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Chapter 9 institutions and legislative oversight navigating the challenges of executive accountability

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Chapter 9 institutions and legislative oversight: navigating the challenges of executive accountability

SHADI MAGANOE*

SAMEVATTING

HOOFSTUK 9-INSTELLINGS EN WETGEWENDE OORSIG: NAVIGERING VAN DIE UITDAGINGS VAN UITVOERENDE AANSPREEKLIKHEID

In hierdie bydrae ondersoek die outeur die sleutelrol wat die openbare beskermer speel in die versterking van wetgewende oorsig in Suid-Afrika. Die kantoor van die openbare beskermer is opgerig ingevolge hoofstuk 9 van die grondwet met die opdrag om misdaad in die openbare sektor te ondersoek en aan te spreek. Daarmee word dit 'n belangrike meganisme vir die bevordering van aanspreeklikheid in die regering. Die klem word geplaas op die ontwikkeling van die openbare beskermer se gesag, veral die skuif na bindende aanbevelings en die implikasies daarvan vir wetgewende oorsig. Deur 'n analise van belangrike regspraak en die uitdagings wat verband hou met die instandhouding van onafhanklikheid, beklemtoon die outeur die impak wat die openbare beskermer het op die bevordering van deursigtigheid en verantwoordbaarheid in die Suid-Afrikaanse regering.

Benewens die belangrike werk wat die openbare beskermer uitvoer, word gefokus op die sistemiese struikelblokke wat die implementering van die instelling se aanbevelings in die praktyk belemmer. Uitsprake soos in die *Nkandla*-saga en die *Phala Phala*-saak het die omvang van die probleem duidelik gemaak. Daar word aangetoon dat die regering dikwels nie reageer op die openbare beskermer se bevindings nie. Dit onderstreep die dringende behoefte aan 'n sterker struktuur vir implementering binne die wetgewende proses, aangesien die parlement se onwilligheid om op aanbevelings van die instelling op te tree, die werk van die openbare beskermer belemmer.

Die outeur vergelyk die Suid-Afrikaanse benadering met dié van ander lande, soos Australië, wat betroubare meganismes van wetgewende toesig het. Dit bied insigte oor hoe Suid-Afrika sy bestaande stelsels kan verbeter en kan leer van internasionale beste praktyke. Daarbenewens word beklemtoon dat daar 'n behoefte is aan meer samewerking tussen die openbare beskermer, die wetgewer en ander belanghebbendes om die doeltreffendheid van wetgewende toesig te bevorder.

Laastens, word aanbeveel dat die parlementêre komitees wat spesifiek fokus op die implementering van die openbare beskermer se aanbevelings versterk moet word om die doeltreffendheid van oorsig en aanspreeklikheid in die regering te verseker. Dit is deurslaggewend vir die volhoubare sukses van demokratiese beginsels en die regstaat in Suid-Afrika.

1 *Introduction*

In the struggle for effective governance and democratic accountability in South Africa, institutions like the public protector play an important role in holding public officials and the executive accountable. As a chapter 9 institution, the public protector was designed to be an independent and impartial entity, empowered by the constitution to investigate maladministration, corruption and abuse of state power.[1] In doing so, the institution provides a check on executive power, aiming to safeguard public resources and protect citizens from government misconduct. However, while the public protector holds significant investigative and remedial powers, its role in

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[1] s 182(1)(*c*) of the Constitution of the Republic of South Africa, 1996.

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enhancing legislative oversight is often undermined by the failure of parliament to implement its findings and recommendations.

Despite being empowered to act on its findings through binding remedial actions, the public protector's ability to influence the executive's accountability is often compromised by parliamentary inaction. This interdependent relationship between the public protector and parliament, where the public protector's reports ultimately rely on parliamentary action to hold the executive to account, has led to systemic failures in ensuring that the executive faces meaningful consequences for misconduct. This tension is evident in prominent cases such as the Nkandla saga and more recently, the Phala Phala scandal, where the public protector's recommendations were not followed through by the legislature. These instances highlight a broader issue: that parliament's failure to act on the recommendations of chapter 9 institutions is eroding its capacity to empower citizens and to enhance democratic accountability.

The author examines the evolving role of the public protector and its interdependence with parliament, arguing that despite its critical role in fostering accountability, the failure of parliament to follow through on its findings hinders the broader goals of democratic governance. This relationship, shaped by the South African electoral system, in which party loyalty often trumps parliamentary independence, weakens the effectiveness of the public protector and undermines the role of legislative oversight. Through case studies, this article explores how the public protector has acted as a powerful institution in the fight against corruption, but also how its effectiveness has been diminished by parliamentary resistance.

Ultimately, the author seeks to contribute new perspectives to the debates on constitutional accountability and governance in South Africa. This article advocates for stronger mechanisms to ensure that the public protector's recommendations are not only heard but are acted upon by parliament, thereby fostering a truly accountable state.

2 *The role of institutions supporting democracy on enhancing legislative oversight*

The role of chapter 9 institutions in enhancing legislative oversight has been widely discussed in the literature. However, most studies have primarily focused on the investigative and remedial powers of these institutions without exploring their potential as platforms for participatory democracy. This article fills this gap by examining the public protector's evolving role in empowering citizens and fostering direct public engagement in governance processes. By doing so, it contributes to the broader debates on constitutional accountability and governance in South Africa.

