



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

30 June 2017

Mr Kaya Zweni

Office on Institutions Supporting Democracy

Parliament

Cape Town

Per Email: oisd@parliament.gov.za

RE: Call for Written Submissions on the Process to Examine the Feasibility of the Establishment of A Single Human Rights Body

Dear Mr Zweni

Kindly find attached the written submission on the Process to Examine the Feasibility of a Single Human Rights Body, from the Council for the Advancement of the South African Constitution (CASAC).

Furthermore, please note that this submission is endorsed by the following organisations:

1. Public Service Accountability Monitor (PSAM)
2. Shukumisa Coalition, which represents 60 civil society organisations across South Africa working against sexual violence.

Yours Sincerely

Lawson Naidoo

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SUBMISSION ON THE PROCESS TO EXAMINE THE FEASIBILITY OF A SINGLE HUMAN RIGHTS BODY

Introduction

1. CASAC is pleased to make this submission in response to the Call for Written Submissions issued by Mr Khaya Zweni, Head of the Office on Institutions Supporting Democracy (OISD) in Parliament. We do so having previously engaged with the OISD and the Office of the Speaker with respect to the time-frames for these submissions. As a result of our intervention the deadline was extended to 30 June 2017 from the original date of 25 May 2017, a mere nine days after the Call was made.
2. We were gravely concerned at the limited time made available for public comment on a matter of such importance, especially given that the 'Report of the Ad Hoc Committee to Undertake a Review of Chapter Nine and Associated Institutions', from which this call now flows, was presented to Parliament a decade ago.
3. As the Chapter Nine Institutions, as well as the two related bodies to which this Call refers, are all aimed at promoting a rights-based culture for the benefit of the public, it is imperative that members of the public be afforded a fair and adequate opportunity to engage with Parliament as it deliberates on the issues. We fervently hope that Parliament will indeed respect its constitutional obligation in terms of s.57(1)(b) of the Constitution in the remainder of this process.

Background

4. In the Report to the National Assembly of the *Ad Hoc* Committee on the Review of Chapter 9 and Associated Institutions (the Asmal Report), the Committee opened Chapter 2 with the following comment:

"During the course of its deliberations it soon became evident to the Committee that there are a number of issues common to the institutions being reviewed that require its attention. While the precise difficulty that these broad issues present might differ from one institution to the next, when viewed collectively it is apparent that a lack of consistency and coherence in approach is ultimately

undermining of their individual, and even common, efforts.”

5. The committee thereafter drew up a series of recommendations following a long and detailed examination of the Institutions. It observed:

“The Committee is of the view that the present institutional framework has created fragmentation, confounding the intention that these institutions would support the seamless application of the Bill of Rights.¹”

6. Referring to the Human Rights Commission, the Asmal Report states:

“The principal recommendation of the Committee in respect of the Human Rights Commission is to establish a Commission that would comprehensively address the promotion and protection of all human rights within a single institution. This recommendation flows from the Committee’s understanding that all human rights are interdependent and indivisible and that one well-resourced body would better address the human rights needs of especially the most marginalised and vulnerable members of the community.²”

The Institutions under Review

7. The **Human Rights Commission** is established by the Constitution³ and gains its mandate from the Human Rights Commission Act 40 of 2013; the Promotion of Access to Information Act 2 of 2000; and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000⁴.
8. The **Commission on Gender Equality** is also established under Chapter Nine, section 187 of the Constitution, and the Commission on Gender Equality Act No 39 of 1996.
9. Chapter Nine, section 185 creates **the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities**. Its legislative mandate is outlined in the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act No 19 of 2002.
10. The **Pan South African Language Board** is not a ‘Chapter 9’ body, but is envisaged by section 6 of the Constitution (which is found in Chapter 1) and accordingly established by the Pan South African Language Board Act of 1995.

¹ . Kader Asmal MP, Chair, *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: Parliament of the Republic of South Africa, 2007), 37.

² . Ibid., p. 185.

³ . Sec. 184.

⁴ . Previously the Human Rights Commission Act 54 of 1994

11. The invitation to make submissions refers to the **National Youth Development Agency** as being one of the bodies to be brought under the 'umbrella'. This was established by the National Youth Development Agency Act 54 of 2008 – *i.e.*, in the year following the publication of the Asmal Report, which however anticipated and noted the possibility of its being established.
12. The Asmal Report proposed that the named Commissions and Board be moved into the Human Rights Commission, and to call the 'umbrella body' the **South African Commission on Human Rights and Equality**.
13. Considering the length of time that has passed since the Asmal Report was presented a great deal more work is needed with regard to the creation of a consolidated body, and this should be directed towards the modalities of taking the Asmal Report's recommendations forward. This we believe is a task that the OISD should embark upon, and we assume that this Call for submissions is intended to inform the content of that assignment.

