



ACFESM

**Association of Certified Fraud Examiners
South Africa Chapter**

(Number 91)

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SUBMISSION

TO

THE PORTFOLIO COMMITTEE ON POLICE

BY

THE ASSOCIATION OF CERTIFIED FRAUD EXAMINERS

1. The Association of Certified Fraud Examiners

- 1.1 The Association of Certified Fraud Examiners (ACFE) is an international, professional organisation dedicated to fighting fraud and white-collar crime through prevention and education.
- 1.2 It has offices in North America, Europe and Japan and chapters around the world including in South Africa. It has more than 55,000 members, 256 chapters and as represented in 40 countries.
- 1.3 Corruption plays a significant role in fraud and white-collar crime and is therefore a key focal area of the Association.

2. The ACFE South African Chapter

- 2.1 The South African Chapter was established as a professional body in 1998.
- 2.2 It has also established Interest Groups in various regions in South Africa and in neighbouring countries which meet regularly to promote network and training opportunities for members.
- 2.3 The Chapter provides the premier forum and platform for local forensic practitioners (accounting, audit, IT, investigative and legal) to interact with each other in the fight against white-collar crime and corruption.
- 2.4 With over 3000 registered individual members in South Africa, representing approximately 600 companies, of which 63 are corporate members, the Chapter's membership is drawn from both the public and the private sector. It has undertaken various collaborative initiatives in conjunction with law enforcement agencies such as the Hawks.

- 2.5 Corruption has a corrosive effect on the fabric of South African society and the SA Chapter is committed to fighting corruption in a structured, professional manner in conjunction with the relevant law enforcement agencies.
- 2.7 Based on our experience and the collective experience of our members, For this to happen effectively, the Chapter believes that the underpinning legal basis for the structure needs to be strong and as independent as possible.
- 2.8 The Chapter therefore offers the following comments on the Bill currently before the Portfolio Committee and the establishment of a dedicated anti-corruption entity.

3. The South African Police Bill [B7-2012] (the Bill)

3.1 Background

- 3.1.1 In the matter of *Glenister v President of the RSA & Others [2011] JOL 26915 (CC)*, the Constitutional Court found that the creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and that the legislation relating to the Directorate for Priority Crime Investigation (the DPCI) legislation could not be invalidated on that ground alone.
- 3.1.2 Indeed, the SAPS together with various other agencies, has an obligation to prevent, combat and investigate crime, to protect and safeguard the inhabitants of South Africa and their property.
- 3.1.3 For this reason, the decision taken by the Legislature to abolish the Directorate : Special Operations (the DSO) and to create the DPCI therefore did not in itself offend the Constitution.
- 3.1.4 The Constitutional Court was clear that the Constitution imposes an obligation on the State to establish and maintain an independent body to combat corruption and organised crime.
- 3.1.5 However, the Court was also of the view that the specialised unit which the impugned legislation has established - the DPCI - did *not* meet the requirement of independence.

"We do not prescribe to Parliament what that obligation requires. In summary, however, we have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required. We have also found that the interpretive admonition in section 17B(b)(ii) of the SAPS Act is not sufficient to secure independence. Regarding the entity's conditions of service, we have found that the lack of employment security, including the existence of renewable terms of office and of flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. We have further found that the appointment of its members is not sufficiently shielded from political influence".

- 3.1.6 Flowing from the above, the Constitutional Court upheld the appeal in the matter and found the offending legislative provisions establishing the DPCI constitutionally invalid, suspending the declaration of constitutional invalidity for a period of 18 months in order to give Parliament the opportunity to remedy the constitutional defect.
- 3.1.7 This period will expire on 17 September 2012 and the Bill has been prepared with a view to remedying the constitutional defect referred to.

3.2 Issues to be addressed

3.2.1 In the light of the Court's judgment - and its focus on, amongst other things, the international agreements to which South Africa is party (such as UN, AU and SADC Conventions) as well as, critically, the OECD report on Specialised Anti-Corruption Institutions : Review of Models (which although not binding was nevertheless considered to be relevant) - key issues which need to be considered in relation to the Bill are:

- i. independence;
- ii. specialisation;
- iii. security of tenure;
- iv. guaranteed financial and infrastructural resources; and
- v. adequate training in the specialised functions of an anti-corruption entity.

3 Independence

3.3.1 Flowing from the judgment, the State must, in order to safeguard and protect the rights contained in the Bill of Rights in our Constitution, create an anti-corruption entity with the necessary independence, this obligation being constitutionally enforceable.

3.3.2 The Court considered that the provisions creating the DPCI, whilst, to a certain extent, "shielding it from undue political interference" do *not* provide an adequate measure of autonomy.

3.3.3 This lack of independence is reflected in there being no security of tenure of employment for members of the entity and in the provision for political oversight of the functioning of the entity.

3.3.4 Whilst we acknowledge that the Constitution requires a member of the Cabinet to be responsible for policing - and this may, at first sight, imply political management of policing - there is no reason what political accountability *cannot* co-exist with an appropriately independent anti-corruption entity which complies with the Bill of Rights.

3.3.5 The issue that raises concerns is the *degree* of management by political actors for the independent functioning and operation of the entity.

