

🔒 Premium content from before 2017 is now available for everyone!

Promotion of Access to Information Act Annual Report: SA Human Rights Commission

🔒 This premium content has been made freely available

Justice and Correctional Services

03 December 2012

Chairperson: Mr L Landers (ANC)

Share this page:



Meeting Summary

The Portfolio Committee on Justice and Constitutional Development received a briefing from the South African Human Rights Commission (SAHRC) on the Promotion of Access to Information Act 2011/2012 Annual Report. The Commission noted that considerable resources were directed towards training for the testing of compliance with the Promotion of Access to Information Act (PAIA). There was a consistent lack of compliance from public bodies. There was also a lack of appreciation of the importance to comply with the right to access to information, particularly at local government level, where service delivery was most important. Five core constitutional and statutory mandates of the SAHRC were identified. These were the promotion of the right of access to information, the need to assist public and private institutions to comply with the PAIA, the need to conduct training, which was done by training over 1 000 Deputy Information Officers in the last year, including training on the Protection of Personal Information Bill, the need to hold management briefings, including senior management from public institutions, and the conducting of compliance audits. These audits would help the SAHRC to gain insight into what was still needed, so that it could develop effective interventions and internal systems aimed at supporting public institutions.

The SAHRC set out its findings with a comparison also of the last five years. Only 25% of public officials knew who their Deputy Information Officers were, or knew of the correct procedures, and 87% of frontline officials were not aware of the Promotion of Access to Information Act procedures. In the 2009/10 reporting period, the Commission had spent a lot of money developing a frontline manual which was distributed to all state institutions. 60% of audited public institutions did not have a designated Information Officer. Only 15% of audited public institutions had a Promotion of Access to Information Act project. Many public institutions did not grant requests for information, for example the Office of the Presidency, National Treasury (NT) and the Department of State Security. It was not known why the requests were denied. The Commission had recommended the amendment of Section 32 of PAIA, so as to include substantive reporting, as well as the expansion of the Commission's powers... These amendments have been proposed to the Department of Justice and Constitutional Development, but there had been no response.

The Committee expressed disappointment that the SAHRC had not included the Protection of Personal Information in its reporting. The Committee was also disappointed that the Commission said it was still awaiting clarity on its role when the Protection of Personal Information was enacted, even though there were clear transitional arrangements. The Committee asked for the views of the SAHRC on the constitutionality of the Protection of State Information Bill, as well as whether the provisions of the Promotion of Access to Information Act that related to the training of magistrates should be removed. More detail on the compliance monitoring audits was sought. Members raised questions on the reporting on Legal Aid South Africa, questioned the role of the Organisation for Institutions Supporting Democracy in assisting the Commission, and asked if the National Archives and Record Keeping Act was working properly. The Committee recommended that the report of the SAHRC should be adopted by the House, with a recommendation from the Committee that national departments should report directly to the National Assembly, and that provincial departments should report to the National Council of Provinces were concerned. The Committee was concerned about the lack of implementation and ratification of international obligations that fell upon South Africa. The Committee would communicate with the Minister of Justice and Constitutional Development on the international obligations that fell under its purview. The Committee recommended that, in future, the SAHRC should also audit Parliament as well as provincial legislatures. It was noted that the Committee would pursue, with the Standing Committee on Appropriations, its recommendation for further appropriations for the Commission.

Mr Fola Adeleke, Manager: Promotion of Access to Information, South African Human Rights Commission, noted that the South African Human Rights Commission (SAHRC or the Commission) directed a lot of its resources towards training on the Promotion of Access to Information Act (PAIA). There was a consistent lack of compliance with PAIA, on the part of public bodies. There was also a lack of appreciation of the right to access to information, particularly at local government level, where service delivery was so important. The Commission had set up a specialist unit to monitor the compliance by public institutions. SAHRC had also identified five core mandates that it had as part of its constitutional and statutory obligations have been identified. The mandates were the promotion of the right to access information, the need for SAHRC to assist public and private institutions to comply with PAIA, and the need to conduct training. In this regard, Mr Adeleke noted that over 1 000 deputy information officers were trained. The Protection of Personal Information Bill (PPI) was also incorporated in the training. SAHRC had held management briefings that included senior management from public institutions. Finally, it had to conduct compliance audits. The objective of the audits was to provide insight for the Commission so that it could then develop effective interventions and internal systems aimed at supporting public institutions.

