

# REPORT OF THE PUBLIC PROTECTOR



PUBLIC PROTECTOR  
SOUTH AFRICA

REPORT NO:22 of 2010/11

*A CONSTITUTIONAL INSTITUTION IN NEED OF GOOD GOVERNANCE*

REPORT ON AN INVESTIGATION INTO COMPLAINTS RELATING TO MISCONDUCT  
AND MALADMINISTRATION IN CONNECTION WITH THE AFFAIRS OF THE  
COMMISSION FOR GENDER EQUALITY

## INDEX

Executive summary	7
1. INTRODUCTION	8
2. THE COMPLAINTS	14
3. THE JURISDICTION OF THE PUBLIC PROTECTOR	17
4. THE INVESTIGATION	18
5. THE LEGAL FRAMEWORK REGULATING THE FUNCTIONING OF THE CGE	43
6. FINDINGS	46
7. RECOMMENDATIONS/REMEDIAL ACTION	54
8. MONITORING	56

## Executive summary

- (i) The Deputy Speaker of the National Assembly requested the Public Protector and the Auditor-General to investigate complaints and allegations of financial impropriety, maladministration and improper conduct lodged against the Commission for Gender Equality (CGE).
- (ii) The Public Protector and the Auditor General decided to divide the investigation of the matters concerned in accordance with their respective mandates. Complaints and allegations of financial misconduct and impropriety were investigated by the Auditor-General. The Public Protector investigated complaints and allegations of maladministration and improper conduct.
- (iii) The Public Protector's finding is that:
  - (a) The Commission on Gender Equality Act is outdated as many of the provisions are not in line with the provisions of the Constitution that relate to the CGE;
  - (b) Due to resignations of Commissioners, the composition of the Commission will be less than prescribed by the Commission on Gender Equality Act, by the end of October 2010;
  - (c) There is no indication that the CGE has succeeded in effectively implementing the recommendations made in a previous report of the Public Protector on an investigation into various allegations made against the CGE, and the Report of a Parliamentary *ad hoc* Committee on the review of Chapter 9 institutions. The failure of the CGE in this regard amounted to maladministration;
  - (d) The manner in which the CGE treated Xabiso Chartered Accountants when their contract with the Commission was cancelled, is unacceptable and improperly prejudiced them. The least that the CGE could have done under the circumstances was to explain the position to Xabiso Chartered

- Accountants and to tender a formal apology for any inconvenience or prejudice that was caused;
- (e) The appointment by the CGE, on 21 April 2008, of 2 Commissioners as joint Chief Executive Officers of the institution was unlawful and irregular and therefore constituted maladministration and improper conduct;
  - (f) The expenditure that was incurred by the 2 Commissioners when they performed the functions of the Chief Executive Officer (CEO), might constitute irregular expenditure and has to be investigated in terms of Treasury Regulations;
  - (g) The perception of 2 employees of the CGE, Mesdames Nxumalo and Moloko, that they were unfairly treated when they were transferred from the positions that they occupied, by the former Chairperson and the former CEO may be justified;
  - (h) Despite the fact that the CGE has spent R4 million on an Organisational Diagnostic Process, there is no tangible result that can be of any value to the organisation to date. The expenditure incurred might have been fruitless and wasteful and needs to be investigated in terms of Treasury Regulations;
  - (i) The creation by the CGE of the posts of Executive Director and Personal Assistant in the Office of the Chairperson, Spokesperson for the CGE and Acting National Coordinator of Provinces, was irregular and constituted maladministration;
  - (j) The capacity, both in terms of staff compliment and skills, of the Finance Department of the CGE requires urgent attention of the CEO and the Chief Financial Officer;
  - (k) There is a need for guidelines or policy arrangements to regulate the interaction between Commissioners and the Secretariat;

- (l) The appointment by the CGE of a consultant, Mr D Setshedi, as the interim CEO of the institution was unlawful and irregular. It therefore constituted maladministration and improper conduct;
- (m) The functions that Mr Setshedi performed as the accounting officer of the CGE during the tenure of his contract might have resulted in irregular expenditure and has to be investigated in terms of Treasury Regulations;
- (n) The CGE does not have a Housing Allowance policy for staff;
- (o) No progress has been made with the implementation of the Occupation Specific Dispensation (OSD) for the staff of the CGE;
- (p) No performance assessment took place for the 2009/10 financial year. This was a contravention of the Performance Management Guidelines of the CGE, which provide that performance of staff has to take place annually, and therefore amounted to maladministration.
- (q) The policy framework of the CGE is incomplete, outdated and inadequate to properly regulate the affairs of the institution; and
- (r) The CGE needs to consider rotating the opportunity to attend the annual meeting of the Commission on the Status of Women amongst the staff dealing with the core business of the CGE.
- (iv) The Public Protector's recommendations and views on key remedial action are that:
- (a) The National Assembly takes urgent steps to:
- Amend the CGE Act to bring it in line with the Constitution and the current organisational requirements of the CGE; and
  - Fill the vacant positions of Commissioners of the CGE.

- 
- (b) The Director-General of the National Treasury:
  - Investigates and reports to the Deputy Speaker of the National Assembly and the CGE on the irregular expenditure incurred by Commissioners Hicks and Loyilane during the period that they performed the functions of the accounting officer of the CGE, referred to in this report, for the appropriate action to be taken, if required;
  - Investigates and report to the CGE on the irregular expenditure incurred by Mr Setshedi during the period that he performed the functions of the accounting officer of the CGE, referred to in this report, for the appropriate action to be taken, if required; and
  - Investigates and report to the Deputy Speaker of the National Assembly and the CGE on the apparent fruitless and wasteful expenditure incurred by the persons that performed the functions of the accounting officer of the CGE during the period that payments were made to the consultant that was appointed for the Organisational Diagnostic Process of the CGE, referred to in this report, for the appropriate action to be taken, if required.
- (c) The CGE takes urgent steps to implement the recommendations made in the previous report of the Public Protector and in the Parliamentary Review Report.
- (d) The CEO of the CGE takes urgent steps to:
  - Inform Xabiso in writing of the reasons why the contract signed with them by the former CEO was invalid and tender an apology for any inconvenience that was caused;
  - Expedite the arbitration process between Four Rivers and the CGE relating to the Organisational Diagnostic Process;

- Conduct an audit of the verified qualifications, skills, experience and appropriate deployment of the staff of the CGE to ensure that they can function optimally in the performance of their duties;
- Regularise the creation of posts and the appointment of staff to comply with the relevant provisions of the CGE Act;
- Ensure induction of new staff takes place as from November 2010 in terms of an approved process;
- Improve the capacity and skills in the Finance Department;
- Develop guidelines or a policy to regulate interaction between Commissioners and the administration. In this regard the CEO should benchmark against the practices in similar institutions locally and in other jurisdictions, in consultation with CGE
- Review and improve the policy framework of the CGE to bring it in line with the relevant legislation and operational requirements of the CGE. A housing policy for staff should be included in the framework;
- Determine with certainty the application of the OSD on the CGE and inform the staff accordingly. The implementation of the OSD, where applicable, should also be attended to as a priority;
- Ensure that performance assessments of all staff are conducted for the 2009/10 and 2010/11 financial years in compliance with the PPRR;
- Consider rotating the nomination of the staff member that will attend the annual meeting of the Commission on the Status of Women in New York.

## 1. INTRODUCTION

- 1.1 This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted to:
  - 1.2.1 The Speaker of the National Assembly;
  - 1.2.2 The Deputy Speaker of the National Assembly;
  - 1.2.3 The Chairperson of the Parliamentary Portfolio Committee on Women, Youth, Children and People with Disabilities;
  - 1.2.4 The Minister of Women, Youth, Children and People with Disabilities;
  - 1.2.5 The Minister of Finance;
  - 1.2.6 The Commission for Gender Equality;
  - 1.2.7 The Chief Executive Officer of the Commission for Gender Equality;
  - 1.2.8 The Director-General of the National Treasury;
  - 1.2.9 The Staff Representative Committee of the Commission for Gender Equality;  
and
  - 1.2.10 Xabiso Chartered Accountants.
- 1.2 It relates to an investigation conducted into complaints of maladministration and improper conduct in connection with the affairs of the Commission for Gender Equality (CGE), that were lodged with and referred to the Public Protector, between 19 June 2008 and 5 March 2009.
- 1.3 The Report is published in terms of the provisions of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act, 1994.
- 1.4 On 19 June 2006, the Public Protector, issued a *Report on an Investigation into Various Allegations made against the Commission on Gender Equality*, which was submitted to Parliament and the CGE.



- 1.5 The Public Protector's report related to his investigation of several complaints of abuse of power, mismanagement and maladministration, lodged by staff members of the CGE.
- 1.6 The investigation found a number of shortcomings and irregularities in respect of the conduct and affairs of CGE, including:
  - 1.6.1 Internal complaint handling structures that were compromised by perceptions of victimization;
  - 1.6.2 Structural deficiencies that manifested themselves in the unreasonably high number of staff that reported directly to the Chief Executive Officer (CEO);
  - 1.6.3 A strained relationship between Commissioners and the CEO;
  - 1.6.4 The absence of job specifications and detailed conditions of service for Commissioners, which affected the functioning of the Commission; and
  - 1.6.5 A failure by the Commission to sign a Performance Agreement with the CEO resulting in accountability problems.
- 1.7 The Public Protector made 19 recommendations on improving the structure, processes and conduct of Commission aimed at the prevention of a recurrence of the allegations and complaints that were raised.
- 1.8 Due largely to policy differences amongst Commissioners, a number of vacancies arose in the CGE between January 2004 and January 2005. The terms of 7 Commissioners expired in April and May 2006. These vacancies were only filled in May 2007.<sup>1</sup>
- 1.9 Ms N Gasa was appointed as the Chairperson of the Commission, with effect from 23 February 2008.

