

CHAPTER 6: CHAPTER 9 INSTITUTIONS

Abigail Stander

1. INTRODUCTION AND OVERVIEW

The separation of powers doctrine, a central tenet of South African constitutional law, entails the provision of checks and balances between the three branches of government.¹ These checks and balances were a constitutional measure aimed at strengthening our democracy. Alongside these measures, various institutions were set out in chapter nine of the Constitution as additional checks on government power.² These institutions were created to be independent, impartial bodies with the purpose of keeping the government accountable. They are essential in the democracy of South Africa which emerged from a history of discrimination, oppression and lack of accountability. They assist organs of state in adhering to the new constitutional dispensation.

There are six chapter nine institutions:

- (a) The Public Protector.
- (b) The South African Human Rights Commission.
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- (d) The Commission for Gender Equality.
- (e) The Auditor-General.
- (f) The Electoral Commission.

¹*Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) at para 45.

² The Constitution of the Republic of South Africa, 1996 at s181.

Section 181 of the Constitution states that the chapter 9 institutions are 'independent, and subject only to the Constitution and law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'.³ Other organs of state must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness.⁴ No person or organ of state may interfere with the functioning of the institutions.⁵ These institutions are accountable to the National Assembly and report on their activities and performance at least once a year.⁶

The institutions are 'state institutions' but they are not part of the government.⁷ The state is a broader concept than government. The latter is restricted to the three branches of government, namely, the executive, legislature and judiciary. Because they are not a branch of government, they do not have the power to take disciplinary action against governmental officials. Their role is purely investigatory and administrative, providing a link between government and citizens. They can make recommendations but do not have the power to review actions and decisions. That power is reserved for the judicial branch. Accordingly, they also cannot set aside legislation.

2. APPOINTMENT AND REMOVAL

In order to remain impartial and appear to be impartial, the procedure for their appointment and removal of the chapter 9 institutions needed careful planning. If they could simply be appointed by the majority ruling party, their impartiality would potentially be sacrificed in favour of loyalty to that party. They would probably not be

³ Ibid at s181(2).

⁴ Ibid at s181(3).

⁵ Ibid at s181(4).

⁶ Ibid at s181(5).

⁷ *Independent Electoral Commission v Langeberg Municipality* (CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (7 June 2001) at para 27.

able to perform their functions without fear, favour or prejudice. The same would be true if the ruling party could simply remove members of these institutions if their reports were not in the ruling party's favour. Thus, the Constitution sets out the appointment and removal process for these bodies.

Regarding the appointment to the various institutions, there are particular requirements set out in the Constitution and legislation. Section 193 of the Constitution states that:

(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.

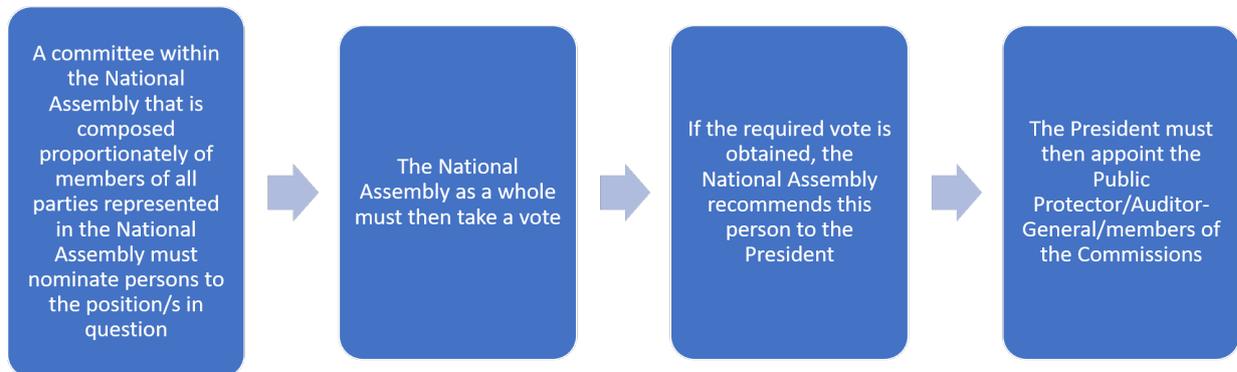
(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

In addition, the Auditor-General must be a South African citizen, fit and proper, whose specialised knowledge or experience in the field is given due regard.⁸ The Public Protector Act of 1994 sets out that in addition, a candidate for the Public Protector's office must either: have been a High Court judge, have 10 years' experience as an advocate, attorney or law lecturer, or as a Member of Parliament.⁹

⁸ Supra note 2 at S193 (3).

