

# **SAIIA OCCASIONAL PAPERS SERIES**

Analysing key policy and governance issues  
in Africa and beyond



## **ASSESSING SOUTH AFRICA'S APRM: AN NGO PERSPECTIVE**

Nick Hutchings, Mukelani Dimba,  
and Alison Tilley

Number 3, June 2008

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## **ASSESSING SOUTH AFRICA'S APRM: AN NGO PERSPECTIVE**

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### **Abstract**

When the time came for South Africa to do its self-assessment in terms of the African Peer Review Mechanism (APRM), a small organisation became determined that its voice would be heard at the highest level.

The Open Democracy Advice Centre (ODAC) was aware that the creators of the APRM wanted the assessment to involve participation by all elements of society. And it had a very strong idea indeed of what its role should be.

ODAC was passionate about two issues in particular, both offering safeguards against corruption in high places. The first was that ordinary people should be able to obtain, more easily and more quickly, information from government and corporations to which they were entitled. The second was that whistleblowers – those exposing corruption within institutions – should be given more legal protection.

The obstacles were formidable. Government seemed bent on controlling the process. ODAC was nearly excluded at the outset. Along the way, its submissions and recommendations fell by the wayside. Final recommendations were amended without consultation. The government refused to let the public see the changes.

But, for ODAC, persistence paid. Its voice was heard in the final, binding document – the Programme of Action. This report tells how it happened.

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*The authors all worked on the APRM at the Open Democracy Advice Centre in Cape Town, South Africa. See [www.opendemocracy.org.za](http://www.opendemocracy.org.za). An early draft of this paper was presented at the 'APRM and Reform' Workshop held by the South African Institute of International Affairs (SAIIA), at the Birchwood Hotel, Johannesburg, 20-22 November 2007.*

## Introduction

ODAC is a not-for-profit company and law centre based in Cape Town. It was founded in 2000 by the Institute for Democracy in South Africa (Idasa), the Black Sash Trust and the Public Law Department of the University of Cape Town after civil society's successful campaign for freedom of information legislation and legislation protecting whistleblowers. Its mission is to promote democracy, foster a culture of corporate and government accountability and responsiveness, and assist people to realise their human rights.<sup>1</sup> ODAC helps people access their rights through three pieces of right-to-know legislation:

- a) **The Promotion of Access to Information Act (PAIA)**, which gives access to information, held by the state or privately, that is required to exercise or protect any rights.
- b) **The Protected Disclosures Act (PDA)**, which protects whistleblowers, in both the private and public sectors, who disclose information about unlawful or corrupt conduct by employers or fellow employees.
- c) **The Promotion of Administrative Justice Act (PAJA)**, which provides for the right to administrative action that is lawful, reasonable and procedurally fair.

## ODAC's role

ODAC wished to engage in the APRM because it recognised that the process offered an opportunity for advocacy on two key issues.

First, it provided a platform for a national debate over issues of democracy and political and economic governance with all relevant stakeholders.

Second, because the APRM was a continental process, ODAC would have the opportunity to create or strengthen regional standards, thereby enhancing good governance regionally.

For example, in 1946 the United Nations General Assembly adopted Resolution 59(1), which stated: 'Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the UN is consecrated.' Other international human rights instruments incorporated the right of access to information in the broader, fundamental right of freedom of expression. The African Charter on Human and People's Rights – created by the Organisation of African Unity (predecessor to the African Union) – also upheld the right of access to information. Article 9 of the Charter states: '1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.'<sup>2</sup>

At the 32nd ordinary session of the African Commission on Human and Peoples' Rights (Banjul, The Gambia, 2002) African countries adopted a Declaration of Principles on Freedom of Expression in Africa, which states: 'Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.'<sup>3</sup> It added: 'Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.'

In raising these issues within the context of the APRM in South Africa, ODAC aimed to start a regional conversation and evaluation of how African governments have met their obligations under these international legal instruments and to monitor implementation.

