orders. On the contrary, personal costs orders constitute an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and the Constitution'.

3.3.4. The mandate and powers of the office of the Public Protector

The preamble of the Act states that the objectives of the OPP are to *investigate any conduct* in state affairs, or in the public administration in any sphere of government, that is alleged or

[172] *Speaker of the National Assembly* para 57.
[173] Para 157.

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suspected to be *improper* or to have resulted in any impropriety or prejudice, *to report on that conduct* and *to take appropriate remedial action*, to strengthen and support constitutional democracy in the Republic. The Act regulates each of these mandates separately.

3.3.4.1. The investigative mandate of the OPP

The investigative mandate of the OPP that is established by section 182(1)(a) of the Constitution is clarified and refined in section 6 of the Act. Matters can be reported to the OPP for investigation by any person by means of a written or oral declaration under oath or after having made an affirmation in which the grounds for the report are specified.[174] Members of the OPP must assist such persons free of charge.[175] Having received a report, the PP may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is an officer or employee in the service of the State who has failed to exhaust the internal remedies available under the Public Service Act of 1994, or the person has not taken all reasonable steps to exhaust his or her legal remedies in connection with the matter.[176]

Section 6(4) contains a comprehensive list of matters that may be investigated by the OPP, including maladministration in connection with the affairs of government at any level; abuse or unjustifiable exercise of power or unfair, capricious, discourteous, or other improper conduct or undue delay by a person performing a public function, corruption, and improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage. The investigative mandate does not extend to 'the performance of judicial functions by any court of law'.[177] The investigative mandate is further limited to matters that are reported for investigation within from the occurrence of the incident or matter concerned.[178] The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.[179]

3.3.4.2. Remedial mandate

The remedial mandate of the OPP has become the most controversial aspect of the work of the OPP. Recall that section 182(1)(c) empowers to OPP, after executing investigative mandate, to 'take appropriate remedial action'.[180] Unfortunately, the Act does not provide further guidance

[174] Section 6(1) of the Act.
[175] Section 6(2) of the Act.
[176] Section 6(3) of the Act.
[177] Section 6(6) of the Act.
[178] Section 6(9) of the Act.
[179] Section 7(1)(b) of the Act.
[180] In *Economic Freedom Fighters v Speaker, National Assembly* 2016 (5) BCLR 618 (CC) para 71 the Court summarised the remedial mandate as follows: 'In sum, the Public Protector's power to take appropriate remedial

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on what 'appropriate remedial action' might mean under different circumstances. Two questions arose as a result. The first is whether the remedial action ordered by the OPP was binding on the state.[181] The second was the scope of the remedial action and whether the OPP could, for example, order the President to establish a commission of enquiry into state capture,[182] or order Parliament to amend the Constitution to change the mandate of the South African Reserve Bank.[183]

As far as the first issue is concerned, the Constitutional Court held in *EFF v Speaker of the National Assembly* that the remedial action ordered by the OPP is binding until such time as it is taken and set aside on judicial review.[184] Mogoeng CJ explained the reason behind this conclusion as follows:[185]

> The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is free to ignore or second guess, is irreconcilable with the need for an independent, impartial, and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy. The words "take appropriate remedial action" do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take. "Take appropriate remedial action" and "effectiveness", are operative words essential for the fulfilment of the Public Protector's constitutional mandate.

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As far as the remedial power to order amendments to the Constitution is concerned, the court ruled as follows:[186]

> 'The Public Protector is a creature of the Constitution, her remedial powers are derived from the Constitution, and hence she operates under the Constitution and not over it. She has no power to order an amendment of the Constitution. Section 74 of the Constitution prescribes the conditions for its own amendment'.

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action is wide but certainly not unfettered. Moreover, the remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made.

[181] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (5) BCLR 618 (CC).

[182] *President of the Republic of South Africa v Office of the Public Protector* 2018 (5) BCLR 609 (GP). See also Wolf L 'The Remedial Action of the "State of Capture" Report in Perspective' (2017) 20 *PER/PELJ* 1.

[183] *Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC).

[184] *Economic Freedom Fighters* para 79. Also see *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* [2015] 4 All SA 719 (SCA) para 52.

[185] *Economic Freedom Fighters* para 67.

[186] *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) para 43. Cited with approval by the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC).

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By contrast, the court ruled that the OPP does have the power to order the President to establish a commission of enquiry.[187]

3.3.5. Reporting obligations

Reporting obligations are twofold in the case of the OPP. First, any person may report orally or in writing the details of matters for investigation (reporting to the OPP).[188] However, the OPP is also obligated to report to the NA or NCOP in writing on all activities undertaken by the OPP during the reporting period (reporting by the OPP).[189] The OPP is obliged to make all its reports open to the public, unless the OPP is of the opinion that exceptional circumstances require a confidential report.[190]

4.4. Conclusion

In conclusion, this chapter investigated the statutory frameworks which regulate the powers and activities of the Public Protector (PP) and South African Human Rights Commission (SAHRC). It has been established that the constitutional role and status of the OPP and the SAHRC have indeed been translated into a comprehensive legislative framework. The next and final question for consideration is whether the constitutional and statutory frameworks have resulted in the operational effectiveness of the two ISDs under consideration. That question is addressed in an exploratory manner in chapter four.

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[187] *President of the Republic of South Africa v Office of the Public Protector* 2018 (5) BCLR 609 (GP) para 82.
[188] Section 6(1)(a) of the Act.
[189] Section 8(2)(a) of the Act: 'The Public Protector shall report in writing on the activities of his or her office to the National Assembly at least once every year: Provided that any report shall also be tabled in the National Council of Provinces. (b) The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if - (i) he or she deems it necessary; (ii) he or she deems it in the public interest; (iii) it requires the urgent attention of, or an intervention by, the National Assembly; (iv) he or she is requested to do so by the Speaker of the National Assembly; or (v) he or she is requested to do so by the Chairperson of the National Council of Provinces'.
[190] Section 8(2A) (a): 'Any report issued by the Public Protector shall be open to the public, unless the Public Protector is of the opinion that exceptional circumstances require that the report be kept confidential'.

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CHAPTER 4: OPERATIONAL EFFECTIVENESS AND EFFECIENCY

4.1. Introduction

Operational effectiveness or efficiency refers to keeping track of an institution's inputs and outputs as performance indicators. Operational effectiveness or efficiency is often divided into four components; leading and controlling functional performance, measuring, and improving the process, leveraging, and automating process and continuously improving performance.[191]

Indicators of operational effectiveness or efficiency, I rely on the range of services the OPP and the SAHRC make *available* to the members of public, and the degree to which those services can be said to be *accessible* to the members of public. The question is thus how much of the constitutional and statutory mandate has been translated into powers and services that are made *available* to the members of public by the OPP and the SAHRC. Factors to consider when measuring the *accessibility* of the OPP and SAHRC include the establishment of offices (where and how many); the operational hours of offices; the staffing of offices (qualification and number of staff members); number of lodged (received) cases and number of cases that have been successfully dealt with (finalised).

Measuring the operational *efficiency* or *effectiveness* of an ISD is a complex task that requires a far more comprehensive field research than could be undertaken for the purposes of this research paper of limited scope. The lockdowns because of the Covid-19 pandemic further disrupted plans to undertake more comprehensive fieldwork and site visits.

4.2 The office of the Public Protector (OPP)

There is little doubt that the OPP is available to the members of the public to investigate, report on, and take remedial action to prevent improper conduct in state affairs or in the public administration in all spheres of government.[192] The OPP is committed to several strategic goals. The first goal is to deliver prompt services to all persons and institutions the OPP serves. The second goal is to achieve access to available PP services. Other goals include an effective and efficient people driven organisation, good governance, and the strengthening of other oversight institutions.

[191] Bourne, M, Mills, J, Wilcox, M, Neely, A & Platts, K 2000, 'Designing, implementing and updating performance measurement systems', International Journal of Operations & Production Management, vol. 20, no. 7, p. 754.

[192] Public Protector South Africa Annual Reports 2003-2019 (www.publicprotector.org (accessed on 04 October 2020); Public Protector *Public Protector South Africa Annual Report 2020/2021* available at https://static.pmg.org.za/Annual_Report_2021_Public_Protector.pdf (accessed 1 September 2022).

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The strategic goals are implemented through three programmes. Programme one (1) deals with administration and aims to improve business processes and systems as well as to enhance the institution's human resources or skills base. Programme two (2) focusses on investigation. The purpose of the programme is to ensure the finalisation of all investigations with speed and required quality. Furthermore, the programme focuses on ensuring that the OPP follows up on implementation of remedial action. Programme three deals with stakeholder management. The purpose of stakeholder management is to ensure that the services provided by the OPP are accessible to all persons and communities. Furthermore, this programme is to play a leading role in strengthening Ombudsman institutions in South Africa and the rest of Africa.

Evidence in place suggests that the OPP is currently accessible through a head office, provincial offices, and regional offices.[193] There are nine (9) provincial offices, one (1) head office and nine (9) regional offices across the country. All eighteen (18) offices (regional and provincial offices) are situated in urban areas. Annexure C shows the addresses and locations of provincial and regional offices. All offices are open and available for walk-in services. In addition to this physical presence on the ground, accessibility of the OPP is enhanced by a national toll-free phone line, an e-mail address, a website (http://www.pprotect.org) and through social media platforms such as Twitter, Facebook, Instagram, and YouTube.[194] Operational office hours are from 08h00 – 16h30 which is in line with the Basic Conditions of Employment Act.[195]

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The OPP is said to require sufficient well-qualified staff members to effectively fulfil its constitutional mandate to investigate, report and remedy improper conduct in state affairs or in the public administration. According to the OPP's strategic plan for the period 2018 to 2023 and annual performance plan 2018/2019,[196] this mandate can be located under programme 2 (see Annexure A). The following information shows the staff complement and the minimum required qualifications for OPP staff members.

