

REPUBLIC OF SOUTH AFRICA

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# **SOUTH AFRICAN HUMAN RIGHTS COMMISSION BILL**

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 36162 of 15 February 2013)  
(The English text is the official text of the Bill)*

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(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B 5—2013]**

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# BILL

**To provide for the composition, powers, functions and functioning of the South African Human Rights Commission; and to provide for matters connected therewith.**

## Preamble

**WHEREAS** sections 181(1)(b) and 184 read with item 20 of Schedule 6 to the Constitution of the Republic of South Africa, 1996, provide that the South African Human Rights Commission, established in terms of section 115 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), continues to function in terms of the legislation applicable to it; and for the conferring of certain powers on and the assignment of certain functions to the Commission;

**AND WHEREAS** the Constitution provides that the South African Human Rights Commission must—

- promote respect for human rights and a culture of human rights;
- promote the protection, development and attainment of human rights;
- monitor and assess the observance of human rights in the Republic; and
- annually require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment;

**AND WHEREAS** the Constitution provides that the South African Human Rights Commission—

- has the powers, as regulated by national legislation, necessary to perform its functions, 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; and
- has the additional powers and functions prescribed by national legislation,

**P**ARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA therefore enacts, as follows:—

## Definitions

**1.** In this Act, unless the context otherwise indicates—

“**Chairperson**” means the chairperson of the Commission referred to in section 6(1); 5

“**chief executive officer**” means the chief executive officer referred to in section 20(1);

“**Commission**” means the South African Human Rights Commission referred to in sections 181(1)(b) and 184 of the Constitution; 10

“**committee**” means a committee established under section 11;

“**Constitution**” means the Constitution of the Republic of South Africa, 1996;

“**Deputy Chairperson**” means the deputy chairperson of the Commission referred to in section 6(1);

**“human rights”** includes the human rights contained in Chapter 2 of the Constitution and relevant international and regional human rights instruments;  
**“investigation”** means an investigation contemplated in section 16;  
**“member”** means a member of the Commission referred to in section 5(1) and includes, where applicable, an acting member appointed in terms of section 5(5); 5  
**“member of staff”** means the chief executive officer and any person appointed in terms of section 20(3)(a) and includes, where applicable, a person seconded in terms of section 20(6);  
**“Minister”** means the Cabinet member responsible for the administration of justice; 10  
**“organ of state”** means an organ of state as defined in section 239 of the Constitution, and includes any other statutory body or functionary;  
**“premises”** includes land, any road, building or structure, or any vehicle, conveyance, ship, boat, vessel, aircraft or container;  
**“private dwelling”** means any part of any building or structure which is occupied as a residence or any part of any building or structure or outdoor living area which is accessory to, and used wholly or principally for, the purposes of residence; 15  
**“Public Finance Management Act”** means the Public Finance Management Act, 1999 (Act No. 1 of 1999); and  
**“warrant”** means a search warrant or an entry and search warrant, as the case may be, issued in terms of section 17(5). 20

### Objects of Commission

2. The objects of the Commission are—
- (a) to promote respect for human rights and a culture of human rights;
  - (b) to promote the protection, development and attainment of human rights; and 25
  - (c) to monitor and assess the observance of human rights in the Republic.

### Seat of Commission

3. (1) The seat of the Commission must be determined by the President.  
 (2) The Commission may establish such offices as it may consider necessary to enable it to exercise its powers and to perform its functions conferred on or assigned to it by the Constitution, this Act or any other law. 30

### Independence and impartiality

4. (1) (a) The Commission is independent.  
 (b) A member as well as a member of staff—
- (i) 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; 35
  - (ii) may not use the position or privileges of a member or a member of staff for private gain or to benefit another person improperly; and
  - (iii) may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission. 40
- (2) 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.
- (3) No organ of state and no member or employee of an organ of state nor any other person may interfere with, hinder or obstruct the Commission, any member, a member of staff or a person appointed under section 11(1) or 20(7) in the exercise or performance of its or his or her powers and functions. 45
- (4) No member or member of staff may conduct an investigation or render assistance with regard thereto in respect of a matter in which he or she has any pecuniary or any other interest which might preclude him or her from exercising or performing his or her powers and functions in a fair, unbiased and proper manner. 50
- (5) If any member or member of staff fails to disclose an interest contemplated in subsection (4) and conducts or renders assistance with regard to an investigation, while having an interest so contemplated in the matter being investigated, the Commission may take such steps as it deems necessary to ensure a fair, unbiased and proper investigation. 55

(6) A member or a member of staff who contravenes or fails to comply with subsection (1)(b) or (4) is guilty of misconduct.

### Composition of Commission

5. (1) The Commission consists of 11 members, who must—
- (a) be South African citizens and fit and proper persons to hold office of the Commission, as contemplated in section 193(1) of the Constitution; 5
  - (b) have a record of commitment to the promotion of respect for human rights and a culture of human rights;
  - (c) be persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission; and 10
  - (d) be appointed by the President in accordance with section 193(4) and (5) of the Constitution.
- (2) (a) The members referred to in subsection (1) may be appointed as full-time or part-time members and hold office for such fixed term as the President may determine at the time of such appointment, but not exceeding seven years: Provided that not less than seven members are appointed on a full-time basis. 15
- (b) The term of office of the full-time members may not expire simultaneously.
- (3) The President may, in consultation with the Commission, appoint a part-time member as a full-time member for the unexpired portion of that part-time member's term of office. 20
- (4) Any person whose term of office as a member has expired, may be reappointed for one additional term.
- (5) Whenever a member is absent or for any reason unable to perform his or her functions, or if a vacancy among the members arises, and the members so recommend, the President may, in consultation with the members, appoint any person qualified in terms of subsection (1) as an acting member for the period of absence or inability of the member concerned or until the vacancy is filled. 25
- (6) A person may be appointed in terms of subsection (5) irrespective of whether he or she was appointed on a previous occasion as an acting member: Provided that no person may act as an acting member for a period exceeding six months. 30
- (7) Any appointment made under subsection (5) must be deemed to have been made also in respect of any period during which the person appointed is necessarily engaged in connection with the disposal of any proceedings in which he or she has participated as a member and which have not yet been disposed of at the expiry of the period for which he or she was appointed. 35
- (8) (a) A member may resign from office by submitting at least three calendar months' written notice thereof to the National Assembly, unless the National Assembly by resolution allows a shorter period in a specific case.
- (b) A member is regarded as having resigned if that member— 40
- (i) accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council;
  - (ii) is appointed as an office-bearer of a political party; or
  - (iii) is an office-bearer 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 and fails to resign 45 from such office within 30 days of having been appointed as a member.
- (c) The Commission must take appropriate steps, where necessary, against a member—
- (i) who fails to give notice in terms of paragraph (a); or
  - (ii) who gives such notice, but fails to comply with the prescribed period referred 50 to in that paragraph,
- for the recovery of any remuneration and allowances, if any, that were paid to that member in the case of—
- (aa) subparagraph (i), for the three months immediately preceding the date on which his or her resignation took effect; and 55
  - (bb) subparagraph (ii), for the period that was less than the prescribed period referred to in paragraph (a).
- (9) A member may be removed from office in accordance with section 194(1) and (2) of the Constitution.
- (10) The President may suspend a member from office— 60
- (a) in accordance with section 194(3)(a) of the Constitution; and

- (b) on such terms and conditions as the President may determine, including the suspension of the payment of his or her remuneration or the suspension of any other term or condition of his or her employment.