A Single Human Rights Body?

14. The Report of the Workshop held by Parliament on the Asmal Report in September 2015 referred to in the Call for submissions suggests that there are divergent views on whether a single human rights body is appropriate. The Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious & Linguistic Communities, Thoko Mkhwanazi-Xaluva speaking on behalf of the bodies affected by the proposed 'umbrella' recommendation in the Asmal Report was of the view that amalgamation was inadvisable.
15. However, Mkhwanazi-Xaluva also claimed that there was also a consensus that the existing issues of overlap should be addressed through co-operation and collaboration. This was facilitated by the location of the institutions within the same precinct – with the exception of Pan South African Language Board – which assists with this, allowing complainants easy access to all the Institutions.
16. It may be argued that in fact these views invite the opposite conclusion to that put forward by Thoko Mkhwanazi-Xaluva. If there are overlaps, then dealing with them on an *ad hoc* basis, as she appears to be arguing, must lead to inconsistencies and uncertainties, and an inevitable waste of resources. Combining the Institutions in one body seems to be the optimum solution.

17. A contrary view was expressed at the Workshop by guest speaker, Judge Navi Pillay, who is reported as having commented that ‘the collaboration and coordination of activities of the Chapter 9 and associated institutions are currently perceived to be non-existent’.⁵ She also emphasised the importance of increasing the visibility of the lesser-known Institutions Supporting Democracy. She was of the view that a single Commission would need to have a ‘chambers-type’ approach if it were to give proper attention to all human rights, for no single body would have the expertise to deal with different types of discrimination. She is quoted as having said that ‘Resources, training, expertise, accountability and political will would be necessary’.
18. The Workshop drew up a list of seven ‘key issues’ for further attention. The first was that there should further consideration of the establishment of a unitary single human rights body –

“.....recognising the importance of not losing sight of the guiding principles of the Constitution, and taking into account that international best practice suggests that a careful and informed approach be followed in assessing whether a unitary single human rights body is the best model.”

19. It is not clear whether this Call for comments goes to the substance of the Asmal Report’s recommendations and whether it would be advisable to implement them, or relate only to the process of implementing them. The arguments in favour are so strong that any decision not to implement the Asmal Committee’s findings would have to be based on a better case than has been made out hitherto.

CASAC’s Proposals

20. CASAC therefore believes that further research to be conducted by the OISD should cover the following areas relating to the implementation of the Asmal recommendation for the establishment of a single human rights body:
- i. The organisational structure and design of the Single Human Rights Body. How will the mandates and functions of the five bodies be accommodated in the new structure? The creation of one body should not weaken their existing specialist focus areas. Consideration should be given to an umbrella body with demarcated focus areas; an over-arching governing structure with separate focus areas or work streams. The administrative consolidation

⁵ . Ibid., p. 19–20.

should be aimed at creating a leaner organizational model while enhancing the effectiveness and quality of its work.

- ii. The regional presence of the Single Body and its structure. In addition to provincial and regional offices of the single human rights body, what other mechanisms and infrastructure could be utilized to expand its reach. Prof Asmal was extremely keen on making use of existing infrastructure including Post Offices and community facilities. Consideration must in particular be given to how the rural footprint of the body can be enhanced. The lack of visibility, seen as a shortcoming in fulfilling its 'promotion' of human rights was a key concern of the Asmal Report. This is likely to prove to be one of the key challenges of the new single body.
- iii. The relationship and a mechanism for communication and sharing of information with other Chapter Nine bodies that may have an overlapping mandate (the Public Protector and the Auditor General) should be investigated. This is necessary to avoid the unnecessary duplication of effort. A 'clearing house' mechanism to determine the most appropriate body to deal with a complaint from the public should be established.
- iv. The research should also explore the opportunities for collaboration with other Chapter Nine bodies especially in relation to use of infrastructure and other resources for public outreach activities.
- v. The restructuring must ensure that the independence of the new body is protected in line with the provisions of s.181 of the Constitution. This should also be reflected in the manner in which its executive staff are chosen, without influence from the line-function government department or indeed parliament.
- vi. There will need to be a rationalization of the number of Commissioners. What would be the optimum number of Commissioners for the new body to effectively execute its combined mandate? The five bodies currently collectively make provision for up to 58 commissioners and board members, and there are 32 serving at the present time. It is proposed that a process of natural attrition be allowed to take root; as the tenure of existing Commissioners ends, they are not replaced. This will however need to be balanced against the specialist expertise that will need to be available to the single body. It may be that in some cases an exception will be made for strategic vacancies to be filled.
- vii. The process and criteria for the appointment of Commissioners will need to be clearly defined against the agreed needs of the body. This should include a