In the context of enhancing democratic governance, legislative oversight is often seen as a key mechanism to ensure both vertical and horizontal accountability for those in positions of power.[2] However, legislative oversight alone is insufficient in systems where executive dominance prevails. In South Africa, this dominance is exacerbated by the electoral system, which enables political party control to overlap significantly with executive power. To address this imbalance and protect the rights and liberties of citizens, the constitution provides for the establishment of

[2] Notshulwana and Lebakeng "Constraints and prospects for legislative oversight in emerging African democracies: the case of South Africa" in Fagbadebo and Ruffin (eds) *Perspectives on the Legislature and the Prospects of Accountability in Nigeria and South Africa* (2019) 179 182.

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institutions that can act as intermediaries between the public and the government, offering alternative channels for public participation.[3] These institutions, including the public protector, play a critical role in holding the executive accountable by reporting to parliament on their findings and recommendations.

Chapter 9 institutions may also be referred to as intermediary institutions aimed at achieving public participation which is different to that provided by political processes.[4] This form of public participation can be found between citizens and the government where the chapter 9 institutions provide a way in which the needs of the public can be articulated outside the political party setting.[5] These institutions promote executive accountability by reporting to parliament on their activities.[6] There are various accountability institutions aimed at strengthening democracy and promoting accountability. This section of the article focuses on the office of the public protector and auditor-general.

Oversight and accountability institutions are a common feature in modern constitutions and are not unique to the South African system of government.[7] Murray emphasises that chapter 9 institutions, while possessing investigative and administrative authority, do not wield power in the same manner as the three main branches of government, nor do they govern.[8] This distinction is crucial in understanding public accountability within the South African context, clarifying their role versus the separation of powers and the overall governmental structure. They serve to support democracy by ensuring adherence to constitutional principles and safeguarding against abuse of power, rather than acting as an additional or fourth branch of government.[9] This perspective underscores their distinct role in maintaining governmental integrity and upholding democratic norms without conflating their functions with those of the executive, legislative, or judicial branches.

The court in the *Certification* case held that members of the public can lodge complaints with the office of the public protector for an investigation when aggrieved by government conduct.[10] The public protector will then take appropriate remedial action following their investigation.[11] The office of the public protector is crucial in bridging the gap between the state and its people, as state power and resources belong to the public. The public protector must ensure that no level of government power is above scrutiny.[12]

This institution's ability to investigate and take remedial action serves as a check on potential abuses of power, reinforcing the rule of law and promoting good governance. By providing an accessible mechanism for addressing grievances, the public protector empowers individuals and enhances their confidence in the democratic process. Furthermore, the court's decision highlights the foundational

3 Ch 9 of the constitution makes provision for institutions supporting democracy.

4 Murray "The human rights commission *et al*: what is the role of South Africa's chapter 9 institutions?" 2006 *PELJ* 1 7.

5 Murray (n 4) 7.

6 s 181(5) of the constitution.

7 Nyane "Separation of powers and state institutions supporting democracy: does South Africa have a 'fourth branch' par excellence?" 2021 *Perspectives of Law and Public Administration* 188 196.

8 Murray (n 4) 5.

9 Murray (n 4) 5.

10 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 161.

11 the *Certification* case (n 10) par 161.

12 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC) (the *EFF 2* case) par 53.

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principle that the public protector must operate independently and impartially to fulfil its mandate effectively. This ensures that the institution can act as a vital conduit through which citizens can seek redress and hold the government accountable for its actions, thereby strengthening the overall framework of public accountability in South Africa.

Although chapter 9 institutions do not govern, their authority to make recommendations which are binding on the other branches of government raises concerns in terms of South Africa's separation of powers. The role of some chapter 9 institutions has evolved over the years from being regarded as the advisors of the three branches of government without any binding powers to binding powers similar to courts of law – but only regarding the directives of the public protector.[13] Case law only confirmed that the public protector has binding powers. The supreme court of appeal recently found that the human rights commission's directives are not binding.

Nyane opines that there has been a shift in the powers of some chapter 9 institutions which has created tension between them and the other branches of government: they no longer wield the limited power of investigating executive conduct, but now have the same authority as the other three branches of government.[14] Some chapter 9 institutions have gained authority to make binding recommendations which may raise a cause for concern regarding the role and functions of the judiciary.

While the shift towards binding recommendations by the public protector could raise concerns about the separation of powers, it is important to note that this evolution does not encroach on the authority of the judiciary or the executive. The public protector, despite its increased authority, continues to operate within the confines of its constitutional mandate, which is primarily investigative and corrective.[15] The binding nature of its recommendations is not intended to usurp the powers of the legislature or the judiciary, but rather to compel the executive to address maladministration and corruption. This transformation can be seen as a positive development in the context of strengthening democratic governance and enhancing legislative oversight. By allowing the public protector to ensure remedial action is taken, the institution helps fill the accountability gap without impeding the independence of the other branches of government.