ODAC's involvement with the APRM started in 2004 with a seminar to discuss the potential of such a process for civil society organisations. It made its interest known to the Department of Public Service and Administration (DPSA), the South African government department charged with organising the APRM process, at the beginning of 2005 when e-mails were sent to Mr Unathi Bongco, an official listed on the DPSA's website as the contact. Subsequently, ODAC telephoned the department regularly, only to receive a standard response each time that 'something will happen in two weeks'.

The APRM questionnaire to be answered by all participating countries was downloaded from the DPSA website and combed through for references to access to information and protection of whistleblowers. ODAC understood

that the questionnaire, while critical, could be adapted to suit circumstances in each country. There was hardly any mention of the two issues, which are key components of good governance.

With proper information, people can help ensure that other human rights are realised, especially socio-economic rights to clean water, adequate housing, health care and so on, and can help to protect themselves from discrimination and unjust allocations.

The APRM Guidelines stipulate in section 21 (i) that the questionnaire is to be sent to the countries for review. In addition, paragraph 2.2.3 of the Guidelines refers to the flexibility of the questionnaire's content, allowing respondents to take into account the peculiarities of their own situation.<sup>4</sup>

ODAC wrote submissions suggesting additions, specifically information related to access to information and protection of whistleblowers. The submissions were endorsed by a range of organisations in South Africa. Meanwhile ODAC continued to contact the DPSA – to no avail.

At a press conference in mid-September 2005 the Minister for Public Service and Administration and APRM Focal Point,<sup>5</sup> Geraldine Fraser-Moleketi, announced that the first APRM meeting would be held on 28-29 September. ODAC was not invited, but the South African Institute of International Affairs (SAIIA) did invite it to attend a civil society meeting on 22 September to discuss the APRM process. This meeting highlighted the fact that the government had failed to invite many non-governmental think-tanks and policy organisations. The participants questioned the government's systematic exclusion of such organisations.

One organisation that was invited to participate and supply members for the national governing council was the Economic, Social and Cultural Council (ECOSOCC). As an advisory body to the African Union on civil society issues, it was central to government's plans to engage the community. But ECOSOCC consists only of indigenous organisations, is predominantly membership-based and excludes specialist policy NGOs. In addition, at that stage it was funded entirely by the South African Department of Foreign Affairs, which had chosen its initial members. It had no track record of involvement in processes like this, and had done nothing other than deal with internal administrative procedures.<sup>6</sup>

ODAC acknowledges that the government may have been trying to make the process more inclusive and representative of the views of ordinary citizens; however, paragraph 22 of the Memorandum of Understanding, signed by South Africa, declares that a state is required to ensure the participation of *all* stakeholders. There is no reason why South Africa should have focused initially and exclusively on membership organisations, ignoring specialist organisations, some of which had working knowledge of the APRM in other countries. Such discrimination is contrary to the spirit of broad-based participation inherent in the APRM.

Among the organisations excluded at the start were ODAC, SAIIA, Idasa, and the Public Service Accountability Monitor in the Eastern Cape, all of which are experienced in formulating and advising on policy issues.

### **First National Consultative Conference**

The SAIIA meeting was followed by the first National Consultative Conference, held on 28 and 29 September 2005 and organised by the local APRM Secretariat, a unit established within the DPSA. The conference had a dual purpose – to initiate the APRM process and inaugurate the National Governing Council (NGC), the body which would drive it.

The DPSA made it clear that it viewed the questionnaire as sacrosanct. Its format and content would not be discussed, and specific questions on whistleblowing and freedom of information would not be considered. This was contrary to the APRM guidelines.<sup>7</sup>

ODAC was ready to present its submissions on key issues at that first consultative meeting. But no time was allowed for suggesting changes to the questionnaire. Instead, academics presented commissioned papers before the plenary was split into the four thematic groups of the APRM, and facilitators (government officials) attempted to read through and get responses to all the issues in each section. For lack of time, very few delegates were able to express their thoughts. Back at plenary, government officials were reluctant to take questions from the floor, so debate was stifled.

