

**Submission in response to the South
African Police Service Amendment Bill
[B 7—2012]**

Executive Summary

The Helen Suzman Foundation (the “HSF”) welcomes the opportunity to make a submission on the South African Police Service Amendment Bill (“the Bill”). The HSF sees this opportunity as a way to foster critical, yet constructive, dialogue between civil society and government in terms of the legislative process.

Introduction

The Bill arises from the Constitutional Court Judgment in the matter of *Glenister v The President of the Republic Of South Africa & Others* (“the Judgment”), in which the HSF participated as *amicus curiae*. The Judgment suspended Section 6A of the SAPS Act 68 of 1995 which formed the Directorate for Priority Crime Investigation in the wake of the disbanding of the Directorate of Special Operations.

The Court found section 6A to be inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the Directorate for Priority Crime Investigation (“the Directorate”).

The Shortfalls in the Bill

The HSF submits that the Bill does not meet the requirements of the Judgment for the reasons that:

- the proposed unit will not be sufficiently independent, either structurally or operationally;
- there are insufficient safeguards to protect the unit from political interference;
- there will be a perception that the unit is not seen to be adequately independent.

Summary of the major HSF recommendations

The HSF suggests, *inter alia*, that:

- To comply with the terms of the Judgment and achieve adequate independence, the Directorate and its Head cannot fall under the control of the National Commissioner of the South African Police Service (“the SAPS”).
- Legislation that brings into being a body within the SAPS that does not fall under the National Commissioner’s control is unconstitutional for want of compliance with section 207 of the Constitution.

- The process of interviewing and recommendation for the position of the Head of the Directorate (“the Head”) should be by an independent body and referred to the relevant Minister for final decision, or the Head should be appointed by Parliament as with Chapter 9 institutions.
- Security of tenure to protect the Directorate’s members’ employment can relatively easily be provided by a fixed non-renewable term of employment, or an indefinite contract of employment.
- The Directorate should be solely responsible for determining which offences and cases should be investigated. The Head should draft guidelines in this regard and Parliament should consider and approve them.
- The criteria for appointment of the Head of the Directorate should be vigorous and substantive.
- Financial management must be in the hands of the Head, not the National Commissioner.
- The issue of security clearance is problematic and needs to be clarified and not subject to the arbitrary exercise of power.

Conclusion

Our detailed submissions and recommendations are contained in the body of this document. We believe that our submissions suggest a way of addressing the requirements of the Court. We trust they will be of assistance to the Portfolio Committee.

We would also like to request that we be invited to address oral submissions to the Committee, in support of this document, at the appropriate time.



Francis Antonie

Director, Helen Suzman Foundation

27 March 2012

**SUBMISSION IN RESPONSE TO THE SOUTH AFRICAN POLICE SERVICE
AMENDMENT BILL, RESPONDING TO THE CONSTITUTIONAL COURT
SUSPENSION OF SECTION 6A OF THE SAPS ACT 68 OF 1995**

Introduction

1. This submission arises from the CONSTITUTIONAL COURT OF SOUTH AFRICA Case CCT 48/10 [2011] ZACC 6 in the matter of GLENISTER v THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS together with the HELEN SUZMAN FOUNDATION (*amicus curiae*).

The matter was heard on 2 September 2010 and decided on 17 March 2011.

2. The majority Judgment of Moseneke DCJ and Cameron J (“the Judgment”) ordered the following:

“5. It is declared that Chapter 6A of the South African Police Service Act 68 of 1995 is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.

