Assessment of the Relationship Between Chapter 9 Institutions and Civil Society

Final Report

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Abbreviations

ABJ	Abahlali base Mjondolo (Durban Shackdwellers' Movement)
ALP	Aids Law project
ANC	African National Congress
APF	Anti-Privatisation Forum
ARV	antiretroviral
CBO	community-based organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	chief executive officer
CGE	Commission on Gender Equality
CHRAJ	Ghana's Commission on Human Rights and Administrative Justice
Cosatu	Congress of South African Trade Unions
CSAP	Civil Society Advocacy Programme
CSO	Civil society organisation
CSVR	Centre for the Study of Violence and Reconciliation
DANIDA	Danish International Development Agency
DVAP	Domestic Violence Advocacy Programme
HSRC	Human Sciences Research Council
IDASA	Institute for Democracy in South Africa
JMC	Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women
Komnas HAM	Komisi Nasional Hak Asasi Manusia (Indonesian National Commission on Human Rights)
LHR	Lawyers for Human Rights
LPM	Landless People's Movement
MP	Member of Parliament
MRC	Medical Research Council
Nedlac	National Economic Development and Labour Council
NGM	National Gender Machinery
NGO	non-governmental organisation
ODAC	Open Democracy Advice Centre
OPP	Office of the Public Protector
OSW	Office of the Status of Women
SACC	South African Council of Churches
Sacob	South African Chamber of Business
SAHRC	South African Human Rights Commission
SAMGI	Southern African Media and Gender Institute
SAMP	Southern African Migration Project
SAOPF	South African Older Persons Forum
SCOPA	Standing Committee on Public Accounts
SWEAT	Sex Worker Education and Advocacy Taskforce
TAC	Treatment Action Campaign
UNCHR	UN Centre for Human Rights

Executive summary

Purpose of the study

This study assesses the nature of the relationship between Chapter 9 institutions, in particular the Commission on Gender Equality (CGE), the South African Human Rights Commission (SAHRC), and the Office of the Public Protector (OPP), and civil society organisations (CSOs). The purpose is, firstly, to establish whether or not the relationship enables Chapter 9s to fulfil their mandate – that is, enabling vulnerable groups (women, children, black and rural South Africans) to access and realise their constitutionally enshrined human rights. Secondly, based on the findings, it is to make recommendations on how to improve relations between the two sectors in order to enhance the effectiveness of Chapter 9 institutions.

Background

The South African Constitution is widely heralded as the most progressive in the world. The distinctive features of this Constitution are that it includes not only political and civil rights, but also recognises socio-economic rights as *justiciable* rights. Even though numerous international treaties or covenants declare 'all human rights are universal, indivisible, interdependent and interrelated', many countries have preferred to avoid a potential conflict between the judiciary and other organs of the state by placing questions of social and economic policy beyond the reach of judicial competence.

The South Africa state, however, recognises all categories of rights, especially socio-economic, as matters that can be enforced by a court or, more generally, as a subject appropriate for a court trial.

Yet the authors of the Constitution also realised that, though guaranteed by the Constitution, such rights would not necessarily translate into a lived reality. Thus they formed Chapter 9 bodies to see to it that these rights are realised, especially by the vulnerable groups in society. This task is especially important given that access to the courts, especially for the poor and vulnerable, remains impossibly difficult.

Methodology

This study was compiled using qualitative methods and was completed over a period of four months, from 15 September 2006 to 15 January 2007.

Interviews

We conducted 59 interviews and held focus group discussions. Particular care was taken to interview individuals from a diverse range of organisations: rural- and urban-based, social movements, community-based organisations (CBOs) and established non-governmental organisations (NGOs). Our respondents included staff members of the three Chapter 9 institutions, leading members of CSOs, academics/experts, civil servants, and Members of Parliament that serve in the portfolio committee to which

these institutions report. Our interview schedule, though slightly varied depending on the respondent, focused on the following issues:

- Both Chapter 9 institutions' and CSOs' understanding of the mandate of Chapter 9s;
- Whether the relationship between Chapter 9 institutions and CSOs is prescribed in legislation, or is a result of operational necessity, where it does exist;
- Current state of the relationship and how they would prefer it to be structured; and
- Identification of instances that illustrate both a successful and a difficult relationship between each Chapter 9 institution and a particular CSO in a similar area.

Case studies

Our idea in compiling case studies was to select case examples that would illustrate a successful relationship that yielded a tangible outcome benefiting a sizeable community of vulnerable people, and another that would demonstrate a difficult relationship highlighting the problems that have beset Chapter 9s and CSOs, incapacitating both kinds of organisations from working in a manner that engenders anything significant.

However, we were unable to compile two such case studies in all three focus areas. This was only possible in the case of the SAHRC. We could only come up with one case study in relation to the OPP, and only with the help of Lawyers for Human Rights. The OPP could only cite one case in which it had co-operated with CSOs. As for the CGE and civil society, we could only discern brief and disparate episodes of interaction. Our interviews did not find anything that amounted to a sustained interaction between the CGE and a particular CSO culminating in a particular tangible outcome.

Our case studies are therefore uneven both in terms of numbers and detail. That we were able to identify numerous case studies in the case of the SAHRC and civil society, from which we chose two, and very few on the other two institutions, is it itself telling not only of the saliency of the issues in which these institutions are involved, but also of their prominence and impact in their respective areas. The SAHRC is clearly the most visible and active of the three Chapter 9s.

Reference group

A reference group was constituted to assist the research team throughout the course of the research. The group was made up of representatives from civil society with direct interest in the three Chapter 9s – the CGE and the SAHRC (the OPP refused to participate) – and officials from the state departments that deal with these institutions. The reference group assisted the research team with background information on how the Chapter 9s actually function with civil society, and helped with the selection of relevant CSOs and respondents to interview. In the main, the group served as a sounding board off of which we bounced ideas about the project and the research findings.

Scope of the study

The three institutions that form the subject of this study – the SAHRC, the OPP and the CGE – are some of the six watchdog institutions. The SAHRC's primary concern is to promote respect, and protect and fulfil the human rights set out in the Constitution; the OPP's primary concern is administrative justice in the dealings of government and its institutions; the CGE's primary role is the attainment of gender equality.

To play their roles effectively and efficiently, however, these institutions depend not only on their organisational make-up and operational procedures, but also on their functional relationship with CSOs. Our definition of CSOs encompasses three categories: formal NGOs, survivalist organisations and social movements. Organisations in each of these categories are differentiated from each other, albeit not exclusively, by orientation (advocacy, research or social delivery), location (national or community-based) and by ideological predisposition. They are often the first port of call for distressed individuals or groups in need of redress. CSOs constitute a valuable network for Chapter 9 institutions to access communities and residents, particularly at a local level or in far-flung rural communities where the Chapter 9 institutions have a relatively poor presence. Thus the relationship between the Chapter 9 institutions and CSOs – diverse as they are – is particularly crucial to enhancing the effectiveness of the former.

Findings

Both the Chapter 9s and the relevant CSOs expressed willingness to form meaningful relationships. They have a common objective and each brings resources that complement the work and effectiveness of the other. It is also crucial to note that legislation compels the CGE to work directly with CSOs, whilst in the case of the OPP and the SAHRC there is no legislative obligation for such a relationship. In reality, however, the SAHRC, at least initially, has shown more commitment to working with CSOs than the other two Chapter 9s.

It is established in this report that the key ingredient of the success of the relationship between the studied Chapter 9 institutions and CSOs is the public's knowledge of their rights and how to act upon any violation of these rights. Thus, popularity of the Chapter 9 institutions amongst CSOs is imperative for a functional collaboration between the two. It is the acknowledged responsibility of both the Chapter 9 institutions and CSOs to educate the public about human rights. Although each of the parties may do this differently, a sustained structured relationship between the two is crucial. This means that the meetings should be mandatory and regular, inclusive of all CSOs, and should prioritise human rights issues of the day. Indeed, both the Chapter 9 institutions and CSOs value this kind of relationship as important for the achievement of human rights and administrative justice.

The report shows that in reality, however, the relationship is either weak or non-existent. The major difficulty in forging this kind of relationship stems from disagreement over the strategies for promoting, monitoring and protecting human rights. These range from issues of priority, different understanding of the roles of

Chapter 9 institutions, ideological orientation (as in disagreements over which gender discourse to pursue in the case of CGE) and different conceptions of the independence/autonomy of the organisations. These disagreements often lead to CSOs misinterpreting the role and function of the institutions. Chapter 9 institutions are seen, by some CSOs, as closer to the state than the public.

Where a relationship does exist, it is ad hoc and intermittent. Indeed, the existence of the relationship seems to depend on the orientation of the NGO (research, advocacy or activist), the kind of issue being dealt with, and the personalities within the organisation. With the exception of the SAHRC, none of Chapter 9 institutions studied has had a structured relationship with CSOs.

Nonetheless, one sees that Chapter 9s are starting to work on building structured relations with CSOs. The most visible of these is the European Union sponsored Civil Society Advocacy Programme. It is striking, though, that after three years the initiative has had little success.

Recommendations

The report recommends the following:

Structured and continuous relationship
Chapter 9s should dedicate focused attention and resources to building healthy relations with CSOs.

Civil society strategy outreach towards Chapter 9s
CSOs need to formulate strategies to engage with Chapter 9s. The responsibility for forging good relations between the two sectors falls not only on the Chapter 9s, but also on the CSOs.

Cultivate consensus on approach and priority issues
Gender activists and the CGE need to cultivate a common understanding of what gender discourse to pursue, as well agree on what aspects of the mandate require urgent attention – advocacy or monitoring.

Follow-up on recommendations
Chapter 9s should consider a host of strategies to test the limits of rights in South Africa. This may include litigation as a way of following up on recommendations arising from investigations. Where this is not viable, they should apply pressure on the relevant parliamentary committee to follow-up on recommendations and intensify their involvement in public activities that demonstrate their zeal in enforcing compliance from the state. The general point is that Chapter 9 institutions are in a privileged position to help develop and deepen the culture of human rights in South Africa.

Public awareness and education
Concerted effort is required to create public awareness about Chapter 9s, but also to educate the public on what these institutions actually do. Particular attention has to be focused towards making local offices of the Chapter 9s more visible.

Community outreach
Chapter 9s should engage with CBOs in areas where outreach is needed to get access to the least advantaged (especially in rural areas).

Institutional capacity
The institutional capacity of the Chapter 9s to deal with complaints timeously should be strengthened. Inability to finalise cases on time dissuades CSOs from referring cases to the institutions.

Proactive approach
Chapter 9s, especially the OPP, need to be proactive in a similar way to comparable organisations in the Czech Republic. The image of the OPP is tarnished when it remains silent or inactive in the midst of a public outcry about corruption or inefficiency within certain state departments.

Chapter 1
Introduction

South Africa's 1996 Constitution is one of the most progressive in the world, ending decades of institutionalised racism and sexism, and effectively establishing a human rights-oriented state for the first time in the country's history. One of the distinctive features of this Constitution, which has earned it international acclaim, is that it includes not only political and civil rights, but recognises socio-economic rights as *justiciable* rights. In India and Namibia, for example, socio-economic rights have only been included as guiding principles by which to interpret and enforce civil and political rights (Iles 2004). In this respect, the Constitution both brings South Africa in line with the post-Second World War conception of citizenship and exceeds it.

Let us recall that the hallmark of the European post-war dispensation was a certain notion of citizenship (Kymlicka & Norman 1991). Especially influential was TH Marshall's *Citizenship and Social Class* (1965), which associated full citizenship with a liberal, democratic welfare state. In particular, Marshall argued that the exercise of political and civil rights presupposed the exercise of socio-economic rights to, amongst other things, education and housing. More recently, at least since the 1980s when the New Right began their critique of welfare dependency, this association has been increasingly called into question. The dismantling of this welfare architecture has been made easier by the fact that no European power has included socio-economic rights as justiciable rights in its constitution. This is the sense in which contemporary South Africa has exceeded the European liberal-democratic vision.

The South African state is alone in the world in recognising all categories of rights, especially socio-economic, as matters that can be enforced by a court or, more generally, as a subject appropriate for a court trial. Even though numerous international treaties or covenants declare 'all human rights are universal, indivisible, interdependent and interrelated',[1] most other countries have preferred to avoid a potential conflict between the judiciary and other organs of the state by placing questions of social and economic policy beyond the reach of judicial competence. Yet the Constitutional Court ruled in 1996, in certifying the Constitution itself, that:

> It is true that the inclusion of socio-economic rights may result in the court making orders which have implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech or the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who were formerly not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a Bill of Rights, a task is conferred upon the courts so different from that ordinarily conferred upon them that it results in a breach of the separation of powers... *We are of the view that these rights are to some extent justiciable.*[2] (emphasis added)

[1] World Conference on Human Rights, Vienna, 1993.
[2] Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC).

Let us note that socio-economic rights are thought to present special problems for liberal-democratic constitutions. In other words, the failure to include them is not necessarily the mark of an authoritarian dispensation. The problem is a conflict that arises between two equally *democratic* principles. The first concerns the separation of powers between the judiciary, the executive and Parliament. In part, this principle is intended to protect the right of elected officials to develop policies and laws that accord with their own particular political interests or visions. The idea of democratic sovereignty holds that it is undesirable for properly and duly elected parliaments to be constrained from pursuing their programmes. More commonly, it is designed to protect judges and magistrates from coming under pressure to make decisions partial to the government of the day, irrespective of the facts of the case. The second concerns the rights of citizens to social and economic development. In this instance, certain basic rights are deemed so important that they must be granted to citizens, irrespective of whether the government of the day thinks them urgent or not or even necessary at all.

The moment a court orders the executive to provide some or other social or economic service (education, housing, electricity, water, etc.), is it not in effect straying into a domain which is not its own? This question is at the heart of a growing jurisprudence in South Africa. It is worth considering briefly because it will help us understand the position of Chapter 9 institutions and the role that they could or are even supposed to play.

The content of socio-economic rights has come before the Constitutional Court on four occasions since it was established, though the most important of these was in the Grootboom case.[3] The facts of the case need not delay us here other than to note that the Constitutional Court found that the South African government had acted 'unreasonably' in not providing shelter for people in immediate and desperate need (Wesson 2004). Even if, according to the court, the government's housing programme was laudable, in concentrating on the provision of 'permanent residential structures' over time, it neglected a significant sector of society (those in immediate need) and, therefore, failed the test of 'reasonableness'.

At the heart of the judgement was the following question: what is entailed by the obligation on the state to take reasonable measures, within available resources, to realise a socio-economic right? We do not have to answer this question positively. Indeed, the nature of the court's own ruling is the subject of a vigorous academic scholarship. What is important for our purpose here is what the court said was *not* necessary. It is *not* necessary for the state to extend a 'minimum core' of socio-economic rights to everybody. In other words, the state is under no obligation to prioritise a basket of basic rights and then make sure that a 'minimum essential level of the right is enjoyed by everyone'.[4] If this were the case, government would be required to fulfil these needs before passing on to what the court might deem less pressing issues.

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[3] Republic of South Africa v Grootboom. Case No. CCT 11/00. 2000 (11) BCLR 1169.

[4] This is, in fact, the standard of the United Nations Committee on Economic, Social and Cultural Rights (CESCR). See CESCR General Comment 15: The Right to Water (2002) para 44, cited in Wesson (2004).

In the Grootboom case, the Constitutional Court refused to adopt such an approach. Instead, it suggested that socio-economic rights be determined on a case-by-case basis, depending on the context, the policy and the budget available. Indeed, socio-economic rights were only enforceable by the court if and when government policy and/or practice unfairly discriminated against a significant group of people. Ultimately, it left it up to government to determine what the content of a socio-economic right was and how it would be realised.

The decision has provoked a storm of comment. Let us simply note that some commentators have accused the court of defective reasoning.[5] They worry, moreover, that the decision does little to promote the interests of the poor and the vulnerable because it defers socio-economic rights to some future 'never-never land'. As Judge Dennis Davis warned during debates about the inclusion of justiciable socio-economic rights:

> To assert a right is to argue that another party has a duty to provide conditions in terms of which that right can be fulfilled. Once social and economic rights are included in a bill of rights, the constitution trumpets to the society at large that each is entitled to demand enforcement of such rights whether they be rights to housing, to employment, to medical care or to nutrition...For members of society to then find that all that is entailed thereby is a process of negative constitutional review is to create a situation where expectations are raised only to be dashed on the rock of a technical legal review. (Davis cited in Pieterse 2006: 475)

Does this decision have consequences for the mandates of Chapter 9 institutions? We think so.

What the Grootboom judgement means, in effect, is that the state has no clear guidelines about what constitutes a socio-economic right or about what the court will accept as their minimum realisation. This would not be the case, for example, had the court found in favour of a minimum core of rights.[6] Instead, socio-economic rights must be established case by case. This being the case, it is particularly important that South African citizens, especially the most vulnerable and the poor, have access to instruments and mechanisms through which they can exercise, or at least establish, their rights. This is especially pertinent for Chapter 9 institutions given that such rights are, ultimately, at the heart of many of the issues brought before them.

Ultimately a vital aspect of the practice of a constitutional democracy, therefore, is that it not only recognises human rights, but also meets the demands of practising those rights.
Pienaar (2000) puts it thus:

> A state is not genuinely 'constitutional' merely by virtue of the fact that it

[5] See especially Bilchitz (2002). For a critical, though more sympathetic take, see Wesson (2004).
[6] Some argue that the court was correct to reject the minimum core argument because it is not the best way of vindicating the entitlements inherent in socio-economic rights. Moreover, some have observed that, despite the ruling, the court is indeed beginning to acknowledge entitlements associated with socio-economic rights

possesses a constitution. It achieves that quality or status only when the constitution acquires a practical significance, in other words, when the principles and rights enshrined in it can be translated into practice.

To be sure, the authors of the Constitution fully grasped the importance of translating constitutional rights into a lived reality. They made constitutional provisions (as detailed in Chapter 9, section 181) for institutions to attend precisely to this challenge. In particular the central task of these Chapter 9 bodies is to make rights accessible to citizens. This task is especially important given that access to the courts, especially for the poor and vulnerable, remains impossibly difficult. Jackie Dugard (2006a), for example, notes that the number of cases brought by poor people, as a percentage of the total number of cases heard by the Constitutional Court, is low. She concludes that the Constitutional Court has not acted as an institutional voice for the poor. More damning, in a review of options available to the poor to access the courts, she concluded by suggesting that the aggregate failure to provide legal assistance to the majority of the population has had the negative effect of entrenching the law as an elite institution (2006b).

Chapter 9 institutions are in a rare and privileged position, therefore, to improve such access, especially in regard to the exercise of human rights. They are in a unique position to help further develop South African jurisprudence on rights, and socio-economic rights in particular, by vigorously assisting South Africans to exercise their constitutional rights.

1.1 Scope of the study

The three institutions that form the subject of this study – the South African Human Rights Commission (SAHRC), the Office of the Public Protector (OPP) and the Commission on Gender Equality (CGE) – are some of the six watchdog institutions.[7] The SAHRC's primary concern is to promote respect, and to protect and fulfil the human rights set out in the Constitution; the OPP's primary concern is administrative justice in the dealings of government and its institutions; the CGE's primary role is the attainment of gender equality. These are cross-cutting of necessity, but are separate roles. To the extent that they act as checks on each other, they are positive, for example CGE on SAHRC or OPP if there are allegations of sexual discrimination or sexual harassment; SAHRC on CGE or OPP if there are allegations of racial discrimination; OPP on SAHRC or CGE if there are allegations that they are not responding to complaints as set out in their statutory mandate.

Needless to say, whether or not the three Chapter 9 institutions are able to fulfil this mandate hinges on a whole range of factors. These include sufficient funding, competent and stable leadership, presence of skilled staff, and assistance from and co-operation with civil society organisations (CSOs) working on similar issues. There is also a further important question about the relationship between the Chapter 9s, which are intended to operate independently but in reality overlap in their jurisdiction.

Over and above these operational issues, we will see that the ability of Chapter 9

[7] The other three are the Auditor-General, the Independent Electoral Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

institutions to fulfil their mandates depends on another, controversial factor: how they understand their roles as 'independent' bodies.

Although other studies have been done to assess how the aforementioned factors impact upon the functioning of these institutions,[8] this study is different in that it examines the state of the relationship between the three institutions – OPP, CGE and the SAHRC – and civil society. The idea is to determine whether or not the relationship is of such a nature that it enables the Chapter 9 institutions to fulfil their mandate and, in particular, assists these bodies to give expression to the rights of South African citizens.

1.2 Defining civil society in South Africa

Our definition draws from classical notions of civil society as well as from the local scholarship interested in this question in relation to the peculiarities of South African society and its history. It is generally accepted among scholars that civil society refers to a whole range of organisations or associations and networks that exist within the public domain, independent of both the state and the economic sector. Corporations involved in direct economic activity or political parties are thus not considered part of civil society, but are themselves subject to lobbying for influence and resources by CSOs. Such organisations are constituted voluntarily by individuals who share a common interest and use that collective power to mobilise on behalf of their members or constituency.

South Africa's specific definition of civil society, both in legislation and scholarly studies, has generally confirmed the foregoing definition.[9] Civil society has been defined as 'self-governing, voluntary, non-profit distributing organisations operating, not for commercial purposes, but in the public interest, for the promotion of social welfare and development, religion, charity, education and research' (see CASE 2004: 1). Whilst operating largely within a similar definitional framework, a study completed by Johns Hopkins University in 2000 expanded the definition to include associations that do not have a public agenda. That is, their interests are not pursued for the benefit of the broader public, but mainly benefit their private members. These include co-operatives, *stokvels*, [10]burial societies, and so on – that is, survivalist organisations (cited in CASE 2004).