⁹ The Public Protector Act 23 of 1994.

For all the positions in any of the chapter 9 institutions, section 193(4) and (5) sets out the following procedure:¹⁰



When the National Assembly votes (refer to the second step in the diagram above), the type of majority required varies depending on the position to be appointed:¹¹

¹⁰ Supra note 2 at S 193(4):

The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

- (a) the South African Human Rights Commission;
- (b) the Commission for Gender Equality; and
- (c) the Electoral Commission.

(5) The National Assembly must recommend persons—

- (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
- (b) approved by the Assembly by a resolution adopted with a supporting vote—
 - (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
 - (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

¹¹ Supra note 2 at s193(5)(b).

- For the position of Public Protector or Auditor-General, a supporting vote of at least 60% is needed to pass the resolution
- For all other positions, a majority supporting vote is needed

Thus, a more stringent procedure is followed for the Public Protector and Auditor-General than the other institutions. This is probably because they are the only two institutions which comprise of one member. The section also provides that civil society may be involved in the recommendation process for the candidates.¹²

The removal process for the Public Protector, Auditor-General or a member of a chapter 9 Commission is another safeguard put in place by the Constitution to protect their independence and impartiality. Section 194 states that:

- 1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—
 - (a) the ground of misconduct, incapacity or incompetence;
 - (b) a finding to that effect by a committee of the National Assembly; and
 - (c) the adoption by the Assembly of a resolution calling for that person's removal from office.
- 2) A resolution of the National Assembly concerning the removal from office of—
 - (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
 - (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.
- 3) The President—
 - (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

¹² Supra note 2 at s193(6).

- (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

The requirement that members of the chapter 9 institutions may only be removed on an objective ground (actual misconduct, incapacity or misconduct) prevents these institutions from being interfered with for purely political reasons. If it was easy to simply remove someone from their chapter 9 office, they could not perform their functions without fear, favour or prejudice.

3. POWERS OF THE INSTITUTIONS

The various provisions in chapter 9 of the Constitution use different wording when describing the powers of the different institutions. This is shown in the table below.

INSTITUTION	POWER
Public Protector	'investigate... report... take appropriate remedial action' ¹³
SAHRC	'investigate...take steps to secure appropriate redress where human rights have been violated... carry out research... to educate' ¹⁴
Cultural commission	'monitor, investigate, research, educate, lobby, advise and report ...' ¹⁵
Gender commission	'monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.' ¹⁶

¹³ Supra note 2 at s182(1).

¹⁴ Supra note 2 at s184(2).

¹⁵ Supra note 2 at s185(2).

¹⁶ Supra note 2 at s187(2).

Auditor-General	'audit and report...' ¹⁷
-----------------	-------------------------------------

The power of the Public Protector's office has recently come under scrutiny. The language employed by the Constitution for this particular institution is different to the other sections. While the other institutions' powers seem to be to merely make recommendations (aside from the Auditor-General), the Public Protector is authorised to 'take remedial action' rather than 'advise' or 'take steps'. This issue came to light in the commonly known 'Nkandla judgment' discussed below.¹⁸

4. INDEPENDENCE OF THE INSTITUTIONS

The chapter 9 institutions were set up to safeguard and promote democracy in the country. The institutions find themselves in a tricky situation, as they are required to act as watchdogs that prevent the abuse of power in an impartial manner; however they are also required to work with the legislature and executive and may have to rely on their co-operation to get things done.¹⁹ They are often caught in between having to please the executive and legislature, while acting independently from them as well.

The Constitution guarantees their independence and states they are subject only to the Constitution and the law.²⁰ Other organs of state are additionally required to assist and protect the institutions without interfering in their mandates.²¹ However, the section also states that the institutions are accountable to the National Assembly

¹⁷ Supra note 2 at s188(1).

¹⁸ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

¹⁹ P de Vos 'Balancing independence and accountability: The role of Chapter 9 institutions in South Africa's constitutional democracy' In D Chirwa & L Nijzink (Eds) *Accountable government in Africa: Perspectives from public law and political studies*. New York: United Nations University Press (2012) at 163.

²⁰ Supra note 2 at s181(2).

