

# Chapter 24A

## Public Protector

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### Functions of the Public Protector

**182.** (1) 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.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

### Tenure

**183.** The Public Protector is appointed for a non-renewable period of seven years.<sup>1</sup>

## 24A.1 Historical background

Nobody has a more sacred obligation to obey the law than those who make the law.<sup>2</sup>

Like most ombudsman around the globe,<sup>3</sup> the Public Protector monitors the

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conduct of state officials and agencies with the aim of ensuring an effective and ethical public service.<sup>4</sup> The office reflects, in both conception and execution, a profound improvement upon its precursor: the Advocate-General. The Advocate-

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1 Sections 182 and 183 of the Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

2 J Anouilh *Antigone* (1942).

3 Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('First Certification Judgment') at para 161 ('The Public Protector is an office modelled on the institution of the ombudsman.') The drafters of the Interim Constitution did not favour the term ombudsman. They objected to both 'man', for its possible sexist connotations, and 'ombud', for an unknown reason. See D Basson South Africa's Interim Constitution: Text and Notes (Revised Edition, 1995) 173; G Devenish The South African Constitution (2005). 'Public Protector' and 'Defensor del Pueblo' have similar connotations. The later term, employed in Spain and some Latin American countries, emphasises the protection of 'the people' and the public good, as opposed to the 'private' or narrow interests manifest in individual complaints. See M Oosting 'The Ombudsman and His Environment: A Global View' in L Reif (ed) *The International Ombudsman Anthology* (1999) ('Reif Anthology') 5.

The original ombudsman — the Swedish *Justiteombudsman* — was established in 1809. Finland followed suit in 1919, Denmark in 1955 and Norway and New Zealand in 1962. See Oosting (supra) at 1. Although most modern ombudsmen trace their lineage back to Sweden, the *Control Yuan* of China, the *Quadi Alqudat* of the Ottoman Empire and the *Tribune* of Ancient Rome are obvious antecedents. See U Lundvick 'A Brief Survey of the History of the Ombudsman' (1982) 2 *The Ombudsman Journal* 85. According to the International Ombudsman Institute, most democracies have such an institution and, in 2004, national ombudsmen numbered 120 worldwide. See *The History and Development of the Public Sector Ombudsman Office* available at <http://www.law.ualberta.ca> (accessed on 1 November 2005). Some writers have described the recent rise in popularity as 'ombudsmania'. See D de Asper y Valdés 'Self Perceptions of the Ombudsman: A Comparative and Longitudinal Survey' (1990-91) 9 *The Ombudsman Journal* 1, 1. Others note that a substantial number of ombudsmen appear to be mere window-dressing — the result of a trend, rather than a truly effective institution. See U Kempf & M Mille 'The Role and Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States' in Reif *Anthology* (supra) 195, 196.

General's brief was limited to investigations into the unlawful or the improper use of public money.<sup>5</sup> The Public Protector's brief, as initially adumbrated in the Interim Constitution, and as now determined by the Final Constitution and the Public Protector Act ('PPA'),<sup>6</sup> is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.

## 24A.2 Nature of the office

The Public Protector's purpose is profitably compared with the role of the judiciary. Courts handle discrete disputes about law and conduct. They rely on correct procedure and solid, sometimes intricate, legal argument. Courts are simply not designed to handle the large number of complaints that arise from simple misunderstandings or bureaucratic red-tape, nor do they lend themselves to the resolution of injustices that turn more on unfairness than illegality.<sup>7</sup>

The Public Protector occupies a middle space in the politico-constitutional landscape. It serves the public and assists the courts and the legislature. It assists the courts by addressing those complaints about the administration of justice that fall beyond the court's purview. It assists the legislature by monitoring the performance of the executive and answering those complaints that elected representatives are unable to address.<sup>8</sup>

The Public Protector performs these functions, in theory at least, free from political pressure. It is not, however, entirely independent. For while the Public Protector enjoys priority over other institutions in the exercise of its functions,<sup>9</sup> it

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4 The Public Protector was originally established in terms of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') ss 100-114.

5 Ombudsman Act 118 of 1979. For a comprehensive history of the Advocate-General, see JP Fegbeutel *An Ombudsman for South Africa* (Unpublished LLD thesis, University of South Africa, 1990); DJ Brynard *Die Advokaat-Generaal in Publieke Administrasie: 'n Vergelykende Evaluering* (Unpublished DLitt thesis, University of Pretoria, 1987). Although it constituted an important step towards greater public accountability, the Advocate-General could not investigate maladministration. *Ibid* at 230-1. See also L Baxter *Administrative Law* (1984) 290.

6 Act 23 of 1994. The Act has been amended four times. See Public Service Laws Amendment Act 47 of 1997; Public Protector Amendment Act 113 of 1998; Promotion of Access to Information Act 2 of 2000; Public Protector Amendment Act 22 of 2003. The PPA repeals the Ombudsman Act. See PPA s 14.

7 See S Owen 'The Ombudsman: Essential Elements and Common Challenges' in Reif *Anthology* (supra) at 51, 54-5. See also M Zacks 'Administrative Fairness in the Ombudsman Process' (1967-1987) 7 *The Ombudsman Journal* 55, 55 ('Complainants come to Ombudsmen for help to cut through red tape and to deal expeditiously with their concerns. If they wanted technical, legal arguments and approaches, one can say with some justification that they should hire a lawyer and go to court.')

8 See Owen (supra) at 53 (Ombudsmen enable politicians to address failures in the state bureaucracy.)

9 *Special Investigating Unit v Ngcinwana & Another* 2001 (4) SA 774 (E), 2001 (4) BCLR 411, 413B (E)(When interpreting the competence of tribunals under the Special Investigating Units and Special Tribunals Act 74 of 1996 with respect to the investigation of maladministration and corruption, the court held that '[c]onstitutional priority would thus seem to lie with the institution of the Public Protector. Any interpretation of the Act's purposes must pay heed to that reality.')

must still often act together with the courts and other Chapter 9 Institutions to fulfil its mandate.<sup>10</sup>

One of the most common criticisms levelled against the Public Protector, and ombudsmen generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively — without making binding decisions — is the real measure of its strength.<sup>11</sup> Stephen Owen explains this apparent paradox as follows:

Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future.<sup>12</sup>

The publication of the Public Protector's findings can shame a body into accepting the validity of its recommendations.<sup>13</sup> Its reports to Parliament enable the national legislature to exercise effectively its oversight function and shape important debates on policy and budgetary matters.<sup>14</sup> Whether our Public Protector has sufficient funds to maintain the high standards of investigation and reporting required to be the 'voice of reason' is discussed below.<sup>15</sup>

Another question of moment, as our government toys with the idea of rationalizing our Chapter 9 Institutions, is whether the Public Protector serves as a 'classical ombudsman' or a so-called 'hybrid ombudsman'. The 'hybrid ombudsman' takes up complaints about maladministration and corruption as well as allegations of human rights violations.<sup>16</sup> Although the Public Protector was not specifically assigned the latter task, the brief of the Public Protector is broad enough to permit such investigations. It has, to date, issued a number of noteworthy reports in this regard.<sup>17</sup>

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10 See § 24A.6 *infra*, on the relationship between the Public Protector, the courts and forum shopping.

11 See Owen (*supra*) at 52; Oosting (*supra*) at 10.

12 Owen (*supra*) at 52.

13 See Oosting (*supra*) at 12 ('[T]he mobilisation of shame can constitute a powerful weapon in his arsenal.')

14 *Ibid* ('In this world the sweet voice of reason — a well formulated argument, based on meticulous research — does not always fall on attentive ears. Political support for the ombudsman is therefore essential.')

