

Supporting Constitutional Democracy in South Africa An Assessment of the Public Protector (Ombudsman)

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OPSOMMING: ONDERSTEUNING VAN GRONDWETLIKE DEMOKRASIE IN SUID-AFRIKA: 'N WAARDEBEPALING VAN DIE OPENBARE BESKERMER (OMBUDSMAN)

Een van die mees gedugte uitdagings wat grondwetlike demokrasie in die Suidelike Afrika-streek in die gesig staar is om doeltreffende en effektiewe instellings en maatreels te ontwerp waardeur die uitvoerende gesag tot verantwoording geroep kan word. Die Openbare Beskermer is grondwetlik verbind tot 'n besondere bydrae in die verband. Die beperkte hulpbronne en kapasiteit van die Openbare Beskermer ondermyn egter sy vermoë om reg te laat geskied aan die grondwetlike mandaat van die instelling. Die ontoereikende begroting het veral 'n stremmende uitwerking op die pogings van die Openbare Beskermer, om sy dienste nader aan die gewone mense te bring ten einde grondwetlike demokrasie te versterk. 'n ligpunt in die somber situasie is egter dat aspekte van kritiek teen die huidige funksionering van die instelling grootliks te wyte is aan

monetere ongenoegsaamhede en nie a an 'n gebrek aan inisiatief by die instelling om die situasie te verbeter nie. Die bepalende vraag is egter steeds of monetere beperkings geregverdig is indien die optimale funksionering van 'n instelling ter ondersteuning van grondwetlike demokrasie wereldik *n prioriteit in Suid-Afrika is. Na *n bestaanstydperk van slegs drie jaar as die herontwerpte amp van Openbare Beskermer en met die voordeel van die ondervinding van die voormalige ampte van die Advokaat-generaal en Ombudsman, kan met sekerheid voorspel word dat dat die instelling die potensiaal het om 'n betekenisvolle bydrae tot die grondwetlike demokrasie in Suid-Afrika te lewer en dat dit waarskynlik verseker is van 'n sentrale plek in die grondwetlike bestel in die toekoms.

BACKGROUND

Nowadays the Ombudsman system is found in a large number of countries in Africa. The Southern Africa region¹ prides itself in the fact that it has the highest concentration of active Ombudsman offices on the continent (Cf. Ayeni, 1997:543-563). Wherever the Ombudsman system is employed, it is adapted to the unique circumstances of the country concerned. This process of adaptation and a deliberate drive to indigenise the concept has resulted in a variety of names for the Ombudsman.

In South Africa the office of the then Advocate-General was established on 18 July 1979 in terms of the Advocate-General Act 118 of 1979. This position was created in the aftermath of the notorious Department of Information debacle which involved the misappropriation of public funds (Cf. South Africa, 1978). This debacle was to a large extent responsible for the setting up of this office² and left its mark on the initial jurisdiction of the Advocate-General in that the emphasis was placed on the misspending of public money. Another primary reason for the creation of an Advocate-General was the then Prime Minister's commitment, on taking office on 28 September 1978, to maintaining honest public administration and orderly government. (South Africa, 1979: Col 2638). The institution of the office of the Advocate-General was one outcome of this commitment.

This initiative was criticised as being the result of a need of the government (to have an institution to investigate matters of a similar nature in the future) and not necessarily the result of a need of the public (Brynard, 1986:1-3). What is particularly evident from the events described above is that the jurisdiction of the Advocate-General was peculiar to the spirit of the time. It was evident that the position of Advocate-General was established in the absence of a thorough prior study of, and investigation into, the needs of the citizens as regards such an institution.

Fortunately this situation was rectified with the creation of a fully-fledged Ombudsman in 1991 which replaced the Advocate-General. This *office* was a true classical Ombudsman, in the international sense, with authority to investigate any act of

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maladministration. Since 22 November 1991 this office was known as the Ombudsman. The Ombudsman was appointed and functioned in terms of the Ombudsman Act 118 of 1979, as amended.

With the dawn of yet another constitutional dispensation on South Africa on 27 April 1994, which was the day of both the first fully democratic elections in South Africa and the birth of the so-called Interim Constitution, provision was made for a Public Protector to replace the Ombudsman. The office was established under Chapter 8 of the then Constitution of the Republic of South Africa, Act 200 of 1993. The operational requirements of the office were provided for under the Public Protector Act 23 of 1994. It took another eighteen months before the first incumbent took office on 1 October 1995³. The 'final' Constitution of the Republic of South Africa, 108 of 1996 which came into operation in February 1997 also made provision for the continued existence of the Public Protector.