The Chief Operations Officer must hold a postgraduate qualification in law or an equivalent qualification (preferably a master's degree in law, business administration, economics, or operations management). A minimum of 10 - 20 years related experience of which 5 years should be at executive management level is required. All staff members under programme two

[193] http://www.publicprotector.org
[194] http://www.publicprotector.org
[195] Act 75 of 1997.
[196] http://www.pprotect.org/sites/default/files/Strategic_plan/PUBLIC%20PROTECTOR%20STRATEGIC%20PLAN%202018_2023%20AND%20ANNUAL%20PERFORMANCE%20PLAN%202018_19.pdf (accessed on 4 October 2020).

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report to the Chief Operations Officer, while the Chief Operations Office report to the Chief Executive Officer (see Annexure A).

The Executive managers are required to hold at least a postgraduate degree in law (preferably LLB degree or LLM degree). The candidate must be an admitted attorney or an advocate. In addition, a minimum of 10 years' related experience of which 5 years should be at Senior Management Level is required.[197] By contrast, other Executive managers (specifically CSM) are required to hold a postgraduate degree in business management or another equivalent qualification, a minimum of 10 years' management experience in performing strategic corporate service management duties of which 5 years should have been at senior management level.[198] Senior manager (Legal Services) is required to hold at least an appropriate LLB degree or 4 - year law degree. Admission as an attorney or an advocate. A minimum of 8-year post-qualification experience of which 5 years should be at managerial level in the legal field.[199]

Provincial Representatives are required to hold a recognised Law degree (LLB, BA Law, B Proc, B Juris). A post graduate qualification in law, forensic investigation, or public administration will be an added advantage. In addition, eight (8) years' relevant work experience, of which 5 years should have been at management level, are required.[200]

Considering the stringent application requirements set out above, there can be no doubt that the OPP has sufficiently qualified staff to provide the mandated investigative services to the members of the public.

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The best indicator of the availability and accessibility of the OPP number of cases lodged (complaints) and finalised (successfully resolved) by the OPP. Below is the analysis of cases lodged and cased finalised.

Figure (a) from Annexure A shows that there was a significant increase in the number of complaints received and the number of complaints finalised between the 2003/2004[201] and

[197] http://www.pprotect.org/sites/default/files/files/vacancies/Latest%20PPSA%20Vacancy%20Responsibilities.pdf (accessed on 4 October 2020).
[198] http://www.pprotect.org/sites/default/files/files/vacancies/ADVERT_MAY_2015.pdf (accessed on 5 October 2020).
[199] http://www.pprotect.org/sites/default/files/files/vacancies/Advert%20-%20February%202019.pdf (access on the 28 September 2020).
[200] http://www.pprotect.org/sites/default/files/files/vacancies/PPSA%20Vacancies%20September%202019.pdf (accessed on 28 September 2020).
[201] Public Protector South Africa Annual Report 2003-2004 (www.publicprotector.org (accessed on 04 October 2020).

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2004/2005[202] financial years. The most interesting trend is between the 2004/2005 and the 2007/2008[203] financial year which shows a drastic decrease in the number of complaints received and finalised [22 350 – 13 195 (complaints received) 41% decrease, 17 539 – 11 280 (complaints finalised) 36% decrease]. After 10 years of democracy, the OPP was well established with a case load of 22 350 complaints received annually. These complaints included a wide range of issues, from compensation for injuries on duty, to maintenance of minor children, the protection of whistle-blowers, investigations relating to the constitutional duty of the state to render health care, standards of service of public servants, high level conflicts of interest, corruption, and principles of administrative justice.[204]

During the years under analysis the OPP was tasked by parliament to investigate allegations that the state-owned petroleum company had made illicit payments to the ruling ANC to assist the party in campaigning for the 2004 national elections.[205] The scandal evolved to include allegations of a major petroleum-procurement process that awarded contracts to firms with close ties to the ANC. The PP conducted investigated and released a report that found no violation of the procurement process while awarding the contract. However, these findings were challenged in the court law. The matter reached the SCA where the Court found that 'no proper investigation' was conducted and that the report should be set aside.[206] This was perceived to be a sign that the PP was overly swayed by the political consequences of potential investigations.[207] This might be one of the reasons for this drastic decrease in number of complaints received. Perhaps the members of the public lost confidence in the work done by the OPP.

Figure (b) from Annexure A showed that the office of the Public Protector received 12 435 complaints and resolve 13 220 (106 %) complaints during 2008/2009 financial year. During 2012/2013 this office received 22 860 complaints and resolve 22 400 (98%) cases. It is evident that other complaints were carried over from 2007/2008 and previous financial years to 2008/2009 financial years hence the OPP resolved more complaints than received cases during

[202] Public Protector South Africa Annual Report 2004-2005 (www.publicprotector.org (accessed on 04 October 2020).
[203] Public Protector South Africa Annual Report 2007-2008 (www.publicprotector.org (accessed on 04 October 2020).
[204] Constitutional mandate, functions, and insights on Institutions Supporting Democracy. Office on Institutions Support Democracy, 2019/2020 Annual Report.
[205] Report No.30 of 2005; Report on an investigation into an Allegation of Misappropriation of Public Funds by the Petroleum and Gas Corporation of South Africa, trading as PetroSA, and Matters Allegedly Related.
[206] The Public Protector v Mail & Guardian para 145.
[207] Musuva, 2009: 20.

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the tenure of Advocate Lawrence Mushwana. There were 25 860 (108% increase from 2008/2009 – 2012/2013 financial year) received during the tenure of advocate Thuli Madonsela[208] and finalised complaints increased up to 22 400 (69% from 2008/2009 – 2012/2013 financial year).[209]

The OPP could be perceived as highly effective during this period in exposing maladministration, corruption and independence was guaranteed. This is how Advocate Thuli Madonsela's tenure was characterised. Advocate Thuli Madonsela and Advocate Lawrence Mushwana's tenure were both highly effective based on the above analysed information. This observation is based on the number of cases or complaints received and the percentage of cases or complaints resolved. This observation is contrary to the media and public observation about Advocate Lawrence Mushwana's tenure that has been criticized after his appointment as chairperson of the SAHRC.[210] During Advocate Lawrence Mushwana's tenure as PP, the OPP was labelled as the "ANC Protector" because of the large number of ANC members being cleared of wrongdoing by the OPP.[211] However, some of these findings were overturned by the courts. The number of cases resolved also include matters affecting ordinary people daily i.e., lack of water, improper roads, lack of housing, poverty, access to social grants and many other issues. The OPP also noted an increase in the number of complaints involving executive ethics and integrity violations in the exercise of state power and control over state resources. The high-profile cases and the clear independence and rigour of the findings helped to enhance the legitimacy of the OPP. An example of this is an investigation conducted in response to the 2009 complaints regarding the public funds that had been spent on the upgrade of the president's personal residence, Nkandla.

Figure (c) from Annexure A, shows an exponential decrease in the number of complaints received and finalised 26 195 – 14 147 and 24 642 – 9 912 during the 2014/2015[212] and 2015/2016[213] financial years. This is at the time when the Nkandla report "Secure in Comfort report" was highly controversial and attracted public attention. It must be noted that Advocate Thuli Madonsela was about to vacate the office and the effectiveness or efficiency of the OPP

[208] Public Protector South Africa Annual Reports 2008/2009 – 2012/2013 (www.publicprotector.org (accessed on 04 October 2020).
[209] Public Protector South Africa Annual Reports 2008/2009 – 2012/2013.
[210] Thipanyane 2015/2016 *NY L Sch L Rev* 140.
[211] Hoexter *Administrative Law* 91.
[212] Public Protector South Africa Annual Reports 2014 – 2015 (www.publicprotector.org (accessed on 04 October 2020).
[213] Public Protector South Africa Annual Reports 2015 – 2016 (www.publicprotector.org (accessed on 04 October 2020).

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was in question. The uncertainty around the independence of the OPP was intensified seeing that the next incumbent was to be appointed by President Jacob Zuma who, at the time, who was the subject on ongoing investigations by the OPP.

The appointment of advocate Busisiwe Mkwebane, the OPP has investigated allegations of misappropriation of public funds, improper conduct and maladministration by the provincial government and several other organs of state in connection with the Nelson Mandela funeral and memorial. Senior ANC officials in the Eastern Cape province were found to have benefited unlawfully and are currently appearing before the court. The OPP found evidence of widespread irregular, fruitless and wasteful expenditure in the procurement of goods and services in most government department at the national, provincial and local level. The OPP finalised several systemic investigations aimed at addressing the root cause of complaints in respect of certain areas of service delivery by State institutions. Advocate Busisiwe Mkwebane personally intervened in Masiphumele, an informal settlement outside Cape Town in the Western Cape, to address the inhumane living conditions of the community were subjected to, as well as restoring law and order and peace at the infamous Glebelands Hostel in Umlazi, Durban in KwaZulu-Natal.[214]

During 2019/2020 – 2021/2022 financial years we have observed an interesting performance of the OPP. Cases finalised were more than cases received. Data showed a highly performing OPP which is has not been observed in other financial year. The OPP intentional invested time and resources to attend to backlog cases hence cases finalised were more than cases received. This performance happened under the tenure of Advocate Busisiwe Mkhwebane who has be recently criticized for losing cases before the courts and currently suspended by President Cyril Ramaphosa. The completion of investigations and publication of reports within time helped OPP not to carry cases over to the next financial year. However, the PP critics perceive this efficiency as a mechanism to find those who are anti- PP guilt as soon as possible. This perception or view ignore internal standard operating procedures that govern investigations and publications of reports.

It evident from the data analysed above that the OPP is only available in urban (head office, provincial offices are found in towns or cities) areas. This then suggest that there are limited number of citizens that access services rendered by OPP. It is an undisputed fact that most people that are affected by poor service delivery reside in townships and rural areas. These are

[214] The Public Protector v Mail & Guardian para 147.

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citizens to be serviced more than the affluent areas. It appears that the current PP intentionally re-focusing the attention of OPP to communities than high profile cases. My observation is contrary to those who perceive the current PP as a tool utilised by politicians to settle political scores. My view does not completely ignore a debate around the current PP being involved in politics, this may need a separate analysis all together.