In *Democratic Alliance v South African Broadcasting Corporation Ltd*,[16] the court held that the public protector's role is fundamentally investigative rather than adjudicative.[17] This decision, however, was overturned on appeal by the supreme court of appeal. Unlike courts, the public protector relies on official documents and sets standards based on constitutional principles, legislation and policies rather than oral evidence. Importantly, findings by the public protector are not legally binding on individuals or state organs, contrasting with court orders.[18] The power to recommend remedial action aims to address improper conduct rather than enforce decisions, highlighting the investigative nature of the institution under constitutional provisions.[19]

[13] *Cf*, however, Nyane (n 7) 190.
[14] the *EFF 2* case (n 12) par 53.
[15] the *Democratic Alliance v South African Broadcasting Corporation Ltd* 2015 1 SA 551 (WCC) (the *DA* case) par 50.
[16] the *DA* case (n 15).
[17] (n 15) par 50.
[18] (n 15) par 51.
[19] (n 15) par 51.

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Initially, chapter 9 institutions appeared generally harmless to the traditional structure of government, which consists of three branches, as their function was to provide oversight without any binding powers over the other legislature, executive and the judiciary.[20] Their role primarily focused on providing oversight without possessing binding powers over these established branches of government. This arrangement underscored their advisory role in promoting accountability and upholding constitutional principles without directly challenging the authority or operational autonomy of the legislature, executive, or judiciary. However, the evolution of some chapter 9 institutions has challenged this initial perception, particularly with the expansion of their mandate to include binding remedial actions.[21] This shift has sparked debates regarding their role in the separation of powers doctrine and their impact on institutional independence and accountability within the constitutional framework.

This article contends that granting chapter 9 institutions the power to issue binding recommendations enhances accountability and strengthens legislative oversight, as these recommendations have a binding effect in holding the executive accountable.[22] However, despite this shift in authority, it is important to argue that chapter 9 institutions do not constitute a fourth branch of government.[23] Only the recommendations of the public protector are binding and, while binding, are ultimately subject to judicial review. This check ensures that chapter 9 institutions operate within the bounds of the law and do not usurp the functions of the other branches of government. Moreover, the binding nature of their recommendations does not equate to the autonomous governance power held by the executive, legislature and judiciary.

Chapter 9 institutions are designed to enhance the accountability mechanisms within the existing framework, not to replace or operate independently of it. Their primary role remains investigatory and advisory, aimed at supporting and strengthening the functions of the other branches, particularly in holding the executive accountable. Their authority to make binding recommendations should be seen as a tool to reinforce their findings and ensure that their investigations have practical consequences, rather than an indication of equal status with the three traditional branches of government. Furthermore, these institutions still report to parliament, which retains the ultimate responsibility for executive accountability.[24] Parliament's role includes reviewing the reports and recommendations of chapter 9 institutions, ensuring that the executive responds appropriately and taking necessary actions based on the findings. This reporting structure underscores the supportive, rather than autonomous, nature of chapter 9 institutions.

Historically, the public protector's findings lacked binding legal force, unlike court rulings. However, recent developments have seen a shift: the public protector's recommendations are now legally binding, reflecting an evolution in chapter 9 institutions' authority. This change enhances the institution's capacity to enforce accountability measures and strengthens its role in overseeing legislative compliance. Granting binding powers to the public protector means that there is

[20] Nyane (n 7) 198.
[21] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) (the *EFF* 1 case) par 56.
[22] Nyane (n 7) 198.
[23] Murray (n 4) 7.
[24] s 8(2)(*b*) of the Public Protector Act 23 of 1994.

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potential for more effective oversight and a bolstered framework for upholding constitutional values and governance integrity.

The judiciary has upheld chapter 9 institutions' authority to overturn decisions made by other branches of government,[25] as illustrated in the case of *President of the Republic of South Africa v Public Protector*.[26] This decision reinforces concerns raised by Nyane about the significant role and power of these institutions in holding government accountable.[27] In the *President of the RSA* case, the president sought to review the remedial action by the public protector, which required him to appoint a commission of inquiry headed by a judge solely selected by the chief justice.[28]

The president then sought to review the remedial action of the public protector by questioning its lawfulness and rationality.[29] The president argued that the constitution vests the power to appoint a commission of inquiry in him and that it was unconstitutional for the public protector to instruct him to do so.[30] He further contended that his decision would be reviewable if he complied with that remedial action as it would have been made under the orders of another person which would amount to an abdication of his power in terms of section 84 of the constitution.[31]

The president further argued that the direction that the chief justice appoint the judge to head the commission of inquiry was unlawful as the constitution did not give the public protector this authority.[32] The president also argued that the power to appoint a commission of inquiry is that of the president and it was unlawful for the public protector to give directions as to how the presiding officer must be appointed.[33] In addition to these contentions, the president stated that the remedial actions of the public protector must not be equated with a judgment order of a court.[34] However, the court held that the public protector's remedial action had all the attributes of a judgment and it was binding and carried the force of law.[35] It held further that the legal consequences of the remedial action must be complied with or acted upon and as such compliance was not optional and has binding effect until properly set aside by a court of law.[36]

