IFAISA SUBMISSION REGARDING THE SA POLICE SERVICE AMENDMENT BILL 2012

1. Introduction

1.1 Ifaisa welcomes the opportunity to make submissions to the Parliamentary Committee in response to the advertisement placed in the Cape Times newspaper on 9 March 2012. It is no coincidence that the leader page of that newspaper carried two articles critical of the SAPS and also reportage of the progress of the board of inquiry into the allegations of corruption, malfeasance, mismanagement and/or incompetence on the part of the National Commissioner of Police, Bheki Cele.

1.2 Nor is it without significance that his predecessor, Jackie Selebi, is serving a lengthy jail sentence for the crime of corruption. The demise of the Scorpions, whose leadership and patriotic personnel were prepared to act without fear, favour or prejudice in the investigation and prosecution of corruption, is very much related to its willingness to proceed against both Selebi and other highly placed persons.

1.3 It can cogently be argued that the former National Director of Public Prosecutions, Vusi Pikoli, to whom the Scorpions were answerable, was suspended by former President Thabo Mbeki for prosecuting Selebi (successfully so, in the end) and dismissed by former President Kgalema Motlanthe for investigating, via the Scorpions, then private citizen Jacob Zuma. The latter was charged with 783 counts of corruption that were later controversially withdrawn by the acting successor of Pikoli, Mokotedi Mphse, in circumstances that are still being contested in litigating pending before the courts. If the DA's court case succeeds on the merits, President Zuma could yet face those painstakingly investigated charges in a court of law.

1.4 After his dismissal, Pikoli sued the government. His case was settled at great expense to the taxpayer and with an acknowledgement from government that he had done nothing wrong and would be considered for future public service by it. These facts, and those carried by the very newspaper in which the advertisement calling for submissions on the abovementioned Bill was placed, are germane to the consideration of the constitutionality and efficacy of the Bill as a means of equipping the state to effectively deal with the challenges posed by the scourge of endemic high level corruption which plagues the land and the realisation of the values of the Constitution, particularly those enshrined in the Bill of Rights which is Chapter Two of the Constitution. Corruption has rightly been described as “theft from the poor”.

1.5 Corruption in high places creates opportunities for this on a vast scale. What COSATU calls the activities of “hyenas” in the field of procurement, the so called “tenderpreneur class” of which the SACP is so critical, have the potential to capture the state and plunge SA into the abyss of failed state status.

1.6 The overall educated estimate of the amount involved in corrupt activities in SA is R675 billion per annum. Willie Hofmeyr, head of the Assets Forfeiture Unit, estimates that about R30 billion is lost to corruption on state tenders alone each year. The Commissioner of Police in the Western Cape reports that illegal drugs to the value of R13 billion have been seized in his province in the last year. If this is reasonably regarded as a small fraction of the value of illicit narcotics in circulation in the country as a whole, it is an indication that the lawlessness situation is out of hand.

1.7 The arms deals have cost the country an estimated R70 billion; an amount that is recoverable in full from those arms dealers who corrupted the procurement process with the bribes they paid if, and only if, government develops the political will to properly investigate and expose the corruption in those deals. The Seriti Commission of Inquiry into the arms deals, announced on 15 September 2011, has yet to hold any public hearings and appears to be suffering from a case of "failure to launch" at the time of the drafting of this submission. As it has been given only two years to complete its task, it is to be hoped that the Commission has not been created as a convenient place to park the scandal that is the arms deals. The Committee should interrogate the lack of visible, open and accountable progress with the work of the Commission. Bribery has been admitted by SAAB and Ferrostaal. Corruption on the part of BAE has been acknowledged in the British House of Commons. German prosecuting authorities have repeatedly been thwarted in their quest for international co-operation with SA regarding corruption in the supply of submarines to SA. Swedish prosecutors are investigating charges against SAAB and Thabo Mbeki has conveniently forgotten whether he met French arms dealers prior to the sale to SA of several warships. All of the arms deals had to be financed with borrowed money, to acquire unsuitable arms that SA does not need to defend itself against enemies it does not have.