VISIBILITY AND USER AWARENESS

Ombudsmen need publicity of their activities and more importantly, of the existence of the office. An awareness of the existence of the ombudsman is a functional imperative for possible users of the service offered by the institution. It is for this reason that the present Public Protector considered it one of his primary tasks upon assuming office to publicise the existence and functions of the office as much as possible. The media could be instrumental in securing publicity. In this regard the Public Protector has started an awareness campaign on radio, television and in the printed media. A pamphlet has also been produced in the various official languages (South Africa, 1997a:17). Information on the office and the reports of the Public Protector are also available on a web site via the internet⁴.

An additional source of information to the media for their stories would be the reports issued by the Public Protector. At the same time it is imperative that the reports should be worded in such a way that they can serve as training manuals with relevant information and guidelines for public officials, to prevent the recurrence of the same error in the future. To attain this goal the Public Protector should be sensitive to the fact that reports are written not only for the benefit of legislators, but also serve the interests of the public and public institutions. Due to the fact that the relevant legislation fails to give statutory acknowledgement to public interest in the contents of reports, the office-bearer needs to exercise his discretion to determine the contents of reports with a creative attitude towards report writing. Credit must however be given in this regard to the present incumbent in that his reports are vastly more informative than those of his predecessor.

The Constitution makes provision for the Public Protector to report on the findings of his investigations [sec.182(1)(b)J. The 1994 Act initially provided that the Public Protector shall, on a half-yearly basis, submit reports to Parliament on the findings in respect of investigations of a serious nature, which were conducted during the half-year concerned

[*sec.8(2)*]. This was recently amended by the Public Protector Amendment Act 113 of 1998 which made provision for a report to the National Assembly at least once every year (the report shall also be tabled in the second chamber of Parliament, namely the National Council of Provinces) [*sec.11(a)*]. Provision is also made in the 1994 Act for the Public Protector to submit a report (i.e. a special report) to Parliament on the findings of a particular investigation if he deems it necessary [*sec.8(2)(a)*]. In addition, the Public Protector may also make any finding, point of view or recommendation in respect of a matter investigated by him, known to any person [*sec.8(1)*]. The latter provision seems to be aimed at allowing press releases.

Despite the efforts that have been made in arousing awareness, there are still huge problems that exist. Factors such as illiteracy, widespread ignorance about the existence of the office, large geographical areas, a sparse and scattered population in some areas, and a poor communication infrastructure militate against more and better visibility and user awareness of the office (Ayeni, 1997:560)

INDEPENDENCE AND IMPARTIALITY

The Constitution recognizes the institution of Public Protector as one of those established to strengthen constitutional democracy in South Africa [*sec.181(1)(a)*] and made special constitutional provision for the independence and impartiality of the office. The Constitution provides that the office is independent, subject only to the Constitution itself and the law, and that it must be impartial and performs its functions without fear, favour or prejudice [*sec. 181(2)*]. Other relevant constitutional provisions include directives that other institutions of state must assist and protect the institution of Public Protector, through legislative and other measures, to ensure the independence, impartiality, dignity and effectiveness of the Public Protector [*sec. 181 (3)*] and that no person or institution of state may interfere with the functioning of the Public Protector [*sec, 181 (4)*].

Although it is commendable that the independence and impartiality of the Public Protector is specifically emphasised in the Constitution it was pointed out, some years ago, that a designation such as 'Public Protector'⁷ is likely to create the impression of an office susceptible to a suspicion of bias towards the members of the public. It was noted that the designation has the potential of making people believe that the Public Protector is a citizen's or public's defender (Brynard, 1995:514-515). This situation is aggravated by the fact that initially the preamble of the 1994 Act stated that it is the duty of the Public Protector '... to protect the public against matters such as maladministration' (this was recently amended by the 1998 Amendment Act [*sec.2*]). Subsequently these fears have materialised in practice and have left the Public Protector with no choice but to report as follows: 'The Public Protector is neither an advocate for the complainant nor for the public authority concerned. He ascertains the facts of the case and reaches an impartial and independent conclusion on the merits. It has become necessary to emphasise the latter

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point because it would appear from what has happened in practice that there is a misconception in some people's minds that unless the Public Protector finds 'in favour' of the complainant then his decision becomes questionable or he is plainly wrong. This is clearly incorrect because if the Public Protector's office were to act in that manner then his independence would be academic or alternatively non-existentf (South Africa, 1996b:1-2).

It is clear from the above and similar statements in subsequent reports that the present Public Protector firmly believes in the duality of purpose (South Africa, 1997a: 1) which boils down to the fact that one of the most basic principles underlying the impartiality and independence of the office is equal protection of both the citizen (member of the public) and the public official. This is important because, if the Public Protector wants to retain the values of easy accessibility, promptness of response, independence, impartiality and integrity, it should at least attempt to enjoy the trust of both officials and the public. On these grounds it can be asserted that, in spite of the unfortunate designation of 'Public Protector', the office should not be seen as a 'watchdog⁵ for the public, or even as an apologist for public officials, but as an independent and impartial upholder of the highest standards of efficient, effective, just and fair public administration.

