

The Attributes desirable in a Human Rights Commissioner / Ways of assessing the candidates

Introduction

The Constitution has created institutions (commonly known as the Chapter Nine institutions) aimed at strengthening constitutional democracy in South Africa. These institutions are independent and are subject only to the Constitution and the law.

The South African Human Rights Commission is one of the Chapter Nine institutions. Its mandate is to protect and promote a culture of human rights culture South Africa. The Constitution¹ provides that the Commission must:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in South Africa.

The Commission is subject to the Constitution and the Human Rights Commission Act 54 of 1994 (The Act). It governs the formation, powers, duties and functions of the Commission. The Act provides that members of the Commission may be appointed as full-time or part-time and shall hold office for a period determined by the president of the Republic, but not exceeding seven years².

The Act does not specifically set out the requirements for or attributes of a Commissioner, other than to provide that a member of the Commission should act in an independent and impartial manner, without favour, bias or prejudice³. However, the Constitution sets out more requirements for members elected to any of the institutions created by its chapter nine. These requirements are:

- ✓ The member must act with Independence and impartiality;
- ✓ The member must be a fit and proper person;
- ✓ The member must possess broad knowledge of the content; and
- ✓ The member must be broadly representative of the South African community.

¹ Section 184, Constitution of the Republic of South Africa Act of 1996.

² Section 3 of the Human Rights Commission Act 54 of 1994 (the Act)

³ Ibid, Section 4



Independence and Impartiality

The Commissioners are expected to advance and fulfil the mandate of the Commission, as set out in the Constitution and the Human Rights Commission Act. In performing their duties, they must be impartial, and should not be influenced by external pressures. The Constitution clearly states, in section 181 (2), that the Chapter Nine institutions must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. Furthermore, the Human Rights Commission Act 54 of 1994 provides that the Commissioners ought to act in an independent and impartial manner. Section 4 (1) of this Act provides that a member of the Commission.....shall serve impartially and independently and exercise or perform his or her powers, duties and functions in good faith and without fear, favour, bias or prejudice and subject only to the Constitution and the law. These sections, read together, mean that the Commission and the Commissioners must, at all times, be willing to act independently, in other words without fear, favour or prejudice. Thus, the Commissioners should not act under political pressure and should make decisions regarding the investigations entirely on legal considerations.

In determining whether a Commissioner will act independently and impartially, one can draw on a test developed by the Constitutional Court in the SARFU v President judgement⁴. In this case, the constitutional Court ruled, that in evaluating whether a judicial officer will exercise his or her powers impartially, one will have to ask whether a reasonable, well-informed, person, armed with all the relevant facts, would have a reasonable apprehension that the relevant officer would potentially be biased in his or her decision making. Though the decision was on court officers, a similar conclusion can be reached when it comes to the members of the Human Rights Commission due to at least two reasons. First, both are categories of public officials tasked with the duty to protect and uphold the Constitution. Secondly, they have the mandate to adjudicate matters, albeit on different levels and forums.

⁴ President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1998] ZACC 21;



Fit and proper person

The Constitution provides that the Commission shall appoint, as the members of the Commission South African citizens who are fit and proper persons⁵. The requirement of “fit and proper person” insinuates persons of high competence and integrity⁶. The integrity and ethical standards of the Human Rights Commission lies at the heart of a fair and impartial Commission envisaged by the Constitution. The expression “fit and proper person” takes its meaning from the activities in which the person is or will be engaged and the ends to be served by those activities. It is a consideration of the person’s suitability, appropriateness, and legal eligibility to undertake the particular activity. The fit and proper person “test” incorporates considerations of honesty, integrity, reputation, knowledge, and ability. Considerations of “proper person” may incorporate aspects of credibility and conduct.

In determining a person’s honesty, integrity and reputation, the following issues need to be examined⁷:

- Whether a person has been convicted of any criminal offence;
- Whether the person has been the subject of any adverse finding or any settlement in civil proceedings;
- Whether the person has been dismissed, or asked to resign, from employment or from a position of trust, fiduciary appointment or similar.
- Whether the person has the ability to execute the role without malice or partiality;
- Whether the person is acting careless or in a dishonest or criminal manner;
- Any other relevant factor.