For the purpose of this study, and guided by our research question, we use the latter definition of civil society. We look at organisations that not only operate in the public domain for the public good, but also make claims and demands on state institutions for private purposes. Their activities therefore have, to varying degrees, a bearing on public policies and the allocation of state resources. CSOs help consolidate democracy in South Africa by assisting their constituencies, often the poor, to exercise their political, cultural and civil rights. They do this either by lobbying state institutions that are directly responsible for fulfilling such rights on their behalf or by

[8] See, for instance, Corder et al. (1999) and HSRC (2005).

[9] See the Non-profit Organisations Act (No. 71 of 1997) and the Taxation Laws Amendment Act (No. 30 of 2000).

[10] An informal group savings scheme that provides small-scale rotating loans.

working together with other institutions – that is, Chapter 9 institutions – for the realisation thereof.

Though employing a singular (definitional) yardstick to identify relevant CSOs, we nonetheless realise that the organisations themselves vary in many ways. Such variations include:

- Political beliefs (ideology) – that predispose these organisations towards the foundational values of the current political system or not;
- Relationship towards the state and other institutions supporting the state, that is, Chapter 9 institutions;
- Institutional focus – service delivery or service (research) provider; and
- Their location – local/community-based or national.

Thus we differentiate civil society into three categories that have markedly distinct features, but which are not entirely dissimilar: the formal non-governmental organisations (NGOs), survivalist organisations and social movements. The formal NGOs – such as the Institute for Democracy in South Africa (IDASA), the Black Sash, etc. – constitute roughly 11 per cent of the entire civil society sector, and are largely research/advocacy oriented. Their relatively small size belies their influence. Because of their resources and expertise, they are usually called on by state institutions to make input on policy and other pertinent matters. Anti-apartheid in character, these NGOs were largely formed in the mid-1980s as the apartheid government began to open up political space as part of a (limited) reform process (Habib 2003).

The survivalist organisations constitute the majority (53%) of civil society. They are poorly resourced and less organised. Such organisations – for example *stokvels* and burial societies – merely attend to the daily, material needs of their members, and do so without much influence on the state apparatus, even though they make up the majority of CSOs. A pre-1994 phenomenon, survivalist organisations were spurred into formation by official neglect of the black population by the apartheid state. It is crucial to underline that the mere existence of these organisations is symptomatic of the failure of the apartheid state to cater for the development needs of the black population. Their continued existence into the post-apartheid era, therefore, simply highlights that the very poor and underdeveloped socio-economic conditions that triggered their formation still persist. In other words, survivalist organisations are testimony to the fact that the post-apartheid state has not responded sufficiently to the needs of the previously marginalised black population (Habib 2003).

Similar to the survivalist organisations, social movements were sparked into formation by policies adopted by the democratic government that had detrimental effects on poor and vulnerable members of the South African public. Such policies included, among others, official reluctance to provide medical treatment to people living with HIV/AIDS and denial of basic social services – such as water and electricity – to the indigent and unemployed, leading to the emergence of the Treatment Action Campaign (TAC) and the Anti-Privatisation Forum (APF) respectively (Habib 2003)

Though owing their origin to a similar source, it should be noted that social movements are themselves diverse. Some simply wish to substitute one government

policy with another, whilst others are opposed to the very ideological (capitalist/neoliberal) orientation that informs such policies. Such organisations wish to go much further than tinkering with policy. They seek, rather, to usher-in a political order that privileges the social welfare and employment of citizens at the expense of what is regarded as a rapacious capitalist sector.

Depending on their orientation, therefore, the manner in which various CSOs relate to the state varies. Some collaborate with and are collegial towards the state. Such organisations may provide services in terms of research expertise or assist with service delivery. Others, spurred by their opposition to state policies, tend to have adversarial relations towards the state. But the relationship is not always clear-cut or rigid. Even those that are largely adversarial on occasion collaborate with the state (Habib 2003). Thus the relationship vacillates between co-operation and confrontation.

This brings us back to our earlier question: why is a relationship between Chapter 9 institutions and CSOs crucial to enhancing the effectiveness of the former? Clearly, and flowing from the aforementioned, CSOs have established a strong presence throughout South African society, including in local communities and rural areas, and are involved in a wide range of activities that are of particular interest to the three Chapter 9 institutions under discussion. Such activities vary from research, public advocacy, and service delivery to material issues enabling their members to eke out a livelihood. All these activities form part of the mandate of the three Chapter 9 institutions in varying degrees, thereby making a relationship potentially beneficial to both parties. Also, that CSOs operate and are located within local communities makes them easily accessible to most residents. They are often the first port of call for distressed individuals or groups in need of redress and seeking to exercise or establish their rights. Thus CSOs constitute a valuable network for Chapter 9 institutions to access communities and residents, particularly at a local level or in far-flung rural communities where the Chapter 9 institutions have a relatively poor presence. Taken together, CSO's are in an invaluable position to assist Chapter 9 institutions establish and test the limits of rights in South Africa.

1.3 Chapter 9s and CSOs: what constitutes an effective relationship?

What is the appropriate relationship between Chapter 9 institutions and civil society organisations? We will see that the foundational legislation does not prescribe what form the relationship should assume. Instead, we suggest that the spirit of the Constitution and, in particular, the value it places on the rights of citizens, is highly instructive. Although no law prescribes the form of such a relationship or even, in most cases, that there should be one, we suggest that it is desirable and useful for these bodies to encourage an engagement with CSOs.

Before considering what a relationship might look like in South Africa, it is instructive to consider how similar bodies operate elsewhere in the world and what relationship they maintain with CSOs.

1.3.1 Some international lessons

The report looked specifically at Indonesia, Ghana, Malta and the Czech Republic. We selected these countries because they all share a similar history of conflict and have a somewhat similar developmental status as South Africa. Thus they were most likely to confront similar challenges and provide lessons that may be applicable to South Africa.

Indonesia

The design of the Indonesian National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia or Komnas HAM) (see ICHRP 2004) underscores how seemingly contradictory elements are crucial to both the credibility of the institution within civil society and its effectiveness, particularly in relation to the state: autonomy and embeddedness. The leadership of Komnas HAM is drawn from the ruling political elite – that is, the ruling party and retired army generals – yet it has managed to remain autonomous of the state and effective in its role.

That Komnas HAM was headed by individuals linked to the country's political elite initially created suspicion within civil society that the organisation would lack independence. Would it be pliant towards political directives from the government? This would entail Komnas HAM not enforcing state compliance with human rights, especially given that some of its (ex-military) officials may have been involved in human rights violations. Indeed, in the early years, public statements of the commission were actually cleared through the headquarters of the armed forces and the Presidency before being released. This led to some human rights activists declining the request to serve on the first commission, denouncing it as an organ of government.

Over time, however, Komnas HAM gained the confidence of civil society. CSOs realised that the very political embeddedness of the leadership of Komnas HAM gave it leverage over the powerful institutions of state, especially the armed forces. They had political clout and influence to gain compliance or co-operation from the state institutions. Consequently, a public opinion survey conducted in Indonesia's capital town, Jakarta, found that 45 per cent of those surveyed believed Komnas HAM to be the most credible institution to defend human rights. The next most popular institution scored just 21 per cent. Although the survey is not a fully reliable measure, it does give some indication of how successful Komnas HAM has been in identifying itself with human rights in the public view.

The experience of Komnas HAM challenges the conventional notion of autonomy as a prerequisite for the effectiveness of institutions such as Chapter 9s. It especially speaks to what Peter Evans (1995), refers to as 'embedded autonomy'. Komnas HAM retains strong links with the officialdom, yet acts independently in a manner that allows it to pursue its mandate effectively. Its effectiveness underscores that the responsiveness of the state is just as crucial as the independence of a watchdog institution. The latter has to have credibility, not only in relation to civil society, but also among state officials, whose co-operation and compliance it requires in order to be successful. In the case of Komnas HAM, that credible and independent leadership was found among the ranks of the ruling party and retired military generals. In any

event, it is highly unlikely that a human rights activist would be apolitical, given the political nature of the issue. Indeed, political orientation (or embeddedness) may well preclude independence in some cases, but it does not always happen that way.

Ghana

Ghana's Commission on Human Rights and Administrative Justice (CHRAJ), stresses the importance of structured relations with civil society and the manner of its operation as a way of bolstering confidence in its effectiveness (ICHRP 2004).

The method of appointment and location of the CHRAJ had originally sparked suspicion about lack of autonomy from the political establishment. Both the commissioner and the two deputies are appointed by the president in consultation with the Council of State, which is an advisory body of distinguished elderly figures in society. And some of the regional and district offices of the CHRAJ are housed in state-owned premises.

But the tenure and success rate of the institution has allayed any fears of connivance with the political authority. Commissioners cannot be fired but, like judges, can only vacate their positions on retirement. This insulates them from possible pressure to comply with political instructions in order to keep their jobs. And the commission has not shirked from tackling politically sensitive issues such as ministerial corruption. As a result, the commission is highly respected by the public and enjoys good relations with civil society. CHRAJ also uses CSOs for educational purposes and to create public awareness.

Positive relations with civil society are a result of a conscious action on the part of the commission. A study conducted by the International Council on Human Rights Policy summarised the CHRAJ–civil society relations as follows: 'The commission meets monthly with a coordinating committee of human rights NGOs to discuss priorities and strategy. The collaboration between the CHRAJ and NGOs is particularly strong in human rights education' (ICHRP 2004: 19).

Ghana provides an example of how a watchdog institution can utilise CSOs – that is, for educational purposes and to create public awareness. Close and regular interaction seems to bear fruition for the commission, particularly in terms of identifying priority issues and devising collective ways of responding to them.

Malta

The Ombudsman in Malta has a very similar structure to South Africa's Public Protector. The Maltese Ombudsman was constructed within a human rights framework and, serving as a Commissioner for Administrative Investigations, is responsible for the investigation of complaints about any decision or action, or lack of action, by public authorities.

Complaints are submitted by members of the public who feel aggrieved and who believe that they have suffered injustice, hardship or discrimination at the hands of government departments or other public bodies. There are also other ways in which the Ombudsman can fulfil his or her role. He or she may decide to commence an

investigation on his or her own initiative (although this is usually undertaken on issues of substantial public interest and importance); any committee of the House of Representatives may refer to the Ombudsman matters under consideration by the committee; and the prime minister may also refer to the Ombudsman for investigation of matters which he or she considers should be investigated by the Ombudsman.

It is an independent and impartial institution and does not call for civil society co-operation; individual complaints are welcomed. However, in his outreach and awareness activities, the Ombudsman promotes his work among the public by organising meetings in various localities with community groups and other interested organisations.[11] Essentially, CSOs are used as a conduit for educating the general populace about the work of the Ombudsman.

The Maltese experience shows us the value of using CSOs as an educational tool. Given the levels of illiteracy and the poor communication infrastructure in South Africa (particularly in the rural areas), it is vital that CSOs serve to inform and advise people regarding their rights and possible recourse by means of the OPP. This kind of collaboration between the OPP and CSOs can only serve to enhance the capacity of the OPP.

Czech Republic

In the case of the Czech Republic, the Public Defender of Rights uses media publicity extensively to liaise with the public.[12] The Public Defender often holds briefing sessions and releases press statements about a particular issue under investigation. In addition, he appears on a news show to update the public on investigations into public administration. From the information available, it would seem that most complaints directed to this office are usually from individuals and not from the non-profit sector. On his own initiative, the Public Defender and lawyers from his office systematically visit institutions affiliated with particular state departments to investigate how well those institutions service the public.

Extracting the lessons for South Africa

The four cases cited above provide some instructive lessons on how CSOs and Chapter 9s can relate to each in a manner that advances the mandate of the latter.

Chapter 9 institutions need to be proactive in creating public awareness of their existence. This can be done in a number of ways, including regular press briefings, television appearances and public meetings. Those with limited institutional reach or insufficient capacity can compensate for this by using CSOs to reach out to as wide an audience as possible. Close and regular interaction with CSOs may help Chapter 9s to identify issues they may not be aware of, and devise ways of addressing them. The idea is to utilise the resources and knowledge that reside with CSOs.

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[11] Information on Malta's Ombudsman is available at <http://www.ombudsman.org.mt/index.asp?pg=charter>.

[12] Information on the Czech Republic's Public Defender of Rights is available at <http://www.ochrance.cz/cn/dokumenty/dokument.php?back=/cinnost/index.php&doc=445>. Accessed on 19 October 2006.

The 'embedded autonomy' of Indonesia's Komnas HAM, moreover, discounts the notion that absolute independence from the state is a necessary prerequisite for a watchdog institution to be effective. The embeddedness of the leadership may actually be an advantage, enabling it to secure official compliance and co-operation where required. Of course, in some instances political embeddedness may yield political compliance or subservience to state institutions, but that is not always a guaranteed outcome. Thus political activism ought not be an automatic disqualifier for one to assume leadership of a Chapter 9 institution.

What counts above all, however, is that Chapter 9 personnel pursue the mandates of the institutions for which they work with independence – irrespective of their personal biographies.

1.3.2 The meaning of independence

We will see in the course of this study, in particular in the case studies of the SAHRC, the CGE and the OPP, that a recurring theme emerges. It relates to the meaning of their 'independence'. Let us note that in the public domain, including in the media, Chapter 9 institutions are sometimes accused of doing the executive's bidding. This begs the question: are they acting 'independently', as per their mandate? Indeed, what does 'independence' in this context mean?

The Constitution only gestures toward a definition in this regard. The relevant clause states merely that 'these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice' (section 9.2). Section 9.3 elaborates further: 'other organs of state,' it declares, 'through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.' We might interpret these clauses by saying that 'independence' here refers to the right to pursue their respective mandates without undue influence from the executive, from Parliament and/or from any other state body. Indeed, undue interference seems to include the passing of legislation that interferes with their constitutionally derived mandates. We can say that the Constitution grants these bodies a high level of autonomy, at least at the level of their internal administration and their management.

There are some limitations on what cases different Chapter 9 institutions may pursue and what action they may take. The Public Protector, for example, is forbidden from investigating court decisions. Apart from these restrictions, however, and within the terms of their mandates and the law, Chapter 9 institutions may pursue their investigations as they see fit. Moreover, and most importantly, there are no prescriptions on what sorts of decisions they must reach. This is surely the meaning of the term 'impartiality' mentioned in the Constitution. The SAHRC, for example, is required 'to take steps to secure appropriate redress where human rights have been violated' (section 184(2)(b)). What these steps are is left to the commission to decide.

These questions of process (impartiality) and of method (fearless, without prejudice, without favour) seem to be in the service of another, implicit understanding of independence. At stake is their political autonomy. This is by no means a simple matter and it is worth exploring. Let us note that administrative independence is a

subject well dealt with in South African law, both in the form of legislation and in case law. This is not the case with questions of political autonomy. Yet it seems that this is the real measure of the independence of Chapter 9 institutions.

What does independence mean when it does not simply refer to operational autonomy? It means that Chapter 9 institutions are expected to reach their conclusions freely, honestly and on the basis of the evidence. Does it mean, however, they must make their judgements without consideration of the political effects of their pronouncements? This is the heart of the matter.

We have seen that this is the crucial question relating to the justiciability of socio-economic rights. To what extent should the Constitutional Court privilege considerations of capacity or budget in its judgements about socio-economic rights? Or to what extent should it tend towards privileging a core basket of rights over and above these considerations? In a similar vein, we might wonder: is it the task of Chapter 9 institutions, in deciding on whether to pursue a case or not, to factor in considerations about the possible consequences of their actions on the state Or must these bodies serve the interests of human rights, irrespective of the consequences of their decisions for the finances and/or reputation of the state?

These questions are rarely broached in the academic or policy literature in South Africa, though they remain a pressing problem. It is worth considering them for a moment.

We have a rare example where these questions came acutely to the fore. It concerns the role and function of parliamentary committees in South Africa and, in particular, the task of the Standing Committee on Public Accounts (SCOPA). Like Chapter 9 institutions, parliamentary committees are intended to enhance good governance through the oversight and scrutiny they exercise over other state bodies. In order to perform this role, custom suggests that these committees are multiparty in their composition, are chaired by someone from a minority party (not from someone from the party in power), and that they reach their decision by consensus. These conventions are designed to ensure that such committees are 'independent', that is, they offer an opinion that does not simply reflect the view of the majority party. Yet in 2001, in considering a report on whether there was corruption in the arms deal, these conventions were overridden. Unable to reach a consensus decision, a new chair was appointed, this time from the majority party, and a decision was taken on the basis of a simple majority. This effectively favoured the African National Congress (ANC) as majority party.

One can see in this instance a conflict over the meaning of 'independence'. For the ANC and the government, the independence of SCOPA was moderated by what it might have called national interests: the integrity of the arms deal itself, and the consequences of a finding of corruption on the reputation of the government and on its officials. In contrast, there were those that insisted that 'independence' must refer to the right to reach conclusions simply on the basis of the evidence and irrespective of the political consequences for the executive or the ruling party.

It is not difficult to see the relevance of the distinction above (between republican and liberal-democratic conceptions of democracy) for the role of Chapter 9 institutions

vis-à-vis civil society. NGOs and community bodies tend to take up cases on behalf of individuals or categories of persons who feel that their political or civil rights have been violated. As such they tend to approach Chapter 9 institutions assuming that they will defend the rights of the individual(s) above all. The evidence of this report, however, suggests that Chapter 9 institutions are not always comfortable with such a role. Indeed, it seems that they tend to be overly worried about the reputation and financial integrity of the state, especially in the form of the executive.

That said, we argue, however, that it is not the task of Chapter 9 institutions to concern themselves with the reputation of state offices and personnel, nor with the consequences of pursuing and defending rights on the general financial or other integrity of the state.

In keeping with the spirit of the Constitution, and the rationale behind the establishment of Chapter 9 bodies in the first place, we suggest that their primary role is to a) protect the rights of citizens, especially the rights of the poor and the marginalised and, thereby, b) help advance South African jurisprudence viz. socio-economic rights by assisting South Africans establish the content of their rights in terms of the Constitution. In fulfillment of their mandates, therefore, it is important that Chapter 9 institutions create institutional spaces and/or actively pursue relations with bodies that are able to bring human rights violations and other violations to their attention.

1.4 Methodology

The study was conducted through a qualitative research method that also involved an analysis of data gleaned off the existing secondary and primary literature. The process of data collection unfolded in three phases: firstly the literature review, followed by interviews, and finally specific case studies were compiled.

The purpose of the study is primarily twofold. Firstly, it is meant to assess the nature of the relationship between the CGE, the SAHRC and the OPP and CSOs with the view to determining whether or not such relationships, if any, enable the former institutions to fulfil their mandate – that is, enabling vulnerable groups (women, children, black and rural South Africans) to access and realise their constitutionally enshrined human rights. Secondly, based on the findings, it is to make recommendations on how to improve relations between the two sectors in order to enhance the effectiveness of Chapter 9 institutions.

We are cognisant that the terms of reference for this study had also mentioned that, in addition to the relationship between civil society and Chapter 9s, we examine whether these institutions have sufficient institutional capacity and resources to fulfil their mandate. It was, however, subsequently agreed within the reference group that, because the latter two factors had been dealt with in other studies, we focus primarily on the relationship between civil society and Chapter 9s. We examined the other factors –institutional capacity and resources – to the extent that they have a bearing on the relationship between Chapter 9s and civil society.

1.4.1 Literature review

The literature review constituted the first phase of data gathering. The literature comprised official documents, reports from previous studies on Chapter 9 institutions and secondary literature on both the Chapter 9 institutions and similar bodies in other countries. The literature provided useful background information that shed light on Chapter 9 institutions and the size and shape of civil society, all of which enabled us to draw comparisons with similar bodies elsewhere in the world. On the basis of this we were thus able to draw up an interview schedule and identify respondents for interviews.

1.4.2 Interviews

Two kinds of interviews were conducted: individual interviews and focus group interviews. Focus group interviews gave us a broader picture of what the pertinent issues are, which we then followed up in detail through one-on-one interviews with key respondents in the various fields, with the exception of the leadership at both the CGE and the OPP.

Repeated attempts to secure interviews with both the chairperson and the chief executive officer (CEO) of the CGE failed. They were simply not available. There were also no commissioners holding posts at the time, as the previous commissioners' terms had come to an end and the president was in the process of appointing new commissioners to take up the vacant posts. A particular methodological weakness of this report stems from our inability to secure interviews with the CEO and the chairperson of the CGE despite numerous attempts to do so. Only provincial co-ordinators were interviewed in the case of the CGE.

The OPP also presented a similar difficulty in terms of availability. The Public Protector initially declined the invitation to become part of the reference group, and later also turned down requests for interviews. Subsequently, however, as a result of intervention by one member of the research team, the OPP agreed to be interviewed, on the condition that all interview questions and requests for information were made in writing to its provincial co-ordinator. Ultimately, only one member of the OPP – a provincial co-ordinator in the Western Cape province – was interviewed. The Public Protector simply refused.

Another limitation imposed on the OPP was the inability, not for lack of trying, to convene a focus group. Two attempts in this regard were unsuccessful, due to clashing schedules of the relevant participants. Focus group discussions went on successfully in the case of the SAHRC and the CGE. In the case of the latter, we were even able to convene one more focus group discussion with all the provincial co-ordinators.

Particular care was taken to interview individuals from a diverse range of organisations: rural- and urban-based, social movements, community-based organisations (CBOs) and established NGOs. Our respondents included staff members of the three Chapter 9 institutions, leading members of CSOs, academics/experts, civil servants, and Members of Parliament (MPs) who serve in the portfolio committee to

which these institutions report. We conducted a total of 59 one-on-one interviews (see the list of references for organisations interviewed).

Our interview schedule, though slightly varied depending on the respondent, focused on the following issues:

- Understanding of the mandate of Chapter 9 institutions by both the Chapter 9 institution and CSOs;
- Whether the relationship between Chapter 9 institutions and CSOs is prescribed in legislation, or is a result of operational necessity, where it does exist;
- Current state of the relationship and how they would prefer it to be structured; and
- Identification of instances that illustrate both a successful and a difficult relationship between each Chapter 9 institution and a particular CSO in a similar area.