3.3.6 In our view, this remains an issue in the Bill.

3.4 Specialisation

3.4.1 The use of this term encompasses the need (in the words of the OECD Report) for:

"an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting 'pre-emptive obedience'"

3.4.2 The focus of the current DPCI is on "priority crimes", which means that the DPCI is not a dedicated anti-corruption entity.

3.4.3 In our view, the fact that the DPCI continues to be responsible for investigating corruption in terms of the Bill, does not allow adequately for the necessary degree of specialisation.

3.5 Security of tenure

- 3.5.1 The head of the DPCI and the persons appointed to it do not enjoy appropriate job security.
- 3.5.2 The head of the DPCI is an SAPS Deputy National Commissioner, "appointed by the Minister in concurrence with the Cabinet". Apart from the head, the DPCI comprises persons appointed by the National Commissioner of the SAPS "on the recommendation" of the head, plus "an adequate number of legal officers" and seconded officials.
- 3.5.3 The Minister must report to Parliament on the appointment of the DPCI head and the Commissioner may discharge a member of the service if, for reasons other than unfitness or incapacity, the discharge is described as promoting "efficiency or economy" in the SAPS, or will "otherwise be in the interest of" the SAPS. This provision appears also to cover the head of the DPCI.
- 3.5.4 By way of contrast, the NPA Act provides that a deputy NDPP may be removed from office only by the President, on grounds of misconduct, continued ill-health or incapacity, or if he/she is no longer a fit and proper person to hold the office. Parliament also holds a veto over the removal of a deputy NDPP. The reason for the removal, and the representations of the deputy NDPP, must be communicated to Parliament, which may resolve to restore the deputy NDPP to office. In addition, before the statutory amendments now at issue, the head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration which was determined by way of reference to the salary of a High Court judge.
- 3.5.5 The absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of security of tenure of employment. Not only do the members not benefit from any special provisions securing their remuneration, the absence of secured remuneration levels tends to indicate a lower level of status for the entity.
- 3.5.6 The Constitutional Court's most significant concern about the relevant provisions arises from the fact that the entity's activities must be coordinated by Cabinet.
- 3.5.7 The statute provides that a Ministerial Committee, which must include at least the Ministers for Police, Finance, Home Affairs, Intelligence and Justice, and may include any other Minister designated from time to time by the President, may determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences.
- 3.5.8 The head of the DPCI, as a Deputy National Commissioner and a member of the SAPS, is accountable to the National Commissioner. Since her/his post is not sufficiently secure as to tenure, whose post, this inevitably creating vulnerability to political pressure for both the National Commissioner and the DPCI head.
- 3.5.9 In addition to this, the power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI poses a clear risk of executive and political influence on investigations and on the entity's functioning since this places significant power in the hands of senior politicians, who could also, depending on the circumstances, also be the focus of anti-corruption investigations.
- 3.5.10 This means that a decision as to whether or not to investigate a matter concerning corruption, would be subject to the Ministerial Committee's policy guidelines and therefore be dependent on a political decision.
- 3.5.11 Despite an emphasis in the Bill on Parliamentary oversight, the level and degree of oversight would appear to be potentially minimal.
- 3.5.12 This is because, firstly, the level of parliamentary oversight the new provision requires is less than that of the Ministerial Committee and, secondly, Parliament's powers are insufficient to allow it to rectify any deficiencies of independence that may flow from the extensive powers of the Ministerial Committee.
- 3.5.13 Whilst we are confident that Parliament will no doubt play its oversight role, this cannot cure the defect of the independence already having been removed via the Committee in relation to the functioning of the Department, more especially, when the Ministerial Committee has the power to determine what the reports to be submitted to Parliament, will contain.

- 3.5.14 The complaints mechanism with a retired judge and possible prosecution, also operates only *after* the fact, which can never be as effective as reducing the potential for things to happen in the first instance. This is even though a member of the public may complain about infringement of rights caused by an investigation, and permits "any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other nature, exerted upon him or her regarding the conducting of an investigation", also to complain.
- 3.5.15 The extent to which the retired judge may also be blocked in a refusal for information by the NDPP on "reasonable grounds" is also problematic.
- 3.5.16 All of this tends to support our view that only adequate mechanisms designed to prevent interference in the first place will ensure that the concerns raised by the Constitutional Court will be addressed effectively.

The SA Chapter's recommendation

As set out at the beginning of this submission, we do not believe that the Bill in its current form addresses the pertinent issues raised by the Constitutional Court in the *Glenister* matter.

We are also concerned that, even if legislation were to be enacted for an anti-corruption entity that was similar to that which was previously in place for the disbanded DSO, this would also not ensure true independence as envisaged by the Constitutional Court.

For these reasons, as a Chapter, we recommend that the Committee give consideration to:

- the creation of a dedicated anti-corruption entity as a Chapter 9 institution; and
- a Constitutional amendment to facilitate this.

Kind Regards



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Zola Vice - objection to the current SA Police Services Amendment Bill

From: Claudio Pace <1paceahead@gmail.com>
To: <zvice@parliament.gov.za>
Date: 2012/04/12 12:14 PM
Subject: objection to the current SA Police Services Amendment Bill

Dear Zola,

Please note my objection to the current SA Police Services Amendment Bill .

Kind regards,

C.Pace

