



**Submission by the Institute for Security Studies in response to  
the SAPS Amendment Bill of 2012**

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Submission by the Crime and Justice Programme, Institute for Security Studies

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## Introduction

The Institute for Security Studies (ISS) would like to thank the Portfolio Committee on Police for the opportunity to offer this submission. The ISS is an African non-governmental policy research institute. Our work is aimed at contributing to a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy and collaborative security.

The Crime and Justice Programme of the ISS works to inform and influence policy and public discourse on crime, its prevention and criminal justice. We do this by conducting research, analysing policy, disseminating information and providing expertise as our contribution towards a safer and secure society. Since 1996, the Crime and Justice Programme has been conducting research focused specifically on improving policing in South Africa. More information about the ISS and its work can be found on our website: [www.issafrica.org](http://www.issafrica.org).

This submission draws on and reflects a legal opinion about the SAPS Amendment Bill prepared for the Institute for Security Studies by Constitutional law expert from the University of Cape Town, Professor Pierre de Vos. In summary our assessment, in which we concur with Professor de Vos is that:

*As it stands, an overall assessment of the proposed amendments suggest that the amendments fall far short of what is required by the Glenister judgment in several ways. This is because the amendments do not remove the potential for political influence and interference in the work of the Hawks because the new body is neither sufficiently structurally or operationally independent and cannot reasonably be perceived as being so independent. The amendments provide far too much power for politicians to regulate the work of the unit, rendering it not sufficiently operationally independent. Neither is it sufficiently structurally independent because of lack of safeguards regarding security of tenure for all members of the unit as well as effective mechanism to report and*

*investigate allegations of political influence and interference in its work. Both in fact and in terms of a reasonable perception of independence the proposals for a reconfigured Hawks fail to safeguard independence as required by the judgment.<sup>1</sup>*

The identification, investigation and prosecution of cases of corruption are matters of national importance, not least because corruption undermines development and the provision of services. It is thus important not to delay the establishment of an anti-corruption unit that meets the requirements of the Constitutional Court judgement. Since the SAPS Amendment Act falls short of meeting these requirements, were it to be passed in its current form it may well result in another legal challenge, and thus result in a delay in the investigation and processing of cases. We hope that the recommendations contained in this submission will assist the Committee to craft a solution that will pass the test of Constitutionality as well as provide South Africans with the best possible unit to investigate corruption.

### **General remarks**

There are two key questions when considering the SAPS Amendment Bill, the first is whether the changes made to the Bill provide an adequate degree of independence as required by the Constitution for a body that is to investigate corruption. The second is whether the Bill takes us closer to having an ideal structure for such a unit, rather than one that has been minimally altered to meet the requirements of the judgement. In our view the Bill achieves neither.

With regard to the first question, there are eight elements that the Constitutional Court judgement addressed in relation to the independence of the unit<sup>2</sup>. In summary these are:

1. Job security for members of the DPCI<sup>3</sup>.
2. Security of tenure for the head of the DCPI<sup>4</sup>.
3. Legally secured remuneration levels for DCPI staff.<sup>5</sup>

4. The need for the Head of the DPCI not to be subordinate to the Ministerial Committee and the National Commissioner of the SAPS in relation to the referral of cases to the unit for investigation.<sup>6</sup>
5. The need for the head of the DPCI not to be subordinate to the SAPS Commissioner in relation to the involvement of *inter alia* prosecutors in investigations.<sup>7</sup>
6. Improved powers of oversight for parliament and a reduction of the powers of Ministerial Committee, in particular in relation to having control over what is reported to parliament.<sup>8</sup>
7. The need for a proactive and open complaints procedure.<sup>9</sup>
8. A requirement that members of the DPCI take an oath of office committing to impartiality etc. (para 217).<sup>10</sup>

While the SAPS Amendment Bill does seek to address most of these specific issues, the approach taken is minimalistic. In other words, the Bill seeks to apply minimal changes to the existing status and location of the Directorate and to address key problems, such as the powers of the Ministerial Committee and the subordination of the head of the DPCI to the authority of the National Commissioner of the SAPS by a sleight of hand, rather than by creating a substantially strong and independent crime investigating agency.