1.4.3 Case studies

We had hoped to compile two case studies in each focus area: one illustrating a successful relationship that yielded a tangible outcome that benefited a sizeable community of vulnerable people, and another demonstrating a difficult relationship that highlighted the problems that have beset Chapter 9s and CSOs, incapacitating both institutions and preventing them from working in a manner that engenders anything significant.

However, we were unable to compile two case studies in all three focus areas. This was only possible in the case of the SAHRC. We could only come up with one case study in relation to OPP, and only with the help of Lawyers for Human Rights (LHR). The OPP could only cite one case in which it had co-operated with CSOs. However, when we asked for a copy of the relevant report, we were informed by the OPP that we could not have access to it 'in terms of the provisions of the Public Protector Act'. The case study that we eventually did use was provided by LHR.

As for the CGE and civil society, we could only discern brief and disparate episodes of interaction. Our interviews did not bring out anything that amounted to a sustained interaction between the GCE and a particular CSO culminating in a particular tangible outcome.

Our case studies are therefore uneven both in terms of numbers and detail. That we were able to identify numerous case studies in the case of the SAHRC and civil society, from which we chose two, and very little on the other two institutions, is in itself telling, not only of the saliency of the issues in which these institutions are involved, but also of their prominence and impact in their respective areas.

1.4.4 Reference group

A reference group was constituted to assist the research team throughout the course of the research. The group was made up of representatives from civil society with direct interest in the three Chapter 9s – the CGE and the SAHRC (the OPP refused to

participate) – and officials from the state departments that deal with these institutions. The reference group assisted the research team with background information on how the Chapter 9s actually function with civil society and helped with the selection of relevant CSOs and respondents to interview. In the main, the group served as a sounding board on which we bounced off ideas about the project, as well as the research findings.

1.5 Structure of the report

The remaining chapters in this report focus on the research findings on each Chapter 9 institution: the SAHRC, the CGE and the OPP. The report concludes by offering recommendations on how the relationship between Chapter 9s and civil society organisations should be structured in a way that strengthens the ability of Chapter 9s to fulfil their mandate.

Chapter 2
The South African Human Rights Commission and civil society

2.1 Background

Headquartered in Johannesburg, the SAHRC came into operation in 1996 and gradually opened up offices in the various provinces. Now its offices are found throughout the country with the exception of the North West province.

The SAHRC derives its mandate and powers from the Constitution and the Human Rights Commission Act (No. 54 of 1994). Its specific functions are to promote respect for, and foster a culture of, human rights; protect, develop and advance the attainment of human rights; and monitor and assess the observance of human rights throughout South African society, including both the public and private sectors. Thus the SAHRC is particularly tasked with enabling and monitoring the implementation of two pieces of legislation that are vital towards realising human rights – the Promotion of Equality and Unfair Discrimination Act (No. 4 of 2000) and the Promotion of Access to Information Act (No. 2 of 2000).

To this end, the SAHRC has powers to investigate and report on the observance of human rights, take steps to secure appropriate redress where human rights have been violated, conduct research into human rights and educate the public on human rights.

Its activities, therefore, include gathering information from state institutions, on an annual basis, to assess the extent to which the state has met the socio-economic rights (for example housing, education, land, water, security); holding investigations into a particular human rights issue (such as violence at schools); holding public seminars; and carrying out public awareness campaigns, particularly during the annual public celebration of Human Rights Week. The work of the SAHRC also extends beyond the national boundaries. It played a key role in the formation of the Africa-wide Human Rights Court and has played host to the secretariat of African national human rights institutions for three years.

The SAHRC comprises two sections: commissioners and the secretariat. A complement of five – chairperson, deputy chairperson and three full-time commissioners – attend to policy formulation and determine priority issues. Their responsibilities also include raising the profile of the SAHRC both locally and internationally, making strategic interventions and providing leadership on human rights issues. For its part, the secretariat sees to the management and functioning of the SAHRC. This involves, among other things, developing programmes that are congruent with the vision and objective of the SAHRC; facilitating interaction between the SAHRC and Parliament, and enabling CSOs to do likewise; and liaising with the public and promoting education and public awareness about human rights issues.

2.2 *The current state of relations between SAHRC and CSOs*

It is crucial to note from the onset that there is no legislation or policy that obliges the SAHRC to forge a relationship with CSOs, or that specifies what shape that relationship should take or the manner in which it should operate. No mention is made in legislation, especially the Human Rights Commission Act (No. 54 of 1994) or the legislation[13] which it is tasked to enforce, as to the necessity of a relationship between the SAHRC and CSOs to enable the former to fulfil its mandate. Rather, the foundational Act simply encourages the SAHRC to 'maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices'.

However, both parties – the SAHRC and CSOs – think they must have a relationship and attach great importance to it, for slightly varying reasons. According to the SAHRC's CEO Advocate Tseliso Thipanyane: 'Our mandate is too massive to be able to implement alone...SAHRC leadership is also keen to work with CS because it comes from civil society, and therefore retained the relations with NGOs' (Thipanyane interview). The relationship in this instance, therefore, is both an operational necessity and a result of the ethos of the SAHRC's leadership, which values the very presence and function of civil society partly due to their origins.

CSOs shared the view that the SAHRC's mandate is too massive to be able to implement alone as it lacks the social networks and reach, and the research capacity. By virtue of their proximity to residents and because it is their vocation, CSOs act as essential intermediaries between the SAHRC and the residents. The nature of the collaboration depends on the orientation of the NGO – that is, whether it is research, advocacy or activist oriented. Organisations like IDASA or LHR provide expertise to the SAHRC, such as conducting a public inquiry or making an expert submission on a particular topic. For an activist organisation with widespread community networks that are directly involved in addressing the plight of their constituencies – for example the South African Council of Churches (SACC) – the collaboration is largely of an informative and intermediary kind. Reverend Klass of the SACC put it as follows:

> The civil society organisations are in almost every corner and live with the experiences of the people. They have a role to enhance and enable people to appreciate their own rights and know what to do in advocating for rigorous defence of those rights, i.e. enabling people to know what to do when their rights are being abused and infringed upon. The most important thing here is the linkage between the SAHRC and the civil society organisations...NGOs also have a responsibility to alert the SAHRC about the practices on the ground, the difficulties in the process of knowing the issues on the ground. (Klass interview)

For organisations with a particular cause and thus intermittently seeking redress on behalf of their members, the SAHRC is useful because of its powers and access to officialdom. A representative of LHR put it thus: 'The commission provides

[13] The Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000) and the Promotion of Access to Information Act (No. 2 of 2000).

important access to higher political levels. Since the commission reports to the National Assembly, this is an entry point to put issues from the grassroots level on the higher agenda' (Makan interview). Stressing a similar point, the Southern African Migration Project (SAMP) stated: 'They have the profile and power to drive an important agenda in HR issues. While we are important in providing research, they provide the institutional space and exercise leverage' (Williams interview 20 October 2006).

Thus both parties – the SAHRC and CSOs – value a relationship between them. They consider it mutually beneficial, and neither party can on its own effectively pursue what are essentially common interests. So what then is the quality of the relationship between the SAHRC and CSOs?

2.2.1 Institutional perspectives and experiences

CSOs differed sharply on the current state of their relations with the SAHRC. Some labelled them positive, whilst others called them difficult. Among the former are IDASA, LHR, and the SACC, whilst the latter category includes organisations such as the APF, Abahlali base Mjondolo (ABJ) and the Landless People's Movement (LPM). The APF and LPM, for instance, think that the SAHRC views them as 'trouble' and 'as enemies of government' respectively. The APF believes that the SAHRC is not sufficiently vocal and activist in this regard. Rather, it frowns upon advocacy methods such as protests and demonstrations – the APF's favourite form of expression – 'as a problem' and thus tends to eschew organisations employing such methods (Ngwane interview).

It is understandable though why the SAHRC would not support some protests by the social movements, especially those that violate the law. As its chairperson Jodie Kollapen explains: '...we live in a constitutional state and even though it comes with its constraints and compromises, we must live within them and work within them in order to change them' (pers. comm. J Kollapen). That does not mean, however, that the commission has not come to the aid of the social movement activists where their civil rights seemed to be trampled upon. In instances where they have been arrested in the course of a protest, the commission has intervened to secure their release, and has 'not only released public statements supporting the right of social movements to protest, but also met with the Provincial Commissioner of Police to ensure the respect of the right to protest' (pers. comm: J Kollapen).

Evidently, the LPM's characterisation of the SAHRC, with respect to social protest and demonstration, is not entirely accurate. It does, however, signal strained relations between the commission and social movements, and strong discontent over how the commission relates to the state vis-à-vis its performance on human rights. We turn now to an examination of the factors underlying this.

2.2.2 Relations as a function of organisational orientation

The contrasting relations with the SAHRC are revealing of the diverse nature of CSOs which, in turn, informs both the different ways in which they perceive the SAHRC in relation to the state and how they relate to the SAHRC. A research organisation formed to promote liberal democracy, IDASA shares a similar objective to the

SAHRC. Its commentary about, or critique against, the SAHRC thus centres on the focus or manner in which the commission goes about fulfilling its task. This is done in a way that does not alienate the SAHRC – through verbal engagement or written text, which may be considered, in such quarters, as 'acceptable' ways of expressing disagreements. Such organisations, therefore, do not doubt the sincerity or legitimacy of the SAHRC.

Conversely, as social movements with leftist inclinations, the APF, ABJ and LPM are critical of the very political system and the liberal constitution within which the SAHRC operates. Trevor Ngwane of the APF explains:

> In general, I don't think they are able to intervene in favour of the poor and the working class, because...of the constitutional constraints. If, for example, the court issues an order, which we regard as the violation of human rights, the SAHRC has to comply with it. Our Constitution is a capitalist constitution; it is based on the principle of the protection of private property, which stems from the historical compromise, where it was agreed that the people who stole the land are the owners. Therefore, the protection of the rights by these institutions will be skewed towards the people who own this land. (Ngwane interview)

Thus, according to the APF and similar CSOs, the SAHRC is incapacitated by the Constitution, particularly in advancing access to socio-economic rights. But where government has the leeway to act, it is not always responsive to the plight of the poor. This in turn forces such organisations to adopt confrontational methods in order to attract or receive official attention. A leader of ABJ explains:

> The problem we have is that you cannot hope to interact peacefully with government. That is, to sit and devise a way forward through normal discussions. You have to take to the streets – that is the only language government understands. Each time you try to meet anybody from government, the question is, 'Who are you? Are you from Mjondolo [ABJ]?' and it ends there. (Zikode interview)

But such methods of protest alienate the SAHRC, which prefers mediation and, only when the latter fails, litigation (Kollapen interview 17 November 2006). This has not helped to endear the commission to its critics, who see it as ineffective. As one farm-workers' activist put: 'The commission does not seem to have enough power to enforce these rights. It is limited to just reporting, it does not bring issues to the courts as is needed many times and this makes enforcement very difficult' (Makan interview). Preference for mediation over litigation, Kollapen explains, does not imply aversion to the latter route. In an instance where the commission makes recommendations, for example, it is not always easy to enforce implementation of those recommendations through litigation. Some recommendations cannot simply be 'converted into litigation', making mediation the only option available to the commission (Pers. comm. J Kollapen).

That the SAHRC 'does not litigate sufficiently' is not in dispute. Whether or not this owes to the commission shirking confrontation with the government is what is in dispute. And this comes out prominently in the section on autonomy that follows.

2.2.3 Perceptions of autonomy

CSO relations towards the SAHRC are also a function of how they perceive its effectiveness in forcing state institutions to meet the socio-economic needs (which are second generation rights) of the citizenry. Some CSOs (especially, but not exclusively, social movements – for example the TAC, APF, LPM, ABJ) perceive the SAHRC as subservient to government, as opposed to being an autonomous institution that pursues its duties without fear or favour, regardless of the institution involved. The basis of this conclusion varies from ideological reasoning to specific instances where the SAHRC is seen to have intentionally eschewed involvement, though empowered to do so. The LPM, for instance, argues that the SAHRC is restrained by the hegemonic influence of the ruling elite, typical of any political system, which configures state or social institutions in a manner that aids its political project:

> Now, it would be difficult for an institution that is found by the Constitution to be independent because everything in this country, the media, the NGOs, etc. is controlled by government. The attempt was to create a civil society that is pro-government. The SAHRC is part of that plot. (Kubheka interview)

For the TAC, however, the SAHRC's submissiveness to the ruling party is illustrated by its relative failure to compel state institutions to meet socio-economic rights, especially in the area of HIV/AIDS. This timidity, they believe, stems from reluctance to confront the government, and especially President Mbeki who has, until recently, been less than enthusiastic to provide medication to people living with HIV/AIDS. Rather than confront government, which would be within its right to do since health is a socio-economic right, the SAHRC has shirked its responsibility to take an active role in this regard (Achmat interview). As a result, CSOs that are largely concerned with socio-economic issues – such as land, housing, health, and social services – may be less inclined to approach the SAHRC for redress because it would probably not force the state to implement recommendations through litigation.

It is not clear, however, if the SAHRC's avoidance of litigation stems from political timidity. In addition to the fact that some issues are difficult to litigate, as noted earlier, it may well be constrained by lack of financial resources. Already, the financial allocation the commission receives from the state is insufficient for it to meet its mandate. For instance, it still has not opened an office in the North West province nor has it trained civil servants on how to comply with the Promotion of Access to Information Act (No. 2 of 2000), as it is required to. To be sure, the commission has been critical in its annual reports when state institutions have failed to meet the socio-economic needs of its citizens. Perhaps, rather than faulting the commission for not litigating, a potential remedy to official non-compliance is to make its recommendations binding on the state officials. In that case, state officials would be obliged by law to comply with recommendations, thereby lessening the need on the commission to litigate – something it is insufficiently resourced to do anyway.

Be that as it may, how does one measure the independence of the SAHRC? To start with, as noted by the UN Centre for Human Rights (UNCHR), independence does not only relate to government, but also to civil society. Being aligned to civil society, on

the one hand, and confrontational towards government, on the other hand, is not synonymous with independence, nor does it make an institution necessarily effective. Unrestrained influence by CSOs over a national watchdog institution may well make it partisan in favour of certain sectional interests to the detriment or neglect of others.

Rather, according to the Paris Principles and the guidelines of the UNCHR, the following criteria should be used to determine the independence of the national human rights commission:

- *Legal and operational independence*: independence must be guaranteed by the Constitution and legislation governing the commission.
- *Clearly defined appointment and dismissal procedures for the commissioners*: these must be drafted in a way that they become a confidence-building exercise for everyone in the integrity, independence and competence of the institution. This should be based on merit of the appointees other than personal and political connections.
- *Control of finances*: the commission must have sufficient financial resources and control over these resources.
- *Composition of individuals capable of acting independently*: there must be a guarantee of pluralistic representation of the social forces (of civil society) involved in the protection and promotion of human rights (Matshekga 2002).

The SAHRC, according to constitutional scholar James Motshekga, rates favourably in all but one criterion: financial independence. It receives funding from the Ministry of Justice and Constitutional Development, without much prior input on the budget itself or in determining its own Medium Term Expenditure Plans. This poses potential challenges, especially on operational autonomy, as the ministry may seek to influence how the SAHRC should operate and supervise its activities. The ideal would be for the commission's funding to be supervised by Parliament and drawn from the national revenue fund. As for the other three criteria: legislation and the Constitution guarantee the independence of the SAHRC; the president appoints persons nominated by a parliamentary committee made up of all the parties and approved by the majority of the members of the National Assembly, and removal of a commissioner is subject to approval by at least a majority of members in the National Assembly; and the composition of the commission has sought to reflect a diversity of views, genders and social backgrounds. This diversity is also reflected in academic or professional expertise among the commissioners.

2.2.4 Varying priorities and focus

CSOs often evaluate the SAHRC not so much on what it has done, but on what they think it ought to do. That is, they use their focus and interests as a barometer by which to measure the performance of the commission. A representative of LHR, working on the Security of Farm Workers Project, put it succinctly:

> Because of the work I am involved with, I believe that it should be responding to the challenges of tenure reform, security and living conditions of farm workers, including their livelihoods and so on. (Makan interview)

An LPM representative expands on the aforementioned point:

> The commission is supposed to be fighting for people's rights. I am saying it is supposed to be because, as we are staying in farms, our rights are being violated every day and we don't see anything happening.
>
> The situation in our country is that you can take a case to the police, to the minister, to the president, to the SAHRC, but nothing is going to happen. At the end, they will always say they are going to investigate and we will come back. But, they will never come back. (Kubheka interview)

The implication is that such CSOs may feel less inclined to seek recourse from the SAHRC since, according to them, it does not consider their issues a priority. Conversely, organisations that have previously collaborated with the commission or had their interests addressed by it are complimentary of the commission and are keen on future collaborations. These include SAMP, the South African National NGO Coalition, LHR, the African Institute of Corporate Citizenship, the SACC, and IDASA. The SACC was particularly complimentary of the manner in which the SAHRC has attended to the concerns of the aged. (An umbrella organisation of churches, the SACC has a considerable number of the aged as part of its constituency. It is familiar with their needs and attends to their care.)

That said, the 'friends' of the SAHRC do, however, concur with its critics that it has not sufficiently attended to socio-economic rights. Whilst complimenting the commission concerning the issues of the aged, the SACC was very critical of the way it has dealt with issues related to HIV/AIDS:

> I think the South African government has so far done well in terms of political and civil rights. I think there is urgency to look at and attend to socio-economic rights for the previously disadvantaged people in South Africa. In other words, the SAHRC should attend to issues such as housing, jobs, health, etc.
>
> I'm not saying that the government is not doing anything to achieve these, but there is little action on issues such as health. For example, the process of paying attention to access to ARVs [antiretrovirals], which is declared a human right, is being prolonged by government. There is human rights abuse in this period of waiting, and it is disturbing to note that the vulnerable groups are the ones who suffer.
>
> To the best of my knowledge, I have not seen the SAHRC leading this campaign. As a result, you see the TAC occupying their offices...The urgency of HIV/AIDS should be responded to accordingly. But, the silence around the issue shows that this was not a priority of the SAHRC. (Klass interview)

A close reading of annual reports from 1999 to date bears out this view. The SAHRC has largely attended to complaints related to civil and political rights, especially racial discrimination, followed closely, particularly in the last two years, by labour relations

disputes. Its involvement in socio-economic rights, as alluded to earlier, has hitherto been confined to monitoring, through the annual compilation of socio-economic right reports, the performance of state institutions with regard to meeting the socio-economic needs of South Africa's citizenry. Evidently some CSOs wish that the commission would do more than simply report, but also enforce compliance. There are limitations in this regard, as noted earlier, which may have little to do with the political orientation of commissioners themselves, but that stem from inadequate financial resources and powers.

2.3 Format of current relations

Despite some successes, both parties – the SAHRC and 'friendly' CSOs – concede that the form and especially the regularity of their interaction is less than satisfactory. They only meet intermittently as and when there is a need – at seminars, to celebrate Human Rights Day, upon request to compile a report of a hearing, or to assist with an investigation.

2.3.1 Initial collaboration

The relationship, however, has not always been ad hoc. Prior to 1999, the relationship was healthy, regular and structured, as the SAHRC included CSOs in the Section 5 committees it set up in advisory roles, as encouraged by its founding legislation. A permanent structure that met regularly, the Section 5 committees advised the commission on what human rights issues to prioritise and suggested ways of addressing them. They therefore provided regular and continuous interactions between the SAHRC and CSOs (Thipanyane interview).

The CEO of the SAHRC attributes this close co-operation with the CSOs to the general enthusiasm that greeted the formation of the commission and the importance attached to what it was set up to achieve. Given South Africa's gruesome past, human rights activists realised the importance of creating an institution dedicated to orienting the new society within a human rights culture. CSOs were naturally expected to play a central role both in the SAHRC's and other activities geared towards this objective. In essence their participation was also a continuation of the key role they had played in the anti-apartheid struggle and the transitional period, in which they were central in a series of negotiations formulating policies and institutions that were to define the new democratic South Africa.

2.3.2 Conflicting views on the role of the SAHRC

The SAHRC, however, disbanded most Section 5 committees, with the exception of the Parliamentary Liaison Committee, around 1999. This was ascribed to several factors, which reflect the dynamics of South Africa's political transition as well the nature of civil society itself. According to the chairperson of the SAHRC, Jody Kollapen, the catalyst seems to have been tension over the stance of the commission vis-à-vis both the state and civil society. Taking a cue from the general understanding that the SAHRC is a watchdog institution intended to safeguard South African democracy, CSOs sought to make the commission a natural partner in their own individual causes to lobby the state on behalf of one constituency or another. The

SAHRC, however, held a different view. Though indeed a watchdog, the commission nonetheless considered itself independent not only from the state, but also from CSOs. It felt that CSOs were using the Section 5 committees to pursue their own sectional interests, which were not necessarily to the benefit of the wider public. Disbanding the Section 5 committees was thus considered the best way to rid the SAHRC of undue influence from the CSOs, whilst also remaining autonomous of the state.

The SAHRC, however, continued to collaborate with various CSOs on a number of initiatives. These included prominent campaigns against racism and xenophobia; an initiative to provide legislative protection and advancement of the rights of the aged; and an investigation into the treatment of illegal immigrants at the state-owned detention centre, Lindela. Nor did the caseload – measured in terms of complaints received from the public, in which CSOs play a referral role – decline as a result of strained relations with civil society. Although the number of complaints dipped during the period 2001–02, they have for the most part grown during the period 1999–2006. In the period 2002–04, for instance, the number of complaints almost doubled from 5 297 to 9 055.

The sheer increase in the number of complaints, however, does not necessarily mean that the public is sufficiently knowledgeable about the SAHRC. In some instances, approximately 35 per cent of such complaints are rejected and referred to other appropriate institutions better suited to address them. A significant section of the population remains ignorant of the exact nature or purpose of the SAHRC, leading people to send complaints that do not fall within its mandate.

