IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO 2107/2020

CASE NO 1731/2020

In the matter between:

THE PUBLIC PROTECTOR	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Third Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL AND RELIGIOUS AND LINGUISTICS COMMUNITIES	Fourth Respondent
THE COMMISSION FOR GENDER EQUALITY	Fifth Respondent
THE AUDITOR-GENERAL OF SOUTH AFRICA	Sixth Respondent
THE INDEPENDENT ELECTORAL COMMISSION	Seventh Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Eighth Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Ninth to Twenty-Second Respondent

as Amicus Curiae:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus
CORRUPTION WATCH	Second Amicus

and

In the matter between:

DEMOCRACY IN ACTION NPC	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE NATIONAL ASSEMBLY OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fifth Respondent
MINISTER OF WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Sixth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Seventh Respondent
THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent
THE AUDITOR GENERAL OF SOUTH AFRICA	Ninth Respondent
THE COMMISSION FOR GENDER EQUALITY OF THE REPUBLIC OF SOUTH AFRICA	Tenth Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES OF THE REPUBLIC OF SOUTH AFRICA	Eleventh Respondent
as Amicus Curiae:	
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus
CORRUPTION WATCH	Second Amicus

HEADS OF ARGUMENT ON BEHALF OF CASAC and CORRUPTION WATCH AS *AMICI CURIAE*

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INTRODUCTION

1. In 2016 our highest court held that "the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation…. the Public Protector was created, not by national legislation but by the supreme law, to strengthen our constitutional democracy".[1] To ensure the functionality of this important office and to enable it to perform its duties without fear, favour or prejudice, the Constitution has sought to firmly entrench its independence. Our courts have, however, also warned that "If that institution falters... the nation loses an indispensable constitutional guarantee".[2]

2. To ensure the effectiveness of the Office of the Public Protector, its occupant must unequivocally demonstrate the independence, credibility, impartiality and competence that inspires confidence and trust from the public it ought to protect. Removal by the National Assembly ("**NA**"), envisaged in the Constitution, is the ultimate form of accountability for those who fall short of these exacting standards. No Public Protector's tenure is impenetrable.

3. The issue in this case is whether the procedure adopted by Parliament to consider the suitability of the current Public Protector to continue to occupy her office gives effect to the principle of accountability and protects her rights.

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[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) at para 50.

[2] *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para 6.

4. Prior to the term of the incumbent Public Protector, there was but a single instance[3] in 2011 when our courts found reason to criticise this institution. Since 17 August 2017[4], the current Public Protector has come under trenchant and repeated criticism from our courts in a series of judgments which, inter alia, have accused her of acting with bias, committing acts of misconduct or demonstrating incompetence.

5. Consequently, the Democratic Alliance ("**DA**") as a political party represented in the NA tabled several motions calling for the removal of the current Public Protector in light of the scathing judgments by our courts.[5] After the third such attempt by the DA, the Public Protector relying on the Constitutional Court judgment (which dealt with the lack of rules providing for the impeachment of the President) advised the Speaker of the National Assembly ("**the Speaker**") that as the National Assembly Rules ("**NA Rules**") did not set out a procedure, that a removal process could not be initiated against her.[6] The Speaker and the Portfolio Committee on Justice and Correctional Services consequently requested the National Assembly Rules Committee to draft rules setting out a procedure for the removal of members of State Institutions Supporting Constitutional Democracy as

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[3] *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA)

[4] In *SARB v PPI and Others* 2017 (6) SA 198 (GP).

[5] *Absa Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP); *Democratic Alliance v Public Protector and a related matter* [2019] 3 All SA 127 (GP); *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution* [2019] 4 All SA 79 (GP); *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC).

[6] *Public Protector v Speaker of the National Assembly* 2020 (12) BCLR 1419 (WCC) at para 33.

listed in Chapter 9 of the Constitution ("**Chapter 9 Institutions**") "to ensure fairness of the process."[7]

6. In keeping with the gravity of removing the head of a constitutionally entrenched independent institution, the NA amended the 9th edition of the NA Rules by inserting a 17-step procedure ("**the Removal Rules**") to be followed when considering the removal of such an incumbent. The Western Cape High Court noted that "most if not all of the political parties participated in the discussions and in the drafting process of the new Rules".[8] While the Constitution provides a high threshold for the removal of the Public Protector (namely a vote supported by at least two-thirds of the members of the NA) to entrench the independence of the Public Protector, the Removal Rules for its part added a number of additional procedural safeguards to ensure fairness and due process.

7. After the Removal Rules were adopted, the DA tabled a substantive motion in terms thereof to initiate a removal process.[9] While their initial motion was withdrawn, the DA submitted a subsequent motion alleging that the Public Protector committed five counts of misconduct and/or incompetence.[10] In response, the Public Protector launched this court challenge to stymie the enquiry.

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[7] Id at para 2.

[8] Id at para 47.

[9] Speaker's AA, p 230-232; 94-96.

[10] Speaker's AA, p 242-244, 125 as well as Annexure TRM60, p 540-550.

8. In Part A, the Public Protector sought to interdict the enquiry from proceeding, but this was dismissed with costs by the full bench of this court.[11] This court similarly dismissed her application for leave to appeal to the Supreme Court of Appeal ("**the SCA**"). The Public Protector in a last-ditch attempt to interdict these proceedings, has now appealed directly to the Constitutional Court.

9. In Part B, the Public Protector seeks orders, inter alia, declaring that:

9.1 the Removal Rules are invalid;

9.2 in the alternative, that the Removal Rules may not operate retrospectively; and

9.3 the decision of the NA to adopt the Removal Rules, be reviewed and set aside.[12]

10. In Part B, the Public Protector raises every conceivable procedural and substantive objection to the Removal Rules, creating the impression in the public mind that she is seeking to delay and/or avoid the accountability process and thereby ensure that she rides out her full term without having to answer to the very serious allegations against her. The Western Cape High Court has however noted that the Removal Rules, are "*principally in*

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[11] *Public Protector v Speaker of the National Assembly* 2020 (12) BCLR 1419 (WCC).

[12] Amended NOM, prayers 1, 2 and 3.

the public interest"[13] and warned that courts "*should not lightly interfere with such processes*…"[14]

11. The DIA application is significantly similar to the Public Protector's application in that it also seeks to thwart the enquiry into the conduct of the Public Protector. It does so by seeking the following declarations, *inter alia*:

11.1 that the Removal Rules be declared unconstitutional on the basis that they contravene sections 181(3) and 194 of the Constitution;[15]

11.2 that Parliament failed to carry out its constitutional obligation to pass legislation which gives effect to the removal provisions contained in section 194 of the Constitution in respect to the Public Protector and other Chapter 9 Institutions;[16] and

11.3 that the national legislation governing the various Chapter 9 Institutions are unconstitutional for failing to provide appropriate circumstances under which the heads of Chapter 9 Institutions may be removed from office.[17]

12. Given the similarities between the two matters, the Public Protector and DIA matters will be heard together at the same hearing. For the sake of

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13 *Public Protector v Speaker of the National Assembly* 2020 (12) BCLR 1419 (WCC), at para 119.

14 Id at para 127.

15 DIA NOM, prayer 8.

16 DIA NOM, prayer 1.

17 DIA NOM, prayers 2-7.

practicality, these submissions on behalf of CASAC and Corruption Watch are both in respect of the Public Protector and the DIA matters.

13. While the applicant in the DIA matter raises challenges pertaining to the removal of members of all Chapter 9 Institutions, including that various legislation is unconstitutional and that Parliament allegedly failed to fulfil its constitutional obligations to enact legislation providing for removal of Chapter 9 incumbents, CASAC and Corruption Watch confine their submissions to matters relating to the holding of the Public Protector accountable via the Removal Rules.

14. In our view, the DIA challenges pertaining to Chapter 9 Institutions other than the Public Protector, mostly fall within the exclusive jurisdiction of the Constitutional Court. Secondly, and more importantly, CASAC and Corruption Watch intervened in these proceedings as they are concerned that notwithstanding the trenchant criticisms made against the Public Protector by our courts since mid-2017, and which are in the media and public eye on a daily basis, the incumbent seems disinclined to participate in this process and thereby account to the NA for her actions and conduct.

15. Equally concerning are the stratagems deployed in seeking to eschew the constitutional accountability process. In this regard, the Public Protector levels baseless yet profoundly serious accusations of current and future impropriety against the President, the Speaker, elected members of the NA as well as the NA as an institution, for trying to hold her accountable. Of late, inappropriate and very virulent attacks have even been made against members of the judiciary. This exacerbated to such an extent that

in *Gordhan v the Public Protector and Others*[18] the court referred the unbecoming attack by the Public Protector on a judge to the Legal Practice Council. In yet a further incident, the Public Protector faces three criminal charges for alleged perjury committed during court proceedings.[19]

16. From the purview of CASAC and Corruption Watch, such conduct negates the *raison d'etre* of a Chapter 9 Institution – namely to enhance and further constitutional democracy and accountability under the Constitution. The approach adopted not only damages the standing of the Office of the Speaker, the NA as an institution of democratic governance, but it equally impugns the credibility of the office of the Public Protector itself, which is designated by our Constitution to be the paragon of accountability.

17. The remainder of these submissions are structured as follows:

17.1 First, we set out why CASAC and Corruption Watch ought to be admitted as *amici curiae;*

17.2 Second, we delineate the relevant principles pertaining to the establishment of the office of the Public Protector;

17.3 Third, we describe the significant powers of the Public Protector;

17.4 Fourth, we set out the accountability standards applicable;

17.5 Fifth, we briefly describe the Removal Rules;

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[18] *Gordhan v the Public Protector and Others* 2020 JDR 2741 (GP).

[19] Available at https://ewn.co.za/2020/12/18/mkhwebane-to-cooperate-with-npa-over-perjury-charges-says-spokesperson.