(11) The President must remove a member from office in accordance with section 194(3)(b) of the Constitution. 5

### **Chairperson and Deputy Chairperson of Commission**

6. (1) The President must designate two of the full-time members as Chairperson and Deputy Chairperson of the Commission, respectively, who must be fit and proper persons to hold office as Chairperson and Deputy Chairperson.

(2) Whenever the Chairperson is absent or for any reason unable to exercise or perform the powers and functions vested in the office of the Chairperson, or whenever the office of Chairperson is vacant, the Deputy Chairperson may exercise all the powers and must perform all the functions of the Chairperson. 10

(3) (a) Whenever both the Chairperson and the Deputy Chairperson are absent or for any reason unable to exercise or perform the powers and functions vested in the office of Chairperson, or whenever both offices are vacant, the remaining members must from their number elect an acting Chairperson. 15

(b) Any member acting as Chairperson of the Commission by virtue of the provisions of paragraph (a) may, while so acting, exercise all the powers and must, while so acting, perform all the functions of the Chairperson. 20

### **Powers and functions of Chairperson, Deputy Chairperson and other members**

7. (1) The Chairperson is vested with all the powers and functions conferred on or assigned to him or her by the Commission, this Act or any other law.

(2) The Deputy Chairperson and any other member are vested with all the powers and functions conferred on or assigned to him or her by the Commission or the Chairperson. 25

(3) The Chairperson is, for the purposes of exercising the powers and performing the functions conferred on or assigned to him or her by the Commission, this Act or any other law, accountable to the Commission.

(4) The Deputy Chairperson and any other member are, for the purposes of exercising the powers and performing the functions conferred on or assigned to him or her by the Commission or the Chairperson, accountable to the Chairperson. 30

(5) The Chairperson is, for the purposes of the Public Finance Management Act, the executive authority of the Commission.

### **Vacancies in Commission**

8. (1) A vacancy in the Commission occurs— 35

(a) when a member's term of office expires;

(b) when a member dies;

(c) when a member is removed from office in accordance with section 194 of the Constitution; or

(d) when a member's resignation, submitted in accordance with section 5(8)(a) or as contemplated in section 5(8)(b), takes effect. 40

(2) A vacancy in the Commission does not affect the validity of the proceedings or decisions of the Commission.

(3) A vacancy in the Commission must be filled as soon as practicable in accordance with section 193(4) and (5) of the Constitution, but within a maximum period of six months after the vacancy occurred. 45

### **Remuneration and allowances of members**

9. (1) The remuneration, allowances and other terms and conditions of office and service benefits of the full-time and part-time members are determined by the President in consultation with the Cabinet and the Minister of Finance. 50

(2) The remuneration of the members may not be reduced, nor may the allowances and other terms and conditions of office and service benefits be adversely altered, during their continuation in office.

(3) A part-time member may, for any period during which that member, with the approval of the Commission, performs additional functions, be paid such additional remuneration as may be determined by the President in consultation with the Cabinet and the Minister of Finance.

### **Meetings of Commission**

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**10.** (1) The meetings of the Commission must be held at the times and places determined by the Commission.

(2) If the Chairperson is absent from a meeting of the Commission, the Deputy Chairperson acts as chairperson, and if both the Chairperson and Deputy Chairperson are absent from a meeting of the Commission, the members present must elect one from among their number to preside at that meeting. 10

(3) The quorum for any meeting of the Commission is a majority of the total number of members.

(4) The decision of the majority of the members present at a meeting thereof is the decision of the Commission and in the event of an equality of votes concerning any matter, the member presiding has a casting vote in addition to his or her deliberative vote. 15

(5) The Commission must—

(a) determine its own procedure: Provided that due regard must be given to the principles of transparency, openness and public participation; and 20

(b) cause minutes to be kept of its proceedings.

(6) The Commission may from time to time by notice in the *Gazette* make known the particulars of the procedure which it has determined in terms of subsection (5)(a).

### **Committees of Commission**

**11.** (1) The Commission may establish one or more committees consisting of one or more members or one or more members and members of staff designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it. 25

(2) The Commission may extend the period of an appointment made by it under subsection (1) or withdraw such appointment during the period referred to in that subsection. 30

(3) The Commission must designate a chairperson for every committee and, if it deems it necessary, a deputy chairperson.

(4) Subject to the directions of the Commission, a committee—

(a) may exercise such powers of the Commission as the Commission may confer on it; and 35

(b) must perform such functions of the Commission as the Commission may assign to it,

and must follow such procedure during such exercising of powers and performance of functions as the Commission may direct. 40

(5) On completion of the functions assigned to it in terms of subsection (4), a committee must submit a written report thereon, including recommendations, if any, for consideration by the Commission.

(6) The Commission may at any time dissolve any committee.

(7) The provisions of section 10 apply, with the necessary changes, to a meeting of a committee. 45

### **Conferment of powers and assignment of functions**

**12.** (1) The Commission may, in writing, confer the exercise of any of its powers or assign the performance of any of its functions to—

(a) a member;

(b) a member of staff; or 50

(c) a committee of the Commission.

