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Zola Vice - Submission on the SAPS Amendment Act

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Attachments: Submission SAPS Amendment Act 7 of 2012.pdf; Hon LS Chikunga SAPS Amendment Bil 2012.pdf

Dear Ms Vice

Attached please find our submission on the SAPS Amendment Bill.

Kind Regards

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Submission to the Portfolio Committee on Police

South African Police Service Amendment Bill [B7 of 2012]

27 March 2012

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1. Introduction

1.1 APCOF would like to thank the Portfolio Committee for the opportunity to offer this submission. As noted in the introduction to the Bill, the Constitutional Court judgment that has prompted this legislative amendment has placed a positive obligation on the South African government to establish a sufficiently independent body to address corruption and organised crime.

2. About APCOF

2.1 The African Policing Civilian Oversight Forum (APCOF) is a network of African practitioners active in police reform and civilian oversight of policing. APCOF works for police services that uphold the rule of law and are mindful of human rights. Established in 2004, its members are drawn from both civil society and government. APCOF promotes civilian oversight of police in Africa by supporting the development of accountability and oversight mechanisms over the police. APCOF utilises the expertise of its membership to promote learning and networking on the continent. It is actively engaging in country reform projects, regional dialogues, and is working at a continental level to prioritise police accountability. It achieves this through research, evidence based interventions, knowledge exchange, technical support, lobby and advocacy, and facilitating ongoing dialogue between citizens, civilian oversight authorities and the police.

2.2 APCOF works to support police reform at three levels:

- Continental level: primarily with the African Commission on Human and Peoples Rights (ACHPR),
- Regional level: through support for local police reform networks; and
- National level: through support to police reform primarily through support to civilian oversight organisations and civil society on the issues where it believes its position, as a continental forum comprising of experienced practitioners, can add significant value.

3. Comments on the Bill

3.1 APCOF congratulates the Ministry of Police and SAPS for its response to the Constitutional Court judgment, and the efforts made (as reflected in this Bill) to strengthen

the independence of the Directorate for Priority Crimes (DPCI).

3.2 This submission is based on the view that the Constitutional Court judgment requires that the DPCI be both structurally and operationally independent, and that it be sufficiently insulated from political influence.

3.3 In this submission, APCOF supports the view that, when placed within existing police structures, agencies such as the DPCI are at significant risk for interference. We therefore believe, that special provisions need to be made to reduce such risks. This concurs with the Constitutional Court judgment, which quotes the OECD's report on models for specialised anti-corruption institutions.

3.4 It is APCOF's view that the Bill does not create a fully independent new body, but seeks to address the concerns of the Constitutional Court judgment through the existing "Hawks" structure. We submit that this misses a vitally important opportunity to establish a fully independent structure to safeguard all South Africans from a range of damaging offences. Further, the proposal to retain the DPCI within SAPS creates an awkward and confused authority structure in SAPS that can potentially undermine hierarchy in both SAPS and the DPCI. We believe that the South African government is selecting an option that is unlikely to remove all the risks highlighted by the Constitutional Court and may well result in another legal challenge with further damaging effect on priority crimes investigation.

3.5 Given the framework selected within this Bill to continue to operate the DPCI within the SAPS, we note a range of concerns.

3.6 Location of the Unit

3.6.1 The Constitutional Court judgment noted the DPCI could not be adequately independent for so long as the National Commissioner of Police had a role in referring cases to the unit and determining what services the DPCI could use. While the Bill meets the narrow interpretation of the judgement; it does not address important issues raised by the subordination of the head of the DPCI to the National Commissioner of the SAPS namely;

- The Amendment Bill provides for the head of the DPCI to hold the rank of Deputy National Commissioner. This means that for all practical purposes, with the

exception of narrowly prescribed circumstances; the DPCI head is subordinate to the National Commissioner.

- The Amendment states that the National Commissioner should draft the budget **after** consultation with the DPCI, it does not require him/her to do so **in** consultation with the head of the DPCI. This lack of budget and financial independence is further entrenched by retaining the DPCI in the SAPS. The National Commissioner of the SAPS will remain the Chief Financial Officer of the SAPS, and will account for the budgeting and expenditure of the unit.

3.6.2 APCOF submits that the location of the DPCI in SAPS will continue to come up against the challenges on independence illustrated above and thus an alternative structure such as a Chapter 9, the location of the DPCI in another entity such as the office of the Public Protector or a dedicated mechanism such as the the Independent Police Investigative Directorate (IPID) formerly the Independent Complaints Directorate (ICD) should be established.