17.6 Sixth, we set out a selection of the latest criticisms of the Public Protector by our courts which demand accountability to Parliament given their adverse, serious and considered nature;

17.7 Seventh, we describe the appointment and removal of ombudspersons in foreign jurisdictions;

17.8 Eighth, we delineate the international legal instruments and positions of international ombuds organisations as well as what constitutes best practice;

17.9 Last, we provide concluding remarks.

APPLICATION TO INTERVENE AS AMICI CURIAE IN THESE PROCEEDINGS

18. On 18 February 2020 CASAC and Corruption Watch sought the consent of the parties to be admitted as *amici curiae* in Part B to the Public Protector application. The following parties consented thereto: the Public Protector, Speaker, President, South African Human Rights Commission, Commission for Gender Equality, Auditor General, Electoral Commission, DA, IFP, UDM, ATM; Good Party; and the PAC. No party cited in this application objected to either CASAC or Corruption Watch being admitted as an *amicus curiae.*

19. On 12 March 2020, CASAC and Corruption Watch also sought the consent of the parties to be admitted as *amici curiae* in the DIA matter. The following parties consented thereto: DIA, Speaker; Public Protector; SAHRC; and the Commission for Gender Equality. None of the parties

cited in the DIA matter objected to either CASAC or Corruption Watch being admitted as an *amicus curiae.*

20. The applications to be admitted as *amici curiae* in Part B of the Public Protector application and the DIA application were served and filed on 30 October 2020. As the parties agreed that the matters be heard together by a full bench from 1 to 5 February 2021 and that CASAC and Corruption Watch be admitted as *amici curiae,* draft orders to this effect were submitted to the Judge President on 23 November 2020 for his approval. For this reason, an application for a hearing to be admitted as *amici curiae* was not set down. In the event that the Judge President does not assent to the admission of the *amici curiae* as per the agreement of the parties reflected in the draft orders, we briefly make out a case below why CASAC and Corruption Watch ought to be allowed to intervene in both applications.

Interests of the *amici*

21. CASAC and Corruption Watch play an active role to foster the rule of law, constitutional democracy, accountability, good governance, transparency and the eradication of corruption, amongst others. Given the important role that the Public Protector plays achieving the above goals, both organisations are concerned to ensure that the Public Protector accounts to the NA in this regard. The aim thereof is not to seek and ensure the removal of the incumbent *per se*, but rather to ensure that the constitutional obligation of accountability is not rendered nugatory.

22. In the view of the *amici curiae*, it is crucial that where there are allegations which are sufficiently serious to warrant the removal of a head of a Chapter 9 Institution, should they be true, an enquiry must be held expeditiously as this protects both the incumbent and the status and dignity of the Chapter 9 Institution concerned. By contrast, lingering untested serious allegations undermines not only the Office of the Public Protector but the entire constitutional landscape.

23. CASAC as a voluntary association seeks to advance the South African Constitution as the platform for democratic politics and the transformation of society in line with constitutional values. CASAC's principles are based on the core values of the Constitution, including democracy, the rule of law, public accountability and open governance. The Advisory Council and Honorary Members of CASAC include retired Justices of the Constitutional Court and other retired judges, former university vice-chancellors, senior advocates, academics and social justice activists.

24. In its work in the defence and promotion of constitutionalism, CASAC has monitored and ensured the accountability of the Public Protector to our courts. In *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector*[20], CASAC sought an order declaring that the Public Protector failed to discharge her duties in terms of the Constitution as well as the Public Protector Act, and that her report into the Vrede Dairy Project should be

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[20] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 (7) BCLR 882 (GP)

set aside. In May 2019, the North Gauteng High Court found against the Public Protector and indeed ordered that her report be set aside and declared unlawful, unconstitutional and invalid. CASAC also is an active litigant, cited as a respondent, in the series of cases arising out of the review of the former Public Protector's *State of Capture* report by former President Zuma.

25. Corruption Watch is a non-profit company registered in terms of the *Companies Act* 71 of 2011. Corruption Watch gathers and analyses information to investigate reports of alleged acts of corruption, especially those which have the most serious impact on society. These findings are shared with relevant authorities, the public, like-minded non-governmental organisations and public sector bodies. Corruption Watch is also an accredited chapter of Transparency International with the purpose of stopping corruption and promoting transparency, accountability and integrity at all levels and sectors of South African society. In this regard, Corruption Watch has monitored and reported on the conduct and investigations of the Office of the Public Protector.

26. In 2016, Corruption Watch intervened as *amicus curiae* in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[21], where an order was sought to have the former Public Protector's report, on the former President's private residence in Nkandla, enforced.

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[21] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC).

27. Corruption Watch also intervened as *amicus curiae* in *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others*[22]. In this matter the SCA found that the remedial action set out in reports of the Public Protector were of legal effect, and, unless set aside on judicial review, organs of state and public officials may not ignore it.

28. In 2019, in light of its mandate to promote transparency and accountability, following calls for an inquiry into allegations against the current Public Protector, Corruption Watch requested the Speaker of the NA and the Portfolio Committee on Justice and Correctional Services to expedite the process of investigating the incumbent's fitness to hold office.

The submissions to be made and their relevance to these proceedings

29. *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* the Constitutional Court held that the relevance of an *amicus*' contribution to a case must be assessed in the following manner:

> "*The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to*

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[22] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA).

the court. That duty is to provide cogent and helpful submissions that assist the court." [23]

30. Whether the contribution of an *amicus curiae* will be of assistance to the court is assessed in the following terms:

"*Thus, the role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A(2) describes an amicus as an "interested party in a constitutional issue raised in proceedings". … the new Rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues*."[24]

31. In the Public Protector and DIA applications, the evidence and submissions by CASAC and Corruption Watch will be of assistance to the court given that it shall provide:

31.1 an overview of the Office of the Public Protector, its independence and why such bodies must nevertheless be accountable to the NA;

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[23] *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5.

[24] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) at para 26.

31.2 a parliamentary law perspective on why the NA is the appropriate body to hold Chapter 9 Institutions accountable;

31.3 a summary of certain findings in additional court cases revealing the bias and further serious acts of misconduct and incapacity by the current Public Protector and which impacts on the standing, credibility, independence, competence and effectiveness of the Office of the Public Protector;

31.4 comparative research on ombuds in foreign and international law demonstrating that no other jurisdiction contains such detailed procedural safeguards as found in the Removal Rules; and

31.5 research on international best practice on the removal of ombuds.

32. It is respectfully submitted that none of the parties have indicated that they will deal with the above matters. In the circumstances, the *amici curiae* ought to be admitted in both the Public Protector and the DIA matters.

THE RELEVANT CONSTITUTIONAL PRINCIPLES

The independence of the Public Protector and other Chapter 9 Institutions

33. De Vos notes that given our oppressive and racially divided past, in 1994:

> "*state institutions had little or no credibility, were profoundly distrusted by the majority of the people and were not accountable in any credible manner … transforming the South African society from an intensely oppressive into an open and democratic society would require more than a change in the system of government. It was*

necessary to create a set of credible independent institutions to strengthen constitutional democracy and to promote an open and accountable government, steeped in the disciplining paradigm of human rights."[25]

34. Section 181(1) of the Constitution therefore established the Public Protector and other Chapter 9 Institutions. While each institution plays a vital role in supporting and safeguarding our democracy and ensuring the realisation of the values contained in the founding provisions of our Constitution as well as the Bill of Rights, the Public Protector plays a particularly significant role. In this regard the Constitutional Court noted that:

"*The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well resourced*

[25] De Vos, P 'Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy' in Chirwa and Nijzink (eds) *Accountable government in Africa (2011, United Nations University Press, 2011) at p 160.*

Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance."[26]

35. To protect and ensure the functioning of the Public Protector and other Chapter 9 Institutions, section 181(2) provides that they "*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*". To emphasise their independence, section 181(3) further provides that other organs of state, through legislative and other means, "*must ensure their independence, impartiality, dignity and effectiveness*", while section 181(4) requires that "*no person or organ of state may interfere with the functioning of these institutions*."

36. While the above provisions ensure the independence of Chapter 9 Institutions, section 181(5) provides for the countervailing but equally important constitutional imperative of holding these institutions accountable and stipulates expressly that they "*are accountable to the National Assembly and must report on their activities and the performance of their functions at least once a year*."

37. To fulfil their functions, it is "*essential that these institutions … enjoy broad support and play an important role in the government's constitutional obligations of respect, promotion, protection and fulfilment of the rights*

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[26] *Economic Freedom Fighters v Speaker of the National Assembly and Others* at para 52.

contained in the Bill of Rights."[27] To ensure that the Public Protector and other Chapter 9 Institutions enjoy such broad support and acceptance, section 193(1) of the Constitution requires that incumbents must be South African citizens who are fit and proper persons to hold the particular office.

38. Furthermore, in terms of section 193(5), while the President makes the appointments, in the case of the Public Protector and the Auditor-General, the NA must first adopt a resolution recommending such a person with a supporting vote of at least 60 percent of its members, while in the case of the remainder of the Chapter 9 Institutions, with a majority vote in the NA.

39. To further ensure their independence, section 194(1) of the Constitution provides that the Public Protector, the Auditor-General and a member of a Commission may only be removed on:

> "*(a) the ground of misconduct, incapacity or incompetence;*
>
> *(b) a finding to that effect by a Committee of the National Assembly; and*
>
> *(c) the adoption by the Assembly of a resolution calling for that person's removal from office.*"

40. Given the important and difficult role the Public Protector is required to play in particular vis-à-vis the Executive branch, in the first *Certification*

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[27] Bekink, B, *Principles of South African Constitutional Law* (2nd edition, Lexis Nexis 2016) at page 581.

Judgment[28] the Constitutional Court held that the proposed removal provisions for the Public Protector mooted in NT194 did not meet the requirements of sufficiently securing independence as per Constitutional Principle XXIX. In this regard the Constitutional Court held:

> "*The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing the removal of the Public Protector from office do not meet the standard …. NT 194 does require that a majority of the NA resolve to remove him or her, but a simple majority will suffice. We accept that the NA would not take such a resolution lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken. These considerations themselves suggest that NT 194 does provide some protection to ensure the independence of the office of the Public Protector. Nevertheless we do not think it is sufficient in the light of the emphatic wording of CP XXIX, which requires both provision for and safeguarding of independence and impartiality...*"[29]

41. Similar considerations applied to the Auditor-General. Consequently, section 194(2)(a) of the Constitution today provides that in the case of both the Public Protector and the Auditor-General, a resolution to remove

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[28] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC).