The Public Protector is appointed by the President on the recommendation of the National Assembly [sec. 193(4)]. In practice, the National Assembly will recommend a candidate nominated by a committee of the Assembly (proportionally composed of members of all parties represented in the Assembly) and approved by 60 per cent of the members of the Assembly [sec. 193(5)]. The Public Protector is appointed for a non-renewable period of seven years [sec. 183]. The Public Protector may be removed from office by the President on the ground of misconduct, incapacity or incompetence. In practice, the President will only act on a finding of a committee of the National Assembly to that effect which was supported by at least two thirds of the members of the Assembly [sec. 194],

The procedures for proposing and authorising the Public Protector's budget are somewhat troublesome. For reasons of expediency, the funds needed for the activities of the Public Protector are provided for in the Vote of the Department of Justice under a separate programme. The logical procedure of attaching the budget to the office of the Speaker of Parliament has been abandoned because of the practical difficulties created by the distance between Parliament in Cape Town and the Public Protector's Office in Pretoria (South Africa, 1997a:16). Although the Public Protector maintains that he is the Accounting Officer for that programme on the budget and that his independence is not affected, some concerns remain. In the words of the Public Protector himself: '... independence is not a theoretical matter... (I)t must be seen to exist even with regard to funding*' (South Africa, 1997a:16). It is my view that a special committee of Parliament could go a long way towards ensuring the functional and budgetary independence of the Public Protector. The recent 1998 Amendment Act has paved the way for such a special committee to

become operational by providing that the Public Protector may, at any time, approach such a committee on any matter pertaining to the office of Public Protector [sec.5(e)].

ACCESSIBILITY TO POTENTIAL USERS

Ready access to the institution of Public Protector by all persons and communities is a priority. The relevant legislation goes a long way towards ensuring that the institution of Public Protector is as accessible as possible to potential users. The Constitution provides that the Public Protector must be accessible to all persons and communities [sec.182(4)].

The Public Protector also stresses the fact that any person or institution may complain to him (South Africa, 1996a:1) and that it is his aim to facilitate such access (South Africa, 1997a:15). In 1996 the Public Protector stated that his Office has the capacity of communicating to its users in all of the eleven official languages with the exception of Venda. He added, however, that there is at least one person in the Office who can understand Venda, if not speak it (South Africa, 1997a:15).

In terms of the 1994 Act a complaint may be made by any person to the Public Protector by means of a written or oral declaration (under oath or after having made an affirmation) or by any other means as the Public Protector may allow, with a view to making the Office accessible to all persons [sec.6(1)]. It is also provided that a member of the institution of Public Protector must render the necessary assistance, free of charge, to enable any person to lay a complaint in the prescribed manner [sec.6(2)]. Even in cases where the Public Protector does not have jurisdiction, the policy of the Office is to assist the complainant by advising him or her on the correct procedures to be followed and places to contact (South Africa, 1997a:6).

The proposed offices of Provincial Public Protectors which were provided for in the interim Constitution of 1993, would have enhanced access considerably. However, the 1996 Constitution did not make provision for these offices. To bridge this gap the Public Protector envisages the creation of nine regional offices in the near future, which will certainly facilitate access to the office by bringing it closer to the people (South Africa, 1997a:3+17).

JURISDICTION AND COMPETENCE

The word 'jurisdiction*' refers to a person's or institution's right or authority to act. Thus the extent of the Public Protector's action is determined by the jurisdiction vested in his office. The jurisdiction of the Public Protector is spelled out in broad terms in the Constitution and in the 1994 Act.

The Constitution stipulates that the Public Protector has the authority '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'

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[sec.182(1)(a)]. The decisions of courts are excluded from the jurisdiction [sec.182(3)]. The 1994 Act mentions the following examples of improper conduct or improper prejudice which may be within the ambit of the above-mentioned constitutional jurisdiction:

- * maladministration;
- * abuse of power;
- * unfair, capricious, discourteous or other improper conduct;
- * undue delay;
- * improper or unlawful enrichment;
- * receipt of any improper advantage; and
- * unlawful or improper prejudice suffered by a complainant as a result of a decision taken by the authorities [sec.6(4)].

It should be clear from the above, and is indeed being confirmed in reports of the Public Protector (South Africa, 1997a:6), that the jurisdiction is exceptionally wide and includes almost any imaginable subject across, the broad spectrum of public administration and state affairs. A case in point is the medicine-investigation where the mere statements of public officials were investigated because they were alleged to be improper in that they failed to meet the basic values and principles governing public administration as set out in the Constitution [sec.195(1)] (South Africa, 1997c: 1-2). It is clear that, within the broad boundaries of his jurisdiction, the Public Protector has considerable discretion to determine the boundaries of his authority.

