

**DEFINING
'RELEVANT ORGANS OF STATE'
IN SECTION 184 (3) OF THE CONSTITUTION**

**PREPARED BY KARRISHA PILLAY
COMMUNITY LAW CENTRE (UWC)**

12 SEPTEMBER 1997

1. RELEVANT SECTION OF THE CONSTITUTION:

Section 184(3) of the Constitution provides as follows:

“Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”

2. THE OBLIGATION OF RELEVANT ORGANS OF STATE TO PROVIDE THE HUMAN RIGHTS COMMISSION WITH THE INFORMATION THAT IT REQUESTS:

In spite of the clarity of Section 184(3) that the Human Rights Commission has a constitutional mandate to request information from relevant organs of state on the steps that they have taken in realizing the stipulated socio economic rights, it is less clear on whether the relevant organs of state are, in fact, obliged to provide the Commission with the necessary information. The concern arises from the omission of an express provision regarding the obligations incurred on the relevant organs of state in the Constitution. Therefore, as a point of departure it is felt necessary to briefly deal with the obligation that Section 184(3) imposes on relevant organs of state.

There are 2 factors that warrant analysis on the present point:

- The first being a very basic principle of the law, that for every legal right there exists a corresponding legal obligation. When applied to the issue at hand, it effectively translates into the Human Rights Commission having a constitutional right to request information from the relevant organs of state on the steps they have taken in the implementation of socio economic rights which accordingly imposes a corresponding obligation on all relevant organs of state to, in fact, provide the Human Rights Commission with information on the steps that they have taken in the implementation of socio economic rights.
- Secondly, in terms of the principles of co-operative government *‘all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by, [inter alia], assisting and supporting one another, informing one another*

184(3). This would accordingly determine the specific organs of state the Human Rights Commission is obliged to request information from.

- Third, to establish how the functions and powers of the different organs of state impact on and affect the type of information that is required. This would involve issues such as the extent to which the same information be requested from provincial and local levels of government as that of national level, as well as how such information should be modified to suit the relevant organ of state in question.
- Fourth, to establish how and exactly to whom such requests for information are directed to within the relevant organs of state.

4. WHAT IS AN ORGAN OF STATE?

Section 239 of the Constitution defines an organ of state as follows:

“Unless the context indicates otherwise:-

‘Organ of state’ means:

(a) Any department of state or administration in the national, provincial or local sphere of government; or

(b) Any other functionary or institution

(i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation

but does not include a court or judicial officer.”

In the light of this definition, it is important to examine the specific organs, institutions or functionaries that will constitute an organ of state for the purposes of Section 239. This task will involve a break down of Section 239, and a analysis of the specific organs that can be regarded as 'organs of state' in each subsection. It is submitted that only once these specific organs of state are established, can a determination be made regarding their relevance for the purposes of Section 184(3). Hence, the initial inquiry will focus on the specific organs of state included in the definition in terms of Section 239, after which their relevance with regard to Section 184(3) will be examined at length.

4.3 AN ANALYSIS OF SECTION 239(b)(ii) - ANY OTHER FUNCTIONARY OR INSTITUTION:

The subsection refers to '*any other functionary or institution exercising a public power or performing a public function in terms of any legislation*'. In interpreting the section, the first question that begs an answer is whether the fact that a function is exercised in terms of legislation is in itself adequate for it to qualify as a public power or public function, or whether some additional criteria are necessary to ensure that it is indeed a public function or public power. Hence, the inquiry will begin with an analysis and definition of the terms 'public power' and 'public function.'

In spite of there existing certain clear situations where an institution or functionary performs a public power or public function, there are numerous cases where the answer is far from obvious. In this regard, some guidance will be sought from administrative law. As the rules of judicial review apply primarily to public bodies exercising public functions or public powers, their definitions will be examined in the context of judicial review specifically.

In examining the boundaries of judicial review pertaining to public bodies exercising public powers, the point has been cogently noted as follows:

*'As a general rule, the doings of private individuals and organizations are not reviewable by courts of law, while those of public bodies are. This corresponds with the notion that public bodies, because they exercise public powers, are subject to a sort of public trust which imposes special standards and duties on them. Most fundamentally, the law requires them to exercise their powers in the public interest, and not arbitrarily and for their own advantage; and more generally, they are subject to both the statutory terms on which their powers are conferred and to the common law rules imposed on them by the courts.'*¹²

Although the excerpt reveals the motivation behind public bodies who exercise public functions or powers being subject to judicial review, it offers little insight as to the exact definition of a public function or public power. Wiechers has suggested various indicators to provide guidance as to

¹² Boule, Harris and Hoexter, *Constitutional and Administrative Law* (1989) at page 247

- Second, should the Human Rights Commission decide to apply the criteria analogous to that in the context of judicial review, it needs to further establish whether it will opt for the specific criteria proposed by Wiechers or whether it would rather apply the 'public interest' test proposed by Baxter.