(2) A conferment or assignment in terms of subsection (1)—

(a) is subject to such conditions and directions as the Commission may impose; and

(b) does not divest the Commission of responsibility for the exercise of the power or the performance of the function. 55

(3) The Commission may confirm, vary or revoke any decision taken in consequence of a conferment or assignment in terms of this section, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

### **Commission may approach President, National Assembly or other relevant body**

**13.** The Commission may, at any time, approach the President, the National Assembly or other relevant body with regard to any matter relating to the exercising of its powers or the performance of its functions. 5

### **Powers and functions of Commission**

**14.** (1) In addition to any other powers and functions conferred on or assigned to it by section 184(1) and (2) of the Constitution, this Act or any other law and in order to achieve its objects referred to in section 3— 10

- (a) the Commission is competent and is obliged to—
- (i) promote the observance of, respect for and the protection of human rights;
  - (ii) develop an awareness of human rights among all people of the Republic; 15
  - (iii) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights; 20
  - (iv) undertake such studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission; and
  - (v) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to human rights; and 25
- (b) the Commission—
- (i) must develop, conduct or manage information programmes and education programmes to foster public understanding of Chapter 2 of the Constitution, this Act and the role and activities of the Commission;
  - (ii) must as far as is practicable maintain close liaison with institutions, bodies or authorities with similar objectives to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction or other appropriate instances; 30
  - (iii) must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission; 35
  - (iv) may consider such recommendations, suggestions and requests concerning the promotion of respect for human rights as it may receive from any source; 40
  - (v) must review government policies relating to human rights;
  - (vi) must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission; 45
  - (vii) must prepare and submit reports to the National Assembly pertaining to any such convention, treaty, covenant or charter relating to the objects of the Commission;
  - (viii) must carry out or cause to be carried out such studies concerning human rights as may be referred to it by the President, and the Commission must include in a report referred to in section 19(1) a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate; and 50
  - (ix) may 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. 55

(2) (a) The Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights.

(b) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.

(3) The Commission is competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and 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, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.

(4) All organs of state—

- (a) must consult with the Commission on all major policy matters affecting the promotion, protection and enforcement of human rights; and
- (b) must afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its functions.

### **Mediation, conciliation or negotiation by Commission**

15. The Commission may, by mediation, conciliation or negotiation endeavour—

- (a) to resolve any dispute; or
- (b) to rectify any act or omission, emanating from or constituting a violation of or threat to any human right.

### **Investigations by Commission**

16. (1) Pursuant to the provisions of section 14(3) the Commission may, in order to enable it to exercise its powers and perform its functions—

- (a) conduct or cause to be conducted any investigation that is necessary for that purpose;
  - (b) through a member, or any member of staff duly authorised by a member, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;
  - (c) require any person by notice in writing under the hand of a member, addressed and delivered by a member of staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice must contain the reasons why such person's presence is needed and why any such article or document should be produced; and
  - (d) through a member, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in that paragraph, irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation.
- (2) (a) Any person questioned under subsection (1) must, subject to the provisions of paragraph (b) and subsections (3) and (4)—
- (i) be competent and compelled to answer all questions put to him or her regarding any fact or matter connected with the investigation of the Commission notwithstanding that the answer may incriminate him or her; and
  - (ii) be compelled to produce to the Commission any article or document in his or her possession or custody or under his or her control which may be necessary in connection with that investigation.
- (b) A person referred to in paragraph (a) is only competent and compelled to answer a question or compelled to produce any article or document contemplated in that paragraph if—
- (i) the Commission, after consultation with the Director of Public Prosecutions who has jurisdiction, issues an order to that effect;

- (ii) the Commission is satisfied that to require such information from such person is reasonable, necessary and justifiable in an open and democratic society based on freedom and equality; and
- (iii) in the Commission's judgement, such person has refused or is likely to refuse to answer a question or to produce any article or document on the basis of his or her privilege against self-incrimination. 5

(3) (a) Any incriminating answer or information obtained or incriminating evidence directly or indirectly derived from a questioning in terms of subsection (1) is not admissible as evidence against the person concerned in criminal proceedings in a court of law or before any body or institution established by or under any law, except in criminal proceedings where the person stands trial on a charge of perjury or a charge contemplated in section 23(b) of this Act or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955). 10

(b) Subject to the provisions of subsection (2)(a)(i), the law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law applies in relation to the questioning of a person in terms of subsection (1). 15

(4) Any person appearing before the Commission by virtue of the provisions of subsection (1)(c) and (d) may be assisted at such examination by an advocate or an attorney, or both, and is entitled to peruse such of the documents referred to in subsection (1)(c) or minutes as are reasonably necessary to refresh his or her memory. 20

(5) If it appears to the Commission during the course of an investigation that any person is being implicated in the matter being investigated, the Commission must afford such person an opportunity to be heard in connection therewith by way of the giving of evidence or the making of submissions and such person or his or her legal representative is entitled, through the Commission, to question other witnesses, determined by the Commission, who have appeared before the Commission in terms of this section. 25

(6) Subject to the provisions of this Act, the procedure to be followed in conducting an investigation must be determined by the Commission with due regard to the circumstances of each case.

(7) The Commission must from time to time by notice in the *Gazette* make known the particulars of the procedure which it has determined in terms of subsection (6). 30

(8) If it is in the interests of justice or if harm to any person might otherwise ensue, the Commission or a member may direct that any person or category of persons or all persons the presence of whom is not desirable may not be present at the proceedings during the investigation or any part thereof. 35

(9) Notwithstanding anything to the contrary contained in any law, no person may disclose to any other person the contents of any document in the possession of a member or a member of staff or the record of evidence given before the Commission during an investigation, unless the Commission determines otherwise.

#### **Entering and search of premises and attachment and removal of articles** 40

**17.** (1) Any member, or any member of staff or a police officer authorised thereto by a member, may, subject to the provisions of this section, for the purposes of exercising the powers and performing the functions mentioned in section 14 or conducting an investigation, search any person or enter and search any premises on or in which anything connected with an investigation is or is suspected to be. 45

(2) The entry and search of any person or premises under this section must be conducted with strict regard to decency and order, including the protection of a person's right to—

- (a) respect for and protection of his or her dignity;
- (b) freedom and security; and 50
- (c) his or her personal privacy.

(3) A member or member of staff or police officer contemplated in subsection (1) may, subject to the provisions of this section—

- (a) inspect and search the person or premises referred to in that subsection, and there make such enquiries as he or she may deem necessary; 55
- (b) examine any article or document found on the person or on or in the premises;
- (c) request information regarding such article or document from the owner or person in control of the premises or from any person in whose possession or control that article or document is, or who may reasonably be expected to have the necessary information; 60

- (d) make copies of or take extracts from any book or document found on the person or on or in the premises;
- (e) request from any person whom he or she suspects of having the necessary information, an explanation regarding that article or document;
- (f) attach anything on the person or on or in the premises which in his or her opinion has a bearing on the investigation concerned; and
- (g) if he or she wishes to retain anything contemplated in paragraph (f) for further examination or for safe custody, against the issue of a receipt, remove it from the person or premises: Provided that any article that has been so removed, must be returned as soon as possible after the purpose for such removal has been accomplished: Provided further that if there is no person present to receive the receipt when it is issued, it must be affixed to a prominent place on the premises.