The 1994 Act also gives the Public Protector competence to investigate, on his own initiative (*mero motu*) or on receipt of a complaint, any matter which falls within his jurisdiction [sec.6(4)-(5)]. This authority to investigate a matter *mero motu*, without a formal complaint having been filed, represents one of the strongest positive features of the system. This authority has been used in the past when rumours of possible maladministration received considerable publicity and the need existed to clear the air as soon as possible⁵. Although not directly related it has happened on occasion that the Public Protector has decided to give preference to the completion of a specific investigation because the matter had been raging in the press for a number of weeks (and) that it was a matter of public interest which I had to attend to quickly and expeditiously.¹ (South Africa, 1996b:3).

During the constitution-writing exercise in 1993, the Technical Committee on Fundamental Rights proposed that the functions of the then Ombudsman be expanded to include the investigation of alleged violations of fundamental rights by the public administration and the authority to take steps to enhance respect for human rights within the public administration generally' (South Africa, 1993: par. 2.2). The proposal was not accepted and the traditional view, that such an office should focus primarily on maladministration and not specifically on human rights as such, triumphed (Du Plessis & Corder, 1994:204). The result is no explicit mentioning of human rights protection in the jurisdiction of the Public Protector, but the jurisdiction is clearly so wide that human rights protection in public administration can safely be read into it. It is clear that the Public

Protector can play a meaningful role in the observance of, *inter alia*, the rights to privacy [sec. 141, of access to information [sec.32], and to administrative justice [sec.33]. In the Sarafma II donor case, where he had to decide on a matter of transparency measured against competing rights such as the right of access to information and the right to privacy the Public Protector made it clear that the issue at hand was one of human rights (South Africa, 1996b: 1-14). Cognisance should, however, be taken of the fact that a Human Rights Commission has been established by the Constitution with the function of, *inter alia*, promoting the protection, development and attainment of human rights and taking steps to *secure* appropriate redress where human rights have been violated [sec. 184].

POWERS OF INVESTIGATION

Under the 1994 Act, the procedure to be followed in conducting an investigation, is such as the Public Protector considers appropriate in the circumstances of each case [sec.7(1)]. It seems that the Public Protector favours an informal method of investigation (South Africa, 1997a:3) on the basis that it ensures that investigations proceed swiftly and smoothly in a non-adversarial way, and that they are as non-confrontational as possible (South Africa, 1996a:2).

The Public Protector may direct that certain persons whose presence is not desirable at a particular investigation may not be present at the proceedings of that investigation [sec.7(1)]. This provision leaves the impression that investigations, in theory, are conducted in public unless the Public Protector decides otherwise. For reasons of maintaining the credibility of the office, it is practice that information submitted to the Public Protector, and the identity of complainants or informants, is kept confidential.

The Public Protector may request any person at any level of government, or who is performing a public function, or who is otherwise subject to the jurisdiction of the Public Protector to assist him in an investigation [sec.7(3)(a)]. The Public Protector may also designate any person to conduct an investigation on his behalf and to report to him [sec.7(3)(b)J. The latter has happened frequently, for example in the medicine-investigation when the Public Protector used experts in the field of medicine to assist him in this investigation because of their specialist knowledge and experience (South Africa, 1997c:4) and the University of Zululand-investigation when experts in university administration were used (South Africa, 1997b:7).

For the purposes of an investigation under the Act the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him to give evidence or to produce documents relevant to the investigation, and may examine such person [sec.7(4)(a)]. The Public Protector may also request an explanation from any person who may have information relevant to the investigation [sec. 7(4)(b)]. Due to excellent co-operation by institutions (with minor exceptions) under his jurisdiction the Public Protector has had little need for these formal powers. Complaints could be solved

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over the telephone or at a meeting and information could be gathered by writing to the institutions involved (South Africa, 1997a:3). The result is the speedy resolution of complaints. In some cases the Public Protector may feel that another body would be the appropriate authority to approach and then simply refer the case to that body, requesting it to keep him informed of developments (South Africa, 1997a:6).

The 1998 Amendment Act provides that if it appears to the Public Protector during an investigation that any person is being implicated in the matter being investigated, that person must be afforded the opportunity to respond in any manner that may be expedient under the circumstances. The implication must however be of such a nature that it may be to the detriment of the person concerned or may result in an adverse finding pertaining to that person [sec.9(d)]. When the Public Protector does decide that a particular investigation should proceed on a formal or quasi-judicial basis, special care is taken to ensure that the basic rights of those being investigated are respected. These rights may be the right to a proper hearing, the right to representation and the right to be heard, i.e. the *audi alteram partem* rule (South Africa, 1997b:7).

The Constitution provides that no person or institution of state may interfere with the functioning of the institution of Public Protector [sec. 181 (4)] and the 1998 Amendment Act makes such interference a culpable offence [sec. 12(a)], The 1994 Act provides that if any person does anything in connection with an investigation, which if that investigation were a proceeding in a court of law would constitute contempt of court, he/she shall be guilty of an offence [sec.9(1)(b)&11(l)].