It is suggested that in response to the first question, the Human Rights Commission should, indeed, apply the same criteria as in the context of judicial review to establish a public function or public power. It is submitted the result would prove both bizarre and fruitless to have a terms accorded one definition in one sphere of the law and quite a different one in another sphere of the law. An analogous interpretation would ensure consistency and certainty into our law, the importance of which can, by no means be under-estimated.

In response to the second question, it is suggested that the criteria proposed by Wiechers be applied. Although it is acknowledged that these criteria are by no means conclusive, in the light of the circular reasoning of Baxter's alternative complemented by the vagueness that currently characterizes the term 'public interest', it is contended that the Wiechers' criteria be used instead. Once more, the fact that the latter criteria are concrete and objectively verifiable as well as the fact that it accounts for the vast majority of cases are strong motivating factors in its favour. However, as has been pointed out by Baxter, it is important that the Human Rights Commission accept that this criteria is by no means a water-tight one and that there may be exceptional cases which not meet the criteria but may nevertheless qualify as a public function. It is important that in such situations the Human Rights Commission judge the case on its own merits.

Having established the specific criteria to be used in establishing a public power or public function, it is important to examine certain specific organs that would be included within the ambit of the criteria. Given the vastness of the number of bodies that may be included within the criteria, the present inquiry will be limited to two areas: Parastatals and the Development Bank of Southern Africa. It must be stressed that this is by no means a suggestion that the subsection is limited to these institutions alone. While it is acknowledged that the functionaries or institutions referred to in Section 239 may extend far beyond this, in view of the pertinence of some Parastatals and the

¹⁶ Boule, Harris and Hoexter, *Constitutional and Administrative Law* (1989) at page 247

*"[I]t has now become desirable to reconstitute the Development Bank of Southern Africa in order to promote, facilitate and by funding to mobilize the socio economic development in Southern Africa, while efficiency, fairness, transparency and responsibility are promoted at the same time."*¹⁷

*"The main objects of the bank shall be the promotion of economic development and growth, human resources development, institutional capacity building and the support of development projects and programmes in the region."*¹⁸

These sections of the Development Bank of Southern Africa Bill clearly reveal that the bank is, indeed, responsible for performing a *public service*. The fact that the performance of a public service is one of the substantive criteria proposed by Wiechers, offers further support for the existence of a public function thereby rendering it undeniable that the Bank does qualify as an organ of state for the purposes of Section 239.

5. WHAT IS A *RELEVANT* ORGAN OF STATE FOR THE PURPOSES OF SECTION 184?

Having gained some insight into the institutions or functionaries falling within the definition of an organ of state in terms of Section 239 of the Constitution, the next challenge is to examine exactly what would constitute a 'relevant organ of state' for the purposes of Section 184. In this regard, the task at hand is three-fold:

- First, to determine whether the term 'relevant' in Section 184(3) is accorded an objective interpretation, a subjective interpretation or a *via media* approach in its interpretation that accords the Human Rights Commission *some* degree of subjectivity or margin of discretion in making a determination on what constitutes a 'relevant organ of state'.
- Second, in the event of the *via media* option being adopted, to determine firstly, in what circumstances the discretion would come into play. Secondly, the manner in which the Human Rights Commission exercises this discretion in making an assessment as to whether a particular organ of state is, in fact, relevant or not for the purposes of Section 184(3) will have to be examined. This would essentially involve establishing specific criteria in terms of which

¹⁷ Preamble - Development Bank of Southern Africa Bill

¹⁸ Section 3 - Development Bank of Southern Africa Bill

feelings or opinions. This, when applied to the task at hand, would effectively translate into the Commission being endowed with absolutely no discretion when determining which organs of state it must request information from. As the term 'realise' is defined as 'to convert in actuality', any organ, provided that it qualifies as an organ of state in terms of Section 239 and has some role to play in converting these socio economic rights into actuality (no matter how remote a role) would render it being a relevant organ of state for the purposes of Section 184(3).

II. A SUBJECTIVE INTERPRETATION OF 'RELEVANT':

Conversely, should the term 'relevant' be accorded a subjective interpretation, it would mean that the final determination as to what constitutes a relevant organ of state is left entirely in the hands of the Human Rights Commission. When applied to the situation at hand, this would effectively translate into what, in the opinion of the Commission is relevant. Therefore, in terms of a subjective interpretation of 'relevant', the Human Rights Commission, in exercising its discretion may decide on exactly what constitutes a relevant organ of state. In so exercising its discretion, it may even decide that national government (in spite of its integral role in the implementation of socio economic rights) does not qualify as a relevant organ of state for the purposes of Section 183(4).

III. A VIA MEDIA APPROACH:

On the other hand, should the term 'relevant' be subject to a *degree* of subjectivity, then the Commission does have some discretion as to which organs of state qualify as 'relevant' for the purposes of Section 184(3). A via media approach would effectively mean that there are certain organs of state that the Commission is *obliged* to request information from, whilst there are other organs where it is granted some discretion in determining whether or not it would qualify as a relevant organ of state or not.