[29] Id at para 163.

them from office must be adopted by a supporting vote of at least two-thirds of members of the NA. By contrast, section 194(2)(b) provides that a resolution passed by a simple majority suffices to remove members of the other commissions established in Chapter 9 of the Constitution.

The powers and functions of the Public Protector

42. Section 182 of the Constitution provides that the Public Protector has the power, as regulated by national legislation:

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

43. Section 182(2) further empowers the Public Protector and provides that she or he has the additional powers and functions prescribed by national legislation. In this regard, section 6(4)(a) of the *Public Protector Act* empowers the Public Protector to investigate and report on, *inter alia*, maladministration in connection with the affairs of government at any level; abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct; an improper or dishonest act, or omission or other offences as referred to in the *Prevention and Combating of Corrupt Activities Act*, 12 of 2004; the improper or unlawful enrichment, or receipt of any improper advantage as a result of an act or omission in the public

administration or in connection with the affairs of government at any level; or an act or omission by a person in the employ of government at any level, or a person performing a public function.

44. In addition, section 4 of the *Executive Members Ethics Act* 82 of 1998 ("**the Ethics Act**") empowers the Public Protector to investigate alleged breaches of the Executive Ethics Code by the President, Deputy President, Members of Cabinet, Deputy Ministers as well as members of Provincial Executives.

45. In 2015, the SCA in *South African Broadcasting Corporation v Democratic Alliance and Others*[30] noted that, while the powers granted to the Public Protector in terms of s 182(1)(c) of the Constitution far exceed those of ombuds in comparable jurisdictions,[31] and even though our Constitution set high standards for the exercise of public power by State institutions and officials:

> "*those standards are not always lived up to, and it would be naïve to assume that organs of State and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond*".

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[30] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) .

[31] Id at para 43.

46. As such the SCA concluded that the findings and remedial measures recommended in an investigation report by the Public Protector are binding:

> "*The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct the implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation."*[32]

47. The aforementioned *dicta* was approved by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly.*[33] On the strength of this authority, the full bench of the Pretoria High Court subsequently held in *President of the Republic of South Africa v Office of the Public Protector*[34] that the *Public Protector's Report entitled 'State of Capture'.. is binding.. and that* [t]*he President is directed to appoint a*

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[32] Id at para 52.

[33] Op cit.

[34] *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (5) BCLR 609 (GP).

commission of inquiry within 30 days, headed by a Judge solely selected by the Chief Justice who shall provide one name to the President."[35]

48. Given the specialised functions of the Public Protector and the enormous power which she or he wields, it is a requirement that the incumbent possess a high degree of both skill and competence and as such section 1A(3) of the Public Protector Act determines that such a person must be a South African citizen who is a fit and proper person to hold such office, and who:

"*(a) is a Judge of a High Court; or*

(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or

(c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or

(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or

(e) has, for a cumulative period of at least 10 years, been a member of Parliament; or

[35] Id at para 191.

(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years."

49. Any finding that a Public Protector acted in an unfit or improper manner, or that she or he lacks the requisite competencies does untold harm to the Office of the Public Protector. A pattern of such findings, especially by an independent judiciary, is catastrophic.

50. While in this application and elsewhere, the incumbent Public Protector has claimed that her position is akin to that of a High Court judge, the SCA in *South African Broadcasting Corporation v Democratic Alliance and Others* considered this to be *"an inaccurate comparator*".[36] Govender and Swanepoel agree stating:

> "*As the [Public Protector] plays an investigative and adjudicative role, it performs functions that are materially and constitutionally different from those performed in a court of law. In terms of the separation of powers doctrine, officers performing investigative functions cannot simultaneously be classified as court officials. … some Chapter 9 institutions that are empowered to take decisions straddle the continuum between the bureaucracy and the judiciary. The [Public Protector], like the SAHRC, is a structure of government. Neither*

[36] *South African Broadcasting Corporation v Democratic Alliance and Others* at para 45.

body, however, are members of the bureaucracy, nor can they be described as courts."[37]

51. The most compelling reason why the Public Protector is not akin to a judge of the High Court is however because the Constitution and the Public Protector Act expressly provides that the Public Protector is directly accountable to the NA and must report to it. How that is to occur is at the heart of this case.

Accountability of the Public Protector to the National Assembly

52. Section 1(d), a founding provision of the Constitution, stipulates that South Africa is founded on, inter alia, "*a multi-party system of democratic government [and] to ensure accountability, responsiveness and openness*".

53. In terms of section 46 of the Constitution, the NA consists of members elected in terms of an electoral system which results, in general, in proportional representation. Section 42(3) further provides that the NA composed of these members, is elected to represent the people and to ensure government by the people under the Constitution.

54. Section 55(2)(b)(ii) of the Constitution furthermore expressly mandates the NA to provide mechanisms to maintain oversight of any organ of state, which includes the Public Protector and any other Chapter 9 Institution.

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[37] Govender, K and Swanepoel, P "The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of SABC v DA and EFF v Speaker of the National Assembly 2016 3 SA 580 (CC)" in PER 2020 (Vol 23), page 15.

The NA Removal Rules which were made in terms of section 57 of the Constitution is one such mechanism.

55. Section 181(5) which provides that the Chapter 9 Institutions "*are accountable to the National Assembly"* dovetails congruently with the aforementioned powers and functions of the NA. This is further confirmed in section 8(2)(a) of the Public Protector Act which provides that "[*t]he Public Protector shall report in writing on the activities of his or her office to the National Assembly at least once every year*".

56. In *United Democratic Movement v Speaker of the National Assembly and others (Council for the Advancement of the South African Constitution and others as amici curiae)* the Constitutional Court held that *"accountability is necessitated by the reality that constitutional office-bearers occupy their positions of authority on behalf of and for the common good of all the people. It is the people who put them there, directly or indirectly, and they, therefore, have to account for the way they serve them*." [38]

57. The Constitutional Court further held that:

> "*Public office… comes with a lot of power. … Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.*

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[38] *United Democratic Movement v Speaker of the National Assembly and others (Council for the Advancement of the South African Constitution and others as amici curiae)* 2017 (8) BCLR 1061 (CC) at para 33.

This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office-bearers, in all arms of the State, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And the objective is to arrest or address underperformance and abuse of public power and resources.

…When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms. Those measures range from being voted out of office by the electorate to removal by Parliament through a motion of no confidence or impeachment. These are crucial accountability-enhancing instruments that forever remind the [incumbent] of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests."[39]

An overview of the Removal Rules

58. Removal from office by the NA is the ultimate accountability mechanism. In the case of the Public Protector, this can only be done by a resolution with a supporting vote of at least two-thirds of the members of the NA. Since the introduction of the Removal Rules, there are now a multitude of

[39] Id at paras 7-9.

procedural safeguards that have to be complied with before reaching this final decision.

59. The 17 steps of the Removal Rules have been succinctly summarised in the Speaker's heads of argument from paragraphs 119 to 144. We note the significant role of the Speaker of the NA who, as the neutral representative and custodian of the NA in its collective capacity, guides the process step by step to ensure compliance and fairness. In this regard:

59.1 After a member of the NA tables a clearly formulated and substantiated charge against a member of a Chapter 9 Institution, the Speaker makes an assessment of whether the motion is compliant with the criteria set out in Removal Rule 129R.

59.2 If the Speaker is so satisfied, she or he notifies the political parties represented in the NA within a reasonable time to recommend nominees to an independent panel who will conduct a preliminary enquiry in terms of Removal Rule 129X.

59.3 The Speaker thereafter establishes the said panel, which must be independent and possess the necessary legal competencies. In so doing, the Speaker must also give due consideration to the nominations made by all political parties.

59.4 Once established, the Speaker must provide the independent panel with the motion and the necessary supporting documents and in terms of Removal Rule 129T must promptly thereafter inform both the NA and the President of this development.

59.5 After the independent panel deliberates on the matter at hand and compiles a report of its recommendations, the Speaker informs the NA thereof in terms of Removal Rule 129Z.

59.6 Should the NA take a decision that an enquiry to remove the incumbent be proceeded with or that the President must suspend the incumbent, the Speaker must inform the President thereof and must establish a section 194 committee.

59.7 The Speaker furthermore determines the composition and size of the section 194 committee provided that each party represented in the NA is allowed one representative on the committee and in substantially the same proportion in which they are represented in the NA except where the number of members of the committee does not allow for all political parties to be represented.

59.8 At the committee stage of the proceedings, the inquiry must be conducted in a reasonable and procedurally fair manner, within a reasonable timeframe; the incumbent must be afforded the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice.

59.9 When the section 194 committee reports back to the NA, it must ensure that the report includes the reasons for its decision and that all the views expressed in the committee, including any minority views, are contained in the report.

59.10 The Speaker thereafter schedules a meeting of the NA to debate and consider the committee's report.

59.11 If the NA adopts a resolution to remove the incumbent with the requisite majority, the Speaker must convey the decision of the NA to the President who will then remove the incumbent.

60. Thus, whereas section 194 of the Constitution provides that Public Protector may only be removed from office on the grounds of misconduct, incapacity or incompetence and on a finding to that effect by a committee of the NA, adopted by a supporting vote of at least two-thirds of the members of the NA, the Removal Rules not only introduce certainty, but also add the aforementioned procedural safeguards to ensure fairness and due process.

61. It is regrettable that, instead of the Public Protector participating in the mandated accountability process and responding to the profoundly serious allegations against her, she has resorted to every conceivable delay in order to escape being held accountable. This not only causes reputational damage to the office of the Public Protector, but it also damages the credibility of the NA as it is seen to be unable to perform its constitutionally mandated oversight functions over the Public Protector. The long delay caused by the incumbent Public Protector is furthermore at variance with the constitutional imperative contained in section 237 of the Constitution which requires that *"[a]ll constitutional obligations must be performed diligently and without delay*".

