



PUBLIC PROTECTOR  
SOUTH AFRICA

**Address by Adv Kevin Sifiso Malunga, Deputy Public Protector of the Republic of South Africa during the Annual General Meeting of the Southern Suburbs Attorneys Association, Rondebosch, Cape Town Wednesday 13 March 2013.**

***“THE CHALLENGES FACED BY THE OFFICE OF THE PUBLIC PROTECTOR”***

**Programme Director;**

**President of the SSAA;**

**SSAA Committee members;**

**Ladies and gentlemen;**

Good evening to the esteemed leadership and members of the Southern Suburbs Attorneys Association. If I wasn't a member of your fraternity I would suspect mischief whenever lawyers are gathered together for a common purpose. Alas! I am one of the pack so we meet today for a good reason. I trust that the deliberations

today have been fruitful and that your Mangaung or is it conclave produced the right colour smoke and that you achieved the desired outcomes. Let me start by citing a Canadian statute which is instructive

***“... the basic purpose of an Ombudsman is ... (to) bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [his] scrutiny and reservations are well founded, corrective measure can be taken in due democratic process, if not no harm can be done in looking at that which is good”.***<sup>1</sup>

## 1. SCOPE OF THE PAPER

The Public Protector South Africa is part of a global family of what is traditionally referred to as “Public Service Ombudsmen”

The Public Protector has the power as regulated by national legislation-

- a) 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;
- b) to report on that conduct; and
- c) to take appropriate remedial action,
- d) The Public Protector has the additional powers and functions prescribed by national legislation,
- e) The Public Protector may not investigate court decisions,
- f) he Public Protector must be accessible to all persons and communities

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs, and the imperative to be accessible to all people, translates to a multi-pronged approach to handling complaints. In complying with its oversight function and its role in reconciling the citizens with the state, the Public Protector seeks to ensure that transgressions by organs of State must be corrected, that a proper diagnosis and correction of any

<sup>1</sup> *Re Alberta Ombudsman Act (1970)*, 10 D.L.R. (3d) 47 at p. 61, 72 W.W.R. 176 at pp. 192-3 (Alta. S.C.), per Milvain C.J.T.D.

administrative inadequacies should also be conducted and that proper redress is provided in cases requiring remedial action, as envisaged in section 182(1) (c) of the Constitution . It aims to assist the State in good governance practice.

According to some experts least three well-defined phases can be identified in the process of making an Ombudsman institution function well: an initial phase where the Ombudsman concept becomes part of the agenda and a battlefield for various administrative, political, legal and economic interests; a second phase where the institution is organised (or reorganised) and starts its operations; and a third phase where the institution is running, consolidating its position and finding practical solutions to a variety of organisational, legal and political problems.

## 2. SAFEGUARDING THE INDEPENDENCE, IMPARTIALITY AND INTEGRITY OF THE PUBLIC PROTECTOR

### 2.1 Introduction

Sections 181, 191, 196 and 220 of the Constitution guarantee the independence of the Chapter 9 Institutions. Section 181(2) furthermore provides that the Chapter 9 institutions “*must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*”. Furthermore, section 181(3) requires other organs of state to “assist and protect these institutions” to ensure their “independence, impartiality, dignity and effectiveness”.

The Constitutional Court provided guidelines on the issue of independence of these institutions in the two Constitutional Court judgments directly dealing with Chapter 9 Institutions, and another decision dealing with the concept of independence in more general terms<sup>2</sup>. A general test for judging the independence of a Chapter 9 institution was set out in *Van Rooyen and Others v S and Others*.<sup>3</sup> The determining

2 Also discussed in the guiding principles considered by the *ad Hoc* Committee in Chapter 1 of the **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 31 July 2007**

3 2002 (8) BCLR 810 (CC).

factor identified by the Constitutional Court was whether from the objective viewpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence. In other words, an institution must not only be independent. It must also be seen to be independent. Such a perception should be guided by the “*country’s complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different institutions*”

The Constitutional Court outlined the following key components of a Chapter 9 Institution’s independence:

- a) financial independence;
- b) institutional independence with respect to matters directly related to the exercise of its constitutional mandate, in particular control over its administrative decisions;
- c) appointment procedures and security of tenure of appointed office bearers.

The need to safeguard the administrative independence of Chapter 9 institutions was also identified in *New National Party v Government of the Republic of South Africa and Others*<sup>4</sup> where the Court ruled that neither the Executive nor Parliament may interfere in the day-to day running of the Chapter 9 Institutions.