Mr Adeleke noted the SAHRC's findings over the last five years. Only 25% of public officials knew who their Deputy Information Officers were or on procedures, and 87% of frontline officials were not aware of PAIA procedures. In the 2009/10 reporting period the Commission spent a lot of money developing a frontline manual which was distributed to all state institutions. 60% of audited public institutions did not have a designated Information Officer. Only 15% of audited public institutions had a PAIA project.

The Commission's work included the provision of capacity building tools, recruitment opportunities and the showcasing of best practices. The provincial Information Officers Forums had been successful where the Commission had held them - for example in the Free State (FS) and Western Cape (WC) there has been 100% compliance. In other provinces, compliance ratings had improved. 39 200 Section 32 (of the Constitution) requests that were received by government institutions. This figure may not be accurate, as the reporting from public institutions was poor. About 32 000 PAIA requests were granted. The South African Police Service (SAPS) received the most PAIA requests, over 20 000, and their compliance was good. A lot of public institutions did not grant requests for information, for example the Office of the Presidency, National Treasury (NT) and the Department of State Security, but it was not known why the requests were denied. The SAHRC had recommended the amendment of Section 32, so as to include substantive reporting as well as the expansion of the Commission's powers. The SAHRC developed a model law for access to information for the rest of Africa, in partnership with the Centre for Human Rights (CHR).

SAHRC outlined that it faced several challenges, which included budgetary constraints. This impacted on its ability to enforce compliance, as well as to conduct community training sessions. Sustaining the political will of senior leadership for the compliance with PAIA was a problem. The amendments to PAIA had been proposed to the Department of Justice and Constitutional Development (DoJ&CD), but there had been no response.

Discussion

Mr J Jeffery (ANC) said that his main frustration with the PAIA report was that the SAHRC did not include reports on the Protection of Personal Information (PPI) Bill, as opposed to the Protection of State Information Bill (PSI). The amendments that the Commission wanted to effect, to PAIA, had been done in the PPI, and he pointed out in this regard that when the Committee had discussed amending PAIA during its deliberations on the PPI, the SAHRC had not given input, and in the end the Committee relied on information submitted by the Open Democracy Advice Centre (ODAC). It was worrying that the SAHRC was seemingly not aware of the provisions that related to its functions, in the new PPI Bill. The Committee had been engaging with the DOJ&CD on the issue of magistrates and their training on PAIA, yet this was another aspect not covered in the SAHRC's report. He said this was an important issue that the Commission should be following up.

Mr Jeffery asked for more detail on the compliance monitoring audits. The Commission complained about Legal Aid South Africa (LASA) on page 29 of the report, yet when this point was raised with LASA, it had responded that it was not happy with the SAHRC report, and disputed the findings.

Mr Jeffery thought that a reporting format that listed departments that did not comply should be adopted.

Mr Jeffery asked how the Commission had arrived at the 25% figure for officials that were not aware of PAIA.

Ms D Schäfer (DA) asked if the Commission would support the removal of the requirement for magistrates to be trained for PAIA. She asked if the SAHRC had engaged with the Public Protector (PP) regarding any PAIA complaints that this office had received. She noted the comment on the amendments but asked what the SAHRC itself had done to get the Department of Justice to respond. Finally, she called for the SAHRC's view on the current version of the PSI Bill that was passed by the National Council of Provinces (NCOP).

Mr S Swart (ACDP) asked if Parliament had to report according to Section 32. He agreed that it would make sense for the requirement for the training of magistrates to be removed, for the purposes of PAIA implementation. He was concerned that this Annual Report highlighted high levels of non-compliance by public bodies and felt that the Committee and the SAHRC needed to take further steps. He wondered if the unit for Organisation for Institutes

Supporting Democracy (OISD) been supporting the Commission. He also asked if, given its financial constraints, the SAHRC could work with other organisations for litigation purposes. He too wanted to know about the final version of the PSI Bill, particularly the “trumping” clause 1(4) and the lack of a public interest defence specifically.