While the constitution grants the president the power to institute a commission of inquiry, it does not specify who should exercise this power when the president is the subject of the inquiry. The decision of the court in the *President of the RSA* case was not the first judgment that confirmed the powers of the public protector. The first case was the *EFF* matter referred to above about the Nkandla matter, as well as the *SABC* case in the supreme court of appeal. The *President of the RSA* case, however, is regarded by some as a landmark ruling for the office of the public protector. It clarified the procedure to follow when the president is the subject of an inquiry that he must institute.[37] Although the constitution clearly outlines the

[25] Nyane (n 7) 197.
[26] *President of the Republic of South Africa v Public Protector* 2018 2 SA 100 (GP).
[27] the *President of the RSA* case (n 26) par 1.
[28] the *President of the RSA* case (n 26) par 3.
[29] the *President of the RSA* case (n 26) par 59.
[30] the *President of the RSA* case (n 26) par 59.1.
[31] the *President of the RSA* case (n 26) par 3.
[32] the *President of the RSA* case (n 26) par 59.2.
[33] the *President of the RSA* case (n 26) par 59.3.
[34] the *President of the RSA* case (n 26) par 179.
[35] the *President of the RSA* case (n 26) par 180.
[36] the *President of the RSA* case (n 26) par 59.3.
[37] the *President of the RSA* case (n 26) par 85.

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powers of the president, it does not address situations where the president must be held accountable through the process of a commission of inquiry.

One such instance is the state capture commission, which was established because of the findings of the public protector's report.[38] The state capture report found that former president Zuma and his associates had crippled state institutions to benefit themselves at the expense of the people of South Africa.[39] The investigation into state capture was after the public protector received complaints in connection with the alleged improper and unethical conduct relating to the appointments of cabinet ministers, directors of government departments, the awarding of state contracts and other benefits to Gupta-linked companies.[40]

To curb corruption and enhance transparency and accountability in government, the state capture commission report recommended a national charter against corruption.[41] The report recommends that the charter could take the same structure or design as the competition tribunal which has its own court to provide an effective and multifactional institution in a fight against corruption.[42] Transparency would eventually result in the elimination of corruption and an effective legislature which would hold the executive accountable. Although the state capture commission recommended an independent body to enhance accountability, the question as to whether such independence could be achieved through a government department or an entity under ministerial control remains an open one.

3 *The public protector's role in upholding accountability*

The transformative impact of the public protector's binding recommendations can be illustrated through an analysis of landmark cases such as the state capture commission and the Nkandla saga. In the state capture commission, the public protector's findings led to the establishment of a commission of inquiry that uncovered widespread corruption and maladministration within the government. Similarly, the Nkandla saga highlighted the public protector's role in holding the executive accountable for the misuse of public funds. These cases demonstrate how binding remedial actions can challenge traditional power dynamics and promote direct public engagement in governance processes. Additionally, this article compares South Africa's approach with international practices, drawing on examples from Australia to highlight best practices and potential reforms for enhancing the independence and accountability of chapter 9 institutions.

The most prominent of the chapter 9 institutions is the office of the public protector. This office is responsible for investigating any conduct in the affairs of the state or in public administration in any branch of government that is alleged or suspected to be improper or to result in any misconduct or prejudice.[43] The constitution requires the public protector to be independent and impartial, exercising his or her powers and functions subject only to the constitution and the law.[44] However, the effectiveness of this institution in combating corruption hinges on robust legislative oversight.

[38] the *President of the RSA* case (n 26) par 85.
[39] Madonsela *State of Capture* (2016) 4; OUTA *No Room to Hide: A President Caught in the Act* (2017).
[40] Madonsela (n 39) 4.
[41] Zondo *Judicial Commission of Inquiry into State Capture Report: Part 1* (2022) 836.
[42] Zondo (n 41) 837.
[43] s 182 (1)(*a*) of the constitution.
[44] the *EFF* 2 case (n 12) par 49.

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It is important to know that the lack of accountability often breeds corruption, frequently involving the misuse of state power.[45] Instances of abuse of power or mismanagement of state resources typically implicate public officials, highlighting the critical need to shield accountability institutions from undue influence. For instance, in the public protector's report titled "When governance and ethics fail", damning findings were made against Motsoeneng, who was accused of abusing his authority by improperly dismissing staff members.[46] These dismissals, found to be procedurally and substantively unjust by the commission for conciliation, mediation and arbitration as well as the courts, resulted in significant financial losses for the South African Broadcasting Corporation.[47] This underscores the article's focus on the role of legislative oversight in combating abuses of power and ensuring transparency and accountability in governance.

The findings of the public protector's report were later taken to court in *DA v SABC*.[48] The DA sought an order that Motsoeneng be suspended immediately from his position as chief operations officer of the South African Broadcasting Corporation pending the finalisation of disciplinary proceedings against him by the board of directors of the South African Broadcasting Corporation.[49] The DA argued that the public protector's findings about Motsoeneng showed a blatant disregard for the rule of law, as he wasted public funds to benefit himself and his friends and to attack his enemies through his power and influence. The DA further argued that Motsoeneng had ignored legislation governing the South African Broadcasting Corporation to further his own ends.[50] Based on the findings of the report, it was also argued that Motsoeneng was allowed to operate above the law and caused employees of the South African Broadcasting Corporation to engage in unlawful conduct.