## **2.2 Funding models for the Public Protector and the other Constitutional Institutions Supporting democracy**

Financial independence is an important indicator of the true independence of the Institutions Supporting Democracy (ISDs). One of the biggest challenges in this regard relates to the current funding processes and the allocation of the Public Protector’s budget from the Public Revenue Fund. The budgets of the Public Protector, South African Human Rights Commission and the Commission on Gender Equality are determined, after a process of consultation, by the National Treasury

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4 (CCT9/99) [1999] ZACC 5

and disbursed through the budget of the Department of Justice and Constitutional Development.

Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions observed in its report submitted to Parliament on 31 July 2007 that the location of budgets of Chapter 9 institutions within government departments “*impacts negatively on the perceived independence of the institutions and creates a false impression*” that they were accountable to the respective government departments for the use of their finances.

In terms of the current process the Portfolio Committee on Justice and Constitutional Development is responsible for engaging with allocations to the Public Protector and other ISD’s, typically calling the Public Protector to hear her views, before reporting to the Assembly. The House then holds a budget debate and votes for the entire departmental budget. *Parliament’s ability to engage meaningfully with the budget at this point is constrained by various circumstances.*<sup>5</sup> The main problem is that Parliament never debates the specific budgets of the ISDs. The budgets are passed as part of the budget of the Department of Justice and Constitutional Development.

Notwithstanding Parliament’s power to oversee and influence the budget allocations of the Public Protector, the budget is therefore, currently, ultimately dependent on consultation between the Executive (the subject of the Public Protector’s oversight responsibilities) and the Public Protector, and therefore, the Executive’s assessment of the appropriate level of resources necessary to execute its mandate.

There is general consensus that if the current arrangements are to satisfy the constitutional framework and protect the independence, the consultation process needs to be transparent; Treasury must acknowledge the legitimate requirements of the ISDs and Parliament must know and be involved in the determination of the reasonable resource requirements of the ISDs as is implied in the Constitutional Court case of *New National Party of South Africa v Government of the Republic of South Africa and Others*,<sup>6</sup> which dealt with the funding of the IEC. The failure to

<sup>5</sup> IDASA’s submission to the Committee

<sup>6</sup> CCT9/99. 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).

extent the ruling to the other IDS's established in terms of the same chapter of the Constitution creates a legal anomaly.

This process has led to a situation where the Public Protector is devastatingly underfunded to such an extent that it is difficult for the Public Protector to comply with its Constitutional imperatives and to meet its strategic objectives. Current staff members are working under increasing strain as a result of the additional case load and the achievement of objectives to reduce turnaround times and comply with the Public Protector's promise of prompt remedial action are becoming increasingly more difficult. The Public Protector cannot comply with the timeframe prescribed for investigations in terms of the Executive Members Ethics Act and cannot allocate resources required to discharge its functions in terms of the Promotion of Access to Information Act. There are simply not enough staff members to do ensure that these cases are attended to as required in terms of the mandate and strategic objectives of the Public Protector and her constitutional obligation.

In submissions made to the Office for Institutions Supporting Democracy, the Public Protector strongly voiced support for recommendations the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions, for the removal of ISD budgets from under government department budget votes, and their placement in Parliament's Budget vote to increase interaction with Parliament and to eliminate conflicts of interest with government. This is in line with the Constitutional Courts decision in respect of the IEC.

### **2.3 Independence in role, function, and appearance**

The primary role of the ombudsman office is to protect individuals from violations of their rights by the government, abuse of power, errors, negligence, unfair decisions, and maladministration.<sup>7</sup> It is critical that all parties in a dispute must see the Public Protector as impartial—neither a mouthpiece of government agencies nor a representative or spokesperson of complainants. An ombudsman office that is

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<sup>7</sup> International Ombudsman Institute: [www.law.ualberta.ca/centres/loi](http://www.law.ualberta.ca/centres/loi).

recognized for its independence and impartiality builds both citizens' and government's confidence in the institution, thereby boosting its own capacity to contribute to the improvement of public administration.<sup>8</sup>

- a) recognized for its independence and impartiality builds both citizens' and government's confidence in the institution, thereby boosting its own capacity to contribute to the improvement of public administration.<sup>9</sup> Managing complainant expectations of what the Public Protector can and cannot do, how complaints should be handled and prioritised, and trying to dictate or influence the outcome of a complaint;
- b) Political parties, organisations and pressure groups endeavouring to use the Public Protector office for partisan or political gain;
- c) Organs of state and public authorities viewing the Public Protector as a representative or even legal representative of the complainant and therefore, treating enquiries in the same manner as litigation against the state; and
- d) Ignorance or disregard by organs of state and public authorities for the Constitutional role and position of the Public Protector.

The existence of an impartial independent Public Protector can contribute significantly to the public's sense of security and trust in not only the Institution, but ultimately in government action, and therefore, in the Constitution and our democratic system. This is especially helpful "*in a transitional society that has moved from an authoritarian political system to one that is more open and based on democratic norms.*"<sup>10</sup>

<sup>8</sup> **The Role and Effectiveness of the Ombudsman Institution.** Working to Strengthen and expand democracy worldwide, National Democratic Institute for International Affairs (NDI) 2005.