(4) Any person from whom information is required in terms of subsection (3)(a), (c) and (e) may be assisted at such enquiry by an advocate or an attorney, or both, and must at the commencement of such enquiry be so informed.

(5) (a) The person referred to in subsection (1) may only be searched or the premises referred to in the said subsection may only be entered and searched, by virtue of a search warrant or an entry and search warrant issued by a magistrate, or judge of a High Court, if it appears to such magistrate or judge from information on oath that there are reasonable grounds for believing that any article or document, which has a bearing on the investigation concerned, is in the possession or under the control of any person or on or in any premises within such magistrate's or judge's area of jurisdiction and cannot reasonably be obtained in any other manner.

(b) The functions referred to in subsection (3) may only be performed by virtue of a warrant issued by a magistrate, or judge of a High Court, if it appears to such magistrate or judge from information on oath that there are reasonable grounds for believing that an article or document referred to in paragraph (a) is in the possession or under the control of any person or on or in any premises within such magistrate's or judge's area of jurisdiction.

(c) A warrant must authorise any member or any member of staff or a police officer to perform the functions referred to in subsection (3) and must to that end authorise such person to search any person or to enter and search any premises identified in the warrant.

(d) A warrant must be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night at times which are reasonable in the circumstances.

(e) A warrant may be issued on any day and is of force until—

- (i) it is executed; or
- (ii) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or
- (iii) the expiry of one month from the day of its issue; or
- (iv) the purpose for the issuing of the warrant has lapsed,

whichever may occur first.

(f) A person executing a warrant under this section must, at the commencement of such execution, hand the person referred to in the warrant or the owner or the person in control of the premises, if such a person is present, a copy of the warrant: Provided that if such person is not present, he or she must affix a copy of the warrant to the premises at a prominent and visible place.

(g) A person executing a warrant under this section or an entry or search under subsection (6) must, at the commencement of such execution, identify himself or herself and if that person requires authorisation to execute a warrant under this section, the particulars of such authorisation must also be furnished.

(6) Subject to the provisions of subsections (2), (4), (5)(g), (7) and (8), any member, or any member of staff or a police officer upon request by a member, may, without a warrant, enter and search any premises, other than a private dwelling, for the purposes of attaching and removing, if necessary, any article or document—

- (a) if the person or persons who may consent to the entering and search for an attachment and removal of an article or document consents or consent to such entering, search, attachment and removal of the article or document concerned; or
- (b) if he or she, on reasonable grounds, believes—
  - (i) that a warrant will be issued to him or her if he or she applies for such warrant; and

(ii) that the delay in obtaining such a warrant would defeat the object of the entry and search.

(7) An entry and search in terms of subsection (6) must be executed by day unless the execution thereof by night is justifiable and necessary.

(8) (a) A person who may lawfully under this section enter and search any premises may use such force as may be reasonably necessary to overcome any resistance against such entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter and search such premises.

(b) The proviso to paragraph (a) does not apply where the person concerned is on reasonable grounds of the opinion that any article or document which is the subject of the search may be destroyed, disposed of or tampered with if the provisions of the said proviso are first complied with.

(9) If during the execution of a warrant in terms of subsection (5) or a search in terms of subsection (6), a person claims that an article or document found on the person or on or in the premises concerned contains privileged information and refuses the inspection or removal of such article or document, the person executing the warrant or search must, if he or she is of the opinion that the article or document contains information that has a bearing on the investigation and that such information is necessary for the investigation, request the registrar of the High Court which has jurisdiction or his or her delegate, to attach and remove that article or document for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

#### **Compensation for certain expenses and damage**

18. (1) Subject to the provisions of subsection (2), the Commission may, after consultation with the Minister and in consultation with the Minister of Finance, order that the expenses or a portion of the expenses incurred by any person in the course of or in connection with an investigation by the Commission, be paid from the National Revenue Fund in accordance with the Public Finance Management Act.

(2) Any person appearing before the Commission in terms of section 16(1)(c) who is not in the public service, is entitled to receive from monies appropriated by law for such purpose, as witness fees, an amount equal to the amount which he or she would have received as witness fees had he or she been summoned to attend criminal proceedings in the High Court held at the place mentioned in the written notice in question.

(3) If a person has suffered damage in the course of the execution of a warrant or an entry and search contemplated in section 17(6) under circumstances where no person responsible for the premises was present at the time of the causing of the damage and the damage was caused by force used to gain entry as contemplated in section 17(8)(a), the Commission may order that such damage be made good from the National Revenue Fund.

#### **Reports by Commission**

19. (1) The Commission must report to the National Assembly at least once every year on its activities, the performance of its functions and the achievement of its objectives.

(2) In addition to the report contemplated in subsection (1), the Commission must, as soon as possible, submit to the National Assembly reports on the findings in respect of functions and investigations of a serious nature which were performed or conducted by it: Provided that the Commission may, at any time, submit a report to the National Assembly if it deems it necessary.

(3) The Commission may, subject to the provisions of subsection (5), in the manner it deems fit, make known to any person, organisation or institution any finding, point of view or recommendation in respect of a matter investigated by it.

(4) If the Commission makes any finding or recommendation in respect of a matter investigated by it known to the organisation or institution concerned, that organisation or institution must within 30 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating the steps that it has taken to give effect to such finding or recommendation, if any such steps are required.

(5) The findings of an investigation by the Commission must, when it deems it fit but as soon as possible, be made available to the complainant and any person implicated thereby.

### Staff of Commission

20. (1) The Commission must appoint a suitably qualified and experienced person or a person seconded in terms of subsection (6) as chief executive officer of the Commission for the purpose of assisting the Commission in the performance of its financial, administrative and clerical functions. 5

(2) The chief executive officer—

(a) holds office for such fixed term as the Commission may determine at the time of such appointment, but not exceeding five years: Provided that any person whose term of office as chief executive officer has expired, may be reappointed for one additional term; 10

(b) is appointed on such terms and conditions and receives such remuneration, allowances and other employment benefits as the Commission may determine; and 15

(c) must enter into a performance agreement with the Commission on acceptance of the appointment.