FURTHER JUDGMENTS BY OUR COURTS INDICATING INCOMPETENCE, MISCONDUCT AND BIAS ON THE PART OF THE PUBLIC PROTECTOR

62. In addition to the scathing judgments by our courts against the current Public Protector which formed the basis of the complaints by the DA removal requests, there have been several further judgments which are of grave concern and demonstrate further acts of misconduct, incompetence and bias by the current Public Protector.

63. It is significant to note the escalating intensity of the findings and criticisms made against the Public Protector by our courts. While we have endeavoured to avoid prolixity, certain of these judgments contain so many remarks delineating serious misconduct or incompetence on the part of the Public Protector, that it would be remiss of us not to refer to them.

64. These are brought to the Court's attention to demonstrate the obvious harm to the credibility and consequent effectiveness of the Office of the Public Protector of this pattern of findings. Unanswered, the public's faith in the Public Protector will dwindle and erode. The NA must act to provide the Public Protector with a fair and meaningful opportunity to address these troubling findings. Exoneration by the NA may restore some of the lustre lost by the Office of the Public Protector due to these successful reviews of the incumbent's service.

65. In President of the Republic of South Africa and Another v Public Protector and Others (Information Regulator as Amicus Curiae)[40] the High Court found that:

65.1 "*For some inexplicable reason, the Public Protector reframed the paragraph and the test… The Public Protector replaces 'wilfully' with 'deliberately or inadvertently'… the* ***Public Protector introduced the element of inadvertent misleading of Parliament into the [Ethics] Code. This is entirely at odds with the text of the Code****. It also introduces an entirely different test…: whether in legal terms, or even in common sense terms, there is a material difference between conduct that is wilful and that which is inadvertent. The one simply cannot be mistaken or interchanged with the other….*"[41] (emphasis added)

65.2 "*She* ***made the firm finding that****, based on PRECCA,* ***the evidence at her disposal established a 'prima facie suspicion of money laundering****.'* ***We know that she had no evidence even remotely suggesting that money laundering was at play****. We also know that PRECCA has nothing to do with money laundering.*"[42] (emphasis added)

65.3 "*Clearly the* ***Public Protector had no foundation in fact and in law to arrive at her finding that the President had involved himself in***

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[40] *President of the Republic of South Africa and Another v Public Protector and Others (Information Regulator as* Amicus Curiae*)* [2020] 2 All SA 865 (GP).

[41] Id at para 48.

[42] Id at para 139.

illegal activities sufficient to evoke a suspicion of money laundering*… The conclusion is inescapable that in dealing with this issue the* ***Public Protector completely failed to properly analyse and understand the facts and evidence at her disposal. She also showed a complete lack of basic knowledge of the law and its application. She clearly did not acquaint herself with the relevant law*** *that actually defines and establishes the offence of money laundering before making serious unsubstantiated findings of money laundering against a duly elected head of state.* ***Had she been diligent she would not have arrived at the conclusion she did****".* [43](emphasis added)

65.4 "***The allegation at the heart of her reasoning is extremely serious****.* ***It implies that the President orchestrated*** *the entire CR17 campaign and used it as a vehicle f****or laundering the bribes he received from donors in return for political favours****.* ***This kind of allegation, even if implied and not express, ought not to be made without strong supporting evidence****. We need to emphasise, once again, that* ***in this case, the Public Protector had no evidence before her to substantiate this very serious allegation****."*[44] (emphasis added)

65.5 "*On the money laundering issue,* ***the Public Protector displayed anything but an open mind. She made serious findings based***

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[43] Id at para 146.

[44] Id at para 151.

***on unfounded assumptions**. She paid no regard to the statute that establishes the very offence in which she implied the President is suspected to have been involved. **She also ignored the detailed explanations** …. We find that **her findings on the money laundering issue were not only irrational, but, indeed, reckless**.*" (emphasis added)

65.6 "*It was, in our view, simply beyond the Public Protector's competence to issue such a directive to the Speaker. …. Clearly in our view, this was an unwarranted encroachment on the Speaker's discretionary powers by the Public Protector, and it is similarly reviewed and set aside.*" [45] (emphasis added)

65.7 "*The Public Protector exceeded the lawful limits of her powers in the remedial action and monitoring measure she directed at the NDPP… **her directive, displays, in our view, a complete lack of understanding on her part of the limits of her powers as provided in section 6(4)(c)(i) of the PPA** in relation to matters falling under the NPA. We also find that **she displayed a clear failure to grasp the meaning of the concept of prosecutorial independence decreed by section 32(1)(b) of the NPA Act**. The PPA and the NPA Act are clear that she has no power to direct the*

[45] Id at para 175.

NDPP to investigate any criminal offence and how to go about doing this." [46] (emphasis added)

66. In Government Employees Medical Scheme v The Public Protector of the Republic of South Africa[47] the SCA held that:

> "***not only did the Public Protector misconceive her powers, but in many respects her approach is regrettable.*** *The Constitutional Court has emphasised that the* ***Public Protector is bound,*** *in terms of section 195(1) of the Constitution,* ***by the basic values and principles governing public administration****, including, amongst others: (a) a* ***high standard of professional ethics****; (b) the constitutional imperative to use resources efficiently, economically and effectively; (c)* ***accountability****; and (d) the constitutional imperative to* ***foster transparency*** *by providing the public with timely, accessible and accurate information.* ***In that, it seems to me, the Public Protector has failed.***"[48] (emphasis added)

67. In Gordhan v the Public Protector and Others[49] the full bench held that:

67.1 "***instead of merely recording her disagreement*** *with the court's interpretation,* ***she launched into a scathing, unwarranted and personal attack on the integrity of the learned Judge****. She even* ***goes as far as to accuse the learned Judge of "a gross***

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[46] Id at para 188 to 189.

[47] *Government Employees Medical Scheme v The Public Protector of the Republic of South Africa* 2020 JDR 2033 (SCA).

[48] Id at para 50.

[49] *Gordhan v the Public Protector and Others* 2020 JDR 2741 (GP).

misinterpretation *of the … Code"* ***and of "deliberately omitting" words from the Code****.*

Apart from the fact that ***the personal attack on the learned Judge is shockingly inappropriate and unwarranted****, the Public Protector's reading and interpretation of paragraph 2.3(a) of the Executive Ethics Code is wrong in law: …* ***To claim that Potterill J "deliberately omitted the words 'inadvertently mislead'" from the actual Code, is simply astonishing****. Besides being a Public Protector, Adv Mkhwebane as an officer of this court owes it a duty to treat the Court with the necessary decorum. She not only committed an error of law regarding the Code but* ***was also contemptuous of the Court and Judge Potterill personally****.* ***What makes this reprehensible conduct worse is that the remarks by Adv Mkhwebane were made under oath, when she ought to have known about the falsity thereof****.* ***This clearly held the possibility of misleading this court. This is conduct unbecoming of an advocate and officer of this court****. She owes Judge Potterill an apology. The* ***Registrar of this Division is requested to send a copy of this judgment to the Legal Practice Council for consideration****."*[50] (emphasis added)

[50] Id at paras 60-61.

67.2 "*This turn of events is disturbing to say the least and* ***it is difficult to label the Public Protector's conduct in this regard as anything else but dishonest****…*"[51] (emphasis added)

67.3 "***Statements such as this*** *made by the Public Protector in her answering affidavit and heads of argument* ***only serve to tarnish her reputation and damage the legitimacy of the office that she holds****.*"[52]

67.4 "***By dismissing Mr Pillay and his evidence*** *out of hand,* ***the Public Protector breached her oath of office in the most fundamental way****.*"[53]

67.5 "***This evidences the most egregious failure of the Public Protector to understand and honour the most basic requirements of the office she occupies****. It is plain that the Public Protector has approached this investigation with an unwavering commitment to her own preconceived views and biases.* ***The manner in which the Public Protector had, and continued, to simply ignore Mr Pillay's evidence, clearly demonstrates her manifest bias****.*"[54] (emphasis added)

67.6 "*The* ***findings and recommendations of the Public Protector*** *in relation to the equipment issue of the unit i****s accordingly the***

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[51] Id at para 120.

[52] Id at para 123.

[53] Id at para 182.

[54] Id at para 195.

product of a fatally flawed and incompetent investigation."[55] (emphasis added)

67.7 "*The **Public Protector did not act in the manner required in our law of someone fulfilling this extremely important and responsible position**. The Report is indicative of her mindset with which she approached the investigation. She postulated herself as a judge, receiving and dismissing evidence at a whim, and then closed her mind to the actual facts available to her to consider.*"[56] (emphasis added)

67.8 "*Accordingly, at the time of the Report, the Public Protector well knew that Mr Pillay has a matric certificate. Her conclusion in the Report that Mr Pillay does not hold even that basic qualification, notwithstanding the fact that on 25 March 2019 she accepted that this was a matter of public record and was within her knowledge, is astounding. In doing this **she has manifested clear bias against Mr Pillay** and material irrationality in arriving at her findings. …. We submit that this further demonstrates that **the Public Protector closed her mind and adopted a process of irrational reasoning**.*"[57] (emphasis added)

67.9 "***It is difficult to envision that the Public Protector was oblivious of her constitutional duties in ensuring that she exercises her***

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[55] Id at para 210.

[56] Id at para 224.

[57] Id at para 236.

***duties without fear, favour or prejudice**. She had an obligation to extend the audi alteram partem principles to the implicated parties before imposing the remedial action. **Her failure to do so not only resulted in a flagrant disregard of her constitutional duties and the obligations imposed upon her in terms of the Public Protector Act and the common law, but also tarnished the reputation of the Office of the Public Protector**."*[58] (emphasis added)

67.10 "*The demand made on the Minister of State Security … is the most astounding of all the remedial action contemplated by the Public Protector. Firstly, **the possession or use of a classified report would clearly constitute criminal conduct on the part of Advocate Mkhwebane** who, as a former State Security Agency operative, remains bound by national security and intelligence legislation.*"[59] (emphasis added)

67.11 "***The Public Protector's bias against Mr Gordhan and Mr Pillay is manifest.***"*[60]* (emphasis added)

68. The point is obvious: the NA must hold the Public Protector to account by affording her an opportunity to respond to these devastating findings. The question is how?