---

<sup>1</sup> See paragraph 3.3(c) of the Review Report (infra)

1.10 The Report of the Parliamentary *ad hoc* Committee on the review of Chapter 9 and associated institutions (the Review Report), was issued on 31 July 2007.

1.11 In its discussion of the institutional governance arrangements of the CGE, the Review Report stated, *inter alia*, that:

*“It is common cause that there has been significant internal conflict between Commissioners since the inception of the Commission more than ten years ago. In 2001/02 senior persons resigned on account of ideological differences of opinion, which should not have led to such tension. Again in 2004/5 differences emerged concerning the nature of the Commission’s approach on women’s issues. As a result of internal tensions, a significant number of persons resigned.*

*There have also been tensions between Commissioners and staff members. The Committee was informed that certain problems arose when Commissioners were allocated to specific provinces, which led to tension between the staff employed by the Commission in that province and the Commissioners involved. These tensions have impacted on the institution’s overall effectiveness and efficiency, have affected the Commission’s credibility, and have fed the perception that the Commission lacks programmatic focus.*

*The Committee is of the view that these tensions should have been handled in a different way and should not have affected the Commission’s work. The Committee believes that some of these tensions could have been avoided if the division of roles and responsibilities amongst Commissioners and between Commissioners and staff had been clearly identified from the outset.”*

1.12 The general conclusions of the Committee, as set out in paragraph 4 of Chapter 11 of the Review Report, included that:

- 1.12.1 The CGE displayed a poor understanding of its legal and constitutional mandate;
- 1.12.2 The CGE's efficiency and effectiveness could be enhanced if certain institutional arrangements are addressed;
- 1.12.3 The relationship between the CGE and civil society is unsatisfactory;
- 1.12.4 Collaboration of the CGE with other Chapter 9 institutions was informal and unsystematic;
- 1.12.5 Public awareness of the CGE's work was inadequate; and
- 1.12.6 The CGE's interaction with Parliament was unsatisfactory.
- 1.13 The Committee made a number of recommendations to improve the structure and efficiency of the Commission that had to be implemented with immediate effect.
- 1.14 As far as the filling of vacancies of Commissioners is concerned, the Committee recommended that the National Assembly *"should establish appropriate mechanisms for the timely initiation and systemic implementation of the process for the appointment of Commissioners to ensure that the outrageous delay experienced in the appointment of the current Commissioners is never repeated."*<sup>2</sup>
- 1.15 On 19 June 2008, the Public Protector received a complaint from Xabiso Chartered Accountants (Xabiso) against the CGE.

---

<sup>2</sup> Paragraph 5.1 of the Review Report

- 1.16 The complainants alleged that their service contract with the CGE was cancelled without reason after they had already performed certain accounting tasks for which they were duly paid.<sup>3</sup>
- 1.17 The Staff Representative Committee of the CGE subsequently also lodged a complaint with the Public Protector, which was based on a submission that they had made to the then Chairperson of the Parliamentary Standing Committee on Security and Constitutional Affairs, on 3 December 2008. The submission contained numerous complaints of improper conduct and maladministration by officials and Commissioners of the CGE. The details of the complaints are referred to in paragraph 2 below.
- 1.18 On 22 January 2009, the Public Protector approached the Speaker of the National Assembly in writing, in connection the reports and complaints referred to above. The Public Protector made the following observations:
- *"The Commission has been plagued with internal conflict and allegations of misconduct and incapacity ever since its inception.*
  - *The intervention by my Office in 2006 after receiving complaints from staff of the Commission, clearly did not achieve the expected results.*
  - *The Commission, without just cause, failed to cooperate with my Office when requested to do so in 2008 in respect of a complaint lodged against it of unfair and improper conduct by a firm of chartered accountants.*
  - *Despite the findings and recommendations of the Parliamentary Review Committee, the situation at the Commission appears to have*

---

<sup>3</sup> See paragraph 4.2.1 below

*deteriorated to the extent that its operations have come to a standstill.*

- *As a result of the unsatisfactory situation at the Commission, members of the staff called on Parliament to come to their assistance.*
- *If the allegations made by the staff, referred to above, are found to be true, it could probably lead to the removal from office of certain Commissioners, including the Chairperson.*
- *Under the circumstances, the view is held that the National Assembly, to whom the Commission is accountable, needs to intervene as a matter of urgency to ensure that adequate steps are taken to restore the credibility of the Commission and to enable it to fulfill its constitutional mandate.”*

1.19 Three members of the Staff Representative Committee of the CGE that submitted the complaint referred to in paragraph 1.17 above, were dismissed on 13 February 2009, on charges that related to the actions that they initiated against the CGE, based on their dissatisfaction and complaints. The Speaker was informed of this development, on 16 February 2009.

1.20 The Deputy Speaker responded on 5 March 2009, indicating that her office had met with the former Chairperson of the CGE, who gave the assurance that despite the complaints and allegations made against the CGE, it was still capable of discharging its constitutional mandate.

1.21 The Deputy Speaker further indicated that the Office of the Speaker had also received complaints of financial irregularities from 2 Commissioners of the CGE. She urged the Public Protector and the Auditor-General to conduct a joint investigation into the allegations against the CGE and to submit a report to Parliament on their findings and recommendations.

- 1.22 The Chief Executive Officer (CEO) of the CGE at the time, Ms C M M Majake, who was suspended on charges of misconduct on 21 April 2008, was dismissed on 26 March 2009. She took her dismissal on review and was reinstated. Her services were, however, subsequently terminated by agreement between her and the CGE, with effect from 30 November 2009.
- 1.23 On 2 April 2009, the Chairperson of the CGE issued a statement announcing her resignation.
- 1.24 The Office of the Deputy Speaker advised, on 10 September 2010 that an *ad hoc* committee will be appointed by the National Assembly to attend to the reports of the Public Protector and the Auditor-General on their investigations into the complaints lodged against the CGE.

## **2. THE COMPLAINTS**

- 2.1 In addition to the complaints referred to in paragraphs 1.15 and 1.17 above, 2 Commissioners of the CGE complained to the Speaker, on 24 February 2009, in connection with the appointment by the CGE of 2 other Commissioners to act as joint Chief Executive Officers, during the time that the CEO was suspended. This complaint was also referred to the Public Protector for investigation.
- 2.2 In response to the request of the former Deputy Speaker for a joint investigation into the complaints lodged against the CGE, the Public Protector and the Auditor-General decided to divide the investigation into 2 parts, according to the respective mandates of the 2 institutions. It was agreed on, 26 March 2009, that the investigation into the complaints of the misappropriation of public funds and financial misconduct would be conducted by the Auditor-General and that the complaints of maladministration and misconduct would be investigated by the Public Protector.
- 2.3 A number of the complaints of misconduct considered by the Public Protector pointed at the former Chairperson directly. As she resigned shortly after the

complaints were lodged, the former Public Protector decided that it would serve no purpose to investigate these matters, as it mostly related to interpersonal conflict and decisions taken by the former Chairperson.

2.4 From the preliminary enquiries that were made in connection with the complaints, it transpired that Mr D Setshedi, who was appointed as the interim CEO of the CGE in January 2009, raised a number of concerns relating to the financial and personnel administration of the Commission with the Chairperson. The financial issues referred to by him formed part of the subject matter investigated by the Auditor-General. His main concerns relating to personnel administration are included in the list of complaints investigated, as referred to in paragraph 2.5 below.

2.5 The Public Protector decided to investigate the following complaints:

2.5.1 The complaint lodged by Xabiso.

2.5.2 The appointment of 2 Commissioners as Acting CEO's was unlawful and improper and that it resulted in a misappropriation of public funds;

2.5.3 The transferring to other positions of the Personal Assistants of the former Chairperson and the former CEO, without consulting them;

2.5.4 The Organisational Diagnostic Process (OD Process) initiated by the CGE was a complete failure and produced no result;

2.5.5 The impropriety relating to the appointment of an Executive Director and a new Personal Assistant in the Office of the former Chairperson, the Spokesperson of the CGE, and the Acting National Coordinator of Provinces. It was mainly alleged that:

2.5.5.1 The creation of the positions of Executive Director in the Office of the former Chairperson, Spokesperson for the CGE and Acting National Coordinator was unnecessary, not budgeted for and not approved; and

2.5.5.2 The appointment of new Personal Assistant in the office of the former Chairperson was unnecessary, as the Personal Assistant of her predecessor is experienced and was still employed by the CGE.