6. The declaration of constitutional invalidity is suspended for 18 months in order to give Parliament the opportunity to remedy the defect.”[at para 251]

3. The Constitutional Court (“the Court”) included in its considerations of an “adequate degree of independence” the following:

3.1 The Directorate for Priority Crime Investigation (“the Directorate”) is insufficiently insulated from political influence in its structure and functioning; [at para 208]

3.2 The conditions of service that pertain to its members and in particular its head make it vulnerable to political interference. [at para 208]

3.3 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:

3.3.1 The absence of any solemn undertaking (oath of office), before commencing service and exercising powers, indicates the sharply diminished standing the legislation accords the Directorate and its members;

3.3.2 The Head of the Directorate (“the Head”) and the persons appointed to it enjoy little if any special job security; [at para 216]

- 3.4 The Directorate's members enjoy the same security of tenure as other members of the police force – no more and no less. There are no special provisions which secure their employment. *“The lack of specially entrenched employment security is not calculated to instil confidence in the members of the Directorate that they can carry out their investigations vigorously and fearlessly... [A]dequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.”* [at para 222]
- 3.5 The head of the Directorate of Special Operations (“the DSO” and the predecessor of the Directorate), as a deputy National Director of Public Prosecutions (“the NDPP”), *“enjoyed a minimum rate of remuneration which was determined by reference to the salary of a judge of the High Court. By contrast, the new provisions stipulate that the conditions of service for all members (including the grading of posts, remuneration and dismissal) are governed by regulations, which the Minister for Police determines. 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.”* [at para 227]
4. The Judgment held that while *“the policy guidelines the Ministerial Committee may issue could be broad and thus harmless”*, they could equally not be. *“Nothing in the statute requires the policy guidelines to be broad and harmless. Indeed, the power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that are not appropriate for the Directorate to investigate – or, conceivably, categories of political office-bearers whom the Directorate is prohibited from investigating.”* [at para 230]
5. The Court held further that *“the Minister for Police must submit any policy guidelines the committee determines to Parliament for approval. This is a safeguard against far-fetched conduct. But if Parliament does nothing, the guidelines are deemed to be approved.”* Two years after the legislation was passed, no guidelines appear to have been published in terms of section 17(2) of the South African Police Services Act 68 of 1995 (“the SAPS Act”). [at para 231]

6. Regarding the entity's conditions of service, the Court 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."* The Court further found that *"the appointment of its members is not sufficiently shielded from political influence."* [at para 249]
7. What is clear from the Judgment, therefore, is that members of the Directorate cannot be employed on grounds that do not:
 - secure their employment,
 - provide for non-renewable terms of office,
 - provide flexible grounds for dismissal based on objectively verifiable grounds, and
 - provide statutorily secure remuneration levels.
8. The Helen Suzman Foundation ("the HSF") submits that the South African Police Service Amendment Bill, 7 of 2012 ("the Bill") does not meet the requirements of the Judgment. In summary, the reasons are –
 - the proposed unit will not be sufficiently independent, either structurally or operationally;
 - there are insufficient safeguards to protect the unit from political interference in the draft Bill;
 - there will be a perception that the unit is not seen to be adequately independent.

South African Police Amendment Bill - Compliance with the Judgment

9. The Legislature has elected to comply with the Judgment by making amendments to the SAPS Act, taking the position that the Directorate will remain within and under the purview of the Police and therefore under the authority of the Minister of Police, rather than locate it, say, under the Ministry of Justice and Constitutional Development.

10. In paragraph 162 of the Judgment, the Court said:

"We gratefully adopt the manner in which the main judgment disposes of certain grounds advanced by the applicant to invalidate the impugned legislation. Like it, we conclude that the impugned legislation, which created the DPCI, cannot be invalidated on the grounds that it is irrational or that Parliament had failed to

facilitate public involvement in the legislative process that led to its enactment. We further agree that section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (“NPA”) and nowhere else. 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.”

11. The Court further states at paragraph 191 that:

“This Court will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.”

Elsewhere in this document, the HSF will make submissions about the continued location of the Directorate within the police services.

12. We will comment on the proposed changes, both positive and negative, by direct reference to the amendments in the Bill. We will quote in full those sections that we believe appropriate. The remainder may either be summarised or excluded.

Clause 2 – Amendment to Section 11: POWERS, DUTIES AND FUNCTIONS

13. Section 11 is amended as follows:

“(1) The National Commissioner [may exercise the powers and shall perform the duties and functions necessary to give effect to section 218 (1) of the Constitution] must exercise control over and manage the police service in accordance with section 207(2) of the Constitution of the Republic of South Africa”;

and

(2) (a) without derogating from the generality of subsection (1), the [powers, duties and functions referred to in that subsection shall include the power, duty and function to] the National Commissioner shall—”.