15 See § 24A.3(b) *infra*, on 'Financial independence and political autonomy'.

16 See L Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard HRLJ* 1.

## 24A.3 Independence

### (a) Appointment and removal

During the certification of the Final Constitution, the Constitutional Court considered whether a provision permitting removal of the Public Protector by a simple majority vote of the National Assembly was sufficient to ensure the independence and impartiality of the Public Protector as demanded by Constitutional Principle ('CP') XXIX.<sup>18</sup> The *First Certification Judgment* Court found that the Public Protector would not be able to investigate politically sensitive matters and review politically sensitive material that could embarrass public officials if it had to concern itself with calls for its removal that could be effected by a simple majority.<sup>19</sup> The *First Certification Judgment* removed that particular sword of Damocles,<sup>20</sup> and the Constitutional

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- 17 Ibid at 66. The Public Protector has considered whether official conduct amounts to a constitutional rights violations in a number of investigations. See Office of the Public Protector *Investigation of the Play Sarafina II* (1996), available at [http://www.publicprotector.org/reports\\_and\\_publications/report1.htm](http://www.publicprotector.org/reports_and_publications/report1.htm) (accessed on 29 November 2005)(Rights to privacy and access to information); Office of the Public Protector *Report on an Investigation by the Public Protector of a Complaint by Deputy President J Zuma Against the National Director of Public Prosecutions and The National Prosecuting Authority in Connection with a Criminal Investigation Conducted Against Him* (2004), available at [http://www.publicprotector.org/reports\\_and\\_publications/Report26.pdf](http://www.publicprotector.org/reports_and_publications/Report26.pdf) (accessed on 29 November 2005)(‘Zuma Report’)(Right to dignity); Office of the Public Protector *Report by the Public Protector on the Investigation into Allegations of Homophobic and Unconstitutional Statements by Mr Peter Marais MPL, Erstwhile Premier of the Western Cape* (2003), available at [http://www.publicprotector.org/reports\\_and\\_publications/report21.pdf](http://www.publicprotector.org/reports_and_publications/report21.pdf) (accessed on 29 November 2005)(Freedom of expression); Office of the Public Protector *Report on the Investigation into Allegations of Underpayment of Beneficiaries of the Venda Pension Fund* (2002), available at [http://www.publicprotector.org/reports\\_and\\_publications/report18.htm](http://www.publicprotector.org/reports_and_publications/report18.htm) (accessed on 29 November 2005)(Right to equality).
- 18 See *First Certification Judgment* (supra) at paras 162–3. CP XXIX reads: ‘The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.’
- 19 Ibid. See also Oosting (supra) at 9 (‘[G]overnments regard the ombudsman’s attempts to expose the abuse of power on the part of government officials as a threat to their position, and react accordingly.’) A similar decision was taken regarding the removal of the Auditor-General. See *First Certification Judgment* (supra) at para 165. See also S Woolman & Y Schutte ‘Auditor-General’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24, § 24B.2. The Court also considered whether the appointment, removal or tenure of the Governor or Board of Directors of the Reserve Bank should be safeguarded by the Final Constitution. It held that unlike the Public Protector and the Auditor-General, ‘its primary purpose is not to monitor government.’ *First Certification Judgment* (supra) at para 166. Given this different purpose, the Court held that CP XXIX did not require the independence of the Reserve Bank to be protected to the same extent as the Public Protector or the Auditor-General. Ibid at 168.
- 20 *First Certification Judgment* (supra) at paras 163–164 (‘They are entitled to at least the same protection of their independence as magistrates are. Indeed, in the case of the Auditor-General and the Public Protector, whose functions involve matters of great sensitivity in which there could well be confrontation between the functionaries concerned and members of the Legislature and the Executive, a higher level of protection would certainly not be inappropriate.’) See also *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC).

Assembly redrafted the apposite provision so as to require a two-thirds vote of the National Assembly to secure removal.<sup>21</sup>

The Public Protector is also subject to a more stringent selection process than are members of other Chapter 9 Institutions. The President appoints the Public Protector after having first received a recommendation from the National Assembly in the form of a resolution that has secured a 60% majority.<sup>22</sup>

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### **(b) Financial independence and political autonomy**

Financial dependence has been recognised both in South Africa<sup>23</sup> and internationally<sup>24</sup> as the greatest threat to the efficacy of the Public Protector. Some commentators have gone so far as to say that its current reliance on the executive is 'inconsistent with independence.'<sup>25</sup>

In *New National Party v Government of the Republic of South Africa & Others*, the Constitutional Court identified two essential desiderata for financial independence.<sup>26</sup> Firstly, the Chapter 9 Institution must have sufficient funding to fulfil its constitutional mandate.<sup>27</sup> Secondly, the funds must come from Parliament and not

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21 FC s 194(2)(a). The Constitutional Court confirmed that this metric met the standard set by CP XXIX. See *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)* at para 134.

22 See FC ss 193(4) and 193(5). The Public Protector must be a South African citizen and be a 'fit and proper person'. See FC ss 193(1)(a) and (b). The PPA also lays down detailed experience requirements for appointment as Public Protector. See PPA s 1A(3).

23 See H Corder, S Jagwanth & F Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at [www.pmg.org.za](http://www.pmg.org.za) (accessed on 10 January 2005) ('Corder Report'). The report found that:

The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . . In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government.

Ibid at paras 7.2-7.2.1. See also Woolman & Schutte (supra) at § 24B.2; S Woolman & J Soweto Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F, § 24F.3 and § 24F.4(g); and C Albertyn 'The Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D, § 24D.3.

24 See Oosting (supra) at 8 ('The role of the ombudsman as an independent investigator can also be weakened if he is subjected to such budgetary constraints that he cannot perform his role adequately'); de Asper y Valdés (supra) at 256 ('The success of the ombudsmen's mission depends dearly on the material resources granted to the office.')

25 Corder Report (supra) at par 7.2.1 ('Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases.')

from the executive.<sup>28</sup> Although the *New National Party* Court views the source of the funds as a requirement for financial independence, the source of funds would seem, at first blush, to only become relevant if the funds provided are insufficient. If the funds are sufficient for the discharge of the Chapter 9 Institution's duties, then any issue regarding the source of the funds could, as a logical matter, never arise.

However, the *New National Party* Court's concerns extend beyond those of mere fiscal viability. The Court's language suggests apprehension over the ability of Chapter 9 Institutions to discharge their oversight responsibilities if the executive retains the discretion to decrease (or increase) funding. When questions of

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sufficiency of funds do arise, whether the executive is, in fact, the source of those funds will enter into the Court's assessment of the independence of the institution.<sup>29</sup> Thus, it is for reasons of political autonomy that the *New National Party* Court signals its preference for Chapter 9 Institutions such as the Public Protector to be funded directly by Parliament.<sup>30</sup>

Despite constitutional<sup>31</sup> and legislative<sup>32</sup> guarantees of political autonomy, the Public Protector is, today, entirely financially dependant on the executive. The total budget of the Public Protector for 2005 was just over R50 million. All but R1 million

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26 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('New National Party') (Court considered the meaning of 'independence' with respect to the financial and administrative independence of the Electoral Commission. The Electoral Commission, like the Public Protector, is a Chapter 9 Institution.)

27 *Ibid* at para 98. ('This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget.')

28 *Ibid*. ('Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.')