<sup>9</sup> **The Role and Effectiveness of the Ombudsman Institution.** Working to Strengthen and expand democracy worldwide, National Democratic Institute for International Affairs (NDI) 2005.

<sup>10</sup> **The Role and Effectiveness of the Ombudsman Institution.** Working to Strengthen and expand democracy worldwide, National Democratic Institute for International Affairs (NDI) 2005.

In established democracies the Ombudsman concept has evolved over a long period of time, with a special focus on improvement of administration. Ombudsman offices in transitional societies undergoing the process of democratization, (*such as Spain and Portugal a quarter of a century ago, Hong Kong at the time of transfer to the mainland China in the 1990s and many post-1990 ombudsman offices in Africa, the Caribbean, Eastern Europe, Latin America, and the Pacific*<sup>11</sup>), have a tendency to develop a specific human rights dimension which puts a strong emphasis on the protection of the individual, but also on the protection of society and the public interest at large. Because the ombudsman office has been shown to be an effective governance tool, which is capable to succeeding in a wide range of institutional environments, the trend amongst newer offices is to expand the mandate area of the Ombudsman beyond the traditional arena of public administration, to include such varied subject areas as child and youth affairs, human rights, access to information, whistle-blower protection and promoting integrity.

The expanded mandate and jurisdiction of ombudsman offices such as the Public Protector, is resulting in a growing expectation from the public to fulfil the role of an advocate beyond a neutral arbiter between a powerless citizen and a powerful state.

The effectiveness of ombudsman offices in the eyes of the public is often boosted by prominent or hard-hitting verdicts in landmark cases. While this leaves a strong impression on the public mind that Ombudsman means business, that it is independent of the state organs and that citizens can trust the institution for safeguarding their interests, it may lead to the situation where the 'political masters and the bureaucrats' sometimes consider the institution as a hostile entity such as in India, Ontario and no doubt elsewhere.<sup>12</sup>

At the same time Public Protector needs to cultivate a strong working relationship with institutions of government and should have a reputation for impartiality and neutrality, to ensure voluntary cooperation with the office to the extent where public

<sup>11</sup> Independence of Ombudsman, by Dr. Mohammad Waseem Professor, Lahore University of Management Sciences

<sup>12</sup> Independence of Ombudsman, by Dr. Mohammad Waseem Professor, Lahore University of Management Sciences

officials are likely to recognize the importance of the Public Protector's findings regarding administrative practices. Independence of the Ombudsman ideally plays an "*indirect role in the political system pertaining to keeping a dynamic balance of powers among and between different organs of the state and different sections and individuals of the society*".<sup>13</sup> The Public Protector has often emphasised the fact that her offices serves to reconcile citizens with the State because it helps to divert, dilute and mitigate the anger and extreme frustration' that could otherwise lead to violence or frustration as seen in the so-called *Arab Spring* or service delivery protests.

It is crucial that both parties to a dispute before the Public Protector have complete confidence that the Public Protector is not an advocate for the individual but rather an impartial investigator of individuals' complaints against the government. As the Public Protector exercises its power of investigation, public employees are reminded that decisions made and actions taken affect individuals and may need to be explained or justified by an external reviewer with the ability to make his/her findings public.

From the nature of the ombudsman system and the mandate of the Public Protector it is natural that the organs of state or public authorities might not be comfortable with the fact that its conduct or actions are the subject of an investigation and scrutiny by the Public Protector. However, confidence in the impartiality and independence of the Public Protector means that such organs of state or public authorities have the assurance that it will be afforded due process during the investigation, that the adjudication and the resolution of the complaint will done in a fair and transparent manner as reflected in the details and contents of Public Protector reports, and by proper application of the law.

The Public Protector is a non-partisan figure and it is important not to allow the use of her office to promote partisan and political interests. Complaints by political parties, pressure groups and similar organisations, is generally a contentious issue

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13 Independence of Ombudsman, by Dr. Mohammad Waseem Professor, Lahore University of Management Sciences

amongst ombudsman offices because of the possibility that such complaints might be lodged with the view to embarrass or discredit a department or body or the government as a whole in order to promote the political or institutional goals of the organisation or party concerned.

In accordance with the Constitutional obligation, the Public Protector has to be accessible to all persons and communities and is required to act without fear, favour or prejudice. It would therefore be difficult to imagine a situation where legitimate or valid complaints will be turned away because the complainant (individual or organisation) might seek to gain political or partisan benefits from an outcome that reflects adversely on the state.