The conference learnt of the establishment of the NGC at the closing ceremony, but not how members were chosen. According to APRM guidelines, the main function of the NGC was to manage the process at national level. It was supposed to be autonomous from government and inclusive of all key stakeholders. But this council had strong governmental representation. It was staffed by five senior ministers: from the presidency, justice and constitutional development, trade and industry and national treasury, with the Minister of Public Service and Administration in the chair. Contrary to the letter and spirit of the APRM, this process looked like a government project.

Initially government had said the NGC would have ten members, five from government and five from civil society. But at the September 2005 conference, the five government ministers were supplemented by ten from ECOSOC. Stakeholders expressed dissatisfaction over its composition during the Country Support Mission by the Panel of Eminent Persons in November 2005 and the panel member for the South African review, Professor Adebayo Adedeji, urged government to make the NGC more representative. Accordingly, membership was increased from 15 to 29, but the extra 14 were merely the official alternates to the first 15, often from the same institution. Of the final 29, nine were from government and Minister Geraldine Fraser-Moleketi was in the chair. ODAC and others believed government was over-represented. Some said so openly.

ODAC acknowledged that there were credible representatives of organised labour (Congress of South African Trade Unions), big business (Business Unity South Africa) and NGOs (SANGOCO) on the NGC. However, many civil society organisations with mass support and representing significant sectors of South African society, were excluded – among them, the Treatment Action Campaign, representing the interests of people living with HIV/AIDS, the media, and specialist groups.

Having a government-heavy NGC was contrary to previous advice, given by the APR Secretariat to Rwanda, regarding the composition of their governing council.<sup>8</sup>

Ambassador Bethuel Kiplagat, a member of the Panel of Eminent Persons, had previously advised that the panel 'did not want to see this as a government project. The government cannot be driving a programme for which itself is being evaluated.'<sup>9</sup>

This message was repeated in the media. After the initial APRM plans were announced, numerous press articles expressed fear that the South African Government would attempt to control the process. The government-heavy representation on the NGC may have given credence to this fear.

Because it was clear from the outset that government would play a very influential role, organisations like ODAC recognised they would have to be assertive and determined if they were to make a meaningful contribution.

### **ODAC's submission**

ODAC made a written submission about the right to know, as expressed in the three pieces of legislation cited above, and established its relevance to the APRM questionnaire.<sup>10</sup> It outlined the strengths and weaknesses of current laws and procedures; made constructive recommendations for improvement; and provided evidence – often from government's own reports – to support its contentions.

ODAC acknowledged that PAIA was both adequate and appropriate to South African circumstances, but made proposals to remedy areas of concern.

Its monitoring studies since 2002 had identified major challenges, both in submitting requests for information and in getting responses. The studies concluded that the act was essentially inaccessible to illiterate people. Although it obliges information officers to help put oral requests in writing ODAC found that 70% of such requests could not be submitted – and a further 10% were refused verbally.

Similarly, two studies had found that between 52% and 62% of requests for information received no response at all, suggesting that officials were not properly trained and got scant guidance on how to implement the act. Problems were compounded by the lack of an effective dispute resolution mechanism or body of jurisprudence to refer to.

Since the APRM questionnaire failed to cover these issues explicitly, ODAC sought to identify places where the principles were most closely echoed. It established that the issues belonged logically in three areas spread through the questionnaire, hence ODAC documents had to be both strategic and persuasive.

ODAC included all three submissions under the first thematic area, section one of the questionnaire, examining democracy and political governance, specifically with reference to the legislation's efficacy in promoting economic, social, cultural, civil and political rights. ODAC also identified how greater responsiveness to requests would increase transparency in the public sector, (falling under the questionnaire's second thematic area, economic governance and management.)