14. This amendment is the first to give rise to our fundamental concern about having the Directorate located in the SAPS. Section 207 of the Constitution provides as follows:

"207. Control of police service

(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces -

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation."

15. In terms of section 207, no matter how the legislation is drafted and despite having a "Head of the Directorate for Priority Crime Investigation" ("the Head") who appears to be independent, the Head would always be subject to the authority and oversight of the National Commissioner.
16. In addition, if the Head is given the independence that is required by the Judgment, the constitutional position of the National Commissioner in carrying out his obligations will be undermined.

17. Essentially, the Head has to be given the independence and authority envisaged in the Bill, but the National Commissioner must have authority over the Head in terms of the Constitution. This contradiction cannot be resolved. In relation to the Directorate, the Court in the Judgment at paragraph 229 said:

"The head of the DPCI, as a Deputy National Commissioner and a member of the SAPS 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." (our underlining)

18. The Judgment also said the following at paragraph 211:

"To understand our native conception of institutional independence, we must look to the courts, to Chapter 9 institutions, to the NDPP, and in this context also to the now-defunct DSO. All these institutions adequately embody or embodied the degree of independence appropriate to their constitutional role and functioning. Without applying a requirement of full judicial independence, all these institutions indicate how far the DPCI structure falls short in failing to attain adequate independence."

19. Thus, the Bill faces a dilemma that cannot be resolved if the Directorate is to remain within the SAPS. On the one hand, in order to comply with the terms of the Judgment and achieve adequate independence, the Directorate and its Head cannot fall under the control of the National Commissioner. On the other hand, any legislation that brings into being a body within SAPS that does not fall under the National Commissioner's control is unconstitutional for want of compliance with section 207 of the Constitution.

20. The Bill is unable to give the Directorate the necessary independence which is required by the Court due to its location within the SAPS and the effect of Section 207 of the Constitution. Currently the Independent Complaints Directorate ("the ICD") is established in terms Section 50 of the SAPS Act. Section 50(2) of the SAPS Act, however, expressly states that: "The directorate shall function independently from the Service." This has not been done for the Directorate. On the contrary, the amendment Bill falls short of the requirement for independence as articulated in the Judgment in that it expressly states that the Directorate will form part of the SAPS, as will be discussed more fully below.

Clause 3 - Amendment to Section 16: ORGANISED CRIME AND PUBLIC ORDER POLICING UNIT

21. A minor issue - clause 3 of the Bill, which amends section 16 of the SAPS Act, has an error in that Section 3(a) refers to a substitution in “subsection (1)” for paragraph (h). It should read “subsection (2)”.
22. With the above correction in mind Section 16(2)(h) is amended as follows –
- "(h) which a Provincial Commissioner requests the **[National Commissioner]** Head of the Directorate for Priority Crime Investigation, referred to in section 17C(2) to prevent or investigate by employing expertise and making resources available at national level and to which request the **[National Commissioner]** Head of the Directorate for Priority Crime Investigation accedes in accordance with the approved policy guidelines;"*
23. This amendment gives authority to a Provincial Commissioner to send a matter for investigation directly to the Head of the Directorate. We argue that this is a breach of the Constitution, as the constitutional authority and obligations bestowed on the National Commissioner may be undermined. This provision bypasses the National Commissioner and regards the Head of the Directorate as an equal to the Commissioner.
24. Further, although the National Commissioner is thus bypassed, he still has potential influence on this process through the Provincial Commissioner who is his direct subordinate.
25. Section 16(3) is amended as follows –
- "(3) In the event of a dispute between the **[National Commissioner]** Head of the Directorate for Priority Crime Investigation and Provincial Commissioner regarding the question whether criminal conduct or endeavour thereto 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, the determination by the **[National Commissioner]** Head of the Directorate for Priority Crime Investigation, in accordance with the approved policy guidelines, shall prevail."*
26. This appears to shore up the independence of the Head from the National Commissioner on issues under the Head’s authority. Unfortunately it does not in itself confer sufficient independence on the Head. This provision does not, however, clarify what would happen in the

event that the National Commissioner actually stepped in to take the side of the Provincial Commissioner in a dispute with the Head.