1.8 Former ANC MP Andrew Feinstein estimates that bribes to the value of R2,1 billion were paid in the arms deals. While this compares favourably with Professor William Gumede's estimate of the R5,8 billion dividend stream to the ANC via Chancellor House flowing from the collusive conclusion of the Hitachi Power Africa boilers deal with Eskom, a state owned enterprise, it can be seen that the trend of corruption is an escalating one. A trend in which successful prosecutions can, according to Adv Hofmeyr, be counted on the fingers of one hand.

1.9 The task facing Parliament is accordingly of monumental scale and a truly awesome responsibility rests on Parliament to act accountably in creating a reasonable anti corruption entity that is up to the task of dealing properly with the kind of challenges posed by the facts set out and alluded to above.

1.10 Should Parliament fail to rise to the occasion, failed state status beckons. The three ugly sisters of inequality, poverty and unemployment will look quite attractive when compared to the misery, chaos and disruption that are the hand-maidens of failed state status. The state of the Zimbabwean economy in the 21st century, the diaspora of her people and the unwillingness of the leadership in that benighted country to accept the outcomes of democratic processes involving checks and balances on the exercise of power, serve as a vivid reminder of what can and does happen when liberation is replaced by oppression, when a tiny power elite captures the state and when accountability and responsiveness to the needs of ordinary people (both foundational values in the new SA) are abandoned in pursuit of the naked exercise of brute force that subjugates rather than liberates.

2. Developing a constitutionally sound approach to the issues that the Bill is meant to address.

2.1 The starting point in any sensible consideration of the Bill has to be the judgment of the majority of the Constitutional Court in the Glenister case, handed down by Moseneke DCJ and Cameron J on 17 March 2011. The judgment is in the “Glenister case” archive on the website of Ifaisa at www.ifaisa.org and this submission will not be burdened with a copy of it. Members of the Committee are encouraged to make a thorough study of the judgment and are respectfully reminded that the majority view is the one that binds

them despite the narrowness of the majority. Of the four judges in the minority, three are unlikely to hear any further litigation on the topic with which the Committee is seized, while all of the Justices in the majority still serve on the Constitutional Court.

2.2 Hugh Glenister has let it be known publicly that if he is dissatisfied by the outcome of the process upon which the Committee is now embarking, and if he is advised that the remedial legislation does not pass constitutional muster, he will return directly to the Constitutional Court for a ruling on the implementation of the order made on 17 March 2011. It accordingly behoves the Committee to punctiliously observe the requirements of the Constitution when it weighs and considers the provisions of the Bill as a response to the findings of the Court that have necessitated the drafting of the Bill.

2.3 Glenister's litigation was successful in two respects: the court in essence found that proper respect for, protection of, promotion and fulfilment of the rights in the Bill of Rights can not occur if appropriate anti corruption machinery of the state is not in place. The Hawks (DPCI) are not, so it was held, a reasonable answer to the issues posed by corruption in high places in that they lack the structural and operational independence to fulfil their mandate adequately. Secondly, the Court had regard to the international treaty obligations of SA and noted the undertakings to maintain an independent corruption fighting entity. SA is currently in breach of these obligations, hence the need for the Bill, and more importantly, the need for Parliament to take reasonable and accountable steps to formulate adequate protection of the rights of the people against the ravages of corruption and to create an entity which properly complies with the international obligations that have been undertaken by SA and by which it remains solemnly bound in the family of free nations.

2.4 The criteria according to which these steps need to be carried out, if constitutional compliance is to be attained, are set out in the judgment. They appear to have been ignored by those who drafted the Bill. This has the effect of rendering the Bill unconstitutional because the mischief it is supposed to address as set out in 2.3 above has not been adequately addressed in a manner which will pass constitutional muster both in the Constitutional Court and in any objective legal scrutiny of the scheme of the Bill. The task of the Committee is accordingly to reject the Bill and send the drafters back to the drafting table with an instruction to come up with a new formulation that is better able to withstand judicial scrutiny against the criteria of the Constitution as interpreted in the majority judgment in Glenister's case.