At the same time there is a school of thought that an ombudsman office is, in fact, an organ of parliament because of its natural link to the legislature's traditional role of watchdog and grievance-handler. The ombudsman's investigatory role enables it to contribute to parliamentary oversight of government and assists that body in performing its government oversight function. The argument is that political parties are represented in parliament, have a responsibility towards its constituents, and are able to participate in the parliamentary processes intended to ensure oversight over the Executive and exact accountability from the Government departments and organs of State. In certain circumstances the objectives of strengthening constitutional democracy might be better served by canvassing a matter through the political democratic processes in parliament rather than pursuing matters directly with the ombudsman as an office of first instance.

### **3. EXPANDED MANDATE, ROLE AND JURISDICTION, AND IMPACT ON THE WORKLOAD OF THE PUBLIC PROTECTOR.**

Section 182(4) of the Constitution specifically requires that the Public Protector **must** be accessible to all persons and communities. "Accessibility" does not refer to only the ability to lodge and submit complaints and report matters to the Public Protector, but more importantly, require real access to the services of the Public Protector -

investigating, rectifying and redressing any improper or prejudicial conduct in state affairs and resolving related disputes through mediation, conciliation, negotiation and other measures.

The Public Protector operates in an environment where its stakeholders have high expectations, and there is an ever-changing demand for its services. Its functions have been progressively expanding over the past decade to the point where its mandate is informed by 16 different statutes, with an oversight responsibility over more than 1000<sup>14</sup> National and Provincial Departments, municipalities, organs of state and public bodies. The Public Protector is also responding to changing models of public service delivery as informed by, inter alia, the Government's 12 outcomes.

The size, function and location of the organs of state and public institutions falling within her oversight makes it impossible for the Public Protector to provide the service required in terms of her Constitutional mandate remotely at limited centralised locations. On Provincial and local Government the complaints related to conduct and service failures that impacts profoundly on the marginalised and the poor, including social grants, pensions, housing and essential services.

Legislation that seeks to give effect to Section 182 (2) of the Constitution has expanded the Public Protector's mandate significantly without proportionate funding to cater for expansion of capacity and resources. This includes reporting and recommending; advising and investigating violations of the Executive Members Ethics Act of 1994; resolving disputes relating to the operation of the Promotion of Access to Information Act of 2000 and discharging other responsibilities as mandated by the following legislation:

- 1) Prevention and Combating of Corrupt Activities Act 12 of 2004
- 2) Protected Disclosures Act 26 of 2000;
- 3) National archives and Record Service Act 43 of 1996;

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<sup>14</sup> Idasa: Submission To The Ad Hoc Committee On The Protection Of Information Bill, *Schedule Of Organs Of State To Which The Protection Of Information Bill Applies*, [26 January 2011]

- 4) National Energy Act 40 of 2004;
- 5) Housing Protection Measures Act 95 of 1998;
- 6) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
- 7) Public Finance Management Act of 1999;
- 8) Lotteries Act 57 of 1997;
- 9) Special Investigation Units and Special Tribunals Act 74 of 1996; and
- 10) National Environmental Management Act 108 of 1999; and
- 11) Electoral Commission Act 51 of 1996.

The work of the Public Protector is further informed by the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and other laws that regulate the conduct of state organs and public administration.

The expanded mandate and the limitations to the availability of capacity and resources have implored us to challenge our individual and collective resolve to exercise greater responsibility in the use of financial and other resources. We start from the assumption that the South African public purse cannot afford as many resources as some of our First-World counterparts but that a certain level of support is essential if Institutions for Supporting Democracy are to fulfil their democratic responsibilities and constitutional mandate effectively.

As a result of its strategic focus based on Constitutional imperatives, the Public Protector experienced a substantial increase in complaints during the past year – driven largely by waves of publicity and growing public confidence and stakeholder faith in an awareness of the office. Current figures indicate a continuous rapid increase in the case load of the Public Protector as the office becomes accessible to more persons and communities as envisaged in section 182(4) of the Constitution and as public trust levels increase. Case numbers had been much higher as the unexpected surges of new complaints resulted in the Public Protector having to re-allocate and maximise resources to actually attend to the increased number of new complaints. The Public Protector was also able to expand the number of investigative staff.

As a result the Public Protector managed to investigate 26 440 complaints during the previous financial year, made of 20 219 new complaints and 5 609 complaints carried over from the earlier financial year. Approximately 2000 more complaints were finalised (16 509) than in the previous year. However, the current workload has become unmanageable to the extent that the number of cases that had to be carried over also increased with 4000 to a total of 9 539 carried over to the current financial year. As a result the Public Protector is not able to work on an increasing number of jurisdictional cases received, or there are significant concerns about the length of time that it takes to resolve a matter.