Possessing broad knowledge of the content

When making appointments to the Human Rights Commission, preference must be given to persons possessing knowledge of the content and application of human rights

⁵ Section 193 of the South African constitution (1996)

⁶ Envy Surty, Commonwealth Magistrates and Judges Association Conference, < www.info.gov.za/speeches/2008/08101011451004.htm > accessed 5 September 2009

⁷ ‘The Fit and Proper Person Handbook’, www.fsa.gov.uk/pubs/hb-releases/rel27/rel27fit.pdf accessed 8 September 2009. ; ‘Guidelines for fitness and Propriety’, < www.cimoney.com.ky/.../GuidelinesFitnessAndPropriety.pdf > accessed 8 September 2009.



and of investigative or fact-finding procedures. The Commissioner must have the ability to know what should be done, and ability to execute the role diligently and not neglect it because of incapability.

In determining the person's competence and capability regard to matters including, but not limited to, should be considered:

- Whether the person has demonstrated by experience and training that the person is able to, or will be able to perform his/her duties.
- Whether the person possesses relevant qualifications;
- Whether the person has the knowledge of applicable legislation;
- Proven track record of commitment to the values of the Constitution; and
- Any previous relevant experience.

Broadly representative of the South African community

The Constitution requires that the Human Rights Commission must reflect the demographics of the South African society. Section 193 (2) provides that the need for the Commission to reflect broadly the race and gender composition of South Africa must be considered when member are pointed. The constitution does not go further to explain what this means for the chapter nine institutions. However, in section 195, the Constitution goes further to state that in appointing public servants, employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation. It can be argued that, in the spirit of the Constitution, the same standard is applicable to the Human Rights Commissioners as their mandate is also to serve the public.

✚ **Comparative material of attributes of Human Rights Commissioners and ways of appointing the Commissioners**

✓ **Examples from three Human Rights Commissions: Australia, Ireland and Nigeria**

Examples for the appointment of Human Rights Commissioners can be drawn from three Human rights Commissions and South Africa can learn from these examples. The first Commission is the Australian Human Rights Commission. In appointing Commissioners, emphasis is placed on the qualifications and experience of the candidates. Section 8 B(2) of the Australian Human Rights Commission Act 125 of 1986 states that a person is not qualified to be appointed as the Human Rights Commissioner unless the Minister is satisfied that the person has appropriate qualifications, knowledge or experience.

Ireland also provides for the attributes desirable for a Human Rights Commissioner. Section 4 of the Irish Human Rights Commission Act 9 of 2000 provides that a person shall not be appointed to be a member of the Commission unless it appears to the Government that the person is suitably qualified for such appointment by reason of his or her possessing such relevant experience, qualifications, training or expertise as, in the opinion of the Government, is or are appropriate, having regard, in particular, to the functions conferred on the Commission by this Act.

The Nigerian Human Rights Commission Act of 1995 does not provide for the attributes for a Human Rights Commissioner, but provides for what disqualifies a person from holding an office of a commissioner. This Act provides that a member of the Council shall cease to hold office if: he becomes of unsound mind; or he becomes bankrupt or makes a compromise with his creditors; or he is convicted of a felony or of any offence involving dishonesty. A conclusion can be drawn from this piece of legislation that a person who acts in the manner described above cannot be appointed as a member of the Human Rights Commission.

✓ **Ways of assessing the candidates: the Tanzanian example**

The appointment procedure that the Tanzanian government uses to appoint Human Rights Commissioners is credible, and has resulted in them appointing competent Commissioners. A transparent method of appointing Commissioners, which conforms with the Paris principles emerged when they had to appoint Commissioners to their Commission for Human Rights and Good Governance⁸. The appointment process is aimed at ensuring that the Commissioners are not only independent, but also competent and qualified. Once applications are received, a small group consisting of members of civil society and some specialists sit to review the applicants and shortlist the best potential candidates⁹. The names of candidates chosen by this group as qualifying for consideration are published in the media for members of the public to give their views on their suitability¹⁰. The views of the public and other comments are taken to a selection committee, which in turn advises the President of the United Republic of Tanzania. The President is obliged to make the final appointments from among the short-listed candidates, taking into account the public's input¹¹.

⁸ This procedure is provided for in the Commission for Human Rights and Good Governance (Appointment Procedure for Commissioners) Regulations, 2001 (Government Notice No. 89 of 11 May 2001). The Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights provide that in order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.

⁹ Ibid.

¹⁰ Chris Maina Peter, 'Human Rights Commissions in Africa – Lessons and challenges', <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/11_Peter.pdf> accessed 11 Sep. 09

¹¹ Ibid.