²¹ Ibid at s181(3).

and must report on their activities and performance of their functions at least once a year.²²

Aside from an intricate appointment and removal process, the Constitutional Court has affirmed that financial independence is relevant to the broad requirement of independence.²³ This does not mean they can set their own budgets – Parliament does that. They are however entitled to a reasonable amount of money for their budgets. Institutions must accordingly be afforded an adequate opportunity to defend their budget requirements before Parliament or its committees.²⁴

5. THE PUBLIC PROTECTOR

The Public Protector acts as an intermediary between the state and citizens. She acts as a link for citizens to the state by receiving complaints from anyone against an organ of state. As such, she is required to be accessible to all persons and communities.²⁵ Upon receiving complaints, the Public Protector can investigate, report on and take appropriate remedial action against the relevant organ of state.²⁶ The office of the Public Protector is additionally regulated by the Public Protector Act.²⁷

Section 182 of the Constitution sets her mandate as follows:

(1) The Public Protector has the power, as regulated by national legislation—

²² Ibid at s181(5).

²³ *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at paras 98 and 99.

²⁴ Ibid

²⁵ Supra note 2 at s182(4).

²⁶ Supra note 2 at s182(1)(a).

²⁷ Supra note 9.

- (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.

In terms of tenure, the Public Protector is appointed for a non-renewable period of seven years.²⁸ The only way to remove the Public Protector is through a finding of misconduct, incapacity, or incompetence as discussed above.

Recently the Constitutional Court was faced with the task of clarifying the powers of the Public Protector. This case (commonly known as the Nkandla judgment) is discussed below:

*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (CC)*²⁹

Facts:

The Public Protector at the time had received many complaints about security upgrades being effected at President Zuma's Nkandla private residence. She acted on these complaints and commenced an investigation. Her conclusion was that the president had breached his constitutional obligations by knowingly deriving undue benefit from state resources.³⁰

The Public Protector accordingly took remedial action in terms of section 182(1)(c) of the Constitution requiring the president to take steps to determine the reasonable costs of the non-security improvements, to repay a reasonable percentage of these costs, to reprimand ministers involved, and to report to the National Assembly within 14 days. Her report was sent to the President and the

²⁸ Supra note 2 at s183.

²⁹ Supra note 18.

³⁰ Section 96(2)(c) states that Members of the Cabinet may not 'use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.'

National Assembly. The National Assembly set up two ad hoc committees to examine the report. Instead of abiding by the remedial action, the National Assembly decided to endorse a report made by a Minister which absolved the President from liability. The Economic Freedom Fighters (EFF) and Democratic Alliance (DA) were aggrieved by the President's non-compliance and launched similar applications to confirm the binding effect of the Public Protector's report, seeking an order that the President comply with the report, and a declaration that the President and the National Assembly had breached their constitutional obligations. The EFF argued that the President breached his obligations in terms of sections 83 (to uphold, defend and respect the Constitution), 96 (to maintain a standard of ethics), 181 (to ensure the effectiveness of the Public Protector) and 182 (to take specific steps towards the fulfilment of the Public Protector's remedial action) of the Constitution. They argued that the National Assembly breached their obligations in terms of sections 55(2) (to hold the President accountable) and 181(3) (to assist the Public Protector in her effectiveness).

The Court's Reasoning:

The court clarified that the Constitution guaranteed the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. Furthermore, they emphasised the importance of her role in the fight against corruption. Litigation is not feasible for many citizens and she was there to give them a voice. This meant she must have the resources and capacities necessary to effectively execute her mandate so that she can strengthen our constitutional democracy.

Section 182 envisages legislation to regulate her powers and confers 'additional' powers and functions on the Public Protector. This means that legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. Taking remedial action in terms of the Constitution means the Public Protector is empowered to take action that has effect if it is the best attempt at curing the cause of the complaint. The court found it would be inconsistent with the language, context and purpose of sections 181 and 182 of the Constitution to conclude that the Public Protector merely enjoys the power to make recommendations that may be disregarded if there is a rational basis for

doing so. The Public Protector's power to take appropriate remedial action is wide but not unfettered. Her remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a particular case will be informed by the subject matter of the investigation and the type of findings made.

Our constitutional order also hinges on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence of self-help'. Taking the law into one's own hands is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded at will. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.

The National Assembly is empowered to satisfy itself about the correctness of the findings before holding the President accountable. However, they have a duty to keep the President accountable by ensuring compliance with the decisions of the Public Protector. It cannot step into the Public Protector's shoes by passing a resolution to nullify her findings and remedial action and replace them with its own.

The remedial action that was taken against the President had a binding effect. Only after a court of law had set aside the findings and remedial action taken by the Public Protector would it have been open to the President to disregard the Public Protector's report. Thus, the National Assembly unlawfully second-guessed the Public Protector and substituted her findings for its own. This was a breach of their duty in terms of section 42(3) of the Constitution to oversee executive action.