The Office has been increasingly underfunded on an on-going basis. The Organizational Structure was last reviewed and approved in 2005. In 2008/2009 the structure was reviewed again and submitted to National Treasury for approval and funding. The Public Protector did not receive response to the request until the structure was reviewed again in 2011. The outcome of the reviewed structure in 2008/2009 and 2010/2011 reflected an additional number of 155 unfunded posts. These figures show that even before the current spike in new complaints the Public Protector was operating with only about 66% of the approved capacity required to handle the actual caseload. The further increase of the ratio between the number of resources and case file per head, as a result of the new complaints, has led to a situation where the caseload per investigator exceeds all reasonable norms of the workload that can be managed by an individual investigator.

This has a serious adverse impact on the objective of the Public Protector to balance the quality of investigations with swiftness in order to ensure the speedy resolution of matters and prompt remedial action as an efficient and cost-effective alternative to the courts. The current workload presents major challenges to properly set target times for disposing of complaints, targets for the number of cases to be disposed of by staff members in a given period and target times for completion of investigations.

The Public Protector is also receiving increasingly complex and challenging complaints overall. Changing pressures on different areas in the public sector result

in changing levels and natures of complaints. In particular, the Public Protector is receiving increasing numbers of complaints relating conduct failures in respect of public procurement, as well as service delivery failures on local government level. These complaints can raise more complex issues and tend to take longer and cost more to complete than complaints about the administrative conduct of state sector agencies.

#### 4. FOCUS ON INVESTIGATION OF SIGNIFICANT AND SYSTEMIC ISSUES

The reality for the Public Protector is that it serves 50 million members of the public in any situation where these members are adversely affected by the conduct of actions of any of the 1001 organs of state.

Linked to the fact that the institution is currently experiencing a high level of confidence and trust from members of the Public, this has led to a proposition that is seemingly self-contradictory. The success of the Public Protector to a very large degree depends on the ability to gain and retain the confidence of the complainants, which is clearly a part of the whole idea of an Ombudsman office. On the other hand, great success might lead to more cases being lodged and the risk of a loss of confidence that threatens the Public Protector's operations if it turns out that the institution is not able to process and complete the incoming cases swiftly and effectively.

We have noted that this not a unique South African experience. All over the world, newly established institutions and even established offices with more pro-active ombudsmen tend to become buried in actual complaint cases - African countries such as Ghana and Malawi or European countries such as Poland or Albania and even Denmark, as well as New Zealand<sup>15</sup>, have shared this experience. The number of incoming complaints/ cases may exceed expectations, forcing the institution to

<sup>15</sup> CHALLENGES FOR THE OMBUDSMAN IN A CHANGING SOCIO-ECONOMIC ENVIRONMENT Presentation to the 12th Conference of the Asian Ombudsman Association, Japan, November 2011 Beverley A Wakem CBE, Chief Ombudsman, New Zealand & President of the International Ombudsman Institute

find individual solutions case by case, with no resources left for the general influence on development of the administration.<sup>16</sup>

The first, obvious solution explored by these offices was to acquire additional human resources, and in most instances more staff was in fact supplied when the relevant Parliaments realised the problem. However, more staff was not enough, partly because the additional resources were only granted sometime after the problem had arisen. By the time the extra staff was in place, a considerable backlog of unprocessed cases had accumulated.<sup>17</sup>

Efforts to apply a more vigorous filtering system in the initial assessment of complaints, by investing more time in analysing and discussing fundamental issues such as values, the significance, impact and priority of the matter concerned, were gradually used *to dismiss not only manifestly ill-founded cases, but also cases where the Ombudsman could clearly see that there was little or no likelihood of his being able to support the complainant.*<sup>18</sup> The risk of this approach is that it requires a large degree of prejudgment of issues that have not been properly investigated, and where mistakes may have been made, would deny the complainant's access to justice.

In countries such as Denmark a new investigation model was for instance, introduced in 1988 in an attempt to deal with this situation. Instead of taking up individual cases for investigation on his own initiative, the Ombudsman from time to time decided to take up a whole sector for investigation (on own initiative). *After selecting between 100 and 150 cases from a specific institution or area, and after processing these cases as if they were complaint cases, the Ombudsman produced a full report which he hands over to the authorities. In Denmark, the term **own-***

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16 **Some Experiences in the Field of assistance and Cooperation between Ombudsmen**, By: Jens Olsen, Søren Knudsen, Ermir Dobjani, and Christian Møller

17 **ibid**

18 **ibid**

*initiative projects* are used for these major, focused investigations of the authorities' administration of selected legal areas.<sup>19</sup>

Internationally, a natural development in complaint resolution activities has been the inclusion of system-wide investigation and reform, demand management, and governance training. By addressing the system, the office can reduce the number of individual complaints and, in turn, its own workload and costs. The Public Protector has therefore increasingly focussed on the investigation of significant and systemic issues. This reflects requests by communities as well as Parliament to undertake more general interventions, together with the Public Protector's own increasing recognition of the need for such proactive interventions in order to achieve its desired outcomes and impacts. However, to be done effectively, investigating significant and systemic issues can be a much more challenging and resource intensive process than individual complaints based investigations.

