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GLENISTER ANTI-CORRUPTION CHALLENGE

NDIFUNA UKWAZI: DARE TO KNOW SUBMISSION

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THE HISTORY AND CONTEXT OF CORRUPTION IN SOUTH AFRICA

FORMS OF POLITICAL CORRUPTION IN SOUTH AFRICA AND OBSTACLES TO ANTI-CORRUPTION EFFORTS

ABSTRACT

The complex nature of political corruption has led to its being described as a 'many-headed beast' that is particularly difficult to vanquish. This paper examines some of the forms of political corruption in South Africa, both before and after the country's transition to democracy in 1994, in order to identify factors that must be recognised by attempts to address corruption. These factors include the continuation of apartheid-era political corruption, whose legacy has endured into post-1994 administrations; the significant obstacle presented by organisational loyalty as an overriding value; fears of repercussions for whistle-blowing amongst civil servants; capacity constraints within government departments; and poor adherence to regulations. These factors will all require attention if political corruption is to be combated effectively.

Political corruption is a complex phenomenon, so how do we start making sense of its efflorescence, especially in South Africa's context? Factors that have been identified as possible contributors include insufficient surveillance procedures; the absence of a strong, independent media; administrative inefficiency and decision-making procedures resulting in lengthy delays; and extensive patterns of political appointment in the civil service (Blindheim 2011; Lodge 1998). Political corruption is often also perceived as characteristic of developing countries and democratisation.

The approach followed in this paper is to examine the different forms political corruption has taken historically, looking at the periods before and after South Africa's democratisation in 1994, followed by an overview of the obstacles facing anti-corruption institutions and measures.

Forms of political corruption

Political corruption can take various forms, but the consensus amongst most authors is that it entails the breaking of laws and regulations for private ends (Hyslop 2005; Lodge 1998). This frequently involves the unauthorised use, or misuse, of public resources or political influence. There is also consensus that political corruption can present itself in varying degrees, from petty and routine forms (e.g. the solicitation of bribes by minor officials) to grander forms (e.g. the so-called Arms Deal Scandal).

Lodge and Hyslop suggest that political corruption existed in the civil service for at least two decades before South Africa's transition to democracy in 1994. What follows is a brief overview of their examinations, focusing on some of the central factors they identify as having contributed to the issue of political corruption.

Pre-1994 corruption

State secrecy, an absence of controls, and a waning commitment to Afrikaner nationalism

Lodge argues that the absence of democratic controls and increasing secrecy after the 1960s reduced the accountability of apartheid state officials who were thus more susceptible to corruption. As a result, corruption was not merely limited to the

many covert operations that characterised the era, but routine corruption was a feature of many central government departments. The example he gives is that of the Department of Development Aid, whose officials almost all demonstrated a generalised level of misconduct, brought on by a pervasive apathy. The resulting misconduct included the awarding of fictitious tenders and acceptance of gifts, amounting to the squandering of hundreds of millions of rands over the years.

By the 1970s, Afrikaner nationalism and the associated patronage networks and rent-seeking activities had created substantial new middle and capitalist classes (Hyslop 2005). However, by this time and especially from the 1980s onwards, the ruling party's ideological commitment to apartheid started to wane and there was no longer a clear shared vision of the future. In the absence of a common ideology to unite followers, the Afrikaner establishment lost its ability to maintain discipline and "a scramble for personal enrichment began" (Hyslop 2005:782).

Expansion of the civil service and the loss of capacity

There was also a rapid expansion of the civil service establishment, which quadrupled in size during apartheid (Lodge 2002). In order to staff this establishment there was large-scale, politically motivated recruitment of National Party supporters. With the appointment of many unskilled and unqualified entry-level staff, many competent managers left the service when the burgeoning service meant that managing it had become more complicated. This resulted in weakened capacity, particularly regarding oversight, which enabled and encouraged rent-seeking behaviour.

International sanctions and criminal networks

The many international sanctions imposed against South Africa during the 1970s and 1980s also encouraged corrupt behaviour (Hyslop 2005). As a result of these sanctions, officials and operatives resorted to engaging with global criminal networks for arms, technology and oil, and much state business involved transactions with fictitious offshore companies. The nature of these dealings

encouraged rent-seeking, with Hyslop (2005:783) pointing out that the “temptations for officials to skim off some of this invisible money was strong”.

Corruption within the ‘homeland’ state bureaucracies

The creation of the ‘homeland’ states also had a significant, enduring effect on political corruption (Hyslop 2005; Lodge 1998). These states called for the large-scale recruitment of black civil servants, resulting in the creation of a large group of black bureaucrats and social brokers. However, the states soon became recognised for pervasive corruption and a general level of incompetence on the part of homeland leaders in charge of large patronage networks. As will be addressed in a following section, this homeland corruption had an endearing legacy in provincial governments post-1994.

Abuse of struggle-movement funding and organisational loyalty

During the anti-apartheid struggle, ANC-aligned organisations also presented certain dimensions that likely contributed to the growth of corruption in the new democracy (Hyslop 2005). In the period before the end of apartheid, foreign benefactors contributed large amounts of money to the struggle. Much of this money was entrusted to prominent struggle leaders and, because of security concerns, no proper records were kept. While most of these leaders used the funds responsibly and honestly, there were some who did not, and as a result, a “cavalier ethos in the handling of money and a sense of being above the mundane processes of accounting were fostered amongst some who rose to positions of power after the transition” (Hyslop 2005:783).

There is also the matter of organisational loyalty, which no doubt has played a part in political corruption in democratic South Africa. Hyslop notes how organisational loyalty became an overriding value during the struggle movement, and such loyalty fostered the development of patronage networks. This, in turn, has made it difficult for the ANC to recognise and denounce acts of corruption committed by old comrades.

Looting at the end of Apartheid

Finally, reflecting on the end of apartheid, Hyslop and Lodge both recognise a dimension of looting in the public service that accompanied the realisation amongst officials that their powers and privileges may soon come to an end. In this time, political corruption seemed to reach new heights. A notable example involved the Department of Development Affairs, which De Klerk had to shut down in 1991 after a commission suggested it was rife with corruption.

Post-1994 era corruption

Given the history of corruption in South Africa in the decades prior to 1994, Lodge argues that it would be surprising if it did not continue into democratic South Africa. The newly elected government expressed a public commitment to an ethic of transparency, established a number of anti-corruption agencies such as the Public Protector, and appointed a number of official inquiries into corruption. However, corruption still persisted across various government department and parastatals, with old forms continuing and new forms emerging.

Hyslop argues that some of the worst cases of corruption in central government involved a continuation of corrupt behaviour from the past, combined with poor ministerial leadership. This may have been exacerbated by job insecurity on the part of apartheid-era civil servants who had retained their posts, which may have impacted negatively on already weak professional ethics within the service (Lodge 1998).