(3) The chief executive officer—

(a) must, subject to the approval of the Commission and the provisions of subsection (4), appoint such staff as may be reasonably necessary to assist him or her with the work incidental to the performance by the Commission of its functions; 20

(b) is the head of the administration of the Commission;

(c) is responsible for— 25

(i) the management of the affairs and operations of the Commission;

(ii) the formation and development of an efficient administration;

(iii) the organisation and management of, and administrative control over, all the members of staff appointed in terms of paragraph (a), all the persons seconded in terms of subsection (6) and all the persons contemplated in subsection (7); 30

(iv) the maintenance of discipline in respect of the members of staff; and

(v) the carrying out of the decisions of the Commission, and is for those purposes accountable to the Commission and must report thereon to the Commission as often as may be required by the Commission; 35

(d) may exercise the powers and must perform the functions which the Commission may from time to time confer upon or assign to him or her in order to achieve the objects of the Commission, and is for those purposes accountable to the Commission. 40

(4) The other members of staff contemplated in subsection (3)(a) are appointed on such terms and conditions and receive such remuneration, allowances and other employment benefits as the chief executive officer may, subject to the approval of the Commission, determine. 45

(5) (a) A document setting out the remuneration, allowances and other employment benefits determined in terms of subsections (2)(b) and (4), must be tabled in the National Assembly within 14 days after such determination. 45

(b) If the National Assembly disapproves of any determination, such determination ceases to be of force to the extent to which it is disapproved.

(c) If a determination ceases to be of force as contemplated in paragraph (b)—

(i) anything done in terms of such determination up to the date on which such determination ceases to be of force is deemed to have been done validly; and 50

(ii) any right, privilege, obligation or liability acquired, accrued or incurred up to the said date under and by virtue of such determination, lapses upon the said date. 55

(6) The Commission may, in the performance of its functions contemplated in subsection (1), at its request, be assisted by officers in the public service seconded to the service of the Commission in terms of any law regulating such secondment. 60

(7) The Commission may, in consultation with the Minister of Finance, in the exercise of its powers or the performance of its functions by or under the Constitution, this Act or any other law, for specific projects, enter into contracts for the services of persons having technical or specialised knowledge of any matter relating to the work of the

Commission, and determine the remuneration, including reimbursement for travelling, subsistence and other expenses, of such persons.

(8) A member of staff must exercise his or her powers and perform his or her functions—

- (a) by or under this Act or any other law; and 5
- (b) conferred upon or assigned to him or her by the Commission or the chief executive officer, as the case may be,

subject to the general or special directions and instructions that the Commission may, from time to time, issue to him or her.

## **Accountability, expenditure and finances** 10

**21.** (1) The chief executive officer is, in accordance with section 36 of the Public Finance Management Act, the accounting officer of the Commission and is charged with the responsibilities referred to in that Act.

(2) (a) Expenditure incidental to the exercise and performance of the powers and functions of the Commission in terms of the Constitution, this Act or any other law must be defrayed from money appropriated by Parliament for that purpose in the same manner, with the necessary changes, and subject to the same laws, as in the case of the expenditure of a department of the State. 15

(b) Money appropriated by Parliament for the purpose contemplated in paragraph (a)— 20

- (i) constitutes earmarked funds on the departmental vote of the Minister; and
- (ii) may not be used for any other purpose.

(3) The defrayal of expenditure in connection with matters provided for in the Constitution, this Act or any other law is subject to—

- (a) requests being received, with the necessary changes, in the form as prescribed for the budgetary processes of departments of State; and 25
- (b) the provisions of the Public Finance Management Act, and the regulations and instructions issued in terms thereof, as well as the Public Audit Act, 2004 (Act No. 25 of 2004).

## **Legal proceedings against Commission** 30

**22.** (1) The Commission is a juristic person.

(2) The State Liability Act, 1957 (Act No. 20 of 1957), applies with the necessary changes, in respect of the Commission, and in such application a reference in that Act to “the Minister of the department concerned” must be construed as a reference to the Chairperson. 35

(3) No—

- (a) member;
- (b) member of staff;
- (c) person contemplated in section 20(7); or
- (d) member of any committee, not being a member, 40

is liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to the National Assembly or made known in terms of this Act.

## **Offences and penalties**

**23.** A person who— 45

- (a) without just cause refuses or fails to comply with a notice under section 16(1)(c) or refuses to take the oath or to make an affirmation at the request of the Commission in terms of section 16(1)(d) or refuses to answer any question put to him or her under section 16(1)(d) or refuses or fails to furnish particulars or information required from him or her under that section; 50
- (b) after having been sworn or having made an affirmation contemplated in section 16(1)(d) gives false evidence before the Commission on any matter, knowing such evidence to be false or not knowing or believing it to be true;
- (c) wilfully interrupts the proceedings at an investigation or misbehaves himself or herself in any manner in the place where such investigation is being held; 55
- (d) defames the Commission, a member or a member of staff in his or her official capacity;

- (e) in connection with any investigation does anything which, if such investigation were proceedings in a court of law, would have constituted contempt of court;
  - (f) anticipates any findings of the Commission regarding an investigation in a manner calculated to influence its proceedings or such findings; 5
  - (g) does anything calculated improperly to influence the Commission in respect of any matter being or to be considered by the Commission in connection with an investigation;
  - (h) contravenes any provision of section 4(3) or 16(9);
  - (i) fails to afford the Commission the necessary assistance referred to in section 4(2) or 14(4); or 10
  - (j) acts contrary to the authority of a warrant or, without being authorised thereto under section 17, enters or searches any premises or attaches any article or document or performs any act contemplated in section 17(3),
- is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months. 15

### Regulations

- 24.** (1) The Minister may, after the Commission has made a recommendation, make regulations regarding the following matters in relation to the members of staff:
- (a) (i) The requirements for discharge and disciplinary steps; and 20
  - (ii) the procedure and manner of and criteria for evaluation, and the conditions or requirements for the purposes of promotion;
  - (b) the powers, duties, conduct and discipline;
  - (c) the creation of posts on the establishment of the Commission;
  - (d) the training of members of staff, including financial assistance for such training; 25
  - (e) a code of conduct to be complied with by members of staff;
  - (f) subject to section 22, the legal liability of any member of staff in respect of any act done in terms of this Act or any other law and the legal liability emanating from the use of official transport; 30
  - (g) the circumstances under which and the conditions and manner in which a member of staff may be found to be guilty of misconduct, or to be suffering from continued ill-health, or of incapacity to carry out his or her duties of office efficiently;
  - (h) the procedure for dealing with complaints and grievances of members of staff and the manner in which and time when or period wherein and person to whom documents in connection with requests and communications of such members of staff must be submitted; 35
  - (i) the membership or conditions of membership of a particular pension fund and the contributions to and the rights, privileges and obligations of members of staff or their dependants with regard to such a pension fund; 40
  - (j) the membership or conditions of membership of a particular medical aid scheme or medical aid society and the manner in and the conditions on which membership fees and other monies which are payable or owing by or in respect of members of staff or their dependants, to a medical aid scheme or medical aid society, may be recovered from the salaries of such members of staff and paid to such medical aid scheme or medical aid society; 45
  - (k) the contributions to and the rights, privileges and obligations of members of staff or their dependants with regard to such a medical aid scheme or medical aid society; and 50
  - (l) in general, any matter, other than a matter relating to the regulation of the terms and conditions of service of members of staff, which is not in conflict with the Constitution or this Act and which the Minister considers reasonably necessary or expedient to prescribe in order to achieve an efficient administration. 55
- (2) Any regulation made under this section—
- (a) relating to state expenditure, must be made in consultation with the Minister of Finance; and
  - (b) must, before publication thereof in the *Gazette*, be submitted to the National Assembly. 60