Ms D Smuts (DA) said that the Commission, in 2010, had correctly pointed out that the Minister of State Security sat “like a big spider with many tentacles” at the heart of the system. The Commission had also correctly pointed out that there was already a law that provided for recording keeping and there was thus no need to include the archives and record keeping in the PSI Bill. She wondered if the Commission could assess whether the National Archives and Record Keeping Act was working, and if the SAHRC was not aware of this at the moment, then it should find out. This could yet be another reason why getting access to information was difficult in South Africa. She noted that the SAHRC was quite correct in the view that Section 46 of PAIA was too stringent and should be amended. However, she wanted to clarify whether the Commission had had a response from the DOJ&CD on the request for the amendment of Section 46 of PAIA?

Advocate Lawrence Mushwana, Chairperson, SAHRC, said that the Commission would need more time to look into and send through a response on section 46 of the PAIA amendment, as well as the implementation of the National Archives and Record Keeping Act.

He noted that the Head of OISD has been ill since February 2012, and the Acting Head had since left. The SAHRC did not receive a lot of help from this unit, and it was dysfunctional. There was an attempt from Chapter 9 Institutions to meet with the Speaker to voice concerns over OISD, as there had been little assistance received from it.

Ms Pregs Govender, Deputy Chairperson, SAHRC, said that the Commission had, at a previous meeting, raised queries as to what this Committee had done with reports where the question of non-compliance with PAIA was raised, and the Chairperson had responded that the Committee would attend to the matter seriously. The SAHRC had developed a plan of action on that point.

Mr Jeffery said that he had been raising this issue, and he proposed that the House should be asked to adopt the SAHRC report, with a recommendation from the Committee that departments must report in future to Parliament. This was not a plan of action; the Commission could then refer a report to the NCOP, for the same proposal to apply to provincial departments.

Adv Mushwana added that he was not sure that the Commission had done everything that its Act allowed it to do. The Commission did have some powers and perhaps it was not using them fully. It would try to do more.

Ms Govender added that the SAHRC had come to the decision that it must use its powers fully, such as power to issue subpoenas, and it had begun to do that in more cases.

Ms Govender said, in relation to the questions around the PPI Bill, that the SAHRC wanted more clarity on the transitional provisions of the PPI, especially for budgetary planning purposes.

The Chairperson said that the Committee had stated, in its Budgetary Review and Recommendations Report (BRRR), that it should have a strategic planning session on the issues raised by Mr Jeffery in the following year. One of the issues raised by the Commission in writing to the Committee had raised the question of international conventions. International Conventions were an Executive prerogative, and Parliament’s role was to endorse these. There were constraints on Parliament to take these forward.

Mr Jeffery said that a complaint from the public was that it took exceptionally long for a Bill to be introduced to Parliament, following signature of an international instrument – for example, the length of time between signature of the United Nations Convention on Combating and Prevention of Torture (UNCAT) and the introduction of the Bill. The Committee should write to the Director General of the DOJ&CS for reports on all conventions that fell upon that Department to implement.

Mr Swart agreed that this was a concern, and Parliament did have an oversight role. The Covenant on Civil and Political Rights (CCPR) was dated in 2000 and was still outstanding, and this indeed indicated a serious problem. South Africa had received a negative score from other international bodies on this, as well as on other obligations, and this could not continue.

The Chairperson said that he would like to afford OISD an opportunity to respond to some of the questions raised about its role.

Adv Nonkosi Cetshwayo, Head, OISD, said that the responsibility of the unit was to support and advise the Committee in relation to the Chapter 9 institutions that reported to it. OISD had read the annual reports from the SAHRC, and had analysed them for purposes of advising the Speaker to which Committee they should be referred. OISD had been looking to bringing together all stakeholders that were considered important in the work of OISD. She, in her capacity as Head of OISD, had also held meetings with the Directors General and the Presidency, to deal with the international responsibilities where Chapter 9 Institutions in South Africa played a role.