2.5 For the convenience of the Committee, Ifaisa summarises the criteria applicable as:

2.5.1 Independence;

2.5.2 Specialisation in corruption fighting;

2.5.3 Proper resourcing of the specialist body created by way of a guaranteed budget;

2.5.4 Appropriate training of personnel; and

2.5.5 Security of tenure to insulate personnel against political interference.

2.6 It is surely not beyond the wit of the drafters of the Bill to come up with a formulation that properly addresses these simple and straightforward criteria. Yet, as a perusal of the Bill shows, they have not done so.

2.7 In order to better acquaint the Committee with the reasoning that lies behind the findings of the Court, Ifaisa commends to the attention of the Committee the Heads of Argument filed on behalf of the parties in the Glenister case as well as to the other material

conveniently gathered on its website's Glenister page, referred to above. For convenience, an extract from the Heads filed by the amicus curiae follows:

A – The link between corruption / organised crime and human rights violations

1. It has been recognised domestically – in legislation and case law – that corruption and organised crime can have a profoundly negative impact on the underlying values and principles of the Constitution and the democratic institutions of South Africa. This is illustrated by the preamble to the Promotion and Combating of Corrupt Activities Act, 12 of 2004 ("**PRECCA**"), which states:

> "*[Whereas] the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;*
>
> *[and whereas] corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;*
>
> *[and whereas] the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law*" (emphasis added).

2. In *S v Shaik*,[1] the Constitutional Court held that corruption is "*antithetical to the founding values of our constitutional order*".[2] Similarly, in *South African Association of Personal Injury Lawyers v Heath*,[3] the same Court held that:

> "*[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state*" (emphasis added).[4]

3. In *S v Shaik*,[5] the Supreme Court of Appeal had the following to say on the pervasive and destructive effects of corruption on constitutional rights:

> "*The seriousness of the offence of corruption cannot be over-emphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that with its putrefying effects is halted. Courts must send out an unequivocal message that will not be tolerated and that punishment will be appropriately severe. In our view, the trial Judge was correct not only in viewing the offence of as serious, but also in describing it as follows:*

[1] *S v Shaik* 2008 (2) SA 208 (CC).
[2] *Ibid*, at para [72].
[3] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).
[4] *Ibid*, at para [4].
[5] *S v Shaik* 2007 (1) SA 240 (SCA).

> *'It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.'*
>
> *It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies* (emphasis added)."[6]

4. The Supreme Court of Appeal summed up the above succinctly in *S v Sadler*,[7] where it held that:

> "*[i]t is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration*."[8]

B – The deleterious impact of corruption and organised crime on the rights in the Bill of Rights

5. The World Bank, in its "*Report on Governance and Development*" (1992), stated that:

> "*It is generally agreed that corruption threatens economic growth, social development, the consolidation of democracy, and the national morale. Corruption hinders economic efficiency, diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures and deters foreign investors. It also*

[6] *Ibid*, at para [319].

[7] *S v Sadler* 2000 (1) SACR 331 (SCA).

[8] *Ibid*, at para [13]. This dictum was referred to by the courts in *S v Kwatsha* 2004 (2) SACR 564 (E) at page 569; and *S v Salado* 2003 (1) SACR 324 (SCA) at para [3].

> *erodes the constituency for development programmes and humanitarian relief*."[9]

6. This articulates the indisputable fact that corruption and organised crime have an almost immeasurable impact upon the capacity of the State to give effect to human rights, socio-economic and civil and political.

7. Moreover, the rule of law has a number of components which are adversely affected by corruption, including, *inter alia*, the principle of equality before the law and the principle of legality.[10]

8. An obvious consequence of corruption, in the public sphere in particular, is that the principle of equality before the law is distorted, as it results in the exemption of persons from the operation of the law as a result of their status, wealth, power, position or connections in society and the personal gain that they can offer a public official.

9. The former Minister for the Public Service, Geraldine Fraser-Moleketi, made the point as follows:

> "*corruption is fundamentally undemocratic and undermines the legitimacy and credibility of democratically elected governments, responsible and accountable public officials ... corruption is systemic*

[9] World Bank, "*Report on Governance and Development*" (1992).

[10] On these fundamental principles, see Currie and De Waal, *The Bill of Rights Handbook* 5th Ed, Juta & Co, 2005 at pages [10] – [11]; *Fedsure Life Assurance Ltd v the Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers Association of South Africa (Assoc Inc in terms of Section 21) and another in re: the Ex Parte Application of: The President of the Republic of SA and others* 2000 (2) SA 674 (CC) at paras [79] and [89].