2.3.3 Lack of institutional strategy on relations towards civil society

Numerous respondents ascribe the aforementioned interactions to the strength of personal relations with certain staff members at the SAHRC. The relationship is thus not between the two institutions, but between individuals. Its continuation hinges on the continuing presence of both individuals, as illustrated in the case of the Centre for Education Policy Development:

> The relationship has been a good one of collaboration, but it has been mainly based on personal relations. One of our programme managers here had a very good relationship with people at the commission and this is how most of the collaboration was initiated…The person has now left the organisation and the collaborations are not as regular as before. (Pampallis interview)

Though appreciative of such collaboration, some CSOs complained of lack of follow-through on the part of the SAHRC. CSOs that participated in the campaign against xenophobia, for instance, charge that the SAHRC withdrew midway through the exercise. This had adverse consequences because, according to LHR, it damaged 'the effectiveness of the campaign and the ability to raise awareness' (Van Garderen interview). Nor did the commission confirm the implementation of the recommendations that came out of the Lindela investigation. The SACC also complained that it had not received a report on the investigation carried by the commission into the typhoid outbreak in Delmas, and 'wonder if the families themselves know of what is happening' (Van Garderen interview) The SACC had

assisted the commission to gain access to families that were affected by the outbreak. Thus it seems the SAHRC lacks a strategy on how to sustain relations with CSOs, even those with which it has collaborated on a particular project. Rather, the commission pulls out of an interaction prematurely without any explanation to its CSO partners.

But CSOs, too, lack a strategy to cultivate relations with the SAHRC. It is unimaginable that organisations such as the APF and ABJ which, as noted earlier, are ideologically hostile to the commission, would invest sufficient resources to build a relationship with the SAHRC. After all, they regard the commission as highly flawed. As for the failure on the part of the commission, some CSOs ascribe it to capacity constraints, insufficient resources and lack of political will. It is difficult to ascertain the veracity of the latter, but capacity was definitely lacking, particularly in the area of HIV/AIDS. It was only in September 2006 that the SAHRC employed a full-time official to attend to issues related to HIV/AIDS. But it is difficult to tell if the previous lack of capacity in this area was due to a lack of resources or simply to indifference towards the issue. An indisputable constraint on the SAHRC, however, is that its 'findings and recommendations are not binding on anyone. This becomes more of a problem if these recommendations are contrary to the established status quo' (Zweni interview).

2.3.4 Other human rights mechanisms

In some instances the absence of the relationship, where one ought to exist, is not an indictment on either party. It reflects the presence of an extensive human rights machinery. Complainants have recourse to institutions other than the SAHRC. This is particularly true of the organised and regulated labour sector. A Congress of South African Trade Unions (Cosatu) representative explained that there 'labour organisations have institutionalised mechanisms or channels, such as Nedlac [the National Economic Development and Labour Council], Bargaining Councils and CCMA [Commission for Conciliation, Mediation and Arbitration], at their disposal to utilise. These are the institutions we fought for. As such, it is much easier for us to use them than the SAHRC' (Dicks interview). Representative of business organisations, Business Unity South Africa and the South African Chamber of Business (Sacob) reiterated a similar point.

Lack of a relationship, however, does not mean absence of contact or use of the work done by the SAHRC. Cosatu, for instance, does consult some of the reports and documents generated by the SAHRC. Such material includes reports the commission compiles assessing the level to which, for instance, state departments have enabled citizens to gain access to socio-economic rights, and the measures taken to promote equality within the various sectors of our society, including the private sector. In this instance, the immediate value of the SAHRC for organisations with which it has intermittent interaction, such as Cosatu, is that it is a repository of information. The commission provides Cosatu with information about issues that affect its working-class constituency, which the federation uses to advance the interests of its organised constituency within the aforementioned official channels.

We must note, though, that the Sacob representative displayed more than just disinterest in the SAHRC. He seemed not to understand the role of the commission:

> My understanding is that these are state agents from parastatals which are supposed to provide a service to the public...I'm sure most of our members think of it as an extension of government, it is viewed in that sense. Like the CCMA, they are an agent of the state, created for a very specific purpose...I'm sure that is the view of a lot of businesses...We are not really that conscious of the functioning of the SAHRC. (Sacob focus group)

2.3.5 Public awareness of the SAHRC

Ignorance of the SAHRC, as noted, is possibly due to various factors. It may be that the business representative quoted above is sincerely ignorant of the commission, since he has no need for it and thus has not bothered to enquire about it. Or it may well mean that the SAHRC has done a relatively poor job of educating the public about its role and functions. A survey done in 2001 by the Human Sciences Research Council (HSRC) on public awareness of the commission points to the latter, as it shows that more than 60 per cent of the public have either not heard of it or have heard of it but do not know what its purpose is. Indeed, both the chairperson and the CEO of the SAHRC concede that the level of public awareness of the commission is not at a satisfactory level, but it may have improved from the 2001 levels when the HSRC did the survey. The commission does, nonetheless, receive frequent citation in the media, which the CEO estimates at no less than three times a week (Thipanyane interview).

If accurate, this frequent media citation has not necessarily generated a satisfactory level of public awareness. The CEO ascribes this to the gradual roll-out of the provincial offices throughout the country. It took the SAHRC approximately 10 years to open offices in 8 provinces, and it still has not opened one in the North West. Local citizens in this province cannot, as a result, be faulted for citing ignorance of the commission.

That said, the national office, according to commission chairperson Jody Kollapen, does generally enjoy greater public awareness than provincial offices. Locals, including CBOs, are more likely to know of the national than the provincial office (Kollapen interview 17 November 2006). The head office received the majority of complaints lodged during 2005–06, closely followed by the Western Cape, and then the Northern Cape and Eastern Cape respectively. This is because the national office gets more publicity than local offices. Provincial staff hardly issue media commentary, even over an issue that concerns their own community, but defer to the national office instead. The CEO identified this as a particular problem that urgently requires addressing if the SAHRC is to expand its reach throughout the country.

Overall, the relations between the SAHRC and the various CSOs over human rights are uneven, marked as they are by tension in some instances and co-operation in others. What form the relationship assumes seems to depend on the nature of the issue itself – socio-economic or civil rights, or political or moral – and on how CSOs prefer the commission to deal with it. The commission eschews confrontation, preferring mediation instead. It is apparent though that some complaints or issues are better dealt with through litigation, whilst others lend themselves to mediation.

2.4 SAHRC–CSO relations: two case studies

2.4.1 The SAHRC and the Treatment Action Campaign

The interaction between the TAC (and the Aids Law project [ALP]) and the SAHRC illustrates some of the challenges faced in the interaction between the commission and CSOs. The case study is subdivided into three specific interactions: a court case over state supply of medication, in which the commission was to serve as 'a friend of the court'; a complaint lodged by the TAC against the MEC of Mpumalanga; and the Westville Prison case in which the commission, the TAC and the ALP have been interacting in several instances.

South Africa is the second highest HIV/AIDS-affected country. More than five and a half million people live with HIV and almost 1 000 people die of AIDS-related diseases each day.[14] Both the commission and the TAC grasp the seriousness of this pandemic. The commission has previously been involved in creating awareness around the disease and fighting discrimination – such as job dismissals and declined insurance claims – against HIV-infected individuals. For its part, the TAC has focused on securing treatment for those living with the disease, particularly medication to help the ill to lead longer and healthier lives and to prevent pregnant mothers passing the virus to their unborn infants.

The two organisations, however, have occasionally had serious difficulty collaborating to advance what is otherwise a common cause. We deal with three such instances below.

Example 1: HIV and mother-to-child transmission – being a friend of the court

In late 2001, the TAC initiated a legal action against government to force it to provide ARV therapy to pregnant HIV-positive women. To bolster the case, the TAC invited the commission to join the legal action as a 'friend of the court' because it was a human rights matter. Sipho Mthati of the TAC describes the process as follows: 'There was ongoing communication with commissioners, we collected the evidence and sent it to them letting them decide their own engagement' (Mthathi interview).

The commission initially agreed to join the legal action, but subsequently withdrew before the legal proceedings got under way. According to Shirley Mabusela, then acting chairperson of the commission, the withdrawal was based on the fact that the commission had nothing new or valuable to add to the case, something which is required to act as *amicus curiae*. But Zackie Achmat, chairperson of the TAC, thought the withdrawal had nothing to do with legalism. Rather, according to him, it was precipitated by political interference from government. This to him was a clear case of the commission lacking independence (Achmat interview). A former chairperson of the commission's policy and planning committee, Ann Routier, appears to have given credence to the suspicion of political control in her media statements, saying that 'there was an acrimonious row between the commissioners about an instruction given it to withdraw'. Routier added that the commission was under the thumb of

[14] UNAIDS: <http://www.unaids.org>.

government since it was funded by the state and the executive appoints the commissioners (*Saturday Weekend Argus* 1 December 2001).

Needless to say, the TAC eventually went alone and won the case. The preceding interaction between the TAC and the SAHRC, however, illuminates the conflicting ways in which the two parties conceptualise collaboration. The TAC expected unconditional support from the SAHRC for its legal bid, whilst the commission insisted on a meaningful participation. This epitomised the commission's discomfort that CSOs sought to utilise it for their own purposes, rather than allow it the independence to determine which campaigns it gets involved in and what form that involvement takes.

It also reflected the TAC's notion of independence with respect to the SAHRC. It only applied to political influence, not to civil society. In fact the TAC considered a détente with civil society a marker of the commission's independence. Failing to do so seemed to imply political timidity on the part of the commission to confront the government. But this claim is not entirely borne out by evidence. The commission can be quite critical of the state, where necessary, in its annual reports on socio-economic rights.

Example 2: Complaint against the MEC of Mpumalanga

In December 2002 the TAC lodged a complaint with the SAHRC against the MEC for health in Mpumalanga (and the Minister of Health). The complaint was based on their finding that the provincial government had not complied with a Constitutional Court decision, issued six months earlier, that public hospitals should provide medication to pregnant women infected with HIV/AIDS.

The TAC hoped the commission would initiate an investigation into the matter, as it is allowed to do when it suspects that human rights violations are being committed. As Mthathi explains, 'We expected them to find the information on our behalf since we wanted to have this information to expose the case and use it to challenge the provincial government' (Mthathi interview). Indeed the commission consented to the request, initiating an investigation. But it stopped halfway through. No report was ever received by the TAC detailing why the investigation was never completed.

The SAHRC lacked capacity to follow through with the investigation, especially on HIV/AIDS. It felt uncomfortable investigating a subject about which it had very little, if any, expertise. Thus the commission lessened its direct involvement on HIV/AIDS (outside of its annual report monitoring the performance of the state on socio-economic issues), until it had acquired sufficient internal capacity. Kollapen put it thus:

> The commission has discovered that in order to do work in this area it is necessary to develop its own working agenda. We felt that it was important for us to develop our own knowledge and to think for ourselves as to what work we want to do in this area. The problem in the previous years was that the commission did not have any internal

capacity and therefore there was no knowledge on the topic. (Kollapen interview)

In September 2006, the SAHRC finally appointed a co-ordinator to focus solely on HIV/AIDS. With this appointment the commission hopes to increase its activities on the epidemic.

Example 3: Investigating Westville Prison

In mid-2006 the TAC requested the commission to investigate whether prison authorities at the Westville Correctional Centre in Durban were complying with a court decision to provide treatment to prisoners infected with HIV/AIDS. The court action had been instituted by 15 prisoners, with the assistance of the ALP and the TAC. But the decision was not complied with immediately and one of the prisoners died before the commission launched its investigation, prompting the TAC to occupy its Cape Town office. Mthathi explains:

> We went to the commission because despite that the order has been in place for months there was no evidence that the court order was being implemented by the Department of Correctional Services. Prisoners were dying. We wanted them to investigate the matter as a human rights issue and the idea was to exercise pressure on government to act. The occupation aimed at putting pressure on the commission but also on the state as a whole, since they are a state institution in a way. Human rights have been violated so we thought that they needed to investigate and make a statement on this. (Mthathi interview)

The invasion appears to have been prompted by the SAHRC's delayed response to the TAC's request. In reality, though, it was more of a publicity stunt for the TAC than an indictment of the commission. A representative of the ALP put it thus:

> I don't think the occupation was targeted as an attack on the commission but it was more about drawing the links between that particular case and the work of the commission. It was something of major political significance. We are not trying to bring them down, we are trying that they do better and I think the commission understands that. (Berger interview).

The SAHRC considered the invasion completely unnecessary, but it was prodded into a quick response. An SAHRC official in the Cape Town office explained: 'We dealt with it and we referred the matter to the judiciary of prisons. We facilitated the interaction. We saw the legitimacy to their complaint and we knew it was a human rights issue' (Mohamed interview).

Overall, this stand-off shows the complexity of a relationship between the SAHRC and CSOs. Each has a different *modus operandi*, and may even hold different motivations despite being involved in a joint action. Tension is therefore inevitable, but it does not have to lead to a complete breakdown of the relationship. Conflict may even be necessary to make the relationship effective.

These three cases show that human rights disputes are increasingly revolving around socio-economic rights and demonstrate the challenges and possibilities of having a successful collaboration. But the commission lacked adequate resources to take a more prominent role in this area. This prompted suspicion that the commission was capitulating to political pressure from the Mbeki government, which was at that stage decidedly hostile to the idea of state hospitals providing HIV/AIDS medication. The lack of openness and regular communication between the commission and the TAC only exacerbated the suspicion and prolonged the lack of co-operation.

The interaction over prisoners' access to medication illuminates both the power of the commission, on the one hand, and the reach of CSOs, on the other hand. The TAC clearly played a key role in highlighting the plight of HIV/AIDS-infected prisoners. But the TAC lacked resources or power to provide any remedies; only the commission could fulfil that role. Once the commission got involved, the investigation got under way and a possible solution to the plight of the prisoners seemed possible.

Lastly, the manner in which these disputes have consistently been settled suggests that the commission should perhaps reconsider its own preferred method of resolving disputes. It prefers mediation to litigation. No amount of mediation could have forced government to agree to providing medication. It took repeated legal action and consistent mass protest to get it to that position. If the commission is to have any significant success over complaints involving socio-economic rights, it would have to be similarly aggressive.

2.4.2. SAHRC and the rights of the aged

Older persons are historically one of the most neglected and vulnerable groups in our society. Whilst numerous pieces of legislation were introduced soon after 1994 to attend to the challenges facing the new democratic society, nothing was done to address the specific plight of the aged, at least not until 2007. Almost 12 years into the democratic South Africa, issues affecting older persons were still regulated under the anachronistic Older Persons Act (No. 81 of 1967).

An inheritance of apartheid South Africa, this legislation was inescapably racist. It did not reflect any of the specific challenges that confront the black aged, whilst attending largely to regulating old-age home facilities, which predominantly catered for the white aged. Even such discriminatory measures could not be implemented sufficiently, as there were no standard regulations and accountability measures for the care of the aged in these homes. This rendered the older persons in both communities and homes for the aged highly vulnerable. A number of CSOs concerned with the aged – mainly Age-in-Action (previously the South African Council for the Aged), the SACC and the South African Association of Homes for the Aged – took up these issues early in the 1990s, but nothing came of it till 2007 when the Older Persons Act was promulgated.[15]

[15] This is when one considers the fact that the first major changes of the older persons regime happened in 1993 when the government institutionalised parity of pension grants for all racial groups in the country (Eckley 2006).

Thus it has taken 12 years for CSOs to secure a favourable legislative regime for the aged. Why so long? Two main problems account for this. Firstly, the concerned CSOs were not able to mobilise significant public support behind their cause. The public was simply indifferent, including the black community, even though this initiative sought to address their specific issues (Van Zyl interview 30 November 2006). Secondly, relations between CSOs and the state were fraught with suspicion. Government considered the aforementioned unworthy partners, since they were unrepresentative, whilst CSOs doubted the sincerity of government on these issues, and wanted to make political gains from the issues.[16] Progress thus seemed unlikely.

The stalemate was broken by the involvement of the SAHRC. This began seriously in 1998, following a request by the Minister of Social Welfare and Development, with the initiation of a consultative process among all CSOs involved to assess the conditions faced by the aged, including housing needs. The proceedings inspired certain new clauses in the existing legislation on the aged, formulated as the Older Persons Amendment Act (No. 100 of 1998),[17] and partly led to the minister's initiative in 1999 called the New Deal for Older Persons (Eckley 2006) This followed a wide-scale investigation in 1999 under the chairpersonship of the commission, again at the request of the Minister of Social Development and Welfare.

The commission put together an investigative committee made up of a variety of stakeholders including CSOs and experts. The committee held hearings and visited sites throughout the country, resulting in a frank and eye-opening report on the status of the aged entitled *Mothers and Fathers of the Nation: The Forgotten People?* The report revealed shocking findings about how senior citizens are being abused and neglected in residential facilities, hospitals, within families, communities, pension queues and government offices (DoSD 2001).

Among the causes of the aforementioned problems, the committee cited insufficient government subsidy, poor management and unequal allocation of resources. The bulk of the resources went towards white elders. The homes for the poor and disadvantaged, which already lacked basic facilities, received lower grants and subsidies. Officials hardly made any inspection rounds to the homes, and only did so when there were reports of abuse. And most social workers lacked skills and expertise to handle issues concerning older persons. Those outside the homes tended to be abused by their own family members, lacked access to important services such as meals-on-wheels and visits by government officials (doctors, social workers, etc.), whilst in some cases old people were responsible for caring for orphans of HIV/AIDS victims.

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[16] This argument is also mentioned by Judith Cohen who, acknowledging the difficulties they faced to make sure that the voice of all the elders in the country is heard, said that, 'most civil society organisations around issues of older persons in South Africa represent whites, as opposed to black people' (Cohen interview).

[17] This Act was meant to 'insert certain definitions; to provide for conditions regarding subsidies to managers of registered homes for the aged and to certain other institutions; to monitor compliance with conditions of registration of homes for the aged; to provide for the establishment of management committees for those homes; to provide for the accessibility of those homes; to provide for the enquiry by designated bodies into matters regarding aged persons; to require reporting on the abuse of aged persons and the keeping of a register thereon; to generally regulate the prevention of the abuse of aged persons; and to provide for matters connected therewith'. It was later realised, however, that these amendments were not sufficient. See the discussion that follows.

This trend is also found when the elders get their pension grant. The pension payment method, based on queuing on particular days, proved to be problematic for them:

- They spend a long time queuing without shelter or seating, with insufficient and filthy toilets, and no water and food.
- Some of them sleep at the pension pay-point to be the first ones there in the morning.
- They get rough and insulting treatment from staff
- They suffer harassment at the hands of loan sharks, fly-by-night burial societies, hawkers/vendors and gangsters.

The committee's recommendations eventually culminated in a new law being promulgated, the Older Persons Act (No. 13 of 2006). Although the Act is being criticised for the omission of gender parity,[18] it was applauded as victory for elders in South Africa. The objectives of the Act, unlike the 1967 Act, are to:

- Maintain and promote the status, well-being, safety and security of older persons;
- Maintain and protect the rights of older persons;
- Shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;
- Regulate the registration, establishment of services and the establishment and management of residential facilities for older persons; and
- Combat the abuse of older person.

The major concern of the SAHRC was that the new policy framework, following international trends, should help elders to live in communities for as long as possible. Eckley sees this as a fundamental shift from the 1967 Act, as it allows for intergenerational mingling in communities (Eckley interview). The Act also reflected a number of concerns raised by older persons to the ministerial committee and parliamentary hearings, such as opportunities to lead a productive existence and participate in any community structures. This is a credit to the widely consultative process initiated by the SAHRC. It was involved with the process right from the beginning. After the release of the Older Persons Bill (No. 68 of 2003) the SAHRC, through Commissioner Thomas Manthata and Parliamentary Officer Judith Cohen, hosted a series of provincial workshops around the country – in areas such as Duncan Village, East London, Durban, Cape Town, Phahameng township, Bloemfontein, Upington, Johannesburg, etc. – in order to educate and empower all the divisions of older people, including an 'elder *magogo* in the rural area or township', about the Bill (Cohen interview). The commission also held a series of group brainstorming sessions with key role-players to engage with the Bill.

Furthermore, the commission formed the Rights of Older Persons Working Group (made up of academics, CSOs, individuals interested in issues of older persons, government departments, experts in the field of gerontology, etc.), an email group meant to provide information to role-players on the progress of the Bill and encourage participation in the parliamentary process. The commission made its submission on 23

[18] The Act defines an older person as someone who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years or older.

August 2005, and oral presentation on 30 August 2005, to the Portfolio Committee of Social Development. According to Judith Cohen, 90 per cent of those who participated in the parliamentary process were people who interacted with the SAHRC through one or all of these ways. Asked how an 'elder *magogo* in the rural area or township', as she puts it, participated in the process, Cohen argues that they had to be in contact with social workers, community leaders and traditional authorities working in these areas (Cohen interview).[19]

The major challenge, according to Mary Turok, chairperson of the steering committee of the South African Older Persons Forum (SAOPF), is now with the implementation of the Act. Asked what will be the role of the SAHRC in this new regime for older persons, the interviewees concur that the commission will have to play a central role in ensuring that the rights of senior citizens are observed in the country. This could serve as a basis for a better relationship between NGOs and the SAHRC (Cohen interview). To this end, both the SAHRC and relevant CSOs have formed a body – the SAOPF – that will not only see to the implementation of the new Act, but also to all other matters related to the aged. The commission was key to the formation of the SAOPF, providing not only the human resources but also administrative support to the process (Turok interview).

From the narration outlined above, one can identify three factors that led to an improved relationship between the SAHRC and NGOs.

Firstly, the relationship depends on the nature of the issue being dealt with. Unlike the HIV/AIDS issue, the promotion of older persons' rights is not riddled with debates about its causes. It is simply a clear-cut, moral issue of abuse concerning older persons, and there was already widespread sympathy and cultural beliefs towards caring for the aged.
Secondly, the initiative was open and inclusive, encompassing as many CSOs as possible within the area of senior citizens. This averted any possibility of suspicion of ulterior motives on the part of either the SAHRC or the CSOs. Thirdly, and flowing from the above, CSOs were encouraged to participate by government's responsiveness and eagerness to attend to this issue. It was clear from the onset that their participation would yield specific results.