The Public Protector's systemic interventions such as the current investigation into systemic deficiencies in the Government's Subsidised Housing Programme contribute directly to improved administrative processes including service delivery and complaint handling within the wider public sector. While this is much more resource intensive than individual complaints, the outcome of an investigation can resolve a problem affecting an agency or be of a more systemic nature with much wider application and consequently save agencies many thousands of rands that can be better used to deliver government programmes.

The ultimate objective is to find a balance between an institution focused on resolving individual complaint cases and *an institution transformed into a body*

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<sup>19</sup> "In his final report, the Ombudsman not only lists the errors he has found, but may also make recommendations on how to change procedures, adjust interpretations, etc. In other words, the own-initiative project involves an entirely different and more systematic contribution directed at the authorities' general standard, which obviously enables the Ombudsman to influence the interpretation of good governance in a broader and more forceful way": **Some Experiences in the Field of assistance and Cooperation between Ombudsmen**, By: Jens Olsen, Søren Knudsen, Emir Dobjani, and Christian Møller

*supervising the general development of the rule of law as well as the general standards and attitudes within the administration.*<sup>20</sup>

## 5. CO-OPERATION BY ORGANS OF STATE AND PUBLIC AUTHORITIES IN INVESTIGATIONS AND THE IMPLEMENTATION OF PUBLIC PROTECTOR'S REPORTS

### 5.1 Lack of cooperation

As noted by some of our international counterparts,<sup>21</sup> the expansion of governmental functions has inevitably, resulted in the rise of bureaucracy. Bureaucracy, in turn, has led to *“maladies which include, inter alia, an excessive sense of self-importance on the part of officials, an indifference towards the feelings of individuals, a failure to recognise the relationship between the governors and the governed as an essential part of the democratic process, and a strict adherence to rules and regulations (i.e., rigidity, a quest to maintain the status quo, a passion for routine in administration and a resistance to change.”*<sup>22</sup>

Ombudsman institutions such as the Public Protector is intended to operate as a cure for these deficiencies; to protect citizens by bridging the rift between the bureaucracy and the citizens, *“bringing the bureaucratic experience closer to the ideals of democracy.”* Hence, the principle aim of the Public Protector is to protect the rights and interests of the public against injustices caused by maladministration. In addition, the Public Protector strives to bring about, in the course of the investigation and resolving of complaints, *“a reform in the administrative process of government that will affect the manner in which similar matters are entertained in the future.”*<sup>23</sup>

<sup>20</sup> **Some Experiences in the Field of assistance and Cooperation between Ombudsmen**, By: Jens Olsen, Søren Knudsen, Ermir Dobjani, and Christian Møller

<sup>21</sup> *Challenges facing the Ombudsman of Ethiopia: The International Ombudsman Yearbook: 2002*, Edited by International Ombudsman Institute, Linda C. Reif

<sup>22</sup> Ibid

<sup>23</sup> Ibid

This is accomplished, firstly by undertaking the impartial investigation of complaints submitted to the Public Protector, honest and good faith attempts at resolving disputes and rectifying improper acts and omissions, and the issuing findings to the administration and demanding compliance with the remedial action that is required to remedy the actions and the consequences thereof. These powers and functions of the Public Protector are regulated by the Constitution and the Public Protector Act, 1994, which also place corresponding obligations on the organs of state and public bodies to cooperate with the Public Protector to ensure its efficiency.

The Public Protector will achieve its purpose in this regard if there is a willingness and readiness on the part of administrative agencies to cooperate with the Public Protector in the investigation and resolution of complaints, and to comply with its findings and remedial action.

The levels of awareness of the role and functions of the Public Protector and the profile of the Public Protector amongst government institutions and public bodies has increased significantly over the last number of years, and there are areas of cooperation by specific departments and officials that shows an understanding of and commitment to the principles of sound administration and accountability. However, the Public Protector has emphasised that the lack of cooperation, besides the issue of capacity constraints, is the biggest obstacle in achieving its Constitutional mandate. Failure to extend assistance and delays in the supply of information could significantly constrain and protract the Public Protector's investigative powers and capacity, since access to information and genuine, timely cooperation are decisive and central to the success of the Public Protector's investigations, reports, and remedial action.