For the Commission to successfully fulfill its mandate, it is critical that certain organs are requested for information and consequently the Human Rights Commission will be granted no discretion in these situations. For instance, it cannot be said that the Human Rights Commission, by exercising its discretion, has decided that information need not be requested from national government. As national government plays a vital role in the implementation of socio economic

necessary information. This would clearly be the case in the event of an objective interpretation being accorded to the term 'relevant'. Hence, it is contended that the omission of the word 'all' endows the Human Rights Commission with some degree of discretion in determining what organ is, in fact, relevant for the purposes of fulfilling its constitutional mandate in terms of Section 184(3).

On the basis of this reasoning, it is suggested that whilst the Human Rights Commission is *obliged* to consider certain organs of state 'relevant' for the purposes of Section 184(3), it does have some margin of discretion in determining what constitutes a relevant organ of state for the remaining situations and a *via media* approach is accordingly applicable to the interpretation of the term 'relevant'.

5.2 HOW THE HUMAN RIGHTS COMMISSION EXERCISES ITS DISCRETION?

Having established that the Human Rights Commission is indeed accorded some degree of discretion in interpreting the term 'relevant', there are 2 further issues arising which the Commission needs to address:

- The first being, the establishment of the criteria for those organs of state which the Human Rights Commission is *obliged* to request information from.
- The second being, an establishment of the criteria for situations when the Human Rights Commission will be allowed to exercise its discretion and guidelines as to how this discretion must be exercised.

I. CRITERIA FOR ESTABLISHING WHICH ORGANS OF STATE THE HUMAN RIGHTS COMMISSION IS *OBLIGED* TO REQUEST INFORMATION FROM?

As has been mentioned, for the Commission to successfully fulfill its constitutional mandate of monitoring the implementation of socio economic rights, it is *obliged* to request information from certain organs of state. The task at hand is to determine the underlying criteria for situations where the Human Rights Commission is *obliged* to request such information from certain organs of state and accordingly *compelled* to consider them to be 'relevant' organs of state.

no means an unfettered one and instead, operates within the parameters of certain objectively identifiable criteria.

Hence, in order to guard against an abuse of discretion, to ensure certainty as well as to ensure that the Human Rights Commission, does in fact, fulfill its constitutional obligation of *meaningfully* monitoring the implementation of socio economic rights, it is suggested that the following criteria inform the discretion of the Human Rights Commission as to whether an organ of state is, relevant for the purposes of Section 184(3):

- Firstly, those organs that, though not *primarily* concerned with the implementation of socio economic rights, nevertheless play an *integral* role in its implementation; or
- Secondly, those organs of state that are entrusted with functions and powers that may *impact substantially* on the implementation of the enlisted socio economic rights.

Once more, in establishing whether or not an organ of state plays an integral role in the implementation of socio economic rights, the Commission will have to be guided by certain factors. Although the powers and functions of that organ of state may not be extensive enough so as to render it being an organ of state that the Human Rights Commission is obliged to request information from, it may nevertheless exercise powers and functions that are integral and fundamental to the implementation of socio economic rights. Once again, the extent of these powers as well as the particular socio economic rights that they pertain to will be of relevance in informing the discretion of the Human Rights Commission. Furthermore, even though the powers and functions of an organ of state may not pertain directly to socio economic rights as such, they may nevertheless impact substantially on the actual implementation of socio economic rights. The extent of their impact will have to be assessed by the Human Rights Commission in exercising its discretion in deciding whether it is in fact, a relevant organ of state for the purposes of Section 184(3).

Although these criteria may be open to criticism for the degree of vagueness inherent in them, it must be noted that their overall purpose is two-fold. Firstly, to avoid an abuse of discretion by the Commission itself. In recognizing the critical importance of monitoring the implementation of

- *informing one another of, and consulting one another on, matters of common interest;*
- *co-ordinating their actions and legislation with one another;*
- *adhering to agreed procedures; and*
- *avoiding legal proceedings against one another.*

This section, when applied to the present task, as has been noted already, would require that irrespective of whether an organ of state is relevant or not for the purposes of Section 184(3), it is nevertheless obliged to 'assist and support' the Commission, 'inform and consult' with the Commission on matters of common interest as well as to 'co-ordinate their actions and legislation' with the Human Rights Commission in fulfilling its task of monitoring socio economic rights.

The contention is further strengthened in terms of the Human Rights Commission Act.²⁰ The relevant section provides that organs of state are obliged to afford the Commission such assistance 'as may be required for the effective exercising of its powers and performance of its duties and functions.'

To stress the point, even though an organ of state may not specifically be targeted for information by the Commission on the basis of it not being considered relevant, that organ may support the Commission in fulfilling its mandate by providing it with any information that may be of relevance to its task. This may occur either on the initiative of the organ of state in question or at the request for assistance or support (as opposed to a formal and official protocol) by the Human Rights Commission.