2.5 Summary

Both parties – the SAHRC and CSOs in the area of human rights – are keen to establish a close working relationship, and indeed did so in the early years of the commission. But relations were soured by conflicting views on how the commission should relate to the compliance of state institutions with human rights. Some CSOs felt that the commission should be aggressive in enforcing official compliance, whilst the commission, for its part, preferred a less confrontational role and simply monitored state performance with respect to meeting the socio-economic rights of citizens. That the commission hardly litigated to enforce compliance with its recommendations strained the relations further, even arousing suspicion that the commission was capitulating to political directives from the government.

[19] Indeed, she relates a story in which older persons from Khayelitsha made presentations about their situations, in their own languages, before the parliamentary committee (Cohen interview).

The resulting tension, however, did not impair public use of the SAHRC. The number of complaints received by the commission continued to rise long after the commission had severed formal ties with CSOs. But the volume of complaints that the commission either declined or referred elsewhere suggests that a large section of the public remained unfamiliar with the role and function of the commission. This problem reflects a lack of education, something that could be rectified through close relations with CSOs (as they are well suited to assuming an educational role, as cited earlier in the case of Ghana's CHRAJ).

Successful collaboration, particularly with regard to investigations and leading campaigns on certain issues were undercut, in some instances, by lack of follow-up on recommendations. Often the commission did not ensure implementation of its recommendations, as it is reluctant to litigate where there is determined official resistance to the recommendations. This has tended to create doubts over its effectiveness (or willingness) to secure official compliance and even independence from the state. Reluctance to litigate does not suggest fear to confront government. The commission has been critical of government where necessary. Rather, it seems to be constrained by lack of financial resources. Rather than litigation, perhaps a more effective way of ensuring state compliance with the commission's recommendations is to make them binding on the state.

To be sure, accusations that the SAHRC lacks autonomy are without factual basis. Instead they stem from conflicting notions of independence. The commission, on the one hand, insists on independence from both civil society and the state. Civil society, on the other hand, contends that the independence of the commission applies only in relation to the state, not to itself. In fact, CSOs believe that the commission should align itself with them in opposition against the state.

It is not readily evident, however, if being adversarial towards the state will make the SAHRC more effective. It is quite likely that, where there is already official resistance against compliance with recommendations, adversity may simply harden attitudes. Recommendations will thus go unheeded, especially if the existing practice is not altered to make it binding on the state. In such instances, a less adversarial relationship towards the state may be more effective in securing results (particularly where litigation may prove too costly to pursue).

Instead of absolute autonomy, the Indonesian practice of embedded autonomy offers a useful model. This would entail the SAHRC being relatively autonomous from both civil society and the state. It retains collegial relations with both parties, enabling it to get assistance and co-operation where necessary to address human rights issues. At the same time, the commission maintains its independence so that it is not swayed by either party from pursuing its mandate.

Chapter 3
The Commission on Gender Equality and civil society

3.1 Background

During national negotiations in the early 1990s, leading activists within the anti-apartheid movement pushed for feminist ideas to be incorporated into the new democratic national project. Representing grassroots township women across the political spectrum, the Women's National Coalition played a critical role in prioritising gender concerns as central to the nation-building exercise (Seidman 2003). This culminated in the formation of an elaborate National Gender Machinery (NGM) within the new democratic state. The NGM includes:

- The national Office of the Status of Women (OSW) and provincial OSWs;
- The Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women (JMC);
- The Women's Caucus in Parliament;
- The Women's Empowerment Unit;
- Gender focal points (such as gender desks in each national civil service department which are tasked with mainstreaming and monitoring legislation) on national and provincial level; and
- The CGE (Gouws 2005)

The Beijing Platform of Action pushed for the existence of specialised gender machinery to ensure that women's human rights are not marginalised within human rights commissions (Manjoo 2006). The function of national gender machineries is to promote state feminism partially through gender mainstreaming. Gouws defines gender mainstreaming as 'the integration of gender equality concerns into the analysis and formulation of all policies, programmes and projects' (2005: 76). She also identifies the two interrelated dimensions of state feminism as influencing policy-making through women in the state, and providing access to the women's movement outside of the state. Citing a study conducted by the Gender Research Project in 2000, Gouws states that the CGE and the JMC have been particularly successful at 'the level of representation and liaison with constituencies of women' (2005: 76). However, it has been difficult to measure these structures' accountability to women, and Gouws argues that 'the structures are the weakest on delivery and some such as the CGE are plagued by internal politics' (2005: 76). Others such as Seidman (2003) have articulated similar concerns.

The NGM has been severely criticised for its lack of accountability to civil society. Sheila Meintjes, former CGE commissioner, has stated that the NGM has been accused by prominent politicians of having failed, of needing to 'develop greater coordination with and accountability to civil society' (2005: 271), and that the NGM has the power to mobilise civil society for gender transformation.

Of particular concern to this study, of course, is the CGE, established in 1997. As a Chapter 9 institution, the CGE is therefore different to the other organs within the gender machinery. It was created through legislation in fulfilment of section 187 of

the Constitution, with wider powers and mandate, and is an autonomous body. According to the Commencement of the Commission on Gender Equality Act (No. 39 of 1996), the mandate of the CGE is to:

- Monitor and evaluate policies and practices of organs of state, statutory bodies and functionaries, public bodies or private businesses with regard to their compliance with legislation on gender equality;
- Conduct research, develop educational strategies and programmes that foster understanding about gender equality;
- Evaluate any existing law or propose new law with a view to ensuring compliance with gender equality;
- Investigate gender matters, complaints and resolve conflicts by mediation, conciliation and negotiation;
- Monitor government's compliance with international conventions with respect to gender equality; and
- Prepare and submit reports to Parliament on aspects relating to gender equality;

The CGE is made up of two components: the secretariat and the commission. The latter consists of the CEO, the Public Education and Information Unit, the Finance and Administration Unit, the Policy and Research Unit, and the Legal Department. Commissioners include the chairperson, the deputy chairperson and the commissioners. The CGE Act (No. 39 of 1996) states that the commission must consist of one chairperson appointed by the president, and between 7 and 11 members. Further, commissioners must have a history of commitment to promoting gender equality, and must also have relevant knowledge and experience in this field. Commissioners are nominated by the public and interviewed by a parliamentary committee, which then makes recommendations to the president. They are appointed by the president for a fixed term not exceeding five years and may be reappointed for an additional term. Members of the commission elect the deputy chairperson.

South African society is replete with multiple problems that emanate from gender inequalities. These include HIV/AIDS, domestic and homophobic violence, participation in public processes and institutions, male-centred curriculum, rape of women, and feminisation of poverty. Because the CGE cannot be expected to tackle all these challenges alone, it has to collaborate with civil society. It is within this social context that the CGE's relationship with civil society is examined.

In the performance of its mandate, the CGE has legal powers to search premises and seize documents, to call people to appear and produce documents and to hear evidence under oath. And it has responded to many cases of gender discrimination in the past few years. For instance, the CGE has highlighted the issue of women's unpaid labour within the care economy in relation to the Women's Budget Initiative, and made recommendations for creating a culture of gender equality in the private sector. Additionally, and amongst other strides made, the CGE has recommended that sexual harassment outside the workplace be included in the sexual offences legislation.

Nonetheless, there is disagreement as to whether the CGE has been able to cover all aspects of its mandate. Some contend that the mandate is simply too broad for the CGE to fulfil, whilst others see its wide scope as providing sufficient space for the

CGE to act strategically in combating gender discrimination. Findings contained in a report titled *Overcoming the Legacy of Discrimination in South Africa* submitted by the HSRC to the Presidency in 2005, confirmed the former contention when it notes that the CGE:

> has struggled in particular with the tensions between representing a constituency through targeted advocacy, and mobilisation of the broad population around gender issues; between creating an impact at the level of national government, and reaching out to the poorest of women in rural areas; between emphasizing a strategic legal interventionist role, and dealing with 'grassroots' complaints from individuals. (HSRC 2005: 137)

3.2 Institutional perspectives and challenges

Interviews with individuals from CSOs and staff of the CGE reflect that institutional constraints have imposed limitations on the functioning of the CGE. These include an inadequate budget (small compared to some Chapter 9 institutions), which does not cover all of the CGE's responsibilities, and internal politics around mobilising support for a feminist agenda. This manifests as contrasting views on gender discourse amongst commissioners, which impacts on the message emanating from the CGE, an issue discussed later in this report and illustrated in the intermittent interactions between the CGE and particular CSOs. Other challenges include lack of clarity regarding the CGE's identity and role specifically in relation to other organisations in the field of gender advocacy; relationship with other Chapter 9 institutions in terms of overlap in priority areas; and advocacy in terms of discrimination against rural women (HSRC 2005). Further, Gouws (2006), citing the Instraw evaluation of 2000, notes the problem faced by the CGE in terms of enforcing horizontal accountability as follows:

> It seemed that the CGE showed reluctance to challenge the government when there was backsliding on gender equality. But what the evaluation showed is that the CGE is unique in its monitoring capacity and that no women's organization alone can fulfill this function. (Gouws 2006: 152)

Internal problems, some which conflict with the values the CGE is intended to promote, have led to the credibility of the CGE being somewhat tainted. In September 2004, for instance, a complaint of sexual harassment was formally made by a female employee against a male provincial co-ordinator. However, it appears from reports that the CGE's management was reluctant to investigate the matter. Instead, the accused employee was promoted despite the allegations of sexual harassment.[20] Ultimately, the OPP was called in to investigate the problems that beset the CGE. The findings of the OPP, issued in June 2006, were highly critical of the CGE. Its recommendations are directed at addressing serious structural problems within the CGE. The OPP recommends, for instance, that:

> The Commission should seek an amendment of the Act to allow for the

[20] See H Geldenhuys, Gender Commission under microscope for harassment. *Sunday Times*, 8 June 2006

promulgation of subordinate legislation to deal with job specifications and conditions of service for Commissioners, or make use of any other avenue that may achieve this objective;

The CEO should be made to sign a Performance Agreement that will indicate what her deliverables are;

New Commissioners should be properly inducted on their duties;

The Commission should establish a properly staffed communication unit that will serve its needs. (OPP 2006: 78–96)

These recommendations tally with civil society's assessments of the CGE and the relations between the two. One ex-CGE commissioner stated, for instance, that:

> We're just too bureaucratic. And perhaps that's what's wrong with the CGE. Not only are we too hierarchical – we're too bureaucratic. And we are stifled by bureaucracy. Now I know there is a fine balance between accountability and...you don't have to be stuck. And that's what's happened to the CGE. We have pockets of good relationships with some civil society organisations in some areas. In certain provinces, there are tensions, power games. (Fester interview)

But other CGE staff felt that 'internal politics' has never crippled their work and that the CGE not only fulfils its goals but at times exceeds what it's meant to do (DuPont and Oliver interview). One ex-CGE commissioner noted that:

> Civil society must actually be the voice, they must be stronger. Don't use your energy just saying that the OSW is doing nothing. Why don't they use the media? Why don't they critique? That's their role. We have never received a letter from any CS organisation saying that the CGE is up to nonsense. (Fester interview)

Another CGE provincial co-ordinator elaborated civil society's role in working with the CGE. She states:

> It's not a healthy relationship. Our mandate and role is misunderstood. Civil society has serious issues with each other. We would like to see an effective CS that is vocal and comes together when needed. CS is supposed to be this strong movement. CS does not want to help themselves. I haven't received an invite from a collective CS inviting the CGE to anything. Everything in CS is driven by money, money, money. We have a small budget but we do four big campaigns per year, 40 to 60 workshops, dialogues, and we haven't stuck within the parameters of our target. I think CS is driven by money and because the CGE does not have a pot of money to give them, we will be criticised. (Du Pont and Oliver interview)

However, many civil society participants perceived institutional challenges within the CGE to be detrimental to their functioning, which in effect limited positive interactions between the CGE and CSOs. One senior academic at a research institution describes her experience with the CGE:

> I think there is a difference in terms of what they see their role as being. It's about attitude. I firstly think that there is a lack of understanding of what their role is. I don't know whether we see it as different to them. You can have a small staff and you can still be productive. It comes from their leadership and I think it filters down from their commissioners. (Mathews interview)

Perceptions around a lack of ethical leadership and internal conflict have also been documented by Seidman, who conducted an observation study of the national CGE office between 1999 and 2000. She described the leadership problems as follows:

> By the end of the commission's first term, in mid-2000...a series of internal conflicts, ranging from debate over which feminist goals should be given priority, to fights over personal issues, to conflicts over the relationship between the commission and the broader South African women's movement, had left the commission in disarray. (2003: 548)

3.3 Current state of relations between the CGE and CSOs

The founding legislation on the CGE, as noted earlier, expects the CGE to interact with other organisations working in the field of gender and with which it shares similar objectives. Section 11(1)(f) and (g) is quite clear that the CGE: 'shall liaise and interact with any organisation which actively promotes gender equality and other sectors of civil society to further the objectives of the commission.'

Equally, CSOs expressed eagerness to work with the commission. This interest stems not only from the enormity of the challenges confronted in the area of gender relations. It also emanates from the CGE being seen to occupy a unique role with resources and powers that cannot be replaced by civil society. But CSOs also believe that the CGE must work through civil society to fulfil its mandate, for various reasons. CSOs have the skills and the necessary experience to deal with specific localities and have specific specialisations on which the CGE can capitalise. Working through CSOs would also create public awareness about the CGE. Overall, CSOs were keen to work with the CGE, because it acts as a co-ordinating body that brings together different institutions working on gender. But one civil society participant also stated that civil society is fragmented; that there exists no strong, stable women's movement to push for transformation as a collective:

> The CGE is not leading discussions. There's just apathy also from CS, they are not engaging with the CGE, they are not using them. They are being used only when they remember that there's probably a body like the CGE. I'm suggesting that it should be coming from the CGE at this stage – that we are here, we want to be visible, we want to engage with you as CS. (Mathews interview)

This report examines whether this expectation has been fulfilled. Where it does exist, we investigate its form and the challenges, if any, which beset this relationship. Where a relationship is lacking we probe the reasons. In the main, the relationship between the CGE and civil society is strained and ineffectual. This is due to its

reactive posture, the lack of consensus on gender discourse, divergent focus and priorities, and inconsistent relations between the two.

3.3.1 Reactive and weak leadership

Participants generally felt that the CGE is a reactive, rather than a proactive institution. Such a style of operations was felt to be inadequate. It was held that the CGE should adopt creative initiatives that both create awareness and recommend new ways of dealing with gender problems. CSOs, for instance, argue that there are different proactive approaches that the CGE can adopt. The CGE can nudge departments to comply with gender equality, and use its access and influence within Parliament to ensure that public policies are gender sensitive. But the CGE hardly fulfils this monitoring role nor is it visible in forums where its presence and input can make a marked difference. Respondents gave numerous examples where the voice of the CGE was absent. These included debates on gender insensitive by-laws in Cape Town and Home Affairs laws that make life difficult for transsexual individuals. A representative of the Medical Research Council (MRC) put it thus:

> [The CGE] is not proactive enough; they are very reactive. I think there is not enough of a clear plan and how I see it (and this is my perception) I do think that you actually have to put something on their plate before they tackle it. There's nothing on 'this is our plan of action and this is what we're about'. I think previously they actually had more of a vision and direction. I don't know whether they are short-staffed or what's happening but I don't see them as visible as they used to be. (Mathews interview)

Two members of the Durban Gay and Lesbian Centre interviewed together had serious issues with the CGE. They argued, with deep regret, that sexual orientation and transsexual issues are not on the agenda of the CGE. They mentioned a few cases on which the CGE's support was absent:

> A Bill that was proposed at Parliament by Home Affairs around sex change – people changed their sex but the ID and Home Affairs records remain with the old sex. We fought that but the CGE took a serious back seat on that. It was a serious disappointment. The last time we spoke about gay women as women was during Beatrice Ngcobo's time. The issue of lesbians as women is not part of debate and discourse and one would expect the CGE to have some contribution to those things. This is not coming out of their workshops or attention at all. Somehow they lose the whole sexual orientation thing. Life is not simply about the women and men, and the stereotypes and links with sexual orientation are not tackled by the commission. Issues around transsexualism and identity that should be a concern of the CGE but this does not seem to be the case. (Mkhize and Naidoo interview)

Rather, civil society participants perceived the CGE as visible only during big events such as Women's Day and 16 Days of Activism against Violence against Women and Children. This lack of leadership, according to CSOs, is further evidenced by the absence of clearly articulated viewpoints on topical and critical issues within the

public domain. Minimal visibility, in turn, impacts negatively on public awareness about the existence of the CGE. A survey that probed public awareness of the CGE by the HSRC in 2001 revealed that 55 per cent of the public had either not heard of the CGE or had heard of it, but did not know what it was intended for (HSRC 2002: 152).

3.3.2 Lack of collaboration, follow-through and continuity

Beyond the major events, CSOs argue that there is little collaboration between the CGE and themselves. Where CSOs, for instance, propose an initiative on which to collaborate with the CGE, often it does not materialise. A member of the Sex Worker Education and Advocacy Taskforce (SWEAT) put it thus: 'We'll get that initial meeting and then nothing will happen thereafter. There's a lot of vocal support for the issues and suggestions but there isn't any follow-through' (Arnott interview). But CSOs also conceded that they may be at fault at times. Again, the director of SWEAT explained:

> I think it works two ways. If one wants the CGE to be responsive, we need to be there as well. I think it's also about finding smaller, manageable things to work around, instead of taking on broad projects. We need to find something that's realistic and concrete to take joint action on that they can take a particular focus on. But with broader issues, it just becomes loud talking campaigns; there isn't anything concrete coming out of it. (Arnott interview)

Another civil society participant stated that:

> The CGE has to be both reactive and proactive. That is its mandate. It has to react to my complaint but it has to be proactive as well. There is an understanding in civil society that because the CGE is funded and because they have institutional mechanisms that we don't always have, that they should be more proactive in pushing for change. (Ludwig interview)

One major cause of the lack of follow-through, according to one respondent, is staff turnover on both sides. Once the contact person leaves the organisation, the proposed initiative dies off. This suggests that interaction is initiated through personal relationships, and not as a result of institutional interactions. Had it been the latter, collaborative initiatives would have survived staff turnover.

3.3.3 Lack of consensus on a gender discourse

Activists subscribe to varying discourses on the subject of gender. This of course has implications for the extent to which there is unanimity within this community, its interpretation of what exactly discrimination is and, as a result, the specific nature of redress.

Some activists seek to address gender inequalities from a human rights perspective. This viewpoint stresses the principle of equality between women and men. It does not call for any special measures or dispensation for women, for it sees no differences between the two sexes. Grounded as it is in the Constitution and the Bill of Rights,

this approach also underlines the importance of individual rights. That is, the individual has the right to lead a life that she or he chooses. To that end, proponents of this discourse deem it necessary to demand equal rights and treatment for homosexual persons or couples, and expected the CGE to adopt a similar position. This would have seen the CGE supporting the Civil Unions Bill (No. 26 of 2006) as a human rights issue in relation to homosexuality, and generally advocating for the protection of gays and lesbians in our society. A representative from the Durban Gay and Lesbian Centre argued this point and linked it with the mandate, authority and weight of the CGE:

> The point is that we as NGOs can hardly go to departments and say you are not doing your job well and you need to do this and that. But an organisation in the position of the CGE can in fact do that, they can say 'hey you do not deserve the money you are getting because...' if the departments are not doing their job well. There is a need to do serious education around definitions of gender. There is a need to create space in communities to define what a man is, what a woman is, making people deliberate on why these definitions have excluded gay and lesbian people before. This is something that can be done by a body such as the CGE which is not promoting anything [non-partisan], like us, except equality. (Mkhize interview)

But the CGE has also encountered resistance from some CSOs when it sought to pursue a human rights discourse. The case of virginity testing, particularly in KwaZulu-Natal, is one such prominent instance where the CGE's insistence on a human rights approach was rejected by some CSOs. Virginity testing is a cultural practice that seeks to encourage sexual abstinence before marriage, and so also curb the spread of HIV/AIDS. The CGE objected to this practice, denouncing it as a violation of the right to privacy, sparking an acrimonious public exchange between the CGE and some CBOs in the province. Similar tensions broke out over the Children's Bill (No. 70 of 2003) on the appropriate age at which girls can decide on contraception use and abortion.

Other activists advocate a feminist approach to gender issues. Rather than insist on equality of the sexes, feminists plead for particular sensitivity towards the specific needs of women in some instances. Some policies, they contend, do not impact equally on both sexes, but actually leave women worse off. One example offered by this respondent was of a recent debate over a by-law proposed for the city of Cape Town. of this is the debate . Critics pointed out that women would be hardest hit by this by-law because it would impact strongly on informal trading, which is an economic sector dominated by women. Women, particularly waitresses, would also have to walk long distances at night before reaching taxis, since taxis were to be barred from the city centre. Feminists were also critical that the CGE did not defend the alleged victim in the Zuma rape trial when she was attacked by Zuma supporters outside the court. For some people this is one example showing the CGE's fear of political figures. However, it is difficult to elaborate much on this point as interviewees themselves preferred to be off the record when articulating it.

Other respondents proposed a gender-neutral approach. They argued that to highlight women in gender interventions is actually detrimental to the overall project of gender

transformation. To seek a specific dispensation for women reinforces the (false) idea that females are not equal to males. They do recognise, however, that gender-sensitive interventions may be necessary to attend to the specific problems that mainly confront women, such as rape and domestic violence. The message of any gender-oriented programmes, though, should always be to underscore the principle of equality.