Mr Jeffery suggested that the Chairperson should write to the Minister or Director General in relation to each treaty

for which the DOJ&CD was responsible, setting out the problem of the outstanding reports and seeking more clarity on where the process was for implementation of the treaties.

Adv Mushwana said that at the last conference in Geneva, a lot was said on South Africa, and referred the Committee to the Universal Periodic Review Report.

Mr Adeleke responded to other questions. He noted that the 25% figure was obtained via the compliance audits. The Commission had considered the period between April 2011 and March 2012 for the purpose of this latest report. During this period there was no engagement with the Parliament on PPI, which was the reason why this was omitted from the Report.

Mr Jeffery said that it was better to leave the matter at that, and for the SAHRC to acknowledge that this should have been done. The figure of 25% was still doubtful.

Mr Adeleke agreed.

Continuing with the answers to questions, he noted that the PPI only amended Section 51, and the presentation had specified that there should be clarity on Section 51, not that there should be an amendment. The Commission was concerned that there were over one million manuals that had not yet been processed. The contracts of the staff who were hired to attend to would lapse at the end of the year, and the SAHRC was concerned about the transitional arrangements in the PPI, what would happen to the manuals and the SAHRC's responsibilities.

The Chairperson said that the Commission should not abandon its mandate.

Mr Adeleke said that the Commission's request for funding to extend the contracts of the data capturers had been refused, and essentially there would not be anybody in the SAHRC who would be able to continue with that work.

Mr Jeffery said that the amendment to Section 51 would mean that the SAHRC could require that the manuals be made available, but not necessarily submitted. The SAHRC could take the lead from the judges of the Supreme Court of Appeal (SCA), who had concluded that it was unduly onerous to require of them that they read an entire record of a trial, in order to consider a petition for leave to appeal. They had simply decided that they would not read the record, and were waiting for the law to be amended. The SAHRC could perhaps follow the same principle, especially since the PPI amendments had already gone through the National Assembly (NA). The SAHRC should not review the Section 51 manuals.

Mr Adeleke continued to state that the consolidated audit reports had been highlighted and recommendations were made. The Commission did have more detailed information on specific institutions, but had not included everything to avoid the documentation being too bulky.

Mr Jeffery said that information on the Department of Justice only was required.

Mr Adeleke answered the question of the LASA disputing the SAHRC's report. He said that LASA could not dispute the finding, because the Commission had shown the PAIA report that they had omitted. The PAIA request was sent to LASA, and it was requested to report on it. However, LASA maintained that this request should have been done during the last reporting period, whereas SAHRC held the view that this fell within the current reporting period.

Mr Jeffery said that the detail was useful and the Committee should get more information and put it to LASA.

Ms L Adams (COPE) said that the North-West (NW) had not been complying for the last three years. The SAHRC had admitted today that it was not, in the past, using its powers as it should, and she asked why the Committee could be expected to take the SAHRC seriously when it did not ensure that it would get compliance. North West was only one example. It seemed that once again it would fail to comply.

Mr Adeleke said that the recommendation for the amendment of Section 90, to enforce Section 32 reporting, was made because the SAHRC would no longer be responsible for PAIA. The envisaged Information Regulator (IR) in the PPI would have far more powerful and broader powers.

Ms Adams asked if Mr Adeleke was suggesting that everything should be left as it was until better systems came into force.

Mr Adeleke said that the SAHRC was unable to enforce Section 32 reporting.

Ms Adams asked if this was not for the courts to decide.

Mr Adeleke said that the most the SAHRC could do was to constantly write and seek the cooperation of departments.

Ms Adams said that surely Section 90(2) and (3) were in place to ensure compliance. She believed that it should be left to the Court to decide whether they were strong enough, rather than for the Committee and SAHRC to engage in

academic debate on the point. She believed that the SAHRC should follow the steps. Somebody had to take responsibility if the North West failed to comply for three years.