SPEED OF THROUGHPUT AND SCALE OF OPERATIONS

When the present Public Protector took office on 1 October 1995 the average of new cases received was 133 per month. After that the rate of incoming complaints rose steadily until it reached an average of 200 incoming cases per month by April 1996 (South Africa, 1997a:5). In 1995 a total of 1039 cases were received, 2327 cases in 1996, 3320 cases in 1997 and 1700 cases during the first six months of 1998. An average of 2000 telephone calls are being received on a monthly basis (Beeld, 5 August 1998). The current Ombudsman office in the North West province⁶ deals with an average of 3300 cases a year, notwithstanding the fact that the Public Protector also receives some complaints from that province. These statistics show that, on average, 0,179% of the population complain to the Public Protector every year. In the event of the Public Protector being successful in creating one regional office in each of the nine provinces this would amount to an estimated 67 000 cases a year for the whole country (Calland, 1997:1).

Constant reference to the 'Public Protector' might suggest to the unwary that he single-handedly copes with all the complaints received. He does in fact have the final word in each case, but in terms of the 1994 Act he has the assistance of some staff members who

operate under his direction and control [sec.3(l)]. The Act makes provision for one or more Deputy Public Protectors [sec.3(l)(a)] but to date none have been appointed. In a recent unfortunate turn of events the 1998 Amendment Act was approved with the provision that a Deputy Public Protector shall be appointed by the Minister of Justice after consultation with the Public Protector [sec.6(a)]. This has the potential to reflect negatively on the independence and integrity of the office, in cases where the Deputy Public Protector - in the absence of the Public Protector and as the acting Public Protector - may be required to investigate allegations of maladministration by the Department of Justice.

Like all Ombudsman-like institutions the Public Protector has a very small staff component. When the first Public Protector took office on 1 October 1995 he inherited a staff complement of eight persons from his predecessor, the then Ombudsman (South Africa, 1997a:3). This establishment was geared to deal with 40 incoming complaints per month. A work study investigation was then performed to determine the staff needs in view of the increase in the number of complaints received. The result was that more posts were created and appointments made. Thus resulted in the staff compliment being increased to 21 of which only 12 are investigators (Beeld, 26 September 1997). Bearing in mind the lengthy period needed to prove the need for further posts, undertake consultations in terms of the relevant legislation, and make the actual appointments, the Public Protector envisages that the process of creating further posts will be an ongoing one (South Africa, 1997a:3).

The budget of the institution increased steadily after it was converted to the office of the Public Protector in 1995, corresponding to an increase in activities of the Office. The budget for the 1995/96 financial year was R1 630 000 and the budget for the 1996/97 financial year has already increased to R4 168 000 (South Africa, 1997a: 16). The budget for the 1997/98 financial year is reported to be R7 438 000 but is considered totally inadequate by the Public Protector. He estimates that the budget will have to quadruplicate to more than R31 million per annum to enable him to perform the function for which he has been appointed (Beeld, 5 August 1998). As a result of the budgetary difficulties and resultant limited capacity it takes on average eight months to conclude a case (Beeld, 5 August 1998). This has resulted in a serious backlog of complaints still awaiting attention (Calland, 1997:1).

REMEDIAL ACTION

The Constitution provides that the Public Protector has the authority to investigate any improper or prejudicial conduct in public administration and to take appropriate remedial action [sec.182(l)(a)&(c)]. Under the 1994 Act the Public FVotector may, at his/her discretion, refuse to conduct an investigation when the person ostensibly prejudiced in the matter is a public servant or official and has not taken all reasonable steps to exhaust the remedies available in terms of the Public Service Act, (Proclamation 103 of 1994)

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[sec.6(3)(a)]. The Public Protector may also, at his/her discretion, refuse to conduct an investigation when a person is ostensibly prejudiced by an act or omission of a public servant or official and has not taken all the reasonable steps to exhaust the legal remedies available [sec.6(3)(b)].

The Public Protector views his office as the instance of last resort for complaints of improper prejudice by the authorities. This implies that a complainant must first obtain a final response from the relevant institution before approaching the Public Protector (South Africa, 1997a:3). In this regard the Public Protector has appealed to departments and officials to examine their internal complaint-resolution mechanisms with a view to solving problems at an early stage. The obvious benefit is much less frustration experienced by the public and the public servant alike, and the opportunity for the department or official itself to improve its level of service (South Africa, 1997a:2). In cases where complainants do approach the Public Protector prematurely, they are not left empty-handed, but instead are assisted by being informed of the procedures to be followed to obtain the final response from the authority concerned, before approaching the Public Protector again (South Africa, 1997a:5).

The Public Protector has also appealed to public institutions to assign a high-ranking official in every institution to deal with complaints. Such a 'complaints commissioner' would then act as a screening mechanism by solving most of the complaints him/herself and only referring to the Public Protector those he/she has been unable to solve (South Africa, 1997a:4).

COMPLIANCE

The Public Protector has no statutory authority relating to the enforcement of his recommendations. Under the 1994 Act he has, however, the discretion to submit a special report to Parliament on the findings of a particular investigation if the matter requires the urgent attention of, or even an intervention by Parliament [sec.8(2)(c)j]. It is possible that this discretion may, *inter alia*, be used by the Public Protector as a 'disciplinary sanction' were an impropriety or prejudice has not been remedied by the public institution concerned (Mafenya, 1995:2).

The 1994 Act makes also provision for Parliament to appoint a committee for the purpose of considering matters referred to it in terms of the Act [sec.2(l)3. Although this has not happened in practice it is possible, as experience from other countries suggest, that a special committee of Parliament may be of assistance in securing compliance with the recommendations of the Public Protector. On a rare occasion when a department may refuse a remedy, and a special committee is of the opinion that the recommendation of the Public Protector has merit, that committee may lend support to the Public Protector.

The Public Protector has reported a willingness to co-operate with his Office on the part of most public servants and institutions (South Africa, 1997a:2+8). In the vast major-

ity of cases government departments will be eager to comply with the recommendations of the Public Protector - even before a report has been tabled in Parliament. A case in point is the Sarafina II saga where the Public Protector, during interviews with the Minister and Director-General, made his concerns on the maladministration within the Department clear to them and even pointed out which recommendations would be forthcoming on certain issues. The result was that action was taken immediately with regard to certain recommendations, whilst the Director-General has also kept the Public Protector up to date on further developments (South Africa, 1997a:8; South Africa, 1996a:47). The benefits of an early resolution of complaints include a saving of resources and a better service to the public (South Africa, 1997a:2).

It is only in rare instances that the recommendations of the Public Protector have been ignored by the authorities concerned. It is, however, not coincidental that the failure of the authorities to rectify a matter, will lead to further complaints to the Public Protector (South Africa, 1997a:8-9). It is my belief that the public sector would be willing to respond even more positively to the recommendations of the Public Protector if they had a better understanding of the value of the office to public administration in general (CF Brynard, 1993:177-193). The notion of equal protection of both the citizen (as a member of the public) and the public official has already been stressed by the Public Protector in his reports (South Africa, 1996b:1+2). He not only protects members of the public, but also endeavours to protect public officials from unfounded criticism and false accusations. Unfortunately many commentators and writers have stressed only the one side of the equation, i.e. protection of the public (Mafenya, 1995:2; Barrie, 1995:580; Botes, 1996:365; Nel, 1996:163). This approach is not helpful and may even impact negatively on the impartiality and independence of the Public FVotector. A simple solution seems to be to pay proper attention to the aggrieved and at the same time give proper support to those who truly serve.

If the above-mentioned methods of seeking compliance are unpersuasive, an important weapon to secure remedial action is publicity. This can be obtained, *inter alia*, through the press. Publicity is a natural ally of the Public Protector in the sense that it brings the activities of the institution to the attention of the public and marshals support for its recommendations. In the spirit of accountability, openness, and transparency, which is the hallmark of the Constitution, the latter states that the reports of the Public Protector must be open to the public unless exceptional circumstances require that a report be kept confidential [sec,182(5)]. The release of a special report on a particular investigation is one way of securing the sometimes needed support. Special reports have often been used by the Public FVotector since the office became operative. *Yet* another option is to use the powers of persuasion by means of conciliation and negotiation to obtain co-operation (Mafenya, 1995:2).

IMPROVEMENTS IN ADMINISTRATIVE PERFORMANCE

It would be wrong to view the Public Protector as being concerned only with the remedying of individual complaints. An important function is the duty of the Public Protector to encourage the improvement of administrative performance in public institutions (South Africa, 1997a:2). This duty is second only to the task of attending to individual complainants. The fact that the Public Protector is the focal point for administrative complaints presents him with a unique opportunity to identify patterns of administrative inconsistency or persistent problem areas which indicate that the cause of the problem is systemic. It has been argued that Section 8(2) of the 1994 Act requires the Public Protector to address systemic issues (Ayeni, 1997:551). In practice he looks beyond individual errors and the mere settlement of a complaint, with a view to seeking changes in procedures, practices and regulations that repeatedly generate errors and injustice, i.e. he adopts a systemic approach towards defective administration (South Africa, 1997a:2). A case in point is the investigation into the integrity of the Senior Certificate Examination which produced positive recommendations on the improvement of human resource management, the provision of information, a communication strategy, logistical practices, long-term planning, and amendments to existing legislation (South Africa, 1996c:18-29).

The Public Protector has also made an observation of the tonic effect' of his Office on public administration. It is said that the effect of his continuous presence may serve to encourage public officials and institutions to keep to the paths of administrative righteousness. The mere existence of the office may have an indirect influence on administrative performance, by exerting psychological fear on officials, in preventing administrative malfeasance. For the Public Protector however, to have any chance of affecting public administration in this way, it is imperative that public officials should be very much aware of the office and its functions (Brynard, 1993:183).