Discussion:

The Public Protector is subject only to sections 181 and 182 of the Constitution. Her remedial action cannot be ignored and other organs cannot second-guess her. The language used by the court creates the impression that there may be

certain circumstances where her remedial action is not binding.³¹ This will depend on the facts and common sense.³² The Public Protector does not enjoy unfettered power as her power is open to judicial scrutiny. This means that the National Assembly may only disregard her findings if it has been judicially reviewed.³³ In summary, the National Assembly has two options when faced with the Public Protector's remedial action:

- Accept the remedial action and then scrutinize and oversee executive action in terms of section 42(3)
- Reject the remedial action and apply to the court for judicial review.³⁴

*President of the RSA v Office of the Public Protector and Others 2016 (GP)*³⁵

Facts:

In this case, the President essentially wanted to review the Public Protector's report on the basis of the lawfulness and rationality of the remedial action. The report arose from complaints of alleged improper and unethical conduct by the President, certain state functionaries and the Gupta family. The conduct related to appointments of Cabinet members and directors of state-owned entities which allegedly resulted in the improper and corrupt award of state contracts and other benefits to businesses of the Gupta family.

Her remedial action in the report included that the President was to appoint a commission of inquiry headed by a judge selected by the Chief Justice to investigate

³¹ See supra note 18 at para 68: "for it to be effective ... it often has to be binding".

³² Ibid. at para 70.

³³ Ibid. at para 82.

³⁴ Ibid. at para 87.

³⁵ *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017).

the matters in her report.³⁶ The President argued that appointing a commission of inquiry was a power of the President and the Public Protector could not order him to abdicate this power. Additionally, it was the President's prerogative to select the officer to preside over the commission. Thus, he argued that the remedial action constituted an unlawful delegation of the Public Protector's investigatory powers to a commission of inquiry.

The main issue before the court was whether the President's Constitutional power to appoint a commission of inquiry can be limited by the remedial action taken by the Public Protector.

The Court's Reasoning:

The court found that although the President had Constitutional power to appoint a commission of inquiry, it was not untrammelled and must be exercised within the Constitution's constraint. This power would be curtailed where his ability to conduct himself without constraint brought him into conflict with his obligations under the Constitution. The Public Protector Act gave the Public Protector wide investigatory powers once she received a complaint (for example, she can subpoena people and require them to give evidence).³⁷ The phrase 'to take remedial action' meant providing a proper, fitting, suitable and effective remedy for the complaint she was called upon to investigate.

Even though the Public Protector's discretion for remedial action was wide, it is not unfettered, as it was always open to judicial scrutiny. The court concluded that her wide powers must include the power to direct the President to appoint a commission of inquiry and direct the manner of its implementation. In ordering this remedial action, the Public Protector did not delegate her remedial powers to a commission of inquiry. She responded to three complaints, made *prima facie* findings and then her remedial action was the commission of inquiry. The Public Protector Act

³⁶ The President has the Head of State Power to appoint a commission of enquiry in terms of section 84(2)(f) of the Constitution.

³⁷ Supra note 9.

empowered her to obtain assistance in her investigations if she needed to. It expressly allowed her to require other parties to make appropriate recommendations after she had concluded her investigation. Thus, the grounds of review could not be sustained.

Furthermore, it was confirmed that the taking of remedial action by the Public Protector was not contingent upon a finding of impropriety or prejudice. She was empowered to take action on the basis of preliminary or *prima facie* findings. Thus, even though her report did not make any firm findings on the evidence against the President, it did not preclude her from taking remedial action. A commission had more power and resources to investigate. Since the second phase of the Public Protector's investigation was to be extensive, a commission of inquiry was appropriate.

Conclusion:

The application was dismissed. Her remedial action was binding, and the President was ordered to appoint a commission of inquiry within 30 days, headed by a judge selected by the Chief Justice.

6. THE AUDITOR-GENERAL

The Auditor-General operates as the supreme audit institution of the Republic. The Auditor-General produces financial audits and compliance audits with respect to all national and provincial departments, all municipalities, all public entities and a host of other institutions. The purpose of these audits is to ensure the proper use of public funds.³⁸ These public reports provide critical information about how arms of government are managing their budgets. The Auditor-General submits audit reports to any legislature that has a direct interest in the audit and any other authority prescribed by national legislation.³⁹ The Auditor-General's powers are also regulated

³⁸ Supra note 2 at s188(1).