PAIA is supposed to provide access to information held by private bodies if it is needed to exercise any right. ODAC argued that this provision would continue to be little used until the act was more robustly monitored. (Section three: corporate governance, asked whether the framework ensured timely and accurate disclosure of all matters relating to corporations.)

In relation to whistleblowing, ODAC's submissions focused on experience in the public and private sectors. Most significantly, this showed that the Protected Disclosures Act (PDA) had not provided whistleblowers with adequate protection from occupational detriment, and was inadequate in bringing corrupt behaviour to the attention of employers and/or the public. Workshops by the Public Service Commission had revealed that many employees were aware of fraud and corruption but were scared to blow the whistle for fear of consequences at work—the very problem the Act was designed to solve.

ODAC submitted recommendations that reflected work done by the South African Law Reform Commission and resolutions passed by the Second National Anti-Corruption Forum. They included:

- expanding the Act to include more categories of people such as contractors;
- protecting the whistleblower against defamation and disciplinary action for releasing unauthorised information or bringing the government department into disrepute; and
- strengthening the capacity to implement anti-corruption legislation at institutions of service delivery, especially at provincial and local government level.

(These submissions were linked to section two of the questionnaire: economic governance and management.)

In 2001 an ethics survey sampled 76 private sector respondents and found that only 44 had informed their employees of the PDA. In 2004 ODAC conducted an informal survey among the top 100 Johannesburg Securities Exchange companies. Only 33 responded, and of them only 21 had heard of the PDA, 15 had set up an anonymous helpline for whistleblowers and none had received training in administering the act.

ODAC submitted that training in the act was inadequate and recommended joint action by the Public Services Commission and private companies. It also argued that hotlines, on their own, were not enough because they provided limited information and little or no feedback to employees, and that the main purpose of a whistleblowing policy was to encourage communication between employee and employer. (ODAC's submissions on whistleblowing fell under section three of the questionnaire, corporate governance.)

ODAC had only one opportunity to make a submission on administrative justice. It argued that the provisions of PAJA should apply to PAIA, so that a request for information could be refused only if there was an exemption in the act, and this exemption was explained. That would ensure government departments complied with standards of accountability and transparency.

(This submission was made under section two: economic governance and management. It was discussed as an example of what the country had done to make the work of the public administration, legislative system and fiscal authorities transparent.)

### **The parliamentary country assessment process**

In addition to the questionnaire and consultations conducted by the NGC, the South African Parliament developed its own country assessment process and conducted its own research from November 2005 to February 2006, to contribute to the Country Self-assessment Report (CSAR).<sup>11</sup>

ODAC attended a number of meetings relating to this assessment and distributed its submissions to the four parliamentary ad hoc committees, each of which focused on one of the four main themes of the APRM: democracy



and political governance, economic governance and management, corporate governance and socio-economic development.

ODAC also made oral submissions to the committees dealing with economic governance and management and corporate governance. Based in Cape Town, it was easy for ODAC to access parliament and its committees, whose meetings were open to the public. The chairpersons of the ad hoc committees with which ODAC interacted showed considerable interest in the issues raised. Members of the Parliamentary Press Gallery covered the proceedings, and the issues were included in the final reports of the two committees.

- The committee on economic governance and management addressed the failure of the PDA to protect whistleblowers, thus recognising that employees were not exposing corruption. It recommended that protection be improved and the definition of whistleblower expanded, perhaps to include contractors.
- The committee on corporate governance made numerous recommendations in line with ODAC's submission that access to information was key to ensuring public and private corporations fulfil their responsibilities to stakeholders. Importantly, it noted the need for a user-friendly appeals process and dispute resolution mechanism; acknowledged that illiterate people were effectively excluded; called for the South African Human Rights Commission (SAHRC) to educate employers and government departments on PAIA; and agreed on the importance of harmonising PAIA and PAJA.

ODAC focused on areas which, in its view, offered the best chance for the organisation to have its concerns incorporated in the final Country Self-Assessment Report (CSAR) and the definitive Programme of Action (POA). Parliament was generally receptive to its suggestions.