> *and its effects undermine and distort the value systems of all societies and their peoples.*"[11]

10. The key instruments of international law that target corruption and related offences all cite the threat that corruption and organised crime pose to, *inter alia*, democracy, the rule of law, human rights and the stability of societies in general, as the rationale behind their formulation.

11. The foreword to the United Nations Convention against Corruption ("**the UN Corruption Convention**")[12] states that:

> "*[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development*."

12. The United Nations General Assembly's general resolution to the UN Convention captures the General Assembly's concern:

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[11] Fraser-Moleketi, Géraldine. "*Statement by Ms. Géraldine Fraser-Moleketi, Minister for the Public Service and Administration, Republic of South Africa*", High-Level meeting: the OECD Anti-Bribery Convention – Its Impacts and Its Achievements. Rome, 21 November 2007, http://www.oecd.org/dataoecd/12/47/39867375.pdf, page 4.

[12] The UN Corruption Convention was adopted by Resolution A/RES/58/4 of 31 October 2003, at the fifty-eighth session of the General Assembly of the United Nations, and came into force on 14 December 2005. South Africa became a party to the UN Corruption Convention by ratification on 22 November 2004.

> "*about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law*".[13]

13. In the preamble to the Organisation for Economic Co-operation and Development ("**OECD**") Convention on Combating Bribery of Foreign Public Officials to International Business Transactions ("**the OECD Convention**"),[14] it states that the parties to the OECD Convention recognise:

> "*that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions*".

14. The preamble to the African Union Convention on Preventing and Combating Corruption ("**the AU Convention**"),[15] provides that the parties are:

> "*[c]oncerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples*",

and

[13] Resolution of the UN General Assembly, A/RES/60/207, 22 December 2005. See, also, the preamble to the UN Corruption Convention.

[14] The OECD Convention on Combating Bribery of Foreign Public Officials in International Business entered into force on 15 February 1999, and South Africa became a party to it by accession on 19 June 2007. South Africa is one of seven non–OECD ember countries that are party to the Convention.

[15] The African Union Convention on Preventing and Combating Corruption was signed on 11 July 2003. South Africa ratified the Convention on 11 November 2005, and it entered into force on 5 August 2006.

> "*[acknowledge] that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent*".

15. The fourth objective of the AU Convention, as set out in Article 2 thereof, is to:

> "*[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights*."

16. In the preamble to the Southern African Development Community Protocol against Corruption ("**the SADC Corruption Protocol**"),[16] the parties state their concern:

> "*about the adverse and destabilising effects of corruption throughout the world on the culture, economic, social and political foundations of society" and acknowledge that "corruption undermines good governance which includes the principles of accountability and transparency*".

17. It is apposite to turn to a brief outline of the impact of corruption and organised crime on certain of the fundamental rights enshrined in the Bill of Rights. The discussion is illustrative of the obvious and ruinous impact of these crimes on our democratic order.

The rights to equality and dignity

18. Under section 9(1) of the Constitution, everyone has the right to equality before the law and the right to equal protection and benefit of the law.

[16] The South African Development Community Protocol against Corruption was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

19. The test for a violation of section 9(1) in *Harksen v Lane NO*,[17] reads as follows:

> "*Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s[ection] 9(1).*"

20. Under section 9, what matters is the effect of State conduct.[18] State conduct which, in effect, promotes or facilitates corruption differentiates between people on the basis of their status, wealth power, position or connections in society and the personal gain (collectively, "**the impugned bases**") that they can offer a public official. These bases of differentiation can in no way be seen as rational or legitimate. As such, state conduct, practice and procedures (or legislation) that facilitate corruption or organised crime constitute clear violations of section 9(1) of the Constitution.

21. In any event, differentiation on one or more of the impugned bases goes to the core of the adversely affected person's dignity. It is thus an analogous ground within the meaning of section 9(3) of the Constitution, giving rise to discrimination. It is inconceivable how discrimination on one or more of the impugned bases can ever be fair.