³⁹ Supra note 2 at s188(3).

by the Public Audit Act.⁴⁰ Furthermore, the Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.⁴¹

7. THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION ('SAHRC')

The SAHRC is designed to protect and promote respect for human rights. The Constitutional Court has acknowledged the distinctive role the SAHRC and other Chapter 9 Institutions might play in creating a new constitutional culture. For example, in *New National Party*, it was stated that:

The establishment of the Commission and the other institutions under Chapter 9 of the Constitution are a new development on the South African scene. They are a product of the new constitutionalism and their advent inevitably has important implications for other organs of State who must understand and recognise their respective roles in the new constitutional arrangement. The Constitution places a constitutional obligation on those organs of State to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness.⁴²

A significant portion of the Commission's activities have been in public education.⁴³ The Promotion of Access to Information Act is an example of specific legislation that imposes additional duties on the SAHRC with regards to the promotion of human rights.⁴⁴ The SAHRC protects human rights through various dispute resolution mechanisms. The Human Rights Commission Act gives the

⁴⁰ Public Audit Act No. 25 of 2004.

⁴¹ *Supra* note 2 at s189.

⁴² *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 78.

⁴³ See South African Human Rights Commission *Sixth Annual Report* (2001/2002) 5. Among other topics, the Commission conducts public education on constitutional rights generally, on socio-economic rights and on the right of access to information.

⁴⁴ See J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2 ed, OS, June 2002) ch 62.

commission the power to resolve by mediation, conciliation, or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. An important part of these powers lies with the commission's power to make recommendations and findings. Any recommendation or finding made by the commission as a result of such a process is not directly binding on a public or private body. However, public bodies are under a constitutional duty to assist the commission to ensure its effectiveness; and, its recommendations are usually acted on by public bodies. Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') empowers an equality court to refer disputes to an alternative forum. In many instances, this forum is the SAHRC.

In *Grootboom*, the Constitutional Court endorsed a significant monitoring role for the SAHRC by way of a declaratory order, that the SAHRC adopt a supervisory role to ensure government compliance with its section 26 obligations as per the judgment.⁴⁵

8. THE COMMISSION FOR GENDER EQUALITY ('CGE')

The Commission for Gender Equality 'must promote respect for gender equality and the protection, development and attainment of gender equality'.⁴⁶ The commission is regulated by the Commission on Gender Equality Act⁴⁷ which sets out the details of the commission's functions and powers. These can be summarised as powers: (a) to monitor (the watchdog function); (b) to educate; (c) to investigate and settle complaints; (d) to conduct research; (e) to advocate for gender equality; (e) to report, advise and make recommendations; and (f) to litigate.⁴⁸

⁴⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) at para 97.

⁴⁶ *Supra* note 2 at s187(1).

⁴⁷ The Commission on Gender Equality Act 39 of 1996.

⁴⁸ *Ibid.* at s11.

9. THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES ('CRLC')

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC') is governed by the Constitution and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act ('CRLC Act').⁴⁹ The objects of the CRLC are:

- (a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
- (c) to foster mutual respect among cultural, religious and linguistic communities;
- (d) to promote the right of communities to develop their historically diminished heritage;
- (e) to recommend the establishment or recognition of community councils in heritage; and accordance with section 36 or 37.⁵⁰

The CRLC is responsible for deepening the appreciation for the variation of cultures, religions and languages in South Africa, and for contributing meaningfully and constructively to social transformation and nation-building for the attainment of a truly united South African nation.⁵¹

⁴⁹ Commission for The Promotion and Protection of The Rights Of Cultural, Religious and Linguistic Communities Act No 19 of 2002.

⁵⁰ Supra note 49 at s4.

⁵¹ See http://crlcommission.org.za/vision_mission.html

10. THE ELECTORAL COMMISSION

Section 190 of the Constitution states that the Electoral Commission must:

- (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
- (b) ensure that those elections are free and fair; and
- (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.⁵²

The Electoral Commission must be composed of at least three persons.⁵³ However, the Electoral Commission Act provides for the commission to be composed of five members.⁵⁴ The Act states that the management of elections is the first function of the commission.⁵⁵

11. CRITICISMS OF CHAPTER 9 REGIME: THE ASMAL REPORT

In 2006, an ad hoc parliamentary committee was formed and tasked with conducting a review of the chapter 9 institutions. It was headed by Professor Kader Asmal and hence, is often referred to as the 'Asmal Report'. The report was prompted

⁵² Supra note 2 at s190(1).

⁵³ Supra note 2 at s191.