Lastly, it is evident from the above analysis that availability and accessibility are co-dependent. This means that availability of the service at OPP is entirely dependent of accessibility and accessibility depends on availability. A conclusion that has been drawn from this analysis is that OPP is available and accessible in urban areas. This clearly means that the OPP has limited offices to reach members of public to access services at the OPP. This also means that the OPP has limited staff members to deal with all received cases or complaints. The OPP consist of highly qualified personnel with necessary skills to service members of public. This does not ignore the fact that the court of law from time to time overturned other investigations done by OPP. Number of lodged (received) cases and number of cases that have been successfully dealt with (finalised) varies from financial year to another based on the analysis conducted. It has been noted that the public perception plays a huge role in this part of analysis. The more confidence experienced by members of public, media, and other sectors the more the OPP receive cases visa verse. This perception at times has to do with the incumbent and the association of the incumbent.

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4.3 Human Rights Commission

To give operational effect to its constitutional and statutory mandate, the SAHRC has adopted five strategic objectives.[215] Strategic goal one is to promote compliance with international and regional human rights related treaties obligations. Strategic goal two is to advance the realisation of human rights. Strategic goal three is to deepen the understanding of human rights to entrench a human rights culture. Strategic goal four aims to ensure fulfilment of the SAHRC's constitutional and legislative mandates. Finally, strategic goal five is to improve the effectiveness and efficiency of the SAHRC to support delivery on its mandate.

The SAHRC intends to fulfil its strategic objectives by implementing three programmes. Programme one deals with administration. The central goal in this programme is to strengthen governance, institutional excellence, professionalism at all levels of the SAHRC. Programme

[215] South African Human Rights Commission Annual Report 1997-2019 (https://www.sahrc.org.za (accessed on 04 October 2020).

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two deals with the promotion and protection of human rights. In this programme there are several units that have been established to fulfil promotion and protection of human rights. These units include Commissioner's programmes; the office of the Chief Operations Officer, a legal services programme, an advocacy and communication programme, and a provincial offices programme. The Advocacy and Communications unit plays a strategically central role in strengthening the Commission's promotion mandate, as articulated in the Constitution.[216] The Parliamentary and International Affairs Unit is situated within the SAHRC's Research Programme. The Legal Services Unit (LSU) is responsible for providing quality legal services for the protection of human rights in South Africa as mandated by the Constitution.[217] Finally, programme three deals with research, monitoring and reporting. The Research Unit (RU) is tasked mainly with discharging the monitoring mandate of the SAHRC.

This is in line with section 184(1)(c) of the Constitution.[218] The Research Unit conducts investigations on pertinent human rights issues through various means, including interviews and desktop studies, and then drafts reports that include findings from these studies. This is in line with section 184(2)(c) of the Constitution.[219] It is evident from all annual reports of the SAHRC that the commission has range of services available to the members of the public.

Evidence suggest that the SAHRC is only accessible through its head office and provincial offices in all nine (9) provinces.[220] Evidence in place shows that the SAHRC's working hours are from 08h30 - 16h30, this amounts to eights (8) working hours including one (1) hour lunch. This is in line with the Basic Conditions of Employment Act.[221] The SAHRC is also accessible through social media platforms i.e., Facebook and Twitter. The SAHRC uses a hardcopy forms (in all official languages) and an online complaint system is available. Furthermore, this system also allows complaints to be lodged on behalf of others and on behalf of organisations.

The accessibility of the Commission is ensured through sufficient well-qualified staff members. The following information shows the staff complement and the minimum qualifications support staff of the SAHRC should possess.

[216] Section 184(1)(b).
[217] Section 184(1)(b).
[218] Monitor and assess the observance of human rights in the Republic.
[219] To carry out research.
[220] https://www.sahrc.org.za/index.php/provinces
[221] Act 75 of 1997.

http://etd.uwc.ac.za/

A provincial manager should have obtained an appropriate degree (preferably at master's level). Knowledge of all relevant human rights legislation is essential, as is knowledge of human rights theory and practices, knowledge of research processes, principles, and practices, knowledge of all relevant legislation, policies, and procedures, knowledge and understanding of monitoring and evaluation. At least 5 - years relevant experience in a management position is required. Experience in human rights education and training specifically is needed. So is experience in the preparation and management of operational plans and budgets.[222]

The SAHRC also employs a number of human rights advocacy and research officers. Either LLB or BA (Social Sciences/Development Studies) Basic Project management including basic monitoring and evaluation. Good understanding of human rights law. Minimum of 2 years of advocacy and/ or legal work, including facilitation and training. Basic Research skills. Dependent on level of qualification, but with at least 1 year of experience conducting field work. Must be an experienced driver with an unendorsed license.[223]
Senior Legal Service Officers should be possession of a LLB degree, be an admitted attorney or advocate (must have completed pupillage and been admitted to the Bar) and have sound legal knowledge of all relevant (national and international) human rights legislation and related laws. Knowledge of human rights theory and practices is an additional requirement. Understanding of litigation practices, processes, and procedures is essential and so is a sound understanding of complaints handling processes and procedures as well as investigation processes and procedures. At least 3 - years practical experience is required with at least 1 to 2 - years management experience. Experience in a human rights environment is an added advantage.[224]

Legal service officers are required to be in possession of a LLB degree. Knowledge and understanding of all relevant (national and international) human rights legislation/laws, as well as human rights theory and practices are essential. Must understand litigation practices, processes, and procedures as well as investigation processes and procedures. At least 2 - years'

[222] https://sahrc.org.za/home/21/files/110929%20-%20Provincial%20Manager.pdf (access on 04 October 2020).
[223] https://www.sahrc.org.za/home/21/files/Job%20Profile%20Human%20Rights%20Officer_Final.pdf (accessed on 4 October 2020).
[224] https://www.sahrc.org.za/home/21/files/110929%20-%20Senior%20Legal%20Services%20Officer.pdf (accessed on the 4 October 2020).

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experience in a similar position is needed. Experience in a human rights environment is an added advantage.[225]

Considering the stringent application requirements set out above, there can be no doubt that the SAHRC has sufficiently qualified staff to provide the mandated investigative services to the members of the public.

As was the case in the discussion of the OPP above, by far the best indicator of the accessibility and availability of the SAHRC is the number and nature of complaints lodged (received) and successfully finalised or otherwise dealt with by this SAHRC.

Figure (d) from Annexure B shows a fluctuating number of cases handled between the 1999 and 2002/2003 financial years.[226] During the 2002/2003 to 2003/2004[227] financial years it is evident that there was an increase of 71% in cases handled during this period. This is a major achievement in the operational effectiveness and performance of the SAHRC. The increasing number of cases between the 1999/2000 and 2000/2001[228] financial years can be attributed to the educational training activities of the SAHRC that have grown exponentially. The Commission presented 214 workshops and training programmes that reached 8 484 participants. In addition, the Commission conducted 75 seminars and reached 11 499 participants. During the 2002/2003 to 2003/2004 financial years the exponential growth can be attributed to reviewed structures and operations to ensure a more streamlined, effective, and efficient delivery of these services.[229] The following offices were established in this period: five (5) provincial offices, situated in Limpopo, Free State, Western Cape, Kwa - Zulu Natal, Eastern Cape during the 2001/2002[230] financial year and later one (1) office was established in the Northern Cape during the 2002/2003[231] financial year. The establishment of provincial

[225] https://www.sahrc.org.za/home/21/files/110929%20-%20Legal%20Services%20Officer.pdf (accessed on the 4 October 2020).
[226] South African Human Rights Commission Annual Reports 1999-2002/2003 (https://www.sahrc.org.za (accessed on 04 October 2020).
[227] South African Human Rights Commission Annual Reports 2002-2003/2004 (https://www.sahrc.org.za (accessed on 04 October 2020).
[228] South African Human Rights Commission Annual Report 2001-2001 (https://www.sahrc.org.za (accessed on 04 October 2020).
[229] South African Human Rights Commission Annual Reports 2002/2003-2003/2004 (https://www.sahrc.org.za (accessed on 04 October 2020).
[230] South African Human Rights Commission Annual Report 2001-2001.
[231] South African Human Rights Commission Annual Report 2002-2003.

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offices within this period (2001/2002 – 2003/2004 financial year)[232] contributed to the exponential increase in the number of cases handled. This exponential growth account for a 96% increase in cased handled from the 2001/2002 to the 2003/2004 financial year. This is evident from figure (e) from Annexure B, that cases received by SAHRC gradually declined between 2004/2015 to 2008/2009[233] financial year by 30%. These cases dropped from 12 194 to 8 556 this is an indicative of a challenge(s) that were faces by this SAHRC during this period. It was also a time of leadership transition where commissioner's terms were coming to an end and new commissioners were appointed. A drastic decrease in number of received cases was evident from 2007/2008[234] financial year by 26%. During this time the vacancy created by the resignation of Commissioner McClain-Nhlapo continued to remain unfilled, impacting on the capacity of the SAHRC to discharge its wide mandate. In late 2007 a major setback to the work of the SAHRC was due to the loss of server and several computers.[235]

Figure (f) from Annexure B, shows a drastic decline in received and finalized cases from 2009/2010 to 2010/2011 financial year.[236] Received cases declined from 9 326 to 5 626 while finalized cases were the lowest, 1 429 – 886. During 2011/2012 to 2013/2014[237] financial years evidence shows an increase in both received cases and finalized cases. Received cases increased from 7 296 to 9 217 while finalized cased increased from 5 784 to 8 550. This is an achievement on the performance of the SAHRC. In October 2019 it was a time of leadership transition and new commissioners took over responsibility.