Though CSOs clearly follow different, even contrasting perspectives, they were nonetheless unanimous in the view that the CGE seems not to have a standpoint at all. Given the divergent discourses and sensitivities in South Africa, CSOs understood that it is difficult for the CGE to adopt a particular perspective, for this would alienate it from other constituencies. Yet they find it inexplicable that the CGE does not even seem to follow a 'multi-discoursal' approach, which would make it appeal to a wider range of CSOs and allow it to deal with issues on a case-by-case basis.

However, the CGE maintains that it subscribes to a human rights discourse, but uses a different tool and focuses on a different audience to most CSOs. For starters, the CGE puts more emphasis on monitoring than on advocacy. This was evident in the CGE focus group with provincial co-ordinators where they argued strongly that the work of the CGE is more focused on monitoring government sensitivity to gender They felt that the role of the CGE is misunderstood by civil society. One of the provincial co-ordinators argued:

> I think there is a serious lack of understanding, people criticise the role of the CGE but I think it's because they don't understand what our role is supposed to be. If you ask me, it comes from civil society; they have a perception of what we are supposed to be doing. They think we are supposed to go to court with them to help them with maintenance matters, divorce courts and giving civil societies money to do their jobs, which is not our role. I think our role is strategic in terms of advancing and attaining gender equality in South Africa. That is what they don't really understand. There is an expectation at times that we should be on the ground as they say. I think that if they look at the bigger picture in terms of what we have achieved in terms of legislation, more specifically if you look at the work our parliamentary officers do through legal services, we have done so much in terms of changing pieces of legislation. I don't think they realise the effect that it has on the ordinary person. (CGE focus group interview)

There was a strong feeling that rather than educate the public about gender issues, the main target audience of the CGE is state institutions. This seems to be an unwelcome realisation on the part of civil society about how the CGE has performed thus far, and it appears to be one that the CGE agrees with. The provincial co-ordinators felt that education is necessary to educate people about the CGE's role. It monitors state institutions to ensure compliance with legislation on gender equality. Thus provincial co-ordinators maintained that to expect a different approach by the CGE simply reflects a misunderstanding of its role (CGE focus group). Clearly, such misunderstanding underscores the virtual absence of meaningful collaboration between the CGE and CSOs, the lack of sharing of knowledge and the failure to jointly determine what should be prioritised.

As for its adherence to a human rights perspective, the CGE is faulted for seeking to apply this approach rigidly. A human rights approach does not apply neatly to all gender issues. Where customary practices are involved, a human rights perspective holds little sway. This was most notable in the 2005 public controversy around virginity testing and polygamy. The CGE denounced such practices as violations of human (and women's) rights, but their practitioners insisted on them on account of their cultural beliefs, for which respect is encouraged by the Constitution. It was argued that the CGE should be able to articulate the nuances of gender equality in the context of cultural diversity without obliterating the latter. The representative of the Centre for Public Participation felt that a rights-based approach that is almost completely foreign in the communities in which it is imposed is not helpful. This is how she interpreted the deadlock between the CGE and the views of some CBOs on matters such as virginity testing. She argued that the reaction of the CGE to issues such as virginity testing is 'not community rooted' (Hicks interview).

Thus CSOs challenge the notion that the CGE requires more resources to be effective. It is difficult to discern what the strategic focus of the CGE is, and thus one cannot determine what resources would be deemed sufficient. There was a feeling that the CGE needed first to clearly define its own strategic direction, and thereafter lobby for resources within that context. Many CSOs argued that the CGE needs to clearly articulate its starting points. There are many gender challenges, and the CGE cannot tackle all of them simultaneously. Once the CGE has undertaken a broad environmental scan of what needs to be done in terms of gender equality, a subsequent question should be how it can respond to these needs. Until the CGE has defined its scope, there cannot be grounds to argue for more resources. Moreover, relations with CSOs could even obviate the lack of resources. CSOs could undertake a lot of the work that the CGE currently does alone. This, however, requires greater collaboration between the CGE and the civil society sector.

3.3.4 Varying priorities and focus

Disagreement around focus and priorities extends to what gender issues the CGE should prioritise. Organisations defined priorities based on their own individual focus. Thus respondents cited a whole range of issues ranging from sex workers' legislation, sexual assault to murder of children, and poverty. One participant who focused on poverty suggested:

> The feminisation of poverty is a big issue. So what the CGE has to do is to look at how government's macroeconomic policy is impacting on both poverty and other attendant social problems, like gender-based violence. I don't think the CGE is critical enough of government's macroeconomic policy. (Ludwig interview)

The CGE and CSOs seem to be working on and prioritising different issues. This undercuts their impact when they could be complementing each other.

3.4 CGE–CSO relations: an assessment

While the initial idea was to present two case studies in this section – one reflecting a positive partnership with a tangible outcome between civil society and the CGE, and

another reflecting a more challenging partnership between civil society and the CGE – this was impossible. The CGE seems not to have had a stable, concrete relationship with any CSO over a long period of time. Therefore this section of the report will look instead at the processes and dynamics involved in partnerships between the CGE and specific CSOs.

CSOs identified the lack of proactiveness and follow-through as the primary cause of the prevailing weak relations between themselves and the CGE. It is hoped that this relationship will be strengthened through the recently developed Civil Society Advocacy Programme (CSAP), which has been implemented in some provinces but will be implemented in all provinces by 31 December 2008. Aiming at facilitating 'regular policy engagement between state institutions and civil society', the role of this body is to 'deepen democracy, improve governance and reduce poverty through the creation of a supportive and enabling environment that strengthens dialogue around social change and furthers citizen participation and rights realization' (CGE 2006: 24).

3.4.1 Intermittent interactions

As for the exact nature of the current interaction, most interviewees cited examples of conferences and workshops. There were brief instances of collaboration over short periods of time, such as the co-authoring of a booklet titled *The Women's Handbook* with the Midlands Women's Group in Pietermaritzburg, as a support for the training of women on their rights. The CGE and the Domestic Violence Advocacy Programme (DVAP), based in Durban, were in partnership in 2002–03 to create awareness about domestic violence. They organised stage plays at taxi ranks around KwaZulu-Natal, in places such as Nquthu, Mandeni and kwaHlabisa. The DVAP also referred cases to the CGE. A conference organised by the CGE in 2001 held at Coastlands Hotel is also cited as having been a good platform of discussion on gender issues in KwaZulu-Natal. A civil society representative explains:

> We've had quite a number of positive experiences with the CGE. I remember the CGE being very active in 2001 in getting together for the World Court of Women. That they were quite involved with and it was a positive experience for me because they were involved in getting things set up and networks set up. There were a couple of other things, seminars and things like that. These were relatively good experiences with the CGE. I just think that they are unfortunately too few and too far between. (Ludwig interview)

Other than these examples, people cited specific commissioners as having been active and receptive to civil society invitations. But one case of good and challenging relations stood out from the interviews conducted.

3.4.2 The CGE and the Medical Research Council

One instance of collaboration involved the MRC with regards to the launch of the femicide report titled *Every Six Hours a Woman is Killed by Her Intimate Partner* (MRC 2004), which took place in June 2005 (see also CGE 2006). Initially, though, the MRC had difficulty securing the support of the CGE as decisions on work to take

up appeared to be left to the discretion of the individual commissioners. The MRC representative explains:

> I phoned [a particular commissioner], who was commissioner at the time and asked her what the commission's take on it would be. I wanted their support in getting this information out and I wanted to hold a seminar to get some discussion around it. Her response to me was that with the CSVR [Centre for the Study of Violence and Reconciliation], they had something similar around regarding justice for women, women who have killed men and she did know how it fitted into that. I said Lisa Vetten is part of our research team; there won't be any duplication. It can only strengthen that campaign. I faxed her a copy of the policy brief as it was being written – it wasn't published at that stage. She never showed any interest and then I picked up the discussion later on in the year with [another commissioner] who was certainly more interested and we started running with the idea of hosting a seminar together because I felt it was important for them to link up with the issues. (Mathews interview)

This partnership was useful in terms of the CGE's role in taking up the issue of intimate femicide as a national public awareness campaign, which they ran over the 16 Days of Activism against Violence against Women and Children. This assisted the MRC as they did not have the capacity to raise the issue at a national level. Although the partnership was not formed for financial gain, the CGE also contributed financially. But there were still problems. For instance, the commissioner concerned was away for most of the period leading up to the event. This meant that discussions had to take place with staff at the CGE, who were not necessarily aware of the initial decisions between the commissioner and the MRC. In addition, the national CGE office did not feel comfortable with the seminar being limited to the Western Cape, and therefore wanted national representation. At this point the MRC was unsure of whether the partnership would happen at all. The issue was resolved a week prior to the event.

While this collaboration produced a positive outcome, the case demonstrates that there were many challenges in the interactions between the institutions. Internal difficulties and a lack of institutional vision within the CGE seemed to initially inhibit the collaboration.

A follow-up to this collaboration was a joint release of the report to the media by the Southern African Media and Gender Institute (SAMGI) and the CGE. Initiated by SAMGI, the aim was to monitor the media's reporting on the femicide report and then to release a different report on the media's response. This partnership is described by SAMGI as a very good one, where many guests from civil society attended, including CGE staff from the national office.

Another partnership between the CGE and SAMGI involved a Men's Summit in 2004. The outcome of this collaboration was again positive, but the relationship itself was fraught with serious challenges. One interviewee put it thus:

> [The relationship with the CGE] has never been a complete disaster. It's also been a collective thing where we would call other organisations to help. But it's not the ideal relationship. It's been very hard work on our part. We are the ones who nurture; we're the ones who phone. We're the ones who get the ball rolling. (Smith-Vialva interview)

CSOs generally felt that the CGE was a lot more active and visible in the early years of its existence. It seemed to reach a stalemate in early 2000, only to be revived in 2001 and 2002, but has now become reactive and immobile again (also see Seidman 2003). SWEAT, for instance, talks about the positive linkages with the CGE on the law reform paper in 2002, and the case brought forward by the CGE in support of the decriminalisation of sex workers in the same year. But, as cited by many other CSOs, SWEAT bitterly complains about the CGE's failure to follow through on this important gender-related initiative.

3.5 Summary

CSOs can be the mechanism to translate legislation into practice. Real knowledge of issues emanates from experience, which can best be articulated by civil society. A planned, thorough consultation strategy therefore needs to be developed to strengthen the existing partnerships between the CGE and CSOs. The CGE should identify organisations that it can use as a resource for extending its mandate and cultivate a stronger relationship with them.

Practical starting points include a database of CSOs; analysis of the kind of support or service they can provide; forming strategic links with those who can afford to do more, given capacity constraints; and requesting assistance from CSOs on specific issues in accordance with the CGE's strategic choices or focus. In essence the linkages with civil society must be driven by a more proactive approach than is currently the case.

Although many CSOs felt that the CGE must have a good consultation strategy for stakeholders at provincial and national level, there was also a view that consultation for its own sake is not helpful. The CGE can consult with various stakeholders on occasion, but it cannot afford to do intensive consultation on each issue that it deals with. Consultation must be a means to an end and occasional consultation conducted under reasonable networking conditions may be sufficient at times. Some even argued that massive resources are often poured into consultation with minimum end results. This, however, was a minority view among those interviewed. The dominant view was that the CGE needs to consult more with various stakeholders in the performance of its role. CSOs must in fact be used as a means to consult people at grassroots level, given that it is not feasible for a body like the CGE to directly co-ordinate access to people countrywide.

Finally, most CSOs felt that the CGE must convey clear messages on gender matters. Its silence on matters of public interest has been interpreted as an indication that the CGE has no strategy for dealing with gender in a socio-cultural context. In this regard, CSOs believe that the CGE, in addition to monitoring, research and handling complaints, should also assume an advocacy role.

Ultimately, the actual message emanating from civil society is that the CGE needs to be proactive in strategy, operations and partnerships if it is to realise both its mandate and its potential to contribute to democratisation and empowerment in South Africa.

Chapter 4
The Office of the Public Protector and civil society

4.1 Background

A successor to the Ombudsman, the OPP was established in 1996 and opened its first regional offices in 1999–2000, beginning with offices in the North West and Eastern Cape provinces. The last regional office was opened in 2004–05, establishing the presence of the OPP throughout the country. Its predecessor – the Ombudsman – had been formed in 1991 in compliance with international norms, as South Africa was being reintegrated into the international community. The Ombudsman had replaced the office of the advocate-general, which had been created in 1979 to fulfil a somewhat similar role, but fell markedly short of meeting the prerequisites of an Ombudsman. The advocate-general was mandated to investigate possible maladministration of public funds (Brynard 1999), and focused on making public administration more accountable to the government, rather than to the public. The institution was not established to promote the ideals usually associated with democracy, such as transparency, participation and inclusivity.

Conversely, an Ombudsman – a term of Swedish origin meaning 'representative' – is intended to:

> ...protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and maladministration in order to improve public administration and make the government's actions more open, and the government, and its servants more accountable to members of the public.[21]

To this end, the Ombudsman has the authority to investigate instances of maladministration within state institutions. The Ombudsman should ensure government accountability, fight corruption and increase government efficiency. Thus the OPP performs a similar role to that of the erstwhile Ombudsman. Section 182(1) of the 1996 Constitution empowers the OPP:

> (a) to investigate any conduct in state affairs, or in the public administrationin any sphere of government, that is alleged or suspected to be improper or toresult in any impropriety or prejudice;
>
> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action.

The Public Protector is appointed by the president on the recommendation of the National Assembly, in accordance with the provisions of section 193 of the Constitution. This section provides that the National Assembly must recommend a person for the position who has been nominated by a committee that is proportionally

[21] International Ombudsman Institute website, <http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I./History-and-Development.php>. Accessed on 10 January 2007.

composed of members of all parties in the National Assembly. Furthermore, 60 per cent of the National Assembly members must vote in favour of the person. Finally, civil society may be involved in the recommendation process, as is envisaged in section 59(1)(a) of the Constitution.

Given the fact that the ruling party holds more than 60 per cent of the seats in the National Assembly, there is a good chance that the person appointed to the position of Public Protector will be one who is sympathetic to or supportive of the ANC, if not an actual member of the party. In fact, the current Public Protector was an ANC member of the National Council of Provinces prior to his appointment. Therefore, the following question needs to be asked: what implications does the appointment process have for the independence of the OPP?

A review of contemporary newspaper reports suggests strongly that the Public Protector is perceived to be lacking in independence and is not fulfilling his duties and functions adequately. This view has been confirmed by a number of academic commentators.[22] It has also been suggested that the Public Protector tends to find in favour of high-profile politicians (*The Star* 16 July 2004). A recent report in the *Mail & Guardian* puts it as follows:

> Controversy has plagued the Public Protector's office in the four years since Lawrence Mushwana took the reins. Mushwana has been found inadequate in exercising his mandate 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'. Critics say he has often put the interests of members of the ruling party before those of the public.
>
> Adrienne Carlisle of the Public Service Accountability Monitor says the Public Protector's office has been 'generally weak, particularly with regard to conducting oversight over the executive'. She says the office of the Public Protector has an 'extremely poor record in this regard' and Mushwana has interpreted his mandate very narrowly. Using the Oilgate investigation as an example, Carlisle says Mushwana's office delivered 'the most superficial possible investigation and a report that raised more questions than it answered'.
>
> Most recently, Mushwana found no link between Social Development Minister Zola Skweyiya awarding a large government contract to a company partly owned by Imvume – an oil company implicated in the Oilgate scandal – and that company's interest-free loan to Skweyiya's wife. Instead he found Skweyiya guilty only of non-disclosure of the loan to Parliament and imposed a sanction requiring the minister to apologise to Parliament. (*Mail & Guardian* 21 November 2006)

The fact that the Justice Minister has the power to appoint a Deputy Public Protector may also pose a threat to the independence of the OPP (Pienaar 2000).

The office is required to be accessible to the public, and to initiate awareness campaigns to alert the public of its existence and purpose. It is crucial to note, though,

[22] See, for example, Sarkin (2000) and Hoexter (2000).

that the OPP, following an investigation, does not have executive power to enforce its recommendations as a court of law would. Its role is mainly to mediate. This may be construed as an inability on the part of the OPP to defend the public effectively. But Gary Pienaar (of the OPP) does not see lack of executive powers as a handicap. He says it is actually an advantage that allows the OPP easier access to information, especially by the state, because of the fact that he cannot prosecute (Pienaar 2000).

The OPP is intended to be integral to the development of South Africa's democracy. It monitors the state's use of its power and ensures that the government fulfils its part of the social contract within a democratic framework. When complaints about state institutions are brought to the OPP's attention, either by individuals or by CSOs, the investigation of these state institutions is intended to improve the latter's performance, as well as the relationship between the state and the public.

4.2 Institutional framework: legislation and policy

Neither the Constitution nor the Public Protector Act (No. 23 of 1994) provides that the OPP must work with civil society. Section 182(4) of the Constitution states that the OPP must be accessible to all persons and communities. Similarly, section 6(1)(b) of the Public Protector Act requires that the Public Protector must make his or her office accessible to all persons, but neither the Act nor the Constitution expressly anticipates or demands a relationship between the OPP and civil society. However, the OPP does believe such a relationship is necessary to its effective functioning. In an interview, the representative of the OPP acknowledged that CSOs have a role in helping the OPP achieve its mandate, because CSOs are an important way of reaching and communicating with the public (Janse van Rensburg interview). The OPP has also stated that:

> Cooperation with Civil Society Organisations (CSOs) is of high importance to the office of the Public Protector (PP), since these organisations are often the eyes and ears of the PP where individuals are unable to access the PP, or do not know about the PP. In such cases CSOs working among the people can easily identify difficulties experienced by the people, and complain to the PP on behalf of the people. This role is regarded as so crucial to the PP, that a previous communication drive that the PP undertook in conjunction with Lawyers for Human Rights indeed targeted CSOs for information sessions about the role of the PP. (pers. comm. M Schutte)

However, the annual reports, with the exception of two provincial offices (Western Cape and Free State), make little or no mention of the OPP (regional and national offices included) having contacted CSOs or sought their assistance specifically in the last five years. While there seem to be some ties with CSOs, most complaints are generated by individual members of the public, despite the fact that the OPP's objectives in the last five years have always included the desire to establish community relationships that would facilitate accessibility to its office.

On a general note, while there is some literature dealing with the position of South Africa's Public Protector, there is little or no literature that specifically refers to the interaction between the OPP and civil society groups or even the public.[23]

4.3 The current state of relations between the OPP and CSOs

4.3.1 Community outreach

Civil society clearly has a role to play in the pursuance of democracy, and given the fact that the Public Protector is expected to enhance transparency, it is important that there should be a collaboration of some sort between the two. To that end the OPP has made progress in improving its relationship with communities through visiting points and clinics. All the regional offices of the OPP have undertaken outreach programmes. For example, the North West office has used its 'clinic' programme as a method of public outreach, and has continued to establish new clinics. A successful public outreach programme in 2003–04 enabled the Eastern Cape office to highlight the 'inadequacies in state-funded housing schemes' (OPP 2001–2005: Annual Report 2003/2004: 13).

The first KwaZulu-Natal outreach programme was launched during 2003–04, with staff from the OPP travelling to all the districts in the province to consult with managers and create awareness (OPP 2001–2005: Annual Report 2003/2004). In Mpumalanga, a radio awareness campaign was undertaken using people's mother tongues. In 2003–04 the Mpumalanga office identified outreach as one of its main objectives and aimed to establish visiting points in all the municipal district areas. This office also uses airtime on radio to create awareness about its office and the services available to citizens.

The Western Cape regional office has built strong relationships with state departments and civil society in the Western Cape (OPP 2001–2005: Annual Report 2003/2004). During the period 2003–04, the Western Cape office participated in the Provincial Anti-Corruption Forum together with various government departments, parastatal agencies and CSOs.

Outreach programmes in the Free State office (2003–04) targeted government departments and NGOs, indicating that the office perceives a need to engage with formally organised civil society bodies. The office embarked on establishing more clinics and visiting points[24] but due to staff shortages could only divide the general area into three parts: northern, eastern and southern districts.

In its public awareness campaign, the Limpopo office engaged in a media blister campaign using local radio and print media. The Limpopo office notes, however, that it is challenged by the fact that the vast majority of the population in this province live in the rural areas from where they cannot necessarily access the office. However,

[23] Both academic and media articles make incidental references to the OPP's relationship to the public. There is no specific focus on whether and why such a relationship is necessary.

[24] Visiting points comprise visits from the OPP at designated times and dates to a particular community to educate the public about its work, as well as to receive complaints from members of the public either through individuals or CBOs.

with the continuation of public awareness campaigns and the continued operation of three visiting points they hope to engage more with the public.

As the *Annual Report 2002/2003* indicates (OPP 2001–2005), prior to 2002–03 the OPP lacked adequate mechanisms for functioning effectively in rural areas. The OPP attempted to remedy this by establishing more visiting points in the countryside. In addition, some of the provincial offices organise outings to healthcare facilities where they inform the people in the hospital wards, both patients and staff, about their mandate.

4.3.2 Challenges in OPP–CSOs relations

While outreach does succeed in broadening public awareness, collaboration with organised groups may be more effective if the OPP intends to reach more people. Since organised civil society groups have more direct access to the individual citizen, an ongoing relationship would assist the OPP in fulfilling its duties, while individuals would get the recourse they deserve. The interviews that we conducted revealed, however, that the OPP's relationships with CSOs seem to be limited, or somewhat tense to the extent that they do exist.

The OPP faces challenges in its civil society interactions because there is no clear strategy for outreach and no delineation between communications and outreach strategies. Mandu Malane, the CSAP co-ordinator at the OPP, notes that there is a disjuncture between the national office and the provincial offices about how to relate with CSOs and about how to alert more people to the services of the OPP (Malane interview). Developing an outreach strategy also raises questions about who should be doing the outreach. At present, the investigators (who are lawyers) tend to go out to communicate information, thus decreasing their investigative time.