### **Involving research institutes**

Experience in other countries showed the South African Government that – for technical and political reasons – responses to the questionnaire could not simply be collated into one document. Experts would have to assess the submissions, plug gaps and draw up technical reports on issues and recommendations. Further consultation would be required on the final CSAR to ensure it truly reflected prevailing views. So government and the NGC agreed to appoint technical support agencies (TSAs), one for each of the four APRM focus areas. Each had to compile a technical report.

Though ODAC commends the role these agencies played, it should be noted that, despite an extended deadline, the TSAs and research sub-committees of the NGC were unable to include all late submissions in their draft reports. It has been reported that the TSAs faced extreme difficulties. They had only five weeks to collate all submissions and distil key issues.

Seminars were held between 4-7 April 2006 to review the draft technical reports. A day was allocated to each focus area and specific groups were invited to specific seminars. The intention was to allow participants an opportunity to identify gaps and suggest ways to fill them. They were also supposed to suggest key issues to incorporate into the draft POA.

Because some stakeholder responses had been omitted, it was questionable whether the participants could achieve these objectives. They received the reports, all running into hundreds of pages, only on arrival, making it difficult to absorb content.

All participants recognised the need to integrate late submissions into the draft technical reports to ensure an informed position. Despite this, the NGC gave priority to drafting the CSAR and POA reports rather than updating the technical reports. On top of that, summarising more than 1,700 pages in slightly more than 100 meant a significant loss of detail. This left a question mark over the value of the research seminars and stakeholders' contributions.

Despite ODAC's concerns, it was satisfied that its submissions had been heard and would be included. It had maintained good relations with the TSAs: SAIIA, which worked on economic management and governance, the African Institute for Corporate Citizenship (AICC) over corporate governance and Idasa on democracy and political governance.



SAIIA had invited ODAC to the first meeting on the APRM in September 2005. As a research institute it had written widely on APRM and Nepad, conducted research and training in early APRM countries like Ghana, Kenya, Rwanda and Mauritius, and knew the rules governing the process and the experiences of countries which had undergone it. SAIIA proved an invaluable resource for ODAC, as did the AICC. And ODAC was confident that Idasa, as a pro-democracy organisation, would represent its submissions fairly in final reports.

## **Second National Consultative Conference**

The draft of the preliminary POA and a summary of the four TSA reports were discussed at a second National Consultative Conference, held in Kliptown on 5-6 May 2006.

Overall, ODAC was satisfied that the comments included in the draft CSAR reflected the issues raised. The draft acknowledged that government did not adequately abide by PAIA<sup>12</sup> and that there were problems with the Act's implementation and effectiveness.<sup>13</sup> It also agreed that the PDA did not provide adequate protection for whistleblowers.<sup>14</sup>

ODAC suggested amendments which were accepted by delegates in the breakaway session. One recommendation was that the gaps in legislation on access to information should be reviewed by the Department of Justice (DOJ), the DPSA and the SAHRC. The same group should also consider extending education programmes, formulating rules for implementing the legislation and considering its relevance for small enterprises. In addition, ODAC recommended that the DOJ, Department of Labour and NACF establish a programme to promote public awareness of whistleblowing and the PDA, and press for stronger protection for whistleblowers. It was agreed that the DOJ should assist in creating an accessible, cost-effective body to adjudicate disputed requests. Finally, the SAHRC should be more robust in ensuring that public bodies took their reporting obligations more seriously.

But the Preliminary POA failed even to mention the issues raised in the CSAR on access to information and protection of whistleblowers. This was of significant concern to ODAC, since the POA was the only document binding on government. ODAC called for the recommendations tabled at the national consultative processes to be included in the POA.