Corruption in provincial administrations, the legacy of the homelands, and party loyalty

After 1994, the homeland administrations were incorporated into the new provincial governments. While the homeland administrations could be recognised as ineffective and disorganised, Hyslop and Lodge suggest they were incorporated because the new government needed the support of the black middle-class officials who staffed these administrations to administer rural areas. However, both argue that as a result the pre-existing corruption continued into the new provincial

administrations. They suggest that the three provinces that drew most heavily from the homeland administrations – namely the Eastern Cape, Limpopo and Mpumalanga – have been those most affected by corruption.

The fact that corrupt officials were often protected by ANC leaders also exacerbates this continuation of corruption. In this way, the issue of party loyalty has been a significant factor in political corruption. With South Africa's democratisation, the ANC brought "an enthusiasm and high hopes for the future, but also a political culture that made it difficult to admit to and tackle corruption problems when they arose" (Hyslop 2005:789). This can be seen in the reluctance to investigate and prosecute certain corrupt officials, arguably stemming from the aforementioned party loyalty, which developed in the guerrilla-war context of the struggle against apartheid.

The Arms Deal

Perhaps the most significant example of large-scale corruption by senior leaders in the South African government is the so-called Arms Deal. Hyslop provides a substantial overview of the different events and players that formed part of the scandal, which is summarised below. The deal centred on the government procurement of aircraft and ships for the Defence Force and involved a number of cabinet members during the first term of Thabo Mbeki's presidency: Mbeki himself, vice-president Jacob Zuma, Zuma's financial advisor Schabir Shaik, and Minister of Transport Mac Maharaj (the current spokesperson for the Presidency).

A notable and worrying observation around the scandal is that the ANC tended to put organisational loyalty above the need to expose corruption and malfeasance (Hyslop 2005; Sole 2005). When this commitment to loyalty was threatened by allegations and investigations focusing on its members, the ANC tended to respond by attacking individuals and institutions, or by attempting to obstruct the investigations. As Sole (2005:107) succinctly argues, "[w]hat emerged at this point of crisis was a consensus among the ruling elite that prioritised the ANC's hegemonic project over the more abstract demands of liberal accountability".

Obstacles to contemporary anti-corruption efforts

Having examined pertinent forms of corruption in South Africa's history, it is valuable to consider the successes and shortcomings of anti-corruption efforts.

Since 1994, the South African government has made several efforts to address political corruption and malfeasance (Naido & Jackson 2009). These included the introduction of legislation such as the Protected Disclosures Act (26 of 2000); the hosting of forums such as the 1999 National Anti-corruption Summit; and a number of anti-corruption resolutions such as the Public Service Anti-corruption Strategy (2002). It is also reflected in the power and independence given to agencies such as the Auditor-General, the Public Protector and the Public Service Commission. However, as the authors note, these efforts have involved a number of critical issues and shortcomings, an overview of which follows below.

Obstacles to disclosure

One such obstacle is the reluctance of civil servants to report corrupt activities when they become aware of them. While the introduction of the Protected Disclosures Act (26 of 2000) promoted the reporting of government corruption, Naido and Jackson (2009) argue that employees in the civil servants remain reluctant to be whistle-blowers. They note that the Public Service Commission (PSC) reports indicate that although surveyed government employees could give numerous practical examples of fraud and corruption in the public service, the vast majority said they would be unwilling to report it. The few who claimed they had previously reported corruption in the public service also spoke of having experienced negative consequences as a result.

The main detractor from disclosing corruption seems to be fear of the potentially adverse consequences one may encounter in the process. This fear could be as a result of employees not having been made sufficiently aware of the provision of the Protected Disclosures Act. However, Naido and Jackson (2009) suggest that a more substantive argument is that the legal protections provided by the Act are not enough to change the environment in which civil servant operate. Public servants

have remained sensitive to the repercussions of reporting and the issue of confidentiality as a significant concern. They argue that the issue of confidentiality is not directly addressed in the Act, whereas potential whistle-blowers are likely to want to their disclosure and identities to be treated as confidential.

Insufficient functionally capacity

Capacity issues have also had an impact. Drawing on a number of PSC reports, Naido and Jackson (2009) discuss a number of capacity issues that may affect effective monitoring and corruption-prevention. This includes an overreliance on departmental audit units to address corruption, which is not their primary function. This overreliance is particularly problematic in light of the large numbers of unfilled internal audit posts in many government departments.

Naido and Jackson also argue that the oversight function of these departments is too limited, focusing on financial management and budget control, and a redefinition of departmental financial management functions may be required if these units are to play a more active anti-corruption role. They further identify the failure of internal audit and other financial management departments to ensure sufficient functional capacity as a fundamental shortcoming.

Anti-corruption and public service regulations

Naido and Jackson (2009) also address the limited scope of, and poor compliance with, certain public service regulations. In particular, they identify the poor compliance with financial interest disclosure regulations. They note that the disclosure regulations in the Public Service Regulations only require a minority of civil servants to disclose financial interest – particularly Heads of Departments and Senior Managers. This is significant because PSC reports indicate that a large amount of government corruption occurs below middle management. They further note that most financial misconduct seems to involve lower level employees responsible for handling monies and procurement.

The authors also point to a 2006 Audit General covering the 2003/04 financial year suggesting that the majority of senior officials required to disclose their directorships

or membership in companies failed to do so. The ambiguities inherent to existing financial disclosure regulations have also likely affected compliance. For instance, chapter one of the Public Service Regulations forbids public servants from accepting gifts, while chapter three calls for them to disclose gifts received and chapter two inadequately defines what constitutes a gift.

Conclusion

Given its inherently secretive and multifarious nature, more research is needed to fully understand the nature of political corruption in South Africa and in other international contexts. However, certain factors can be identified as having enabled or encouraged its presence in the South African public service. This includes the enduring legacy of old forms of corruption, the supremacy of organisational loyalty as a value, and significant obstacles to existing anti-corruption efforts. It is evident that much is still to be done to reduce the widespread presence of political corruption in South Africa and that this will require a broad and multifaceted approach.

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MEMORANDUM OF THE SOUTH AFRICAN ANTI-CORRUPTION UNIT, ACT 33 OF 2012

INTRODUCTION

Corruption is a difficult notion to pin down mainly because of its secretive nature. What can be agreed upon is that corruption is particularly destructive in developing countries; it hurts the poor disproportionately by undermining development and government's ability to provide basic services; it perpetuates injustice and inequality; and it discourages foreign investment and aid.¹ In light of this, the challenge is to create a legal framework that protects citizens against those in power who abuse their positions and which makes it difficult to perpetuate patterns of corruption and which creates independent crime-fighting institutions that are able to meaningfully carry out their functions. In doing so, we need to consider the judgment in *Glenister v the President of South Africa and others*² (*Glenister*), the historical development of South Africa's culture of corruption, and humans' susceptibility to self-interest.

In the *Glenister* decision, the Constitutional Court (the Court) held that:

Chapter 6A of the South African Police Service Act 68 of 1995 is inconsistent with [the] Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.³

The Court suspended the declaration of constitutional invalidity for 18 months so that Parliament could have an opportunity to remedy the defect.⁴

The Court confirmed that the state has a positive obligation in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. In determining the content of the state's obligation the Court relied on the provisions of the Constitution as a whole, which requires that the state create a concrete and effective mechanism to prevent and eradicate corruption and corrupt practices. This requirement originates from the recognition that corruption interferes with full realisation of the Bill of Rights and jeopardises our constitutional democracy.