29 The test for independence is whether the relevant body 'from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence.' *Freedom of Expression Institute & Others v President, Ordinary Court Martial, & Others* 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C) at paras 23-25. This test was confirmed in *Van Rooyen. Van Rooyen* (supra) at paras 31-4. See also *South African National Defence Union & Another v Minister of Defence & Others* 2004 (4) SA 10 (T), 38. See also *Oosting* (supra) at 9 ('[L]ack of finances may lead individual citizens to refrain from voicing their complaints, either out of fear or because they do not believe anything will be done about them.')

30 See Corder Report (supra) at para 7.2 (Argues that each Chapter 9 Institution's budget should be subject to a separate vote and that genuine independence requires the creation of a parliamentary oversight committee that takes responsibility for their efficacy.)

31 FC s 181(2) reads: 'These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'

32 PPA s 3(13)(a) obliges all members of the Public Protector's office to serve impartially and independently.

of this total was a direct allocation from the Department of Justice and Constitutional Development.<sup>33</sup> Moreover, despite significant increases in the Public Protector's budget allocation since 1996,<sup>34</sup> the Public Protector itself has stated that insufficiency of funds is a 'hindrance' to the fulfilment of its mandate<sup>35</sup> and that its 'very limited budget' prevents it from achieving 'all desired goals.'<sup>36</sup>

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The political nature of the Public Protector's brief means that it must be able to engage other political actors in relatively robust exchange. The sensitivity of the material handled by the Public Protector often means that its investigations and its reports, even if they have no binding authority, can ruffle feathers and bruise egos. In order to protect the independence of the Public Protector, the PPA contains something akin to a shield law. As a result, neither the Public Protector nor any of his staff can be held liable for any good faith submission in a report.<sup>37</sup>

## 24A.4 Complaints and investigations

### (a) Jurisdiction

#### (i) General

The Public Protector lacks inherent jurisdiction. The PPA establishes — and limits — the Public Protector's jurisdiction both with respect to the entities it may investigate and the type of conduct it may investigate.<sup>38</sup>

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33 See Office of the Public Protector *Annual Report 2004-2005* (2005), available at [http://www.publicprotector.org/reports\\_and\\_publications/annual\\_report/public\\_protector\\_2004\\_2005.pdf](http://www.publicprotector.org/reports_and_publications/annual_report/public_protector_2004_2005.pdf) (accessed on 1 November 2005) ('2004-5 Annual Report') 110 (R49 163 000 was allocated by the Department; R903 000 accrued from interest on favourable balances; R7 000 000 was rolled over from the previous year.)

34 The current budget of R50 000 000 compares quite favourably with the budget for the 1996/1997 financial year of R4 168 000. See Office of the Public Protector *Second Half-Yearly Report 1996* (1997), available at [http://www.publicprotector.org/reports\\_and\\_publications/report10.htm](http://www.publicprotector.org/reports_and_publications/report10.htm) (accessed on 1 November 2005).

35 *2004-5 Annual Report* (supra) at 6 ('We will continue to knock on the doors of the Treasury Department for more funds that will enable us to fulfil our mandate without hindrance.')

36 *Ibid.* The most recent annual report offers a number of specific examples of under-funding: 'The target set was to establish nine regional offices but due to financial constraints, approval has been granted to open two additional permanent regional offices.' *Ibid.* at 14. 'A further constraint was the introduction of the Supply Chain Management legislative framework. That required additional compulsory appointment of a manager without additional funding.' *Ibid.* at 18. Earlier reports express similar sentiments. In 1998, the Public Protector wrote that '[a]lthough Parliament and the Department of State Expenditure are continuing to assist us in accessing more resources, we are still not out of the woods in this regard.' Office of the Public Protector *Annual Report 1998* (1998), available at [http://www.publicprotector.org/reports\\_and\\_publications/report15.htm](http://www.publicprotector.org/reports_and_publications/report15.htm) (accessed on 1 November 2005). In 1999, the Public Protector wrote that '[t]he combination of limited funds, rise in complaints and lengthier investigations resulted in my staff still being under severe pressure to cope with the workload.' Office of the Public Protector *Annual Report 1999* (1999), available at [http://www.publicprotector.org/reports\\_and\\_publications/report16.htm](http://www.publicprotector.org/reports_and_publications/report16.htm) (accessed on 1 November 2005) ('1999 Annual Report').

37 PPA s 5(3).

The Public Protector may investigate the following bodies: (a) government at any level;<sup>39</sup> (b) any institution in which the State is the majority or controlling shareholder;<sup>40</sup> (c) any public entity;<sup>41</sup> and (d) persons performing a public function.<sup>42</sup> The Public Protector can investigate the following types of conduct with respect to the above institutions: (i) maladministration;<sup>43</sup> (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct;<sup>44</sup> (iii) improper or unlawful enrichment, or receipt of any improper advantage, or

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promise of such enrichment or advantage by a person;<sup>45</sup> (iv) any act or omission that results in unlawful or improper prejudice to any other person.<sup>46</sup> In addition, the Public Protector may investigate any improper or dishonest act or omission or offences referred to in certain sections of the Prevention and Combating of Corrupt Activities Act<sup>47</sup> and *must* investigate any alleged breach of the Executive Ethics Code.<sup>48</sup> In practice, the most common types of complaints referred to the Public Protector are:

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38 Office of the Public Protector *Report on an Investigation into an Allegation of Misappropriation of Public Funds by the Petroleum Oil and Gas Corporation of South Africa, Trading as PetroSA, and Matters Allegedly Related Thereto: Report No. 30* (2005), available at [http://www.publicprotector.org/reports\\_and\\_publications/petrosa\\_report\\_2005.pdf](http://www.publicprotector.org/reports_and_publications/petrosa_report_2005.pdf) (accessed on 31 October 2005) ('*Oilgate Report*') at para 5.1.3.2.

39 PPA ss 6(4)(a)(i), (iv) and (v).

40 PPA s 6(5).

41 PPA s 6(5). The Act uses the definition of a 'public entity' provided in s 1 of the Public Finance Management Act 1 of 1999 ('PFMA'). That act defines a public entity as including a national and a provincial public entity. A provincial public entity is '(a) a provincial government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a provincial government business enterprise) which is — (i) established in terms of legislation or a provincial constitution; (ii) fully or substantially funded either from a Provincial Revenue Fund or by way of a tax, levy or other money imposed in terms of legislation; and accountable to a provincial legislature.' A national public entity is '(a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is — (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament.' For more on the meaning of public entity in the PFMA, see R Kriel & M Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 27.

42 PPA s 6(4)(a)(ii), (iv) and (v).

43 PPA ss 6(4)(a)(i) and 6(5)(a).

44 PPA ss 6(4)(a)(ii) and 6(5)(b).

45 PPA ss 6(4)(a)(iv) and 6(5)(c).

46 PPA ss 6(4)(a)(v) and 6(5)(d).

47 Act 12 of 2004.

- (a) Insufficient reasons given for a decision;
- (b) The interpretation of criteria, standards, guidelines, regulations, laws, information or evidence was wrong or unreasonable;
- (c) Processes, policies or guidelines were not followed or were not applied in a consistent manner;
- (d) Adverse impact of a decision or policy on an individual or group;
- (e) Unreasonable delay in taking action or reaching a decision;
- (f) Failure to provide sufficient or proper notice;
- (g) Failure to communicate adequately or appropriately;
- (h) Due process denied;
- (i) A public service was not provided equitably to all individuals;
- (j) Denial of access to information.<sup>49</sup>

In addition, the Public Protector will not consider a matter referred to it later than two years after its occurrence — unless special circumstances so warrant.<sup>50</sup> Furthermore, he retains the discretion to decline to investigate a matter.<sup>51</sup>

As a general rule, disputes between private persons fall outside the jurisdiction of the Public Protector. However, private persons may attract the scrutiny of the Public Protector if their conduct relates to (a) state affairs; (b) improper or unlawful enrichment or the receipt or promise of any improper advantage by a person as a result of an act or omission in the public administration or in connection with

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the affairs of government at any level or that of a public entity; or (c) an improper or dishonest act with respect to public money.<sup>52</sup>

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48 Section 3(1) of the Executive Members Ethics Act 82 of 1998. This is the only time that the Public Protector can be compelled to investigate a matter. Such an investigation has, in fact, been undertaken and the attendant report recognizes the mandatory duty to investigate imposed on the Public Protector to investigate. Office of the Public Protector *Report on an Investigation of a Complaint Regarding the Alleged Failure of Mr M P Lekota, The Minister of Defence, to Comply With Certain Provisions of the Executive Members' Ethics Act, 1998 and the Executive Ethics Code* Report 23 (2003), available at [http://www.publicprotector.org/reports\\_and\\_publications/report23.pdf](http://www.publicprotector.org/reports_and_publications/report23.pdf) (accessed on 1 November 2005) at para 7.