2.5.6 The absence of an induction process for new staff;

2.5.7 The failure of the CGE to implement the cost of living salary adjustments for Senior Managers, since September 2008;

2.5.8 The non-feasibility of the open plan accommodation of staff of the Human Resources Department;

2.5.9 The Human Resources Department is under and incorrectly resourced;

2.5.10 The staff of the Finance Department is not properly qualified and trained;

2.5.11 The absence of policies and procedures that regulate and guide interaction between the staff and the Commission; and

2.5.12 The improper and unlawful appointment of Mr D Setshedi as the interim CEO of the CGE, in January 2009.

2.6 On 3 March 2010, the Public Protector received an anonymous complaint from persons who identified themselves only as “CGE Junior Staff”. The complaint consisted mainly of grievances relating to human resource practices and shortcomings, such as:

2.6.1 No increase in the provident fund contributions paid by the CGE and tax deductions from salaries that do not keep trend with tax relief when it is announced by the Government;

2.6.3 Housing allowances that are not paid to all employees;

2.6.4 Salary adjustments that are not made in accordance with the increases in the public service;



- 2.6.5 The non-implementation of the Occupational Specific Dispensation;
- 2.6.7 Vacant positions that are not filled resulting, in persons acting in such posts for long periods;
- 2.6.8 Performance bonuses were not paid to all staff in 2008;
- 2.6.9 Policies that are outdated; and
- 2.6.10 The failure to rotate the nomination of the employee that attends the annual meeting of the Commission on the Status of Women in New York.

### **3. THE JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector was established by the Constitution to support constitutional democracy in the Republic of South Africa.
- 3.2 Section 182(1) of the Constitution provides that the Public Protector has the power:
  - 3.2.1 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;
  - 3.2.2 To report on that conduct; and
  - 3.2.3 To take appropriate remedial action.
- 3.3 In terms of section 181(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.
- 3.4 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate (in addition to what is stated in paragraph 3.2.1 above), *inter alia*, a complaint of improper conduct or of any act or omission

by a person performing a public function, which results in unlawful or improper prejudice to any other person.

3.5 The CGE is another state institution that was established by Chapter 9 of the Constitution to strengthen the constitutional democracy of the Republic of South Africa. The performance of its functions therefore constitutes state affairs and it performs a public function.

3.6 The Public Protector consequently has the jurisdiction and the powers to investigate the complaints lodged against the CGE, referred to in paragraph 2 above.

#### **4. THE INVESTIGATION**

The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.

##### **4.1 Key sources of information**

###### **4.1.1 Correspondence with representatives of the Staff Representative Committee of the CGE**

Representatives of the Staff Representative Committee were informed of the investigations conducted into their complaints by the Public Protector and the Auditor-General.

###### **4.1.2 Correspondence with Xabiso**

Xabiso were informed of the progress made with the investigation and the responses that were received from the former Chairperson of the CGE.

###### **4.1.3 Correspondence with the CGE**

4.1.3.1 The former Public Protector and the former Chairperson of the CGE corresponded in connection with the investigation on 27 June 2008, 9

July 2008, 18 July 2008, 13 August 2008, 20 August 2008 13 March 2009, 27 March 2009, 30 March 2009.

4.1.3.2 The Public Protector requested further information from the Acting Chairperson on 23 October 2009, who responded on 23 February 2010.

4.1.3.3 On 26 March 2010, the Acting CEO was requested to provide the outstanding information that was required.

4.1.3.4 The Acting CEO responded on 13 May 2010. She was requested to provide further information on 30 August 2010

#### 4.1.4 Documentation considered

Voluminous documentation was submitted by the CGE in connection with the complaints, including:

4.1.4.1 Written inputs submitted by Commissioners J Hicks, Y Abrahams and A Keet;

4.1.4.2 A document entitled: *Various Dialogues for Effective and Substantive Equality in South Africa: Commission on Gender Equality responds to the Ad Hoc Committee on the Review of the Chapter 9 and Related Institutions*, dated 10 October 2007;

4.1.4.3 Minutes of meetings of the Plenary and Management Committee relating to the period relevant to the investigation;

4.1.4.4 Personnel records of employees of the CGE;

4.1.4.5 Internal correspondence between the Acting CEO's, the CEO; and the Human Resource Manager and the staff, and Commissioners;

4.1.4.6 The current Organisational Structure of the CGE;

- 4.1.4.7 The Report of the Commission of Enquiry (the Harris Commission) into the conduct of the (former) Chief Executive Officer of the CGE, Ms C Majake;
- 4.1.4.8 The 2008-2013 Strategic Plan of the CGE;
- 4.1.4.9 Correspondence between the CGE and its attorneys in connection with the dispute with Four Rivers Trading 337 (Pty) Ltd (Four Rivers);
- 4.1.4.10 An Arbitration Award issued by the Commission for Conciliation, Mediation and Arbitration (CCMA), on 25 March 2009, in connection with employees of the CGE, Messrs V Mavhidula, S Dikgale and C Makgoba;
- 4.1.4.11 The contract entered into by the CGE and Mr D Setshedi in terms of which he was appointed as the interim CEO, dated 12 January 2009;
- 4.1.4.12 Internal memoranda issued by the former Chairperson and the Acting CEO's during the period relevant to the investigation;
- 4.1.4.13 A document entitled: *Project Clean Audit Report: Business Process Improvements, Compliance and Capacitating the Organisation*, generally referred to as the *Turnaround Strategy* of the CGE, dated 12 May 2010;
- 4.1.4.14 A report of the Acting Chairperson to the Chairperson of the Parliamentary Portfolio Committee on Women, Youth, Children and People with Disabilities, dated 28 July 2010.

4.1.4 Meeting with the Acting Chairperson, Commissioners and the Acting CEO of the CGE

The Public Protector met with the Acting Chairperson, Commissioners and the Acting CEO on 14 January 2010, to discuss the investigation and requested outstanding information.

4.1.5 Correspondence with the former Chairperson

4.1.5.1 The former Chairperson of the CGE, Ms N Gasa approached the Public Protector in connection with the investigation on 11 May 2010. She was provided with a comprehensive response, including the scope of the matters investigated by the Public Protector, on 20 May 2010. Ms Gasa was requested to submit any information that could be of assistance to the investigation.

4.1.5.2 In her reply of 3 June 2010, Ms Gasa requested a meeting with the investigator assisting the Public Protector to have “*a discussion with him on the impact these have on me as a person, whether I am at the CGE or not.*” Her request was granted and she was invited on 1 July 2010 to indicate a suitable date for the meeting to be confirmed. She never responded to this invitation.

4.1.6 Interviews with the CEO, the Human Resource Manager, Commissioner Maitse and Mesdames L Nxumalo and E Moloko

The investigation was finalised by means of these interviews that were conducted on 10 September 2010.

4.1.7 Reports

The findings and recommendations of the following reports were also considered:

4.1.7.1 The *Report of the Public Protector on an investigation into various allegations made against the Commission on Gender Equality*, dated 19 June 2006; and

4.1.7.2 The *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*, dated 31 July 2007.

4.1.8 Legislation and other prescripts

The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

4.1.8.1 The Constitution;

4.1.8.2 The Public Protector Act;

4.1.8.3 The Commission on Gender Equality Act, 1996; (CGE Act)

4.1.8.4 The Public Finance Management Act, 1999; (PFMA)

4.1.8.5 The Treasury Regulations for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management Act, 1999, in March 2005 (Treasury Regulations); and

4.1.8.6 The Principles, Policies, Rules and Regulations of the CGE (PPRR).

## **4.2 The investigation process and the evidence and information obtained in connection with the complaints**

### **4.2.1 The complaint of Xabiso Chartered Accountants**

4.2.1.1 Xabiso's complaint related to the cancellation of their contract with the CGE, in terms of which they were appointed as the internal auditors of the Commission, on 19 December 2007 after having participated in a tender process.

4.2.1.2 After having performed certain functions for the CGE in January 2008, for which they were paid, Xabiso were requested, in February 2008, to suspend the rendering of their services, as the CGE wanted to conduct an internal review of their appointment. The contract was cancelled on 19 May 2008, without any proper reasons having been provided to Xabiso. Their attempts to discuss the matter with the 2 Commissioners who acted as joint CEO's at the time, were unsuccessful.

4.2.1.3 Xabiso complained to the Public Protector that they were improperly treated by the CGE.

4.2.1.4 The Public Protector commenced with his investigation of the complaint on 27 June 2008, by approaching the Chairperson of the CGE for her response to the allegations.

- 4.2.1.5 In her reply, the Chairperson confirmed that there had been an engagement between the CGE and Xabiso, but stated that she could not respond to the allegations as Xabiso was threatening the CGE with litigation and the matter was in the hands of attorneys.
- 4.2.1.6 The pending litigation was raised with Xabiso who responded in writing, stating that they had suspended further legal proceedings.
- 4.2.1.7 The Chairperson was informed of the said suspension on 18 July 2008 and requested to provide the Public Protector with the relevant documentation relating to the contract that was entered into with Xabiso.
- 4.2.1.8 Apart from a response that the CGE had not been advised of the suspension of litigation, dated 13 August 2008, the former Chairperson did not provide any further cooperation in the investigation of the matter, despite having been requested to do so.
- 4.2.1.9 The appointment of Xabiso was also investigated by an inquiry that was commissioned by the CGE to investigate a number of allegations of financial misconduct against the former CEO, on 14 May 2008. The enquiry was referred to as the “Harris Commission”.
- 4.2.1.10 In its report, dated 19 February 2009, it was found that:
- (a) The Procurement Committee of the CGE determined on 10 December 2007 that Xabiso should be appointed as the internal auditors of the CGE. The process required that the decision of the Committee had to be considered and ratified by the Plenary before the service provider could be approached and made an offer.
  - (b) However, on 19 December 2007, the CEO wrote to Xabiso offering them a 3 year contract. Xabiso responded on 15 January 2008, accepting the offer.