¹Kofi Anan, "Foreword to the United Nations Convention Against Corruption"; available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed July 2012.

²2001 (3) SA 347 (CC).

³*Ibid*, 129-130.

⁴*Ibid*, 130.

South Africa's obligations in terms of international law, which inform the state's constitutional obligations, require it to establish an anti-corruption unit with the necessary independence. These obligations originate from agreements South Africa is party to, such as the United Nations Convention against Corruption⁵ and the African Union Convention on Preventing and Combating Corruption.⁶

The Court emphasised that any anti-corruption unit must comply with the fundamental principles of the country's legal system.⁷ In our context this would entail compliance with the meaning and manifestation of independence in the Constitution, which gives the executive authority a role in the administration of justice: they have final responsibility to Parliament for the functioning of institutions responsible for the administration of justice, such as the National Prosecuting Authority and the Police.⁸

In understanding the Constitution's conception of adequate independence, we must consider the independent institutions it creates, particularly Chapter 9 Institutions⁹ such as the Auditor-General and the Public Protector, which have the specific function of supporting our constitutional democracy. Even in these institutions, mandated to protect and ensure compliance with the provisions and principles contained in the Constitution, the executive authority has a significant and clearly defined role. This forms part of the system of checks and balances that ensures bodies are functioning effectively and remain accountable.

Structures of anti-corruption bodies

There are three ways in which an anti-corruption unit could be established to meet the requirements of the *Glenister* judgment.

The first way would be for the unit to remain in the South African Police Service (SAPS). However, an Organisation for Economic Co-operation and Development (OECD) report

⁵*Supra* note 1.

⁶http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf, accessed July 2012.

⁷*Glenister supra* note 2 at 56.

⁸*Glenister supra* note 2 at 61.

⁹Constitution of the Republic of South Africa, 1996.

published in 2007, “Specialised Anti-corruption Institutions Review of Models”,¹⁰ warns about the dangers of this approach. The report, drawing on evidence from Eastern European and Central Asian anti-corruption networks, cautions that the hierarchal systems in bodies such as the SAPS requires that, when an anti-corruption unit is established within its structures, extra care should be taken to ensure that the unit is adequately independent.

A decision to establish the anti-corruption unit within the SAPS should not be taken lightly. The Helen Suzman Foundation, responding to the South African Police Services Amendment Bill, expressed concerns about the likely impact of adopting this approach. The Foundation argued that the powers and functions of the National Commissioner¹¹ would conflict with the powers the head of the anti-corruption body needs to ensure independence. If the body were to be established within the SAPS, special and explicit provisions would be required to ensure that the unit complies with the Constitution and the *Glenister* judgment.

The second way to establish the unit would be to place it within an existing institution that is already adequately independent in terms of our constitutional principles. This includes the state institutions supporting constitutional democracy established in terms of Chapter 9 of the Constitution.

Finally, the third option would be to establish an entirely new institution that is adequately independent.

LEGISLATION FOR AN ADEQUATELY INDEPENDENT ANTI-CORRUPTION BODY

To determine the Constitution’s notion of a sufficiently independent institution, we should consider the characteristics of independent bodies and institutions it establishes.

Independent institutions

The success of an independent institution depends largely on a number of factors that illustrate how the institution will deal with key challenges in the long term.¹² Factors highlighted by the Court in *Glenister* include public legitimacy, institutional strength and

¹⁰ OECD, ‘Specialised anti-corruption institutions’ available at <http://www.oecd.org/corruption/acn/library/39971975.pdf>, accessed April 2012.

¹¹ For a list of these powers and functions, see section 207 of the Constitution.

¹² J M Ackerman, ‘Understanding independent accountability agencies,’ in Susan Rose-Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (2010). 266.

second-order accountability.¹³

Public legitimacy means that the public perceives the body as independent in structure and operation from its very inception. In *Glenister*, the Court stated that public confidence in mechanisms to secure independence is indispensable, especially in relation to security of tenure, appointments and removal procedures. A critical question is whether an informed and reasonable member of the public would have confidence in the entity's ability to ensure autonomy.¹⁴ Public legitimacy would help the entity to carry out of its functions because people would be more inclined to report suspicions and vital allies (such as civil society) would be more willing to assist where they can.¹⁵

Institutional strength involves the institution's ability to influence and control other areas of government.¹⁶ Institutional weakness can mean that other areas of government completely ignore the unit. This is where the unit's education and capacity-building aspect is important. By learning about the unit's purpose, officials in various departments will stop seeing it as a threat and instead come to understand the implications and effects of corruption, as well as the need for cooperation between the government departments and institutions to effectively address it. This will help to ensure that the unit has the support of departments and institutions and that other bodies effectively deal with cases outside the unit's jurisdiction.

Then there is also the important question of the unit's own accountability. Anti-corruption institutions must remain independent so that they remain untainted by the reciprocal relationships in politics. However, it needs to be clear to whom the unit itself is accountable. The Court in *Glenister* stressed that these bodies' independence should not be such that they become a law unto themselves.¹⁷ It needs to accord with our Constitutional provisions that require the executive to exercise final responsibility over the administration of justice.¹⁸

¹³ *Ibid*, 267.

¹⁴ *Glenister supra* note 2 at 108.

¹⁵ Ackerman op. cit note 11 at 267.

¹⁶ *Ibid*, 268.

¹⁷ *Glenister supra* note 2 at 61.

¹⁸ *Ibid*.

The troika principle

Effectively combatting corruption in all its manifestations requires a multi-faceted approach. The *troika* approach, which the Khampepe Report¹⁹ refers to in relation to the Directorate of Special Operations, is an aspect and example of the approach to be used in our context. In the report Justice Khampepe wrote that the rationale behind the approach is to create a multi-disciplinary structure to combat intolerable levels of crime.²⁰

The *troika* methodology combines the expertise of prosecutors, those in the intelligence field (including crime data analysts), and police investigators.²¹ Individuals from these fields work together in project teams, along with specialist prosecutors appointed to ensure that the teams are court-directed in the performance of their investigations.²²

The advantages of a three-pronged approach to investigation include the diversity of expertise in tackling cases and the fact that the unit members act as a check on one another, with a designated team leader who ensures that the investigation is run properly.

Under the traditional method of investigation, a senior police officer takes the lead and is directly responsible for managing investigators. She guides, oversees and maintains discipline during the investigation, while also reviewing the evidence docket for quality, giving instructions if further investigation is needed.²³ The prosecutor only has an opportunity to review the docket when an arrest is made or where a warrant is required. This is the first time the prosecutor can share his expertise about whether an offence can be supported by the evidence, whether the evidence is admissible, the degree of reliability and strength of the evidence in the docket and whether the evidence in the docket proves all the elements of the crime.²⁴

In the traditional approach, investigators are usually left to use their individual discretion to conduct the investigation. A problem is that they usually have little legal knowledge and

¹⁹ Justice Khampepe, 'Final Report: Khampepe Commission of Enquiry into the Mandate and Location of the Directorate of Special Operations' available at <http://www.info.gov.za/view/DownloadFileAction?id=80441>, accessed April 2012.