It was in response to the shortcomings described that the European Union formed a CSAP in 2004 to 'facilitate the interaction between Chapter 9 institutions...and Civil Society in order for communities to effectively claim and access their constitutional, democratic and socioeconomic rights'.[25] The strategy is to establish networks in provincial offices and through NGOs, especially in those areas with higher rural and poor populations – Limpopo, KwaZulu-Natal and the Eastern Cape.

According to Malane, the OPP subscribed to CSAP's mandate because it acknowledged that CBOs and NGOs are better equipped to reach the people who may need the services of the Public Protector. Essentially, the OPP envisages a relationship where CSOs can help individuals access its (the OPP's) services. CSAP would therefore like to strengthen the relationship between the OPP and CSOs so that they engage with one another and the OPP enhances its advocacy capacity (Malane interview). In order to do the above successfully, the OPP's profile amongst smaller NGOs needs to increase as most of these groups work to meet the needs of the most marginalised.

CSAP's mandate allows for many of these challenges to be addressed. At the time of the interview, CSAP had just finished developing an outreach strategy for the OPP.

[25] CSAP website, <http://www.csap.co.za/>. Accessed on 11 January 2007.

Malane hopes that this will contribute to a more formal relationship between the OPP and the civil society sector.

Despite attempts to use CSOs as intermediaries by virtue of their proximity to communities and residents, the OPP receives more complaints from individuals than organisations. Does this mean that the OPP actually has less need for CSOs?

We would argue that the OPP does need civil society, particularly as an educational tool. For instance, the OPP declines to address a fairly substantial number of cases because they fall outside its jurisdiction. Evidently, the individual complainants are not entirely knowledgeable about the exact jurisdiction or mandate of the OPP. It is vital, therefore, that the OPP engages more with CSOs that are close to the people as they can effectively assist in explaining the mandate. This brings us to the current state of relations between the OPP and CSOs.

Our findings indicate that the OPP–CSO relations are prefigured by the following factors: knowledge of the OPP and its role, the nature of investigations undertaken by the OPP, public perceptions of the OPP, and the capacity of the OPP.

4.3.3 Knowledge of the OPP and its role

Public knowledge of the OPP and its mandate is limited. Whereas better known NGOs such as the Black Sash and programme components of IDASA have a good understanding of the role of the OPP, many others do not. Smaller groups, including trade unions and the survivalist organisations, have little or no understanding of the mandate. While the representatives of the groups interviewed had heard of the Public Protector at some point during their work within the civil society sector, they contend that the public, which they represent, knows little or nothing about OPP.

For example, Vincent Daniels, the director of the Cape Town Society for the Blind, and Martha Mokholo, CEO of Age-in-Action (which has 900 affiliates), knew very little about the role of the OPP (Mokholo interview 9 November 2006; Daniels interview). Ignorance about the OPP extends to the general public. A survey undertaken by the HSRC in 2001 found that more than 70 per cent of the public have either not heard of the OPP or have heard of it 'but do not know what its purpose is' (HSRC 2002: 153). The general perception seems to be that the OPP focuses on high-profile and 'political' cases.

In both the interviews cited above, it became clear that these organisations liaise directly with government departments in order to solve problems, or refer a complainant to another CSO, for example the Black Sash Advice Office. A representative of the Development Action Group (that deals, inter alia, with housing issues), for instance, revealed that the NGO always deals directly with the Department of Housing on behalf of its clients. Nevertheless, these organisations expressed interest in learning more about the OPP as well as a willingness to facilitate interaction between the public and the OPP.

Of those knowledgeable about the OPP, some would prefer the OPP to assume a protective instead of a mediating role. The literature reviewed suggests that if someone does not have a decision made by the OPP in their favour, sometimes they

will claim that the OPP is not protecting the people. In addition, because the OPP cannot *enforce* its recommendations, people may perceive the OPP as lacking real power to make a difference.

Insufficient knowledge of the OPP is due neither to a lack of funds for public awareness campaigns nor to the absence of such exercises. The OPP has received funds and has launched public awareness campaigns. For instance, in 2001–02 it received R147 000 and R359 000 from the Foundation for Human Rights (a European Union entity) and the Royal Danish Embassy (Danish International Development Agency [DANIDA]) respectively. These monies were used, according to the OPP, to fund publications such as pamphlets and other promotional materials to facilitate awareness. Both donations and awareness campaigns have resumed in subsequent years. It seems that these efforts have been rewarded by an increase in caseload.

4.3.4 The ad hoc nature of interactions

Both the OPP and CSOs define their current relationship as ad hoc (that is, interaction is not regular and/or structured), which they find disappointing. The current relationship is restricted to two methods: referral of individuals to the OPP by CSOs and complaints about state departments lodged by the CSOs themselves. This has meant that, although sometimes the cases are resolved for the complainant to his or her satisfaction, many other times there is a delay or non-resolution. There is no clear understanding of what cases can be reported to the OPP; or at least this is the most viable explanation for why cases have been turned down. The view of the civil society sector appears to be that because the OPP does not engage with CSOs and those that they represent, there is no incentive for the organisations to initiate co-operation and partnerships.

CSOs would like their relationship with the OPP to be more structured, contingent on factors such as their ability to trust the OPP. Adv. Janse van Rensburg, a representative of the OPP, noted that the organisation's outreach and communications strategies envisage a more structured way of communicating with CSOs.[26]

The absence of a meaningful relationship between the OPP and CSOs has led to the latter performing duties that are otherwise meant for the OPP. For instance, they approach government departments directly with people's complaints about inefficiency. There are two reasons for this: CSOs are well known to the public and people feel more comfortable about approaching them, and several CSOs contend their constituencies are dissatisfied with the service provided to them by the OPP. According to Vincent Williams of the Southern African Migration Project, in his experience clients walk in and ask for his help after complaining that they got 'no joy' from the Public Protector (Williams interview 6 November 2006).

Our own experiences with the OPP also revealed that the office is not as accessible, transparent or accountable as it should be. For a period of 10 days during late November and early December 2006, we made numerous phone calls and sent emails to our contact in the OPP in order to obtain more background information on our case

[26] Unfortunately, Janse van Rensburg did not have much more information available on the communication strategy.

study, but received no responses at that time. It was only in January 2007 that we received a detailed response to the case study that appears below.

It is also clear that the OPP doubts the integrity of some CSOs. Adv. Janse van Rensburg of the national OPP, for instance, stated that some CSOs report a complaint to the OPP only to charge the concerned individual or constituency a type of 'contingency' fee for addressing the problem. Some CSOs also approach the OPP for funding. Once money becomes involved, Janse van Rensburg explained, it jeopardises the perception that the OPP is independent and impartial. The OPP has, therefore, had to reject some cases where an NGO has received money for bringing a case to the Public Protector, for fear that there will be perceptions of partiality, especially if the investigation finds in favour of the complainant.

4.3.5 Investigations by the OPP and public perception

The profile of the OPP in recent times has increased due to high-profile investigations involving high-ranking government officials. The OPP has conducted these investigations in line with its mandate to investigate maladministration. When interviewees were asked if the OPP should focus more on these sorts of cases, or rather on the individual complaints it receives on a daily basis, the consensus was that it should engage with all cases that fall within its jurisdiction. According to Alison Tilley of the Open Democracy Advice Centre (ODAC), when the OPP engages in the higher profile cases, it earns the reputation needed for people to know more about its existence and the trust of those who already know about the office (Tilley interview). But there still is a widespread opinion within the sector that the OPP is unable to fulfil its obligations, and this makes the public very wary of the OPP and the services it can provide. As far as such cases are concerned, there have been doubts expressed (in the media, for example) about the impartiality of the OPP, since it has almost always found in favour of the ruling party. This may be one reason why some sectors of the public are doubtful about the independence of the OPP.

Also, whilst generating publicity around the OPP and increasing its profile, the high-profile cases create a misperception about the kind of cases the OPP takes on. The relentless media reportage of high-profile cases leads people to believe that the OPP deals only with cases of such a nature. Yet the reality is that the bulk of the OPP's workload comprises complaints about lack of service delivery, inefficiency, and so on. To this end, Janse van Rensburg sees the challenge of the OPP as 'bringing it to the public's attention that the office is there to deal with bread and butter issues' (Janse van Rensburg interview).

4.3.6 The capacity of the OPP

In the past, one of the challenges raised by the Public Protector's office was that the office was understaffed while it had a growing caseload. An examination of the annual reports from 1999 to 2004–05 indicates that there has been a steady increase in the number of cases brought to the OPP and the number of cases finalised. Table 1 provides the details of numbers of cases received, finalised and carried over. (The statistics in this table were obtained from the annual reports of the OPP.)

Table 1 *A statistical overview of complaints handled by the OPP, 1999–2005*

	Cases carried forward from previous year	New cases received	Cases finalised	Cases carried over to following year
1999	10 884	9 085	6 993	12 976
2000/01	13 326	10 442	9 649	14 120
2001/02	13 427	12 174	12 202	13 399
2002/03	13 399	15 674	21 705	7 368
2003/04	7 520	17 295	15 946	8 869
2004/05	9 292	22 350	17 539	14 103

Note: There are discrepancies between 'Cases carried over to following year' and 'Cases carried forward from previous year' that do not seem to be accounted for.

When asked for comment on these figures, the OPP responded as follows:

> The reason why a fairly high number of cases were carried over in 2004/05 (14 103) compared to the two previous reporting years (8 869 and 7 368 respectively), is mainly because in 2004/05 the number of new cases received increased with 5 055 and 6 676 respectively, compared with the previous two financial years. Accordingly, during 2004/05 the Office of the Public Protector had capacity constraints to deal with the increased workload. Another explanation could also be that successful outreach initiatives close to the commencement of a financial year may generate a fairly large number of new cases that are in process and that are, for statistical reasons, carried over to the following financial year.[27]

The aforementioned challenge regarding a lack of staff was confirmed by Adv. Rudolph Jansen of LHR and Ms Leonie Caroline Nyman of the Black Sash, but Alison Tilley of ODAC found it unconvincing as a justification for non-delivery. This reflects two very interesting perspectives of members of CSOs that have dealt with the OPP on more than one occasion. Tilley is certainly sympathetic to the increase in caseload (Tilley interview). However, she argues that if the OPP had indeed conducted the systemic investigations as it should have done more often, there would be less complaints to deal with. In addition, the problem of lack of capacity has more to do with institutional structure and operation than actual worker numbers. In essence, there should be a more comprehensive strategy as to what kinds of skills are needed, rather than using investigators (all of whom are lawyers) for all the external business of the OPP. While this is quite an accurate observation to make, Jansen noted that we should not lose sight of the fact that South Africa's democracy is only 12 years old and so are its institutions. The grand systemic investigations that those in the civil society sector might favour may only realistically be possible some time in the future, as South African democracy itself grows (Jansen interview 22 November 2006).

However, on being asked whether the current workload of the OPP was too great, given the fact that the OPP is dealing with everything from day-to-day cases to high-profile corruption cases (for example), Adv. Janse van Rensburg responded that the

[27] Email from OPP dated 25 January 2007.

office is managing its workload well. It has adequate resources, 9 offices and over 200 staff, most of whom are investigative staff (Janse van Rensburg interview).

The case study that follows will give more insight into the success that one civil society organisation has had in bringing its complaint to the Public Protector. The case also highlights the challenges that beset the OPP in relating to civil society even as they investigated the complaint.

4.6 OPP–CSO relations: a case study

Selecting a case study that illustrated co-operation with CSOs proved to be difficult. We asked the OPP for cases in which it had co-operated with CSOs, but it could tell us of only one case in Ceres that had involved a CBO. However, when we asked for a copy of the relevant report, we were informed that we could not have access to it 'in terms of the provisions of the Public Protector Act'.[28]The case study that we eventually used here was provided to us by Rudolph Jansen of LHR.[29]

4.6.1 The Braamfontein Refugee Reception Office (now in Rosettenville)

This case study was chosen to illustrate civil society–OPP relations.[30] It highlights the challenges that arise from such a relationship and recommendations can be drawn from the case study on how to improve the relationship. It also provides a concrete illustration of how CSOs can help the OPP to fulfil its mandate.

Background

In 2002, the University of Witwatersrand Law Clinic, in association with LHR and the Black Sash, Johannesburg, laid a complaint with the Public Protector concerning the ill-treatment of asylum seekers as witnessed by Abeeda Bhamjee, then of the Wits Law Clinic.

She contended that the Public Protector did not respond to the complaint or acknowledge its receipt, despite several follow-ups by the Black Sash (Johannesburg) office (Bhamjee interview). This prompted (approximately six months after the initial submission of the complaint) the NGO consortium to approach the SAHRC, which in turn approached the OPP, acting on submissions made by the two NGOs. The complaints against the refugee centre included, inter alia, refusal to grant refugees access to the centre, the use of undue force by security personnel, and undue delays in issuing identity documents and other identification certificates.

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[28] Email received from the OPP, 23 November 2006.

[29] This case study relies extensively on the Public Protector's report as submitted to Parliament and subsequent interviews with representatives of the complainant NGOs. A response was also received from the OPP in January 2007 and is included in this analysis.

[30] The OPP has since commented that, 'All reports of the PP can be accessed on the website www.publicprotector.org.za, or through the library of the PP. It should be noted that for many cases no separate reports were published, but that they were reported on in the annual reports of the PP. Many case reports can therefore be found in the annual reports of the PP.' However, we have noted that it is only a very limited number of reports that appear on the website.

In response, the OPP has noted that at that time a complaint received was routinely registered on a database of the OPP before it was sent for investigation. No complaint, before the one presently under scrutiny, could be traced under the name of Ms Bhamjee, or the organisations mentioned. The first indication on the database that the complaint had been received was under file reference 7/2-3209/02, and this complaint was received from the SAHRC on 30 August 2002. Furthermore, a letter dated 27 August 2002 was received from the SAHRC referring to a meeting held on 11 July 2002, which was attended by one of the investigators of the OPP. The letter noted that at the meeting it was agreed that the OPP would receive an official complaint from the SAHRC, which would also consist of submissions received by the SAHRC from LHR and the Wits Law Clinic. These submissions were addressed to the SAHRC, and did not mention a previous complaint to the OPP. The only mention of the OPP was in the submission of the LHR where it requested the SAHRC 'to investigate the matter either by itself or in partnership with other Chapter 9 Institutions such as the Public Protector' (pers. comm. M Schutte). The letter of the SAHRC outlined the complaint as concerns relating to the treatment of applications from asylum seekers or refugees. It is this complaint that resulted in the report of the OPP under discussion in the present report, and was the only formal complaint that the OPP could trace on its database about the matter (pers. comm. M Schutte).

Abeeda Bhamjee contends that following the submission of the complaints, the Public Protector did not consult with the LHR or the Law Clinic, the complainants in the case. Indeed, it was only through an internet follow-up search by the Law Clinic that Bhamjee discovered that an investigator had been appointed to the case. Bhamjee notes that, despite the manner in which the case had been handled thus far by the Public Protector, the NGO consortium was excited that the complaints were being investigated.

To this contention, the OPP has responded that it was the SAHRC that requested the OPP to investigate, and that the name of a commissioner of the SAHRC was given as the contact for further information. The OPP therefore regarded the SAHRC as the complainant in the matter, and dealt with it accordingly. Acknowledgement of receipt of the complaint was therefore sent to the SAHRC, and it was informed of progress. However, the OPP acknowledged that progress reports were not made as often as they should have been. The OPP also conceded that it would probably have been advisable to copy in the CSOs mentioned in the complaint of the SAHRC, since it is now clear from Bhamjee's comments that they were not informed of developments (pers. comm. M Schutte).[31]

The complaint and subsequent investigation

Firstly, the complaint claimed that bribes were solicited in the centre. In addition, the centre seemed to have developed a quota system whereby only people of certain nationalities were allowed entrance on particular days. Furthermore, the department did not provide enough interpreters, which meant refugees had to make use of freelancers who were not officially employed by the Department of Home Affairs and

[31] It would be inappropriate to doubt the word of either Ms Bhamjee or the OPP. Part of the problem here seems to be that three of the four investigators involved in the case have since left the OPP. Given the time that has passed since the initial complaint was made – five years – it seems it would be impossible to resolve the various factual discrepancies.

solicited bribes for their services. The complaint also noted that security guards had assaulted refugees in order to control the crowd. The centre officials alleged that this practice was not one condoned by the department but enforced by the private security company that was employed to guard the centre. Finally, the department had failed to issue the proper identity documents to many refugees. This meant that the refugees were denied their right to administrative justice and continually suffered 'improper prejudice' (OPP n.d: 19).

The first phase of the investigation by the OPP required an inspection of the centre, conducted on 12 June 2003. According to the investigators' first point of contact, the assistant head of the centre, the centre employed a quota system, which meant accepting only cases from a particular region on particular days (which is a contravention of international laws governing refugees and their treatment). The assistant head claimed that it was necessary to employ this system as the centre was overextended in terms of its staff and technological capacity in relation to its workload.

At this point the OPP still had not advised any of the NGOs that laid the complaint of its progress with the investigation (Bhamjee interview).[32]

Reporting back for action

An official letter dated 10 October 2003 was sent by the OPP to the Chief Director: Migration at the Department of Home Affairs, highlighting the aforementioned issues and ways in which they could be rectified. The director-general formally responded to the OPP only on 20 July 2004 addressing the concerns raised by the OPP in its letter.

Again, at no time did the investigators or the Public Protector provide progress reports to the CSOs about the investigation or the response of Home Affairs. Furthermore, Bhamjee alleges that in this initial phase, when the OPP interviewed Home Affairs officials, it did not engage with the asylum seekers themselves. This is indeed surprising given that the report noted that there were asylum seekers present at the first inspection. Indeed, it would seem that, according to Bhamjee, the OPP took the word of the Home Affairs officials without sufficiently investigating the issues raised in the complaints.

The OPP has responded that from the investigators' perspectives, as well as a perusing of the file, it becomes clear that the approach in this matter was to address the identified issues in a practical way. The view was that the identified issues were not really in contention, therefore it was not necessary to go further than what the officials said, and the department was willing to accept the recommendations of the OPP without having to spend more time on gathering further evidence that would lead to the same result. This approach is borne out by the fact that the investigation and the report seemed to have served their purpose (pers. comm. M Schutte).

Following the responses of the director-general and the relocation of the centre to new premises in Rosettenville, the Public Protector conducted another inspection of the centre on 7 September 2004 (OPP n.d.). At this time, the investigators met with Mr

[32] See earlier for the OPP's response to this contention.

Ngozwana, the acting head of the centre. According to him, based on the first inspection by the Public Protector, the centre had made some important changes in July 2004. Concerning the quota system that had been employed at the previous premises, Ngozwana admitted that a quota system was still being used based on geographic regions. Therefore, the centre was taking only 25 cases each day, 4 days per week, keeping Friday aside to attend to administrative concerns.

In regards to allegations of bribes, Ngozwana claimed that this was untrue of department officials. He claimed that volunteer interpreters had asked for the bribes and he had been forced to dismiss some of those volunteers.

At the conclusion of this second phase of the investigation, the Public Protector went back to examine the laws that governed refugee status both nationally and internationally, to determine the extent to which the department may have violated the refugees' human rights and rights to administrative justice. The Public Protector concluded that whereas the department had no official policy of using a quota system or beating asylum seekers, the centre had denied the refugees their rights in contravention of both national and international law (OPP n.d.). The security guards' conduct was also deemed 'unbecoming' and it was noted that members of the public should not be subjected to this kind of conduct at a public institution (OPP n.d).

The Public Protector made several recommendations to the Department of Home Affairs at the conclusion of the investigation. Those recommendations included:

- The requirement that the department should investigate the operations and functioning of the centre and present its findings to Parliament within a six-month period;
- That issues related to staffing be finalised within two months;
- That the department hire qualified interpreters after conducting a study of the needs of asylum seekers who utilise the centre (no time limit was given for this recommendation);
- That the quota system be abolished immediately; and
- That the department liaise with the Ministry of Safety and Security about providing adequate security in the refugee offices.

The Public Protector's report was concluded on this note. There is no indication of whether the Public Protector would follow up after six months to certify that the recommendations had indeed been implemented.[33] The OPP has since advised us that such follow-ups were done during February 2005, October 2005, December 2005 and February 2006 (pers. comm. M Schutte).

According to Abeeda Bhamjee, the new premises were an improvement on the Braamfontein Centre, but shortly after the Braamfontein Centre moved to its new premises in Rosettenville, it closed down, leaving a substantial number of refugees unprovided for. According to Adv. van Garderen of LHR, conditions in the refugee

[33] During the interview with Adv. Janse van Rensburg, he was asked whether the Public Protector checks whether the recommendations made in its reports are implemented. He stated that the relevant investigator is obliged to follow up the case, and his/her manager must ensure compliance. He estimated that close to 100 per cent of the Public Protector's recommendations are implemented – although sometimes the Public Protector is forced to use Parliament as leverage to ensure implementation.

centres are still dismal. This has prompted court cases against the Department of Home Affairs, where one of the plaintiffs' claims is that asylum seekers are still unable to get access to refugee centers (Van Garderen interview).

In short, the Public Protector's report on the abuses at the Braamfontein Refugee Centre highlighted the problems and promoted action on the part of the department. In Bhamjee's view, however, the report was not substantive enough as it lacked the testimony of asylum seekers themselves. In addition, she was disappointed that the Public Protector did not engage further with the CSOs that brought the complaint against the department. CSOs would have provided further information about the problems to the OPP, and facilitated connections between the OPP and the refugees. Bhamjee's counterpart at the LHR, Jaco van Garderen, agrees that the Public Protector did not engage with the NGO consortium during the initial investigations, but notes that the office has expressed its willingness to work in the future with the LHR on administrative justice issues in the Department of Home Affairs. In addition, Van Garderen notes that the Public Protector has used his report to support the LHR and its partners in their court cases against the Department of Home Affairs. In December 2006, the procedures for receiving applications from refugees at the Marabastad and Rosettenville Refugee Reception Offices were declared unconstitutional and unlawful. Judge Pierre Rabie of the Pretoria high court also appointed a curator to assist asylum seekers and to ensure the implementation of the court order (*Pretoria News* 14 December 2006).