Mr Adeleke said that the SAHRC could not simply bring a government department before the Court.

Adv Mushwana said that the Commission had admitted that it had not done enough in the past, and had acknowledged that it did have the powers and it was a question of using them in future.

Adv Adams said that this was the whole point, but she wanted to hear when the SAHRC would be using those powers.

Adv Mushwana said that it was up to the SAHRC to do what Ms Adams suggested.

Mr Adeleke noted that, in relation to the training of magistrates, the SAHRC was of the view that PAIA was very technical and it was necessary to ensure that judicial officers had the skills to apply it.

Mr Jeffery said that the Committee had been chasing this up with the DOJ&CD.

The Chairperson agreed and stated that a letter would be written to the Director General of the DOJ&CD.

Mr Adeleke said that when the Information Regulator was established, it would not be a Chapter 9 Institution, and there was some question whether or not it would have access to classified information. Letters written to the DOJ&CD on this point had been met with a mild response. The current PSI Bill as passed by the NCOP was welcomed in the sense that PAIA had been reinstated to full recognition, and that Chapter 9 Institutions would not be restricted in their access to classified information.

Ms Govender cautioned that the SAHRC Commissioners still had to sit as a collective and engage on the views that it might express on the PSI Bill.

Ms Govender answered the questions on whether PAIA should apply to Parliament by saying that the Commission had interpreted a public body, in terms of PAIA, as applying to the Executive arm of government and perhaps not Parliament. However Parliament had an Information Officer and thus should submit reports as well, although it had not done so in this period.

The Chairperson said that in that case Parliament had to be summoned and answer.

Mr Jeffery said that his reading of the section was that Parliament indeed fell under the definition of a public body, and asked then why it was not included in the Report as not having complied.

Mr Adeleke responded that this was because the reporting format included national and provincial bodies as well as municipalities and other public bodies. It was an omission on the part of the Commission.

Mr Jeffery asked why provincial legislatures had not been included.

Mr Adeleke said that the Commission had largely focused on the Executive since a lot of requests went to public bodies, and not legislatures.

The Chairperson suggested that legislatures could be included, for the purposes of highlighting importance of PAIA.

Adv Mushwana confirmed that the Commission did share resources with other institutions such as drafting of legal documents.

Mr Swart agreed that this was correct, as long as there was no conflict of interest.

Adv Mushwana agreed with this point.

Mr Adeleke commented on the questions around records. Some departments had submitted that they did have file plans, but that some were outdated and not submitted to archives for approval. Some institutions did not have file plans at all.

Ms Smuts added that the PSI Bill perpetuated the problem, because it had intermingled requirements around classification and plain record keeping. There was also a conflicting situation of the National Archives Act, the Archivist, the Minimum Information Security Standards and the PSI Bill all standing alongside each other, and she cautioned that it was necessary to keep an eye on the handling of these records in the future.

Ms Govender said that the SAHRC should keep this in mind.

Mr Adeleke said that the Commission could have record keeping as one of its functions next year.

Mr Jeffery said that it would be useful to know the compliance of all Chapter 9 Institutions. The Section 14 categories were difficult to understand, from the Commission's reporting card. He also wanted to know the difference between 'easily accessible', 'accessible' and 'fairly accessible'.

Ms Govender said that this could easily be rectified and clarified.

Mr Jeffery noted that the Committee had, in the BRRR, specifically recommended further allocations for the SAHRC, but understood that National Treasury may either have refused the request or not responded. He suggested that the Committee should pursue the point with the Standing Committee on Appropriations

the Chairperson asked if National Treasury should not have responded to the Committee.

Mr Jeffery said it was not clear if National Treasury had replied, and this had to be pursued further through the budget process of Parliament.

The Chairperson agreed.

Adv Mushwana thanked the Committee for its efforts. He wanted to let the Committee know that the SAHRC had retained its international "A" rating as a human rights organisation.

The Committee congratulated the Commission.

The meeting was adjourned.

Share this page:

