

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL, 2011

1. BACKGROUND AND PURPOSE

1.1 The Constitutional Court, in the matter of *Glenister v President of the RSA & others* [2011] JOL 26915 (CC), found that the creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution. Two questions needed to be addressed. The first is whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. The Constitutional Court was unequivocally of the opinion that the Constitution itself imposes that obligation on the state. The second is whether the specialised unit which the impugned legislation has established, the DPCI, meets the requirement of independence, in respect of which the Court found in the negative. The Court therefore upheld the appeal and found the offending legislative provisions establishing the DPCI constitutionally invalid and suspended the declaration of constitutional invalidity in order to give Parliament the opportunity to remedy the constitutional defect within 18 months. It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

1.2 The Court found that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable. By applying this criterion the Court did not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary, but merely that public confidence in mechanisms that are designed to secure independence is indispensable. The Court considered that the provisions creating the DPCI, while succeeding in creating some hedge around it, fail to afford it an adequate measure of autonomy. The lack of independence is reflected in the Court's view most signally in the absence of secure tenure protecting the employment of the members of the entity and in the provisions for direct political oversight of the entity's functioning.

1.3 The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be "responsible for policing". These constitutional duties can productively co-exist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the state's constitutional obligations under section 7(2) of the Constitution. The second general point is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible and averse to our uniquely South African constitutional structure. What is required is not 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. Under the provisions that applied to the now-defunct DSO, the head of the DSO, the directors, deputy directors and prosecutors all had to swear an oath of office or make an affirmation before commencing duty. That oath was to “uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law.”

1.4 What is more, the head of the DPCI and the persons appointed to it enjoy little if any special job security. The provisions at issue provide that the head of the DPCI shall be a Deputy National Commissioner of the SAPS, and shall be “appointed by the Minister in concurrence with the Cabinet”. In addition to the head, the Directorate comprises persons appointed by the National Commissioner of the SAPS “on the recommendation” of the head, plus “an adequate number of legal officers” and seconded officials. The Minister is required to report to Parliament on the appointment of the head of the DPCI. The Commissioner is 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. The reach of this provision appears to include the head of the Directorate. A renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures. The NPA Act provides that a deputy NDPP may be removed from office only by the President, on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office. And Parliament holds a veto over the removal of a deputy NDPP. The reason for the removal, and the representations of

the deputy NDPP, must be communicated to Parliament, which may resolve to restore the deputy NDPP to office. In addition, before the statutory amendments now at issue, the head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration which was determined by reference to the salary of a judge of the High Court.

1.5 The absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. Not only do the members not benefit from any special provisions securing their emoluments, but the absence of secured remuneration levels is indicative of the lower status of the new entity. The Constitutional Court's gravest disquiet with the impugned provisions arises from the fact that the new entity's activities must be coordinated by Cabinet. The statute provides that a Ministerial Committee, which must include at least the Ministers for Police, Finance, Home Affairs, Intelligence and Justice, and may include any other Minister designated from time to time by the President, may determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences. The head of the DPCI, as a Deputy National Commissioner and a member of the SAPS, is accountable to the National Commissioner, whose post, as we have pointed out, lacks sufficient security of tenure, thus inevitably creating vulnerability to political pressure. In addition to this, the power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates in our view a plain risk of executive and political influence on investigations and on the entity's functioning.

1.6 The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed

that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of “priority offences”. What those crimes might be depends on the opinion of the head of the Directorate as to national priority offences – and this is in turn subject to the Ministerial Committee’s policy guidelines. The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a discretion outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy. We note, in considering how far parliamentary oversight counter-weighs these limitations of structure, that the phrase “oversee the functioning of the Directorate” occurs in relation to the duties of both the Ministerial Committee and Parliament, Despite this verbal emphasis on Parliament’s oversight, no timelines or minimum standards are set for what it does in this regard.

1.7 First, the parliamentary oversight the new provision requires is more benign and less intrusive than that of the Ministerial Committee. Second, Parliament’s powers 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. We appreciate that Parliament is unlikely to ignore its oversight role.

But the provisions are nowhere designed to afford it as active an involvement in the functioning of the DPCI as that of the Ministerial Committee. In addition, the Ministerial

Committee and the head of the DPCI have power to determine what the reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI. We also accept that our legal system requires some level of executive involvement in any area of executive functioning. It is its extent, and the largeness with which its shadow looms in the absence of other safeguards, that is inimical to the independent functioning of the DPCI. The complaints mechanism, headed by a retired judge, and backed up by power to refer a complaint for prosecution, operates after the fact. It permits complaints to be made, but does not constitute a hedge in advance against their causes. It also permits a member of the public to complain about infringement of rights caused by an investigation, and permits “any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other nature, exerted upon him or her regarding the conducting of an investigation” to complain. This in our respectful view deals with history. It does not constitute an effective hedge against interference.

1.8 What is more, section 17L(7) is clear that in the course of this investigation the retired judge may request information from the NDPP in so far as it may be necessary, but the NDPP may on “reasonable grounds” refuse to accede to such request. That may place a considerable hurdle in the way of the retired judge’s investigation. In short, an ex post facto review, rather than insisting on a structure that at initio prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate

mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking. The Constitutional Court clearly stated that:

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

1.9 The approach taken is that the DPCI needs to be made more independent. The Constitutional Court was clear on the issue that a capacity to address corruption as well as organised crime needs to be established. The Court concentrated more on the international obligations in respect of corruption, but eventually the international obligations in respect of all international crimes are the same and it is clear that there is a convergence of all international crimes, mostly so in respect of organised crime and terrorism, but very much so in respect of organised crime and corruption.

1.10 To establish now a capacity only to address corruption, in view of other international obligations would not make sense. The same capacity, independence and intelligence work is required in respect of all international crimes. In the case of South Africa the greatest threat is in respect of organised crime and corruption, but that does not mean that a separate capacity needs to be established for corruption.

2. PROVISIONS OF THE BILL

Clause 1

2.1 Clause 1 of the Bill amends section 6 of the Act and seeks to align the provisions in the Act which provide for the appointment of the National Commissioner and the Provincial Commissioner with sections 207(1) and 207(3) of the Constitution of the Republic of South Africa, 1996.

Clause 2

2.2 Clause 2: of the Bill seeks to amend section 11 of the Act in order to align the functions of the National Commissioner with section 207(2) of the Constitution.

Clause 3

2.3 Clause 3 of the Bill seeks to amend 16 of the Act by providing for the Head of the Directorate instead of the National Commissioner as it used to be in terms of the Act, to decide which matters will be investigated on a provincial or national level, in accordance with the approved policy guidelines.

2.4. Clause 3 of the Bill also provides for the determination of the Head of the Directorate to prevail in accordance with the approved policy guidelines, in the event of

a dispute between the Head of the Directorate and the Provincial Commissioner regarding the question of whether criminal conduct should be regarded as organised crime, crime which requires national prevention or investigation or crime which requires specialised skills in the investigation and prevention thereof.

Clause 4

2.5 Clause 4 of the Bill seeks to provide for the amendment of section 17B of the Act by providing for the need of the establishment of a Directorate in the South African Police Service to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption. Clause 4 also provides for the circumstances under which this Directorate must operate and the need for its independence.

Clause 5

2.6 Clause 5 of the Bill seeks to amend section 17C of the Act by providing for the the composition and establishment of the Directorate.

Clause 6

2.7 Clause 6 of the Bill to provide for the insertion of section 17CA after section 17C of the Act. Clause 6 of the Bill provides for the appointment, remuneration and conditions of services of the Head of the Directorate and the employees of the Directorate so as to enhance the independence of the Directorate and give effect to Glenister judgment.

Clause 7

2.8 Clause 7 of the Bill seeks to amend section 17D of Act by providing that the functions of the Directorate are to prevent, combat and investigate national priority offences and in particular selected offences contemplated in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004) , which in the opinion of the Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament. Clause 7 of the Bill also provides that the Head of the Directorate must ensure that the Directorate observes the policy guidelines referred to in subsection.

Clause 8

2.9 Clause 8 of the Bill provides for the insertion of sections 17DA and 17DB in the Act. Clause 8 of the Bill also makes provisions of the loss of confidence in the Head of the Directorate. Clause 8 provides that where there is loss of confidence in the Head of the Directorate, he or she may not be suspended or removed by the Minister from the office unless certain procedures are followed as provided in the section .

2.10 Clause 8 provides that the Minister may provisionally suspend the Head of the Directorate from his or her office, pending an enquiry into his or her fitness to hold such office as the Minister deems fit, if there is misconduct, ill health, account of the incapacity of the Head of the Directorate to carry out the duties or he or he is no longer a fit and proper person to hold the office concerned. The Minister may thereupon remove the Head of the Directorate from office after the matter has been referred to Parliament and the Minister carries out such recommendations of the Parliament to remove the Head of the Directorate.

2.11. Clause 8 also provides that the provisional suspension of the Head of the Directorate must be communicated to Parliament .Clause 8 also provides that the Minister may allow the Head of the Directorate at his or her request to vacate the office based on the grounds stipulated in Clause 8 of the Bill.

2.12 Clause 8 also provides for the insertion of section 17DB in the Act by providing that the Head of the Directorate must determine the fixed establishment of the Directorate and the number and grading of posts, after consultation with the Minister and the Minister of Public Service and Administration. The Head of the Directorate must also appoint the staff of the Directorate and if a member of the South African Police Service is appointed to the Directorate, the Head must do so after consultation with the National Commissioner of the Service.

Clause 9

2.13 Clause 9 provides for the security clearance of members of the Directorate by an Intelligence structure identified by the Minister, the transfer by the National Commissioner of members from the Directorate in view of a lack of a security clearance and an oath to be taken by members of the Directorate to serve impartially and exercise and carrying out or performing their duties in good faith and without fear, favour or prejudice.

Clause 10

2.14 Clause 10 of the Bill provides for the amendment of section 17F of the Act. Clause 10 of the Bill provides that the the Head of the Directorate may request the

secondment of personnel from any other Government department or institution, whenever he or she deems it necessary for the effective performance of the functions of the Directorate.

2.15 Clause 10 of the Bill also provides that the Director-General of the government department or Head of the relevant government institution, shall upon request by the Head of the Directorate, identify suitable personnel to be seconded to the Directorate upon such terms and conditions as may be agreed upon between the Head of the Directorate and the Director-General of the department or Head of the government institution concerned.

2.16 Clause 10 of the Bill provides that if the Head of the Directorate so requests, any person seconded shall retain the powers, duties and functions endowed by any law governing the powers, duties and functions of that department or institution, and that person may exercise such powers, duties and functions under the command of the Head of the Directorate or his or her delegate, but subject to such conditions as may be determined by the head of the seconding government department or institution.

2.17 Clause 10 of the Bill provides that a person seconded shall in the performance of his or her functions act in terms of the laws applicable to the Government department or institution from which he or she is seconded, subject to such conditions as may be agreed upon by the Head of the Directorate and the Director-General of the government department or head of the government institution.

Clause 11

2.18 Clause 11 of the Bill provides that the National Commissioner after consultation with the Head of the Directorate shall prepare the necessary estimate of revenue and expenditure of the Directorate, and that the Head of the Directorate must report directly to Parliament in the performance and finances of the Directorate as a program of the South African Police Service, that the National Commissioner shall be the accounting officer in respect of the Police Service, including the Directorate, and that monies appropriated by Parliament for the Directorate shall constitute earmarked funds on the Departmental vote of the Service and may not be used for other purposes other than that of the Directorate.

Clause 12

2.19. Clause 12 of the Bill provides for the amendment of section 17I of the Act. Clause 12 of the Bill provides that the Ministerial Committee may determine procedures to coordinate the activities of the Directorate and other relevant Government departments or institutions. Clause 12 also provides that the the National Commissioner and the Head of the Directorate shall, upon request of the Ministerial Committee, provide performance and implementation reports to the Ministerial Committee.

Clause 13

2.20 Clause 13 of the Bill provides for the amendment of section 17J of the Act, in order to provide that the Head of the Directorate will chair the Operational Committee, that the Deputy Head of the Directorate shall be the Deputy Chairperson and to provide for representation by the Crime Intelligence Division of the Service as well as a Deputy National Commissioner of the Service.

Clause 14

2.21 Clause 14 of the Bill seeks to amend section 17K of the Act by providing that the National Commissioner shall include in the annual report to Parliament in terms of section 55 (d) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), a report in respect of the performance of the Directorate as a programme of the Service.

2.22 Clause 14 of the Bill also provides that the Minister shall report the appointment of the Head of Directorate to Parliament and determine, with the concurrence of Parliament policy guidelines for the selection of national priority offences by the Head of the Directorate referred to in section 17D (1) of the Act and policy guidelines for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the Directorate referred to in section 17D (1) (b) of the Act.

2.23 Clause 14 of the Bill also provides that the first policy guidelines issued under this Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the Head in terms of this Act and any changes to the policy guidelines referred to in subsection (4) must be submitted to Parliament for consideration and approval for implementation.

Clause 15

2.24 Clause 15 of the Bill seeks to amend Section 17L of the Act by providing that the retired judge may request and obtain information from the National Director of

Public Prosecutions in so far as it may be necessary for the judge to conduct an investigation.

Clause 16

2.25 Clause 16 of the Bill seeks to provide for the insertion of a new section 17M in the Act in order to provide that members of the Directorate are, members of the South African Police Service, with subject to the provisions of the Act, the same powers, duties and functions as other members as well as for transitional provisions to ensure the smooth institution of the Directorate as a statutory body in the South African Police Service. The proposed provision provides for the continuation of investigations, and the selection of personnel as well as the reappointment of the Head and Deputy Head of the Directorate, and the Provincial heads of the Directorate.

Clause 17

2.26 Clause 17 of the Bill seeks to provide for the transitional arrangement .

Clause 18

2.27. Clause 18 of the Bill seeks to amend the preamble to be in line with the provisions of the Bill

Clause 19

2.28 Clause 19 of the Bill provides for the amendment through a Schedule to the Act, of the Prevention and Combating of Corruption Act, 2004 (Act No. 9 of 2004).

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Bill was drafted by a Task Team consisting of officials of the Secretariat of Police and both the South African Police Service and the Department of Justice and

Constitutional Development. The Department of Justice and Constitutional Development, the Director General of State Security, and the Department of Public Service and Administration were consulted in the drafting of the Bill.

4. FINANCIAL IMPLICATIONS FOR THE STATE

As the Bill provides for the continuation of the Directorate for Priority Crime Investigation, it will be less burdensome. Provision must be made for the expansion of certain activities of the Directorate, such as the higher status of the Head and the institution of the Deputy Head. The inclusion of the INTERPOL office as well as broadened intelligence activities need to be catered for. In effect the financial burden of the Bill should be viewed against the Constitutional objective of ensuring the required measure of independence of the Directorate.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