(c) Subsequently Xabiso indeed performed certain tasks for which they charged fees in the amount of R92 235.92

(d) When the CEO was confronted with the appointment of Xabiso without the Plenary ever having ratified the decision of the Procurement Committee, she denied that a contract had been concluded.

4.2.1.11 The Harris Commission further found that:

*“The simple question is why the CEO wrote to Xabiso offering them a three year contract before the matter had been placed before the Plenary for approval. A further issue is why the CEO did not make mention of the fact that Xabiso had been made an offer of appointment in the finance meeting of the 25<sup>th</sup> of January 2008.*

*In all likelihood, the CEO, after the decision of the Procurement Committee ‘jumped the gun’ and offered Xabiso the contract. Xabiso formally accepted the offer and then commenced work. In fact, the CEO should have followed the normal process, taken it to the Audit Committee and had the decision of the Procurement Committee confirmed by Plenary before offering the contract to Xabiso. Something as important as the appointment of the internal audit service provider in a Constitutional Institution should have gone to Plenary and been fully canvassed after disclosure of all the relevant information.*

*It is submitted that a likely scenario is that when the issue was raised at the Finance Committee meeting of the 25<sup>th</sup> of January 2008, the CEO found herself in a position where, because she had not followed procedures, she did not disclose the full information to the Committee and in fact misrepresented to them the true situation by merely saying that a service provider had been identified when, in fact, the service provider had already been sent a letter of appointment on the 19<sup>th</sup> of*



*December 2007. In this regard, it is clear that the CEO did not follow appropriate processes and procedures in regard to the appointment of the internal auditors and in so doing, we find that she misrepresented the true situation." (emphasis added)*

4.2.1.12 The report of the Harris Commission, which was accepted by the Commission, formed the basis of the disciplinary charges against the former CEO, that ultimately resulted in her services being terminated by agreement.

4.2.1.13 According to the CEO, no further interaction took place between the CGE and Xabiso after their contract was cancelled by the 2 Acting CEO's. Xabiso was also not provided with any apology for the inconvenience caused by the incident.

#### 4.2.2 The appointment of 2 Commissioners as joint Acting Chief Executive Officers

4.2.2.1 It was established from the investigation that the Plenary of the CGE unanimously decided, on 21 April 2008, to appoint Commissioners Hicks and Loyilane to act as joint CEO's until a new CEO was appointed. The decision was taken, following the suspension of the former CEO on charges of misconduct.

4.2.2.2 According to the Acting Chairperson, Mr M Shozi, the CGE could not appoint any senior manager to act as the CEO at the time, due to the vote of no confidence expressed by the staff in the management of the Commission.

4.2.2.3 Mr Shozi further explained that at the time when the decision was taken, the Commission was under the impression that the investigation and disciplinary action against the former CEO would not take more than 3 months to be finalised.

4.2.2.4 In her response to this complaint, Commissioner Hicks stated that:

*'Upon suspension of the then CEO Ms Chana Majake, Commissioners deliberately subsumed the Office of the CEO into the Office of the Chairperson, and appointed two full-time Commissioners to jointly assume the role of Acting CEO (ACEO), as a strategic, interim measure, to steer the CGE through an organisational diagnostic (OD) and re-engineering process, and attend to practical matters relating to the running of the organisation.*

*Commissioners made an informed decision to deliberately blur the lines of distinction between Commissioners and the Secretariat, and consciously step into the realm of the secretariat. While this blurring of roles is not what is envisaged by the CGE Act, the context within which this was introduced, as well as a multitude of examples of similar practice in the corporate sector, where Directors are compelled to take appropriate measures to intervene and rescue a company, by stepping into executive roles, give compelling argument and support for this decision taken by Commissioners. This appointment also has precedence within the CGE, where the previous term of Commissioners, then full-time Commissioner Bafana Khumalo was appointed ACEO while Commissioners were awaiting the filling of the position of CEO." (emphasis added)*

4.2.2.5 Commissioner Hicks further confirmed that she and Commissioner Loyilane were paid allowances during the time that they acted as joint CEO's.

4.2.2.6 Commissioner Abrahams also submitted her input in this regard during the investigation and confirmed that she supported the decision of the Plenary. She further indicated that the understanding was that the arrangement would only be for 3 months. However, it transpired that the 2 Commissioners acted as joint CEO's for much longer and until it was raised at the Plenary of 9-12 September 2008, when they were requested to relinquish their acting positions and to take steps to appoint a CEO that is not part of the executive.

4.2.2.7 In a document entitled: *“Draft discussion document: Statement of principles and observations: Proposal on the way forward”* which was addressed to the Commission by Commissioner A Keet on 4 September 2008, he questioned the validity of the decision of the Plenary to appoint 2 Commissioners as Acting CEO’s. Referring to the provisions of the CGE Act, in terms of which the CEO is accountable to the Commission, Dr Keet stated:

*“The upshot is that one Commissioner may hold another accountable as Acting CEO and that the Commission as a collective may hold the Chairperson accountable as CEO. This exposes the Chairperson, the two Commissioners and the Commission to a plethora of risks. Part of the niggling tensions amongst us and the inability to operate as a team stems from this because the lines that allow us to conduct collective and collegial oversight and fiduciary functions have been blurred.”*

4.2.2.8 Commissioners Hicks and Loyilane acted as joint CEO’s of the Commission until January 2009, when an interim CEO, Mr D Setshedi was appointed.

4.2.2.9 Commissioner Hicks lives in KwaZulu-Natal and Commissioner Loyilane in the Eastern Cape. During the approximately 8 months that they acted as joint CEO’s for the CGE, they each travelled from their places of residence to the Head Office of the CGE in Johannesburg, at the cost of the Commission, 17 times.

#### 4.2.3 The transferring of the Personal Assistants to the former CEO and the former Chairperson, without consultation

4.2.3.1 In his response to this complaint, the Acting Chairperson explained that the decision to transfer the Personal Assistant of the former CEO, Ms L Nxumalo, was taken to ensure that documents relating to the disciplinary investigation that was conducted against the former CEO at the time, were only accessible through the office of the former Chairperson. She was transferred to the Public Education Department

after the matter was raised with her by the former Chairperson and the Acting Head of the said Department.

- 4.2.3.2 This was confirmed by both Commissioners Hicks and Abrahams.
- 4.2.3.3 Commissioner Hicks further stated that the Chairperson reported to the Plenary that the Personal Assistant of her predecessor, Ms Eva Moloko, was not coping with the workload in the Chairperson's office and that she, after consultation, opted to take up a post in the Finance Department to enable her to acquire new skills.
- 4.2.3.4 According to the CEO, it was her impression that there was no proper consultation with the two ladies at the time. Ms Moloko felt humiliated because of the manner in which she was dealt with by the Chairperson. She does however now appear to be content in her position in the Finance Department.
- 4.2.3.5 The CEO also stated that after the former Chairperson left, Ms Nxumalo returned to her position as the Personal Assistant of the CEO.
- 4.2.3.6 Ms Nxumalo confirmed during the investigation that she was not properly consulted in connection with her transfer to another department. After the former CEO was suspended, she was just told move out of her office and find space for herself elsewhere in the CGE. She eventually landed up in the Public Education Department, where she stayed until January 2009, when Mr Setshedi was appointed as the interim CEO. She was then moved back to her original position as the Personal Assistant of the CEO.
- 4.2.3.7 Ms Moloko was the Personal Assistant of the Chairperson of the CGE since 1998. In 2008, she was informed by the Chairperson and the CEO that the Chairperson had decided to change the style of her office and that she would be acquiring a person with better skills than Ms Moloko. There was a vacancy in the Finance Department, where she was redeployed. Although she was very unhappy about the manner in which she was treated, Ms Moloko indicated during the investigation

that she is now satisfied in the Finance Department, where she has acquired new skills.

#### 4.2.4 The failed Organisational Diagnostic Process initiated by the Commission

4.2.4.1 The procurement of a consultant for and the financial implications of this process were investigated and reported on by the Auditor-General.

4.2.4.2 Early in 2008, the CGE appointed a consultant to assist with the comprehensive review of its systems, structures, personnel and business processes in order to enable the alignment of the activities of the CGE with its mandate and strategic objectives. A budget of R1 million was made available for the process. A total amount of R4 008 000 was however spent on this process by September 2009, but the CGE still does not have a final consolidated report on the work that was done. The policy framework of the CGE is still the same than it was before this process, which was supposed to have reviewed and improved the policies of the CGE, started.

4.2.4.3 From correspondence between the CEO and attorneys representing the CGE, it was established that the consultant, Four Rivers, sued the CGE in 2009, for alleged non payment of an amount of approximately R530 000 for services rendered.

4.2.4.4 The parties agreed to refer the claims for private arbitration. The CGE also instituted a counter claim against Four Rivers, for overpayment of an amount of R 808 000.