**Repeal of law and transitional arrangements**

**25.** (1) The Human Rights Commission Act, 1994 (Act No. 54 of 1994), is hereby repealed.

(2) Any person who, immediately before the commencement of this Act, has been appointed to a post in or additional to the fixed establishment of the South African Human Rights Commission or is otherwise dealt with in terms of the Human Rights Commission Act, 1994, is deemed to have been so appointed or dealt with under the corresponding provisions of this Act. 5

(3) Anything done, including any regulation made or instruction issued or other administrative measure taken or any contract entered into or any obligation incurred under the Human Rights Commission Act, 1994, which could be done under this Act and which was in force immediately before the commencement of this Act, is deemed to have been so done, issued, taken, entered into or incurred, as the case may be, under this Act until amended, withdrawn or repealed under this Act. 10

(4) Any reference in any law to the Human Rights Commission Act, 1994, must, unless the context otherwise indicates or if clearly inappropriate, be construed as a reference to this Act, or to the corresponding provision thereof, as the case may be. 15

**Short title and commencement**

**26.** This Act is called the South African Human Rights Commission Act, 2013, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 20

## MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION BILL, 2013

### 1. BACKGROUND

- 1.1 Since the commencement of the Human Rights Commission Act, 1994 (Act No. 54 of 1994) (the Act), and the establishment of the Human Rights Commission (now called the “South African Human Rights Commission”) (the Commission), numerous amendments to the Act, dealing with a variety of matters, have been proposed by, among others, the Commission. It has also been proposed that the Act should be amended so as to—
- (a) insert the provisions of the repealed sections 115 to 118 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) (the Interim Constitution), where applicable, in the Act; and
  - (b) bring the existing provisions of the Act in line with the provisions of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2 The numerous amendments to the Act essentially boil down to a redrafting of the Act. It therefore appears to be more appropriate to repeal the Act and to replace it with a new South African Human Rights Commission Act, rather than to promote a comprehensive Amendment Bill.

### 2. OBJECTS OF THE BILL

2.1 The Bill seeks to give effect to the proposals referred to in paragraph 1.1 above by repealing the Act and replacing it with a new South African Human Rights Commission Act. The existing sections of the Act, although in an amended form, have been retained in the Bill. Furthermore, the amendments to the Act, as proposed in the Bill, are intended largely to streamline the application of the existing legislation and, in turn, to enhance the functioning of the Commission.

2.2 The provisions of the Bill can be summarised as follows:

#### 2.2.1 Ad long title and Preamble

The existing long title and Preamble are substituted to bring them in line with the relevant provisions of the Constitution.

#### 2.2.2 Ad clause 1

Clause 1 contains definitions of expressions used in the Bill and is similar to the existing section 1 of the Act. However, consequential amendments are effected to some of the existing definitions whilst definitions of certain expressions, for example, “chief executive officer”, “Deputy Chairperson”, “member”, “member of staff”, “Minister” and “warrant” are added. Although the Preamble to the Constitution refers to “fundamental human rights”, section 184(1) of the Constitution, which provides for the functions of the Commission, refers to “human rights”. It therefore appears appropriate to substitute the definition of “fundamental rights” with a definition of “human rights”. Furthermore, the words “and relevant international and regional human rights instruments” have been added to the definition of “human rights”, which broadens the ambit of the existing definition.

#### 2.2.3 Ad clause 2

Clause 2 provides for the objects of the Commission as provided for in section 184(1) of the Constitution. While a view exists that national legislation should not repeat what is stated in the Constitution, it has been suggested that a repetition in the objects clause is appropriate.

2.2.4 Ad clause 3

Clause 3 provides for the seat of the Commission and is similar to the existing section 2 of the Act that provides that “[t]he seat of the Commission shall be determined by the President.”.

2.2.5 Ad clause 4

Clause 4 deals with independence and impartiality and is, apart from certain amendments, similar to the existing section 4 of the Act. Provision is made that the Commission is independent (**subsection (1)(a)**). Provision is further made that a member of the Commission or a member of staff of the Commission—

- (a) may not use the position or privileges of a member of the Commission or a member of staff of the Commission for private gain or to benefit another person improperly (**subsection (1)(b)(ii)**);
- (b) may not act in any manner that compromises the credibility, impartiality, independence or integrity of the Commission (**subsection (1)(b)(iii)**); and
- (c) who contravenes or fails to comply with any of the matters referred to above is guilty of misconduct (**subsection (6)**).

2.2.6 Ad clause 5

The repealed section 115 of the Interim Constitution provided for the establishment, constitution, and the appointment of members, of the Commission. Section 193 of the Constitution now provides for the requirements for appointment as members of the Commission (and other Chapter 9 Institutions), as well as the procedure to be followed in appointing such members, whilst section 194 of the Constitution regulates the suspension and removal from office of such members. Clause 6 provides for the composition of the Commission and is, to some extent, similar to the existing section 3 of the Act (that provides for the term of office of the members of the Commission). Clause 5, among others—

- (a) provides for the composition of the Commission (the Commission will consist of 11 members) (**subsection (1)**);
- (b) further regulates the qualifications, appointment, suspension and removal from office of members of the Commission and provides that the term of office of the full-time members of the Commission may not expire simultaneously (**subsections (1) to (4) and (9) to (11)**);
- (c) increases the number of full-time members from the present five to seven (**subsection (2)(a)**);
- (d) provides for the appointment of acting members of the Commission and matters related thereto (**subsections (5) to (7)**);
- (e) further regulates the resignation from office by members of the Commission by providing that such a member will be regarded as having resigned if that member, for example, accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council or if he or she is appointed as an office-bearer of a political party (**subsection (8)(b)**); and
- (f) empowers the Commission to take appropriate steps, where necessary, against a member of the Commission for the recovery of remuneration and allowances, if any, that were paid to him or her if he or she, for example, failed to give the required three months’ written notice of his or her resignation to the National Assembly (**subsection (8)(c)**).

2.2.7 Ad clause 6

Clause 6 provides for the mandatory designation of two of the full-time members of the Commission as Chairperson and Deputy Chairperson of the Commission by the President (**subsection (1)**) and regulates matters related thereto (**subsections (2) and (3)**).