3.7 Mandate

3.7.1 A new proposed section 17D(1)(a)(A) of the SAPS Amendment Bill states that the functions of the DPCI are, among others, to prevent, combat and investigate " particular selected offences contemplated in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act."

3.7.2 APCOF submits it is unclear what these "selected offenses" are and who will select the offenses. Section 17D(1)(a) and 17D(1)(c) states that national priority offenses and other offences can be investigated at discretion of Head or if it is referred to the DPCI by the National Commissioner, but this remains subject to policy guidelines issued by the Minister. APCOF submits that fails to create sufficient independence and that rather such policy must be submitted to Parliament for approval.

3.8 Appointment of the head and staff of the DPCI

3.8.1 In terms of a proposed section 17CA of the SAPS Amendment Bill, the Head of the DPCI, the Deputy Head and the Provincial Heads are to be appointed by the Minister for a non-renewable fixed term for a period "not exceeding seven years". Section 17CA(3)

requires that the Deputy Head be appointed by the Head with the concurrence of the Minister of Police and section 17CA(4) requires that the Provincial Head of the DPCI to be appointed by the Head with the concurrence of the Minister of Police. This means that the Minister has a veto right over the appointment of the Deputy Head and the Provincial Heads of the DPCI.

3.8.2 APCOF submits it is inappropriate that the political head of the Police has the sole discretion to appoint the Head. This would render the Head insufficiently independent both in fact and in terms of perception by the public. APCOF therefore submits that the appointment of Head of the DPCI must be made after a public consultation and approval by a Parliament. APCOF further submits that the veto authority of Minister on the appointment of DPCI staff needs to be removed.

3.8.3 The wording of the proposed section also means that a person could be appointed for any period of less than seven years. This means that the Minister has discretion in terms of the length of the appointment of the Head, Deputy Head and Provincial Heads. Shorter terms of tenure could, arguably, be used to render the DPCI less effective or ineffective. This should be amended to provide a range of service from between 5 – 7 years.

3.8.4 No objective minimum criteria are prescribed regarding the skills, experience or commitment to independence of any of the men or woman appointed to senior positions in the DPCI. APCOF submits that the wording in section 17CA should be more specific in terms of the skills requirement of the candidates and that the person appointed as Head of the DPCI should be appointed based on additional criteria such as political non-partisanship/impartiality, demonstrated ability to act independently, demonstrated commitment to addressing priority crimes in the mandate of the DPCI.

3.9 Dismissal of the head and staff of the DPCI

3.9.1 Security of tenure remains a problem in the Bill. Security of tenure is central to the ensuring insulation from political interference. The Bill fails to establish this security and therefore needs significant amendment. In particular the section around the issue of processes for instituting an inquiry into the fitness of the Head of DPCI needs further development. We submit that the Act needs to make specific provision that

- Any inquiry of this nature needs to be on the authority of the Minister
- Any inquiry needs to be undertaken by an independent authority.
- Inquiry needs to have significant authority, such as members of the judiciary.
- Provisions in respect of due process also need to be made in relation to other members of the DPCI.

3.10 Security Clearance

3.10.1 Section 17E of the SAPS Amendment Bill deals with the requirement that every member of the DPCI needs to obtain security clearance in terms of the relevant legislation in order to work and to continue working at the DPCI. Other members of the Police Services are not subjected to the same requirement. Moreover in terms of subsection (4) the National Commissioner (not the Head of the DPCI) may transfer an individual or if such a person cannot be redeployed elsewhere may discharge such a person if his or her security clearance is degraded, withdrawn or refused "on reasonable grounds".

3.10.2 It is unclear why security clearance is required for all members of the DPCI. There is nothing inherently related to national security in the investigation of corruption and most investigators would not encounter issues of national security. While a minimum number of members of the DPCI may be required to obtain security clearance in order to deal with matters of national security, this sweeping requirement is unnecessary open to abuse and could well create the well-founded perception that the DPCI is not independent.

3.11 Political Oversight and Accountability

3.11.1 The SAPS Amendment Bill places the responsibilities and powers, previously invested in the Committee, in terms of determining the policy guidelines of the DPCI in the hands of the Minister of Police (Section 17D(a)). APCOF submits that this does not reduce the possibility of political influence over investigations.

3.11.2 APCOF submits replacing the Committee of Ministers with a single Minister cannot be sufficient to address the concerns of political interference raised in the judgment. APCOF proposes oversight and accountability including performance monitoring must be vested in Parliament whereas coordination can be managed operationally.

4 Conclusion

4.1 Given the short period of time for consideration of the Bill our recommendations are broad and will require more detailed consideration and consultation. We would thus appreciate the opportunity to make an oral submission during the hearings scheduled for 23 – 25 April 2012.