4.2.4.5 The dispute between the parties relates to the final consolidated report of Four Rivers on the work that they had done, which, according to the CGE, has never been delivered.

4.2.4.6 According to the CEO, the arbitration process will commence as soon as an agreement on the arbitrator can be reached.

4.2.5 The impropriety relating to the appointment of an Executive Director and a new Personal Assistant in Office of the former Chairperson, the Spokesperson of the CGE and the Acting National Coordinator of Provinces

4.2.5.1 The details of the complaints in this regard are contained in paragraph 2.5.5 above.

4.2.5.2 It was established that the creation and filling of the respective positions were discussed and approved by the Plenary of the CGE, on 6 May 2008. The recording of the meeting and its transcript have been lost and the Minutes of the meeting could also not be found.

4.2.5.3 The Acting Chairperson stated during the investigation that it was agreed at the said meeting that *“the position of Director in the Office of the former Chairperson and PA should be temporal.”* He could not confirm whether the positions were budgeted for.

4.2.5.4 Commissioner Hicks’ recollection of what was decided at the 6 May 2008 plenary was that the former Chairperson submitted a proposal for the creation of the posts of Executive Director and Personal Assistant in Office of the former Chairperson and the post of Spokesperson of the CGE. Plenary authorised the Chairperson to proceed as these posts were regarded as vital to the effective functioning of the Office of the former Chairperson.

4.2.5.5 She further explained that the posts of Executive Director and Personal Assistant were filled on a temporary basis, whilst the positions were advertised. *“These posts have subsequently lapsed and no permanent appointment has been made.”*

4.2.5.6 As far as the position of Spokesperson is concerned, Commissioner Hicks confirmed that it was a new position that was urgently needed due to *“the CGE’s prior dismal record of engaging with the media and its poor public profile. The Chairperson noted an existing staff member with potential to*

*assume this role, and motivated for his permanent appointment to this post, which was accepted by Commissioners. While this incumbent did not have media experience, his deep understanding of gender issues and commitment to gender equality and the CGE, and strong work ethic reveal his potential.”*

4.2.5.7 In connection with the post of Acting National Coordinator of Provinces, it was established that the post of Chief Operations Officer was left vacant after the suspension of the former CEO and the appointment of 2 Commissioners as Acting CEO's. All the positions of Heads of Departments were vacated at the time and filled by persons who acted, pending the conclusion of the OD Process, which was supposed to also have addressed the high staff turnover at the CGE. According to Commissioner Hicks, it was agreed by the Plenary to convert the post of Chief Operations Officer (COO) into that of Acting National Coordinator of Provinces, as a temporary measure.

4.2.5.8 Commissioner Hicks conceded during the investigation that the CGE failed to comply with the provisions of the CGE Act in respect of the creation of new posts.<sup>4</sup> She further indicated that the Plenary of the CGE resolved that all temporary and unbudgeted posts should not be filled until they have been properly assessed and regularised.

4.2.5.9 The Human Resources Manager confirmed during the investigation that an employee had been appointed as a Spokesperson of the CGE. The position of Executive Director in the Office of the former Chairperson was filled on a temporary basis, but the post was later abandoned. .

4.2.5.10A position of “*Acting Provincial Coordinator*” was created by the Plenary when the COO resigned after the former CEO was suspended. The post of COO is still part of the Organisational Structure, but is not filled.

4.2.5.11The CEO and the Human Resources Manager could not explain how an “*Acting*” position was created. According to them, the COO is supposed to perform the functions of the Provincial Coordinator.

---

<sup>4</sup> See paragraph 5.2 below

#### 4.2.6 The absence of an induction process for new staff

The Human Resources Manager confirmed that the CGE does not have an induction process for new staff. Such a process is however, currently being developed and should be in place by November 2010.

#### 4.2.7 The failure to implement the cost of living salary adjustments for Senior Managers since 2008

4.2.7.1 In her response to this complaint, the CEO stated, on 13 May 2010, that the salary increases in the Public Service in 2009 were equally applied to all the staff of the CGE and implemented in September 2009, including back payments for the months of July and August 2009.

4.2.7.2 It was further established and confirmed by the Human Resources Manager that the remuneration packages of all Senior Managers of the CGE are on par with that of Senior Managers in the Public Service. Adjustments were made early in 2009 and 2010, in accordance with the increments that were announced in the Public Service.

#### 4.2.8 Non feasibility of open plan accommodation of the staff of the Human Resources Department

It was established that only 2 employees of the Human Resources Department work in an open plan environment. The Human Resources Manager confirmed that all the personnel files of the CGE are locked in his office to prevent unauthorised access thereto. Currently, he is not aware of any complaints regarding the open plan arrangement.

#### 4.2.9 The Human Resources Unit is under and incorrectly resourced



4.2.9.1 According to the Organisational Structure of the CGE, the Human Resources Unit currently consists of an Human Resources Manager, a Senior Personnel Practitioner: Labour Relations, a Senior Personnel Practitioner: Development and Planning and an Human Resources Administrator.

4.2.9.2 The CEO and the Human Resources Manager indicated during the investigation that the Unit is properly resourced and that they are satisfied that it can perform its functions optimally.

4.2.10 The staff of the Finance Department is not properly qualified and trained

4.2.10.1 The CEO confirmed that the Finance Department needs urgent improvement in terms of its skills and capacity.

4.2.10.2 The vacancy of the Chief Financial Officer has been advertised and it is hoped that the position will be filled by November 2010.

4.2.10.3 At the time of the investigation, the CEO was in the process to verify the qualifications of the staff in the Department to determine whether they have the necessary skills and experience.

4.2.11 The absence of policies and procedures that regulate and guide interaction between the staff and the Commission as an employer

4.2.11.1 This matter was identified and raised by Mr Setshedi, who was appointed as the interim CEO of the CGE in January 2009.

4.2.11.2 In her response to this complaint, Commissioner Abrahams stated that:  
*"This is not true. The document Principles, Policies, Rules and Regulations for Staff of the Commission on Gender Equality was gazetted on 5 MAY 2007, and may have its shortcomings, but continues to be the official document until such time as we gazette a different one."*

4.2.11.3 No response was provided in this regard by the Acting Chairperson.

4.2.11.4 The document entitled *Principles, Policies, Rules and Regulations for the staff of the Commission on Gender Equality (PPRR)* came into operation on 1 August 2006. It consists of principles and guidelines in respect of:

- A Code of Conduct;
- Delegations;
- Human Resources;
- Performance Management;
- Operations, Claims and Allowances;
- Procurement and
- Salaries, allowances, leave, grievances, etc of Commissioners.

4.2.11.5 Policies on the following are included in the said document:

- Leave;
- Misconduct;
- Discipline;
- Grievances;
- Employee Wellness;
- Staff Retention;
- Subsistence, Travelling and Entertainment;
- Vehicles;
- Education Assistance;
- Supply Chain Management;
- HIV/AIDS;
- Protocol on securing Counsel Services;
- Volunteers;
- Sexual Harassment; and
- Laptop computers.

4.2.11.6 The CGE currently does not have any policy that specifically regulates the interaction between the Secretariat and the Commission. Many of the complaints had their origin in the perception of staff that the

Commission failed to understand and abide by the general principle that the executive of an organisation should not interfere unduly and improperly with the administration, which is headed by the CEO.

4.2.11.7 Both the CEO and the Human Resources Manager expressed their support to the idea that the CGE should develop guidelines or a policy to regulate the interaction between Commissioners and the Secretariat. The idea was also supported by Commissioner Maitse, who was present when the matter was discussed during the investigation.

4.2.12 The appointment of Mr D Setshedi as the interim CEO

4.2.12.1 At the 21 November 2008 Plenary, it was reported that the search for an interim CEO was fruitless. It was resolved that the Acting joint CEO's should speed up the process. They were authorised to head hunt and contract a suitable person for up to a maximum figure of R650 000 for a 3 to 6 month period.

4.2.12.2 A shortlist of possible candidates was compiled and 2 candidates interviewed late in December 2008. Mr Setshedi was selected and appointed for a period of 4 months at an amount of R130 000 per month.

4.2.12.3 The contract with Mr Setshedi was signed on 12 January 2009.

4.2.12.4 In terms of the main conditions of the contract, Mr Setshedi

- (a) Was appointed as interim CEO for a period of 4 months;
- (b) Was charged with providing strategic and administrative support to the Commission; and
- (c) Had to ensure that proper financial controls were in place.