The court held that as the chief operations officer of the South African Broadcasting Corporation, Motsoeneng was an executive member of the board and had access to all the documents in relation to the charges of misconduct against him.[51] Due to his position, the court held that he had to be suspended as he posed a real threat not only to the integrity of the investigation concerning the allegations of his misconduct but also to the disciplinary inquiry itself.[52] To ensure that the process was independent and in accordance with the constitution, the court held that the path to South African Broadcasting Corporation's stability had to start with Motsoeneng's suspension.[53]

An important factor to consider is that chapter 9 institutions should provide a dependable voice for the people, truly independent and free from political influence. In the *EFF* 1 case, the court held that: "The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice, and impropriety in state affairs, and for the betterment of good governance."[54]

This declaration underscores the essential function of the public protector in promoting transparency and accountability within the government. By referring to the public protector as an "invaluable constitutional gift," the court recognises the

[45] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) par 118.
[46] the *DA* case (n 15) par 93.
[47] the *DA* case (n 15) par 10.
[48] the *DA* case (n 15).
[49] the *DA* case (n 15) par 1.
[50] the *DA* case (n 15) par 35.
[51] the *DA* case (n 15) par 5.
[52] the *DA* case (n 15) par 6.
[53] the *DA* case (n 15) par 35.
[54] the *EFF* 1 case (n 21) par 52.

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importance of an independent institution dedicated to overseeing state affairs and addressing misconduct. The emphasis on combating corruption and fostering good governance aligns with the foundational principles of democracy and the rule of law.

However, to truly fulfil this mandate, it is important that the public protector remains impartial and free from any political influence. The effectiveness of this office hinges on its ability to operate without fear or favour, ensuring that all individuals and entities, regardless of their political affiliations, are held accountable. The court's acknowledgment in the *EFF* 1 case serves as a powerful reminder of the high expectations placed on chapter 9 institutions to act as the watchdogs of democracy, ensuring that the executive's actions reflect the will and interests of the people.[55] The court's assertion reinforces the notion that the independence of the public protector is not merely a constitutional ideal but a practical necessity. Any perception of bias or political interference undermines the credibility and efficacy of this institution.

Section 183 of the constitution provides that the public protector is appointed for a non-renewable period of seven years. While these provisions ensure security of tenure, they do not eliminate the element of political influence in the appointment process. The political affiliations of all four public protectors have raised concerns due to their connections with the ANC. As noted, the national assembly nominates the public protector,[56] and the ANC, having maintained an absolute majority in the national assembly since 1994, has been able to select candidates favourable to the party.[57] This alignment has been a contentious issue since the establishment of the office.[58] Although the country had a bold public protector during Madonsela's term, the appointment process remains problematic.

Despite the historical dominance of the ANC in the national assembly since 1994, recent political shifts have altered this landscape. With the emergence of a government of national unity, where no single party holds an absolute majority, future appointments of the public protector will likely face a more pluralistic nomination process. This development could potentially mitigate concerns over partisan influence in the selection of candidates, marking a pivotal moment for enhancing the institution's independence. As South Africa navigates these political changes, the appointment of the next public protector will serve as a litmus test for the country's commitment to upholding constitutional values of transparency, accountability and impartiality in governance.

The influence of political dynamics on the public protector's office is illustrated by the tenure of Mushwana, appointed in 2002 under former president Mbeki.[59] His appointment drew criticism due to his prior affiliation with the ANC, raising concerns about the independence of the institution.[60] Despite these reservations, Mushwana extended the reach of the office of the public protector significantly, particularly through the establishment of provincial offices and an enhanced outreach program. This expansion aimed to improve accessibility and public engagement, resulting in

[55] the *EFF* 1 case (n 21) par 49.
[56] s 193(4) of the constitution.
[57] Tomohiro "South African public protector: people's watchdog or politicians' lapdog?" 2023 *African Study Monographs* 61 65.
[58] the *DA* case (n 15) par 35.
[59] Nesbitt *Background Paper: Public Protector South Africa* (2016) https://static.pmg.org.za/160601BackgroundPaperPublicProtectorSA.pdf (10-03-2025).
[60] https://www.corruptionwatch.org.za/sas-public-protectors-the-legacies-part-two/ (12-02-2025).

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a notable increase in the number of complaints received annually, averaging around 13 000 by the end of his tenure.[61]

Mushwana's legacy is mixed, but he is credited with introducing concrete remedial actions for investigations. However, his handling of high-profile cases often drew criticism for perceived leniency towards certain ANC members, raising questions about impartiality. For instance, his findings on issues like the appointment of McBride and investigations into Zuma's arms deal involvement were seen as soft, prompting accusations of bias and ineffectiveness in holding powerful individuals accountable.[62]

In *McBride v Minister of Police* the court highlighted that there are certain factors which influence the independence of accountability institutions in terms of the prescripts of the constitution.[63] These include the method of appointment, reporting, removal from office, disciplinary procedures and security of tenure.[64] These factors are crucial and have a determining factor when it comes to the independence of a certain institution and must thus be taken seriously. The court also echoed the importance of public confidence in government institutions by stating that the Helen Suzman Foundation submitted that the appearance or perception of independence plays an important role in assessing whether independence exists.[65] Based on this submission, the court held that the impugned provisions had the potential to diminish the confidence the public should have in the Independent Police Investigative Directorate.[66]

This illustrates that the true measure of an institution's independence is multifaceted, encompassing both legal safeguards and public perception. The court's assertion reinforces the notion that for oversight institutions to hold the executive accountable effectively, they must not only be independent in structure and function but also be perceived as such by the public they serve. This is an important reminder that maintaining the integrity and independence of these institutions is essential for the proper functioning of a democratic society and the promotion of good governance.