2.2.8 Ad clause 7

Clause 7 regulates the powers and functions of the Chairperson, Deputy Chairperson and other members of the Commission (**subsections (1) and (2)**). Provision is further made that—

- (a) the Chairperson is, for the purposes of exercising or performing his or her powers and functions, accountable to the Commission (**subsection (3)**);
- (b) the Deputy Chairperson and any other member of the Commission are, for the above purposes, accountable to the Chairperson (**subsection (4)**); and
- (c) the Chairperson is, for the purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (the PFMA), the executive authority of the Commission (**subsection (5)**).

2.2.9 Ad clause 8

Clause 8 deals with vacancies in the Commission and is, apart from certain amendments, similar to the existing section 11 of the Act. In terms of the existing section 11 a vacancy in the Commission occurs, for example, when a member of the Commission dies, he or she is removed from office or his or her resignation takes effect. The amendments seek to—

- (a) create a further scenario when a vacancy in the Commission will occur, namely when a member's resignation, as contemplated in the new section 6(8)(b), takes effect (**subsection (1)(d)**); and
- (b) provide that a vacancy in the Commission must be filled within a maximum period of six months after it has occurred (**subsection (3)**).

2.2.10 Ad clause 9

Clause 9 regulates the determination of the remuneration, allowances and other terms and conditions of office and service benefits of members of the Commission and is, apart from certain consequential amendments, similar to the existing section 13 of the Act. Provision is now made that the allowances and other terms and conditions of office and service benefits of those members may not be adversely altered during their continuation in office (**subsection (2)**).

2.2.11 Ad clause 10

Clause 10 regulates matters relating to meetings of the Commission and is, apart from certain consequential amendments, similar to the existing section 12 of the Act. Further provision is, however, made that the Commission must, in determining its own procedure, give due regard to “the principles of transparency, openness and public participation” (**subsection (5)(a)**). In terms of the existing section 12(6) the Commission must from time to time by notice in the *Gazette* make known the particulars of the procedure which it has determined in terms of subsection (5)(a). That subsection is amended to give the Commission a discretion regarding the matter.

2.2.12 Ad clause 11

Clause 11 regulates matters relating to committees of the Commission and is, apart from a few minor amendments, similar to the existing section 5 of the Act. Provision is also made that the provisions of clause 11, regulating matters relating to meetings of the Commission will also be applicable to meetings of committees of the Commission (**subsection (7)**).

2.2.13 Ad clause 12

Clause 12 provides for the conferment of powers and assignment of functions. This clause—

- (a) provides that the Commission may, subject to such conditions and directions as it may impose, confer the exercise of any of its powers or assign the performance of any of its functions to a member of the Commission, a member of staff of the Commission or a committee of the Commission (**subsections (1) and (2)(a)**); and
- (b) regulates other matters incidental to such conferment or assignment (**subsections (2)(b) and (3)**).

2.2.14 Ad clause 13

In terms of the existing section 6 of the Act, the Commission may, at any time, “approach either the President or Parliament with regard to any matter relating to the exercising of its powers or the performance of its functions”. Clause 13 is similar to the existing section 6 of the Act, except for the fact that—

- (a) the word “Parliament” has been substituted with “National Assembly” because the Commission is, in terms of section 181(5) of the Constitution, accountable to the National Assembly; and
- (b) the words “other relevant body” have been added.

2.2.15 Ad clause 14

2.2.15.1 The repealed section 116 of the Interim Constitution provided for certain powers and functions of the Commission. The existing section 7 of the Act provides for powers and functions of the Commission, in addition to what was set out in the repealed section 116 of the Interim Constitution. Clause 14 provides for the powers and functions of the Commission and is, apart from certain amendments, similar to the existing section 7 of the Act. Clause 14, among others—

- (a) inserts the provisions of the repealed section 116 of the Interim Constitution (subject to certain minor changes) in section 7 (**subsections (1)(a), (2)(b) and (3)**);
- (b) aligns the powers and functions of the Commission with some of those of the Commission for Gender Equality (provision is, among others, made that the Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights) (**subsections (1)(b)(iii), (vi) and (vii) and (2)(a)**);
- (c) provides that the Commission must—
  - (i) develop, conduct or manage education programmes to foster public understanding of Chapter 2 of the Constitution, the Act and the role and activities of the Commission (**subsection (1)(b)(i)**); and

- (ii) review government policies relating to human rights (**subsection (1)(b)(v)**); and
- (d) provides that all organs of state must consult with the Commission on all major policy matters affecting the promotion, protection and enforcement of human rights (**subsection (4)(a)**).

Section 184 of the Constitution also confers certain powers on, and assigns certain functions to, the Commission.

2.2.15.2 The words “regional”, “treaties” and “monitor the implementation” have also been inserted in subsection (1)(b)(vi). The insertion of those words broadens the scope of the duty assigned to the Commission.

#### 2.2.16 Ad clause 15

Clause 15 provides for mediation, conciliation or negotiation by the Commission and is, apart from one consequential amendment, similar to the existing section 8 of the Act.

#### 2.2.17 Ad clause 16

Clause 16 regulates the procedures applicable to investigations to be conducted by the Commission and is, apart from certain amendments (mainly consequential/technical in nature), similar to the existing section 9 of the Act. Provision is, among others, made—

- (a) that the Commission or a member of the Commission may direct that any person or category of persons or all persons the presence of whom is not desirable, may not be present at the proceedings during an investigation or any part thereof “if it is in the interests of justice or if harm to any person might otherwise ensue” (**subsection (8)**); and
- (b) that no person may disclose to any other person the contents of any document in the possession of a member of the Commission or a member of staff of the Commission or the record of evidence given before the Commission during an investigation, unless the Commission determines otherwise (**subsection (9)**).

#### 2.2.18 Ad clause 17

Clause 17 regulates the powers of members of the Commission, members of staff of the Commission or authorised police officers regarding the entering and search of premises and the attachment and removal of articles by virtue of a search warrant or an entry and search warrant issued by a magistrate or a judge of a High Court and is, apart from certain amendments (mainly consequential/technical in nature), similar to the existing section 10 of the Act. Provision is, among others, made to—

- (a) empower members of the Commission, members of staff of the Commission or authorised police officers to exercise those powers not only in the case of an investigation, but also in the exercising of the powers and the performing of the functions of the Commission (**subsection (1)**);
- (b) extend those powers to include the search of persons and premises (**subsection (1)**); and
- (c) further regulate matters incidental to the exercise of those powers.