After the Kliptown conference, workshops were convened to discuss the drafts in more detail. However, not all these workshops were completed before the final CSAR was submitted to the APR Panel for example, in KwaZulu-Natal – confirmation that there was no intention to seek additional input or serious revision.<sup>15</sup> Combined with the earlier exclusion of stakeholder submissions, this undermined the participatory nature of the process. It also meant that completed documents like the CSAR and POA were less credible.

## **The final CSAR and preliminary POA**

The summary report of the four TSAs, which was presented in Kliptown,<sup>16</sup> was extensively revised and condensed before being submitted to the Continental APRM Secretariat at the end of June 2006.

This final CSAR not only failed to include any of the Kliptown recommendations on whistleblowing and access to information, it also removed almost all discussion on PAJA and significantly abridged discussion on the problems with PAIA.

There were other significant omissions:

- It excluded useful recommendations by the TSA for economic governance and management (SAIIA).
- It failed to address specific deficiencies in the right to information laws.
- It failed to mention the lack of an efficient mechanism to resolve disputes under PAIA, as well as the problem of mute refusals.
- It failed to address the main issues raised in the CSAR on the laws on access to information.
- Its discussion on protecting whistleblowers was minimal and not robust enough to ensure action.

The text excluded several recommendations, prepared by the Technical Support Agency for Economic Governance, which addressed specific deficiencies in the freedom of information law. Among these were:

- the need for an efficient appeals mechanism for those denied access to information;
- that the SAHRC should be more aggressive in demanding government bodies produce annual reports on the implementation of the Act;
- an independent investigation by the public protector into obstacles to implementing PAIA;
- amending PAIA to exempt small businesses from compiling information manuals;
- modifying procedures for dispute resolution to ensure cheaper and more effective access to information through the creation of an Information Ombud office;
- simplify the appeals process to make it less cumbersome and expensive;
- make the refusal to give access to information (in terms of PAIA) subject to PAJA.

ODAC's fears about the opaque nature of the process were realised when final drafting of the CSAR took place behind closed doors and without public participation.<sup>17</sup>

The Kliptown conference was supposed to provide civil society with the opportunity to make further inputs. Instead the final CSAR not only dismissed its recommendations but removed content deemed important.

A report by SAIIA comparing the Kliptown text with later versions of the CSAR highlighted the fact that the changes affected not only issues of access to information and whistleblowing but others too. There was concern about the conduct of the national APRM secretariat, housed within the DPSA. In some quarters this conduct was interpreted as unresponsive, non-participatory, non-transparent and in defiance of the spirit of the APRM. National debate seemed to have had little bearing on the final outcome.

### **Lobbying the Country Review Mission**

After a country has prepared its own CSAR, an African Peer Review team – the Country Review Mission (CRM) – visits the country, consulting and doing its own research on the content and the fairness and transparency of the process. The 22-person CRM, led by Professor Adebayo Adedeji, visited South Africa from 11 to 25 July 2006.

With considerable effort, ODAC succeeded in attending a civil society meeting with the visiting team. It was a disappointment. Participants were predominantly community development workers and community members, who gave anecdotal accounts of personal experiences unrelated to questions raised in the focus areas of the APRM. ODAC handed over its submissions on why access to information and whistleblowing should be included in the final POA.

The South African NGO Coalition (SANGOCO) invited ODAC to attend an additional meeting with the APR team, but members of the review team facilitating the discussion maintained strict control and participants were not able to discuss issues that concerned them, only those that the team felt important. Paragraph 22 of the guidelines and paragraph 19 of the base document<sup>18</sup> state that the priority in all aspects of the process, including the country visit, is to carry out the widest possible consultation and the main purpose of the visit is to glean different stakeholder perspectives on governance. This demands a participatory format, not a restrictive one.

ODAC handed the review team copies of its submissions on the POA.