Whilst we are critical of the approach taken in the Bill we are also acutely aware of the serious practical implications of creating a new structure by moving the DPCI out of the SAPS. In particular, we are aware of the fact that such a move may affect on-going investigations by the Hawks and any new investigations that may be undertaken in this period. We believe that it is of vital importance that the Portfolio Committee and stakeholders (including ourselves) give these matters serious consideration and draw on the knowledge and expertise that exists within the DPCI and other government agencies to identify ways in which this can be addressed, should our recommendation to remove the DPCI from the SAPS be considered, or accepted.

Finally we would like to draw the attention of the Committee to the fact that given the short period of time for consideration of the Bill before the deadline for submissions to parliament, our recommendations are broad and will require more detailed consideration and consultation.

We request that the Committee grants us an opportunity to make an oral submission during the hearings scheduled for 23 – 25 April.

### **Shortcomings of the SAPS Amendment Bill**

In the following sections we identify the shortcomings of the SAPS Amendment Bill (hereafter 'the Bill') in relation to the following inter-related issues:

- The location of the agency. The primary question considered is whether the DPCI can have an adequate degree of independence while located as a directorate of the SAPS.
- The appointment and dismissal of the head and other staff of the unit
- Oversight and accountability of the agency
- Mandate of the unit

These four issues are not the only matters requiring attention if we are to create the best possible institution to investigate and counter corruption. However, we have restricted this submission to these issues, which we regard as key in order for the new DPCI to meet the requirements of the Constitutional Court judgement. We would additionally like to draw your attention to the attached legal opinion by Professor de Vos that identifies other errors and inconsistencies in the Bill.

#### **Location of the DPCI**

The Memorandum accompanying the SAPS Amendment Bill argues that "[T]he Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of Cabinet must be 'responsible for policing'."<sup>11</sup>

The memorandum therefore conflates policing with the activities of an anti-corruption agency. While there is no doubt that the investigative powers and functions of an anti-corruption unit would need at least mirror those of the police, there is no necessary requirement for the Minister of Police to bear responsibility for the anti-corruption unit. Indeed, the memorandum fails to provide a compelling reason for why the unit should fall under this Minister's remit. It would be equally conceivable and logical for the unit fall under the political authority of the Minister of Finance or the Minister of Justice and Constitutional Development.<sup>12</sup> This is a

matter that requires consideration during the process of consultation. It is equally conceivable that such a unit might be a directorate of the Public Protector's office or of the Auditor General.

Even if we were to accept that the DPCI should remain under the authority of the Minister of Police, we have to ask whether it should be located under the authority of the National Commissioner of Police.

The Constitutional Court judgement was clear that the unit 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 whether the DPCI could make use of the services of, for example, independent prosecutors. The Amendment Bill addresses these two issues by:

- (i) granting the head of the DPCI the authority to arrange for the secondment of staff from other departments (Section 17F), a change which we regard as positive and necessary;
- (ii) by amending Section 16 to give the DPCI head, rather than the National Commissioner, the authority to accept cases for investigation that are referred by Provincial Commissioners or the National Commissioner (s17D); and
- (iii) giving the DPCI head authority to overrule a decision by the National Commissioner if there is a dispute about what cases fall within the remit of the DPCI.

While these measures meet a narrow interpretation of the judgement; they do not address the important issues raised by the subordination of the head of the DPCI to the National Commissioner of the SAPS. As de Vos notes, "indirect influence or interference can occur where the political principles or their politically accountable underlings can influence the operation of the unit...the head of the DPCI, as a Deputy National Commissioner and a member of the SAPS, is accountable to the National Commissioner, whose post lacks sufficient security of tenure, thus inevitably creating vulnerability to political pressure. (This means that the National Commissioner of the SAPS is not suitably independent and cannot play any direct role in the supervision of the work of a truly independent corruption-fighting unit.)"<sup>13</sup>

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 the narrowly prescribed above-listed situation; the DPCI head is subordinate to the National Commissioner. This is entrenched through S17H which provides for the National Commissioner to determine the budget of the DPCI.

Indeed, while 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 formulation implies that the National Commissioner merely has to have input from the DPCI head, and is not required to draft the budget collaboratively with him or her.

Since a unit's functioning is largely determined by its access to funds, this places the National Commissioner in a powerful position, and would act as a disincentive for the head of the DPCI to cross the National Commissioner even where not doing so might conflict with the mandate of the unit, such as if the DPCI had to investigate allegations of corruption or involvement in organised crime by the National Commissioner; or if the head of the DPCI wished to appoint a member of SAPS to his/her team against the wishes of the National Commissioner. While again this could be minimally addressed by a minor adjustment to allow the head of the DPCI to determine the budget of the unit, the National Commissioner of the SAPS must (according to the Public Finance Administration Act) remain the Chief Financial Officer of the SAPS, and will have to account for the budgeting and expenditure of the unit. By virtue of this, the National Commissioner would have detailed insights into the performance and functioning of the unit, including details of cases being investigated by the unit. This could allow for indirect influence over the unit.