22. In view of the centrality of the right to dignity to the equality analysis and to almost every other right in the Bill of Rights, measures which facilitate or promote corruption work an infringement on the right to dignity. A person's

[17] 1998 (1) SA 300 (CC) at para [53].

[18] See, for example, *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para [90].

self-worth is substantially diminished if he or she is preferred over another person on an arbitrary or unfair basis.

The right to just administrative action; and socio-economic rights

23. Section 33(1) of the Constitution provides that "*[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair*."

24. State conduct which facilitates or promotes corruption or bribery is fundamentally incompatible with an administrative law regime based on lawful, reasonable and procedurally fair administrative conduct. By way of example, a person who lawfully seeks to participate in public tender processes (which form the basis of most government procurement and are thus fundamental to service delivery) is adversely affected by state conduct which facilitates or promotes bribery and corruption within those processes. Bribery and corruption, by their nature, violate the core principles of just administrative action.

25. In this light, the ability of the State to fulfil its socio-economic obligations under section 26, 27 and 28 of the Constitution will be adversely affected, constituting infringements of the correlative rights of prospective beneficiaries. Service delivery in respect of socio-economic rights is self-evidently undermined where the vehicle through which delivery takes place (and even the choice of that vehicle, eg a private contractor) is tainted by corruption and organised crime.[19]

[19] Goudie, Andrew W and Stasavage, David. "*Corruption: The Issues*", January 1997. OECD Development Centre, Working Paper No 122,, http://ideas.repec.org/p/oec/devaaa/122-en.html, at page 41. See, also, Fraser-Moleketi, Geraldine. Boone, Rob. "*Country Assessment Report – South Africa*". United Nations Office on Drugs and Crime and South African Department of Public Service Administration. April 2003, http://www.info.gov.za/view/DownloadFileAction?id=70185, page 131; Lash, N., *Corruption and Economic Development*, Loyola University, Chicago, 2003, http://www.u4.no/pdf/?file=/document/literature/lash2003-corruption-and-economic-development.pdf,

26. According to the former Minister of Social Welfare, Zola Skweyiya, in 2004 alone social grant fraud cost government approximately R 2 billion, and as much as R 10 billion may have been lost to corruption between 1994 and 2004.[20]

27. This extraordinary waste of resources not only undermines the capacity of the State to give effect to its socio-economic obligations, but it fundamentally diminishes the quality of lives of millions of South Africans.

The right to freedom and security of the person

28. Section 12(1) states that "*[e]veryone has the right to freedom and security of the person, which includes the right … to be free from all forms of violence from either public or private sources*". Section 12(2) states that "*[e]veryone has the right to bodily and psychological integrity*".

29. It is axiomatic that organised crime is often associated with forms of physical and psychological violence. In these circumstances, any measure which facilitates or promotes organised crime breaches the right to freedom and security of the person.

C – Combatting of corruption requires an independent body

30. To ensure that the rights in the Bill of Rights are respected, protected, promoted, fulfilled and not infringed, the State bears an obligation to ensure that a viable

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page 5; and Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 2000, http://www.un.org/events/10thcongress/2088b.html.

[20] Van Vuuren, Hennie. *National Integrity Systems – Transparency International Country Study Report (Final Draft): South Africa 2005*. March 2005. Transparency International. 13 August 2010. http://www.transparency.org/content/download/4106/25546/file/draft_s_africa_18.03.05.pdf. pages 19 and 21.

and independent body is established and maintained to deal with corruption and organised crime.

31. The independence of the body which is legislatively mandated to combat corruption, organised crime, and indeed all other "*national priority*" crimes is an essential feature of ability to fulfil its mandate effectively.

32. The link is apparent from a cursory reading of a number of international instruments on the issue.[21] The Republic has signed and ratified six international agreements directly relating to corruption and organised crime:

32.1 the UN Corruption Convention;

32.2 the AU Convention;

32.3 the OECD Convention;

32.4 the United Nations Convention against Transnational Organised Crime ("**the UN Organised Crime Convention**");[22]

32.5 the SADC Corruption Protocol; and

32.6 the Southern African Development Community Protocol on Combating Illicit Drugs ("**SADC Drugs Protocol**").[23]

[21] See, also, *Impact of corruption on the human rights based approach to development.* United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme. September 2004, http://www.undp.org/oslocentre/docs05/Thusitha_final.pdf, at page 23.