27. Section 16 (4)(b) and (c) are amended respectively as follows -

*"(b) Where an investigation of a crime or alleged crime reveals that the circumstances referred to in subsection (2) are present, the Provincial Commissioner shall report the matter to the **[National Commissioner]** Head of the Directorate for Priority Crime Investigation as soon as possible.*

and

*(c) The **[National Commissioner]** Head of the Directorate for Priority Crime Investigation may, in consultation with the Provincial Commissioner concerned, notwithstanding the presence of the circumstances referred to in subsection (2) direct that the investigation or any part thereof, be conducted by the Provincial Commissioner."*

28. The Head's function is given considerably more independence through these provisions by being given an equal or even superior status to the National Commissioner in these matters. This may accord with the requirements of the Judgment. However, the HSF maintains that it is arguably unconstitutional because it removes authority for the Directorate from the National Commissioner who is required to have overall authority over the SAPS (of which the Directorate remains a part) by section 207 of the Constitution.

29. In section 16(4)(c) there is reference to the direct relationship between Provincial Commissioners and the Head. We thus ask whether a Provincial Commissioner can be obliged to report to a body (the Directorate) within the SAPS without reference to the National Commissioner.

Clause 4 - Amendment to Section 17B: APPLICATION OF CHAPTER

30. Section 17B of the SAPS Act is amended by the substitution for paragraph (a) for the following -

*"(a)The need to establish a Directorate **[as a Division of]** in the Service to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption."*

31. It is unclear whether, as a "Directorate", the DPCI is actually meant merely to be a division in the SAPS or something more. This amendment does not meet the requirements of the Constitution. Although it appears to give the Directorate independence, it seems that the Directorate would continue to fall within the service and therefore be under the control of the National Commissioner. This is discussed in more detail below.

32. The following provisions which apply to Chapter 9 institutions in terms of the Constitution are pertinent:

"(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions."

We suggest that a similar clause be added to the Bill.

Clause 5 - Amendment to Section 17C: ESTABLISHMENT AND COMPOSITION OF DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

33. Section 17C of the SAPS Act is substituted by the following –

*"(1) The Directorate for Priority Crime Investigation is hereby established as a **[Division of]** Directorate in the Service.*

(1A) The Directorate comprises of—

(a) The Office of the Head of the Directorate at national level; and

*(2) The Directorate **[comprises]** consists of—*

(a) The Head of the Directorate, at national level, who shall manage and direct the Directorate and who shall be a Deputy National Commissioner appointed by the Minister in concurrence with Cabinet;

(aA) the Deputy Head of the Directorate at national level;

(aB) the Provincial Heads of the Directorate;

*(b) other persons appointed by the **[National Commissioner on the recommendation of the]** Head of the Directorate at the national and provincial levels on the basis of the required level of experience, training, skills, competence and knowledge;*

(c) An adequate number of legal officers appointed to the Directorate; and

(d) Officials from any Government department or institution, seconded to the Directorate in terms of laws governing the public service,

(e) Administrative staff appointed to the Directorate."

[[3] The Minister shall report to Parliament on the appointment of the Head of the Directorate.]"

34. It is not clear whether the change from a Division to a Directorate is a matter of form or substance. It suggests that the Directorate is different from a normal Division of the SAPS. In particular, given the intention of the Bill to comply with the Judgment, this provision could imply that the Directorate should fall outside of the SAPS' direct hierarchy of control. If this is so, it may again fall foul of the constitutional imperative of control by the National Commissioner in terms of Section 207 of the Constitution.

35. In terms of Section 17C(1A)(a) and (b), the Directorate now comprises the Office of the Head at national level and an Office of a Provincial Directorate in each province. The Head's appointment remains in the hands of the Minister with the concurrence of Parliament.
36. This also appears to be a 'distinction without difference' in that it refers to the Directorate comprising "the Office of the Head" rather than as previously "the Head of the Directorate" as head of a "Division" of SAPS.
37. Section 17C(2)(a) provides that the Head at national level will manage and direct the Directorate AND that he or she shall be a Deputy National Commissioner appointed by the Minister in concurrence with Cabinet. The Head has autonomy from the National Commissioner and yet is technically considered a Deputy National Commissioner. On the one hand, this provision seems to be intended to clear the contradiction with the Section 207 of the Constitution previously discussed. On the other hand, the provisions of Section 17C of the Bill fall foul of the dilemma between constitutionality and independence.
38. The Head (Section 17C(2)(b)) is given the authority to appoint at any level anyone with the "required level of experience, training, skills, competence and knowledge". This grants the Head the freedom and autonomy to employ whomever is needed. The change specifically removes the National Commissioner from the ultimate decision making position on these matters. It does, however, raise the problem of conflict with Section 207 of the Constitution again.
39. One of the problems with the Bill is the lack of criteria for the appointment of either the Head or his staff. Under the DSO the National Director of Public Prosecutions was entitled to appoint any person recommended by the Head of the DSO as long as they were a "fit and proper person". There is no similar provision in the Bill.
40. The Bill does provide for the secondment of officials from "any Government department or institution...in terms of the laws governing the public service". It does not, however, create a specific nexus between the Directorate and the NPA. Under the DSO provision was made for the obligatory assistance of prosecutors and similar staff. Whether this is necessary or desirable is a matter for debate and will be considered below.

41. The requirement that the Minister must appoint the Head (Deletion of 17C(3)) with the “concurrence of Cabinet” and then report to Parliament has been removed from this section. However, it has been incorporated to the next section and we will deal with it there.

Clause 6 - Insertion of Section 17 CA immediately after section 17C: APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE

42. **Appointment** - Insertion in Section 17CA as follows –

“(1) The Minister, with the concurrence of Cabinet, must appoint a South African citizen as Head of the Directorate for a non-renewable fixed term not exceeding seven years.

“(2) The Minister shall report to Parliament on the appointment of the Head of the Directorate within 14 days...of its next ensuing session.

“(3) The Head of the Directorate, with the concurrence of the Minister, must appoint a South African citizen as a Deputy Head of the Directorate for a non-renewable fixed term not exceeding seven years.

“(4) The Head of the Directorate, with the concurrence of the Minister, must appoint a South African citizen as a Provincial Head of the Directorate for a non-renewable fixed term not exceeding seven years.

43. The impression given by both an initial reading and subsequent readings of the Bill is that the requirement that the Minister appoint the Head with the concurrence of the Cabinet has been removed, because it is no longer in Section 17C. However, it has been reinserted in Section 17CA(1), above. Is this a “sleight of hand”? In our view, appointment by the Minister does not accord with the Court’s requirements of independence. At the least the process of interviewing and recommendation should be in the hands of an independent body and referred to the Minister for final decision.
44. An alternative option is that appointment could also be made by Parliament with a high majority and or by the President as is the case with the head of the NPA. The process for appointing the head of a Chapter 9 institution is laid out by section 193 of the Constitution as follows –

“193. Appointments.—

(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

(a) the South African Human Rights Commission;

(b) the Commission for Gender Equality; and

(c) the Electoral Commission.

(5) The National Assembly must recommend persons—

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote

—
(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (a)."