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[58] Id at para 249.

[59] Id at 250.

[60] Id at para 293.

FOREIGN LAW GOVERNING OMBUDS

69. The *amici curiae* have compiled research dealing with foreign and international law provisions governing ombuds in 12 other jurisdictions in respect of the following elements: instrument of establishment, reporting obligations, term of office, membership requirements, removal and suspension. Measured against these benchmarks, the Removal Rules go far beyond them to prescribe a procedure for removal and to provide explicit safeguards to the rights of participants at each step of the process.

Sweden

70. The Justitieombudmannen or the Swedish Parliamentary Ombud was created in 1809 as the first ombud of modern times.[61] The Swedish Parliamentary Ombud is appointed by the Swedish Riksdag (the Swedish Parliament) to ensure that public authorities and their staff comply with the laws and other statutes governing their actions. The Swedish Parliamentary Ombud ensures that public authorities treat individuals lawfully and correctly, and are a pillar of constitutional protection for the basic freedoms and rights of individuals.[62]

71. The Instrument of Government (Regeringsformen)[63] provides for the appointment by the Riksdag of one or more parliamentary ombuds to

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61 Gregory and Giddings, *Righting Wrongs, The Ombudsman in Six Continents*, Volume 13, page 145.

62 Available at https://www.jo.se/en/About-JO/.

63 Chapter 13, Article 6.

supervise the application of laws and other regulations in the public service, under terms of reference drawn up by the Riksdag.

72. The election of the Swedish Parliamentary Ombud is governed by a simple majority decision (more than half of the votes cast) and the term of office of the Swedish Parliamentary Ombud is four years.

73. The Riksdag may dismiss the Swedish Parliamentary Ombud prematurely if she or he does not have the trust of the Swedish Parliament. The Constitution Committee would present the proposal according to which the Swedish Parliamentary Ombud may be dismissed.[64] The proposal is presented to the Riksdag and its members then decide on the matter. If a Swedish Parliamentary Ombud wishes to resign during her or his term of office, the resignation must be approved by the Riksdag. The outcome is governed by a simple majority decision.

74. This differs from South Africa in that the decision is taken by a simple majority and the Swedish Parliamentary Ombud may be dismissed on a very open-ended ground which is more akin to a motion of no confidence.

Denmark

75. The Danish Parliamentary Ombud ("**Danish Ombud**") is elected by the Danish Parliament ("**Folketing**") to investigate complaints about the public administration. The Danish Ombud is independent from the Folketing in

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64 Article 4 of the Riksdag Act.

the discharge of its functions but works closely with the law committee of the Folketing.[65]

76. In terms of the Danish Ombud Act 473 of 1996, ("**Danish Act**") the Folketing shall elect the Danish Ombud following each general election and when a vacancy occurs.[66] The Danish Ombud's total term of office cannot exceed 10 years.[67] The Danish Act provides for the dismissal of the Danish Ombud if they cease to enjoy the confidence of the Folketing[68], but does not specify the removal procedure.

77. Michael Gotze notes that there are no specific grounds for dismissal in the Danish Act and that it is left to Parliament to define the concept of a "*lack of confidence*".[69] The dismissal procedure has not been used in Denmark and the majority of the political parties have consistently supported the Danish Ombud.[70]

78. After a review of the Danish Act and the rules of the Folketing, there does not appear to be a stipulated voting majority for the removal of the Danish Ombud. The position in Denmark differs to the position in South Africa in that Denmark does not stipulate a voting majority and may remove the Danish Ombud in terms of open-ended criteria.

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65 *Righting Wrongs: The Ombudsman in Six Continents*, (IOS Press, 2000), page 147.

66 Section 1(1) of the Danish Ombudsman Act 473 of 1996.

67 Section 1(2) of the Danish Act.

68 Section 3 of the Danish Act.

69 Michael Gotze, *The Danish Ombudsman - A National Watchdog with Selected Preferences* (2010) 6:1 Utrecht L Rev 33, page 38.

70 Gotze, page 37.

Finland[71]

79. There are two supreme overseers of legality in Finland: the Chancellor of Justice, who reports to the government and to parliament, and the Parliamentary Ombud. Their tasks and powers are largely the same.

80. The Finish Parliamentary Ombud is established in terms of the Constitution of Finland ("**Finnish Constitution**").[72] The appointment of the Finnish Parliamentary Ombud is made in terms of section 38 of the Finnish Constitution which provides that Parliament appoints them for a term of four years.

81. In respect of removal, section 38 provides that Parliament, after having obtained the opinion of the Constitutional Law Committee, may, for extremely weighty reasons, dismiss the Parliamentary Ombud before the end of her or his term by a decision supported by at least two-thirds of the votes cast.

82. Finland enacted the Parliamentary Ombud Act 197 of 2002[73] to accompany the constitutional provisions relating to the Ombud. The Act however does not provide any further procedural requirements in respect of the appointment and removal of the Parliamentary Ombud beyond what

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71 Available at https://www.oikeusasiamies.fi/en_GB/web/guest/the-ombudsman-and-the-chancellor-of-justice-.

72 The Constitution of Finland, 11 June 1999 (731/1999), entry into force 1 March 2000 available at https://www.oikeusasiamies.fi/en/constitutional-provisions-pertaining-to-parliamentary-ombudsman-of-finland.

73 Available at https://www.oikeusasiamies.fi/en/parliamentary-ombudsman-act.

is stated above in the Finnish Constitution, and merely seeks to regulate the duties and actions of the Parliamentary Ombud.

83. The Finnish system therefore resembles the position in South Africa in that it requires a two-thirds majority to dismiss the Parliamentary Ombud. However, while the dismissal must be for 'weighty reasons', these are not enumerated - it is nevertheless potentially broader than the three limited grounds of misconduct, incapacity or incompetence which are of application in South Africa.

The Netherlands

84. The Dutch National Ombud ("**Dutch Ombud**") is established in terms of Article 78a of the Dutch Constitution[74] and shall investigate, on request or of her or his own accord, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to an Act of Parliament. The Dutch Ombud and a deputy are appointed by the Lower House of the States General for a period to be determined by an Act of Parliament.

85. The Dutch Ombud or the deputy may resign or retire on attaining an age to be determined by an Act of Parliament. They may also be suspended or dismissed by the Lower House of the States General in instances specified by an Act of Parliament.

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[74] The Constitution of the Kingdom of the Netherlands, available at https://www.government.nl/binaries/government/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands/WEB_119406_Grondwet_Koninkrijk_ENG.pdf.

86. The National Ombud Act, was enacted on 4 February 1981 ("**Dutch Act**").[75] Chapter II of the Dutch Act provides for the Dutch Ombud. Article 2 states that the Dutch Ombud is appointed by the House of Representatives of the States General.[76] The appointment of the Dutch Ombud is for a term of six years.[77]

87. Article 3 of the Dutch Act deals with the dismissal procedure for the Dutch Ombud. Article 3 states that the House of Representatives will dismiss the Dutch Ombud in the following circumstances:[78]

87.1 with effect from the following month after the month in which she or he reaches the age of seventy;

87.2 at her or his request;

87.3 if she or he is permanently unable to perform her or his function due to illnesses or disabilities;

87.4 declared incompatible with the office of Ombud when accepting an office or position;

87.5 upon loss of Dutch citizenship;

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75 National Ombudsman Act, Law of February 4, 1981 available at https://wetten.overheid.nl/BWBR0003372/2020-01-01#HoofdstukII.

76 Article 2(2) of the Dutch Act.

77 Article 2(3) of the Dutch Act.

78 Article 3(1) and (2)(a)-(g) of the Dutch Act.

87.6 if she or he has been convicted of a criminal offence by a final judicial decision, or if a measure has been imposed on her or him by such a decision resulting in deprivation of liberty;

87.7 if she or he has been placed under guardianship as a result of a final court decision, has been declared bankrupt, has been declared subject to a debt rescheduling scheme for natural persons, has been granted a moratorium or has been held in custody for debts;

87.8 if, in the opinion of the House of Representatives, she or he causes serious harm to the confidence to be placed in her or him either by act or omission.

88. According to article 4 of the Dutch Act, the Dutch Ombud may also be suspended by the House of Representatives if;[79]

88.1 she or he is in pre-trial detention;

88.2 she or he has been convicted of a criminal offence by a court decision that has not yet become final, or a measure has been imposed on her or him in such a decision resulting in deprivation of liberty;

88.3 she or he has been placed under guardianship, has been declared bankrupt, the debt rescheduling scheme for natural persons has been declared applicable to her or him, she or he has been granted a

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[79] Article 4(1)(a)-(c) of the Dutch Act.

moratorium on payments or has been held hostage for debts as a result of a court decision that has not yet become final.

89. The House of Representative may further suspend the Dutch Ombud if she or he is prosecuted for a crime or if there is another serious suspicion of the existence of facts or circumstances leading to dismissal, other than on the grounds stated in Article 3, second paragraph under sub-article (2b).[80]

90. No further requirements or procedures are described in the Dutch Act with regard to the removal or suspension of the Dutch Ombud.

United Kingdom ("UK")

91. The UK Parliamentary and Health Service Ombud ("**UK Ombud**") combines the two statutory roles of Parliamentary Commissioner for Administration and Health Service Commissioner for England, with both appointments being held by the same person, the powers of which are set out in the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993, respectively.[81] The UK Ombud is accountable to the Public Administration and Constitutional Affairs Committee of the UK Parliament.

92. The appointment of the UK Ombud is subject to the requirements of both the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993. The recruitment process is led by the House of

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[80] Article 4(2) of the Dutch Act.

[81] Available at https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/810/810.pdf.