4.2.12.5 There is no reference in the contract to the provisions of the CGE Act or the PFMA.

- 4.2.12.6 From the records of the CGE and the information provided by the CEO and Commissioners, it is clear that Mr Setshedi was expected to perform all the functions of the Chief Executive Officer of the CGE during the terms of his contract. He was therefore also the accounting officer of the CGE.
- 4.2.12.7 The Acting Chairperson denied during the investigation that the appointment of Mr Setshedi was unlawful and a waste of public funds. He held the view that the appointment was made in terms of section 7 of the CGE Act.
- 4.2.12.8 Commissioner Abrahams lodged a complaint with the Speaker of the National Assembly, on 24 February 2009, in connection with the appointment of Mr Setshedi. She claimed that his appointment was not made in terms of the CGE Act.
- 4.2.12.9 On 10 March 2009, Mr Setshedi sent an e-mail message to the Commissioners informing them, the National Treasury and the Auditor General that he had discovered various serious financial malpractices, which warranted a forensic investigation. These matters were investigated by the Auditor-General.
- 4.2.12.10 Mr Setshedi's e-mail resulted in several altercations with Commissioners and on 11 March 2009, he responded as follows:

*"I want to put it on record that I take exception to the personalization of my comments that refer to specifics at law; I have no material interest in how the CGE decides to implement its processes. I want to furthermore state that based on my observations of various email exchanges between Commissioners as well as my documented discoveries, I am not convinced that all Commissioners are united and committed in their quest to turn the CGE around. I furthermore take exception to being used as a battering ram by Commissioners pursuing their own untoward intents, I refuse to be a pawn to be used to achieve*

*an end that may detract the CGE from meeting its Constitutional mandate.*

*To that end I hereby confirm that my contract is terminated forthwith and will deliver all CGE equipment by no later than Monday close of business.”*

4.2.12 No increase in provident fund contributions and tax deductions from salaries that do not keep trend with tax relief when it is announced by the Government

- 4.2.12.1 No details were provided by the complainants in this regard.
- 4.2.12.2 In her response to this complaint, the CEO stated that the CGE uses an automated payroll system that automatically calculates the tax deductions on the salaries of employees in accordance with the directions of the South African Revenue Services (SARS). Any over deductions will be corrected when employees submit their tax returns to the SARS at the end of the tax year.
- 4.2.12.3 As far as the provident fund contributions of the CGE are concerned, it was established from the Auditor-General that the complaint was not justified. His investigation indicated that the contributions of the CGE are correct.
- 4.2.12.4 The CEO of the CGE further indicated that a Management Committee, composing of representatives of the staff and management, has been established to oversee the running of the provident fund in conjunction with Alexander Forbes. The first meeting of the Committee was held in December 2009.

4.2.13 Housing allowance not paid to all employees

It was established that a housing allowance is only paid to an employee that owns a house and in whose name, whether jointly with another person, or individually, and in whose name a bond in respect of the property is registered. The conditions of service of employees provide for the allowance,

but the CGE does not have a policy that regulates the conditions and the amount payable.

#### 4.2.14 Non implementation of OSD

4.2.14.1 According to the CEO, the OSD as implemented by the Public Service, has not been applied by the CGE to date. Management has been engaging the Department of Public Service and Administration to determine how it should be implemented in the case of the Commission.

4.2.14.2 No significant progress has been made since 2008 in this regard. The Human Resource Manager and the CEO agreed that the matter requires urgent attention and that the staff of the CGE should be informed of the steps taken by management to address their concerns.

#### 4.2.15 Vacant positions are not filled

4.2.15.1 The concern in this regard related mainly to the filling of the posts of Heads of Departments.

4.2.15.2 It was established that all the vacancies of Heads of Departments were advertised, the shortlists compiled and interviews will be conducted in October 2010. It is envisaged that all these positions will be filled by November 2010.

#### 4.2.16 Performance bonuses not paid to all staff in 2008

4.2.16.1 The records of the CGE indicate that all the staff that qualified for a financial incentive based on their performance evaluations for the 2008/9 financial year, were paid accordingly.

4.2.16.2 No performance assessments were conducted for the 2009/10 financial year, due to incorrect job descriptions that were not changed in time.

4.2.16.3 The CEO explained that the matter was recently discussed with the labour unions that the staff belong to and it was resolved that the improved performance agreements will be signed by all the staff by the end of September 2010, and the performance of the staff will be assessed accordingly.

#### 4.2.17 Outdated policies

4.2.17.1 The CEO agreed that the current policy framework of the CGE requires an urgent review and update.

4.2.17.2 It was established in this regard that the Commission has recently decided that the Management of the CGE has to develop and submit a plan to the Plenary in this regard and that the target set for the new policy framework to be in place, is September 2011.

#### 4.2.18 Failure to rotate the nomination of the employee that goes to the annual meeting of the Commission on the Status of Women in New York

During the investigation, the CEO and the Human Resource Manager agreed that the CGE should consider rotating the nomination of the staff member concerned, to enable others to also have the experience and benefit of attending and participating at the annual meeting in New York.

### **4.3 Information and evidence obtained in respect of matters incidental to the complaints that were lodged**

4.3.1 The implementation of the recommendations made by the former Public Protector in his *Report on an investigation into various allegations made against the Commission on Gender Equality*, dated 19 June 2006

- 4.3.1.1 The Public Protector made a number of recommendations relating, *inter alia*, to the improvement of the policy framework of the CGE, the signing of performance agreements, the filling of vacancies, the compliance with policies, improving the team spirit of the organisation and its Performance Management System.
- 4.3.1.2 It could not be established with certainty during the investigation whether these recommendations had been properly implemented by the Commission. The attempt to have the policies reviewed and upgraded appears to have been part of such process.
- 4.3.1.3 The difficulty experienced with the implementation of the recommendations was that the Commission went through a transition phase when the report was released. It only consisted of the Chairperson at the time. The other Commissioners were only appointed in May 2007.
- 4.3.2 The implementation of the recommendations of the *ad hoc* Parliamentary Committee of the Review of Chapter 9 and Associated Institutions, dated 31 July 2007
- 4.3.2.1 The Parliamentary Committee also made several recommendations to strengthen the efficiency and effectiveness of the CGE.
- 4.3.2.2 During the investigation, the Commission was requested to indicate what progress had been made with the implementation of the said recommendations.
- 4.3.2.3 In her response, Commissioner Hicks stated:
- “Since June 2007, the CGE has made numerous and great strides in turning around the institution and rebuilding it to ensure that it gives effect to its Constitutional mandate, and serves the public of South Africa.”*



4.3.2.4 Detailed information in this regard was requested from the CEO, but all that was provided was the response of the Commission to the findings of the Committee in 2007.

4.3.2.5 The matter was further discussed with the CEO and Commissioner Maitse during the investigation, who indicated that in their view, no progress had been made with the implementation of the recommendations.

#### 4.3.3 The Turnaround Strategy of the CGE

4.3.3.1 The Commission adopted a strategic document on 12 May 2010, entitled: "*Project Clean Audit Report: Business Process Improvements, Compliance and Capacitating the Organization*".

4.3.3.2 The objectives of the project include:

- (a) The realignment of operational processes;
- (b) The introduction of Performance Management Systems;
- (c) The improvement of financial management processes and procedures;
- (d) Organisational redesign, especially in the Finance Department;
- (e) Organizational Development; and
- (f) Regularising Supply Chain Management Policies and contract management.

4.3.3.3 The timeline of the strategy stretches over a period of 16-20 months. The first phase will focus on Financial and Human Resources Management as well as on improving business processes. It is envisaged that the CGE will be able to focus more on its constitutional mandate in the second phase.

4.3.3.4 The overall aim defined in paragraph 3.7 of the Strategy, is as follows:

*“The overall goal of this turnaround strategy is transform the CGE into a catalyst or an enabler organisation that facilitates the promotion, monitoring and protection of gender equality through networks, collaborators and partners.*

*In addition, this turnaround strategy must ensure that the CGE return from an underperforming or distressed organisation to one that operates at acceptable levels of compliance to the Constitutional and Legislative requirements in terms of the effective, efficient and economic use of the resources through the public purse.”*

4.3.3.5 The Acting Chairperson reported on the progress made with the implementation of the Turnaround Strategy of the CGE to the Chairperson of the Parliamentary Portfolio Committee on Women, Children, Youth and People with Disabilities, on 28 July 2010.

4.3.3.6 In his report, the Acting Chairperson confirmed that the CGE undertook to provide the Committee with monthly reports on the progress made.

#### 4.3.4 The dismissal of members of the Staff Representative Committee

4.3.4.1 Messrs Mavhidula, Dikgale and Makgoba, who were dismissed by the CGE on 12 February 2009,<sup>5</sup> approached the CCMA. They claimed that their dismissal was both procedurally and substantively unfair.

4.3.4.2 On 25 March 2009, the CCMA granted an award by default in favour of the three employees, in terms of which they were reinstated as from 14 April 2009 with their full benefits.

#### 4.3.5 Vacancies in the Commission

5 of the 12 Commissioners, including the Chairperson, have resigned. The Commission has also been without a formally appointed Chairperson since April 2009. In terms of the said resignations, the

---

<sup>5</sup> See paragraph 1.19 above

Commission will at the end of October 2010 consists of an Acting Chairperson and 6 members.

## **5. THE LEGAL FRAMEWORK REGULATING THE FUNCTIONING OF THE CGE**

### **5.1 The Constitution**

5.1.1 The CGE was established by section 181 as one of the institutions created to strengthen the constitutional democracy of the Republic of South Africa.

5.1.2 Section 187 provides that the Commission must promote respect for gender equality and the protection, development and attainment of gender equality. It further provides that the Commission has the additional powers and functions prescribed by national legislation.

5.1.3 The President, on recommendation of the National Assembly must appoint the members of the CGE, in terms of section 193.

5.1.4 A member of the Commission may, in terms of section 194(1) be removed from office on the ground of misconduct, incapacity or incompetence. There has to be a finding to that effect by a committee of the National Assembly and the adoption by the Assembly of a resolution calling for that person's removal from office.