The court in *Public Protector v Mail and Guardian Ltd* emphasised the essence of the public protector's role by underlining that its function extends beyond merely uncovering the truth; it equally involves instilling public confidence that truth has indeed been uncovered.[67] It is vital for the public to trust that there has been no wrongdoing in public life and this assurance must be based on thorough investigation and corroborated evidence. The public protector's function is therefore not only about uncovering facts but also about ensuring public trust in the integrity of governmental actions and decisions.[68]

The court sharply criticised the then public protector, Mushwana, for refusing to investigate complaints from the *Mail and Guardian* newspaper regarding the diversion of state funds by a state-owned oil company, Petroleum Oil and Gas Corporation of South Africa (SOC) (PetroSA), to the ANC through a private company.[69] As a result, the court ordered a re-investigation, emphasising that the

61 (n 60).
62 (n 60).
63 *McBride v Minister of Police* 2016 2 SACR 585 (CC) .
64 the *McBride* case (n 63) par 31.
65 the *McBride* case (n 63) par 42.
66 the *McBride* case (n 63) par 43.
67 *Public Protector v Mail & Guardian Ltd* 2011 4 SA 420 (SCA) par 19.
68 the *Public Protector* case (n 67) par 19.
69 the *Public Protector* case (n 67) par 140.

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initial investigation conducted by the public protector was so scant that it could not be considered a legitimate investigation.[70] The court found the investigation's lack of depth and thoroughness deeply concerning, highlighting significant deficiencies in the public protector's approach to the matter.[71]

The case could be seen as indicative of potential bias on the part of the public protector towards the ruling party. By failing to investigate serious allegations involving the ANC thoroughly, the public protector's actions, or lack thereof, may suggest a preferential treatment of the governing party. This perceived partiality undermines the independence and impartiality expected of the office, further eroding public trust in its ability to hold the executive accountable without fear or favour. The court's mandate for a "fresh investigation" implicitly acknowledges this potential bias, highlighting the necessity for rigorous and unbiased investigations to uphold the principle of accountability.

Despite these controversies, Mushwana's tenure laid the foundational groundwork for the institution's operational expansion and procedural advancements, setting the stage for subsequent public protectors to define the institution's role in South Africa's governance landscape further. However, the legacy of the public protector went through a turbulent time during Mkhwebane's tenure. Mkhwebane faced numerous legal challenges and judgments against her, ultimately resulting in a personal costs order against her in *Speaker of the National Assembly v Public Protector*.[72]

In *Speaker v Public Protector*, the court addressed the appeal by public protector Mkhwebane regarding a punitive costs order imposed by the high court. The case stemmed from her investigation into financial assistance provided by the South African Reserve Bank to Bankorp Limited, later acquired by ABSA Bank. The high court had initially ordered Mkhwebane to cover fifteen per cent of the Reserve Bank's legal costs on a punitive scale personally, criticising her handling of the investigation and remedial actions.[73] The court, in a majority decision, upheld this punitive costs order. It found Mkhwebane had acted in bad faith, exceeded her authority under the Public Protector Act and presented misleading information during the litigation process. The majority emphasised that such personal costs orders against public officials are crucial to uphold constitutional values, ensuring they act in good faith and within the bounds of the law.

In contrast, the minority judgment argued that the high court's punitive costs order lacked justification, highlighting concerns over the severity of financial repercussions on Mkhwebane without sufficient evidence of gross negligence or bad faith. They contended that courts should aim to educate rather than financially ruin litigants, suggesting that the costs order was disproportionate to the alleged wrongdoing. Ultimately, the court dismissed Mkhwebane's appeal and declined the Reserve Bank's cross-appeal for a declaratory order, pending further consideration. The ruling underscored the judiciary's role in maintaining accountability and integrity within public office, while also reflecting differing judicial perspectives on the appropriate use of punitive costs in cases involving high-profile public officials.

In agreement with the minority view, this article argues that the judiciary's role in administering costs orders should prioritise considerations of fairness and proportionality. Imposing punitive costs, as exemplified in Mkhwebane's case, must be justified by unequivocal evidence of egregious misconduct warranting severe

[70] the *Public Protector* case (n 67) par 141.
[71] the *Public Protector* case (n 67) par 145.
[72] 2022 3 SA 1 (CC).
[73] *Absa Bank Limited v Public Protector* 2018 2 All SA 1 (GP) par 131.

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financial consequences. Without such evidence, there is a risk of disproportionately penalising public officials, potentially deterring robust defence and stifling legitimate inquiry and oversight efforts. This stance aligns with the minority's perspective, advocating for a judicial approach that balances accountability with preserving public officials' capacity to fulfil their duties without undue financial jeopardy.