Commons, in collaboration with the Cabinet Office and the Department of Health and in consultation with UK Ombud Office;[82] and a recommendation is put to the House of Commons for approval before the Prime Minister presents a name to Her Majesty the Queen.[83]

93. According to both Acts, the UK Ombud may be relieved from office at the person's own request or on the ground of misbehaviour, as a result of addresses made to Her Majesty from both Houses of Parliament.[84] The term 'misbehaviour' as used in UK legislation, has a similar or analogous meaning to that of 'misconduct' used in the South Africa Constitution.

Spain

94. The office of the Spanish Ombud or Defender of the People (*Defensor del Pueblo*) is established in terms of article 54 of the Spanish Constitution.[85]

95. To give effect to article 54 of the Spanish Constitution, Organic Act 3 of 1981, April 6th, Regarding the Ombud ("**Organic Act**"), was promulgated.

96. The Defensor del Pueblo has the power to supervise the activity of all public administrations: central, regional and local administrations. This supervisory power includes the activity of public enterprises and the

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82 Available at https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/810/810.pdf.

83 Available at https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/810/810.pdf.

84 Section 1(3) of the Parliamentary Commissioners Act, 1967 and item 1C and 1D of Schedule 1 to the Health Service Commissioners Act, 1993.

85 Spanish Constitution of December 27, 1978.

Administration agents or collaborators when they are performing public services or achieving public goals.[86]

97. The election of the Defensor del Pueblo is in terms of Article 2 of the Organic Act which states that the Defensor del Pueblo shall be elected by Parliament for a term of five years.[87] The Defensor del Pueblo is elected from a selection of candidates by a three-fifths majority of the Members of Congress which election must then be ratified by the Senate within 20 days by a three-fifths majority as well.[88]

98. The removal of the Defensor del Pueblo is in terms article 5 of the Organic Act, which provides that the incumbent shall be relieved from duty in any of the following cases:

98.1 resignation;

98.2 expiry of this term of office;

98.3 death or unexpected incapacity;

98.4 flagrant negligence in fulfilling the obligations and duties of his office; or

98.5 non-appealable criminal conviction.[89]

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86 European Network of National Human Rights Institutions, Ombudsman of Spain available at http://ennhri.org/our-members/spain/.

87 Article 2(1) of the Organic Act.

88 Article 2(4) of the Organic Act.

89 Article 5(1) of the Organic Act.

99. The post shall be declared vacant by the Speaker of Congress in the event of death, resignation or expiry of the term of office. In all other cases removal is confirmed by a three-fifths majority of the members of each House, following a debate and the granting of an audience to the person concerned.[90]

The European Union ("EU")

100. The European Ombud ("**EU Ombud**") investigates complaints by citizens or residents of EU countries or EU-based associations or businesses about maladministration of EU institutions bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role.[91]

101. The Treaty on the Functioning of the EU ("**EU Treaty**") sets out all the matters related to the EU Ombud: including that, she or he:[92]

101.1 is elected by the European Parliament after each election of the European Parliament for the duration of its term of office; and is eligible for reappointment;

101.2 dismissal is through the Court of Justice at the request of the European Parliament if the EU Ombud no longer fulfils the conditions required for the performance of her or his duties or if she or he is guilty of serious misconduct.

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90 Article 5(2) of the Organic Act.

91 Available at https://europa.eu/european-union/about-eu/institutions-bodies/european-ombudsman_en.

92 Article 228.

102. Rule 231 of the Rules of Procedure of the European Parliament ("**EU Rules of Procedure**") deals with the election of the EU Ombud:

102.1 at the start of each parliamentary term or in the case of death, resignation or dismissal of the EU Ombud, the President shall call for nominations for the office of EU Ombud and set a time limit for their submission.[93]

102.2 nominations must have the support of at least 38 Members who are nationals of at least two Member States and is elected by a majority of the votes cast.

102.3 the EU Ombud shall exercise his or her duties until his or her successor takes office, except in the case of his or her death or dismissal.[94]

103. Rule 233 EU Rules of Procedure provides for the dismissal of the EU Ombud:

103.1 one-tenth of the EU Parliament's component Members may request the dismissal of the EU Ombud if they no longer fulfil the conditions required for the performance of their duties or if she or he is guilty of serious misconduct. Where such a request for dismissal has been

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93 Rule 231(1) of the Rules of Procedure of the European Parliament.

94 Rule 231(8) of the EU Rules of Procedure.

voted on in the preceding two months, a new one may only be tabled by one-fifth of the component Members of the EU Parliament;[95]

103.2 the request shall be forwarded to the EU Ombud and to the committee responsible, which, if it decides by a majority of its members that the reasons are well founded, shall submit a report to the EU Parliament. If she or he so requests, the EU Ombud shall be heard before the report is put to the vote. The EU Parliament shall, following a debate, take a decision by secret ballot;[96]

103.3 before taking the vote, the EU President shall ensure that at least half of the EU Parliament's component Members are present[97];

103.4 if the vote is in favour of the EU Ombud's dismissal and they do not resign, the EU President shall, at the latest by the part-session following that at which the vote was held, apply to the Court of Justice to have the EU Ombud dismissed and request that a ruling be given without delay. Resignation by the EU Ombud shall terminate the above procedure.[98]

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95 Rule 233(1) of the EU Rules of Procedure.

96 Rule 233(2) of the EU Rules of Procedure.

97 Rule 233(3) of the EU Rules of Procedure.

98 Rule 233(4) of the EU Rules of Procedure.

New Zealand

104. The New Zealand Office of the Ombud ("**NZ Ombud**") is appointed by the New Zealand Parliament to investigate complaints about public sector agencies including official information requests.[99]

105. The legislation that regulates and empowers the NZ Ombud is the New Zealand Ombuds Act 9 of 1975 ("**NZ Act**").

106. One or more ombuds are appointed by the Governor-General[100] on the recommendation of the House of Representatives.[101] as officers of Parliament and Commissioners of Investigation[102], one of whom shall be the Chief Ombud responsible for the administration for the office and the allocation of work between ombuds.[103] Each NZ Ombud shall be appointed for a term of five years and may be reappointed.[104]

107. Section 6 of the NZ Act provides for the removal or suspension of the NZ Ombud:

107.1 the NZ Ombud may at any time be removed or suspended from office by the Governor-General upon an address by the House of Representatives, for the inability to perform the functions of office, bankruptcy, neglect of duty or misconduct;

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99 Available at https://www.ombudsman.parliament.nz/about/what-we-do#toc-3.

100 The Governor-General is the representative of Her Majesty Queen of England II, available at https://gg.govt.nz/office-governor-general.

101 Section 3(2) of the NZ Act.

102 Section 3(1) of the NZ Act.

103 Section 3(4) of the NZ Act.

104 Section 5(1) and (2) of the NZ Act.

107.2 at any time when the Parliament is not in session, the NZ Ombud may be suspended from office by the Governor-General for inability to perform the functions of the Ombud, bankruptcy, neglect of duty or misconduct which is proved to the satisfaction of the Governor-General.

Australia

108. The activities of the Commonwealth Ombud's office are governed by a number of Australian and Australian Capital Territory ("**ACT**") laws. The Australian legislation includes the Ombud Act 1976, Ombud Regulations 2017, Freedom of Information Act 1982, Australian Federal Police Act 1979, Telecommunications (Interception and Access) Act 1979, and Public Interest Disclosure Act 2013.[105] Under the ACT legislation and through arrangement between the Australian and ACT governments, the Commonwealth Ombud is also the Ombud for the ACT. The ACT legislation includes the Ombud Act, 1989 ("**ACT Ombud Act**") and the Freedom of Information Act 2016.[106]

109. The office of Commonwealth Ombud is created by the Ombud Act 1976 ("**AU Act**") with an extensive range of powers to investigate the administrative actions of Australian Government departments/agencies and prescribed private sector organisations following complaints or on his or her own motion.

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[105] Available at https://www.ombudsman.gov.au/Our-responsibilities/our-legislation.

[106] Available at https://www.ombudsman.gov.au/Our-responsibilities/our-legislation.

110. The Commonwealth Ombud is appointed by the Governor-General[107], and shall hold office for a period not exceeding seven years with eligibility for re-appointment.[108]

111. Section 28 of the AU Act deals with suspension or removal of the Commonwealth Ombud by the Governor-General:

111.1 on an address praying for the removal on the ground of misbehaviour or physical or mental incapacity presented by each House of the Parliament in the same session of the Parliament[109];

111.2 where the Governor-General suspends the Commonwealth Ombud from office, the responsible minister shall cause a statement of the grounds of the suspension to be put before each House of the Parliament within seven sitting days after the suspension[110];

111.3 after such a statement has been put before a House of the Parliament, that House may, within 15 sitting days after the day on which the statement has been put before it, by resolution, declare that the Commonwealth Ombud should be removed from office and, if each House so passes such a resolution, the Governor-General shall remove the Commonwealth Ombud from office[111];

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[107] Section 21 of the AU Act.

[108] Section 22 of the AU Act.

[109] Section 28(1) the AU Act.

[110] Section 28(2) and (3) the AU Act.

[111] Section 28(4) the AU Act.

111.4 if the 15 sitting days of a House of the Parliament has expired and such House has not passed a resolution, the suspension of the Commonwealth Ombud terminates[112]

111.5 if the Commonwealth Ombud becomes insolvent the Governor-General shall remove her or him from office[113];

111.6 if the Commonwealth Ombud is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months, the Governor-General may remove her or him from office[114].

111.7 the suspension or removal of a Commonwealth Ombud shall only be in terms of this section.[115]

112. Section 28D of the ACT Ombud Act describes the procedure for the removal of the Commonwealth Ombud:

112.1 the Speaker of Parliament must end the Commonwealth Ombud's appointment if (a) the Legislative Assembly passes a resolution, where the Commonwealth Ombud has been suspended, to require the Speaker to end the Commonwealth Ombud's appointment or otherwise resolves to require the Speaker to end the Commonwealth Ombud's appointment for misbehaviour or physical or mental incapacity, if such incapacity substantially affects the exercise of the

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[112] Section 28(5) the AU Act.