[22] The UN Organised Crime Convention was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations and came into force on 29 September 2003. South Africa became a party on 20 February 2004.

[23] The SADC Drugs Protocol was adopted on 24 August 1996 and entered into force on 20 March 1999. South Africa is a signatory to the SADC Drugs Protocol and has ratified the Protocol.

33. In 2004, Parliament enacted PRECCA, giving effect to UN Corruption Convention and the SADC Corruption Protocol.[24] It also appears that PRECCA covers South Africa's obligations under the OECD Convention.[25]

34. **UN Corruption Convention**

34.1 Article 6(1)(a) of the UN Corruption Convention imposes an obligation on each state party to guarantee the existence of a body or bodies tasked with the prevention of corruption. Moreover, Article 6(2) provides that:

> "*[e]ach State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their function effectively and free from undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out in their functions, should be provided*" (emphasis added).[26]

34.2 Independence, in the context in which it is used in Article 6(2), must be interpreted as encompassing, at a minimum, a structure which:

34.2.1 vests the relevant body or bodies with authority and competencies necessary to perform their specified functions; and

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[24] See Preamble to PRECCA.

[25] OECD (2008) "*Specialised anti-corruption institutions. Review of models*" Paris: OECD, http://www.oecd.org/dataoecd/7/4/39971975.pdf, at page 6. Whilst PRECCA is silent on the creation of a specific institution to combat corruption, it nonetheless confers certain investigation powers on the NPA in terms of sections 22, 23 and 27 of the NPA Act.

[26] See, also, article 36 of the UN Corruption Convention: "*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks*."

34.2.2 guarantees that the relevant body or bodies will not be subject to undue influence.[27]

34.3 Independence does not merely envisage bodies acting separately and without undue influence from the judicial, executive and legislative arms of government. The guarantee must include a duty on the State to prevent undue interference by third parties with the functions and processes of such bodies.[28]

35. **The AU Convention**

35.1 Article 5 of the AU Convention provides that state parties undertake to "*[e]stablish, maintain and strengthen independent national anti-corruption authorities and agencies*" (emphasis added).

35.2 Article 20(4) of the AU Convention reinforces the importance of independence in more direct terms: "*The national authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively*."

36. **The OECD Convention**

36.1 In 2008, the OECD undertook a review of the models of the various specialised anti-corruption institutions internationally. The OECD report "*Specialised anti-corruption institutions. Review of models*" (2008) ("**the OECD Report**") identified the main criteria for effective anti-corruption

[27] Hussman et al, "*Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention against Corruption Article 6*", Anti Corruption Resource Centre, 2009, at page 12.
[28] *Loc cit.*

agencies to be independence, specialisation, adequate training and resources.[29]

36.2 The OECD Report defined independence as follows:

> "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability; specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work. No single body can fight corruption alone; inter-agency co-operation, co-operation with civil society and business are important factors to ensure their effective operations*" (emphases added).[30]

36.3 The OECD Report also found that:

> "*in light of international standards, one of the prominent and mandatory features of specialised institutions is not full*

[29] The OECD drew these criteria from the provisions of UN Corruption Convention as well as the Council of Europe Criminal Law Convention on Corruption.

[30] The OECD Report, at page 6.

independence but rather 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. In short, independence, first of all entails de-politicisation of anti-corruption institutions. The adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions" (emphases added).[31]

"*The question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice. Similarly, but to a lesser extent, this is true for prosecutors in systems where the prosecution service is part of the government and not the judiciary. In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals' abusing the chain of command and hierarchical structure, either to discredit the confidentiality of investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to*

[31] *Ibid*, at page 18.

> *address this risk. For instance, special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor* (emphases added)."[32]

37. **UN Organized Crime Convention**

37.1 The UN Organized Crime Convention also requires state parties to establish anti-corruption institutions which are sufficiently independent to perform their tasks. Article 9(2) provides that:

> "*[e]ach state party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions*".