### **5.2 The Commission on Gender Equality Act, 1996**

5.2.1 The CGE Act regulates the powers, functions and associated affairs of the CGE.

5.2.2 It provides for its composition to consist of a chairperson and no fewer than 7 and no more than 11 members.

5.2.3 Section 4(3)(a), read with section 3(2), provide that a vacancy in the Commission shall be filled as soon as practicable.

5.2.4 In terms of section 7 of the Act, the Commission has to appoint a suitably qualified person or a person seconded from the Public Service, as the Chief Executive Officer of the Commission for the purpose of assisting the Commission in the performance of its financial, administrative and clerical functions. This appointment has to be done in consultation with the Minister of Finance.

5.2.5 Section 7 also provides that the Commission may be assisted by such staff, seconded from the Public Service or appointed by the Commission, in consultation with the Minister of Finance, as may be necessary to enable the Commission to perform its functions.

5.2.6 The remuneration and conditions of service of persons appointed by the Commission, are determined by the Commission, in consultation with the Minister of Finance.

5.2.7 The functions and accountability of the Chief Executive Officer are provided for in section 9. He/she is accordingly responsible for the management and administrative control over staff and also charged with the responsibility of accounting for the money received and expended by the Commission. He/she also has to cause the necessary accounting and other records to be kept and is accountable for the performance of his/her functions to the Commission.

### **5.3 The Public Finance Management Act, 1999 and the Treasury Regulations**

5.3.1 The object of the Act is defined in section 2 as *“to secure, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.”*

5.3.2 Section 36 provides that every constitutional institution must have an accounting officer which has to be the Chief Executive Officer.

5.3.3 In exceptional circumstances, the National Treasury may approve or instruct that a person other than the Chief Executive Officer can be the accounting officer.

5.3.4 Section 37 provides that:

*“When an accounting officer is absent or otherwise unable to perform the functions of accounting officer, or during a vacancy, the functions of accounting officer must be performed by the official acting in the place of that accounting officer”.*

5.3.5 The general responsibilities of accounting officers of constitutional institutions are provided for in section 38. It includes the responsibility to, on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, report the particulars of such expenditure to the National Treasury.

5.3.6 He/she also has to take effective and appropriate disciplinary steps against any official who makes or permits an unauthorised, irregular or fruitless and wasteful expenditure.

5.3.7 Section 81 provides that an accounting officer of a constitutional institution commits an act of financial misconduct if he/she wilfully or negligently makes or permits an unauthorised, irregular or a fruitless and wasteful expenditure.

5.3.8 A charge of financial misconduct against the accounting officer of a constitutional institution must, in terms of section 84, be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer and any regulations prescribed by the Minister of Finance, by virtue of section 85.

5.3.9 Regulation 4.1.3 of the Treasury Regulations provides that:

*“If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct,*

*must ensure that the relevant executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable and agreements applicable in the public service.”(emphasis added)*

5.3.10 The National Treasury may, in the case of a constitutional institution, direct that an official other than an employee of the institution conducts the investigation or issue any reasonable requirement regarding the way in which the investigation should be performed.

#### **5.4 The Principles, Policies Rules and Regulations of the CGE**

The PPRR of the CGE consists of a Code of Conduct, principles and guidelines on delegation of authority, human resources, performance management, operations, claims and allowances, procurement and on matters relating to Commissioners. The only policies found in the document are the ones listed in paragraph 4.2.10.5 above.

## **6. FINDINGS**

### **6.1 The CGE Act**

The CGE Act is outdated as many of the provisions are not in line with the provisions of the Constitution that relate to the Commission.

### **6.2 Vacancies in the Commission**

If everything remains the same, the composition of the Commission will be less than prescribed by the CGE Act, by the end of October 2010.

### **6.3 The implementation of the recommendations of the former Public Protector and the Review Committee**

The previous report of the Public Protector and that of the Review Committee referred to in paragraph 1 above, indicate that a number of shortcomings in

the administration and other affairs of the CGE have been identified and raised since 2006. There is no indication that the CGE has succeeded in effectively implementing the recommendations made in these reports. The failure of the CGE in this regard amounted to maladministration. However, the adoption of a Turnaround Strategy in May 2010 and the expressed commitment of the CGE to provide monthly progress reports to the Parliamentary Portfolio Committee on Women, Children, Youth and People with Disabilities, are positive steps in the right direction.

#### **6.4 The termination of the agreement with Xabiso**

6.4.1 The Harris Commission found that the former CEO made a misrepresentation when she concluded a contract with Xabiso, that all the requirements for the procurement of their services had been met. The contract was therefore not valid and binding on the CGE. This finding was accepted by the CGE.

6.4.2 The manner in which Xabiso was treated by the CGE when it was discovered that the former CEO did not act properly in respect of their appointment, is unacceptable and caused them improper prejudice. The least that the CGE could have done under the circumstances was to explain the position to them and to tender a formal apology for any inconvenience or prejudice that was caused.

#### **6.5 The appointment of 2 Commissioners as joint Acting CEO's**

6.5.1 Neither the CGE Act, nor the PFMA provide for a member of the executive of a constitutional institution to be appointed as Acting CEO.

6.5.2 In terms of the PFMA, the CEO of a constitutional institution is the accounting officer. When the accounting officer is not available, all his/her functions, responsibilities and accountabilities in terms of the PFMA are transferred to the person that acts in his/her place.

6.5.3 Section 37 of the PFMA makes it very clear that the person that has to be appointed as acting accounting officer under circumstances when the accounting officer is not available, must be an official.

- 6.5.4 The accounting officer of a constitutional institution is accountable for the performance of his/her functions to the executive of the institution. (In the case of the commissions, the executive referred to in this sense means the commission). There is therefore a clear and pertinent distinction between the executive of a constitutional institution and its staff, which includes the chief executive officer, who is also the accounting officer.
- 6.5.5 Only in exceptional circumstances can the National Treasury, in terms of section 36(3) of the PFMA, approve that a person other than the chief executive officer be the accounting officer. Such approval has to be in writing. No evidence was found that the National Treasury was consulted in connection with the appointment of 2 Commissioners as the joint accounting officers, that was made by the Commission.
- 6.5.6 The PFMA also does not provide for 2 persons to be appointed as joint accounting officers.
- 6.5.7 Furthermore, the provisions of the PFMA relating to financial misconduct do not cater for a situation where action can be taken against a member of the executive, who acted as accounting officer, whilst remaining a member of the executive. In the case of the CGE therefore, it is only the National Assembly that can act against a Commissioner for misconduct, which obviously includes unlawful conduct, in terms of the relevant provisions of the Constitution.
- 6.5.8 By appointing 2 Commissioners as joint Acting CEO's of the CGE, the Commission created a situation where the Acting CEO's were accountable to a body of which they remained members. They did not resign their positions as Commissioners. As a matter of fact, they still received their remuneration as Commissioners, as well as an allowance for performing the functions of the Chief Executive Officer. They performed their functions of Commissioners and that of the accounting officer. The Commissioners therefore had a dual responsibility, which could easily had resulted in a conflict of interests or responsibilities, which was clearly what drafters of the PFMA wanted to avoid by defining the roles and responsibilities of the accounting officer.



6.5.9 The said appointment was also made in violation of the object of the PFMA, which, in terms of section 2, includes proper accountability and sound management of the revenue and expenditure of constitutional institutions.

6.5.10 The appointment by the Commission of 2 Commissioners was therefore unlawful and irregular and constituted maladministration and improper conduct.

6.5.11 The responsibilities of accounting officers of constitutional institutions are regulated in much detail by the PFMA. It includes the effective, efficient, economical and transparent use of the resources of the institution.

6.5.12 Expenditure of the financial resources of a constitutional institution can only be incurred in compliance with and in terms of the PFMA.

6.5.13 Section 1 provides that expenditure that is incurred in contravention or not in accordance with the Act, constitutes irregular expenditure.

6.5.14 It therefore follows that expenditure that was incurred by the 2 Commissioners when they performed the functions of the Chief Executive Officer of the CGE, whilst their appointment to do so was made in contravention or not in accordance with the Act, might constitute irregular expenditure and have to be investigated.

## **6.6 The transfer of the Personal Assistants of the former Chairperson and CEO**

The perception of Mesdames Nxumalo and Moloko that they were unfairly treated, might be justified. As the former CEO and the former Chairperson, who were responsible for their transfers, have both left the CGE and as Ms Nxumalo has been reinstated in her position and Ms Moloko is content in her new environment, no further action has to be considered.

## **6.7 The failed Organisational Diagnostic Process**

6.7.1 Despite the fact that the CGE has spent more than R4 million on this project, there is no tangible result that can be of any value to the organisation, to date.