Moreover, punitive measures such as excessive costs orders against officials in accountability institutions could create a chilling effect on future actions by the public protector and similar oversight institutions. The prospect of substantial financial penalties in the absence of clear misconduct evidence may dissuade future officeholders from vigorously pursuing matters before the courts. This, in turn, threatens to diminish the effectiveness of institutions tasked with holding the executive accountable and strengthening legislative oversight. Therefore, it is imperative for the judiciary to exercise caution in applying punitive costs orders to prevent unintentional undermining of these vital roles in upholding transparency and accountability in government affairs.

Following the constitutional court's decision in *Speaker v Public Protector*,[74] Mkhwebane became the first public protector to be removed from her post. The national assembly conducted a vote, resulting in 318 votes for her removal and 43 against, surpassing the required two-thirds majority.[75] This followed a rigorous section 194 impeachment process, which was concluded with multiple findings of misconduct and incompetence against her by the committee and ultimately recommended her removal.[76] Despite the challenges faced, the role of the public protector remains integral to ensuring accountability. It highlights the critical balance needed between independence, accountability and public trust to ensure the institution effectively serves its purpose in holding the executive accountable.

4 *Comparing executive accountability mechanisms: lessons from Australia for South Africa's independent oversight bodies*

In both South Africa and Australia, independent institutions play an important role in ensuring executive accountability and promoting good governance. These institutions, such as the public protector and Australia's ombudsman, are designed to investigate misconduct, promote transparency and hold the executive to account.[77] However, while both countries share the principle of independent oversight, there are key differences in how their systems operate, particularly in the follow-up on findings, legislative engagement and the enforcement of recommendations. Examining these differences provides valuable insights for South Africa, highlighting potential lessons from Australia's experience that could enhance the effectiveness of its own accountability mechanisms.

The effective implementation of oversight recommendations in Australia significantly contributes to stronger democratic governance and public trust. By ensuring that recommendations from bodies like the ombudsman and the Australian national audit office are swiftly acted upon, Australia fosters a culture

[74] (n 72).
[75] Parliament of RSA *Minutes of Proceedings of the Resolution of the National Assembly on Removal of Public Protector* (2021).
[76] Parliament of RSA *Report of the Independent Panel on the Public Protector in terms of Section 194 of the Constitution* (2021) 114-115.
[77] s 6(4) the Public Protector Act (n 24); see also s 4 of the Australian Ombudsman Act 181 of 1976.

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of accountability and transparency.[78] This proactive approach not only holds the executive accountable but also reinforces the public's confidence in government institutions. In contrast, South Africa faces challenges in achieving similar outcomes due to inconsistent follow-up on the public protector's recommendations and political reluctance to address issues involving high-ranking officials as highlighted above.[79] These challenges can undermine democratic accountability and erode public trust in oversight institutions. Addressing these issues is crucial for South Africa to strengthen its democratic governance and ensure that the executive is held accountable for its actions.

One of the primary differences between South Africa and Australia lies in the follow-up procedures and implementation of recommendations. In South Africa, the public protector's findings are often tabled in parliament, but the response from the executive is frequently inconsistent and recommendations are not always acted upon.[80] Political influence and reluctance to address issues, particularly when high-ranking officials are implicated, often lead to delays or even complete non-implementation of these findings. The public protector's mandate, while constitutionally significant, faces significant challenges in achieving tangible outcomes due to a lack of effective parliamentary oversight. A clear example of this is the Nkandla saga, as highlighted above.[81]

South Africa can learn valuable lessons from Australia's approach to executive accountability. Key among these is the importance of robust follow-up mechanisms that ensure recommendations are not only discussed but actively implemented. Adapting Australia's model, which includes parliamentary committees dedicated to overseeing the implementation of oversight recommendations, could enhance the effectiveness of South Africa's public protector.[82] Additionally, ensuring the financial and political independence of oversight bodies through secure funding and legal safeguards is essential for their effective functioning. By fostering greater public engagement and transparency, South Africa can improve citizen awareness and support for the work of its independent institutions. Implementing these lessons could significantly strengthen the role of the public protector and other chapter 9 institutions in promoting accountability and upholding constitutional values.

Similarly, the debate on the "Section 89 Independent Panel Report" regarding president Cyril Ramaphosa's Phala Phala farm further illustrates the difficulties in following through on independent findings.[83] Despite the report's conclusions that Ramaphosa had a case to answer, a majority of members of parliament voted against accepting it, showing how political considerations often override

[78] s 15 the Australian Ombudsman Act (n 77) and s 16: "Where action that is, in the opinion of the Ombudsman, adequate and appropriate in the circumstances is not taken with respect to the matters and recommendations included in a report to a Department or to a prescribed authority under section 15 within a reasonable time after the Ombudsman furnished the report to the Department or to the prescribed authority, the Ombudsman may inform the Prime Minister accordingly in writing."

[79] Nhleko *Report by the Minister of Police to Parliament on Security Upgrades at the Nkandla Private Residence of the President* (2015). The Nkandla saga illustrates a challenge to the public protector's authority. Despite her 2014 report recommending Zuma repay a portion of R250 million spent on his private residence, a subsequent report by police minister Nhleko, commissioned by Zuma, dismissed her findings and lacked credibility, undermining executive accountability.

[80] Madonsela *Secure in Comfort: Report on President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* (2014).

