

**SUBMISSIONS TO THE OFFICE ON INSTITUTIONS SUPPORTING DEMOCRACY AND
THE KNOWLEDGE INFORMATION SERVICES DIVISION, PARLIAMENT**

ON

**A PROCESS TO EXAMINE THE FEASIBILITY OF THE ESTABLISHMENT OF A “SINGLE
HUMAN RIGHTS BODY”**

Persons and organisations making submissions:

1. Zita Hansungule

Centre for Child Law: zita.hansungule@up.ac.za or 012 420 4502

2. Samantha Waterhouse

Dullah Omar Institute: swaterhouse@uwc.ac.za or 021 959 2950

3. Vanessa Japtha

Inclusive Education South Africa: Training@included.org.za or 021 762 6664

INTRODUCTION

1. The Centre for Child Law, University of Pretoria; the Dullah Omar Institute, University of the Western Cape; and Inclusive Education South Africa acknowledge the call for written submissions, to be submitted no later than 30 June 2017, on a “Process to Establish the Feasibility of the Establishment of ‘A Single Human Rights Body’”. We welcome the opportunity to make the following submissions in response to the call. From the outset we affirm that the aspect of investigating human rights abuses and effecting redress in this regard is a high priority of a democratic state based on a supreme constitution, which South Africa is. It is therefore important that processes and institutions established to achieve this aim are strengthened.

2. We note that the wording of the call for submissions points to this process being the start of in-depth research that is being undertaken by the Office on Institutions Supporting Democracy and the Knowledge Information Services Division (OISD) and that the submissions and other processes will feed into the research study. We therefore, in light of this, make these submissions with the expectation that we will receive feedback on the process as it develops and be called on to engage on the issue further, and with more specificity, as the process unfolds.

3. This expectation arises from our concern that the Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions (Asmal Report) was released 10 years ago, in 2007, and is therefore in some respects outdated. Since then there have been a number of developments that have had an impact on the functioning of institutions that were the focus of the report, such as jurisprudence setting precedent on the extent of the powers of some of these institutions¹ as well as improved processes that have over the years strengthened the functioning of these institutions.

4. Furthermore, the Asmal Report raises a complex range of political, legal and administrative questions linked to the institutions in question. In order to properly engage with each of these, and taking into consideration the developments within Institutions Supporting Democracy (ISD) and in South Africa’s evolving democracy over the past 10 years, detailed research and analysis is required. Such a process requires far more preparation and time that even the extended deadline for submissions is woefully inadequate

¹ See for example jurisprudence dealing with the Public Protector: *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA); *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA); and *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

to meet. It would only be after such a research and analysis process that we would feel confident to debate our positions regarding some of these critical questions.

5. Finally, the question of the functioning and strengthening of South Africa's ISDs is one that is of great importance to the South African public. This current process of the OISD, its limitations noted above, is better suited to the engagement of organised civil society and is not accessible to the public. We thus urge the OISD and Parliament to commit to a robust process of communication and engagement with the public through its investigation on these questions.

6. It is due to the limitations of this process that our submissions are silent on the explicit question of whether it is in the interests of our democracy for the institutions considered in the Asmal Report to be consolidated into a 'single human rights body', or how this should be achieved.

7. It is with these considerations regarding the process in mind that we offer the following submissions at this time. Our limited submissions, seek to identify key principles and considerations for the unfolding research and engagement processes and raise issues that have developed generally and specifically within South Africa's children's and women's sectors over the past 10 years. Given that we are at this point not taking a position on the feasibility and strategic value of establishing a consolidated 'single human rights body', we consider issues generally related to strengthening capacity, within South Africa, of independent human rights bodies.

SUBMISSIONS

Submissions aligned with the Constitution

8. We confine our submissions to suggestions that are within the current framework of the Constitution. In this regard it is important to note, with circumspection, that the creation of a single human rights body may require amendments to the Constitution. The Constitution currently provides for the establishment and maintenance of institutions each with different areas of focus. Amending the Constitution requires very serious consideration and a cautious approach, given that it is "the supreme law of the Republic".² This is especially so of amendments that have the potential of materially altering the Constitution, we submit that a

² Section 2 of the Constitution.

dialogue as to if the proposed amendments fall into this category would be essential prior to embarking on such amendments.

9. To date, analysis shows that amendments that have been made to the Constitution “have not materially altered the ... Constitution This state of affairs has enabled the political institutions established in 1994 — though still fragile — to consolidate the underlying commitment to the formal and the substantive transformation of South African society.”³ Any proposed amendments to any part of the Constitution must not undo this important work.

Ensure capacity to promote, monitor and investigate the full range of rights

10. ISDs (or a single institution) must hold the capacity to promote, monitor, investigate and ensure accountability to the full range of rights articulated in the Bill of Rights. At present, there are gaps in the existing framework and structures. For example, children’s rights and the rights of persons with disabilities should be addressed by all relevant bodies, however the quality of engagement with these rights by the ISDs is dependent not on the framework but on if it is prioritised, and on the level of expertise, specialisation and capacity of Commissioners and staff within the ISDs. Thus the consistency of the extent to which ISDs adequately fulfil their functions in regard to these (and other) rights is not safeguarded in the existing framework.

Ensure strong, independent and capacitated ISDs

11. Measures must be in place to ensure that ISD’s are strong, independent and capacitated to fulfil their functions. In particular their functions of monitoring human rights and investigating human rights abuses.

12. This is given meaning through a range of measures, including ensuring the necessary checks and balances in **appointments processes** to act to safeguard the independence of Commissioners appointed. This includes a better articulated and **stronger role for the public** in appointments processes; better articulated criteria for appointees; consideration of the range of expertise required across these institutions (or in a single body).

13. Given the significant importance, and complexity of the question of the **powers of the ISDs** and the other bodies under consideration, we will not comment substantively on this beyond recognising that there may be justifiable reasons for such differences in powers.

³ Woolman and Swanepoel “Constitutional History” in Woolman and Bishop (eds) *Constitutional Law of South Africa Service 6* (2014) at 2-47.



Most importantly we submit that, at this time, in which these questions are under a high level of public scrutiny and scrutiny by the courts that no amendments or changes to the powers of any of these bodies would be acceptable.

14. The question of **financial resourcing** of ISDs to fulfil their constitutional and legislative mandates has frequently been raised in the annual reporting processes of these ISDs and questioned by parliamentary committees. These questions include issues of physical infrastructure and accessibility of the offices to the public, in particular in rural areas; issues of capacity for education and outreach; and issues of staff complements as well as the research and investigative capacity of these institutions.

15. **Budgets and financial resourcing** provide some indication of the political priority given to any legislation or policy. The relatively small budgets and significant discrepancies across the different institutions under question raise the question of the current priority afforded to the institutions and their critical role in protecting and promoting human rights in our democracy. The current low funding to these institutions is likely to cement the under-performance of some of the institutions in question.

16. We recognise the critical importance of ethical leadership and strong financial controls in any publically-funded entity and submit that the investigation must explore measures to safeguard this along with increased funding to enable strong and functional ISDs. The possible funding models for ISDs must form part of the investigation; which should seek to consider the questions of sources of funding, financial accountability, and ensuring that the funding and accountability model appropriately promotes the independence of ISDs from the Executive and from private entities within the principle of transparency.

17. Based on the limited information from annual reports and parliamentary oversight processes available to us, we consider the ISDs to be underfunded in terms of their outreach, monitoring and investigative functions. We thus do not advocate that the budgets allocated for their strengthened functioning should be cut. However it is feasible to investigate the potential budgetary and public access benefits to shared physical infrastructure and administrative functions such as reception and building security. Such consolidation of infrastructure and not the outreach, monitoring and investigative functions of the institutions could be achieved with some basic coordination in a relatively short period of time.



Children’s rights monitoring and the establishment of an independent child rights monitoring body

18. Discussions, processes and engagements around the feasibility of the establishment of a single human rights body and the strengthening of ISDs generally, must take into account the rising call to establish an independent child rights monitoring body. South Africa’s child rights protection framework is relatively comprehensive. Progress made in this regard includes amongst others: a children’s rights clause in the Constitution of the Republic of South Africa; legislation which entrenches the statutory protection of children’s rights, such as: the Schools Act (No. 84 of 1996); the Social Assistance Act (No. 13 of 2004); the Children’s Act (No. 38 of 2005); the Child Justice Act (No. 75 of 2008); and the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32 of 2007). We also acknowledge strong jurisprudence from the superior courts – High Courts, the Supreme Court of Appeal and the Constitutional Court – affirming and protecting children’s rights as contained in the Constitution and legislation. However, despite the above progress, some aspects of the framework are problematic, and the lives of the majority of children in South Africa are characterised by serious challenges; a lot of these challenges related to the implementation of the protective legal framework. It is therefore important that structures of accountability be established to ensure that children’s rights and well-being are not only recognised on paper but seen in their lives.

19. Given that the current responsibility for monitoring children’s rights lies within the SAHRC and that this responsibility is not explicit and thus subject to changing capacity and priorities within the SAHRC, there is consensus amongst a significant number of child rights organisations that South Africa requires a stronger framework for an independent child’s rights monitoring body, including the clear articulation in law of the mandated body to carry out this accountability function. The United Nations Committee on the Rights of the Child (UNCRC) encourages state parties to establish “independent human rights institution[s] with [the] responsibility for promoting and protecting children’s rights.” This is also in line with 2014 recommendations from the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UNCRC recommendations to South Africa in 2016. These recommendations were made as a result of both bodies recognising and expressing their concern at the absence of an institution in South Africa that focuses on children’s issues and that aims to promote and protect children’s rights.



20. **We thus submit that the research and investigation into these institutions must give due and explicit consideration to ensuring a stronger framework for child rights monitoring.**

Women's rights and gender equality

20. Gender inequality is deeply embedded in South African society. This is evident in the serious levels of violence against women; the stubbornly unresponsive criminal justice system, despite the protective legislative framework; gender-skewed land and property ownership; culturally enforced exclusions faced by rural women, and their diminished access to justice; the persistent violation of sex workers' human rights, violence against LGBTI people; gender discrimination in the workplace; and the gendered nature of the spread and impact of HIV and AIDS amongst others.

21. In this context, independent oversight bodies – in particular the Commission for Gender Equality (CGE) – to monitor national programmes of action, investigate violations of women's rights and to advise on and oversee the long-term project to transform gender inequality and women's rights is critical. **The CGE is an important element of the National Gender Machinery and requires strengthening, either as a distinct body under the current framework, or as part of the consolidated 'single human rights body' that is currently in question.** The failures in the past in making strong appointments to the leadership of the CGE coupled with its systematic under-funding has exacerbated other barriers within the institution to fulfilling its functions in promoting gender equality in South Africa. This underfunding, linked to at times inadequate leadership within, signals a low priority being given to the paper-promises of women's rights and gender equality in South Africa.

22. As with our submissions regarding child rights monitoring above, **we submit that the OISDs process must include consideration of the measures and practices needed to strengthen the independent human rights monitoring and investigations capacity relating to women's rights and gender inequality in South Africa.**

CONCLUSION

23. As noted above, we appreciate the opportunity to make these submissions, however limited, and we look forward to feedback and further engagements with the OISD on these important questions.