This case reflects some level of interaction, albeit somewhat frayed, between the Public Protector and CSOs. The CSOs involved in this process expressed their disappointment that the OPP did not consult with them during the process as the complainants and also felt that the NGOs could have helped the OPP gain access to the testimonies of the asylum seekers. All this would have gone a long way to presenting a detailed and well-balanced report. Nevertheless, the OPP's report has done much to expose the failings in the Department of Home Affairs, adding credibility to the recent court cases that have examined similar issues.

The OPP has conceded that interaction with the CSOs may have benefited the investigation and the eventual report, even if only to keep the CSOs informed of the OPP's approach to the investigation and of progress, and maybe to glean a new perspective from the inputs of CSOs (pers. comm. M Schutte).

4.7 Summary

Of the Chapter 9 institutions, the OPP has the broadest mandate to support constitutional democracy in South Africa. The main objective of this section of the report was to assess the extent to which this office relates to South Africa's civil society in fulfilling its mandate. The fact of the matter is that there is no legislative requirement that compels the Public Protector to cultivate a relationship with civil society. But the various outreach initiatives, which are primarily funded by European community donors, testify to the importance of such a relationship in order to enhance the capacity of the OPP to fulfil its mandate more successfully. Service to the rural areas and marginalised groups, in particular, has been prioritised by both the OPP and its external funders, such as the Foundation for Human Rights and DANIDA.

The OPP differs from the other two Chapter 9 institutions dealt with in this report because its interaction with actual organisations is limited in comparison to its interaction with individuals. The Public Protector is indeed well positioned to accept individual cases according to its mandate and this conforms to international norms. However, adequate linkages with CSOs, especially in terms of educating the public, would limit instances of improper cases being referred to the OPP. In addition, as has been observed, individuals tend to approach CSOs and the courts directly in their quest for administrative justice. Thus it makes sense to form a relationship with CSOs to ensure that they continue to refer complainants to the OPP. This may, even encourage others to do likewise, thus possibly increasing public access to the OPP. Finally, since the OPP has subscribed to the CSAP, which aims to improve its relations with CSOs, it can be concluded that the OPP values the contribution that CSOs can or do make towards helping it fulfil its mandate (Janse van Rensburg interview).

To improve its effectiveness as an institution, the OPP also needs to make some changes in certain aspects of its operations. This involves reaching out to the rural areas; developing a communication strategy that enables it to keep the public adequately informed about its work and progress, and thus avoid misunderstanding; and finally, working more closely with the parliamentary committee. The latter, through its oversight role, can prove useful in assisting the OPP to ensure compliance with its recommendations.

Chapter 5
Conclusion and recommendations

This study assessed the state of the relationship between the Chapter 9 institutions – CGE, SAHRC and the OPP – and relevant CSOs. The objective was to investigate whether the relationship, if any, enables Chapter 9 institutions to fulfil their mandate. Moreover, the study was meant to make recommendations on how to improve the relationship, so as to enable both sectors to realise their potential.

We argued that that CSOs are crucial in enabling Chapter 9 institutions to achieve their mandate. CSOs are spread throughout South African society, are intimately involved in similar issues as the Chapter 9s, and some work closely with local communities, making them the first port of call for residents in need of redress. This recognition is borne out by both legislative prescription, in the case of the CGE, and institutional commitment (and practice) towards working with CSOs on the part of both the OPP and the SAHRC. Similarly, CSOs are keen to work with Chapter 9 institutions because they have resources and are empowered to promote their cause and investigate complaints, and have access to officialdom to lobby for changes where necessary. Taken together CSO's are in a privileged position to assist Chapter 9 institutions establish and test the limits of rights in South Africa.

In reality, though, the relationship is either weak or non-existent. There is much disagreement over strategy. For instance, in the case of the SAHRC, CSOs feel that it has neglected socio-economic rights, but focused largely on enforcing civil rights, particularly in cases of discrimination. The focus on the latter is due to the fact that the commission finds such matters easier to address, whilst the former pits it against the state. That the commission eschews confrontation with the state, as would happen if it pursued socio-economic rights, is taken as a sign of subservience to government. This has particularly alienated social movements, which focus largely on socio-economic issues. Yet, as we have seen in the Introduction, however, testing the content and limits of socio-economic rights is precisely one of the privileged domains of Chapter nine institutions.

Reluctance to challenge state institutions partly explains the much cited lack of follow-up on recommendations, particularly in the case of the SAHRC. State institutions are not obliged to implement recommendations. Short of a court order, and where there is official resistance, such recommendations are likely to go unheeded by officialdom. Litigation thus becomes the only way of enforcing compliance. Thus the refusal to litigate in the face of clear-cut official non-compliance breeds suspicion of political capitulation on the part of the commission towards the political authority.

Disagreement also afflicts relations with the CGE. Some in this sector advocate a feminist perspective, whilst others caution against appeals for a special dispensation towards women on account of their gender, for that runs the risk of validating (mis)perceptions of inherent gender inequality. How the enforcement of gender equality should respond to specific cultural practices, which may be contrary to human rights, is another source of contention. This lack of consensus on gender

discourse and perspectives has consequently hampered effective co-operation between the CGE and CSOs.

Perceptions about lack of independence on the part of the Chapter 9 institutions also strained the relations.

What is often at issue are different conceptions of independence or autonomy. We saw that on the basis of the guidelines of the UNCHR, these institutions are independent. Yet these principles refer to operational autonomy – the ability of Chapter 9 institutions to manage their own affairs, including their finances, without interference. What civil society bodies complain about is another form of independence.

In the introduction we discussed a potential conflict at the heart of the South African state regarding the role of oversight institutions, including the judiciary and Chapter 9 institutions. In the first case, oversight bodies are expected to balance their findings with an appreciation of the consequences of such findings on the integrity of the state, including its finances and the reputation of its officials. In other words, they should not confuse the 'separation of powers' between different parts of the State. In the second, Chapter 9-type bodies are expected to act 'without fear or favour' to defend individual rights, without consideration for the reputation, etc. of government and state personalities. Let us note that the latter approach risks bringing such bodies into conflict with other state organs, whereas the former would tend to reduce the likelihood of such clashes.

The case studies in this report suggest that Chapter 9 institutions prefer not to enter into conflict with other state bodies. Let us note that this is not necessarily the same thing as bias. We were unable to find evidence that any institution unfairly favoured one party or another – though such evidence may exist. Instead, we found that the institutions in question often failed to raise or tackle certain issues out of concern that they might embarrass the government of the day.

Yet there is good reason to think that such a (conciliatory) role for Chapter 9 institutions is inappropriate in the South African context. In the first place, the spirit of the Constitution gives central stage to human rights and their protection. In the second place, Chapter 9 institutions were established precisely to give expression to these rights in people's daily lives. Even if Chapter 9 institutions choose to engage the executive and other parts of the state in a style that is more collegial than combative, their primary task is to defend individual rights, rather than protect the integrity of the state and its officials.

Other than conceptual differences, Chapter 9–CSO relations also suffer from indifference, despite declarations of commitment. The OPP, for instance, does not consider CSOs central in its referral system – that is, getting complaints forwarded to the OPP. This is partly because the absence of good relations has not hampered the volume of complaints referred to it. The same is true of the SAHRC. But a significant number of complaints are either declined or referred to other relevant bodies. This suggests that familiarity with a Chapter 9 institution does not mean the complainant is necessarily knowledgeable of the institution's work or mandate. Evidently, the public

is poorly educated about the role, functions and powers of Chapter 9s, something that a close working relationship with CSOs may rectify.

Where the relationships have existed, they have been personalised, issued-based and irregular. None of the Chapter 9 institutions has a strategy to develop continuous and permanent relations with CSOs. Relations tended to be a function of individual initiatives from both sides. In such instances, the relationship dies off as soon as one of the parties leaves the institution. Institutional relations and co-operation do not survive the inevitable fact of staff turnover. In the case of the OPP, CSOs find it so inaccessible that they prefer to forward their complaints directly to the department concerned. Distrust between the OPP and CSOs has also soured relations. The OPP charges that CSOs make a financial gain from a referral by imposing a fee on the complainant. This has further diminished the OPP's desire to work with CSOs.

5.1 Key findings

The key findings of this study can be summarised as follows:

Structured relationship between Chapter 9s and CSOs

Chapter 9s and CSOs currently do not have a structured relationship. The SAHRC had one earlier in the 1990s but it tapered off, whilst the OPP and CGE have not had one since formation. The OPP is not obliged by law to have a relationship with CSOs, and thus has not made any concerted effort to build one, as it does not consider CSOs crucial to it performing its functions. The CGE is obliged by law to form relations with civil society, but has not done so with any measure of seriousness. In the case of the SAHRC, the relationship was strained by differences over the role of the commission. It must be noted, however, that the SAHRC is now in the process of resuscitating firm relations with CSOs.

Perceptions about lack of autonomy

Some CSOs reason that Chapter 9s are not independent, but biased towards government. They ascribe this to a number of reasons, including reluctance to litigate in the case of the SAHRC, issuing findings in favour of government on a regular basis as in the case of the OPP, and because the leadership of Chapter 9s is appointed by the state president and also funded by state departments.

As regards litigation on socio-economic rights, it is not a question of whether or not such rights are justiciable. We have established that they are. The question is whether or not litigation is the best method to advance such rights. And where litigation is not pursued, does it mean that Chapter 9s are fearful of confronting the state? Evidence shows that Chapter 9s, especially the SAHRC, have been critical of government performance on socio-economic rights. Their failure to litigate owes much to scarcity of resources, and less to a lack of will to compel government to comply with socio-economic rights. This makes litigation a less appealing option for the SAHRC, since it already has relatively few resources and such legal matters are not always winnable. Nonetheless, if the role of Chapter 9 institutions is to help develop South Africa's human rights jurisprudence, then litigation might sometimes be a useful instrument.

With regard to the OPP we could not validate perceptions of political bias arising from the fact that the present incumbent is a member of the ruling party. In order to make such a determination we would have had to examine each case that involved the ruling party over which the OPP presided, to establish both how the verdict was arrived at and whether or not it was merited by the facts of the case. This is a matter that, if at all necessary, requires a different study altogether.

Suffice to say, factual (in)accuracy of the perception of Chapter 9s being biased towards the state is immaterial in so far as their relationship with CSOs is concerned. What matters is the courage of these bodies to privilege the rights of South African citizens over the reputation of state officials. The mere perception is sufficient to influence how CSOs relate to Chapter 9s. *It is the perception, therefore, that the Chapter 9s need to address – in the case of the SAHRC, if not through litigation, it must be through some symbolic gestures that demonstrate solidarity with those affected.* The public hearings on poverty a few years ago had this effect, and more of such activities by the commission would undercut perceptions of bias or indifference towards socio-economic rights.

Moreover, experience of similar bodies elsewhere suggests that independence of Chapter 9s does not necessarily mean that their relations with the state have to be characterised by hostility. After all, Chapter 9s, whilst remaining autonomous might, in fact, need to cultivate collegial relations with state institutions to see their decisions carried through. Indonesia has followed this route by appointing individuals with strong links to the ruling party, which seems to be working in that it has not compromised the independence of their human rights body and has allowed them a favourable reception and audience with officialdom.

In South Africa, though, it is precisely the political connectedness of the current Public Protector that has stirred suspicion of political bias. But it does not necessarily follow that someone with a particular political biography is automatically unsuited to such a position. What is of utmost importance, nonetheless, is that such a history or affiliation does not hinder or compromise their ability to put the rights of South African citizens, and the poor in particular, at the forefront of their thinking and their actions.

Commitment and strategies to create relations

Assisted by the European Union's CSAP, the three institutions are working on building relations with civil society. But the programme, initiated three years ago, has not achieved its objective, particularly in the case of the CGE and the OPP where structured relations with CSOs are non-existent.

By contrast, CSOs do not seem to have a similar programme in place, even though they profess to value a relationship with Chapter 9s. Some CSOs seem to be downright disdainful of the Chapter 9s because of their own ideological hostility towards the 'neoliberal' framework that regulates these institutions.

Lack of consensus on strategy and perspective

The two sectors are divided on the best way to pursue human rights. The CGE and the SAHRC prefer monitoring and mediation respectively. Conversely, CSOs believe that the CGE should also assume an advocacy role for a particular perspective on gender equality, and that the SAHRC should litigate to enforce compliance with its recommendations.

Poor public awareness and education

The public is not properly educated about the mandate and role of the three Chapter 9s. Even though the CGE and the SAHRC have received a higher number of complaints over the years, a significant portion of them have either been turned down or referred to other relevant bodies. This shows that even those who are familiar with the two institutions still do not know exactly what they do.

Lack of institutional capacity and follow-through

Chapter 9s lack capacity to form tangible and sustainable partnerships with CSOs. The CGE and the SAHRC, for instance, have either pulled out of joint campaigns prematurely or failed to assume a visible role on certain socio-economic issues. This is due to staff turnover and a lack of prompt reappointments. The CGE has been particularly hard hit by vacancies that remained unfilled for a considerable period of time.

5.2 Recommendations

Based on the aforementioned, we recommend the following:

Structured and continuous relationship

Chapter 9s should dedicate focused attention and resources to building healthy relations with CSOs. This could be done by forming a unit that deals specifically with civil society and/or by having regular meetings. This does not imply that the ad hoc relationship will cease to exist; however, most CSOs agree that a more formal relationship will be mutually beneficial.

Civil society strategy outreach towards Chapter 9s

CSOs need to formulate strategies to engage with Chapter 9s. The responsibility for forging good relations between the two sectors falls not only on the Chapter 9s, but also on the CSOs. This entails educating themselves about the Chapter 9s and relating to them in a way that promotes further collaboration, rather than acting in way that alienates these institutions. After all, CSOs themselves concede that Chapter 9s are valuable to their own activities as well, as demonstrated in the aforementioned case studies involving the aged and HIV/AIDS. Collegial relations with Chapter 9s thus carry immense benefits for CSOs.

Cultivate consensus on approach and priority issues

Gender activists and the CGE need to cultivate a common understanding of what gender discourse to pursue, as well agree on what aspects of the mandate require urgent attention – advocacy or monitoring. Their varying perspectives and emphases inhibit collaboration.

Similarly, even though the OPP responds to individual complaints, it must increase its advocacy capability, as the lack thereof deters potential complainants from using its services since they have always used CSOs.

Follow-up on recommendations

Chapter 9s should seriously consider litigation as a way of following up on recommendations arising from investigations. Where this is not viable, they should apply pressure to the relevant parliamentary committee to follow-up on recommendations and intensify their involvement in public activities that demonstrate their zeal in enforcing compliance from the state. This will go a long way towards eliminating perceptions of political bias and, consequently, encourage even more co-operation from the side of CSOs.

Another consideration is to make the recommendations of Chapter 9s binding. This would lessen the need on these institutions to litigate, something they are limited in their ability to do anyway by lack of financial resources.

Public awareness and education

Concerted effort is required to create public awareness about Chapter 9s, but also to educate the public on what these institutions actually do. Awareness about these institutions is not synonymous with knowledge of what they do. CSOs can be useful in this regard, as illustrated by the case of Ghana's CHRAJ.

Particular attention has to be focused on making local offices of the Chapter 9s more visible. National offices are disproportionately more visible and known than their provincial counterparts. This does not help in making Chapter 9s accessible, because the national office is too far for most people. Local offices are accessible and thus convenient for locals.

Community outreach

Chapter 9s should engage with CBOs in areas where outreach is needed to get access to the least advantaged, especially in rural areas.

Institutional capacity

Institutional capacity of the Chapter 9s to deal with complaints timeously should be strengthened. Inability to finalise cases on time dissuades CSOs from referring cases to the institutions. It is unacceptable that some Chapter 9s go without a full complement of commissioners for a considerable period of time. This inevitably impairs their capacity to function optimally. Both Parliament and the Presidency should be urged to make timeous appointments to avert institutional incapacity.

Proactive approach

Chapter 9s, especially the OPP, need to be proactive in a similar vein to the Czech Republic. It tarnishes the image of the OPP to remain silent or inactive in the midst of a public outcry about corruption or inefficiency within certain state departments.

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Interviews and focus group meetings

For the CGE case study

Jayne Arnott, Director (Sex Worker Education & Advocacy Taskforce/SWEAT), 19 October 2006

Lynn Davids (pseudonym), Political correspondent (Independent Newspapers), 26 October 2006

Tasneem DuPont, (CGE), 2 November 2006

Gertrude Fester, Ex-Commissioner (CGE), 20 November 2006
Janine Hicks, Director (Centre for Public Participation), 9 November 2006
Glenise Levendal, Local Government and Gender Programme Co-ordinator (Gender Advocacy Programme/GAP), 26 October 2006
Vanessa Ludwig, Programme Research Co-ordinator (Gender Equity Unit, University of the Western Cape), 27 October 2006
Dr Thenjiwe Magwaza, Director (Centre for Gender Studies, University of KwaZulu-Natal), 20 October 2006
Maharaj, Director (Midlands Women's Group), 21 November 2006
Shanaaz Mathews, Senior Scientist (Gender and Health Unit, Medical Research Council/MRC), 31 October 2006
Lungiswa Memela, Director (Western Cape Network of Violence Against Women/WCNVAW), 27 October 2006
Nonhlanhla Mkhize, Director (Durban Gay and Lesbian Centre), 27 October 2006
Prof. Robert Morell, Director. (School of Education Studies, University of KwaZulu-Natal), 26 October 2006
Evanshnee Naidoo, Community Liaison (Durban Gay and Lesbian Centre), 27 October 2006
Liezl Oliver, Ms (CGE), 2 November 2006
Mfanozelwe Shozi, former KwaZulu-Natal Co-ordinator (CGE), 24 November 2006
Judith Smith-Vialva, Director (Southern African Media and Gender Institute/SAMGI), 26 October 2006

CGE focus group (9 November 2006)

For the SAHRC case study
Goolam Aboobaker, Member of the Parliamentary Committee (Presidency), 6 November 2006
Zackie Achmat, Chairperson (TAC), 23 November 2006
Tagbo Agdazue, Programme Manager (African Institute of Corporate Citizenship/AICC), 18 October 2006
Jonathan Berger, Senior Researcher (Aids Law Project ALP), 14 December 2006
Sheila Cameron, Chairperson, Parliamentary Justice Committee, 20 September 2006
Judith Cohen, Parliamentary Officer (SAHRC), 14 December 2006
Rudy Dicks, Labour Market Policy Co-ordinator (Congress of South African Trade Unions/Cosatu), 2 December 2006
Syd Eckley, Independent Consultant and former Chairperson (Age-in Action), 1 December 2006
Corinna Gardner, Chief Officer: Social Policy (Business Unity South Africa/BUSA), 19 October 2006
Paul Graham, Executive Director (Institute for Democracy in South Africa/IDASA), 23 October 2006
Rev. Teboho Klass, Director: Health Programme (South African Council of Churches/SACC), 10 November 2006
Jody Kollapen, Chairperson (South African Human Rights Commission/SAHRC), 17 November and 12 December 2006
Mangaliso Kubheka, National Organiser (Landless People's Movement/LPM), 19 October 2006
Kamal Makan, Manager (Security of Farm Workers Project – LHR), 20 October 2006
Tom Manthata, Commissioner: Old persons (SAHRC), 27 November 2006
Sindiswa Mathiso, Co-ordinator: Old persons (SAHRC), 27 November 2006
Sue Mbaya, Programme Manager (South African Regional Poverty Network/SARPN), 24 October 2006
Ashraf Mohamed, Co-ordinator: Cape Town Office (SAHRC), 13 December 2006
Martha Mokholo, CEO (Age-in-Action), 9 and 30 November 2006
Sipho Mthathi, Secretary General (Treatment Action Campaign/TAC), 12 December 2006

Walter Nene, Assistant, Complaints handling (SAHRC), 15 December 2006
Steven Ngobeni, Co-ordinator: HIV AIDS (SAHRC), 29 November 2006
Trevor Ngwane, National Organiser (Anti-Privatisation Forum), 20 October 2006
John Pampallis, Director (Centre for Education Policy Development/CEPD), 23 October 2006
Tseliso Thipanyane, CEO (SAHRC), 9 November 2006
Mary Turok, Member of Parliament and former chairperson (Age-in Action), 4 December 2006
Jaco van Garderen, Project Co-ordinator (Lawyers for Human Rights/LHR), 29 October 2006
Margaret Van Zyl, President (South African Association of Homes for the Aged/SAAHA), 30 November and 1 December 2006
Tracy Vienings, Program Director, (Is not an acronym CARE), 23 October 2006
Vincent Williams, Co-ordinator/Project Manager (Southern African Migration Project/SAMP), 20 October and 6 November 2006
Sbu Zikode, Chairperson (Abahlali Base Mjondolo/ABJ), 3 November 2006
Khaya Zweni, Head of Legal Services Department (SAHRC), 24 November 2006

SAHRC focus group (25 October 2006)

For the OPP case study
Abeeda Bhamjee, (then of Wits Law Clinic), telephonic interview 23/11/06
Vincent Daniels, Director (Cape Town Society for the Blind), 13 November 2006
Joanna Harding, Director (Social Change Assistant Trust), 26 October 2006
Rudolph Jansen, National Director (LHR), 1 November 2006, 22 November 2006 (telephonic interview)
Ruthven Janse van Rensburg, Provincial Co-ordinator, (OPP), 22 November 2006
Mandu Malane, Co-ordinator (OPP–Civil Society Advocacy Programme), 20 November 2006
S. Mali, Provincial Chair (South African Democratic Teacher's Union/SADTU), 2 November 2006
Martha Mokholo, CEO (Age-in Action), 9 November 2006
Brian Nair, Legal Aid Board, 23 November 2006
M. Schutte, OPP, 22 January 2007
Alison Tilley, Manager (Open Democracy Advice Centre/IDASA), 23 October 2006