The achievements of the Public Protector in improving administrative performance may not be conspicuous, but in addition to his substantive and psychological impact, he may affect administrative performance in subtle ways. The Public Protector is not an administrative panacea and therefore it is probable that those who will be most disappointed with his achievements will be those who expect too much. It is for this reason that the qualitative aspects of the Public Protector's impact on administrative performance may be of more importance than the quantitative aspects.

COST-EFFECTIVENESS

The Constitution also has a specific provision on the effectiveness of the office. It provides that other state institutions must, through legislative and other measures, assist and protect the office of Public Protector to ensure, inter *alia*, the effectiveness of the institution

[sec.181(3)]. A viable instrument to attain the envisaged assistance is a special committee of Parliament. Legislative authorization does exist in terms of the 1994 Act and the 1998 Amendment Act for the creation and use of such a committee [sec.2(1) and sec.5(e)]. Such a committee may have the potential to enhance the effectiveness of the office of Public Protector (Mireku, 1995:16-18). This could be done by rendering support in ensuring the functional and budgetary independence of the office and by being of assistance in seeking compliance with important recommendations made by the Public Protector in cases where government departments are slow or unwilling to respond.

Access to the Public Protector and publicity of his functions and activities are equally important for the effectiveness of the institution. Unrestricted access to the institution can be a major contributing force towards the effectiveness of the office. The Public Protector also envisages a role for civil society in making the office more effective. He has appealed to civil society, as represented by non-governmental organisations (NGOs) with their capacity, resources and insight, to bring to the attention of his Office matters that otherwise would never receive public attention (Mafenya, 1995:2).

It is a recognized fact that the survival of the Public Protector is directly related to his ability to function effectively. The Public Protector is essentially a personality-orientated institution where the personal influence of the office-bearer is crucial to the success of the office. It is therefore of utmost importance that the individual who is appointed to such an office has the personal qualities to make an essential and direction-giving contribution to the successful functioning of the institution (CF Brynard, 1990:1-12).

ACCOUNTABILITY AND LINKS WITH LEGISLATURE

The Constitution provides that the Public Protector is subject only to the Constitution and the law [sec. 181(2)]. It also provides that the Public Protector is accountable to the National Assembly, and that it must report to the Assembly at least once a year on its activities and the performance of its functions [sec.181(5)]. As explained in the section on 'visibility and user awareness' above, the 1998 Amendment Act stipulates that the Public Protector is required to submit yearly reports to Parliament with the added responsibility of special reports when necessary [sec.11(a)]. The Public Protector is, however, not liable for anything done by him in good faith [sec.5(3)]. Accountability to Parliament is strengthened by the fact that the financial records of the office are audited by the Auditor-General [sec.4(2)].

The Public Protector must be distinguished from other institutions which monitor *government* activities in that he is *part* of the constitutional mechanism of Parliamentary control. The fact that the Public Protector has to report to Parliament on the findings of his investigations implies that he derives his importance not only from the specific powers given to him by the Constitution and the 1994 Act, but also from the fact that he repre-

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sents Parliament and that he enjoys the confidence of Parliament. It is for this reason that the present Public Protector views himself as an 'Officer of Parliament' who has a clear mandate to address citizens' grievances against government institutions, statutory bodies and local authorities, separate from the traditional role of members of Parliament to redress constituents' grievances (South Africa, 1996b:1).

The Public Protector nevertheless ensures public accountability by means of his investigations. The present incumbent views his office as an instrument to enforce accountability where there has been any maladministration or unfairness in the provision of governmental services (South Africa, 1997a: 1). This notion of accountability was brought to the fore in a visible manner by the findings of the Sarafina II investigation. The special report of the Public Protector on the findings of this investigation strengthened the tradition of public accountability of the Executive Authority and its public administration, to Parliament (Cf. Venter, 1998:89-105).

Accountability to, and indeed positive linkage with Parliament could be exercised through a special committee of Parliament, if such a committee were to become operative. The 1994 Act makes provision for the appointment of a committee by Parliament for the purpose of considering matters referred to it in terms of the Act [sec.2(1)]. In practice this committee has been constituted for matters such as the appointment of an incumbent to the office of Public Protector. Such a committee then becomes *fundus officio* until it is reactivated by a future vacancy. The Public Protector has, however, recently approached a so-called Parliamentary oversight committee with a request to have a deputy Public Protector appointed (South Africa, 1997a: 16). But the Public Protector is in dire need of a special committee of Parliament (of a more permanent nature) which can assist him in matters such as the appropriation of funds and the handling of reports.