[113] Section 28(7) the AU Act.

[114] Section 28(7A) the AU Act.

[115] Section 28(8) the AU Act.

Commonwealth Ombud's functions; or (b) if the Commonwealth Ombud becomes bankrupt or personally insolvent[116];

112.2 the Legislative Assembly must give at least seven days' notice of the date on which the motion is first to be debated, of the motion and of a statement of reasons for the motion[117];

112.3 the Speaker must provide the Commonwealth Ombud with a copy of the notice and the statement of reasons and tell the Commonwealth Ombud that a written submission about the motion may be made to the Speaker no later than three days after the day the Commonwealth Ombud is given notice[118];

112.4 the Speaker must give any written submission made by the Commonwealth Ombud to the Legislative Assembly before the day the motion is to be first debated[119];

112.5 the Speaker may end the Commonwealth Ombud's appointment if the Commonwealth Ombud has been absent from duty, except on leave granted by the Speaker, for 14 consecutive days or for 28 days in any 12 months[120];

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116 Section 28D(1) of the ACT Ombudsman Act of 1989.

117 Section 28D(2)(a)(i) of the ACT Ombudsman Act.

118 Section 28D(2)(a)(ii) of the ACT Ombudsman Act.

119 Section 28D(2)(b) of the ACT Ombudsman Act.

120 Section 28D(3) of the ACT Ombudsman Act.

112.6 the Commonwealth Ombud's appointment may be ended by the Speaker only in terms of section 28 and section 27 of the ACT Ombud Act.[121]

113. The grounds for removal are similar to those in the South African Constitution in that they include misbehaviour and incapacity. The Australian legislation goes further by including absence from duty and bankruptcy as removal grounds. The majority requirement for voting on the removal of the Commonwealth Ombud by the Houses of Parliament is not specified, however, the use of the word "resolution" in the legislation,[122] along with literature on the House of Representatives seems to suggest that it is by a simple majority.[123]

Quebec (Canada)

114. There is no general purpose Ombud of federal jurisdiction in Canada.[124] Eight out of ten provinces have created a provincial Ombud by statute.[125]

115. The Public Protector Act ("**QPP Act**") was passed into law by the Quebec National Assembly on 14 November 1968, "*to create an organization tasked to receive, examine and handle complaints relating to the public service.*"[126]

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121 Section 28D(4) of the ACT Ombudsman Act.

122 Section 28(4) of the AU Act.

123 Odgers JR *Odgers' Australian Senate Practice* 12th Edition 2009.

124 Righting Wrongs, page 127.

125 Righting Wrongs, page 127.

126 Available at https://protecteurducitoyen.qc.ca/en/about-us/history.

116. The Quebec Public Protector is appointed by a two-thirds majority of the National Assembly on recommendation by the Prime Minister[127] and serves for a period of five years until reappointed or replaced.[128] The Quebec Public Protector may not be dismissed except by a resolution of the National Assembly which is approved by a two-thirds majority.[129]

Alaska (United States of America)

117. The State of Alaska Office of the Ombud ("**Alaskan Ombud**") was created by the Alaska State Legislature in 1975[130] and is governed by Alaska Statutes 24.55.010-340. The Alaskan Ombud is selected by the Alaska Legislature's bi-partisan Ombud Selection Committee, subject to approval by a two-thirds vote of the Legislature in joint session and by the Governor.[131]

118. The appointment of the Alaskan Ombud is in terms of section 24.55.020. of the Alaska Statute:

118.1 a candidate for appointment shall be nominated by the Alaskan Ombud selection committee composed of three members of the senate appointed by the president of the senate and three members of the house of representatives appointed by the Speaker of the

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127 Section 1 of the Public Protector Act, 1968.

128 Section 2 of the Public Protector Act, 1968.

129 Section 3 of the Public Protector Act, 1968.

130 Righting Wrongs, page 47.

131 Available at https://ombud.alaska.gov/about-the-ombudsman/.

house. One member of the minority party caucus in each house shall be appointed to the selection committee[132];

118.2 the Alaskan Ombud selection committee shall examine persons to serve as Alaskan Ombud regarding their qualifications and ability and shall place the name of the person selected in nomination. The appointment is effective if the nomination is approved by a roll call vote of two-thirds of the members of the legislature in joint session and approved by the governor. However, the governor may veto the appointment and return it, with a statement of objections, to the legislature. Upon receipt of a veto message the legislature shall meet immediately in joint session and reconsider approval of the vetoed appointment. The vetoed appointment becomes effective by an affirmative vote of two-thirds of the membership of the legislature in joint session. The vote on the appointment and on the reconsideration of a vetoed appointment shall be entered in the journals of both houses[133];

118.3 the appointment of the Alaskan Ombud becomes effective if, while the legislature is in session, the governor neither approves nor vetoes it within 15 days, Sundays not included, after its delivery to the governor. If the legislature is not in session and the governor

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132 Section 24.55.020. (a) of the Alaska Statute.

133 Section 24.55.020. (b) of the Alaska Statute.

neither approves nor vetoes the appointment within 20 days after its delivery to the governor, the appointment becomes effective.[134]

119. The Alaskan Statute provides that the legislature may remove or suspend the Alaskan Ombud from office for neglect of duty, misconduct, or disability, by a concurrent resolution adopted by a roll call vote of two-thirds of the members in each house entered in the journal.[135]

120. The Alaskan Statute also provides that a proceeding or decision of the Alaskan Ombud may be reviewed in a superior court only to determine if it is contrary to the provisions of the statute.[136]

121. This provision is similar to the South African provisions in that the Constitution[137] prescribes a two-thirds majority vote for the removal of the Public Protector from office on the grounds of misconduct, incapacity or incompetence.

Namibia

122. The Namibian Ombud is appointed by the President of Namibia on the recommendation of the Judicial Service Commission ("**JSC**") and has no term limit. The first Namibian Ombud assumed office in 1992. The Namibian Ombud has the power to make recommendations and take direct action by bringing proceedings for an interdict or other suitable

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134 Section 24.55.020(c) of the Alaska Statute.

135 Section 24.55.050 of the Alaska Statute.

136 Section 24.55.240 of the Alaska Statute.

137 Section 194 of the Constitution of South Africa.

remedy as a means to secure the termination of the offending action or the abandonment or alteration of the offending procedures complained against. The Namibian Ombud is a hybrid institution incorporating the public protector, human rights protections, anti-corruption and environmental protection mandates.[138]

123. Chapter 10 of the Namibian Constitution[139] establishes the Office of the Ombud. Article 90 of the Namibian Constitution states that the Namibian Ombud shall be appointed by proclamation by the President on the recommendation of the JSC.[140] The Namibian Ombud shall hold office until the age of 65 or by extension by the President to 70.[141]

124. Article 94 sets out the procedure for the removal from Office of the Namibian Ombud. According to article 94, the Namibian Ombud may be removed from office before the expiry of her or his term of office by the President acting on the recommendation of the JSC.[142]

125. The Namibian Ombud may only be removed from office on the ground of mental incapacity or for gross misconduct and in accordance with removal procedure set out in sub-Article (3) of article 94.

126. The process of removal in terms of sub-Article (3) of article 94 is as follows: If the JSC considers that the question of removing the Namibian

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138 African Democracy Encyclopaedia Project, Namibia: Office of the Ombudsman available at https://www.eisa.org/wep/namagency.htm.

139 The Namibian Constitution of 21 March 1990, as amended.

140 Article 90(1) of the Namibian Constitution.

141 Article 90(2) of the Namibian Constitution.

142 Article 94(1) of the Namibian Constitution.

Ombud under Article 94 ought to be investigated, it shall establish a tribunal which:

126.1 shall consist of a Chairperson and not less than two other members, who hold or have held judicial office;

126.2 shall enquire into the matter and report on the facts thereof to the JSC; and

126.3 if after considering that report, the JSC, after due deliberation, recommends that the President removes the Namibian Ombud for any reason referred to in sub-Article (2), the President must remove the Namibian Ombud from office.

127. The Ombud Act 7 of 1990 was promulgated "*to define and prescribe the powers, duties and functions of the Ombud, and to provide for matters incidental thereto.*"[143] Similar to Finland, the act does not regulate the appointment and removal procedures of the Namibian Ombud beyond what has been stated in the Namibian Constitution and only seeks to define the Namibian Ombud's duties, functions and operations of the office.

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[143] Preamble to the Ombudsman Act 7 of 1990.

INTERNATIONAL LEGAL INSTRUMENTS, INTERNATIONAL OMBUD ORGANISATIONS AND INTERNATIONAL BEST PRACTICE

International Legal Instruments

Venice Principles on the Protection and Promotion of Ombudsman Institutions

128. The Venice Principles on the Protection and Promotion of Ombudsman Institutions ("**the Venice Principles**") which was issued by the Council of Europe Venice Commission in 2019 is regarded as a standard or set of best practices for ombuds institutions and their states.[144]

129. Principle 11 addresses removal: "*The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehaviour" or "misconduct", which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law."*

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[144] Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e.

International Ombud Organisations

International Ombud Institute

130. The International Ombud Institute ("**IOI**") was established in 1978 and provides for the cooperation of more than 170 independent Ombud institutions from more than 90 countries worldwide.[145] According to the IOI:

> "*the role of the Ombud has been recognised by international organisations including the United Nations, who have passed a resolution on the role of the Ombud in protecting human rights and the Council of Europe who passed a resolution on strengthening the role of the Ombud in Europe". Further, "the original vision of a Parliamentary Ombud with oversight of all public services continues to be a key component of good governance and excellence in public services*".

131. In its best practice publication, the IOI positions independence as a key cornerstone to the legitimacy of office of the Ombud: the Ombud must be "*demonstrably independent from all bodies in his or her jurisdiction*".[146] The IOI points to the United Nations Paris Principles as a reference point when considering the measures necessary to secure independence.[147] The IOI suggests that in a constitutional democracy, the role of the Ombud should ideally be established in the Constitution, with arrangements that

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145 Available at https://www.theioi.org/the-i-o-i.