²⁰Ibid, 8.

²¹Ibid, 19.

²²Ibid, 21.

²³Ibid, 117

²⁴Ibid, 118.

cannot evaluate what information is relevant to particular offences or make difficult legal decisions.²⁵

By contrast, the *troika* approach harnesses the skills of the prosecutor (who ensures that the investigation remains prosecution-directed), the analyst (who interprets the information the investigation uncovers), and an investigator (who gathers the evidence for an effective prosecution).²⁶

The *troika* principle is considered to work best where the three disciplines operate under one command structure, which in this case would be the unit's National Office. The aim is to ensure constant collaboration between these three disciplines.

The OECD report warns against assigning the unit too many focus areas, as this could dilute its priorities;²⁷ similarly its jurisdiction should not be mandatory, as this could overburden its resources; instead its investigative function should be limited to important and high-level corruption cases.²⁸ However, this does not mean the unit will not have other mechanisms for dealing with corruption at every level; all the unit's provincial offices will have departments dedicated to building the capacity of provincial departments to identify, address and, where necessary, report cases of corruption that fall outside the main unit's jurisdiction. The national office will also have departments for all national departments.

The national office will have a department to co-ordinate the functioning of the capacity-building units. The provincial departments' main function will be to assist government departments to establish mechanisms for safely reporting corruption and internal procedures to deal with minor cases of corruption where possible. These units' aim will be to educate officials on the nature and effect of different forms of corruption, the importance of reporting any suspicion of corruption, and that no negative consequence will result from reporting.

The combination of the *troika* principal, building and strengthening new and existing anti-corruption measures, is a comprehensive structure aimed at effectively eradicating

²⁵Ibid, 119.

²⁶Ibid, 120.

²⁷OECD, op. cit note 9 at 6.

²⁸Ibid.

corruption or, at the very least, ensuring that corrupt officials and institutions are held accountable.

Section 1 (Composition of the Committee)

The unit has been established in terms of section 181 of the Constitution. The aim is to cement its status as a body aimed at preventing and dealing with violations of constitutional principles and rights in the Bill of Rights. The fact that the unit enjoys the extensive protection that the Constitution gives Chapter 9 institutions means that the initial response to the unit will be one of trust, which reflects the Court's emphasis on the public's perception of the unit's independence.

The aims of the unit are structured to ensure that it functions in terms of the *troika* principle, to broaden and strengthen the ability of state bodies and institutions to identify and tackle corruption. Ideally this would make the unit the last port of call in dealing with corruption, ensuring that it only deals with the most serious corruption cases, while ensuring that minor cases are still effectively addressed.

The rationale for giving the unit investigative and capacity-building competencies is to ensure that there are mechanisms for addressing corruption at all levels and that it is not the only avenue for tackling corruption. Crimes not taken up by the unit will still be addressed. This can only happen if other means of tackling corruption are strengthened.

Section 2 (Composition of the Committee)

The Parliamentary Committee will deal with the potential lack of skills of Members of Parliament (MPs) to exercise adequate oversight over the unit. Most of the Committee members should be experts in the three areas of discipline of the *troika* principle to ensure that the disciplines are effectively co-ordinated and that MPs and other individuals are properly advised and assisted on their policies and actions regarding the unit.

The procedures and requirements for appointment and the relevant considerations to be made when appointing someone to the Committee are set out to increase accountability and decrease the likelihood of undue political interference.

Section 3 (Powers and functions of the Committee)

The Committee's main function is to assist and advise Parliament in its functions and oversight role. The Committee is also there to assist all other individuals empowered by the Act in relation to the unit in the exercise of their powers and fulfilment of their functions.

Section 4 (Functions and powers of Parliament)

Parliament has final oversight over the unit, and the relevant Cabinet Ministers have final responsibility to Parliament. These provisions facilitate Parliament's role.

Section 5 (General operation policy and issuing of policy directives)

The Court felt that the Ministerial Committee, in the SAPS Amendment Bill, was given extensive powers in relation to drawing up the policy guidelines. There were no prescribed requirements for the policy to be expanded to prevent the stifling of the unit's functioning. Furthermore, insufficient mechanisms were established to protect against the drafting of unduly limiting guidelines. The result the Court foresaw was a risk of executive and political influence on the unit's functioning.²⁹

These provisions, by requiring a varying field of stakeholders' involvement, are aimed at minimising the chance that the policy might contradict the unit's objectives and that its operations will not be unduly limited.

Section 6 (Composition of the unit)

The Court emphasised that a unit's independence is largely determined by factors including security of tenure, remuneration and mechanisms of accountability and oversight. The importance of security of tenure is to instil confidence in the members of the unit and to ensure they are able to carry out their functions and duties effectively and vigorously, without fear of reprisal.

Section 7 (Appointment, remuneration and conditions of service of the Head and Deputy)

The Court emphasised the need for clear, objective standards and specially secured employment is essential to minimising undue political influence and ensuring that the members of the body report such incidents without fear that they might lose their job.

²⁹*Glenister supra* note 2 at 120-125.

The Court expressed concern that, in the Amendment Bill, the Minister of Police would determine the conditions of service of all the unit members. The Court warned that the omission of statutorily secured remuneration has the same effect as not having special provisions securing the members of the body's security of tenure.

Section 10 (Powers, duties and functions of the unit)

The OECD report states that the body must not have too many areas of focus. However, the body still needs to include structures aimed at dealing with, giving support to and building the capacity of other state entities to fight corruption. Further, it needs to ensure that mechanisms are in place to comprehensively deal with corruption.

The aim of this aspect of the unit is to research trends and levels of corruption, assess the effectiveness of existing anti-corruption measures, develop sector-specific policy in consultation with that particular sector and coordinate and monitor implementation.

Section 13 (Reporting matters to the unit)

To incentivise the reporting of corruption, these provisions are aimed at making it mandatory for people to report reasonable suspicions of corruptions while simultaneously providing appropriate protection from any adverse consequences that may result from reporting corruption.

Section 16 (Investigations and enquiries by the unit)

To ensure that the unit's capacity and resources are not overburdened, it has no obligation to institute and perform investigations on every suspicion it may have. The body must deal primarily with the most serious and complex corruption cases. To ensure this, one of the functions of the body is to assist and build the capacity of state organs and institutions to effectively deal with smaller and/or less serious and instances of corruption.

Section 19 (Hand-over on conclusion of investigation)

To ensure thorough impartiality in the prosecution process, prosecutors forming part of an investigative team are not to make the final decision of whether a prosecution should be

proceeded with. This approach was referred to in the Khampepe Report³⁰ in relation to the United States Attorney's offices where the decision to prosecute rests solely with impartial attorneys of the state.