#### 2.2.19 Ad clause 18

Clause 18 provides for the payment of compensation for certain expenses incurred by persons in the course of or in connection with

investigations by the Commission and is, apart from certain amendments, similar to the existing section 14 of the Act. Provision is further made that the Commission may only after consultation with the Cabinet member responsible for the administration of justice and in consultation with the Minister of Finance order that such expenses be paid (**subsection (1)**). Furthermore, the reference to “State funds” has been substituted with a reference to “the National Revenue Fund” (**subsections (1) and (3)**).

#### 2.2.20 Ad clause 19

In terms of the repealed section 118 of the Interim Constitution the Commission had to report to the President annually on its activities and the President had to table those reports in the National Assembly and the Senate. The existing section 15 of the Act provides for additional reports to be submitted to the President and Parliament by the Commission. However, in terms of section 181(5) of the Constitution the Chapter 9 Institutions, which includes the Commission, are accountable to the National Assembly and must report on their activities and the performance of their functions to the National Assembly at least once a year. Clause 19 deals with reports by the Commission and is, apart from certain amendments, similar to the existing section 15 of the Act. Provision is, among others, made—

- (a) for the insertion of the provisions of section 181(5) of the Constitution in order to confirm the requirement contained in that section (**subsection (1)**);
- (b) that the Commission must, in such a report to the National Assembly, also report on the achievement of its objectives (**subsection (1)**);
- (c) that the Commission must “as soon as possible” (and no longer on a quarterly basis as the case is at present), submit to the National Assembly (and no longer to the President and Parliament as is presently the case) reports on the findings in respect of functions and investigations of a serious nature which were performed or conducted by it (**subsection (2)**); and
- (d) that if the Commission makes any finding or recommendation in respect of a matter investigated by it known to the organisation or institution concerned, that organisation or institution must within 30 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating the steps that it has taken to give effect to such finding or recommendation, if any such steps are required (**subsection (4)**).

#### 2.2.21 Ad clause 20

The existing section 16 of the Act contains provisions pertaining to the staff, finances and accountability of the Commission. As a result of clause 21 (see paragraph 2.2.22 hereunder) and the proposed amendments to the existing section 19 of the Act (see paragraph 2.2.25 hereunder), section 16 has to be amended in order to provide only for matters relating to the staff of the Commission. The other provisions of the existing section 16, pertaining to the finances and accountability of the Commission, have been included in the proposed new section 21. Clause 20 is, apart from certain amendments, similar to the existing section 16 as far as it pertains to matters relating to the staff of the Commission. Provision is, among others, made—

- (a) to further regulate the appointment, term of office, terms and conditions of appointment and the remuneration, allowances and other employment benefits of a chief executive officer (CEO) of the Commission and to provide for the entering into a performance agreement between the Commission and the CEO (**subsections (1) and (2)**);

- (b) to prescribe the responsibilities, accountability, powers and functions of the CEO (**subsection (3)**);
- (c) to further regulate the appointment, terms and conditions of appointment and the remuneration, allowances and other employment benefits of the other members of staff of the Commission (**subsection (3)(a) and (4)**);
- (d) regarding the remuneration, allowances and other employment benefits of the CEO and the other members of staff of the Commission as determined by the Commission which determination must be tabled in the National Assembly for approval (**subsection (5)**);
- (e) to provide that the Commission may, in the performance of its functions be assisted by officers in the public service who are seconded to the service of the Commission (**subsection (6)**); and
- (f) that the CEO and all other members of staff of the Commission must exercise and perform their powers and functions conferred upon or assigned to them by the Commission or the CEO, as the case may be, subject to the general or special directions and instructions that the Commission may, from time to time, issue to them (**subsection (8)**).

#### 2.2.22 Ad clause 21

The repealed section 117(2) of the Interim Constitution provided for the defrayal of expenditure incidental to the exercise and performance of the powers and functions of the Commission, whilst the existing section 16 of the Act also contains provisions pertaining to the finances and accountability of the Commission. Clause 21, which is a new clause that deals with the accountability, expenditure and finances of the Commission, contains the provisions of the repealed section 117(2) of the Interim Constitution, as well as the provisions pertaining to the finances and accountability of the Commission that have been omitted from the existing section 16 of the Act (see clause 20) for the reasons mentioned under the discussion of that clause in paragraph 2.2.21 above. It is, among others, proposed that the CEO will be the accounting officer of the Commission and that he or she will be charged with the responsibilities referred to in the PFMA (**subsection (1)**). It is further made clear that the budget of the Commission constitutes earmarked funds on the Departmental Vote of the Cabinet member responsible for the administration of justice (**subsection (2)(b)**).

#### 2.2.23 Ad clause 22

Clause 22 provides for legal proceedings against the Commission and is, apart from a few consequential amendments, similar to the existing section 17 of the Act.

#### 2.2.24 Ad clause 23

Clause 23 deals with offences and penalties and is, apart from certain consequential amendments, similar to the existing section 18 of the Act. However, a further offence that could be committed in respect of the Commission is created, namely, where a person discloses to any other person the contents of any document in the possession of a member or a member of staff of the Commission or the record of evidence given before the Commission during an investigation, without the Commission's permission (**subsection (1)(h)**).

#### 2.2.25 Ad clause 24

The existing section 19 of the Act provides that the President may, after the Commission has made a recommendation, make regulations

regarding various matters relating to the members of staff of the Commission, for example, the different categories of salaries and scales of salaries which will be applicable to the different categories of the members of staff, the requirements for their appointment, their hours of attendance and leave of absence. It is, however, argued that the President should not be burdened with the determination, by means of regulations, of those day to day administrative functions of the Commission and that it should rather form part of the functions of the CEO. Clause 24 is similar to the existing section 19 of the Act, except that it does not contain certain matters relating to the members of staff of the Commission that are regarded as day to day administrative functions (**subsection (1)**). The word “President” is also substituted with the word “Minister”, the effect of which is that the President’s power to make regulations relating to the members of staff of the Commission is transferred to the Cabinet member responsible for the administration of justice. Provision is further made that any regulation made under clause 24 must, before publication thereof in the *Gazette*, be submitted to the National Assembly (**subsection (2)(b)**).

#### 2.2.26 Ad clause 25

Clause 25 provides for the repeal of the Act and also provides for transitional arrangements that are required as a result of such repeal.

#### 2.2.27 Ad clause 26

Clause 26 contains the short title and provides for the commencement of the new Act.

### **3. DEPARTMENTS/BODIES/PERSONS CONSULTED**

The Commission was consulted.

### **4. FINANCIAL IMPLICATIONS FOR THE STATE**

The increase of the number of full-time members of the Commission from the existing five to seven will result in financial implications for the Commission. It is, however, not possible to estimate the additional expenditure for the Commission as it will depend on the remuneration package of the additional two full-time members.

### **5. PARLIAMENTARY PROCEDURE**

5.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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