After this the process became opaque. It was difficult for organisations like ODAC to gauge the effect of the CSAR on the APR team's report. However, having seen the final Country Review Report (CRR) ODAC knows that its submissions led the team to record that South Africa's CSAR had not referred to problems with the implementation of PAIA. The final report also referred to ineffective implementation of PAIA and the PDA and recommended developing a programme to monitor the process. This would entail ongoing training for government officials, building capacity to process public requests and ensuring full political commitment to PAIA. The report also identified the need for more protection for whistleblowers.

## The final POA

The participating government has an opportunity to respond to the draft CRR findings. According to APRM procedures, if there are irreconcilable differences (but not clear factual inaccuracies) the CRR report itself is not changed, but government's response is appended. It was difficult for ODAC and other organisations to gauge how government reacted, because discussions were held in camera. The civil society members on the NGC persuaded the minister to allow them to respond to the panel's draft report, and SANGOCO also made a submission. The NGC did not meet until August 2007. Government maintained it was dealing directly with the AU and other states, and the process became more politicised and moved out of the orbit of civil society.

The report and POA were due to be presented to the APR Forum of Participating Heads of State and Government in January 2007 in Addis Ababa, Ethiopia. But the presentation was delayed to June 2007, when South Africa produced a revised POA at the last minute – and without consulting civil society.

Not only do opaque decisions like these affect the credibility of the final document, they also diverge from the objective of an inclusive and participatory self-assessment. The entire process, including research and consultations, is negated by government amendments made behind closed doors after undisclosed discussions and secret consultations with the APRM panel. The fact that the NGC was not convened in this period raises further questions about its role – was its claim to consultation mere window-dressing? Stakeholders complained that they did not know why amendments were made, or the reasoning behind the new proposals.

Government responded that the public had had an opportunity to contribute and that it (the government) was now bound by the APRM base document not to disclose the new POA. ODAC took legal advice on this.

The advice was that the opposite was true. The government's decision to withhold the document was contrary to the spirit of the APRM. Paragraph 3 of the base document states that every exercise done under the APRM must be technically competent, credible and free of political manipulation. Similarly, paragraph 13 states that the process is designed to be open and participatory and refers specifically to transparent decision-making.

What occurred in South Africa could not be described as transparent; counsel's advice to ODAC was that the document could and should be released in terms of the rules. This opinion was sent to the Minister for Public Service and Administration who responded that 'it is not considered prudent to disclose the revised POA', thereby conceding that the government was simply imposing a political decision.<sup>19</sup>

The legal opinion appeared to persuade the Minister that the POA should be released, and ODAC was then informed that a meeting of the NGC had been convened to discuss the final POA, a development which achieved ODAC's objective. As a result of that meeting, ODAC was invited to a national workshop in 2007 to map out how the POA would be implemented, focusing on how the partnership between civil society, government and business would work.

The final and binding POA which was disclosed to those who attended dealt with both access to information and whistleblowing. On the whole, ODAC regarded the outcome as a testament to its tenacity. Clearly, had it not remained engaged its key issues would not have been included in the POA, ultimately the most important outcome of the exercise.

The final POA states that 'lack of access to information impair(s) the full enjoyment of human rights' and provides for a 'Know Your Rights' campaign targeted at 'empowering vulnerable groups such as women, farm workers, people with disabilities and children'. The campaign will be implemented by the departments of Justice and Education and monitored by the SAHRC. Unfortunately the POA did not touch on issues of implementing and enforcing PAIA.

The issue of protection of whistleblowers was more directly addressed. The POA called for a review of the Protected Disclosures Act and established the 'strengthening of whistleblower protection legislation as a monitorable indicator'.

When this reference is compared with ODAC's detailed submissions it is clear that much has been omitted, including major reforms such as an alternative dispute resolution mechanism.

To strengthen the partnership ethos needed to implement the POA, four thematic workgroups were set up, each consisting of government, civil society, business and Chapter 9 & 10 institutions. APRM countries which have been peer reviewed by heads of state are obliged to present to the forum an annual report on the status of POA implementation. South Africa's first report should be presented to the June-July 2008 meeting in Egypt.

ODAC volunteered for the workgroup dealing with democracy and political governance, seeing it as an opportunity to implement strategies it had had a hand in creating. It aims to ensure that deadlines and goals established through the review process and confirmed by the APR Forum are adhered to. It also believes the POA is open to some interpretation, which will allow the organisation to further its cause.

The second stage of the APRM process has begun. Having drafted a plan of action South Africa must now implement it. ODAC has ensured that it plays a crucial role in pursuing its aim of promoting the right of access to information and the protection of whistleblowers.

## Endnotes

1. See [www.opendemocracy.org.za](http://www.opendemocracy.org.za)
2. African Charter on Human and Peoples' Rights, adopted 27 June 1981 and came into force 21 October 1986. Available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html)
3. African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 2002, found at [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html)
4. APRM Secretariat, 'Guidelines for Countries to Prepare for and to Participate in the African Peer Review Mechanism (APRM)', November 2003, paragraph 21(i), 'the APR Secretariat will send to countries to be reviewed, a questionnaire on the four areas of the APRM.'
5. The focal point within a country is the government official responsible initiating the process and providing initial strategic direction, until a national governing council is formed. In South Africa, however, the Minister for Public Service and Administration, Geraldine Fraser-Moleketi, was both the focal point *and* chairperson of the national governing council, and the local APRM Secretariat operated out of her offices.
6. Herbert R and S Gruz, *The African Peer Review Mechanism: Lessons from the Pioneers*, Johannesburg: The South African Institute of International Affairs, February 2008, p. 258.
7. See above (section 5). Paragraph 21(i), Guidelines for Countries to Prepare for and to Participate in the African Peer Review Mechanism: 'the APR Secretariat will send to countries to be reviewed, a questionnaire on the four areas of the APRM.'
8. Herbert R, 'Our way for them to cheat', *The Star*, 20 September 2005. The APRM Secretariat advised that Rwanda have a 10 member council with two to three seats for Government members. The Kenyan Government, during their self-assessment, allowed civil society to elect the members of its council. Finally, Ghana set up a completely autonomous and separate body, composed of seven senior, non-partisan and respected civil society members that managed the entire process.
9. Videotaped interview with Ambassador B Kiplagat, 27 April 2006, Nairobi, Kenya.
10. See *The State of Whistleblowing and Access to Information in South Africa: A submission to the African Peer Review Mechanism*, prepared by the Open Democracy Advice Centre, November 2005. All subsequent references to ODAC's submission are to this document.
11. Although Parliament initially stated that it would produce and submit a stand-alone report, it was later persuaded to submit its report as a background document for the CSAR.
12. South Africa's APRM Country Self-Assessment Report, 30 June 2005, paragraph 9, p. 74.
13. *Ibid.*, paragraph 19, p. 109.
14. *Ibid.*, paragraph 20, p. 48; and paragraph 27, p. 82.
15. South African APRM Secretariat, South Africa's APRM Implementation Process Report for the period April 2005 to June 2006, 29 June 2006, paragraph 6.10.
16. See Draft APRM CSAR, presented at Kiptown, Soweto, 5-6 May 2006, p. 46.
17. The Panel and continental Secretariat are meant to take the CSAR, preliminary POA, their own background and issues

papers and the results of the CRM into account when drafting the final combined report, known as the Country Review Report. This process is not held in public.

18. Assembly of Heads of State and Government, Thirty-Eighth Ordinary Session of the Organisation of African Unity, 8 July 2002, Durban, SOUTH AFRICA. AHG/235 (XXXVIII) Annex II The New Partnership for Africa's Development (Nepad) The African Peer Review Mechanism (APRM).
19. Letter from the Minister of Public Service & Administration to the Open Democracy Advice Centre, 'Legal Opinion on Whether the Rules Governing the APRM Prohibit Disclosure of the Revised Programme of Action to Stakeholders Other Than Government', 26 June 2007.



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