5.3 WHICH SPECIFIC ORGANS OF STATE ARE INCLUDED WITHIN THE TERM 'RELEVANT'?

With some insight having been gained regarding what constitutes an organ of state as well as criteria to be employed in determining its relevance in relation to the mandate of the Human Rights Commission, the next challenge facing the Commission is to establish the specific organs of state included within the ambit of a 'relevant organ of state'. In undertaking this task the exact functions

²⁰ Human Rights Commission Act 54 of 1994 - Section 7(2)

Furthermore, although Schedule 5²⁴ lists the functional areas of exclusive provincial legislative competence, in terms of Section 44(2) the national legislature may, in certain circumstances pass legislation pertaining to these areas. Schedule 5 also includes many areas that are of significant importance to the realisation of the socio economic rights enlisted in Section 184(3). An example of this would be the significant importance of ambulance services to the realization of the right to health care.²⁵ In terms of Section 44(2), Parliament may intervene by passing legislation, with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

- *to maintain national security;*
- *to maintain economic unity;*
- *to maintain essential national standards;*
- *to establish minimum standards required for rendering of services; or*
- *to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.*

It must be noted that various matters in Schedule 5 may be necessary to maintain essential national standards or to establish minimum standards for the rendering of services or even to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole and hence, it is foreseeable that in these circumstances Parliament may intervene by passing legislation regarding a Schedule 5 matter.

In addition, Parliament may also assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.²⁶ Furthermore, it confers on the National Council of Provinces the power to pass, in accordance with Section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with Section 76.²⁷

In terms of Section 44(3) the National Legislature is also empowered to pass legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a

²⁴ See Annexure B for Functional Areas in Schedule 5

²⁵ * denotes the rights included in Schedule 5 that are of relevance to the realization of the rights enlisted in Section 184(3).

²⁶ Section 44 (1)(a)(iii)

²⁷ Section 44(b)(ii)

powers accorded to it in this regard undeniably point to the fact that national government has, as part of its primary mandate, a vital role to play in the implementation of socio economic rights. As this mandate accords with the criteria established in terms of which the Human Rights Commission is *obliged* to request information from organs of state which, as part of their primary mandate are required to implement socio economic rights, national government is clearly a relevant organ of state for the present purposes, and accordingly the Human Rights Commission is *obliged* to request information from it.

II. PROVINCIAL GOVERNMENT:

The legislative authority of the provinces is vested in the Provincial Legislature, which has the power in terms of the section to pass legislation for its province with regard to-

- *any matter within a functional area listed in Schedule 4;*
- *any matter within a functional area listed in Schedule 5;*
- *any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and*
- *any matter for which a provision of the Constitution envisages the enactment of provincial legislation;²⁸*

Furthermore, in terms of Section 104(1)(c), the provincial legislature may assign any of its legislative powers to a Municipal Council in that province.

As has been already noted, Schedule 4 in particular, makes extensive reference to socio economic rights. Furthermore, Schedule 5 makes reference to many areas that may impact substantially on the implementation of certain socio economic rights. In addition, national government may assign areas pertaining to socio economic rights to the provinces. These factors clearly point to the provincial legislature playing an integral role in the realization of socio economic rights.

Furthermore, the executive authority of provinces is vested in the Premier of that Province.²⁹ In terms of the section, the Premier exercises the executive authority together with the other members of the executive council, by -

- *implementing provincial legislation in the province;*

²⁸ Section 104(1)(b)

²⁹ Section 125

It is foreseeable that this would occur, where, for instance, the Human Rights Commission is provided with information from both the National and Provincial Legislature that are in conflict or contradict each other. An example of this may be where provincial legislation prescribes lesser standards for socio economic rights than national legislation does. Therefore, it is important to briefly examine, at this point, the method proposed by the Constitution for resolving such conflict as this will be of assistance to the monitoring of the Human Rights Commission. Furthermore, it is within the Human Rights Commission's power to make recommendations on how conflicts be resolved with a view to the effective protection of socio economic rights. An example of this would be that of maintaining essential levels of the rights or the minimum core obligations.³¹

Section 146 applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4. The section provides that national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the conditions are met:

- *The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.*
- *The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing -*
 - *Norms and standards;*
 - *Frameworks; or*
 - *National policies.*
- *The national legislation is necessary for -*
 - *the maintenance of national security;*
 - *the maintenance of economic unity;*
 - *the protection of the common market in respect of the mobility of goods, services, capital and labour;*
 - *the promotion of economic activities across provincial boundaries;*

³¹ This has been dealt with by Sandy Liebenberg in a paper entitled *Identifying Violations of Socio Economic Rights under the South African Constitution - The Role of the South African Human Rights Commission* (May 1997)

vested in the Municipal Council. A municipality has the right to govern, on its own initiative, the local government affairs of the community, subject to the national and provincial legislation, as provided for in the Constitution. The national or provincial government may not compromise or impede a municipalities ability or right to exercise its powers or perform its functions.³²

The objects of local government are -

- *to provide democratic and accountable government for local communities;*
- *to ensure the provision of services to communities in a sustainable manner;*
- *to promote social and economic development;*
- *to promote a safe and healthy environment; and*
- *to encourage the involvement of communities and community organizations in the matters of local government.*³³

Section 152(2) also provides that *'A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).*

The section reveals that municipalities also have an obligation to promote the rights set out in Chapter 2, including of course, the socio economic rights contained therein. It must be noted that Part B³⁴ of both Schedule 4 and Schedule 5 refer to the functional areas pertaining to local government. Many of these areas are of relevance to local government achieving its objects in terms of Section 152 and, in particular, to promoting social and economic development and to promoting a safe and healthy environment.

The role of local government in the implementation of socio economic rights finds further support in terms of Section 153 which enlists the developmental duties of municipalities:

A municipality must -

- *structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community, and*

³² Section 151

³³ Section 152 (1)

³⁴ * denotes the areas that are of relevance to socio economic rights in Part B of Schedule 4 and Schedule 5 - See Annexure A and B in this regard.

accordingly follows that, local government, as part of its *constitutional* mandate, is under an obligation to implement socio economic rights.

The second determination involves an assessment of the *primacy* of that mandate. The first point to be noted in this regard is that although local government may not have as extensive a role to play in the implementation of socio economic rights as may national or provincial government, it certainly does have vast powers with regard to many areas that may impact on the actual delivery of the specific socio economic rights. This becomes clearer when examining the Schedule 4 and 5, Part B, functional areas, which fall within the domain of local government. For instance, in Schedule 4, Part B, air pollution, building regulations, child care facilities, electricity and gas reticulation, municipal planning and municipal public transport all impact on the right to housing. Furthermore, water and sanitation services, domestic waste-water and sewage disposal systems impact on the rights to access to water, housing and the environment. Municipal health services are also directly relevant to the implementation of the right to health care.

In addition, when examining the Schedule 5, Part B, functional areas of local government, it is evident once more, that cleansing and refuse removal, refuse dumps and solid waste disposal have implications for health and the environment; markets and municipal abattoirs have implications for food as well as health; municipal roads are of importance for the right to housing and noise pollution is of importance to the right to a clean and healthy environment.³⁶

The substantial role of local government in the implementation of socio economic rights is further strengthened by reference to other sources. The White Paper on Water and Sanitation, for instance, expressly notes and emphasizes that *'the key to sustainable water and sanitation development is the existence of functional, competent local government.'*³⁷

³⁶ These examples are not intended to provide a coherent list of *all* of the functional areas of local government that impact on socio economic rights but rather an illustration of the fact that there are a vast number of functional areas of local government that are of significance to the enlisted socio economic rights.

³⁷ The White Paper on Water Supply and Sanitation - The Role of Local Government at page 14.

Furthermore, the White Paper on Housing envisages the following functions to be performed at metropolitan and/local level:

- Setting metropolitan/local housing delivery goals;
- identification and designation of land for housing purposes;
- the regulation of safety and health standards in housing provision;
- the creation and maintenance of a public environment conducive to viable development and healthy communities;
- the mediation of conflict in the development process;
- the initiation, planning coordination, promotion and enablement of appropriate housing development;
- facilitate support to housing delivery agencies;
- planning, funding and provision of bulk engineering services;
- provision and maintenance of revenue generating services;
- provision of community and recreational facilities in residential areas;
- welfare housing;
- land planning in areas under their jurisdiction; and
- regulation of land use and development.⁴³

In view of these provisions, it is clear that local government has indeed a critical role to play in the implementation of various socio economic rights. It is by no means being suggested that the role of local government is limited to the implementation of housing, health care and water, but, instead that these areas provide evidence of its vital role regarding socio economic rights.

Furthermore, in terms of Section 10 (c) of the Local Government Transitional Act⁴⁴ provides:

- (1) A metropolitan council shall, having regard to the principles of co-operative government, promote -
- (a) integrated economic development;
 - (b) the equitable redistribution of municipal resources; and

⁴³ *ibid* at page 36

⁴⁴ 203 of 1993

socio economic rights. Instead, it has attempted to illustrate the fundamental role of local government in the implementation of socio economic rights. The functions, powers and duties accorded to local government in terms of the Constitution were strengthened by reference to certain policy documents, the Local Government Transitional Act as well as by an example of the Cape Metropolitan Council and the metropolitan local councils, all of which clearly point to the extensive role that local government plays in the implementation of socio economic rights. It has accordingly established that local government, as part of its *primary, constitutional* mandate is required to implement the enlisted socio economic rights in terms of Section 184(3), thereby *compelling* the Human Rights Commission to request information from local government and accordingly considering it a relevant organ of state.

5.3.2 RELEVANT ORGANS OF STATE IN TERMS OF SECTION 239, SUBSECTION

(b)(i) - ANY OTHER CONSTITUTIONAL FUNCTIONARY OR INSTITUTION:

The section refers to 'any other functionary or institution performing a function in terms of the Constitution or a provincial constitution.' It was contended at an earlier stage that this would include the state institutions provided for in terms of Chapter 9 of the Constitution. The question now, is to determine which of these organs of state are relevant for the purposes of Section 184(3). Once again, in order to determine this, their powers and functions would have to be examined, and in particular, their role in relation to socio economic rights. Each of the state institutions enlisted as organs of state at an earlier stage in this paper, will accordingly be examined in the light of the criteria that has been suggested to determine their relevance.

I. THE PUBLIC PROTECTOR:

The function of the office of the Public Protector would, in terms of Section 182 (1), include the power 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 result in any impropriety or prejudice. Although such impropriety or prejudice may arise in the context of implementing socio economic rights, the fact that the Public Protector does not have any specific role in the implementation of socio economic rights, as well as the fact that it does not engage in any functions that may impact *substantially* on the implementation of socio economic rights, indicates that it should not be

⁴⁵ Schedule 2, Local Government Transitional Act 203 of 1993

IV. AUDITOR GENERAL:

The functions of the Auditor General are provided for in terms of Section 188. However, as they clearly do not relate to the actual implementation of socio economic rights, the Human Rights Commission may not specifically target it for information. However, it should also assist the Commission by bringing any irregularity which impacts on the implementation of socio economic rights to the attention of the Human Rights Commission.

V. ELECTORAL COMMISSION:

As the Electoral Commission clearly has no relevance to the implementation of socio economic rights, it cannot be considered a 'relevant' organ of state for the purposes of Section 184(3).

VI. PUBLIC SERVICE COMMISSION:

In terms of Section 196(4)(b), included in the powers and functions of the Public Service is the power to investigate, monitor and evaluate the organization and administration, as well as the personnel practices of the Public Service. Since, the implementation of socio economic rights is not included in its mandate, it is submitted that the Public Service Commission is not, in fact a relevant organ of state for the present purposes but, rather a complementary body to the Human Rights Commission.

VII. FINANCIAL AND FISCAL COMMITTEE:

In terms of Section 220, the Financial and Fiscal Committee has the power to 'make recommendations envisaged in this Chapter'. Included in the Chapter is provision for:

- *'the equitable division of revenue raised nationally among the national provincial and local spheres of government;*
- *the determination of each province's equitable share of the provincial share of that revenue;*
and
- *any other allocations to provinces, local government or municipalities from the national governments share of that revenue, and any conditions on which those allocations may be made.'*

5.3.3. RELEVANT ORGANS FOR THE PURPOSES OF SUBSECTION (b)(ii) - ANY OTHER FUNCTIONARY OR INSTITUTION:

I. PARASTATALS:

Having established that Parastatals do constitute organs of state, the next task is to determine their relevance for the purposes of Section 184(3). As no Parastatals have a constitutional mandate to implement socio economic rights, it is clear that the Human Rights Commission cannot be *obliged* to consider them 'relevant' for the purposes of Section 184(3).

However, in applying its discretion regarding their relevance, the criteria set out above needs to be applied to each Parastatal to determine its relevance for the purposes of Section 184(3). This is a task that needs to be undertaken by the Human Rights Commission and justified in terms of the aforementioned criteria. This would involve an analysis of all of the Parastatals and their functions which will then have to be assessed in the light of the criteria proposed to establish their relevance.

II. THE DEVELOPMENT BANK OF SOUTHERN AFRICA:

In view of the fact that the Development Bank of Southern Africa does not have a constitutional mandate to implement socio economic rights, it is clear that the Human Rights Commission, again, is by no means *obliged* to consider it a relevant organ of state for the purposes of Section 184(3). However, in exercising its discretion regarding its relevance, the Commission should be guided by the main objects of the Bank which are provided for in terms of Section 3(1) of the Development Bank of Southern Africa Bill. The section reads as follows:

"The main objects of the Bank shall be the promotion of economic development, institutional capacity building, and the support of development projects and programmes in the region by...."

The section clearly reveals that the Bank has an integral role to play in the implementation of socio economic rights and it is on this basis that it is suggested that the Human Rights Commission considers it to be a relevant organ of state for the purposes of Section 184(3).

This reveals that the task of the Human Rights Commission involves an analysis and an assessment of both the legislation that is in place that is relevant to fulfilling the state's constitutional obligations regarding socio economic rights as well as other measures that have been taken towards the implementation of socio economic rights at all three of these levels. Therefore, the legislative as well as the other measures that have been taken by all three levels of government will be examined briefly in the context of the state's duty to respect, protect and fulfill these rights.

6.1. PROVINCIAL GOVERNMENT:

I. CURRENT INFORMATION:

The request for current information, as provided for in the draft Protocol will remain largely the same for provincial government as has been prepared for national government. It will prove both interesting and helpful to the task of the Human Rights Commission in gaining data regarding the implementation of particular rights. This information will be critical in establishing blockages in the implementation of socio economic rights in particular areas. In addition, it will allow the Commission to verify information that has been provided by national government.