45. Remuneration – Insertion in Section 17CAC as follows

"(5)(a) The remuneration, allowances and other terms and conditions of service and service benefits of the Head of the Directorate shall be determined by the Minister with the concurrence of the Minister of Finance, by notice in the Gazette; and

(b) The remuneration allowances and other terms and conditions of service and service benefits of the Deputy Head and Provincial Head of the Directorate shall be determined by the Minister after consultation with the Head of the Directorate and with the concurrence of the Minister of Finance: Provided that—

(i) the salary of the Head shall not be less than the salary level of the highest paid Deputy National Commissioner of the Service;

(ii) the salary of the Deputy Head shall not be less than 75 per cent of the salary of the Head; and

(iii) the salary of a Provincial Head shall not be less than 65 per cent of the salary of the Head;

(6) The Minister must submit the remuneration scale payable to the Deputy Head and the Provincial Head to Parliament for approval and such remuneration scale may not be reduced except with the concurrence of Parliament.

46. The salaries of Deputy Directors and Prosecutors in the NPA are determined by the Minister of Justice and Constitutional Development after consultation with the NDPP and the Minister for the Public Service and Administration. Their other conditions of service are determined in terms of the Public Service Act (see Sections 17 – 19 of the National Prosecuting Authority Act of 1998 (NPAA)). In the case of the Directorate it is the Minister, in consultation with the Head and the Minister of Finance, who determines salaries. There is no provision similar to those for the NPA that other terms and conditions of employment will either be governed by the Public Service Act or the SAPS Act. Instead, Section 17CA(13) stipulates that “the minister may make regulations in respect of... other conditions of service”. The HSF poses the question whether to ensure independence, the provisions that apply to the Directorate should be similar to those that apply to the NPA?

47. **Conditions of Service** – Insertion in Section 17CA as follows:

(7) The Deputy Head of the Directorate must exercise such powers and perform such functions as the Head of the Directorate in terms of this or any other law may assign to him or her.

(8) The Provincial Head must exercise such powers or perform such functions as the Head of the Directorate in terms of this or any other law may assign to him or her.

(9)(a) Whenever the Head of the Directorate is absent or unable to perform his or her functions, the Minister may, with the concurrence of the Cabinet, appoint the Deputy Head as the acting Head of the Directorate.

(b) Whenever the office of the Head of the Directorate is vacant, or the Head is for any reason unable to take up the appointment contemplated in subsection (1), the Minister may, with the concurrence of Cabinet, appoint the Deputy Head as the acting Head of the Directorate.

(c) Whenever the Deputy Head is absent or unable to perform his or her functions, the Head of the Directorate may, in consultation with the Minister, appoint a suitably qualified and experienced person as the acting Deputy Head of the Directorate;

(d) If both the Head and the Deputy Head of the Directorate are absent or if both those offices are vacant, the Minister must, with the concurrence of Cabinet, appoint a suitably qualified and experienced person as the acting Head of the Directorate.

(10) Subject to subsection (12), the Head, Deputy Head and Provincial Heads of the Directorate, must vacate their offices on attaining the age of 60 years.

(11) If the Head or Deputy Head of the Directorate attains the age of 60 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(12) If the Minister is of the opinion that it is in the public interest to retain the Head or Deputy Head of the Directorate in his or her office beyond the age of 60 years, and—

(a) the Head or Deputy Head of the Directorate wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue, the Minister may from time to time with the concurrence of Cabinet, direct that the Head or Deputy Head be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that the term of office of the Head or Deputy Head of the Directorate shall not exceed seven years.

(13) The Minister may make regulations in respect of the remuneration, allowances and other conditions of service of other members of the Directorate.

(14) The regulations referred to in subsection (13) must be submitted to Parliament for approval.”

48. The NPAA provided that the NDPP, Deputies etc. had to have their conditions of employment determined by the President, subject to the NDPP’s salary not being less than that of a judge of the High Court and a Deputy’s salary not less than 85% of that. This suggests that the respect for the NPA hierarchy is on a different level to that for the SAPS.

49. Subsection (5)(b)(i) provides that the salary of the Head will be no less than that of the highest paid Deputy National Commissioner of SAPS. This implies a lesser status than that of 85% of a High Court judge as applied to the head of the DSO and a lesser status than the National Commissioner. The same comment applies with relevant amendments to the salaries of the Deputy and Provincial Heads.

50. In terms of the NPAA the Director of the DSO had to be a Deputy National Director and, more significantly, had to be “a fit and proper person”. The criteria were –

“(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.”

51. It is debatable, though by no means certain, that the Directorate should have prosecutorial powers. Accordingly, the criteria for appointment of the Head and his staff may not need to comply with those required by the NPA but certainly the criteria that accompany “a fit and proper person” should apply. Without it we submit that the provisions of Section 17CA do not meet the requirements of the Court with regard to appropriate appointment of staff to the Directorate.
52. The Bill makes no suggestions as to the criteria to be looked at in the appointment of such a person.
53. We submit for comparison the Chapter 9 Institutions, which give detailed criteria for the appointment of a head, rather than the simple requirement that the person be “fit and proper”.
54. Thus, the **criteria** set out in Section 1A(3) of the Public Protector Act 23 of 1994 require the Public Protector to be “...a fit and proper person to hold such office, and who-
- (a) is a Judge of the High Court; or*
 - (b) is admitted as an advocate or an attorney who has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or attorney; or*
 - (c) is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at university; or*
 - (d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or*
 - (e) has for a cumulative period of at least 10 years, been a member of Parliament; or*
 - (f) has acquired any number of combination of experience mentioned in paragraphs (b) to (e) for a cumulative period of at least 10 years.”*
55. Thus the **procedure** for appointment of the head of a Chapter 9 Institution is found in Clause 193.5 of the Constitution, in terms of which the National Assembly must recommend persons, “
- a. nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and*

- b. *approved by the Assembly by a resolution adopted with a supporting vote*
 - i. *of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or*
 - ii. *of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission."*

56. The Judgment at paragraph 184 makes mention of one of the Government's obligations under the Southern African Development Community Protocol on combating illicit drugs, ("SADC Drugs Protocol") under which member states are required to institute appropriate and effective measures to curb corruption. Under article 8(2) of the SADC Drugs Protocol these measures 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".

57. The amendment in subsection (1) of the Bill states that the Head shall be appointed for a "**non-renewable fixed term not exceeding seven years.**"

58. The use of the phrase "not exceeding" is confusing as it implies that the period can be stipulated to be less than seven years, with no minimum duration. This means that the Minister can choose to appoint the Head for anywhere between a single day and 7 years. This is not compliant with the Judgment, which stated at paragraph 213, *"The lack of independence is reflected in our view most signally in the absence of secure tenure protecting the employment of the members of the entity..."*

59. The HSF wishes to suggest that 'secure tenure' that has not been considered sufficiently. We suggest that it is debatable whether a fixed, non-renewable term of office would actually create the necessary independence needed of a Head. This independence may be compromised in reality not by the length of service as Head, but by promises made to the Head as to his or her future employment elsewhere after the expiry of the 7 years.

60. We argue that a case can be made that the well-established labour laws of the Republic should simply apply here. By that we mean that the Head should be appointed on an indefinite term contract with a mandatory retirement age, but should be subject to the same disciplinary injunctions as any other employee (public or private sector) with respect to misconduct or incapacity. The Head's (and his staff's) incapacity, misconduct or redundancy should be dealt with following a proper procedure and for a substantive reason. Such hearings could be held by an independent panel of suitably eminent independent persons which should then make its recommendation to the Minister who should not be able to deviate from the decision except for sound and objective reasons.
61. Indefinite term employment, arguably, would ensure a higher degree of independence because the Head would be required to work under successive governments, whether under a change to the executive of a single ruling party or a change as to which party governs. This would enhance the professionalism of the position.
62. In the HSF's view, the appointment, remuneration and conditions of service of the members of the Directorate are not adequately addressed in the Bill. The Judgment requires the protection, not just of the position and independence of the Head, but of those of the members as well.

Clause 7 - Amendment of section 17D: FUNCTIONS OF THE DIRECTORATE

63. The substitution for subsection (1)(a) as follows –

*“(1)(a) national priority offences, 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 **[Ministerial Committee] Minister and approved by Parliament; [and]”;***
(aA) 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);
*(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the **[Ministerial Committee] Minister and approved by Parliament.**”; and*
(1A) The Head of the Directorate shall ensure that the Directorate observes the policy guidelines referred to in subsection (1).”