- 6.7.2 Expenditure which was made in vain and would have been avoided had reasonable care been exercised, constitutes fruitless and wasteful expenditure, in terms of section 1 of the PFMA.
- 6.7.3 Section 38 of the PFMA compels the accounting officer of a constitutional institution to report fruitless and wasteful expenditure to the National Treasury.
- 6.7.4 The wilful or negligent authorising by an accounting officer of fruitless and wasteful expenditure constitutes financial misconduct in terms of section 81 of the PFMA. Such conduct has to be investigated. The expenditure relating to the project was made after the former CEO was suspended and during a period when 2 Commissioners acted as the joint CEO's, Mr Setshedi performed the functions of an interim CEO and the current CEO acted in that position.
- 6.7.5. Regulation 4.1.3 of the Treasury Regulations provides that if the accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable in the public service. The relevant treasury may also, in terms of Regulation 4.1.4, direct that an official other than an employee of the institution conducts the investigation.
- 6.7.6 Under the circumstances where Commissioners, a consultant and an official of the CGE might have been jointly or severally responsible for the apparent fruitless and wasteful expenditure, it is prudent that the National Treasury directs that an official of its department investigates the matter. The National Treasury should then report on the findings of the investigation reports the Commission and the National Assembly, to whom the CGE is accountable, on his/her findings to enable the responsible body to take the appropriate steps, if required.

## **6.8 The creation of the posts of Executive Director and Personal Assistant in the Office of the Chairperson, Spokesperson for the CGE and Acting National Coordinator of Provinces**

6.8.1 The creation of these posts was irregular as it did not comply with the provisions of section 7(1)(b) of the CGE Act. (See paragraph 5.2 above). It therefore constituted maladministration.

6.8.2 Although the posts of Executive Director and Personal Assistant have since been “abandoned”, the posts of Spokesperson and Acting National Coordinator of Provinces still exist and are still occupied.

6.8.3 There is an understanding that the position of Chief Operations Officer was converted into that of Acting National Coordinator of Provinces. The creation of an “Acting” post is in itself improper and not provided for by the CGE Act. Apart from that, the position of Chief Operations Officer is still included in the Organisational Structure of the CGE.

6.8.4 There is an urgent need for the CGE to regularise the posts in its Organisational Structure and to ensure that the incumbents are deployed, qualified and trained to perform their functions optimally.

## **6.9 The induction process for new staff**

This process is in a developmental stage and the target for the completion of the process is November 2010.

## **6.10 The cost of living salary adjustments for staff and Senior Managers**

Salary adjustments for staff and Senior Managers have been implemented.

## **6.11 Open plan accommodation for the Human Resources Unit**

The concern in this regard was mainly the security of confidential information of staff. It was addressed by the Human Resources Manager who took steps

to ensure that personnel files kept safely. No further complaints were lodged pertaining to this matter.

#### **6.12 The capacity of the Human Resources Unit**

The capacity of the Unit appeared to be adequate for the moment.

#### **6.13 The capacity of the Finance Department**

This matter requires urgent attention of the CEO and the CFO to ensure that capacity, both in terms of staff compliment and skills are improved.

#### **6.14 A policy to regulate interaction between Commissioners and the Secretariat**

Strained interaction between staff and Commissioners has been the cause, whether directly or indirectly, of many grievances, complaints and discomfort in the past. There is clearly a need for guidelines or a policy arrangement in this regard.

#### **6.15 The appointment of Mr Setshedi as the interim CEO**

6.15.1 It is doubtful whether the Legislature in enacting the provisions of the PFMA, envisaged a situation where a private person (not an employee of the CGE) could be appointed as an interim CEO and therefore become the interim accounting officer.

6.15.2 This is evident from the provisions of section 37 which, as indicated above, clearly state that when the appointed accounting officer is absent or otherwise unable to perform his/her functions or during a vacancy, the functions of the accounting officer must be performed by the official acting in the place of that accounting officer.

6.15.3 The provisions relating to financial misconduct also clearly indicate that what was envisaged in respect of the person occupying the position of accounting officer, is an employee of the institution.

6.15.4 Mr Setshedi's contract of appointment does not state that he was appointed in terms of the CGE Act, He was not appointed as an employee of the CGE, but merely as a consultant. There is also no indication that his appointment or the performance of his functions was subject to the provisions of the PFMA.

6.15.5 As Ms Maema, who subsequently acted as Acting CEO and who was later appointed in that position was employed as an official of the CGE at the time when Mr Setshedi was appointed, there was no legitimate reason why she could not have acted as CEO as from January 2009.

6.15.6 The appointment of Mr Setshedi as interim CEO in terms of the contract signed between him and the CGE was therefore unlawful and irregular. It constituted maladministration and improper conduct.

6.15.7 As indicated in paragraph 6.4 the functions that he performed as "accounting officer" during the tenure of his contract might therefore also have resulted in irregular expenditure and has to be investigated.

#### **6.16 Provident fund contributions and income tax deductions**

The CGE has taken steps to attend to the improved management of the relationship between the Provident Fund and the CGE. Tax deductions are made by the automated payroll system of the CGE, in accordance with directives issued by SARS

#### **6.17 Housing Allowance**

The CGE does not have a Housing Allowance policy for staff.

#### **6.18 Non implementation of the OSD**

No progress has been made in this regard in the past 2 years.

#### **6.19 Vacant posts of Heads of Departments**

It is envisaged that all the vacancies will be filled by November 2010.

#### **6.20 Performance bonuses not paid to all staff in 2008**

6.20.1 The records of the CGE show that performance bonuses were paid to all staff who qualified in the 2008/9 financial year. No performance assessment took place for the 2009/10 financial year. This was a contravention of Part 5 of the PPRR of the CGE, which provides that performance of staff has to take place annually, and therefore amounted to maladministration.

6.20.2 Steps have been taken by the CEO to ensure that the performance of staff is assessed for the 2010/11 financial year.

### **6.21 Outdated policies**

The PPRR of the CGE is incomplete, outdated and inadequate to properly regulate the affairs of the institution.

### **6.22 The nomination of the staff member that attend the annual womens' event of the Commission on the Status of Women in New York**

The CGE needs to consider rotating the the opportunity to attend the annual session of the Commission on the Status of Women amongst the staff dealing with the core business of the CGE.

## **7. RECOMMENDATIONS/REMEDIAL ACTION**

Remedial action in terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is that:

7.1 The National Assembly takes urgent steps to:

7.1.1 Amend the CGE Act to bring it in line with the Constitution and the current organisational requirements of the CGE;

7.1.2 Fill the vacant positions of Commissioners of the CGE.

7.2 The Director-General of the National Treasury:

- 7.2.1 Investigates and reports to the Deputy Speaker of the National Assembly and the CGE on the irregular expenditure incurred by Commissioners Hicks and Loyilane during the period that they performed the functions of the accounting officer of the CGE, referred to in this report, for the appropriate action to be taken, if required;
- 7.2.2 Investigates and report to the CGE on the irregular expenditure incurred by Mr Setshedi during the period that he performed the functions of the accounting officer of the CGE, referred to in this report, for the appropriate action to be taken, if required; and
- 7.2.3 Investigates and report to the Deputy Speaker of the National Assembly and the CGE on the apparent fruitless and wasteful expenditure incurred by the persons that performed the functions of the accounting officer of the CGE during the period that payments were made to the consultant that was appointed for the Organisational Diagnostic Process of the CGE, referred to in this report, for the appropriate action to be taken, if required.
- 7.3 The CGE takes urgent steps to implement the recommendations made in the Review Report and the previous report of the former Public Protector, referred to in this Report.
- 7.4 The CEO of the CGE take urgent steps to:
  - 7.4.1 Inform Xabiso in writing of the reasons why the contract signed with them by the former CEO was invalid and tender an apology for any inconvenience that was caused;
  - 7.4.2 Expedite the arbitration process between Four Rivers and the CGE relating to the Organisational Diagnostic Process;
  - 7.4.3 Conduct an audit of the verified qualifications, skills, experience and appropriate deployment of the staff of the CGE to ensure that they can function optimally in the performance of their duties;
  - 7.4.4 Regularise the creation of posts and the appointment of staff to comply with the relevant provisions of the CGE Act;

- 7.4.5 Ensure induction of new staff takes place as from November 2010 in terms of an approved process;
- 7.4.6 Improve the capacity and skills in the Finance Department;
- 7.4.7 Develop guidelines or a policy to regulate interaction between Commissioners and the administration. In this regard the CEO should benchmark against the practices in similar institutions locally and in other jurisdictions, in consultation with the Commission
- 7.4.8 Review and improve the policy framework of the CGE to bring it in line with the relevant legislation and operational requirements of the CGE. A housing policy for staff should be included in the framework;
- 7.4.9 Determine with certainty the application of the OSD on the CGE and inform the staff accordingly. The implementation of the OSD, where applicable, should also be attended to as a priority;
- 7.4.10 Ensure that performance assessments of all staff are conducted for the 2009/10 and 2010/11 financial years in compliance with the PPRR; and
- 7.4.11 Consider rotating the nomination of the staff member that will attend the annual meeting of the Commission on the Status of Women in New York.


## **8. MONITORING**

The Public Protector will:

- 8.1 Require an implementation plan in respect of the recommendations made in paragraphs 7.3 and 7.4 above from the CGE within 30 days of the date of this report;
- 8.2 Require a progress report from the CGE on the implementation of the recommendations made in paragraphs 7.3 and 7.4 above within 3 months of the date of this report; and



- 8.3 Monitor the progress made with the implementation of the recommendations made in paragraph 7 above over the next 6 months.



ADV D N MADONSELA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

Date: 27 September 2010

*Assisted by: Adv C H Fourie: Executive Manager: Good Governance and Integrity*

**ISBN 978-1-920456-21-4**