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The SAHRC received an unqualified audit report from the Auditor-General.[238] The SAHRC continue working with very limited resources and significant financial and information technology challenges continue to have a negative impact on the SAHRC's performance. During the 2011/2012 – 2013/2014[239] financial years, the SAHRC visited the Free State and Makhaza in the Western Cape, two communities where the SAHRC made findings against municipalities for building toilets without enclosures. Disabled residents were unable to access

[232] South African Human Rights Commission Annual Reports 2001/2002-2003/2004 (https://www.sahrc.org.za (accessed on 04 October 2020).
[233] South African Human Rights Commission Annual Reports 2004/2005-2008/2009 (https://www.sahrc.org.za (accessed on 04 October 2020).
[234] South African Human Rights Commission Annual Report 2007-2008 (https://www.sahrc.org.za (accessed on 04 October 2020).
[235] South African Human Rights Commission Annual Report 2007-2008.
[236] South African Human Rights Commission Annual Reports 2009/2010-2010/2011 (https://www.sahrc.org.za (accessed on 04 October 2020).
[237] South African Human Rights Commission Annual Reports 2011/2012-2013/2014 (https://www.sahrc.org.za (accessed on 04 October 2020).
[238] South African Human Rights Commission Annual Reports 2011/2012-2013/2014.
[239] South African Human Rights Commission Annual Reports 2011/2012-2013/2014.

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the toilets, women and young girls were afraid to use these toilets after dark, and deaf residents indicated that they were unable to communicate with each other after dark since there were no lights in and around the toilets.

Figure (g) of Annexure B shows a decline on both received and finalized cases from 9217 – 8000 and 8550 – 7200 during the 2013/2014 and 2014/2015 financial years.[240] This decline can also be seen in the 2017/18 financial year by 3% on received cases and 8% on finalised cases. Other than the above two declines, the number of received and finalised cases steadily increased. Received cases increased from 8 000 to 10 448 while finalised cases increased from 7 200 to 8 498. The SAHRC handled 8 000 new complaints lodged across the various provincial offices in 2014/15. More than 7 200, which accounts for 90% of the cases, were finalised. SAHRC strategically focused on advocacy and outreach. Through these interventions' communities have been made aware of available human rights mechanisms. The advocacy and promotional role were strategically important in enhancing and deepening public understanding and entrenching a human rights culture within our nation. The Commission's emphasise on taking the human rights education to rural and peri-urban areas, engaging with community leaders and community-based organizations to expand the reach of the Commission's services. These results can be attributed to the effectiveness of the corrective measures put in place to deal with the backlog in the processing of complaints. The SAHRC has appeared as *amicus curiae* or litigant in many cases.[241]

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Evidence shows that between 2019/2020 to 2021/2022 financial years SAHRC resolved/ finalised less cases than received. Received and finalised cases increased exponentially. About 74% cases were resolve between 2019/2020 to 2021/2022 financial years. An observation between 2019/2020 – 2021/2022 financial year there is evident increase in number of cases received (11803 – 16444) and cases finalised (8891 – 12302). This could be attributed to two factors i.e., qualified personnel and public confident on the SAHRC. To show that the public confidence has been restored at SAHRC number cases received have increased.

[240] South African Human Rights Commission Annual Reports 2013/2014-204/2015 (https://www.sahrc.org.za (accessed on 04 October 2020).

[241] Several of the most recent such cases are *Welkom High School and Another v Head, Department of Education, Free State Province* 2011 (4) SA 531 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Another* 2009 (4) SA 222 (CC); *Brummer v Minister for Social Development and Another* 2009 (6) SA 323 (CC); *Bhe and Others v Magistrate, Khayelitsha; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

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4.4. Conclusion

In conclusion, this chapter has dealt extensively with the performance of the two selected ISDs given their constitutional and statutory mandates. The ISDs consist of highly qualified personnel with necessary skills to service members of the public. ISDs are available, meaning the programmes in each of the selected institution or ISDs exist. ISDs have insufficient offices established over a wide enough spread to be called accessible. This also means that the ISDs have limited staff members to deal with all received cases or complaints, hence the backlog carried over to other financial years. Lastly, ISDs have been perceived to politicized and used for patronage purposes by the dominant political party. This compromises the level and quality of independence of ISDs, but investigations can be overturned by the court of law to secure the level of independence.

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CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This research paper set out to investigate the constitutional status and the role of Institutions Supporting Democracy (ISDs). To make contribution to the body of knowledge towards closing this gap in the academic literature by taking a fresh look at the constitutional role and status of two of the chapter 9 institutions or ISDS: the Public Protector (OPP) and the South African Human Rights Commission (SAHRC). to use this research paper as a tool to educate ordinary citizens about ISDs.

Law theories have been used to locate ISDs on the subject. The common strains that emerged from the theories were that the ISDs are perceived to be a fourth branch of government while another theory located ISDs as apex civil society organisation and open community of constitutional interpreters. The last theory located ISDs as intermediaries, a link between government citizens. I have argued that ISDs should be regarded as open community of constitutional interpreters to fulfil their constitutional mandate.

Furthermore, the research paper investigated the statutory frameworks that regulates the powers and activities of the ISDs i.e., Public Protector (PP) and South African Human Rights Commission (SAHRC). It has been established that the constitutional role and status of the OPP and the SAHRC have indeed been translated into a comprehensive legislative framework. In other words, ISDs should be able to function efficiently and effectively from the current existing legislative framework without hindrances.

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The last part of the research paper focuses on the operational efficiencies and effectiveness of the selected ISDs. It is evident that ISDs consist of highly qualified personnel with necessary skills to service members of the public. ISDs are available, meaning, the programmes in each of the selected institution or ISDs exist. However, ISDs have insufficient offices established over a wide enough spread to be called accessible. This also means that the ISDs have limited staff members to deal with all received cases or complaints, hence the backlog carried over to other financial years. ISDs have been perceived to politicized and used for patronage purposes by the dominant political party. This compromises the level and quality of independence of ISDs.

The intention of this chapter is to draw conclusions based on the above analysis and make necessary recommendations.

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5.2. Conclusion(s)

Chapter nine of the Constitution entrenches the core elements of an efficient ISDs, as understood under the Paris Principles. There is a clear constitutionalised mandate and the basic conditions of an effective ISD are constitutionally entrenched. As a result of their constitutional mandate, I strongly believe that ISDs should not be regarded as a fourth branch of government as suggested by Klug. Instead, ISDs should be seen of regarded, as open community of interpreters that exist outside government and the executive, not as apex civil society organisations as Du Plessis suggested. I would agree that ISDs have characteristics of being intermediaries as alluded by Murry. ISDs should not be perceived as quasi-judicial or quasi-parliamentary institutions as they cannot interfere with the judicial mandate. The emphasis from the legislative framework is that they cannot investigate matters before the court and cannot declare findings being unconstitutional. Only the court of law is empowered to do so.

Evidence from this research paper shows that ISDs are designed and entrusted to hold the executive (President, Deputy President, Ministers, and Deputy Ministers) and government accountable. It is for that reason that they should not be seen as a fourth branch of the government. This characterisation (fourth branch of government) can severely compromise independence of ISDs. Budget allocations to ISDs from state departments, such as the Department of Justice and Constitutional Development, clouds the picture and could become one contributor to the failure of ISDs to perform their constitutional mandate independently, without fear or favour. Should the ISDs be perceived and begin to operate as a fourth branch of government, there will be an insufficient internal division of power among these institutions and the government. They will certainly fail to hold the government accountable because they will be under governmental pressure, rules, and decisions.

The constitutional role and status of the ISDs has been translated into statutory powers and obligations. It is evident from chapter three (3) that the current South African Human Rights Commission Act amended the previous version of the Act to address most of the recommendations made by the ad hoc or Asmal's committee in 2017. Similar amendments were made to the Public Protector Act in 2003, even prior to the ad hoc Asmal Committee's recommendations. Over the past 25 years a legislative framework has developed to enable the independence of ISDs to effectively perform their constitutional mandate outside government by qualified or competent officials.

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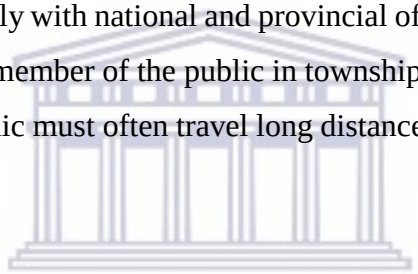
The third conclusion is that much work has been done by the ISDs to implement their constitutional and statutory mandates, such as setting up governance structures within the ISDs and ensuring that services are available in line with their constitutional mandates. However, there are still shortcomings and challenges identified in relation to independence, accessibility and availability which are fundamental constitutional mandates. Identified shortcomings have hindered the progress to an extent and performance of ISDs as mandated by the Constitution.

By far the best indicator of the accessibility and availability of the ISDs is the number and nature of complaints lodged (received) and successfully finalised or otherwise dealt with by these ISDs. The number of lodged (received) cases and the number of cases that have been successfully dealt with (finalised) vary from financial year to another, based on the analysis conducted. It became evident that ISDs are available and accessible only in urban areas. The OPP tried to establish regional offices to enhance accessibility and availability. While the SAHRC remains operational only with national and provincial offices, which makes it difficult to access available services by member of the public in townships and rural areas. This clearly means that members of the public must often travel long distances to access the services of the SAHRC and OPP.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The ISDs consist of highly qualified officials with skills to service members of the public. This professionalisation of the ISDs contributes to the independence of the ISDs. Officials are expected to perform their duties without fear, favour, or prejudice. This does not always translate to quality work produced by ISDs, for an example, several findings made by ISDs have be overturned by courts. It remains difficult to measure or assess the degree of independence because a qualified and skilled official does not translate to an official acting without fear, favour, and prejudice. Fear, favour, and prejudices are characteristics attributed to a behaviour of an individual which are difficult to regulate. One can only rely on the code of conduct and ethics that bind officials in their field of work. It has been noted that the public perception play a role in as far as independence is concerned. The more confident members of public, media, and other sectors are, the more the ISDs receive complaints.

5.3. Recommendations

The National Assembly must establish mechanisms to ensure that the procedures for the replacement of commissioners are carried out efficiently. This should include matters such as the staggering of appointments, exit interviews, death, resignation, and hand-over periods. The

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process should commence long enough before the date of expiry of the current incumbents and the appointment of new commissioners should be made several month(s) before the expiry of the current incumbents. This recommendation was initially made by the ad hoc Asmal Committee and deserves full and continuing support.

There remains some uncertainty around the accessibility and availability of the selected ISDs. It is evident from the analysis that ISDs are largely urban based. The ad hoc Asmal Committee could not confirm the usefulness of provincial offices where such have been established and held that such offices should be established only where a demonstrable need can be shown.[242] This research paper has also outlined challenges in detail regarding accessibility and availability of the ISDs in rural areas. The selected ISDs are not accessible to all citizens given their geographic locations. The following recommendations are made:

- ISDs should increase public access and availability of their work through innovative public outreach or awareness mechanisms.
- ISDs should consider use of existing government infrastructure such as libraries, post offices, community centers, social grant pay points, Thusong Service Centers and Community Development Workers, Community halls and clinics and non-governmental organisation and faith-based organisation (MOUs be signed).
- ISDs should consider the establishment of regional and local offices or consider sharing (with other ISDs) of facilities in provincial offices where practical and appropriate.
- ISDs should consider employing more qualified staff members to avoid backlog cases. This will also guarantee independence to extent of the ISDs that function without fear, favour, or prejudice. The appointment of candidates who held political office in the past must be avoided at all costs.
- ISDs must be allowed to source funds externally and to declare sources of funding, or the National Assembly should fund all costs of ISDs to avoid compromising the independence of the ISDs.

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[242] Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. (2007) xi.

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South African Human Rights Commission Annual Report 2019 – 2020 (accessed on 22 November 2022).

South African Human Rights Commission Annual Report 2018 – 2019 (accessed on 04 October 2020).

South African Human Rights Commission Annual Report 2017 – 2018 (accessed on 04 October 2020).

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South African Human Rights Commission Annual Report 2014 – 2015 (accessed on 04 October 2020).

South African Human Rights Commission Annual Report 2013 – 2014 (accessed on 04 October 2020).

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South African Human Rights Commission Annual Report 2010 – 2011 (accessed on 04 October 2020).

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South African Human Rights Commission Annual Report 2009 – 2010 (accessed on 04 October 2020).

South African Human Rights Commission Annual Report 2008 – 2009 (accessed on 04 October 2020).

South African Human Rights Commission Annual Report 2007 – 2008 (accessed on 04 October 2020).

South African Human Rights Commission Annual Report 2006 – 2007 (accessed on 04 October 2020).

South African Human Rights Commission Annual Report 2005 – 2006 (accessed on 04 October 2020).

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South African Human Rights Commission Annual Report 2003 – 2004 (accessed on 04 October 2020).

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ANNEXURE: A

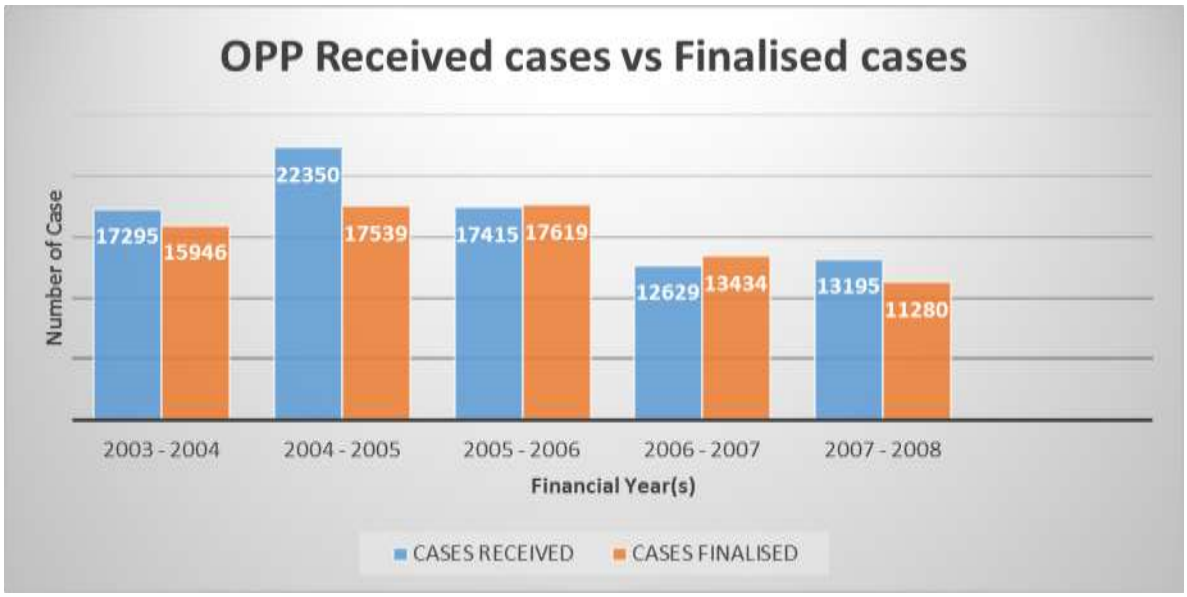

Figure (a): Shows numbers of cases received and finalized as between April 2003 – April 2008 by the office of the Public Protector.

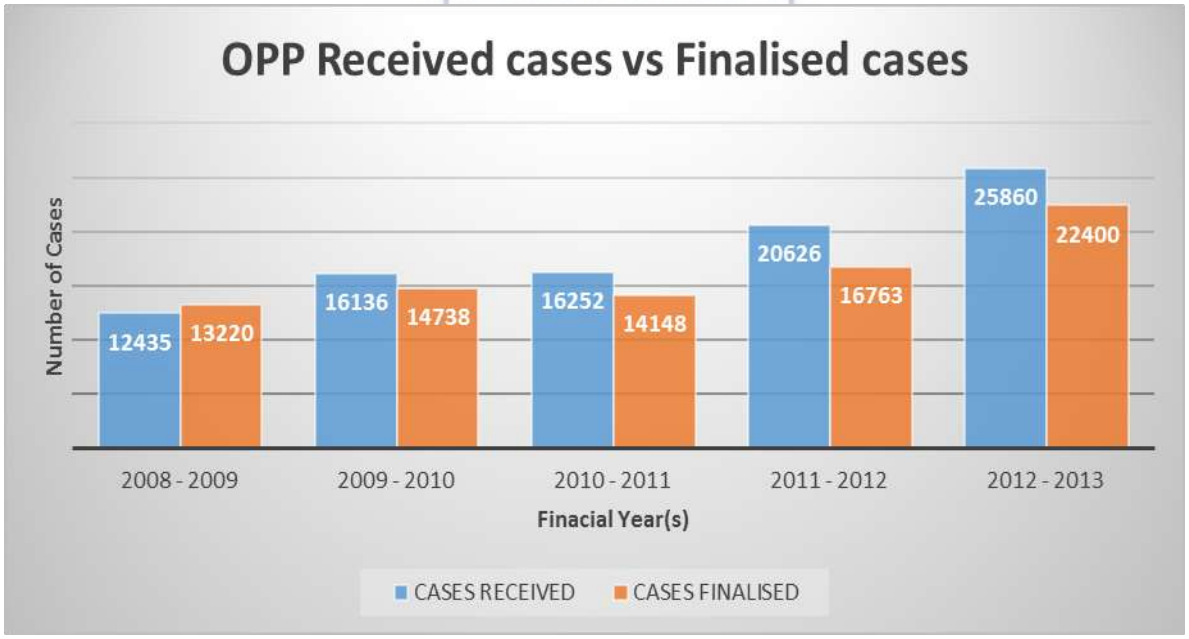

Figure (b); Shows numbers of cases received and finalized as between April 2009 – April 2013 by the office of the Public Protector.

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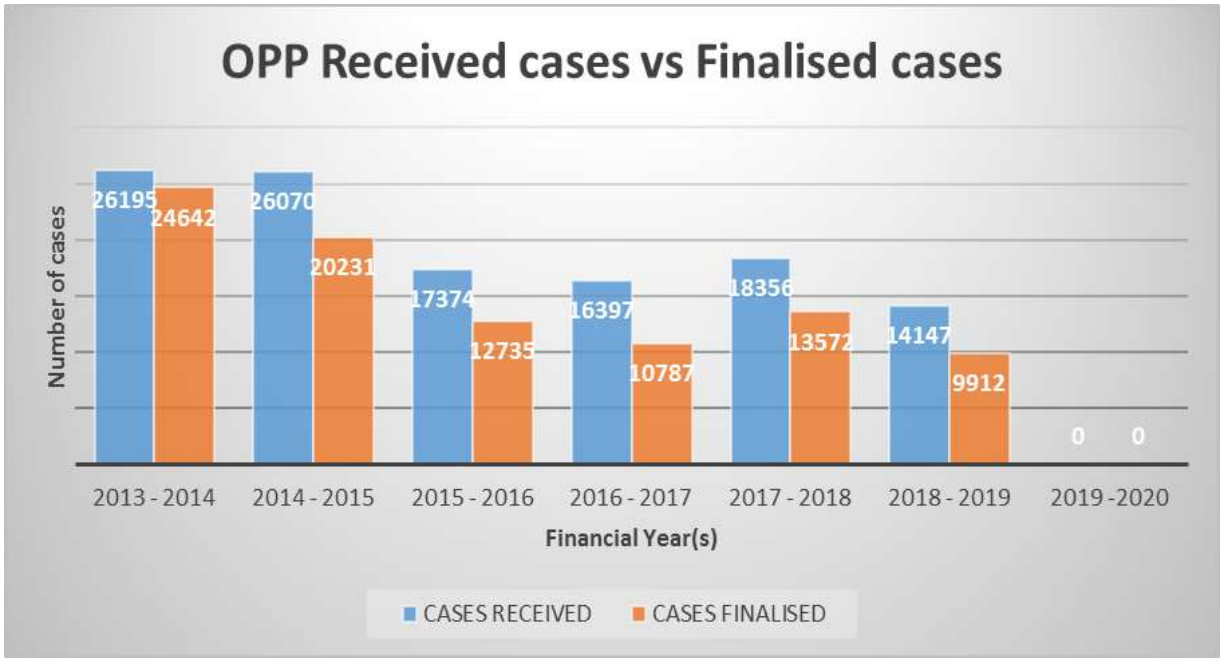

Figure (c); Shows numbers of cases received and finalized as between April 2014 – April 2020 by the office of the Public Protector.