146 IOI Best Practice Publication Issue 1 Developing and Reforming OM Institutions, June 2017, page 3.

147 IOI Issue 1, page 3.

clearly set out that the Ombud is not subject to control by the Executive.[148] Where this is not possible, the position should be established in law. In either respect, the role of the Ombud should be established with Parliament and not the government or a government department.[149]

132. According to the IOI, an Ombud's appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause.[150] The grounds on which dismissal can be made should always be stated in the legislation.[151] The appointing body, usually the relevant elected assembly, should be the only body with the power to dismiss an Ombud.[152] For the purposes of removal, it is appropriate to consider a qualified majority which is at least equal to that required for appointment.[153] It is essential that no individual or body in the Ombud's jurisdiction should have the power to remove the Ombud.[154]

133. Gottehrer, former President of the United States Ombud Association, listed four minimum characteristics for an Ombud: independence, impartiality and fairness, credible review process and confidentiality.[155] With regard to independence, Gottehrer stated that:

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148 IOI, issue 1, page 4.

149 IOI, issue 1, page 4.

150 IOI, issue 1, page 5.

151 IOI, issue 1, page 5.

152 IOI, issue 1, page 5.

153 IOI, issue 1, page 5.

154 IOI, issue 1, page 5.

155 Gottehrer, *Fundamental Elements of An Effective Ombudsman Institution,* 9th IOI World Conference, Stockholm, June 2009, page 5.

> "*Independence is strengthened when the Ombud is appointed or confirmed preferably by a supermajority of all members of a legislative body or entity other than those the Ombud reviews*."[156]

134. Furthermore, one of the provisions which Gottehrer identified to increase independence is allowing for the removal of Ombuds only for a cause and preferably by a supermajority of the appointing entity.[157] Gottehrer stated that one of the major factors in Ombud legislation includes an appointment and removal process, which should be designed to foster independence and create a broad base of legislative and public support.[158]

135. In the case of the removal of an Ombud from office, provisions used to create independence and support include that "*the Ombud may be removed from office for causes specified in the law by a two-thirds majority vote of the legislative body that appointed the Ombud. The Ombud may resign by a letter to the presiding officer of one of the legislative bodies.*"[159]

136. Gottehrer provided examples of causes that have been used in legislation to remove ombuds, including: permanent mental or physical incapacity to perform the duties of the office or other grounds sufficient to remove a judge from office; bankruptcy or obtaining a moratorium on debts; misconduct; conviction and sentencing for serious violations of the law; accepting posts incompatible with the office of Ombud; losing citizenship;

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156 Gottehrer page 6.

157 Gottehrer page 6.

158 Gottehrer page 10.

159 Gottehrer page 12.

being made the subject of a guardianship order; in the opinion of the jurisdiction's legislative body seriously undermining the confidence placed in the Ombud.[160]

137. In 1998 Gottehrer penned an Occasional Paper, entitled "*Ombud Legislative Resource Document*"[161] which researched and prepared a legislative guideline for establishing an Ombud or as a checklist to legislation already in place. According to Gottehrer, the reasons acceptable for the removal of an Ombud should be specified in the country's constitution. Furthermore, he states as principle 12 of the suggested legislative provisions that an Ombud may be removed from office for a cause specified in the legislative act by a two-thirds majority vote of the legislative body that appointed the Ombud.[162]

138. Gottehrer provides commentary on the principle, stating that removal is made difficult because it should be for widely recognized and accepted causes rather than for political threats or attacks on the office and its holder. He then goes on to comment on some jurisdictions which provide a method for suspending the Ombud and allowing the suspension to be considered by the legislative body, in which regard, if the legislative body does not remove the Ombud within a specified time, the suspension is lifted automatically.[163] He comments further that, the alternate process of

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160 Gottehrer page 12, footnote 14.

161 Dean M Gottehrer, Ombudsman Legislative Resource Document, Occasional Paper no. 65, March 1996, International Ombudsman Institute ("Ombudsman Legislative Resource Document).

162 Gottehrer, page 10.

163 Gottehrer, page 11.

removal uses the judiciary to investigate whether the Ombud should be removed. This process has the advantage of removing the investigation from the legislative body and providing for independent review outside the political process of whether the Ombud should be removed or not. If the tribunal does not recommend removal, the Ombud cannot be removed. This process also provides a method for the Ombud to be suspended from exercising the functions of the office while the tribunal conducts its work.[164]

International Ombud Association

139. The International Ombud Association ("**IOA**") was formed in 2005 to support organisational ombuds worldwide working in corporations, educational institutions, non-profit organisations, government entities, and non-governmental organisations.[165] The IOA has published a Standards of Practice and a Code of Ethics. However, these documents are silent on a suggested appointment or removal mechanism for ombuds.

African Ombud and Mediators Association

140. The African Ombud and Mediators Association ("**AOMA**") was established in 2002 as the successor to the African Ombud Centre which was formed in 1995. In 2013 the AOMA commissioned the African Ombud Research Centre ("**AORC**") to conduct a comparative analysis of legal systems governing Ombud offices among AOMA members. As part of the study the AORC developed a set of best practice guidelines for the institution of the

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164 Gottehrer page 12.

165 Available at https://www.ombudsassociation.org/.

Ombud in Africa. The AORC's best practice guidelines include the following:[166]

140.1 the Office of an Ombud should be enshrined in the country's constitution, in addition to its legislation. The AORC believes that this provides additional protection to the institution, as it is harder to modify constitutional provisions, while embedding the institution in statutory laws can help to guarantee maximum stability;

140.2 there must be a clearly defined mandate and focus for the Office of the Ombud and where there is anti-corruption and human rights bodies, the mandate to investigate such issues should be transferred to the Ombud in order to avoid duplication of function and inefficiency;

140.3 the executive should not be excluded from the remit of the Ombud in the interests of equality and fairness. To ensure the independence of the Office of the Ombud the executive should not have the power to initiate or halt the investigation of the Ombud;

140.4 it is essential to ensure there is compliance with the recommendations and remedial actions of the Ombud. Furthermore, to ensure the independence and impartiality of the Ombud Office,

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166 Reddi, Barraclough, Brock, Lwelela and Devenish, Best Practice Guidelines for the Institution of the Ombudsman in Africa, available at http://aoma.ukzn.ac.za/Libraries/Best_Practice_Briefs/1_African_Ombudsman_Best_Practice_AORC_PolicyBrief1_Apr_16.sflb.ashx.

recourse should not be made to the executive, government ministers or parliament;

140.5 when appointing the Ombud, it should be ensured that the appointment procedure is transparent, fair and inclusive. The appointment of the Ombud for one term, without renewal, is preferable and should be prescribed in the constitution and enabling legislation. The AORC recommends an appointment for at least five years, and for at least one year longer than the term of the relevant legislative body as it removes the Ombud from the 'political winds of the moment'. Furthermore, the AORC states that the appointment process should be entrenched in the relevant legislation and constitution and should involve the executive, legislature or other elected body and a body from which informed and unbiased counsel can be sought, such as the Judicial Service Commission (as is used in Namibia);

140.6 to ensure impartiality and independence of the Office, the Ombud should not be a member of any political party;

140.7 the process to remove an Ombud should have a firm legal basis in the constitution or the enabling legislation and should adhere to meticulous procedure. The legislature or elected body should be involved in the removal process, preferably with input and support from all major political parties such as where a two-thirds majority vote in parliament is required;

140.8 the Ombud should report to parliament, at the minimum annually, but with an option to also report to the executive as a matter of courtesy.

INTERNATIONAL BEST PRACTICE

141. To summarise, international best practice includes the following guiding principles:

141.1 Independence as a key cornerstone stating that ombuds must be demonstrably independent from all bodies in his or her jurisdiction.

141.2 The role of the ombud should ideally be established in the Constitution.

141.3 An ombud's appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause.

141.4 The appointing body, which is usually the relevant elected assembly, should be the only body with the power to dismiss an ombud.

141.5 For the purposes of removal, it is appropriate to consider a qualified majority which is at least equal to that required for appointment. It is essential that no individual or body in the ombud’s jurisdiction should have the power to remove the ombud.

141.6 There are four minimum characteristics of an ombud: independence, impartiality and fairness, credible review process and confidentiality.

141.7 Independence is strengthened when the ombud is appointed or confirmed preferably by a supermajority of all members of a legislative body or entity other than those the ombuds reviews and removed only for cause and preferably by a supermajority of the appointing entity.

141.8 The ombud may be removed from office for a cause specified in the law by a two-thirds majority vote of the legislative body that appointed the ombud which causes include:

141.8.1 permanent mental or physical incapacity to perform the duties of the office or other ground sufficient to remove a judge from office;

141.8.2 bankruptcy or obtaining a moratorium on debts;

141.8.3 misconduct;

141.8.4 conviction and sentencing for serious violations of the law;

141.8.5 accepting posts incompatible with the office of Ombud;

141.8.6 losing citizenship;

141.8.7 being made the subject of a guardianship order;

141.8.8 in the opinion of the jurisdiction's legislative body seriously undermining the confidence placed in the ombud.

142. What this comparative evidence demonstrates is that the South African legislative provisions in relation to the Public Protector and the Removal

Rules are comparable to, if not superior to, the provisions that govern ombuds elsewhere in the world.

CONCLUSIONS

143. In these submissions the *amici curiae* have demonstrated the significance, powers and functions of the Public Protector as well as the constitutional safeguards protecting its independence. At the same time, we have set out the imperatives of why it is that the Public Protector must account to the National Assembly with regards to the very serious allegations made against her, and in particular, those criticisms which emanate from the judiciary.

144. We have furthermore demonstrated by reference to foreign law, international law and international best practice, that South Africa's removal provisions as contained in section 194 of the Constitution, and the Removal Rules, more than meet all the requisite standards.

145. The Removal Rules in addition constitute multi-layered procedural safeguards which protect an incumbent who is to be held accountable. The Removal Rules as such are unassailable and superior to the procedures adopted around the world.

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Chambers: Sandton and Cape Town

22 January 2021

LIST OF AUTHORITIES

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