⁵⁴ The Electoral Commission Act 51 of 1996.

⁵⁵ Ibid. at s5(1).

by concerns as to the efficacy and cost of the various institutions. The committee created a report with recommendations for the chapter 9 institutions.⁵⁶

The committee developed a questionnaire that was filled out by the heads of the chapter 9 institutions. Along with these questionnaires, the annual reports of the institutions, media reports and public submissions were among the methods used by the committee to interact with the institutions.⁵⁷ Submissions from the public were also encouraged so that the committee could be presented with the public's experiences with the institutions. The committee identified a set of guiding principles that would ensure consistency in approaching the various chapter 9 institutions. These principles included: independence, accountability, effectiveness, indivisibility, interdependence and interrelatedness of human rights.⁵⁸ Notably, the committee's general test for independence was adopted from the Constitutional Court case of *Van Rooyen*.⁵⁹ The court held that the determining factor was whether, from the objective standpoint of a reasonable and informed person, there would be a perception that the institution enjoyed the essential conditions of independence.⁶⁰ In determining independence, consideration should be given to the perception of independence by a well-informed and objective person. Such person should be guided by the social realities of South Africa and the Constitution, particularly the values contained in the Constitution and the differentiation it makes between the different institutions. The factors may include: financial independence; institutional independence with respect to matters directly related to the exercise of its constitutional mandate, especially

⁵⁶ Parliament of the Republic of South Africa (2007) *Report of the ad hoc committee on the review of Chapter 9 and associated institutions: A report to the National Assembly of the Parliament of South Africa* ('Chapter 9 Report'/'Asmal Report'). Accessed 25 February 2015, <https://pmg.org.za/committee-meeting/9593/>

⁵⁷ *ibid* at 7.

⁵⁸ *Ibid* at 9-16.

⁵⁹ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).

⁶⁰ *Ibid* at para 32.

relating to the institution's control over the administrative decisions that bear directly and immediately on the exercise of its constitutional mandate; appointment procedures and security of tenure of appointed office-bearers.⁶¹

The report found a number of problems relating to the institutions and 'when viewed collectively it is apparent that a lack of consistency and coherence in approach is ultimately undermining of their individual, and even common, efforts'.⁶² One of the recommendations was that there should be a separate budget for the chapter 9 institutions,⁶³ which would allow for greater autonomy. The report also urged for more public involvement in the appointment process,⁶⁴ greater accountability,⁶⁵ improved accessibility to the public,⁶⁶ and finally, merging the various institutions that deal with human rights (SAHRC, CRLC, CGE as well as the Pan South African Language Board and National Youth Commission) into one umbrella human rights commission, the South African Human Rights and Equality Commission.⁶⁷ This would prevent an overlap in functions, save costs and make the body more efficient. Additionally, a Youth Commission and Language Board should be formed. Neither Parliament nor the government has fully embraced the recommendations contained in the Asmal Report. However, it remains a useful analysis of the institutions and their effectiveness.

⁶¹ Op cit note 56 at 9-10.

⁶² Ibid at 19.

⁶³ Ibid. at 37.

⁶⁴ Ibid. at 40.

⁶⁵ Ibid. at 31.

⁶⁶ Ibid. at 45.

⁶⁷ Ibid. at 46.

12. QUESTIONS

(a) MCQs

Choose the most correct.

1. Only the following chapter 9 institutions may exercise remedial action:
 - (a) The Auditor-General
 - (b) The SA Human Rights Commission
 - (c) The Electoral Commission
 - (d) None of the above

2. In which case did the court acknowledge the supervisory role of the Human Rights Commission?
 - (a) *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (CC) (“Nkandla judgment”).
 - (b) *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).
 - (c) *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC).
 - (d) None of the above.

3. The following all provide checks and balances on the executive:
 - (a) The Public Protector, the judiciary and the legislature
 - (b) Chapter 9 institutions, judiciary and executive
 - (c) The Ministers
 - (d) None of the above

4. If the Public Protector has issued a report that states her remedial action to be taken is an appointment of a commission of inquiry, which response from the President of South Africa would be acceptable? **(1 Mark)**

- (a) The appointment of a commission of inquiry is solely the discretion of the President. He does not have to abide by the Public Protector's remedial action as the Public Protector does not have authority to order this remedial action.
- (b) The President may refer the report to the National Assembly which has the discretion to abide by her report or favour another report if it chooses to conduct its own investigation.
- (c) The President must abide by the Public Protector's remedial action or challenge it in a court of law.

(b) True/False

Is the following statement true or false? Motivate your answer.