II. INFORMATION ON LEGISLATION OR OTHER MEASURES TO RESPECT, PROTECT, PROMOTE AND FULFILL THE RIGHTS:

As provincial government, like national government has a significant role to play in the implementation of socio economic rights and shares concurrent jurisdiction with national government regarding the legislative competence of Schedule 4 matters, it should clearly be required to provide information on the legislative measures or other measures that it might have taken in respecting, protecting, promoting and fulfilling these socio economic rights. Here again, the request for information should be analogous to that requested from national government.

III. FUNCTIONAL AREAS THAT MAY HAVE BEEN ASSIGNED TO PROVINCIAL GOVERNMENT REGARDING THE REALIZATION OF SOCIO ECONOMIC RIGHTS:

In terms of Section 44(1)(a)(iii), the provincial legislature may be assigned certain areas falling within the powers of the national legislative authority. As the national legislative authority has the power to pass legislation with regard to any matter, it is quite conceivable that it may assign

The section was the subject of some degree of interpretation in the Certification Judgement⁴⁸ where the court held:

"We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of local government, beyond perhaps the power to measure or test at intervals Local Government compliance with national or provincial directives or with the NT itself. What the NT seeks hereby to realize is a structure for Local Government that, on the one hand, reveals a concern for the autonomy and integrity of Local Government and prescribes a hands off relationship between Local Government and other levels of government and, on the other acknowledges the requirement that higher levels of government monitor Local Government functioning and intervene where such functioning is deficient or defective in a manner that comprises this autonomy. This is the necessary hands-on component of the relationship."

In the light of this interpretation accorded to the section, it is important for the Human Rights Commission to ascertain from provincial government whether it has in fact, monitored local government with regard to the implementation of socio economic rights. If so, exactly how it has monitored local government and to provide the Human Rights Commission with a brief assessment of its findings in this regard.

VII. PROVINCIAL SUPERVISION OF LOCAL GOVERNMENT:

In terms of Section 139(1), provision is made for the relevant provincial executive to take steps to ensure the fulfillment of an obligation where a municipality cannot or does not fulfill an executive obligation in terms of legislation. It is important for the Human Rights Commission to ascertain whether such situations have occurred in the realm of socio economic rights and the exact obligations the provincial executive may have fulfilled.

VIII. CONSTRAINTS BEING FACED:

For the Human Rights Commission to determine where the blockages lie in the implementation of socio economic rights it is important for it to determine what constraints are being faced by provincial government. This would include financial, administrative or other constraints.

⁴⁸ 1996 (10) BCLR 1253 (CC) at para 373

IV. SUPPORT FROM NATIONAL AND PROVINCIAL GOVERNMENT:

In terms of Section 154(1), provincial and national government are required to strengthen and support the capacity of municipalities to exercise their powers and perform their functions. The Human Rights Commission accordingly needs to be furnished with information regarding such support and whether it has, in fact been provided. Furthermore, local government must provide information on the areas pertaining to socio economic rights where further support is required and how does local government envisage such support being provided.

V. CONFLICTS THAT MIGHT HAVE ARISEN BETWEEN PROVINCIAL GOVERNMENT AND LOCAL GOVERNMENT:

Local government should also provide information on any conflicts that may have arisen between provincial and local government in the context of socio economic rights, how have they been resolved and what prevailed in the final instance.

VI. CONSTRAINTS BEING FACED:

The financial, administrative or other constraints being faced by local government in implementing socio economic rights must also be requested. In addressing constraints, local government should also provide information regarding measures that national or provincial government may have taken that impeded the ability of local government to fulfill its functions.⁴⁹

6.3. OTHER FUNCTIONARIES OR INSTITUTIONS:

In the context of other functionaries or institutions that may constitute relevant organs of state for the purposes of section 184(3), it is suggested that specific requests relating to specific powers and functions of a particular institution or functionary will have to be made. The protocol will have to be tailored to meet their specific functions, powers and objectives. For example, with regard to the Development Bank of Southern Africa, some its main objectives include the promotion and development of economic growth, institutional capacity building and the support of development projects in the region. Therefore, the protocol will have to reflect these objectives and the steps the Bank has taken towards achieving them. It will clearly include issues such as the particular groups

⁴⁹ National government as well as provincial government are prohibited in terms of Section 151(4) from impeding local government from fulfilling its functions.

7.2. PROVINCIAL GOVERNMENT:

Unlike at a national level, it is significantly more difficult to request the relevant information from the different departments of provincial government. These departments often vary between the different provinces. This inconsistency between the different provincial government's makes the task of the Human Rights Commission incredibly cumbersome and difficult by having to direct separate requests to each of the relevant departments within each provincial government. This problem also bears severe cost and personnel implications for the Human Rights Commission.

Therefore, as an alternative it is submitted that all information be requested from one particular person in each provincial government who would then be responsible for distributing and co-ordinating the information between the different departments in that particular provincial government. This request should be directed to a senior official in each provincial government.