49 *2004-5 Annual Report* (supra) at 23. See also Office of the Public Protector *Annual Report 2003-2004* (2004) 20, available at [http://www.publicprotector.org/reports\\_and\\_publications/annual\\_report/Annual\\_Report\\_2003\\_2004.pdf](http://www.publicprotector.org/reports_and_publications/annual_report/Annual_Report_2003_2004.pdf) (accessed on 1 November 2005) ('2003-4 Annual Report'); Office of the Public Protector *Annual Report 2001-2002* (2002) 19, available at [http://www.publicprotector.org/reports\\_and\\_publications/annual\\_report/AR2001\\_02,part4.pdf](http://www.publicprotector.org/reports_and_publications/annual_report/AR2001_02,part4.pdf) (accessed on 1 November 2005) ('2001-2 Annual Report').

50 PPA s 6(9).

51 PPA ss 6(4)(a) and 6(5) use the phrase 'shall be competent'.

The Public Protector's role in the so-called 'Oilgate' scandal provides an instructive example of how these jurisdictional requirements work themselves out in practice.<sup>53</sup> The Freedom Front ('FF') had lodged a complaint about the alleged improper distribution of public funds between PetroSA, a parastatal, and a private company, Imvume Management.<sup>54</sup> The FF further alleged that Imvume served as a front for the African National Congress ('ANC') and that the ANC itself was responsible for the improper distribution of public funds. The Public Protector considered its jurisdiction over each of the three bodies separately. It found that PetroSA, as a public entity, fell within its jurisdiction.<sup>55</sup> The Public Protector refused to investigate Imvume Management on the grounds that it was a private company and did not perform a public function.<sup>56</sup> The Public Protector concluded that the ANC was not a 'person performing a public action' and was therefore beyond the reach of the Public Protector's powers.<sup>57</sup> Although this narrow construction of the PPA's jurisdiction provisions is plausible, the Public Protector could have brought both Imvume and the ANC within its inquisitorial reach on the grounds that they had allegedly engaged in conduct that related to state affairs and that involved the improper use of public money.

## (ii) Judicial functions

The Public Protector does not possess jurisdiction to investigate the 'performance of any judicial function by a court of law.'<sup>58</sup> The term 'judicial function' appears to extend the constitutional prohibition on the investigation of 'court decisions'.<sup>59</sup>

Too cramped a reading of this restriction on the Public Protector's powers would constitute something of a departure from internationally accepted best practices.<sup>60</sup> Many ombudsmen retain jurisdiction over maladministration,

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52 See *Oilgate Report* (supra) at para 5.1.3.3.

53 Ibid.

54 Ibid at paras 6-7.

55 Ibid at para 5.2. The report states that PetroSA is wholly owned subsidiary of the Central Energy Fund. The Central Energy Fund is listed as a major public entity in Schedule 2 of the PFMA. The PFMA also states that wholly owned subsidiaries of major public entities also fall under schedule 2. PetroSA is therefore a public entity.

56 Ibid at para 5.3.

57 Ibid at para 5.4 citing *Institute for Democracy in Southern Africa v African National Congress & Others* 2005 (5) SA 39 (C) ('IDASA') (High Court held that a political party was not a 'public body' for purposes of the Promotion of Access to Information Act.) The report finds that the meaning of a 'person exercising a public function' is similar to that of a 'public body'.

58 PPA s 6(6).

59 FC s 182(3).

negligence or inappropriate conduct by judges and other court officials.<sup>61</sup> The benefits that flow from this limited oversight of judicial administration by an ombudsman are said to include: (a) access (b) independence; (c) transparency; and (d) the ability to address 'minor and unintentional bungling, mistakes and delay.'<sup>62</sup> Moreover, an ombudsman can only issue reports and recommendations. She cannot prosecute or punish.<sup>63</sup>

The Public Protector has, it would appear, adopted a rather generous approach to this limitation on its jurisdiction. It regularly entertains complaints related to delays in judicial decision-making,<sup>64</sup> and has undertaken systemic investigations into prisoners' appeals<sup>65</sup> and Maintenance Courts.<sup>66</sup> The Public Protector has also held that it has jurisdiction to investigate the conduct of the National Prosecuting Authority.<sup>67</sup>

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60 Sweden, Finland, Austria, Spain, Venezuela and, to a certain extent, Britain permit such oversight. See D Rowat 'Why an Ombudsman to Regulate the Courts?' in Reif *Anthology* (supra) 527, 532. But a substantial number of ombudsmen do not possess any oversight responsibilities with respect to the judiciary. See T Christian 'Why No Ombudsman to Supervise the Courts in Canada?' in Reif *Anthology* (supra) at 539. Christian argues that the supervision of the judiciary by an ombudsman in the Canadian context is

. . .mixing up constitutional fundamentals . . . The effect of such a move would be to make the judiciary accountable to an agent of the legislator. However, the legislator itself is subject to constitutional supervision by the judiciary. At a conceptual level this is a recipe for serious confusion and conflict.

One critical difference between the Canadian system Christian describes and our own is that the Public Protector is not an agent of the legislature but an independent institution.

61 See Rowat (supra) at 530; C Sheppard 'An Ombudsman for Canada' (1964) 10 *McGill LJ* 291, 337.

62 See Rowat (supra) at 534.

63 Ibid at 531.

64 See, eg, Complaint 03/92 in *2004-5 Annual Report* (supra) at 46-7 (Delay by Magistrate's court in setting aside interdict); Complaint 1643/03 in *2004-5 Annual Report* (supra) at 66 (Delay by Magistrate's court in finalising appeal); and Complaint 1996/04 in *2004-5 Annual Report* (supra) at 70 (Delay by Labour Court of over 2 years in delivering judgment.)

65 *2004-5 Annual Report* (supra) at 54. This type of complaint makes up 17% of the total received by the Public Protector. The investigation is meant to 'identify those courts or institutions where complaints regarding appeals cannot be said to be isolated incidents, but [are] rather due to systemic deficiencies in the administration of appeals, and to address those systemic deficiencies.' Ibid.

66 Ibid at 55. Because the Commission for Gender Equality ('CGE') has already published a report on the same subject, the Public Protector did not undertake its own investigation. It is, however, working together with the CGE to monitor the implementation of the CGE report's recommendations. Ibid.

67 Office of the Public Protector *Zuma Report* (supra) at 48. The Public Protector does not have jurisdiction over attorneys or advocates. Complaint 125/03 reported in *2004-5 Annual Report* (supra) at 34.

That said, the extension of the Public Protector's jurisdiction to judicial conduct might legitimately be found to conflict with the powers accorded the Judicial Services Commission ('JSC').<sup>68</sup> In addition, although the Public Protector is an independent entity, the potential exists for such oversight — and any public reporting in light of that oversight — to be viewed as an impairment of judicial independence.

### (iii) Legislative and executive matters

The Public Protector's brief as government watchdog would not, on paper, look to raise concerns about undue interference in the legislative or the executive

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domain.<sup>69</sup> However, the effective execution of its brief will, firstly, often require the Public Protector to suggest amendments to existing legislation or regulations,<sup>70</sup> and, secondly, sometimes have a bearing on the articulation of policy.<sup>71</sup>

The Public Protector has had a number of opportunities to consider the appropriate limits of its brief and whether its actions constitute a breach of institutional comity. The Gauteng Department of Education ('GDE') challenged the jurisdiction of the Public Protector to act on a complaint by a group of primary and secondary schools regarding the GDE's allocation of educators.<sup>72</sup> The GDE argued that the matter fell outside the Public Protector's jurisdiction as it concerned policy, not administrative action. The Public Protector found that although his office could

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68 The JSC is established by FC s 178. It is responsible for making findings regarding the appointment (FC s 174) and removal (FC s 177) of judges. Although the president has the final say in both these matters, he can only act once he has received a recommendation from the JSC. The JSC is also required to submit an annual report to parliament. Judicial Services Commission Act 9 of 1994 s 6.

69 See Owen (supra) at 57 ('Care must be taken to distinguish administrative policy from legislative policy. Developing legislation is a political task which typically involves debating the relative merits of differing social and economic policies. In this, an ombudsman has no business. Only if legislation offends established principles of fairness in an absolute way does an ombudsman have a responsibility to enter the debate.')

70 Complaint 311/03 in *2004-5 Annual Report* (supra) at 32 ('GDE Complaint').

71 The Constitutional Court has distinguished — or attempted to distinguish — administrative functions from legislative or executive functions on a number of occasions. See, eg, *Fedsure Life Assurance & Others v Greater Johannesburg Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (Municipal council's decision to pass a budget and impose levies or taxes is legislative action); *Pharmaceutical Manufacturers Association of South Africa & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (President's power to sign legislation into force lies somewhere between administrative and legislative action); *Permanent Secretary for the Department of Education and Welfare, Eastern Cape & Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC), 2001 (2) BCLR 118 (CC) (Allocation of a portion of total budget by an MEC in terms of an explanatory memorandum is legislative action); *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) (Court holds that the implementation of legislation is administrative action while the formulation of policy is executive action: therefore the creation of a commission of enquiry by the President is executive action.) See, generally, J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63; JR De Ville *Judicial Review of Administrative Action in South Africa* (2003) 59-62.

72 *GDE Complaint* (supra) at 31-2.

not change law or issue policy directives, 'it was clear that legislative prescripts and governmental policies that result in conduct that is alleged or suspected to be improper or to result in any impropriety or prejudice, could be investigated by the [Public Protector].'<sup>73</sup> The Public Protector has, on another occasion, refused to offer an opinion as to the constitutionality of

legislation on the grounds that such advice fell within the proper purview of the courts.<sup>74</sup>

The small number of precedents makes it difficult to construct a useful rubric with which to assess the scope of the Public Protector's powers to 'review' legislative and executive matters. However, the holding in *GDE Complaint* suggests that the Public Protector's powers of investigation extend further than a court's powers of administrative review under FC s 33 and the Promotion of Administrative Justice Act.<sup>75</sup> Although its remedies in this regard are rather limited, the Public Protector may still provide a useful vehicle for challenges to administrative action that fall beyond the jurisdiction of the courts.

### **(b) Manner and method of investigation**

In addition to determining subject matter competency, the PPA regulates the powers the Public Protector may exercise in carrying out investigations.

#### **(i) Types of investigations**

The PPA identifies two main categories of investigation: (1) investigations based on the receipt of a complaint; and (2) investigations undertaken at the Public Protector's own initiative.<sup>76</sup> While the overwhelming majority of investigations conducted are

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73 Ibid at 32. The Public Protector did not issue a finding in the matter. Instead it counseled patience and preferred to wait until the GDE completed its own internal review. As Christopher Milton, a former ombudsman of Bophutatswana, notes '[An ombudsman] cannot order an amendment, cannot change the law, demand an about-face of government policy. But [he] can consider and [he] can recommend.' C Milton 'The Wider Aspects of Ombudsmanship' (1984-1985) 4 *The Ombudsman Journal* 59, 62. As a result, Milton says, the correct response to a complaint about the actual law in place is: 'I agree with you. At the moment, that is the law and you must abide by the law. However it is a matter we feel worthy of consideration by the Government and we will recommend that.' Ibid at 61.

74 See Office of the Public Protector *Report on the Investigation into Allegations of Underpayment of Beneficiaries of the Venda Pension Fund* (2002), available at [http://www.publicprotector.org/reports\\_and\\_publications/report18.htm](http://www.publicprotector.org/reports_and_publications/report18.htm) (accessed on 29 November 2005) at para 5.15. This decision was confirmed in *Dabolorivhuwa Patriotic Front & Another v Government of the Republic of South Africa & Others*. [2004] JOL 12911 (T) at para 30.3. The applicants sought an order declaring Venda Proclamation 9 of 1993 unconstitutional. Before approaching the court, the applicants had approached the Public Protector for an opinion regarding the constitutionality of the pension fund created by the proclamation. He declined to offer one. The High Court agreed that 'this complaint is manifestly a complaint which is incapable of being adjudicated by the Public Protector and which has to be taken to the courts.' This view was confirmed by the Supreme Court of Appeal in *Dabolorivhuwa Patriotic Front & Another v Government Employees Pension Fund & Another*. Case No 553/04 (unreported decision of 30 November 2005).

75 Act 3 of 2000.

76 PPA ss 6(4)(a) and 6(5).

based on actual complaints received, the Public Protector has increased the number of 'own initiative' investigations.<sup>77</sup> Recent 'own initiative' investigations engaged allegations of maladministration with respect to the renewal of drivers licences, misconduct by the head of the Johannesburg Metro Police and the non-compliance, and thus apparent contempt, of the Eastern Cape provincial government with respect to court orders.<sup>78</sup> Own initiative investigations are often related to individual complaints. When the Public Protector receives a number of complaints related to a similar constellations of issues, it will institute an investigation into the 'root cause' of the problem with the aim of pre-empting

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future complaints.<sup>79</sup> In the past year, the Public Protector has embarked on nine new 'systemic investigations'.<sup>80</sup>

## **(ii) Confidentiality**

Issues of confidentiality generate significant tension, if not controversy, within the office of the Public Protector. The office is dedicated to transparency and accountability.<sup>81</sup> At the same time, its effectiveness as a watchdog, and the risk attached to whistle-blowing, demands that the identity of complainants and the information they disclose be kept confidential.<sup>82</sup>

### **(aa) Confidentiality during investigations**

The PPA makes specific provision for the maintenance of confidentiality during an investigation by criminalising the disclosure of any document or the record of any evidence, by anyone involved in the investigation, without the Public Protector's consent.<sup>83</sup> Section 7(1)(b)(i) allows the Public Protector to determine the manner or

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77 In the twelve months from April 2004 — March 2005, the Public Protector considered 22 350 individual complaints. *2004-5 Annual Report* (supra) at 20. It conducted 5 'own initiative' investigations. *Ibid* at 13.

78 *Ibid* at 13.

79 See D Jacoby 'The Future of the Ombudsman' in Reif *Anthology* (supra) 15, 27-8 ('Carrying out such investigations is a preventive measure that can actually be helpful to authorities because suggestions can be made to correct deficiencies in standards or administrative procedures.') See also Owen (supra) at 57-8 ('A fundamental aspect of this systemic approach is a belief that public institutions, despite their size and complex responsibilities, are able and willing to respond to individuals in a fair way, on their own initiative. While individual problems will always occur and can be resolved on a case-by-case basis through an ombudsman or internal complaint offices, the vast majority of potential complaints should simply never arise in institutions which are systemically sensitive to their overriding duty to ensure the individual fairness and quality in their administrative actions, decisions and practices.')

80 *2004-5 Annual Report* (supra) at 54. These systemic investigations embrace such varied concerns as the handling of appeals by the courts, the Compensation Commissioner, social grants in the Eastern Cape, maintenance matters, the protection of 'whistle-blowers', RDP housing, civil pensions, unemployment insurance and the witness protection programme. *Ibid* at 56.

81 See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 72-78 (On the obligation to provide effective, transparent, accountable and coherent government, the Court writes that '[a]ccountability by those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.')

the method to be followed in any investigation.<sup>84</sup> This power has a direct bearing on confidentiality.

Indeed the power to determine the manner of an investigation and its relationship to confidentiality was the subject of a dispute in *South African Broadcasting Corporation & Others v Public Protector & Others*. The applicants had applied to broadcast the proceedings of the 'arms deal investigation' jointly conducted by

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the Public Protector, the Auditor-General and the National Director of Public Prosecutions. A panel — representing the Public Protector, the Auditor-General and the National Director of Public Prosecutions — had refused the application in so far as it concerned live radio and television transmissions of witness testimony. In review proceedings of the panel's decision in the High Court, the applicant's contended that the decision had violated their right to freedom of expression, and in particular, the freedom of the press. The applicant relied heavily on *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO & Others*: the *Dotcom* High Court had overruled a decision not to allow television or radio broadcasting of the United Cricket Board enquiry into the Hansie Cronje cricket scandal.<sup>85</sup> The *SABC* High Court held that the right to freedom of expression included the right of journalists to use the tools of their trade and that the preclusion of the use of cameras by the panel constituted a limitation on that right.<sup>86</sup> The High Court then considered the justifications offered for this limitation. It observed that the PPA, unlike the legislation at issue in *Dotcom*, did not require public investigations.<sup>87</sup> It found that the purpose of the limitation — 'the fighting of crime and other forms of impropriety' — was a constitutionally valid objective.<sup>88</sup> The Court concluded that the grounds for the panel's refusal to permit televised proceedings — (1) the deleterious effect on witnesses; (2) the violation of contractual confidentiality clauses; and (3) the

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82 *South African Broadcasting Corporation & Others v Public Protector & Others* 2002 (4) BCLR 340, 347 (T) ('SABC') (Public Protector refused application to broadcast proceedings on grounds that '[c]onfidentiality is paramount in the mandate of the Public Protector and it is necessary to encourage and preserve the confidence and trust in the [Public Protector]'). See also D Jacoby 'Comments on Relations between Ombudsmen and the Media' in Reif *Anthology* (supra) 711, 714 ('The duty [of confidentiality] is, above all else, one of protecting the complainant, who has a right to assume that neither his or her name will be divulged nor the specifics of his or her dealings with the ombudsman.')

83 PPA s 7(2) read with s 11(1). The penalty is a fine of R40 000, 12 months imprisonment or both.

84 PPA s 7(1)(b)(ii) specifically empowers the Public Protector to exclude certain people or categories of people from an investigation.

85 2000 (4) SA 973 (C) ('Dotcom').

86 *SABC* (supra) at 350.

87 *Ibid.* The High Court also distinguished the instant case from *Dotcom* on the basis that the two decisions engaged dramatically different subject matter and that the latter did not address matters of national security. *Ibid.*

88 *Ibid.*

disclosure of confidential information<sup>89</sup>— were rationally related to the purpose of the PPA's infringement of FC s 16 and therefore constituted a justifiable limitation on the applicant's rights under FC s 16.<sup>90</sup>

### **(bb) Confidentiality after investigations**

Although confidentiality is the norm during an investigation, afterwards it is the exception. Both the Final Constitution<sup>91</sup> and the PPA stipulate that '[a]ny report issued by the Public Protector *shall* be open to the public, unless the Public Protector can convince the apposite parliamentary committee that *exceptional circumstance* require that the report be confidential.'<sup>92</sup> The term 'exceptional circumstances' embraces conditions under which release of the report can be said: (i) to

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endanger the security of the citizens of the Republic; (ii) to prejudice any other investigation or pending investigation; (iii) to disturb the public order or to undermine the public peace or security of the Republic; (iv) to be prejudicial to the interests of the Republic; or (v) in the opinion of the Public Protector to have a bearing on the effective functioning of his or her office.<sup>93</sup> The Public Prosecutor has, as yet, not deemed it necessary to keep any report confidential.<sup>94</sup>

### **(iii) Powers of search and seizure**

The Public Protector possesses sweeping powers of search and seizure.<sup>95</sup> This

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endowment entitles the Public Protector to search any building or premises and to seize object he believes material to an investigation.<sup>96</sup> The PPA states that a search can only be conducted with a warrant issued by a judge or magistrate convinced by credible information — obtained under oath — that reasonable grounds exist to suspect that the objects relevant to an investigation by the Public Protector are on the premises.<sup>97</sup>

### **(iv) Power of subpoena**

Amongst the assorted powers granted to the Public Protector, the ability to subpoena any person to provide evidence or submit affidavits may be the most

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89 Ibid at 346-7.

90 Ibid at 354. The High Court held that while it possessed the power to overturn the panel's decision, its powers were limited to rationality review and that neither the particular provisions of the PPA nor the facts of the matter warranted interference with the panel's decision. Ibid at 353. However the use of an administrative standard of review — rationality — in a context that demands a higher threshold — namely reasonableness — goes wholly uninterrogated and unexplained.

91 FC s 182(5).

92 PPA s 8(2A)(a)(our emphasis). Section 8(2A) was inserted by the Public Protector Amendment Act 113 of 1998. See also PPA s 8(2A)(b). If the reasons given by the Public Protector are accepted, the document will be treated as a confidential document in terms of the rules of Parliament.

93 PPA s 8(2A)(c).

important.<sup>98</sup> Without this, her ability to conduct meaningful investigations would be severely limited.<sup>99</sup>

## (v) Outcomes of investigations

The complainant must be informed of the outcome of an investigation. The Public Protector possesses a limited amount of discretion with respect to the timing of that disclosure.<sup>100</sup>

As we note below, the Public Protector possesses any number of different tools to resolve disputes.<sup>101</sup> With respect to completed investigations, the Public Protector's primary means of responding to a complainant's legitimate grievance is to refer the matter to the appropriate public body and to make a recommendation

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94 A comparable controversy has, however, arisen around the Auditor-General's desire to keep certain records confidential. See *CCII Systems (Pty) Ltd v Fakie NNO & Others* 2003 (2) SA 325 (T). The High Court had to decide whether a refusal by the Auditor-General to supply documents, related to the Arms Deal Investigation, and requested in terms of the Promotion of Information Act, was justified. The Auditor-General refused the request on the grounds that some of the documents were supplied in confidence, others could potentially jeopardise the security of the Republic and that the work required to sort through the vast quantity of documents that could be relevant would compromise the work of the Auditor-General's office. *Ibid* at para 4. The High Court rejected the Auditor-General's blanket refusal to comply with the PAIA request: 'It is not good enough to hide behind generalities. If it means that the first respondent has to employ extra staff, it must be done.' *CCII* (supra) at para 17. The High Court did, however, accept the contention that certain documents could not be disclosed because their disclosure would breach the confidentiality of third parties. *Ibid* at paras 19–20 ('One can understand that there is a duty to protect such third parties and that the respondents would be remiss if they did not do so.') Hartzenberg J noted that, in terms of the PAIA, the term 'third parties' does not include public bodies in order 'to prevent technical objections based on what department is really in possession of a document.' The High Court also agreed that the release of some documents could prejudice the interests of the defence force or the state. *Ibid* at para 22 ('I have come to the conclusion that it may cause prejudice to the Defence Force and the Government to order it to produce the whole reduced record.') The High Court therefore concluded that the Auditor-General was obliged to turn over all documents related to the request that did not fall into either of the two aforementioned categories and that it must to furnish a list of the documents it believed ought not to be disclosed and the specific reasons for the non-disclosure. *Ibid* at para 22. For more on *CCII*, see Woolman & Schutte (supra) at § 24B.3.

95 PPA s 7A, inserted by Public Protector Amendment Act 113 of 1998. The original PPA contained no powers of search and seizure. For a discussion of powers of search and seizure under the Final Constitution, see D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38, § 38.3(a)(ii). Three conditions must obtain for these powers to be exercised in a constitutionally valid manner. Firstly, they must be properly defined. See *Mistry v Interim National Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) (Court found that the search and seizure procedures were disproportionately broad for the purpose they were meant to achieve). Secondly, the search must be authorised by an independent authority. See *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C) (Section 6 of the Investigation of Serious Economic Offences Act 117 of 1991 permitting search and seizure without a warrant unconstitutional); *Janse van Rensburg NO v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC) (Section 7(3) of the Harmful Business Practices Act 71 of 1988, granting wide powers of warrantless search and seizure, unconstitutional.) Thirdly, the independent authority must be provided with information under oath detailing reasonable grounds for the search. See *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others; In Re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) ('Hyundai') (Section 29(5) of the National Prosecuting Authority Act must be read to require proof of the existence of a specified offence before a warrant is granted.)

96 PPA s 7A(1). The search may be conducted by the Public Protector or anyone else authorised by him to do so.

to that body as to the appropriate form of redress.<sup>102</sup> If the matter under investigation constitutes a criminal offence, the Public Protector can refer the matter to the relevant prosecuting authority.<sup>103</sup>

## 24A.5 Ancillary functions of the public protector

### (a) Public Reporting

The Public Protector must table an annual report in both the National Assembly and the National Council of Provinces.<sup>104</sup> He may also, under certain circumstances, submit the findings of specific investigation.<sup>105</sup>

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97 PPA s 7A(3). PPA s 7A(3) is structured identically to section 29(5) of the National Prosecuting Authority Act ('NPAA'). Act 32 of 1998. The NPAA, s 29(8) deals with search warrants for preliminary investigations for certain offences. It specifies the content of the information that must be supplied and then states that a warrant may be granted if there are reasonable grounds to believe that the object sought is on the premises, without ever specifically requiring that the object be related to any offence. In *Hyundai*, the Constitutional Court held that NPAA s 29(5) can and must be read to permit the issuance of a warrant only where there are reasonable grounds to suspect that an offence has been committed. Similarly, PPA s 7A(3) should only permit a warrant to be issued when there are reasonable grounds to suspect that the objects required are related to the investigation and that there is something worth investigating. It is clear from *Hyundai* that searches are permissible even when no offence is suspected. See *Hyundai* (supra) at para 28. ('I should emphasise at this stage, however, that this judgment is concerned only with the constitutionality of search warrants issued for purposes of a preparatory investigation under s 29. It should not be understood as stating that all searches, in whatever circumstances, are subject to the requirement of a reasonable suspicion that an offence has been committed.') The PPA also adumbrates the conditions for the appropriate use of force (PPA s 7A(5)(a) and (b)), delivery of a warrant (PPA s 7A(7)), the timing of the search (PPA s 7A(6)), and the procedure for handling privileged information (PPA s 7A(8)).

98 PPA s 7(4)(a) read with s 7(5). Any person appearing before the Public Protector is entitled to legal representation. PPA s 7(8).

99 See Oosting (supra) at 11 ('The ombudsman must, in principle, have unlimited access to information and must be able to rely on the full cooperation of the government in conducting its enquiries.')

100 PPA s 8(3). The section is subject to the proviso 'when he or she deems it fit but as soon as possible.' The phrase 'when he or she deems it fit' should apply only to the timing of the disclosure, and have no bearing on its occurrence.

101 See §26A.6 infra, on 'Access, efficacy and forum shopping'.

102 PPA s 6(4)(c)(ii).

103 PPA s 6(4)(c)(i).

104 PPA s 8(2)(a).

105 PPA s 8(2)(b). The relevant circumstances exist when:

(i) he or she deems it necessary;

(ii) he or she deems it in the public interest;

## (b) Alternative Dispute Resolution ('ADR')

The Public Protector possesses a great deal of latitude with respect to the manner in which it addresses complaints. While the PPA places strict jurisdictional limits on the Public Protector's investigative powers, it simultaneously authorizes the Public Protector 'to endeavour, in his or her sole discretion, to resolve *any* dispute or rectify *any* act or omission' in a variety of different ways.<sup>106</sup> The resolution of a dispute or the rectification of a problem can take place in terms of: (a) mediation, conciliation or negotiation;<sup>107</sup> (b) an advisory opinion as to alternative remedies;<sup>108</sup> or (c) a procedure deemed both efficacious and expedient in the circumstances.<sup>109</sup>

Although some commentators have suggested that this power to employ alternative mechanisms for dispute resolution occur within the context of an investigation and are therefore subject to its jurisdictional limits,<sup>110</sup> we would suggest that this grant of power is distinct from the power to investigate.<sup>111</sup> Moreover, the

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practice of the Public Protector suggests that it views its ADR powers as a complement to, rather than derivative of, its powers of investigation.<sup>112</sup>

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- (iii) it requires the urgent attention of, or an intervention by, the National Assembly;
  - (iv) he or she is requested to do so by the Speaker of the National Assembly; or
  - (v) he or she is requested to do so by the Chairperson of the National Council of Provinces.

106 PPA s 7(4)(b)(our emphasis).

107 PPA s 7(4)(b)(i).

108 PPA s 7(4)(b)(ii).

109 PPA s 7(4)(b)(iii).

110 See L Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard HRLJ* 1, 65.

111 These powers will often be better suited to solving a problem than a finding of right or wrong. See Owen (supra) at 55 ('In keeping with the general principle that it is the proper role of an ombudsman office to strive for the mutually acceptable resolution of a problem rather than necessarily a finding of fault or absence of it, the office should attempt to provide informal mediation services wherever such an approach may be productive. This approach not only tends to result in greater satisfaction among all parties, but frequently provides a more rapid resolution than a full investigation oriented towards a finding of right or wrong.')

112 See, eg, Complaint 012/02 NC in *2003-2004 Annual Report* (supra) at 57 (Complaint about compensation for electrical damage solved by negotiation); Complaint 64/01 MP in *2004-2005 Annual Report* (supra) at 42 (Complainants alleged that government departments were obliged to provide them with a resource centre. The departments countered that the duty rested with a private party. At the mediation, the private party took responsibility for the provision of services. This resolution illustrates the manner in which the power to mediate disputes extends the jurisdiction of the Public Protector.) See also Complaint 1480/03 in *2004-2005 Annual Report* (supra) at 65 (Successful mediation with Department of Education for reimbursement of fees.)

## 24A.6 Access, efficacy and forum shopping

The Public Protector must take those steps necessary to make it 'accessible to all persons and communities.'<sup>113</sup> While meaningful access dictates that the services provided be free — which the Public Protector's services are — they must also be geographically accessible and expeditiously dispatched.

Although provision is no longer made for provincial Public Protectors,<sup>114</sup> the Public Protector now has offices in every province and a national office in Pretoria.<sup>115</sup> The Public Protector has also instituted an outreach programme to improve access for people in remote areas.<sup>116</sup> The pressure to implement these initiatives indicates that the current level of geographical access is less than adequate.

With regard to the speedy handling of claims, in 2004–2005 the Public Protector carried over 9 292 complaints from the previous year and received 22 350 new complaints.<sup>117</sup> Of the 31, 642 complaints in its docket for 2004–2005, only 17 539 were finalised. Thus, 14 103 complaints will be carried over into 2005–2006.<sup>118</sup> Although a special team of investigators has been created to respond to all complaints older than two years, given that most complaints reach their sell-by date after 24 months, this particular strategy might bear far less fruit than anticipated.<sup>119</sup> The real crisis in the Public Protector's office flows from its limited manpower. The office itself claims that the optimal number of active complaints per investigator is between 20 and 100. In 2003, the average was 111. In some provinces, active complaints per investigator average 157.<sup>120</sup> These numbers reflect inadequate levels of funding and threaten both the public perception of and the actual effectiveness of the Public Protector.<sup>121</sup>

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Although these numbers suggest an overwhelmed and understaffed Public Protector's office, the public appears to be getting good value for money. In 2002,

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113 FC s 182(4) and PPA s 6(1)(b).

114 The provisions relating to provincial Public Protectors in the Interim Constitution, IC s 144, and the original PPA not included in the Final Constitution, and were deleted from the PPA by the Public Protector Amendment Act 113 of 1998.

115 See *2004–2005 Annual Report* (supra) at 128–9.

116 *Ibid* at 14–5. Forty-three visiting points across South Africa provide service at least once per week. More regional offices are planned.

117 *2004–5 Annual Report* (supra) at 19 and 20.

118 *Ibid* at 21 and 22.

119 *Ibid* at 13.

120 *2003–2004 Annual Report* (supra) at 11.

121 See § 24A.3(b) supra, for a discussion of the financial independence of the Public Prosecutor.

10% of finalised cases found in favour of the complainant.<sup>122</sup> In 99% of these cases, the state rectified the wrong.<sup>123</sup> When a well-founded and properly registered claim is made, the Public Protector appears to be a very accessible and highly effective alternative to the courts.<sup>124</sup>

The Public Protector's relatively high rate of success in securing adequate redress for complainants raises the question of when, and whether, the Public Protector ought to be treated as the preferred forum for ventilation of disputes between a citizen and the state. As it stands, the law provides only limited disincentives with respect to forum shopping.

On the one hand, the PPA permits the Public Protector to refuse to investigate any matter in which the complainant has not exhausted his legal remedies.<sup>125</sup> This power has been exercised in less than 1% of all complaints.<sup>126</sup> On the other hand, the complainant has no obligation to approach the Public Protector for assistance prior to filing suit in a court of law.<sup>127</sup>

If anything, the current case law suggests that a complainant might be well advised to adopt a two-pronged approach to the resolution of a dispute with a

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122 2001–2002 Annual Report (supra) at 16. The complainant lost 9% of all cases; 50% of complaints were determined to be either premature or outside the Public Protector's jurisdiction; 4% of complaints were referred to another body to finalise; 1% of complainants were instructed to first exhaust alternative legal remedies; 26% of complaints required no further action due to a deficiency in the claim or the complaint being resolved without the Public Protector's aid. Ibid

123 Ibid. 98% were finalised before the case closed and a further 1% after the case closed. In only one case did the state refuse to follow the recommendation: it chose to take an alternative route to address the problem.

124 The Office of the Public Protector increases access through its acceptance of complaints in numerous formats. Personal interviews ensure that persons who are illiterate or who lack sufficient education to draft a document stating the alleged wrong can lay a complaint. Complaints registered by telephone interview ensure that those persons who lack the resources (time or money) needed to travel to a Public Protector's office are still able to file a complaint. Complaints can also be initiated by letter. See the public information brochure issued by the Office of the Public Protector *Public Protector: South Africa* (2003), available at [http://www.publicprotector.org/brochure\\_faq/11\\_lang/english.pdf](http://www.publicprotector.org/brochure_faq/11_lang/english.pdf) (accessed on 1 November 2005). The brochure is available in all 11 official languages. A toll free number — 0800 11 20 40 — enables members of the public to speak directly with a member of the Public Protector's office. The office will assess both the merits of the claim and the likelihood of success should the complainant pursue it further. Ibid. Although the Office of the Public Protector will act on a purely telephonic complaint, it prefers a written complaint that includes the following: the nature of the complaint; the background and history of the complaint; the reasons why the complaint should be investigated by the Public Protector; the steps that have been taken to solve the problem; the names of the relevant officials; and copies of any correspondence. Ibid.

125 PPA s 6(3)(b).

126 2001–2002 Annual Report (supra) at 16.

127 See *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E), 625, 2000 (12) BCLR 1322, 1333 (E) ('[The Public Protector and the Auditor-General] are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the Courts are precluded from coming to the assistance of the applicants.') See also *Dabalorivhuwa Patriotic Front & Another v Government, RSA & Others* [2004] JOL 12911 (T) ('*Dabalorivhuwa*') at para 30.2.

public entity. In *Mothibeli*, the court held that the lodging of a complaint with the Public Protector does not count as sufficient reason for the late lodging of an application.<sup>128</sup> The complainant, in *Mothibeli* had first lodged his labour complaint with the Public Protector. After failing to receive a satisfactory response from the Public Protector, he approached the court — some 18 months after the claim arose. The *Mothibeli* court held that 18 months did not constitute a reasonable time within which to bring suit. The Prescription Act reinforces the view that a complaint to the Public Protector will also not prevent the running of prescription.<sup>129</sup>

The holding in *Mothibeli* makes the Public Protector a somewhat less attractive substitute for litigation. However, the Public Protector remains a free and effective mechanism for dispute resolution. Those complainants who believe that their best chance at securing the required relief is to be found in the courts are not barred from filing in both forums simultaneously. The contemporaneous pursuit of litigation and alternative dispute resolution can only be said to defeat the purpose of creating the Public Protector if, in fact, the vast majority of complainants are obliged to adopt such a tactic. The evidence, albeit scant, does not support such a conclusion.

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128 *Mothibeli v Western Vaal Metropolitan Substructure* [1999] JOL 5678 (LC) at para 18 ('While the applicant may well have been entitled to approach the Public Protector for assistance, that clearly would have been a parallel exercise to the course of legal proceedings . . . In any event, he could not reasonably have understood that his referral of the dispute to the Public Protector could excuse him from pursuing the matter under the Labour Relations Act, including the filing of the necessary statement of claim in this Court.') See also *Prinsloo v Development Bank of Southern Africa Pension Fund & Another* [1999] 12 BPLR 439, 443 (PFA) (The Pension Funds Adjudicator denied application for the condonation of late application despite an earlier application to the Public Protector.)

129 The Prescription Act provides that the running of prescription will only be interrupted by 'service on the debtor of any process whereby the creditor claims payment of the debt.' Act 68 of 1969, s 15. A complaint to the Public Protector does not amount to such service.