1. The ruling party has a wide discretion to remove persons appointed to a chapter 9 institution. **(3 marks)**

(c) Short Questions

1. Briefly describe the test used by the ad hoc committee in the 'Asmal Report' to establish whether these institutions were independent as guaranteed by the Constitution in section 181. **(4 Marks)**
2. Briefly list and explain three measures put in place by the Constitution to safeguard the independence of the chapter 9 institutions. **(6 marks)**
3. Explain the appointment process set out in the Constitution for the position of the Public Protector. **(4 marks)**

(d) Long Questions

1. Members of the ruling party have had their reservations about the office of the Public Protector. They have prepared a Bill to amend section 182(1)(c) of the Constitution by replacing the words 'to take remedial action' with the words 'to make recommendations to secure appropriate redress'. The Bill will also extend the term of the current Public Protector by up to four years. Lastly, the Bill will amend the Public Protector Act by requiring the Public Protector, when investigating misconduct by the President, to appoint his own 'special independent investigator' to carry out a parallel inquiry and if appropriate to furnish the President with an alternative set of conclusions which the Public Protector must then take into account before publishing her final report. You have been approached by a member of the opposition party to advise on the constitutionality of this Bill. **(10 marks)**

2. During October 2019 at a news conference in Cape Town, just before the Springboks departure to Japan for the Rugby World Cup, President Cyril Ramaphosa announced that each Springbok player would receive a R2,5 million bonus if the Springboks won the Rugby World Cup. Coach Rassie and Captain Siya gladly accepted the challenge at the news conference. On the 2nd of November 2019 the Springboks annihilated England 32-12 in the final and were crowned rugby champions of the world 2019.

The Public Protector, Ms Mkhwebane, sent a report (on 5 November 2019) to the President instructing him to not pay over any bonuses to the Springboks as this was beyond his constitutional powers, and that in any event there were numerous other areas in which the money, amounting to R77,5 million (R2,5 million x 31 players), could be spent, such as education and healthcare.

The Public Protector furthermore ordered the President to pay over the money allocated to the Springboks to the Ministers of Health and Education (in equal shares). **(20 marks)**

Answer the following:

1. What is the nature of the powers of the Public Protector? Furthermore, has she exercised her powers correctly to order the President first, not to pay the Springboks the bonuses, and secondly, by ordering the President to pay of the allocated money to the departments of health and education?
2. Lastly, is there anything the President can do to invalidate the actions taken by the Public Protector?

13. ANSWERS

(a) MCQs

1. c. The Public Protector is empowered to order binding remedial action that is capable of remedying the wrong in the particular circumstances. This must include directing or instructing members of the executive, including the President, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question. In order to properly fulfil her constitutional mandate, the Public Protector must have the power, in appropriate circumstances, to direct the President to appoint a commission of inquiry and to direct the manner of its implementation.
2. d. The language employed by the Constitution is such that the words 'remedial action' are used only in relation to the Public Protector.
3. c. See paragraph 97 of *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) where the court said: 'In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment'.
4. a. The Public Protector, the judiciary and the legislature all provide checks on the executive. The executive is directly accountable to the legislature, and the Public Protector may take remedial action against the executive, and the judiciary can review the actions of the executive. Answer 'b' is incorrect because even though the chapter 9 institutions and the judiciary act as checks on the executive, the executive is not a check against itself. Answer 'c' is incorrect because the Ministers form part of the executive and therefore, do not act as a check on themselves.

(b) True/False

1. **False.** Section 194 of the Constitution states that members of chapter 9 institutions may only be removed from office on grounds of misconduct, incapacity or incompetence. Furthermore, the National Assembly must adopt a resolution to call for that person's removal from office. Thus, the ruling party does not have wide discretion as members can only be removed on objectively valid grounds.

(c) Short Questions

1. The committee's general test for independence was adopted from the *Van Rooyen* case. The determining factor is whether, from the objective standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence. Consideration should be given to the perception of independence by a well-informed and objective person.
2. Appointment, removal and security of tenure. The appointment process is set out in section 193 of the Constitution which involves a vote by the National Assembly. Section 194 states that members can only be removed on the basis of a finding of misconduct, incapacity or incompetence. They also enjoy security of tenure which means that unless a finding in terms of section 194 is made, they will remain in their positions for as long as the Constitution prescribes.
3. Section 193 of the Constitution sets out the appointment procedure for positions of the chapter 9 institutions. A committee within the National Assembly that is composed proportionately of members of all parties represented in the National Assembly must nominate persons for the position of Public Protector, and the national assembly then votes on the nominee. For the Public Protector, a supporting vote of 60% is required. If the required vote is obtained, the National Assembly recommends this person to the President. If this vote is obtained, the President appoints the candidate to the position of Public Protector.