clear description of the areas of expertise and experience required by the single body. The current practice of appointing Commissioners and then allocating portfolios to them must be addressed. The duration of Commissioners' tenure will also have to be fixed, taking into account the need for continuity. Currently in some Chapter Nine's, Commissioners may serve more than one term whilst others may only serve one term – this will need to be resolved. An open and transparent Parliamentary process should provide for the selection of Commissioners, as well as the appointment of the Chairperson and other designated portfolios. There should be no discretion for the President or other members of the national executive to make appointments.

- viii. Recommendations regarding the remuneration of Commissioners must be made to eliminate unnecessary and irrational disparities.
- ix. The role of civil society in the appointment of Commissioners and the functioning of the single body should be considered. This should go beyond the recommendation process as stated in s. 193(6) of the Constitution, and incorporate how civil society organisations can assist with and enhance the work and reach of the single body.
- x. The powers and functions of the Single Human Rights Body in the promotion of human rights must be clearly articulated. It is primarily a body that exists to enable government to govern more effectively, and to realize the vision of the Constitution. This may include the legislative consolidation of the Single Human Rights Body. Each institution is currently guided by different pieces of legislation (see above).
- xi. There must be a recognition of the separate and distinct roles played by a human rights body: on the one hand they proactively promote respect and protection of human rights and monitor its observance, while on the other they protect the rights individuals (pursuant to its complaints process). They also operate under different legislative standards; some have search and seizure powers. Should such a human rights body have binding legal powers to force compliance with its findings and recommendations? If not, what role should Parliament play in ensuring that the recommendations are indeed acted upon by organs of state?
- xii. The new body should have an explicit proactive role, which would include:
 - a. Education and awareness – it would have the responsibility for co-ordinating public education about human rights;

- b. Promoting itself as an institution with which the public may table grievances about human rights violations;
 - c. Making interventions when it becomes aware of human rights transgressions;
 - d. Making submissions to Parliament and provincial legislatures to enhance respect for and promotion of human rights.
- xiii. The demarcation between the roles of Commissioners and administrative staff. This was an issue that the Asmal Report reflected upon as impacting on the efficiency of these bodies.
- xiv. The OISD research should look at appropriate performance indicators and monitoring tools for the new single body. This will be a key component of its accountability to Parliament and the public.
- xv. The relationship between Parliament and the Body should be clearly established. This must include how it reports to Parliament, as well as the role played by Parliament in determining and appropriating funds for the single body. In order to enhance and buttress its independence, the executive should not determine the budget of the body. What, if any, constraints should be placed on the body obtaining additional funds from other sources?
- xvi. The lack of funding has been a common complaint from these bodies which they argue undermines their ability to execute their mandate and meet the expectations of the public. Whilst the levels of public funding are inevitably the outcome a process of political prioritization, the prioritization of human rights in the South African Constitution suggests that the funding of human rights bodies be elevated. Any assessment of value for money associated with a human rights body must reach beyond a simple cost benefit analysis. The broader societal benefits of a rich human rights environment are difficult to quantify, and should not be under-estimated. The amalgamation of bodies under one umbrella should not merely be viewed as a mechanism to save money; increased expenditure on a more effective body may be sufficiently justified. An assessment of the current cost structure of the five bodies under review must be conducted, together with a budget for the new single body over a three year horizon.
- xvii. The methodology used in the research to be done by the OISD on the Chapter 9 must be robust and allow for indicators that accurately describe how the institutions are currently functioning.

The OISD Process

21. The process to examine the feasibility of a Single Human Rights Body must be designed to maximise public participation. There must be no repeat of the severely curtailed timeframes for public comment that marked the start of this process. Clear timeframes should accompany each step of the process in future.

22. The report that is expected to be produced after the OISD has conducted further research must be disseminated broadly to elicit meaningful public engagement. A further round of public submissions should be called for after this report has been made available.

23. We also recommend that at this point the National Assembly establish an Ad Hoc Committee to take the consideration of the Single Human Rights Body forward. The Ad Hoc Committee should call for public hearings on the issue.

Cape Town
30 June 2017