Some of the challenges relate to the fact that State Institutions -

- a) Do not show a willingness to take responsibility for findings of maladministration and to reverse the consequences as indicated in the remedial action;

- b) Try their best to provide justification, using their information and resources to find support from experts and legal advisors, to avoid compliance with the findings and remedial action of the Public Protector.
- c) Do not understand the constitutional imperative of the Public Protector in terms section 182 of the Constitution for providing remedial action for prejudice resulting from improper administrative action.
- d) Confuse lawfulness and fairness. Fairness involves considering both legal and non-legal issues. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability.
- e) Do not live up to the principles and values contained in section 195 of the Constitution. These ethical principles for public sector agencies, including the *Batho Pele Principles*, are consistent with a redress framework which provides that, when people are unfairly or unreasonably affected by decisions, the agencies should take all fair and reasonable steps to make good.

## 5.2 Jurisdictional challenges

Institutions are increasingly raising objections or make submissions on the issues of jurisdiction and the interpretation of the powers and function of the Public Protector, in response to the Public Protector's enquiry or request for information, or in the general course of an investigation and dispute resolution processes.

Institutions that raise jurisdictional concerns are often under the impression that they could be excluded from co-operating with or participating in an investigation if, in their opinion, there is no basis for an investigation, that the Public Protector is not empowered to investigate the allegations or a complaint or some aspects thereof, or

that the Public Protector is not authorised to pursue a specific option or avenue in order to resolve a complaint.

Such a perception would however, not reflect a proper construction of the Public Protector's investigative powers and processes:

Section (1) (a) of the Public Protector Act, 1994 provides as follows:

*The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6 (4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be.*

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.<sup>24</sup> The Constitution requires the Public Protector to perform her/ his functions without fear, favour or prejudice. Even the Supreme Court of Appeal<sup>25</sup> found that it was unable “to direct the Public Protector as to the manner in which an investigation is to be conducted ... A proper investigation might take as many forms as there are proper investigators. It is for the Public Protector to decide what is appropriate to each case and not for this court to supplant that function.”

The Court<sup>26</sup> also confirmed the statutory position that, in the course of an investigation, the Public Protector is not restricted to approach only those institutions that are perceived to be within its jurisdiction:

*“I think it is important to bear in mind that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. **The Act confers upon the Public***

<sup>24</sup> Section 7(1)(b) of the Public Protector Act

<sup>25</sup> *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 June 2011)

<sup>26</sup> *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 June 2011)

***Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person, he or she may require any person to appear for examination, he or she may call for the production of documents by any person,<sup>27</sup> and premises may be searched and material seized upon a warrant issued by a judicial officer.<sup>28</sup>*** (own emphasis)

Even if an institution is of the opinion that the Public Protector misconstrued her/his powers and duties and that, consequently, proceeded with an investigation where she should not have done so, it would not bar the Public Protector from proceeding with the investigation.

### **5.3. Failure to comply with the findings and remedial action directed by the Public Protector**

## **6. RELATIONSHIP WITH PARLIAMENT**

ISDs such as the Public Protector conduct extensive research possess technical expertise and exercise specialised functions in dealing with maladministration and conduct - as well as service failures by organs of state. It has an important role to play in assisting Parliament in its oversight function over the Executive. The Public Protector produces reports which are submitted to the National Assembly and may contain findings and remedial action aimed at correcting specific administrative wrong or improper conduct of the state while ensuring remedial action where appropriate and implementing measures to diagnose and remedy systemic administrative inadequacies.

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<sup>27</sup> Section 7(4).

<sup>28</sup> Section 7A(1).

Both government and ISDs such the Public Protector exist to ensure that the people of South Africa enjoyed the better life promised by the country's Constitution. The ability of "*ordinary people ... to involve themselves in the process of holding the powerful to account*"<sup>29</sup> accentuate the very essence of constitutional democracy as supported by the Institutions created in terms of Chapter 9 of the Constitution. In simple terms "accountability" means that those with power or authority have to explain their performance and to justify their decisions.

The Public Protector is accountable to Parliament, who in turn, in terms of its oversight obligation created by s 55(2) of the Constitution, must provide for mechanisms to exact accountability from all executive organs of state in the national sphere of government. The Ad hoc Committee on the review of Chapter 9 and Associated Institutions expressed grave concern at the inadequacy of the arrangements by means of which Parliament exercised its oversight of the institutions (ISDs) under review and stressed that they also complement and are supportive of Parliament's oversight function.

Parliament should therefore continue to play a more visible role with regard to monitoring state compliance and encourage respect for the Constitutional status of and support for the Public Protector and the rule of law.

The Public Protector is appreciative of the fact that engagement with Parliament is more frequent and no longer limited to the annual meetings with portfolio committees as noted by the Committee. Parliament, through the

<sup>29</sup> "How to exact Accountability", Paul Hoffman SC, Institute for Accountability in Southern Africa

Portfolio Committee on Justice and Constitutional Development has undertaken to strengthen its relationship with the Public Protector to help in the implementation of its reports and remedial action.