38. **The Southern African Development Community Protocols**

38.1 South Africa is a member state of the Southern African Development Community ("**the SADC**"). The SADC has adopted two Protocols which are of relevance to the prevention and combating of corruption and organised crime.

The SADC Drugs Protocol

38.2 Under Article 8 of the SADC Drugs Protocol:

[32] *Ibid*, at page 17.

"*1. Member States shall institute appropriate and effective measures for co-operation between enforcement agencies to curb corruption, resulting from illicit drug trafficking.*

2. Measures to be taken shall include the following:

a) establishment of adequately resourced anti-corruption agencies or units that are:

(i) independent from undue intervention, through appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity;

(ii) free to initiate and conduct investigations" (emphases added).

The SADC Corruption Protocol

38.3 Under Article 4(g) of the SADC Corruption Protocol state parties must:

"*adopt measures which will create, maintain and strengthen…*

(g) Institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption."

39. **The Twenty Guiding Principles of the Council of Europe**[33]

39.1 On 6 November 1997, the Council of Europe adopted the Twenty Guiding Principles for the Fight against Corruption, outlining the requirements of independence and freedom from undue influence which are now reflected in international law.

39.2 By way of example, Principle 3 requires that States:

[33] http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924_EN.pdf

> "… ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations".

2.8 As the Heads are more detailed than the judgment, which adopts the line of argument taken in them, the Committee is now in a better position to appreciate that the criteria listed have in essence been ignored by the drafters of the Bill. They do so at their peril as the legislation is supposed to make the position in regard to specialised corruption fighting constitutionally compliant. The Bill is not consistent with the Constitution because it has failed to properly address the mischief identified by the Court in the majority judgment in Glenister. This renders the entire scheme of the Bill unconstitutional. SAPS is under the control of the Minister of Police. It is structurally incapable of housing a unit that is able to function properly without fear, favour or prejudice – which is what independence really entails.

2.9 The Hawks are not a specialised anti corruption body. They deal with all forms of priority crime identified by the executive branch of government.

2.10 The mere fact that the executive identifies priority crimes makes it impossible for the new Hawks to function independently as the Constitution and the treaties that bind the land require.

2.11 Security of tenure is not possible when a Minister is able to suspend a functionary without pay.

2.12 The Bill does not adequately address the criteria that relate to resourcing and training the anti corruption unit that is meant to be

created reasonably and accountably in accordance with the criteria of the judgment.

2.13 While the Court, very properly, did not prescribe to Parliament what should be done to take the remedial steps needed to ensure constitutional compliance, a Bill that does not address the criteria set out in 2.5 above is unlikely to meet with the approval of the Court, nor can it pass constitutional muster.

2.14 It accordingly behoves the Committee to jettison the Bill rapidly and to insist that it be replaced with a Bill that more comprehensively addresses the criteria laid down by the Court.

3. The appropriate response to the Glenister judgment.

3.1 Before the Bill was published, Ifaisa advocated the formation of a new Chapter Nine institution, the Anti-Corruption Commission, to achieve compliance with the criteria set so as to accountably implement the judgment won by Glenister. This is an African solution to the challenge now facing the Committee. This is surely the best practice solution to the challenge. The country both needs and deserves a best practice solution because of the threats to a peaceful, prosperous and progressive future posed by corruption in all of its current manifestations in SA.

3.2 The existence of an independent NPA in Chapter Eight of the Constitution will be complemented by and ACC under Chapter Nine. The ACC need not be given prosecutorial powers, but a mechanism needs to be devised to resolve any possible disagreement between the NPA and ACC on the fate of a corruption docket presented by the latter to the former. There are different ways of doing this.

3.3 A draft constitutional amendment to create an ACC and the empowering legislation that, in effect, replace the Bill now under consideration are attached to this submission as an alternative to the wholly inadequate scheme proposed by the Bill.

3.4 Ifaisa is willing to engage with the Committee by way of oral submissions to provide it with justification of the alternative suggestion it has put forward as a replacement of the Bill at present under consideration.

3.5 Time is of the essence in that the Court has ordered compliance by 18 September, 2012.

Adv Paul Hoffman SC
Ifaisa
www.ifaisa.org
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