Section 21 (Final responsibility to Parliament)

To ensure all the disciplines are effectively coordinated, co-operating and accounted for, all relevant Ministers are to exercise concurrent final responsibility to Parliament.

³⁰Justice Khampepe, op. cit note 16 at 38-39.

**THE SOUTH AFRICAN ANTI-CORRUPTION UNIT ACT,
33 OF 2012**

THE SOUTH AFRICAN ANTI-CORRUPTION UNIT, ACT 33 OF 2012

In view of the provisions of the Constitution of the Republic of South Africa, 1996 and the judgment of the Constitutional Court of South Africa in *Glenister v the President of South Africa and others* 2001 (3) SA 347 (CC) to establish an anti-corruption body with an investigative, monitoring and capacity building mandate that has sufficient structural and operational independence to effectively fulfill its mandate; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

ESTABLISHMENT OF THE SOUTH AFRICAN ANTI-CORRUPTION UNIT.

1. Establishment of the Unit.

(1) The Unit is hereby established as a state institution within the meaning of section 181 of the Constitution a body with the aim of strengthening the constitutional democracy of South Africa.

(2) The Unit is independent, and subject only to the Constitution and the law, and it must be impartial and must exercise its powers without fear, favour or prejudice.

(3) The Unit is established with the aim to:

(a) investigate, and to carry out any functions incidental to investigations;

(b) gather, keep and analyse information;

(c) where appropriate, institute criminal proceedings and carry out necessary functions incidental to instituting criminal proceedings; and

(d) assist in building and maintaining the capacity of other state organs, departments and institutions to identify and tackle corruption in all its forms.

**ESTABLISHMENT, FUNCTIONS AND POWERS OF THE PARLIAMENTARY COMMITTEE AND
PARLIAMENT**

2. Composition of the Unit Committee

(1) Any person to be appointed as a member of the Unit Committee must-

(a) possess the necessary qualifications, or their equivalent, in their particular field of expertise;

(b) be a fit and proper person, with due regard to his experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned;

(c) any person appointed must be a South African citizen.

(2) The Unit Committee shall consist of-

(a) three members of the Detective Service of the SAPS with no less than 10 years of experience in one of the Service's six components, particularly Serious and Violent Crime, the Commercial Branch and the Organised Crime Component,

(i) to be appointed by the President after consultation with the National Commissioner;

(b) three Deputy Directors of the National Prosecuting Authority,

(i) to be appointed by the President after consultation with the National Director of Public Prosecutions;

(c) three persons designated for the purpose of forming part of the Unit by the President after consultation with the heads of the Services (defined in section one of the Intelligence Services Control Act)

(d) four members of Parliament appointed by the President who shall not be members of the executive authority or attached to the state administration, and whose knowledge and experience law enforcement and the administration of justice shall be taken into consideration; and who proportionally represent political parties represented in Parliament;

(e) No person may be appointed as a member of the Committee unless-

(i) information with respect to that person has been gathered in a security screening investigation by the National Intelligence Agency established by section 3 of the Intelligence Services Act; and

(ii) the Head of the National Intelligence Agency, after evaluating the gathered information, is satisfied that such person may be appointed as a member of the Committee without the possibility that such person might be a security risk or that he or she might act in any way prejudicial to the objectives of the Unit

(iii) if the Head of the National Intelligence Agency is so satisfied, he or she shall issue a certificate with respect to such person in which it is certified that such person has successfully undergone a security clearance, such certificate is to be issued to the person responsible for appointing that particular member;

(iv) any member may from time to time, or at such regular intervals as the Head of the National Intelligence Agency may determine to be necessary, be subjected to a further security screening as contemplated in subparagraph (e)(i);

(v) the Head of the National Intelligence Agency, in consultation with those responsible for appointing that particular member, may withdraw a certificate referred to in sub-paragraph (e)(iii) if he or she obtains information which, after evaluation by him or her, causes him or her to believe that the person in question could be security risk or could possibly act in any manner prejudicial to the objectives of the Unit

(vi) if the certificate referred in sub-paragraph (e)(iii) is withdrawn, the person concerned shall be unfit to continue to hold such office and the persons responsible for his or her appointment must discharge him or her from the Committee

(3) The President, in consultation with the Minister of Justice and Constitutional Development, the Minister of Safety and Security and the Minister of State Security, shall appoint the chair and deputy chairperson of the Unit

3. Powers and functions of the Unit Committee

(1) The functions of the Unit are-

(a) to receive nominations for the position of the Head and Deputy Head of the Unit ;

(b) to make recommendations to the National Assembly of four candidates more than the number of positions to be filled;

(c) to draw up policy guidelines for the general operation of the Unit. in consultation with the Head of the Unit, the NDPP, Heads of the Services and the National Commissioner to be approved by Parliament by a 60% majority;

(d) to resolve disputes, in conjunction with Parliament, of jurisdiction and/or competencies that may arise between the Unit and any other institution with an overlap in mandate;

(e) to conduct enquiries into the fitness to hold office of the Head of the Unit where he or she has been suspended in terms of Unit.;

(f) to make any recommendations requested by Parliament to assist it in the fulfillment of its functions in terms of this Act;

4. Functions and Powers of Parliament

(1) The role of Parliament shall be-

(a) to make recommendations of the candidates to be appointed as Head and Deputy Head of the Unit, from a list of candidates supplied by the Unit Committee, to the President, Minister of Justice and Constitutional Development, Minister of State Security and the Minister of Safety and Security;

(b) to approve, with a 60% majority, the general operation policy of the Unit ;

(c) to resolve, in conjunction with the Unit Committee, disputes of jurisdiction and/or competencies, which may arise between the Unit and any other institution with an overlap in mandate;

OPERATION OF THE UNIT

5. General operation policy and issuing of policy directives

(1) The general operation policy must be observed in the processes of the Unit, and the Head of the shall exercise such powers and perform such functions in respect of the operation policy, as determined in this Act or any other law.

(2) Any intended amendments to the operation policy are to be tabled in Parliament, to be considered by the Committee and Parliament approved by Parliament after consultation with the Committee.

(3) The operation policy must, as broadly as possible without diminishing the ability of the Unit to effectively carry out its objectives and mandates-

(a) give a broad outline of the crimes over which the Unit has jurisdictional competence keeping in mind the body's constitutional mandate;

(b) give an outline of the legislation that applies to-

(i) individuals involved in the investigation of the crimes;

(ii) individuals involved in the gathering and the analysis of relevant intelligence information;

(iii) individuals involved in the prosecution of crimes, in the exercise fulfillment of their functions.

STRUCTURE AND COMPOSITION OF THE UNIT

6. Composition of the Unit.

(1) The Unit shall comprise of-

(a) the Office of the Head of the Unit at a national level; and

(b) the Office of the Provincial Unit in each province.

(2) The members of the Executive responsible for the operation of the Minister of Safety and Security and the Minister of Justice and Constitutional Development to be collectively referred to as the Ministers,

(a) each will be responsible for the disciplines and actions in the Unit that relate to their portfolio.

(3)The Head of the Unit must, after consulting with the Deputy Head of the Unit, the Ministers and the Minister for the Public Service and Administration determine the number and grading of posts in the Unit.

(4)The Office of the Head of the Unit shall consist of-

(a) the Head of the Unit, at a national level ;

(b) the Deputy Head of the Unit, at a national level;

(c) other persons appointed by the Head of the Unit, after consulting with the Deputy of the Head of the Unit on the basis of the required level of experience, training, skills, competence, and knowledge to be determined in the general operation policy;

(d) a team of legal officers the number of which will be determined by the Head of the Unit in consultation with the Deputy Head of the Unit;

(e) officials from any Government department or institution, seconded to the Unit in terms of laws governing the public service;

(f) administrative staff.

(5) The offices of the Provincial offices shall consist of-

(a) the Provincial Head of the Office, who shall be in control of the office, subject to the powers and directions of the National Head of the Unit

(b) Deputies of the Provincial Head Office;

(c) other persons appointed by the Head, after consultation with the Deputy, on the basis of the required level of experience, training, skills, competence, and knowledge as determined by the general operation policy;

(d) a team of legal officers the number of which will be determined by the Head of the Office, after consultation with the Deputy;

(e) officials from any Government department or institution, seconded to the Unit in terms of laws governing the public service;

(h) administrative staff.

(6) No person may be appointed to any of the Offices of the Unit unless-

(a) information with respect to that person has been gathered in a security screening investigation by the National Intelligence Agency;

(b) the Head of the Unit, after evaluating the gathered information, after consultation with the Head of the National Intelligence Agency, is satisfied that such person may be appointed as a member of the Unit without the possibility that such person might be a security risk or that he or she might act in any way prejudicial to the objectives of the Unit.

(c) if the Head of the Unit is so satisfied, he or she shall issue a certificate with respect to such person in which it is certified that such person has successfully undergone a security clearance;

(d) any member of the Unit can from time to time, or at such regular intervals as the Head of the Unit may determine, be subjected to a further security screening as contemplated in subsection (5)(a);

(e) the Head of the Unit may withdraw a certificate referred to in subsection

(5) (c) if he or she obtains information which, after evaluation by him or her, causes him or her to believe that the person in question could be a security risk or could possibly act in any manner prejudicial to the objectives of the Unit;

(f) if the certificate referred to in subsection (5)(a) is withdrawn, the individual concerned shall be unfit to hold such office and the Head of the Unit must discharge him or her from the Unit.

APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF THE HEAD AND

DEPUTY HEAD OF THE UNIT

7. Appointment, remuneration and conditions of service of the Head and Deputy Head of the Unit

(1) The Head of the Unit shall be appointed by President in consultation with the Ministers from a list of candidates approved and supplied by Parliament on the recommendation of the Committee,

(a) the Head shall be appointed for a fixed, non-renewable term of between five and seven years to be determined upon appointment.

(2) The Head of the Unit may appoint, in consultation with the Committee and the Ministers, no more than four persons, as Deputy of the Unit;

(a) such appointment is to be communicated to Parliament within 30 (thirty) days of such appoint;

(b) the Deputy shall be appointed for a non-renewable term of between five and seven years to be determined upon appointment.

(3) (a) Whenever the Head of the Unit is absent or unable to perform his or her functions, the Head may appoint any of the Deputies as acting Head of the Unit,

(b) whenever the office of the Head is vacant, or the Head is for any reason unable to make the appointment contemplated in paragraph (a), the President may,

after consulting with the Ministers, designate any other Deputy Head to act as the Head;

(c) whenever a Deputy Head is absent or unable to perform his or her functions, or an office of the Provincial Unit is vacant, the Head may designate any other Deputy Head or any Head of the Provincial Offices to act as such Deputy Head.

(4)The remuneration, allowances and other conditions of service of the Head and Deputy of the Unit shall from time to time be determined by the Parliament after consultation with the Unit Committee, and in consultation with the Ministers and the Minister of Finance: Provided that-

(a) such remuneration shall not be reduced, nor shall the terms and conditions of employment be adversely altered, during their terms of office.

(5)The Ministers may allow the Head or the Deputy Head to vacate his or her office-

(a) on account of continued ill-health; or

(b) at his or her request: Provided that such request shall be addressed at least three calendar months prior to the date on which he or she wishes to vacate such office, unless the a shorter period is allowed in a specific case.

(6) If the Ministers allow the Head or Deputy of the Unit to vacate his or her post then they shall communicate that fact by message to the National Assembly.

(7) The Head shall appoint the Heads of the Provincial Offices of the Unit in consultation with the Deputy Head on the basis of the required level of experiance, training, skills, competence, and knowledge as determined by the general operation policy of the Unit.

(8) The Head shall appoint the Heads of the Local Offices, in consultation with the Deputy Head and the relevant Head of the Provincial Office for each municipality, on the basis of the required level of experience, training, skills, competence, and knowledge as determined by the general operational policy of the Unit.

8. Removal of the Head and Deputy Head of the Unit

(1) The Head or Deputy Head of the Unit of the may be removed from office only on-

- (a) the ground of misconduct, incapacity or incompetence;
- (b) a finding to that effect by the Committee; and
- (c) the adoption by Parliament of a resolution calling for that person's removal from office.

(2) (a)The President may provisionally suspend the Head of the Unit from his or her office, after consultation with the Ministers,

- (i) the Deputy Head may be suspended by the President by the in consultation with the Head, after consultation with the Ministers;
 - (ii) the Deputy may also be suspended by the Head of the Unit after consultation with the Ministers;
- pending an enquiry by the Committee into his or her fitness to hold such office.

(b) The President or the Head, as the case may be, may thereafter, in consultation with the Ministers, remove the Head or Deputy Head, as the case may be, from his or her office-

- (i) for misconduct;
- (ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned;

(c) The removal of the Head of the Unit, the reasons therefor and the representations of the Head (in any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(d) Parliament shall, within 30 days after the message referred to in paragraph (c) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the Head so removed, is recommended.

(e) The President shall restore the Head of the Unit to his or her office if Parliament so resolves.

(f) The Head provisionally suspended from office shall receive, for the duration of such suspension such salary as may be determined by the President after consultation with the Minister of Finance.

(g) The President shall also remove the Head from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (b), is addressed to the President.

(h) If the Head-

(i) vacates his or her office on the grounds of paragraph (b)(i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or

(ii) vacates his or her office in terms of paragraph (b)(ii), he or she shall be deemed to have been retired in terms of paragraph 16(4) of the *Public Service Act*, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she would have been so retired.

REMUNERATION AND CONDITIONS OF SERVICES OF THE MEMBERS OF THE UNIT

9. Remuneration and conditions of service of members of the Unit.

(1) The remuneration, allowances and other conditions of service of the Head and the Deputy Head shall be determined by Parliament after consultation with the Committee, the Ministers and with the concurrence of the Minister of Finance.

(2) The remuneration, allowances and other conditions of service benefits of members of the Unit are determined by Parliament, in consultation with the Committee, the Ministers, the Head of the Unit and with the concurrence of the Minister of Finance.

(3) If an officer or employee in the public service is appointed as a member of the Unit, the period of his or her service as a member of the Unit shall be calculated as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other condition of service. The provisions of any pension law applicable to him or her or, in the event of his or her death, to his or her dependents which are not inconsistent with this section, shall, with the necessary changes, continue to apply.

(4) No member of the Unit may strike or induce or conspire with any other member of the Unit to strike.

(5) The services of the Unit shall, for the purposes of Chapter IV of the Labour Relations Act, be deemed to have been designated as an essential service in terms of section 71 of that Act.

(6) All other conditions of service of members of the Unit are as prescribed in terms of this Act.

POWERS, DUTIES AND FUNCTIONS IN THE UNIT

10. Powers, duties and functions of the Unit

(1) The powers, duties and functions of the Unit shall include-

(a) to enforce and investigate violation of all laws and legislation addressing corruption in any manner or form;

(b) to have any powers and/or functions incidental to achieving its objectives and mandate in terms of the Constitution, this Act and any applicable law;

(c) to exercise powers and fulfill functions conferred and imposed by the general operation policy;

(d) to conduct research on the extent and nature of existing corruption and the effectiveness of existing anti-corruption mechanisms; educate state organs and institutions, private institutions affiliated to the state and independent private institutions on corruption, its forms, its effects and mechanisms available to combat it;

(e) to provide state organs and institutions with specialist and capacity support in establishing, maintaining and enforcing sector specific policies, practices and mechanisms to combat corruption within those bodies and institutions;

11. Powers, duties and functions of the Head of the Unit

(1) The Head of the Unit, as the head of the Unit, shall have authority and control over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the Unit by this Act or any other law.

(2) The powers, duties and functions of the Head of the Unit, in addition to those provided for in subsection (1), shall include the power, duty and function to-

- (a) ensure compliance with the general operation policy;
- (b) develop and plan before the end of each financial year, setting out priorities and objectives of policing for the following financial year;
- (c) determine the numerical strength of the Unit in consultation with the Committee;
- (d) organise or re-organise the Unit at national level into various components, units or groups aimed at effectively meeting its aims and objectives and fulfilling its duties and performing its functions;
- (e) establish and maintain training institutions or centres for the training of students and other members of the... in consultation with the Committee;
- (f) establish and maintain bureaus, depots, quarters, workshops or any other institution of any nature, which may be expedient for the general management, control and management of the Unit; and
- (g) perform any legal act of act in any legal capacity on behalf of the Unit

12. Powers, duties and functions of the Provincial Heads of the Unit

(1) Subject to this Act, a Provincial Head of the Unit, shall have control over the Unit under his or her jurisdiction in the province and may exercise the powers and shall

perform the functions necessary to give effect to the purpose and objects of the Unit;

(2) A Provincial Head of the Unit may, subject to section (1)-

(a) delimit any area in the province and determine the boundaries thereof until the province has been divided into as many areas as is necessary for the purposes of the organisation of the Unit under his or her jurisdiction; and

(b) establish and maintain offices and units of the Unit, to be the responsibility of the officials determined by the Provincial Heads in consultation with the National Head of the Unit, and determine the boundaries of office and unit area.

(3) A Provincial Head of the Unit shall determine the distribution of strength of the Unit under his or her jurisdiction in the province among the different areas, offices and units.

POWERS, DUTIES AND FUNCTIONS RELATING TO INVESTIGATIONS BY THE UNIT

13. Reporting of matters to the Unit

(1) If any person has reasonable grounds to suspect that an offence that the Unit has jurisdiction over, in terms of this Act, the general operation policy and other applicable law in terms of the general operation policy, he or she must report the matter in question to the relevant Provincial Office of the Unit by means of an affidavit or affirmed declaration specifying-

(a) the nature of the suspicion;

(b) the grounds on which the suspicion is based; and

(c) all other relevant information known to the declarant.

(2) The identity of a declarant shall remain confidential to the extent and for the amount of time determined by the official in charge of the investigation, in consultation with the other members of the team, and is reasonable and justifiable in the circumstances of the case.

(3) failure to comply with the provisions of subsection (1) may constitute an offence,

(a) whether or not the failure to report suspicions of corruption amounts to an offence, the consequences and how offenders are to be dealt with will be determined in the general operation policy.

(4) The declarant referred to in subsection (1) shall, to the extent that the Act is applicable, be protected in terms of the Protected Disclosures Act, 2000,

(a) where the Protected Disclosure Act does not apply, no person who makes a declaration in terms of this Act may in any way be adversely treated as a result of their declaration;

(b) where an adverse decision is made in relation to a person who has made a declaration in terms of this Act it must be reasonably shown that the declaration made had no role to play in the making of the decision.

(5) The above provisions apply, to the necessary and reasonable extent and as provided for in applicable legislation, regulations, rules and policies, to the reporting of suspected corruption to appropriate institutions within states organs and department tasked with the tackling of corruption within those bodies.

14. Powers and duties of members of the Unit.

- (1) The powers and duties of members of the Unit shall be determined by their capacity within the Unit and this Act and laws applicable to them in terms of the general operation policy.
- (2) All members of the Unit are to exercise their powers subject to the Constitution and with due regards to the fundamental rights of every person, a member may exercise such power and shall perform such duties and functions are conferred by law on or assigned to such member.
- (3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.

(b) where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.
- (4) Every member shall be competent to serve or execute any summons, warrant or other process whether directed to him or to any other member.
- (5) Any member may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without a warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic .

15. Functions of members of the Unit

(1) Any member of the Unit may, subject to the control and direction of the head of the Office, his capacity and position within the Unit, exercise such powers and must perform such duties as are conferred or imposed upon him or her by or under this Act or any other law and must obey all lawful directions which he or she may from time to time receive from a person having the authority to give such directions.

(2) A member of the Unit has the powers as provided for in the Criminal Procedure Act, 1977 which are bestowed upon a peace officer or a police official, relating to-

- (a) the investigation of offences;
- (b) the ascertainment of bodily features of an accused person;
- (c) the entry and search of premises;
- (d) the seizure and disposal of articles;
- (e) arrests;
- (f) the execution of warrants; and
- (g) the attendance of an accused person in court.

16. Investigations and inquiries by the Unit

(1) If any member of the Unit has reason to believe that an offence over which the Unit has jurisdiction, in terms of this Act or the general operations policy, has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section Unit.

(2) If the National Commissioner, the National Director of Public Prosecutions or any of the Heads of the Services refers a matter in relation to the alleged commission or attempted commission of a crime within the Unit's jurisdiction to the relevant office

of the Unit, the relevant member of the Unit shall conduct an investigation, or a preparatory investigation on that matter.

(3) If the member of the Unit at any time during the conducting of an investigation on a matter, considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the investigation so as to include any offence, whether or not it is an offence which falls within the Unit's jurisdiction in terms of this Act or general operation policy, which he or she suspects to be connected with the subject of the investigation.