7.3. LOCAL GOVERNMENT:

In view of the numerous local governments in the country, it is contended that directing requests for information to each and every local government is clearly not a feasible option for the Human Rights Commission. Hence, the possibility of a representative local government structure being requested for such information was examined.

Section 163 of the Constitution provides for organized local government. It provides, *inter alia* that an Act of Parliament must provide for the recognition of national and provincial organizations representing local government. The Local Government Transition Act 209 of 1993 makes provision for such a structure. In terms of Section 10 F(1)(a) of the Act:

'The Minister may, on such conditions as he or she may determine, recognize one organization representing municipalities at national level, provided that all the different categories of municipalities shall be represented in that organization'

Section 10 F (1) (b) further provides:

'The Minister may, in consultation with the MEC on such conditions as he or she may determine, recognize one organization in each province representing municipalities in that province,

ANNEXURE A:

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE:

Part A:

- Administration of indigenous forests - * Environment
- Agriculture - * Food and the environment
- Airports other than international and national airports
- Animal Control and Diseases - * Health and Food
- Casinos, Racing, Gambling and Wagering, excluding lotteries and sports pools
- Consumer Protection - * Health and Food
- Cultural matters
- Disaster Management - * Food
- Education at all levels, excluding tertiary education - *
- Environment - *
- Health Services - *
- Housing - *
- Indigenous law and customary law, subject to Chapter 12 of the Constitution
- Industrial Promotion
- Language policy and the regulation of official languages to the extent that the provisions of Section 6 of the Constitution expressly confers upon the Provincial legislature's competence
- Media Services
- Nature Conservation, excluding national parks, national botanical gardens and marine resources - * Environment
- Police
- Pollution Control - * Environment
- Population Development
- Property Transfer fees
- Provincial Public Enterprise in respect of the functional areas in Schedule 4 and 5.
- Public Transport - * Housing
- Public Works
- Regional Planning and Development - * Housing
- Road Traffic Regulation
- Soil Conservation - * Food and Environment
- Tourism
- Trade
- Traditional Leadership
- Urban and Rural development - * Housing
- Vehicle Licensing
- Welfare Services - *

Part B:

- Air pollution - * Housing
- Building regulations - * Housing
- Child Care facilities - * Housing

- Electricity and gas reticulation - * Housing
- Fire fighting Services
- Local Tourism
- Municipal Airports
- Municipal Planning - * Housing
- Municipal Health Services - *
- Municipal Public Transport - * Housing
- Municipal Public Works
- Pontoons, Ferries, Jetties, Piers and harbours
- Stormwater management systems in built-up areas - * Environment
- Trading regulations
- Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems - * Water and Housing

PLEASE NOTE: * denotes the impact that these particular functional areas have on the implementation of the socio economic rights enlisted in Section 184(3)

ANNEXURE B:

SCHEDULE 5 FUNCTION AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE:

Part A:

- Abattoirs - *Health and Food
- Ambulance Services - *Health
- Archives other than National Archives
- Libraries other than national libraries -* Education
- Liquor Licenses
- Museums other than national Museums
- Provincial Planning - *Housing
- Provincial Cultural Matters
- Provincial Recreation and Amenities
- Provincial Sport
- Provincial Roads and Traffic
- Veterinary Services excluding regulation of the profession

Part B: -

- Beaches and amusement facilities
- Billboards and the display of advertisements in public places
- Cemeteries, funeral parlours and crematoria
- Cleansing -* Health
- Control of public nuisances
- Control of undertaking that sell liquor to the public
- Facilities for the accommodation, care and burial of animals
- Fencing and fences
- Licensing of dogs
- Licensing and control of undertakings that sell food to the public
- Local Amenities
- Local Sports facilities
- Markets
- Municipal Abattoirs -* Food and health
- Municipal Parks and recreation
- Municipal roads -* Housing
- Noise Pollution - * Environment
- Pounds
- Public Places
- Refuse removal, refuse dumps and solid waste disposal -*Health
- Street trading
- Street lighting
- Traffic and Parking

PLEASE NOTE: * denotes the impact that these particular functional areas have on the implementation of the socio economic rights enlisted in Section 184(3)

ANNEXURE C:

PARASTATALS:

- ESKOM
- TELKOM
- SPOORNET
- SA POST OFFICE
- SABC
- PORTNET
- SARCC
- AIRPORTS COMPANY
- AIR TRAFFIC NAVIGATIONAL SERVICES
- DENEL
- PETRONET
- ATOMIC ENERGY BOARD
- ARMSCOR
- MOSSGAS
- SAA
- STRATEGIC FUEL FUND ASSOCIATION
- SOEKOR (PTY) LTD
- SUN AIR
- AUTONET
- SAFCOL
- ALEXKOR
- TRANSKEI AIRWAYS
- AVENTURA
- PX (PARCEL EXPRESS)
- ABAKOR