However, a suggestion has been made that the establishment of a dedicated standing Parliamentary Committee for ISDs may help to fully allow Parliament to focus appropriately on its responsibilities in terms of Chapter 9 of the Constitution. Such a mechanism will also deal with the challenges on the part of the committees as a result of uncertainty regarding the extent of engagement required from them (given the independence of the institutions) as well as capacity constraints and the extensive workloads of the committees in pushing various pieces of legislation. We currently have a very energetic and dedicated oversight committee in the form of the Portfolio Committee on Justice and Constitutional Development. For this we are very grateful

## 7. ACCESSIBILITY

Section 182(4) of the Constitution specifically requires that the Public Protector **must** be accessible to all persons and communities. “Accessibility” does not refer to only the ability to lodge and submit complaints and report matters to the Public Protector, but more importantly, requires real access to the services of the Public Protector - investigating, rectifying and redressing any improper or prejudicial conduct in state affairs and resolving related disputes through mediation, conciliation, negotiation and other measures.

The size, function and location of the organs of state and public institutions falling within our oversight makes it impossible for the Public Protector to provide the service required in terms of her Constitutional mandate remotely at limited centralised locations. This includes about 1001<sup>30</sup> organs of state and government agencies operating on all three levels of government, as well as public institutions and bodies performing a public function. On Provincial and local Government the complaints related to conduct and service failures that impacts profoundly on the marginalised and the poor, including social grants, pensions, housing and essential service delivery at municipal level.

Province	Populati on <sup>31</sup> (million)	Public Protector's mandante covers 45 National Departments, 9 Provincial Governments, 283 Local Governments and in excess of 550 Public Entities and institutions.		Complaints received for 2010/11
		Provincial Departments	Municipalities	
<b>EASTERN CAPE</b>	6,8	12	45	1 648

<sup>30</sup> Idasa: Submission To The Ad Hoc Committee On The Protection Of Information Bill, *Schedule Of Organs Of State To Which The Protection Of Information Bill Applies*, [26 January 2011]

<sup>31</sup> Mid-year population estimates, 2011. [www.statssa.gov.za](http://www.statssa.gov.za)

<b>FREE STATE</b>	2,8	11	25	1 437
<b>GAUTENG</b>	11,3	13	14	2 619
<b>KWAZULU-NATAL</b>	10,8	16	61	923
<b>LIMPOPO</b>	5,6	11	30	1 046
<b>MPUMALANGA</b>	3,7	12	21	994
<b>NORTHERN CAPE</b>	1,1	11	32	650
<b>NORTH WEST</b>	3,2	11	25	2 279
<b>WESTERN CAPE</b>	5,2	13	30	1 347

The Public Protector has 20 walk-in offices countrywide. In some of the provinces such as Kwazulu-Natal and Limpopo the lack of regional presence is evident. The Public Protector only has one office in Limpopo, with a staff complement of 16, half of whom are investigators, which has to render services to the province's five million citizens. Public consultations and figures of other regulatory agencies confirmed that the Public Protector complaint statistics that currently sit at below 20 000 are clearly not representative of public needs regarding the conduct and decisions of public authorities in the three spheres of government and nine provinces. It was also a source of concern that the complaints did not represent the full spectrum of the public sector. Media exposures suggest that administrative problems transcend the sectors where the bulk of the complaints currently come from.

The key change imperative emerged as the need to reposition the Public Protector to achieve real **accessibility to all those among the 52 million** South Africans and residents of South Africa that need remedies for administrative wrongs. Achieving trust among all persons and communities while being accessible in terms of physical access, processes and opportunities were identified as non- negotiable in order to comply with section 182(4) of the Constitution. The provincial and regional presence of the Public Protector is therefore not only a *demonstrable need*, but a constitutional imperative.

The Public Protector has indeed been innovative in fulfilling our constitutional mandate to be accessible to all communities. Our key achievements<sup>32</sup> under this objective during the past financial year were as follows:

- a) 771 clinics were conducted in the remote areas in all provinces, but this fell short of our target of 916 clinics due to financial constraints.
- b) 217 information sessions were held on the mandate of the Public Protector.
- c) 102 radio interviews were given and the key message was the mandate of the Public Protector.
- d) 48 newspaper articles were published and the key message was also the mandate of the Public Protector.
- e) 6 national events were arranged to celebrate Freedom Month, Heritage Month, 16 Days of Activism of No Violence against Women and

<sup>32</sup> Based on the draft annual report . CEO kindly confirm

Children, Human Rights Month and finally the launch of the African Ombudsman Research Centre.

- f) The Public Protector's Good Governance Week is implemented annually. The purpose of the week is to raise awareness about the existence, mandate and services of the Public Protector and to advance the cause of promoting good governance and integrity in all state affairs.

As you can see to say that we have our plates full is an understatement.

I thank you