The Amendment Bill continues to subordinate the DPCI to the National Commissioner of Police in a manner that we believe continues compromises its independence and fails to fully achieve the principle of independence required by the Constitutional Court, in particular through providing the National Commissioner with power over the appointment and dismissal of staff of the DPCI (as discussed in the next section).

### **Appointment and dismissal of the head and staff of the DPCI**

The Constitutional Court judgement found that the DPCI needed to be both structurally and operationally independent in order to meet the requirements of the Constitution and South Africa's international obligations. According to de Vos, structural independence relates to the appointment of the members of the unit, the conditions under which its members operate and its funding. All of these must all be regulated in such a manner as to ensure it is independent in fact and is also perceived to be independent by the public.

### **Appointment of the head, deputy head and provincial heads**

In terms of a proposed section 17CA of the SAPS Amendment Bill, the Head of the Directorate, 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".

This section raises several problems.<sup>14</sup> First, the appointment is to be made by the political head of the South African Police Service, namely the Minister of Police. It is inappropriate that the political head of the Police, a politician whose colleagues may be investigated by the unit, 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.

Section 17CA(1) proposes that the Minister of Police, with the concurrence of the Cabinet, appoint the Head of the Directorate for a non-renewable term "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 Directorate 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 Directorate.

No objective minimum criteria are prescribed regarding the skills, experience or commitment to independence of any of the men or woman appointed to these positions. In theory the Minister could appoint an outgoing member of Parliament of



the governing party (or another political party) or a sitting member of the highest decision making body of the governing political party (or another political party), somebody without any police experience or someone embroiled in allegations of corruption, in any of these positions.

The absence of a mechanism that provides for safeguards against the appointment of individuals who are, or who are perceived not to be politically partial, the perception may well be created that the Directorate is not in fact independent and will thus fly in the face of the requirement that the body should be independent in fact and in terms of perceptions.

In addition, the wording of the proposed section means that a person could be appointed for any period of less than seven years. This means that the Minister has some discretion in terms of the length of the appointment of the Head, Deputy Head and Provincial Heads (as long as this term is no longer than seven years). This could, arguably, be used to render the Directorate less effective or ineffective.

If appointments are made for short periods it would make it difficult for the individuals appointed to gain the necessary knowledge, skill and confidence to do their jobs effectively, thus rendering the Hawks less effective than required.

In addition, the term of office of seven years is arguably too short. Since the members of the DPCI remain members of the Police Service, are subject to the other provisions of this Chapter employed in terms of the South African Police Services Act, and are therefore not guaranteed any special pension benefits at the end of the seven year term, might place the Head, the Deputy Head and the Provincial Heads remain in a vulnerable position as they may have to return to the other divisions or posts with the SAPS after the completion of their seven year stint, rendering them susceptible to political influence and interference. If these appointees need to return to other posts in the SAPS in order to secure for themselves a liveable pension on retirement, they might tread carefully regarding politically sensitive cases in order not to jeopardise their chances for such "redeployment" back into the SAPS or other government agencies.

Moreover the proposed section 17CA(12) provides that the Head and Deputy Head, who would normally have to retire at the age of 60, may be retained at the Discretion of the Minister for a period of up to two years. If a person of suitable age is thus appointed to one of these positions it would render such a person vulnerable to political influence or interference as the person, rightly or wrongly, might believe that the Minister will not exercise his or her discretion in his or her favour unless politically sensitive cases are handled to take account of the wishes of the Minister.

Despite the proposed amendments, the possibility of political influence and interference in the work of the Directorate looms large, both in fact and in terms of reasonable perceptions about such influence and interference. The requirements set out in the *Glenister* judgment have therefore not been met.

#### **Dismissal of the head of the DPCI<sup>15</sup>**

Section 17DA provides wide discretion for the Minister to suspend and remove the Head of the Directorate from office. In terms of the proposed amendment, the Minister is empowered in terms of section 17DA(2)(a) to provisionally suspend the Head of the Directorate, pending an "enquiry into his or her fitness to hold office as the Minister deems fit" and then may then remove him or her from office for misconduct; on account of ill-health; on account of incapacity to carry out his or her duties of office efficiently; or on account thereof that he or she is no longer a fit and proper person to hold the office concerned. Subsection (3) allows removal from office by an address of the two Houses of Parliament for the same reasons as set out above.

Where the Head is suspended, he or she shall receive no salary, or such salary as the Minister will determine.

Four aspects of this provision might cause problems.

- (1) Any enquiry into the fitness of the Head of the Directorate to hold office will be conducted as the Minister sees fit. There are no formal requirements for how this enquiry should be conducted, who should conduct the enquiry or what criteria will be used to determine fitness for office. This wide discretion means that an enquiry could be conducted by the Minister him or herself or

by someone in the Minister's office thus watering down the safeguard of an objective determination on whether one of the four criteria for removal is in fact present.

- (2) The third requirement relating to the Head's possible incapacity to carry out his or her duties of office efficiently, is exceedingly broad and not easily susceptible to objective determination. The undefined notion of efficiency renders the basis on the Minister may remove the Head of the Directorate overbroad. This opens the door for removal on non-objective grounds, which is not compatible with actual independence or perceived independence.
- (3) When the Head of the Directorate is preliminary suspended, he or she could be suspended without a salary and could therefore in effect be punished before he or she is formally found guilty of any wrong doing. This places considerable power in the hands of the Minister to put pressure on the Head of the Directorate, and thus rendering the independence of the Head of the Directorate tenuous at best; and
- (4) The two Houses of Parliament can remove the Head of the Directorate by "praying for such removal on any of the grounds" referred to above. No enquiry is required in this regard and the wording is vague, which means the section could be interpreted as not requiring the two Houses of Parliament to have established as objective fact that one or more of the grounds listed is actually present. In one reading of this section, this would render this power as little more than the exercise of a political discretion which may not easily be reviewed by a Court, rendering the security of tenure and hence the independence of the Head of the Directorate. These fears are reinforced by the heading of this section, which states that the section relates to "Loss of Confidence in Head of Directorate". A "loss of confidence" is a subjective standard, not an objective standard, as it relates to whether the Minister or the Parliament had stopped having confidence in the Head of the Directorate and such loss of confidence could just as well relate to political reasons as to objective criteria reviewable by a court of law.

#### **Appointment and dismissal of staff**

The amendments also provide insufficient guarantees to safeguard the structural independence of the Directorate as they fail to provide security of tenure for all the members of the Directorate, and fail to establish statutory secured levels of remuneration for all members of the Directorate.

In terms of a newly created section 17M of the SAPS Amendment Bill all members of the Directorate remain members of the South African Police Service "with all the powers, duties and functions of other members of the South African Police Service". Section 17G which states that the remuneration, allowances and other conditions of service of members of the Directorate shall be regulated in terms of section 24 of

the Act (a section which allows the Minister to make regulations about the reduction in rank of members as well as the remuneration structure of members), falls short of the security of tenure for all members discussed in the judgment.

The majority judgment in *Glenister* made it clear that in the absence of explicit provisions entrenching the employment security and remuneration levels of members of the Directorate, "individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution", which would be inimical to structural independence.

Ordinary members of the Hawks would remain subject to the hierarchical structure and discipline of the SAP and could be removed by the National Police Commissioner (who is not an independent person). The National Commissioner would retain the power to "discharge" any member of the DPCI from the SAPS on account of redundancy or the interests of the SAPS. The Commissioner would also still be empowered to discharge a member of the service if, for reasons other than unfitness or incapacity, the discharge "will promote efficiency or economy" in the SAPS, or will "otherwise be in the interest of" the SAPS. Ordinary members of the Directorate therefore would not be sufficiently protected in terms of job security as required by the *Glenister* judgment.

Moreover, although a newly inserted section 17DA provides limited protection for the employment security for the Head of the Directorate, and the newly inserted section 17CA(c) provides limited remuneration protection for the Head, Deputy Head and Provincial Heads of the Directorate, it contains no such protection for other members of the Directorate. This means that ordinary members of the Directorate will be subject to the ordinary remuneration regime of the SAPS in exactly the same manner as other members of the SAPS, rendering them insufficiently independent in a structural sense.

An additional concern relates to the security clearance required for staff of the unit. Section 17E of the SAPS Amendment Bill deals with the requirement that every member of the Directorate needs to obtain security clearance in terms of the relevant legislation in order to work and to continue working at the Directorate.

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 Directorate) 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". This provision is open to abuse in the following ways.

First, the decisions of members of the Intelligence Services are kept secret and it will be very difficult if not impossible to have any decision to degrade, withdraw or refuse security clearance reviewed by a court. This means that these provisions would be capable of being used to influence, interfere and even remove members of the Directorate for political reasons. Second, the power and hence also the discretion to remove the individual from the Directorate is retained by the National Commissioner, a political appointee who is not independent and who might exercise his or her discretion wrongly for political reasons. At the very least, this power needs to be transferred to the Head of the Directorate in order to ensure that the exercise of this discretion to some degree protected from political abuse. Third, it is unclear why security clearance is required for all members of the unit. Ordinary members of the Police Service need not obtain security clearance of this sort. There is nothing inherently related to national security in the investigation of corruption (even the corruption of high powered business people or politicians) and most investigators would not encounter issues of national security. While a minimum number of members of the Directorate may be required to obtain security clearance in order to deal with matters of national security, this sweeping requirement is unnecessary and provides an avenue through which to improperly influence investigations undertaken by the directorate.

#### **Oversight and accountability**

The Constitution requires that a member of Cabinet "must be responsible for policing".<sup>16</sup> This requirement must be squared with the requirement that a policing body responsible for investigating corruption with the aim of securing successful criminal prosecution must be insulated from political influence or interference. The

majority in the *Glenister* judgment emphasised that this constitutional injunction does *not* require “that the anti-corruption unit must itself function under political oversight”. To this end, the particular political oversight arrangements in the impugned legislation were found to be incompatible with adequate independence.<sup>17</sup>

However, adequate independence does not require insulation from political *accountability* (as opposed to political oversight). What was required was not total “insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit”.<sup>18</sup>

Given these general principles, the following arrangements regarding the powers of the unit to choose which crimes to investigate would not be compatible with the carefully constructed balance between operational independence on the one hand and political accountability on the other. Where Cabinet (or a member of Cabinet) is empowered to coordinate the unit’s activities, this will raise constitutional problems. Co-ordination can be direct or indirect. Direct co-ordination will occur where a member of Cabinet can influence the selection of the crimes to be investigated by the unit (see the discussion about the mandate of the unit in the following section). Indirect co-ordination will occur where a member of the Cabinet can issue policy guidelines in respect of the functioning of the unit as well as for the selection of national priority offences

Both issues were found to be problematic in the impugned legislation. First, section 17D(1)(a) determined that the DPCI could investigate “priority crimes” which in the opinion of the DPCI needs to be investigated. This section did not explicitly state that the DPCI could investigate corruption). Furthermore, this discretion was made subject to the policy guidelines issued by a Ministerial Committee. This power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI (which could in theory direct that only some kinds of crimes should be investigated) created a “plain risk of executive and political influence on investigations and on the entity’s functioning” and was therefore unconstitutional.<sup>19</sup>

Second, in terms of section 17D(1)(b), the National Police Commissioner could also refer matters to the DPCI for investigation, but once again subject to any policy guidelines issued by the Ministerial Committee. This raised the same concerns as above.

In terms of section 17I(2)(a) and (d) a Ministerial Committee was allowed to issue policy guidelines in respect of the functioning of the DPCI and may determine procedures to coordinate the activities of the Directorate and other relevant departments or institutions. This power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates a clear risk of executive and political influence on investigations and on the entity's functioning.<sup>20</sup>

Nothing in the Act required the policy guidelines to be broad and harmless and the Ministerial Committee's determination of the policy guidelines were unconstrained. This, the Constitutional Court found to be at odds with a structure designed to secure effective independence. It underscored the conclusion that the legislation does too little to secure the DPCI from interference.<sup>21</sup>

Although the South African legal system requires some level of executive involvement in any area of executive functioning, the extent of the involvement, provided for through the SAPS Amendment Bill remains far-reaching and not compliant with the Constitutional requirement for independence.

To address this the SAPS Amendment Bill places the responsibilities and powers, previously invested in the Committee, in terms of determining the policy guidelines of the unit in the hands of the Minister of Police (Section 17D(aA)). This does not reduce the possibility of political influence over investigations. Indeed, it is not clear what the logic of this change was since a merely replacing the Committee of Ministers with a single Minister cannot be sufficient to address the concerns of political interference raised in the judgement.

In addition, this change leaves the Committee with two responsibilities: (i) to review the performance and implementation reports from the DPCI and, (ii) to establish the procedures for co-ordination between the DPCI and other government departments.

The Committee is required by the Bill to meet at least four times a year for this purpose.

While co-ordination between the DPCI and other government departments is clearly necessary, establishing the procedures for co-operation appears to be an operational matter that could easily be achieved by the Operational Committee or even by regular meetings of the Directors General of relevant departments, and is not an appropriate role for a Ministerial Committee in relation to an independent unit. Moreover, once procedures for co-ordination between government departments have been established there seems little reasons to revisit them on a regular basis, unless problems arise.

If the function of determining such procedures were to be allocated to the Operational Committee or a similar body, the Ministerial Committee would be left with the task of reviewing the performance of the unit. The Bill is currently not clear whether this is an oversight function, or merely for information purposes. Reviewing the performance of government agencies and departments is a function that is performed by parliamentary portfolio committees on a regular basis, it is not clear why in the case of this unit the reporting line should be to a Ministerial Committee rather than to a parliamentary portfolio committee, which would be preferable not least because the meetings of these committees are open to the public (at least in most cases).

It should also be noted that Sections 17J(2)(b) and (c) of the SAPS Amendment Act (as amended by the Bill), says that the Co-ordination Committee (which is top heavy with non-independent members) must fulfill such functions as required by the Ministerial Committee and must report to the Ministerial Committee. This creates another potential avenue for indirect political influence over the work of the agency as there are no guidelines for what kinds of tasks the Ministerial Committee can ask the Co-Ordinating Committee to do.



### **Mandate of the unit**

The question of who is responsible for determining the mandate of the unit, in particular which cases fall within the units' remit and which do not, is an essential element of its independence. As discussed above, it is not constitutionally acceptable for the unit's policies and operational guidelines to be determined by the Ministerial Committee. For the same reasons it is also not acceptable for the policies and guidelines to be determined by the National Commissioner of Police or the Minister of Police, as provided for in the SAPS Amendment Bill. As explained by de Vos:

*Where Cabinet (or a member of Cabinet) is empowered to coordinate the unit's activities, this will raise constitutional problems. Co-ordination can be direct or indirect. Direct co-ordination will occur where a member of Cabinet can influence the selection of the crimes to be investigated by the unit. Indirect co-ordination will occur where a member of the Cabinet can issue policy guidelines in respect of the functioning of the unit as well as for the selection of national priority offences. Both issues were found to be problematic in the impugned legislation.<sup>22</sup>*

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

It is unclear what these "selected offenses" are intended to be and who will select the offenses. However 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 unit by the National Commissioner, but this remains subject to policy guidelines issued by the Minister.

The insertion of a specific focus on charges in terms of the Corruption Act, goes some way to allay fears of political influence and interference. However, corruption

is often closely aligned with other offenses such as fraud, money laundering and racketeering. The fact that the Minister therefore would retain broad discretion to issue policy guidelines on which priority crimes to investigate might potentially hamstring investigations in which fraud and corruption are intertwined. Such a broad discretion provided to political actors was not compatible with independence as required by the judgment.

## **Recommendations**

### **Location of the DPCI**

It is our recommendation that in order to secure the actual independence as well as the perception of independence of the unit it should be located outside of the SAPS. In this regard there are a number of possible options, in order of preference:

- (1) To create a new independent structure that remains politically accountable to the Minister of Police but that is independent of the command-and-control of the SAPS, such as the Independent Complaints Directorate
- (2) To create a new unit as a division of an existing, independent institution, such as the Public Protector or the Auditor General;
- (3) To create a new statutory institution that is not part of an existing institution, nor a Chapter 9 institution; or
- (4) To create a new Chapter 9 institution (which would require a Constitutional amendment)

The ICD provides an existing model, and therefore precedent for the first option. The Independent Complaints Directorate is a directorate that falls under the authority of the Minister of Police. The Directorate is responsible for investigations of deaths in police custody (although the remit of the Directorate will substantially expand after the passing of the IPID Bill). This Directorate is however entirely independent of the SAPS. The head of the IPID does not hold a police rank and is not subordinate in any way to the National Commissioner. ICD investigators have the same powers as SAPS. Existing legislation specifically protects their work from interference and encourages cooperation. Providing the DPCI with an equivalent measure of independence by mirroring this structure would be preferable to the status quo, and preferable to tweaking the structure minimally as the SAPS Amendment Bill does.

### **Oversight and accountability**

There are several ways in which the unit could be held accountable. Both in Indonesia and Australia the units responsible for anti-corruption investigations determine their own procedures and policies and do not report to any Minister<sup>23</sup> they are however audited by the auditor general.

In South Africa the Auditor General is able to, and does already perform assessments of the performance of government institutions.<sup>24</sup> It is thus possible to conceive that the Auditor General could monitor the performance of the unit, and report on these to parliament.

It is also possible, and desirable, to consider the establishment of an additional oversight structure that is independent of parliament and the executive. Such a structure could be made up of members of parliament, external experts and representatives from relevant government departments. In this regard we could draw on the experience of Hong Kong. The activities of the ICAC in Hong Kong are overseen by four advisory committees, each comprised of citizens appointed by the Chief Executive and chaired by civilians.<sup>25</sup> A similarly independent body comprised of a mixture of government officials and independent experts (that could include the Public Protector, the Secretary of Police, the Auditor General and others) could provide oversight over the unit. This would not take the place of the unit being held accountable by parliament.

The role of parliament should be to receive reports from the unit, approve the budget of the unit and ensure that the unit meets its functional obligations; as parliament does for all government departments and agencies.

### **Appointment and dismissal of the head of the DPCI**

It is necessary to ensure that the process to appoint the head of the unit should be transparent. It is also necessary to ensure that the appointee meets a range of criteria. An independent body (such as that proposed to provide oversight of the unit, above) be established to short list candidates, hold public interviews and

provide the Minister with a shortlist of suitable candidates. The criteria for selection of candidates should be included in the new legislation.

Suitable candidates should be those known for their integrity, who are beyond reproach and who has, at least, the following skills and qualities:

- Have a solid track record of executive management experience – no less than ten years
- A good manager and leader with proven experience in the management of staff and finances
- Have a well developed knowledge of investigation of crime and corruption
- Have a good understanding of relevant laws
- Be a good communicator
- Have a strong working understanding and experience in applying the provisions of the PFMA
- Should not be associated with a particular political party

Appointment and dismissal of the staff of the unit should be at the sole discretion of the head of the unit.

Criteria for the dismissal of the head of the unit should be clearly articulated in the legislation and should not allow for subjective assessments.

#### **Mandate of the unit**

The mandate of the unit, i.e. which cases should fall within the unit's remit, should be determined through regulations to the legislation. Defining this mandate will require extensive consultation, in particular with those who have experience of undertaking investigations of this nature. Members of the DPCI, the Asset Forfeiture Unit, the SAPS Anti-corruption Unit, the Public Protector and others should be engaged to determine an appropriate mandate for the unit. The mandate should allow for the Head of the unit to exercise discretion, albeit constrained.

The agency should be focused on investigating serious corruption, in this case the severity of the corruption should not only be determined on the basis of how much money is involved but also includes other factors, such as whether it is systemic, whether it includes organised crime and whether it is perpetuated by people in

positions of power and influence. Clear guidelines would be required and these guidelines need to be contained in legislation and not left to the discretion of a politician, directly or indirectly.

## Conclusion

The Constitutional Court judgement in the Glenister case provides an important opportunity for parliament to create the best possible institution to investigate and counter corruption in South Africa. It is our hope that the Committee's deliberations will result in a decision to craft legislation that will strengthen our ability as a country to stop corruption and enhance the ability of the state to develop and deliver services to all.

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<sup>1</sup> Pierre de Vos, The South African Police Service Amendment Bill 2012: An opinion on compliance with the Constitutional Court judgment *Glenister v President of the Republic of South Africa & others*, legal opinion prepared for the Institute for Security Studies, 19 March 2012

<sup>2</sup> In the judgement reference was made to the shortcomings of the existing legislation in relation to these elements, but the judgement stopped short of providing a list of requirements for legislative changes.

<sup>3</sup> The shortcoming of the existing legislation is that it allows the National Commissioner of the SAPS broad powers to discharge members of the directorate to "promote efficiency and economy" or "otherwise...in the interests of" SAPS (Constitutional Court Judgement, para. 222). The judgement said that, "the absence of specially secured employment may well disincline members of the Directorate from reporting undue interference in investigations for fear of retribution" (Constitutional Court Judgement para. 224)

<sup>4</sup> Shortcoming of the current legislation is that it provides for "a renewable term of office, in contradistinction to a non-renewable term, [which] heightens the risk that

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the office-holder may be vulnerable to political and other pressures (Constitutional Court Judgement *para 223*)

<sup>5</sup> The current legislation does not provide secured remuneration levels which “gives rise to problems similar to those occasioned by a lack of secure employment tenure” (para. 227)

<sup>6</sup> Shortcoming of the current law is that it provides for the National Commissioner to refer offences or categories of offences to the DPCI based on to policy guidelines issued by a Ministerial Committee (para. 228) The powers of the Ministerial Committee are variously referred to as “untrammelled”, creating “a plain risk of executive and political influence on investigations and on the entity’s functioning” (para. 229), “unavoidably inhibitory” (para. 232), not “conducive to independence, or to efficacy.” (para. 233), “inimical to independence.” (para. 234) and creating “the possibility of hands-on management, hands-on supervision, and hands-on interference” (para 235)

<sup>7</sup> The power to involve independent prosecutors in investigations is at the discretion of the National Commissioner of SAPS, who himself does not enjoy adequate independence from political influence - “it is a limping and partial mechanism, which underscores the inadequacy of the arrangements to secure the overall independence of the DPCI” (para. 245)

<sup>8</sup> “Parliament’s powers [of oversight] are insufficient to allow it to rectify the deficiencies of independence that flow from the extensive powers of the Ministerial Committee. This diluted level of oversight, in contrast to the high degree of involvement permitted to the Ministerial Committee in the functioning of the Directorate, cannot restore the level of independence taken at source.” (para. 241) - “the Ministerial Committee and the head of the DPCI have power to determine what reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI.” (para. 242) - the majority also noted that “parliamentary committees function in public...The Ministerial Committee by contrast comprises political executives who

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function out of the public gaze. The accountability they seek to exact is political accountability. It is inimical to an independent functioning of the DPCI." (para. 243)

<sup>9</sup> The complaints mechanism under the statute "operates after the fact" and "does not constitute an effective hedge against interference" (paras. 246 & 247) - the NDPP may "on reasonable grounds" refuse to accede to the complaints judge's request for information (para 247)

<sup>10</sup> See Philip Stenning and Melea Lewis, Independence requirements for anti-corruption institutions: some comments on *Glenister v. President of the Republic of South Africa et al.*, *SA Crime Quarterly* No 39, Pretoria: Institute for Security Studies, forthcoming 2012.

<sup>11</sup> Memorandum on the objects of the South African Police Services Amendment Bill, 2012 (ca060112), 2.

<sup>12</sup> The Directorate of Special Operations (DSO), or Scorpions, fell under the authority of the Minister of Justice & Constitutional Development; this was found by the Khempepe Commission to a Constitutionally sound arrangement.

<sup>13</sup> De Vos, An opinion on compliance with the Constitutional Court judgment *Glenister v President of the Republic of South Africa & others*, 19 March 2012.

<sup>14</sup> This section is drawn from de Vos's legal opinion, 21-22.

<sup>15</sup> *Ibid*, 16.

<sup>16</sup> Constitution of South Africa, Section 206(1).

<sup>17</sup> Judgement in *Glenister vs the President of South Africa and others*, Par 215.

<sup>18</sup> Judgement in *Glenister vs the President of South Africa and others* Par 216.

<sup>19</sup> Judgement in *Glenister vs the President of South Africa and others* Par 229.

<sup>20</sup> Judgement in *Glenister vs the President of South Africa and others* Par 229.

<sup>21</sup> Judgement in *Glenister vs the President of South Africa and others* Par 231.

<sup>22</sup> De Vos, An opinion on compliance with the Constitutional Court judgment *Glenister v President of the Republic of South Africa & others*, 19 March 2012,

<sup>23</sup> See Philip Stenning and Melea Lewis, Independence requirements for anti-corruption institutions: some comments on *Glenister v. President of the Republic of*

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*South Africa et al., SA Crime Quarterly* No 39, Pretoria:Institute for Security Studies, forthcoming 2012

<sup>24</sup> David Bruce, "Measuring outputs, neglecting outcomes: The Auditor General's role in SAPS performance assessments", *South African Crime Quarterly*, No 38, December 2011.

<sup>25</sup> According to the ICAC website the advisory committees are: Advisory Committee on Corruption; Operations Review Committee; Corruption Prevention Advisory Committee; and Citizens Advisory Committee on Community Relations. There is also an ICAC Complaints Committee, which includes members of the community, again elected by the Chief Executive. This committee also includes members of the Legislative Council. See <http://www.icac.org.hk/en/home/index.html>