[81] the *EFF* 2 case (n 12) par 197.

[82] s 16 the Australian Ombudsman Act (n 77).

[83] Parliament of RSA *Report of the Section 89 Independent Panel* (2022) 78-79.

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the recommendations of oversight bodies.[84] These examples underscore the gap between the investigative work of institutions like the public protector and the lack of meaningful political will to act on their findings.

In contrast, Australia's ombudsman and the Australian national audit office operate within a system that ensures their findings lead to swift action. The Australian parliament has mechanisms in place, such as the joint committee of public accounts and audit, that ensure strong follow-up on the recommendations made by independent oversight bodies.[85] This structure guarantees that recommendations are not only discussed but are actively acted upon, providing a model for effective legislative oversight. Unlike in South Africa, where the executive can dismiss or delay the implementation of independent findings, Australia's system ensures a more consistent and binding process for holding the government accountable for its actions.

Another significant difference between the two countries is the level of institutional independence and support. In Australia, the independence of institutions like the ombudsman is ensured through adequate funding and legal safeguards that protect these bodies from political interference. These agencies also benefit from a clear legal framework that empowers them to carry out their duties without fear of reprisal. On the other hand, South Africa's office of the public protector often faces challenges related to funding and political interference despite constitutional safeguards.[86] The public protector's work is sometimes undermined by a lack of financial stability and support, which can limit the scope and effectiveness of its investigations.[87] Strengthening the independence and funding of such institutions would enhance their ability to act without external pressure, ensuring they can carry out their mandate more effectively.[88]

A further lesson South Africa could learn from Australia lies in public engagement and transparency. In Australia, oversight bodies actively engage the public by making their reports easily accessible and ensuring that their findings are widely discussed in the public sphere. This level of transparency fosters trust in government institutions and encourages public participation in holding the executive accountable. In South Africa, while the public protector's reports are made public, there is often a lack of comprehensive engagement with the public. This limited accessibility can reduce the impact of these reports, as citizens are not always fully aware of the findings, or the actions or lack thereof taken in response. By adopting Australia's approach to public communication, South Africa could improve citizen awareness of executive accountability and enhance public support for the work of its independent institutions.

Finally, Australia's model offers insight into the potential for making the recommendations of independent oversight bodies more binding. Unlike South

[84] Ludidi 2022 https://www.dailymaverick.co.za/article/2022-12-13-anc-nec-to-decide-on-fate-of-members-who-voted-against-party-line-in-phala-phala-debate-lamola/ (29-04-2025).

[85] https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JCPAA/Executive_minutes_and_gov_responses/Guide_on_executive_minutes_and_gov_responses.pdf (10-03-2025).

[86] s 181(2) of the constitution: "These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."

[87] e-News Channel Africa 2015 https://www.enca.com/south-africa/public-protector-forced-close-offices-due-lack-cash (10-03-2025).

[88] https://www.pprotect.org/?q=content/public-protector-south-africa-welcomes-additional-allocations-strengthen-its-capacity (10-03-2025).

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Africa, where recommendations are typically non-binding, Australia's oversight bodies have mechanisms in place that encourage timely action by the executive. The parliamentary committees that oversee these institutions hold government officials accountable for implementing recommendations, often through detailed reports and public scrutiny. This legal backing for the enforcement of oversight recommendations could provide an important avenue for South Africa to explore, particularly for systemic issues that require urgent attention from the government.

South Africa and Australia share the overarching principle of independent oversight, but Australia's more structured and legally supported approach to follow-up, institutional independence, public transparency and the binding nature of recommendations provides important lessons for South Africa. By adopting similar strategies, such as improving parliamentary follow-up, ensuring the financial and political independence of oversight bodies, engaging the public more effectively and exploring the possibility of binding recommendations, South Africa could strengthen the effectiveness of the public protector and enhance executive accountability. These lessons could significantly improve governance and ensure that South Africa's independent bodies fulfil their mandate to hold the executive accountable in a more impactful way.

5 *Conclusion*

This article examined the role of the public protector and other chapter 9 institutions in strengthening legislative oversight and ensuring public accountability in South Africa. The public protector's ability to issue binding recommendations is crucial for holding the executive accountable and enhancing democratic governance. By empowering citizens and facilitating direct public engagement, these recommendations address the democratic deficit created by South Africa's party-dominant electoral system. However, the effective implementation of these recommendations often remains hindered by the lack of consistent parliamentary follow-through and political resistance, particularly when high-ranking officials are implicated in wrongdoing.

The shift towards binding remedial actions introduces both opportunities and challenges. While these actions have the potential to improve executive accountability, they must be carefully balanced with democratic legitimacy and institutional independence. This article has proposed key policy recommendations to address these challenges, such as establishing clear guidelines for implementing remedial actions, safeguarding the public protector's independence and enhancing public participation in oversight processes. The incorporation of insights from international best practices, particularly from countries like Australia, offers valuable lessons for improving South Africa's oversight framework.

Finally, the article underscores the importance of a robust and responsive accountability system to ensure that government actions align with constitutional principles and uphold the highest standards of integrity. Strengthening legislative oversight, safeguarding the independence of institutions and fostering greater public participation are essential steps towards building a more accountable and transparent government in South Africa.

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