ASSESSMENT

One of the major challenges facing all constitutional systems which aspire to democracy in the Southern Africa region is to devise and implement institutions and measures whereby the executive authority can necessarily be held accountable for its actions. Due to the inherent flexibility and the ability of the Ombudsman concept to adapt to the sociopolitical realities of the region it has become a popular concept in Southern Africa. The future of the Ombudsman concept in the region is therefore bright and will certainly continue to play a major role in the constitutional dispensations of the countries concerned.

The South African Public Protector, as an independent and impartial institution, subject only to the Constitution and the law, seems to compare favourably with Ombudsman institutions in other countries. Similarly there are also particular strengths and weaknesses attributable to the institution.

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The features of the South African Public Protector institution most open to criticism are:

- * The relatively low visibility and user awareness of the Public Protector owing to external factors such as widespread illiteracy, large geographical areas, a sparse and scattered population in some areas, and a poor communication infrastructure.

- * The potential of the designation 'Public Protector' to create confusion in the minds of people as to his independence and impartiality in investigating and making a ruling on their complaints.

- * The potential of the present procedures for proposing and authorising the Public Protector's budget to cast a shadow of doubt on the independence of the office from those institutions that may be a possible subject of investigation by the office.

- * The limited resources and capacity of the Public Protector prevents him from doing justice to his constitutional mandate, in particular the fact that an inadequate budget is frustrating his efforts to bring his services closer to ordinary people.

- * The time which the Public Protector takes to complete investigations and issue reports. The average 'throughput time' of eight months to conclude a case is, by the Public Protector's own admission, far too long.

- * The absence of a special parliamentary committee, of a more permanent nature, to oversee the work of the Public FVotector in order to strengthen his accountability to, and relations with, Parliament and to promote the effectiveness of the Public FVotector in general.

In other respects, however, the South African institution of Public FVotector is of sound construction and appears to operate effectively as can be gauged from the following:

- * Its constitutional and procedural impartiality and independence of government in terms of the special constitutional provision for impartiality and independence, and the procedural safeguard of appointment to the office with the approval of Parliament and for a non-renewable term of office.

- * The accessibility of the Public Protector to potential users, both in terms of constitutional provision for accessibility and in terms of the practical efforts of the institution of Public FVotector in this regard.

- * The almost unlimited nature of the jurisdiction of the office within the broad spectrum of public administration and state affairs and the flexibility with which the Public FVotector has used his discretion to determine the bounds of the jurisdiction.

- * The authority of the Public FVotector to investigate a matter on his own initiative, without a formal complaint from a complainant - this is one of the strongest features of the institution.

- * The virtually unrestricted powers of investigation conferred on the Public Protector implies unlimited access to all relevant information and expertise for the purpose of conducting thorough investigations and come up with authoritative findings.

- * Due to his high status, his public image and the measures of persuasion at his disposal, the Public Protector has proved to be effective in securing compliance with his

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recommendations for redress of individual complaints and for improvements in administrative performance.

* The practice of the Public Protector to look beyond individual errors and the mere settlement of a complaint on occasion, with a view to possible systemic improvements, has already become a valuable aspect of the institution of the Public Protector.

* With realistic expectations of the substantive and psychological impact of the Public Protector on administrative performance in mind one can come to the conclusion that the contribution of the Public Protector in this regard is more qualitative and less quantitative in nature.

By virtue of the particular weaknesses and strengths of the Public Protector raised here it is possible to give the following interim verdict on the future prospects for the office. After only three years of its existence as the redesigned office of the Public Protector, and with the benefit of experience of the previous offices of Advocate-General and Ombudsman in hand, it can safely be predicted that the institution has the potential to make a significant contribution to constitutional democracy in South Africa and that it will be part of our constitutional dispensation for a long time to come.

It is noteworthy that all the points of criticism are to a large extent attributable to monetary inadequacies and not so much to the will of those concerned to better the situation. The question, however, remains whether monetary restrictions should be placed on the principles of justice and democracy in public administration. In the words of John Milton: "When complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for"

Notes

1 This region is commonly understood to include the following 12 countries: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

2 Despite certain functional differences, the *office* of Advocate-General was comparable to that of the Special Prosecutor in the United States of America, which was also instituted in the wake of a scandal - in this case, the Watergate Scandal.

3 In terms of the transitional arrangements of the so-called Interim constitution [sec.243] the incumbent of the then Ombudsman office continued to hold office and perform the functions of the Ombudsman until the Public Protector was appointed and assumed office.

4 See the following internet address: <http://www.polity.org^a/govt/pubprot/pubprot.html>

5 Press release by the office of the Public Protector on the investigation into gang-related violence at Baiberton Prison, Pretoria, 8 January 1996.

6 This is the Ombudsman office of the former Bophuthatswana which is still operating under the transitional measures of the 1993 constitution [sec.243(1)(c)] as a separate institution until it is either abolished or converted into a regional office for the province of North West. The same applies for the office of the Ombudsman in the former Transkei, now part of the province of the Eastern Cape.

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