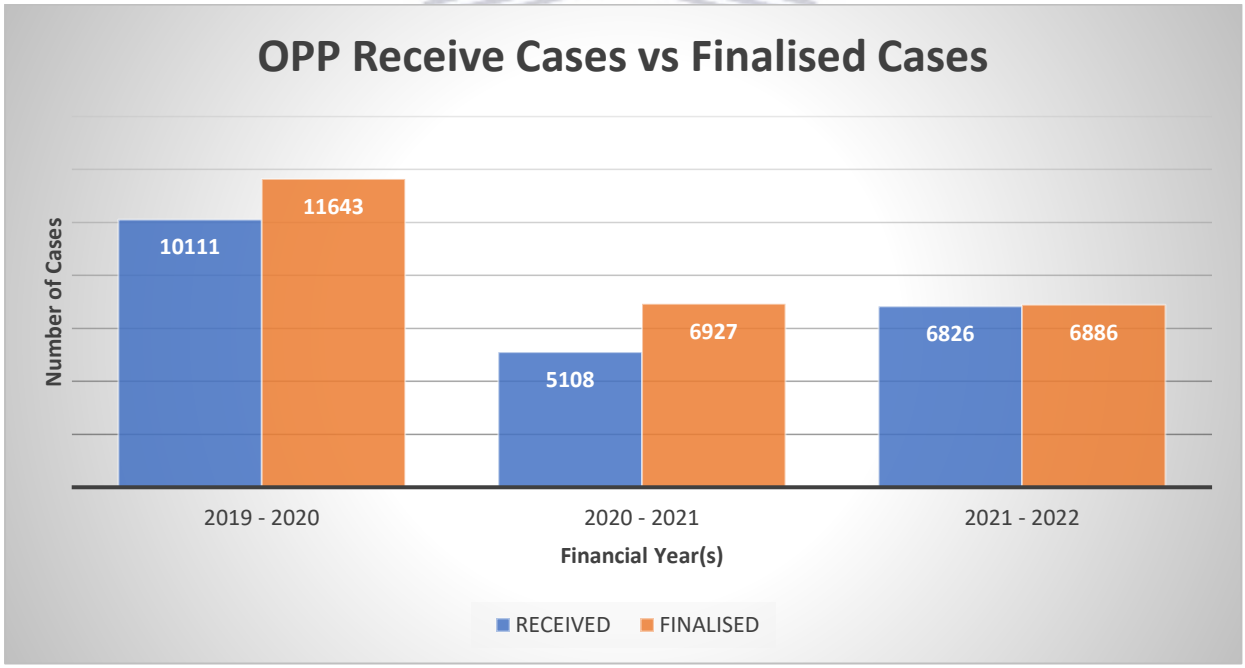

Figure (d); Shows numbers of cases received and finalized as between April 2019 – April 2022 by the office of the Public Protector.

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ANNEXURE: B

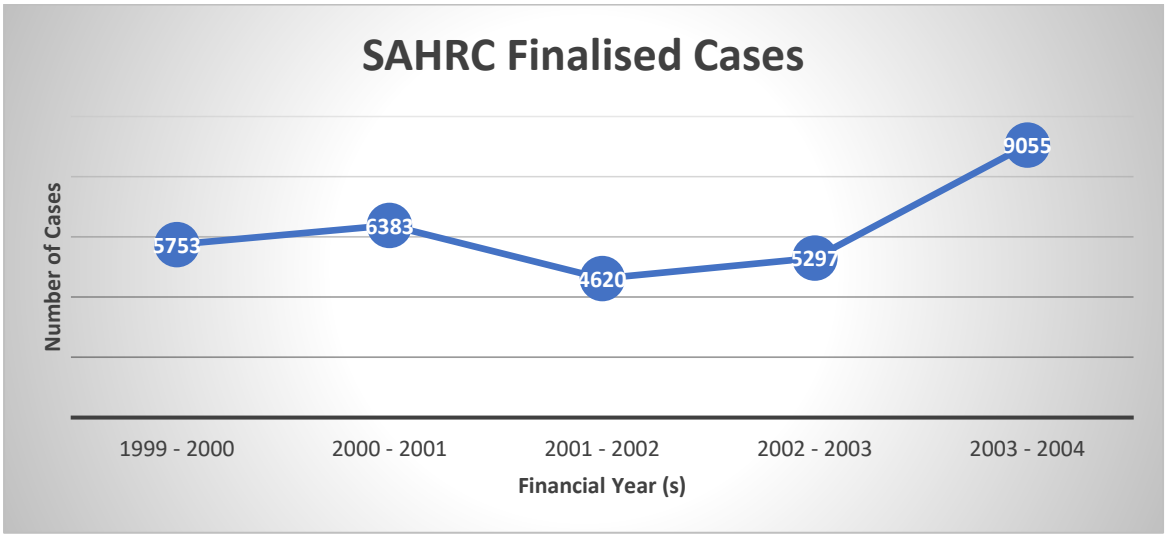

Figure (a); Shows numbers of cases handled between year 1999 – 2004 by the office of the South Africa Human Rights Commission.

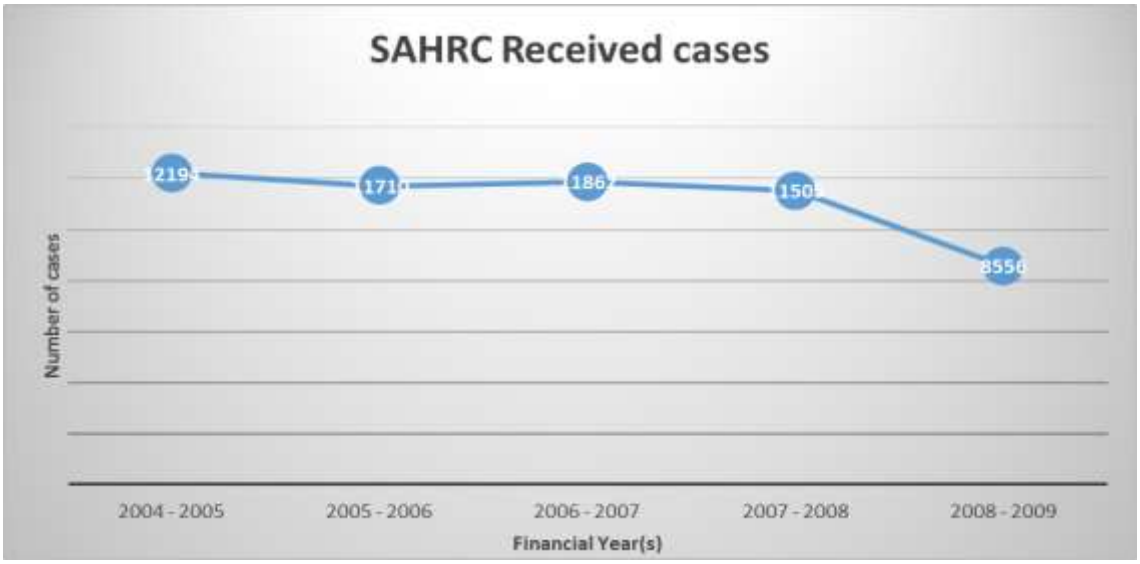

Figure (b); Shows numbers of cases handled between year 2005 – 2009 by the office of the South Africa Human Rights Commission.

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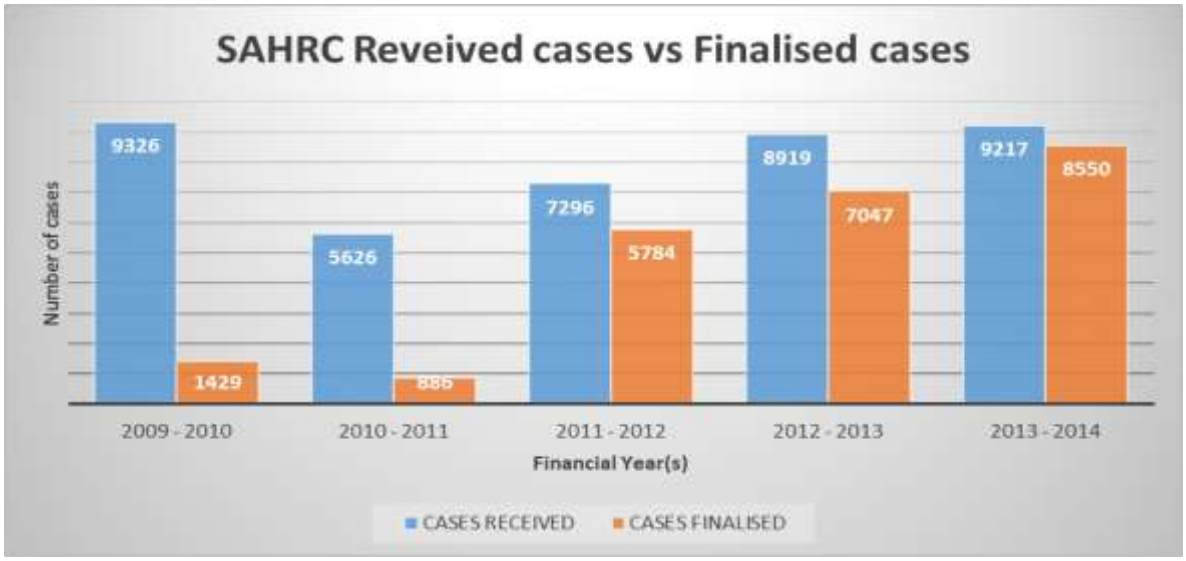

Figure (c); Shows numbers received and finalized cases between 2010 – 2014 by the office of the South Africa Human Rights Commission.