(d) Long Questions

1. The issue is whether the Bill in question is unconstitutional. First, the Bill replaces the Public Protector's power 'to take remedial action' with a power to recommend. Secondly, it requires the Public Protector to appoint a 'special independent investigator' to carry out a parallel inquiry when she is investigating the President. If appropriate, she should furnish the President with an alternative set of conclusions and must take them into account before publishing her final report. According to section 181(4) in the Constitution, no organ of state can interfere with the functioning of the institutions. They are, however, required in section 181(3) to ensure their 'independence, impartiality, dignity and effectiveness'. Section 182(1) provides that the public protector's powers are regulated by the National Assembly and additional powers prescribed by legislation. The *EFF* case found that a parallel inquiry to the public protector's findings was reasonable, but only after her report is submitted. Furthermore, national legislation 'cannot have the effect of watering down the powers conferred by the Constitution on the Public Protector'.

'Additional' in section 182(1) means 'more'. This could imply that legislation cannot diminish the Public Protector's powers. The amendment would impose a duty on the Public Protector to consider the President's investigator's findings along with her own. This diminishes her independence as she is not free to publish her report based on her own findings without the contribution of someone appointed by the executive. Furthermore, 'taking reasonable steps' is a much weaker power than 'taking remedial action'. The President, by appointing his own investigator interferes with her function as a check on the state. If her report is to be challenged, it must be done after she has submitted her report to allow her to work independent of the influence of the executive. Thus, the legislation would effectively water down the Public Protector's powers. In consequence the Bill is unconstitutional on the basis that it interferes with the independence of the Public Protector, in contravention of section 181(4), and places an additional duty on her which decreases her powers envisaged in section 182(1).

2. 1) The Constitution confers powers on the Public Protector in section 182(1) to 'investigate . . . report . . . [and] take appropriate remedial action.' The interpretation of the nature of these powers was set out in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*. The court held that 'taking remedial action' meant the Public Protector is empowered to take action that has effect if it is the best attempt at curing the cause of the complaint. The Public Protector is empowered to decide on and determine the appropriate remedial measure. 'Action' presupposes that she may, where appropriate, take concrete or meaningful steps. She can determine the appropriate remedy and prescribe the manner of its implementation. 'Appropriate' means nothing less than effective, suitable, proper or fitting measure to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case.

In *President of the RSA v Office of the Public Protector and Others*, the court held that the phrase 'to take remedial action' means providing a proper, fitting, suitable and effective remedy for the complaint she is called upon to investigate. In this case, the court concluded that her wide powers must include the power to direct the President to appoint a commission of inquiry and direct the manner of its implementation.

In this case, the Public Protector's remedial action involves ordering the President not to pay the Springboks the bonuses and ordering the President to pay of the allocated money to the departments of health and education. The Public Protector's powers in taking remedial action are wide. The question becomes whether her remedial action was appropriate. The President made a generous promise to the Springbok players to pay them large amounts of money if they won the World Cup. This would result in a payment of millions out of public money to be awarded to each player on the team. This could easily be seen as unlawful enrichment as, although the Springbok heroes were treated as the nation's heroes, there is no legal obligation to pay the players such large bonuses and no rational basis for doing so. The President needs to be responsible with the public money. Thus, ordering the President not to pay the bonuses would be an effective means to undo the unlawful enrichment.

Whether ordering the President to pay the money to other departments is appropriate or not depends on the facts. While the Public Protector's report cannot simply be ignored, it is likely that this aspect of her remedial action may be set aside by the court as the Public Protector is not necessarily the best placed to decide where the public money should go. This would likely infringe the separation of powers doctrine as it is the executive's role to determine the budget, not the Public Protector.

2) *The Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* case stated that the Public Protector's powers are wide but not unfettered. Her remedial action is always open to judicial scrutiny. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. No binding and constitutionally or statutorily sourced decision may be merely disregarded. In order to avoid complying with the remedial action, an order of court would have to be obtained. The court held that while the National Assembly is empowered to inquire into the correctness of the Public Protector's findings, they cannot simply nullify her findings and replace them with their own.

Thus, the remedial action taken by the Public Protector against the President has a binding effect. He cannot simply invalidate her remedial action. The President has to refer the remedial actions to court and only when and if the court sets aside her findings, can the President disregard the Public Protector's report.