(4) If the member of the Unit, at any time during the conducting of an investigation, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the Unit, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such a matter.

(5) All proceedings contemplated in subsections (7) shall take place *in camera*.

(6) The procedure to be followed in conducting an investigation shall be determined by the Head of the relevant Office of the Unit as his or her discretion, having regard to the general operation policy and the circumstances of each case.

(7) For the purpose of an investigation-

(a) the official in charge of the investigation may summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the investigating team at a

time and place specified in the summons, to be questioned or to produce that book, document or other object;

(b) the official in charge of the investigation or a person designated by him or her may question that person, under oath or affirmation administered a magistrate, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Unit, at his request be allowed, at his own expense and under the supervision of the Unit, to make copies thereof or to take extracts therefrom at any reasonable time.

(8) A summons referred to in this Act shall-

(a) be in the prescribed form;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the person who summoned him;

(c) be signed by the Head by the office of the Head of the Office that is conducting the investigation or a person authorised by him or her; and

(d) be served in the prescribed manner.

(9) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of this Act: Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands on trial on a charge contemplated in subsection (11) (b) or (c), or in section 319 (3) of the Criminal Procedure Act, 1955.

(10) A person appearing in terms of (7)-

(a) may be assisted at his or her examination by an advocate or an attorney;

(b) shall be entitled to such witness fees as he or she would have been entitled to if he or she were a witness for the state in criminal proceedings in a magistrate's court.

(11) Any person who has been summoned to appear before the member of the Unit and who-

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she has been excused by the relevant member of the Unit from further attendance;

(b) at his or her appearance before the Unit-

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;

(ii) refuses to be sworn or to make an affirmation after he or she has been asked to by the Unit to do so;

(c) having been sworn or made an affirmation-

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true, shall be guilty of an offence.

(12) If the relevant member of the Unit considers it necessary to hear evidence order to enable the relevant member of the Unit to determine if there are reasonable grounds to conduct an investigation in terms of this Act, the relevant member of the Unit may hold a preparatory investigation.

(13) The provisions of subsection (2) to (11), including section 17, with the necessary changes, shall apply to a preparatory investigation referred to in subsection (12).

17. Entering upon premises by a member of a Unit investigating team

(1) The official in charge of the investigation or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an investigation at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that investigation is or is suspected to be, and may-

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in

question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the investigation in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the Unit, at his or her request be allowed, at his or her own expense and under the supervision of the relevant member of the Unit, to make copies thereof or to take extracts therefrom at any reasonable time.

(2) Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including-

- (a) a person's right to, respect for and the protection of his or her dignity;
- (b) the right of a person to freedom and security; and
- (c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (12).

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a

warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating-

(a) the nature of the investigation;

(b) that there exists a reasonable suspicion that an offence, which might fall within the jurisdiction of the Unit, has been or is being committed, or that an attempt was or had been made to commit such an offence; and

(c) the need, in regard to the investigation, for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

(6) A warrant issued in terms of this section may be issued on any day and shall be of force until-

(a) it has been executed;

(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or

(c) the expiry of three months from the day of its issue, whichever may occur first.

(7) (a) Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or

window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph (a) shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

(8) A warrant issued in terms of this section shall be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

(9) Any person executing a warrant in terms of this section shall immediately before commencing with the execution-

(a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(10) (a) The official in charge of the investigation or any person that forms part of the investigative team may without a warrant enter upon any premises and perform the acts referred to in subsection (1)-

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that-

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph (a) shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

(11) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the investigation and that such information is necessary for the investigation, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

(12) Any person who-

(a) obstructs or hinders the official in charge of the investigation or any other person authorized by that official in the performance of his or her functions in terms of this section;

(b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading, shall be guilty of an offence.

18. Confidentiality of operations of the Unit

Notwithstanding anything to the contrary contained in any law members of the... are to exercise their powers, fulfill their duties and functions with the utmost discretion and, to the extent required in each case, confidentiality with due regard to the public and private reputation of individuals that form part of its investigations and the right to be presumed innocent until proven guilty.

19. Hand-over on conclusion of investigation

Once an investigation has been concluded, the information and evidence gathered in the course of the investigation is to be presented to the appropriate member of the National Prosecuting Authority, in terms of the National Prosecuting Authority Act, who will exercise his or her powers on terms of the National Prosecuting Authority Act, and determine whether or not to prosecute or whether further action is required,

(a) the decision of whether or not a prosecution can be instituted or further action is required is to be made by the member of the National Prosecuting Authority independently of any member of the Unit who had been involved in any way in the investigation under consideration;

- (b) no member of the investigative team and the Unit may interfere or unduly influence a decision to be made by the Prosecuting Authority;
- (c) the prosecutors in the National Prosecuting Authority are responsible for making the decision and for conducting the prosecution.

GENERAL PROVISIONS

20. Oath or affirmation by members of the Unit

(1)(a) A member of the Unit shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

(b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the Unit. or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

(2)(a) All members of the Unit must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of this Act, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely-

'I (insert full name) do hereby swear/solely affirm that I will in capacity as (insert post), uphold and protect the Constitution and the fundamental rights rights entrenched therein and enforce the Law of the republic without fear, favour or prejudice and, as the circumstances of any case may require, in accordance with the Constitution and the Law. (In the case of an oath: So help me God.)'

(b) Such an oath or affirmation shall-

(i) in the case of the Heads and Deputy Heads of the various Offices, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the Head is situated; or

(ii) in the case of other members of the Unit, be taken or made before the Head in whose Office the person concerned has been appointed or before the most senior judge or magistrate at the court where the person is stationed, who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

21. Finances, expenditure and financial accountability of the Unit.

(1) The Head of the Unit shall appoint, or second in terms of applicable law, a suitably qualified and experienced person as Chief Financial Officer for the purpose of assisting the Head in the performance of all of his or her financial functions pertaining to the Office of the Unit,

(a) each Office at the provincial and local level shall also have a Chief Financial Officer to be appointed by the relevant Head in consultation with the Chief Financial Officer appointed to the national Head's Office.

(2) The expenses incurred in connection with-

(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the Unit; and

(b) the remuneration and other conditions of service of members of the Unit,

shall be defrayed from monies appropriated by Parliament for this purpose to the departmental vote of the departments of the Ministers in terms of the Public Management Act.

(3) The national Head shall, in consultation with the Minister of Finance and the Chief Financial Officer and the Ministers, prepare the necessary estimate of revenue and expenditure of the Unit.

(4) The national Head of the Unit, as the accounting officer of the Unit, shall, subject to the Public Finance Management Act-

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the Unit.;

(b) cause the necessary accounting and other records to be kept; and

(c) ensure the annual report on the performance of the Unit. is included as a distinct programme in the annual report of the Unit.

(5) The records referred to in subsection (4)(b) shall be audited by the Auditor-General.

22. Final responsibility to Parliament

(1) The Ministers shall have final responsibility to Parliament for the operations of the Unit that relate to the functions and responsibilities of their departments.