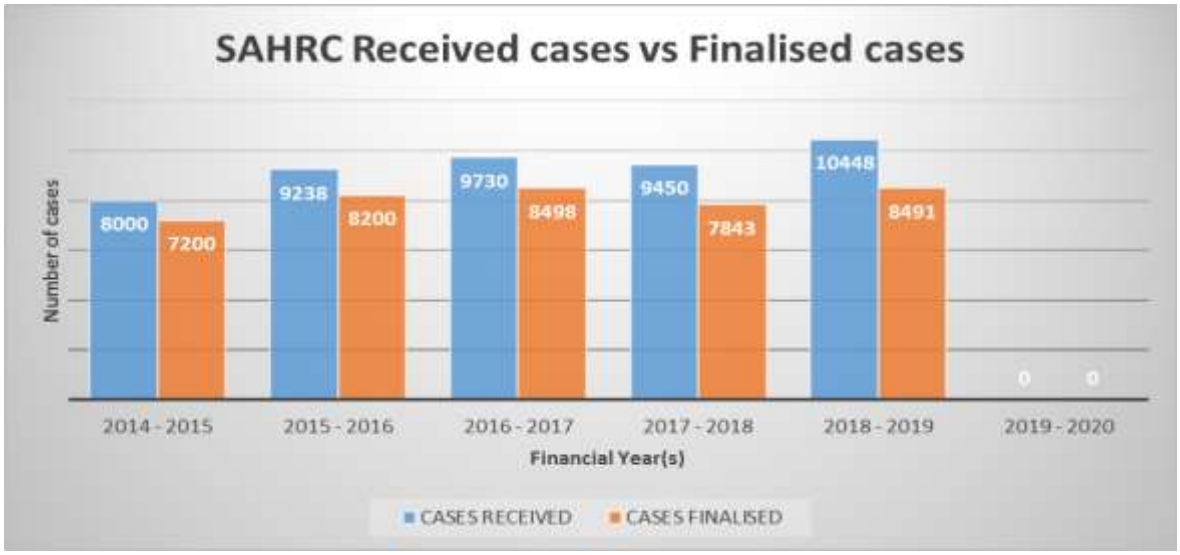

Figure (d); Shows numbers received and finalized cases between 2015 – 2020 by the office of the South Africa Human Rights Commission.

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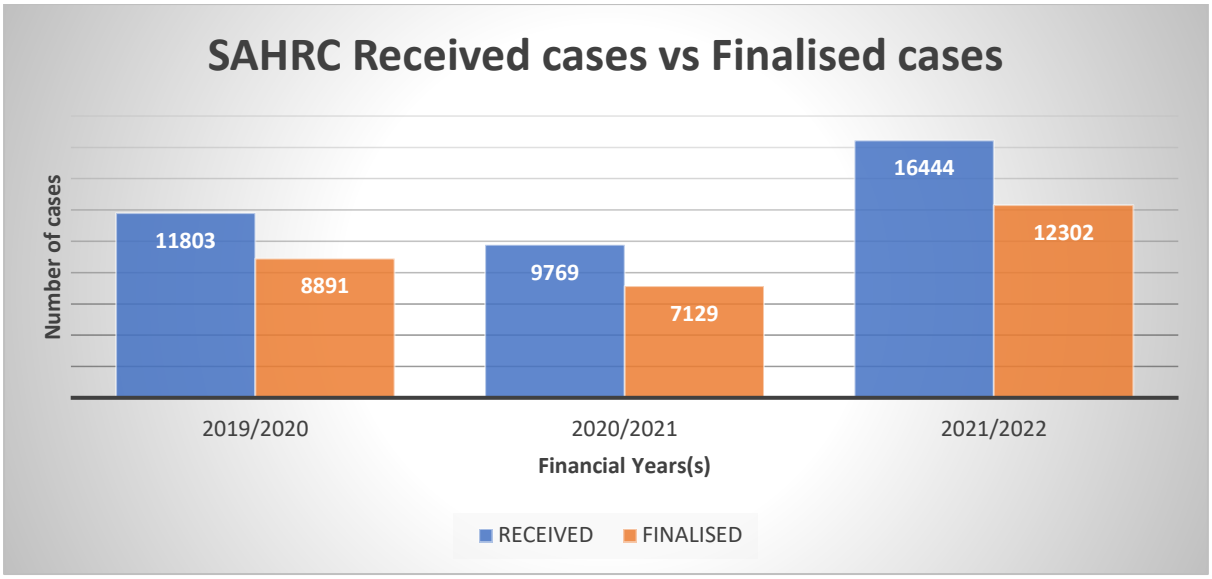

Figure (e); Shows numbers received and finalized cases between 2019 – 2022 by the office of the South Africa Human Rights Commission.

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Annexure: C[243]

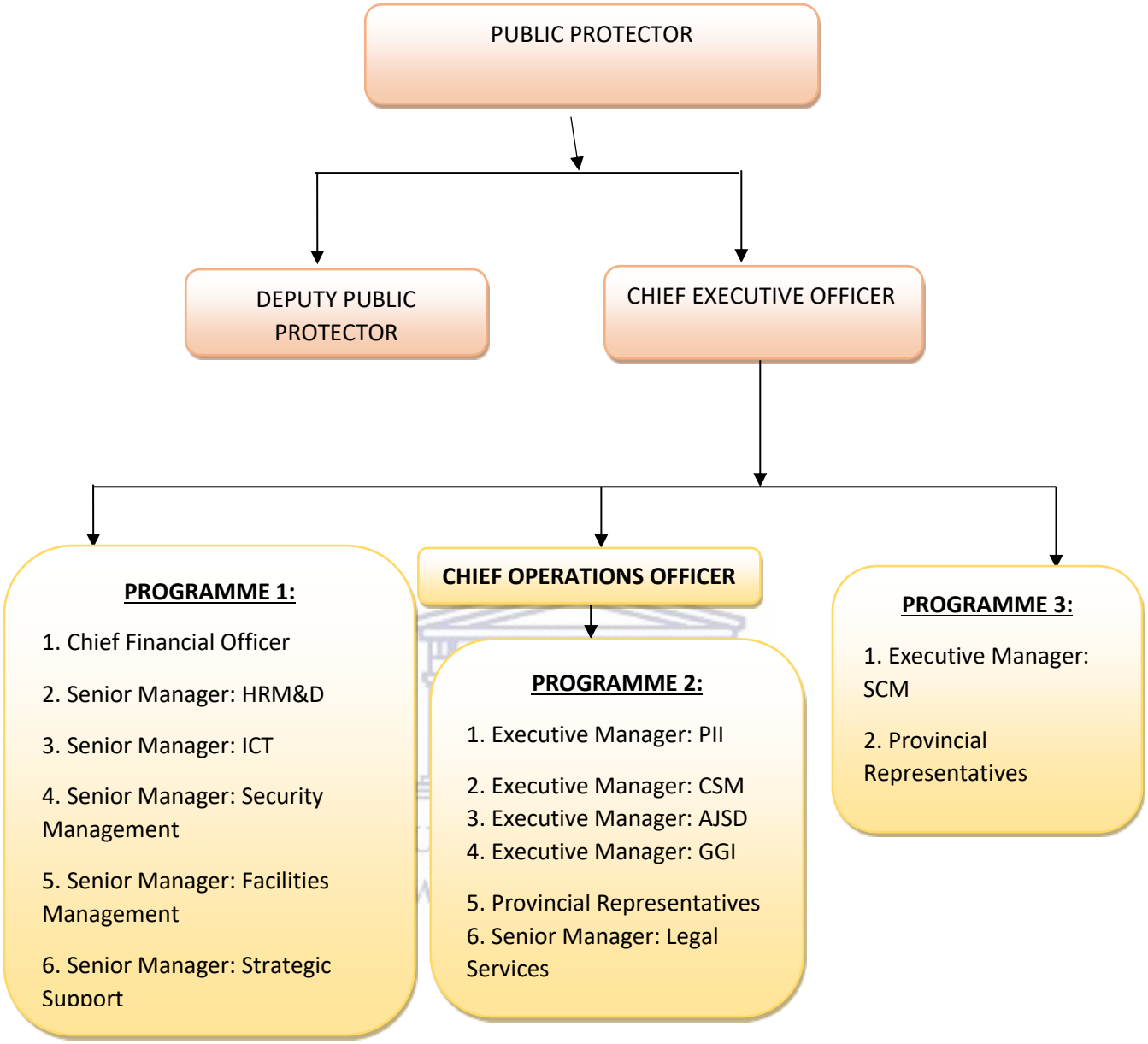

Diagram (a): Public Protector head office structure.

[243] http://www.publicprotector.org/sites/default/files/Strategic_plan/32332_Text%20Public%20Protector.pdf (accessed on 4 October 2020).

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Annexure: D[244]

Province(s)	Physical Address	Regional offices	Physical Address
Head office	Public Protector Office, Hillcrest Office Park, 175 Lunnon Street, 0083	N/A	N/A
Eastern Cape	Unathi House, Independent Avenue, Bisho, Behind Pick n Pay	Mthatha	No. 6 Knorf Street, Fortgale, Mthatha, 5099
Free State	Engen House, 169A Nelson Mandela Drive, Westdene, Bloemfontein, 9302	Phuthaditjhaba	Mampoi Street, Shop No 1 Naledi Mall, PHUTHADITJHABA, 9866
Gauteng	2nd Building Mineworkers Provident, Fund Building, 26 Ameshoff Street Braamfontein, Johannesburg 2000	Rustenburg	Suite No 12, Old SARS Building, 135 Klopper Streets, Rustenburg
KwaZulu Natal	22nd Floor, Suite 2114, Commercial City Building, Durban	Pietermaritzburg	Asupol Building 1st Floor 221 Pietermaritzburg, Street, Pietermaritzburg
Limpopo	18 Landros, Mare Street, Polokwane	Musina	Viyas Centre, 1 Hans Van der Merwe Avenue, MUSINA, Ext 1, 0900
Mpumalanga	Pinnacle Building, Suite 101, 1 Parkin Street, Nelspruit	Kuruman	1 Rose Avenue, Shop 1, Kuruman, 8460
Northern Cape	48 Sydney Street, Ewing Building, Kimberley, 8300	Upington	Umbra Building 55-59 Mark Street, Upinton, 8800
North West	Public Protector's Chambers, C/o Martin & Robinson Streets, Mafikeng	Klerksdorp	PC Pelser Building, 8th Floor, Cnr Anderson and Voortrekker Street, Klerksdorp, 2571
Western Cape	4th Floor, 51 Wale Street/Bree Street, Cape Town	George	1st Floor, South Wing, Bataleur Park, Cnr of Cathedral and Cradock, Street, GEORGE, 6529

Table (1): Public Protector head, provincial and regional offices physical addresses

[244] www.pprotect.org (accessed on the 4 October 2020).

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Annexure: E

Province(s)	**Physical Address**
Head office	Braampark Forum 3, 33 Hoofd Street, Braamfontein.
Eastern Cape	3 – 33 Phillip Frame Road, Waverley Park, Chiselhurst, East London.
Free State	18 Keller Street, Bloemfontein.
Gauteng	3, Braampark, 33 Hoofd Street, Braamfontein, Johannesburg
KwaZulu Natal	First Floor, 136 Margaret Mncadi, Durban.
Limpopo	29A Biccard Street, Polokwane.
Mpumalanga	34 Brown Street, Mbombela (Nelspruit).
Northern Cape	45 Mark and Scot Road, Ancorley Building, Upington.
Northwest	25 Heystek Street, Rustenburg.
Western Cape	7th Floor ABSA building, 132 Adderley Street, Cape Town

Table (2): South African Human Rights Commission provincial offices physical addresses.[245]

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[245] https://www.sahrc.org.za/index.php/contact-sahrc/contact-sahrc-2 (accessed on the 4 October 2020).

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Annexure: F

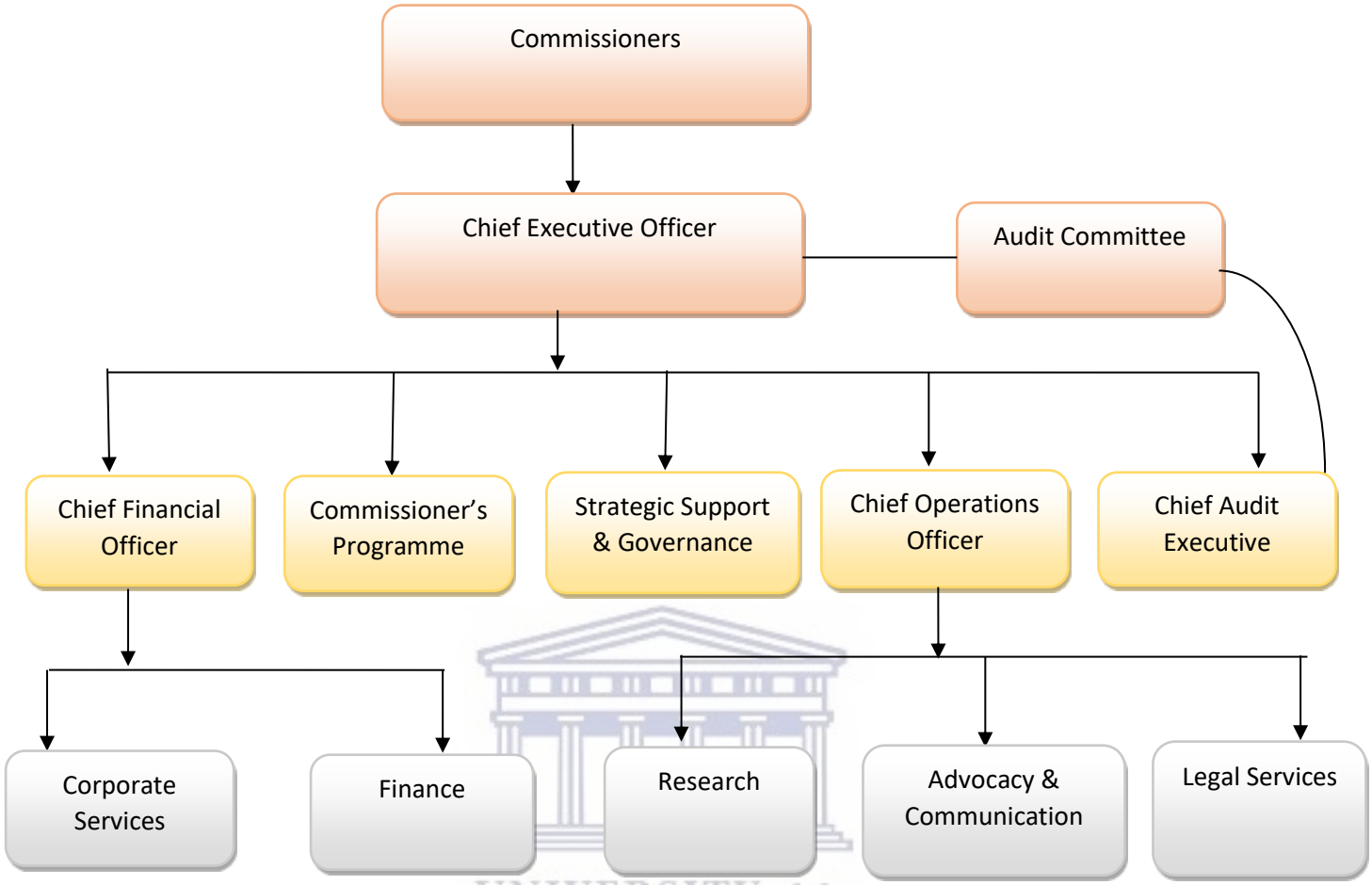

Diagram (b): South African Human Rights Commission Head office structure.[246]

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[246] https://www.sahrc.org.za/index.php/contact-sahrc/contact-sahrc-2 (accessed on the 4 October 2020).

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Annexure: G

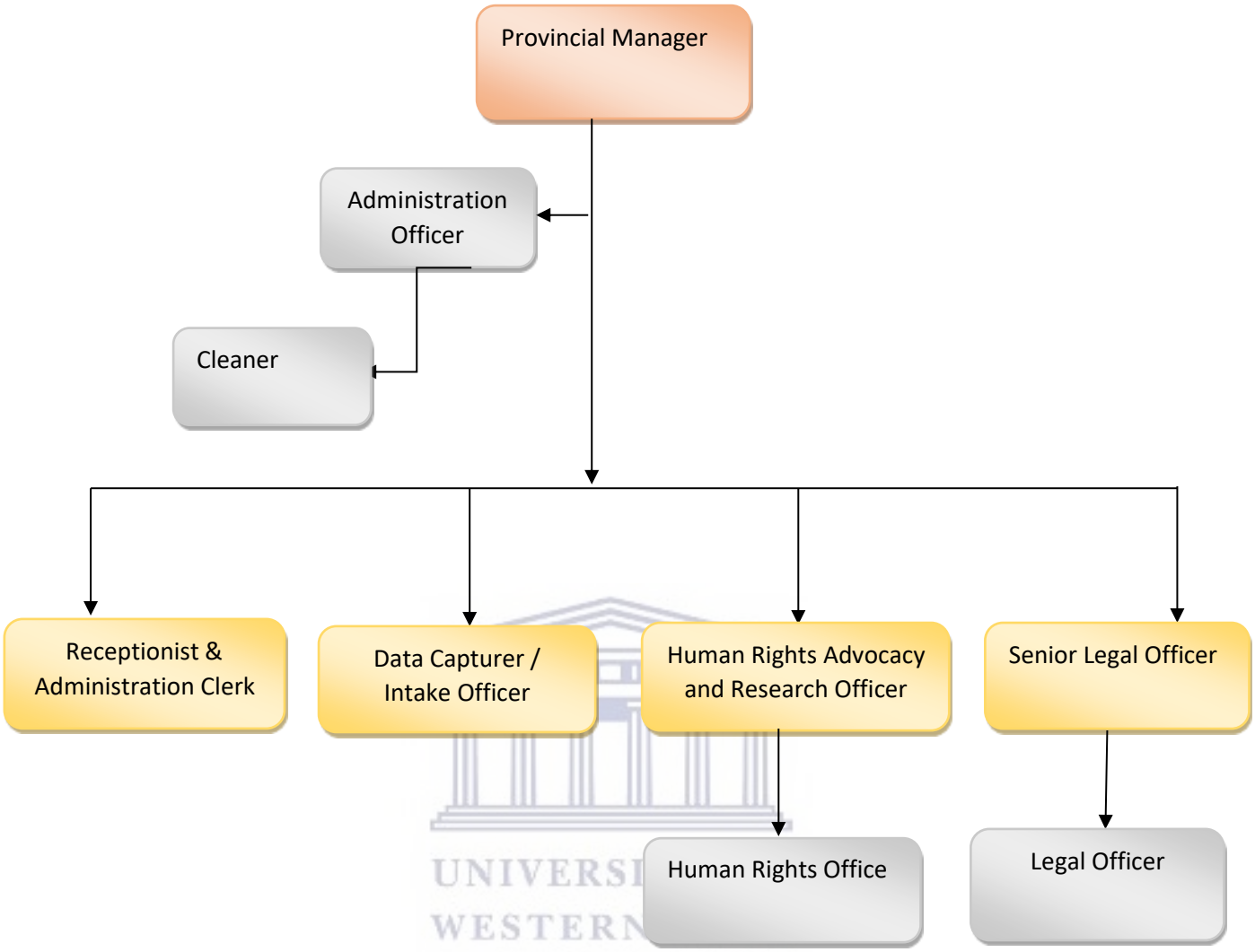

Diagram (c): South African Human Rights Commission provincial structure.[247]

[247] https://www.sahrc.org.za/home/21/files/Job%20Profile%20Human%20Rights%20Officer_Final.pdf (accessed on the 4 October 2020).

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