64. The Head's discretion to investigate “national priority offences” (Section 17D(1)(a)) is circumscribed by Policy Guidelines issued by the Minister and approved by parliament. Previously such guidelines were issued by the “Ministerial Committee” which was a committee

comprising the Cabinet Members responsible for the administration of Justice (the chair), Correctional Services, Defence, Intelligence Services, Safety and Security; and any other Cabinet member designated from time to time by the President. The powers of the Ministerial Committee in this regard were seen as problematic by the Judgment.

65. Under Section 17D as amended by the Bill, the power to issue Policy Guidelines lies with the Minister rather than the Ministerial Committee. However, the new Section 17I reintroduces the Ministerial Committee. We deal with this when the relevant section is addressed below.
66. We are concerned that the Directorate's activities would be limited to the policy guidelines issued by the Minister. Subsection (d) of the amended clause states that: "***The Head of the Directorate must ensure that the Directorate observes the policy guidelines referred to in subsection (1)***". Anything that the Directorate does would therefore be limited to these policy guidelines.
67. We do not believe that the Minister is suitably qualified to create such guidelines. Specialists within the Directorate should draft the guidelines, and once drafted the Minister should submit them to Parliament for approval.
68. We are further concerned that it is implied that the guidelines will have some sort of "binding force" on the Head, as he or she is compelled to follow the guidelines. Guidelines are created to guide, not prescribe. The Head should be able to deviate from the guidelines for **proper and appropriate reasons** without having to account to anyone for so doing.
69. We are perturbed that there is no clarity as to what is meant by "selected offences" and who is tasked with selecting them. It is unclear why they would need to be selected by an external decision-maker on behalf of the Head. We suggest that the Head must select cases and offences with due regard to the guidelines and the laws of the Republic.
70. Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA) comprehensively sets out the range of potential corrupt activities that the Directorate could investigate. Section 34 of PRECCA, as contemplated in Section 17D(1)(a)(aA) of the Bill, however, deals only with the duty to report corruption, not the specific acts of corruption themselves. The primary duty of the Directorate should be to investigate these crimes, with

priority given to the most complex and serious matters, in the discretion of the Head, as is the case with the NPA, and was the case with the erstwhile DSO.

71. Considering the purpose of this section of the Bill we suggest that this reference to Section 34 of PRECCA is an inappropriate and careless insertion as it has nothing to do with the issue at hand.

72. Clause 2.8 of the Memorandum on the objects of the SAPS Amendment Bill (Memorandum) states that 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.

73. The Memorandum highlights, by underlining it, reference to “particular selected offences”. Whether this is innocent or ominous depends on the intent behind it. The Memorandum makes it clear, however, that the opinion of the Head as to which offences should be so selected is circumscribed by the obligation to observe the policy guidelines issued by the Minister and approved by Parliament. In our view this goes to the heart of interference with the independence of the Directorate.

74. The requirement that the Directorate be limited to the policy guidelines may be problematic, as was noted in the Judgment at paragraph 206:

“...legal mechanisms must be established that limit the possibility of abuse of the chain of command and that will protect the agency against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption. It then asks whether the DPCI has sufficient structural and operational autonomy to protect it from political influence. Here the question is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational

autonomy, secured through institutional and legal mechanisms, to prevent undue political interference." (our underlining)

75. Limiting operation of the Directorate to the structure contained in the policy guidelines is unlikely to lead to adequate operational autonomy as is required by the judgment.

Clause 8 - Insertion after section 17D of sections 17DA and 17DB: LOSS OF CONFIDENCE IN THE HEAD OF THE DIRECTORATE (17DA) and STAFF OF THE DIRECTORATE (17DB)

76. Section 17DA is amended as follows –

"(1) The Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (2), (3) and (4).

(2)(a) 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 and, subject to the provisions of this subsection, may thereupon remove him or her from office—

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the Head of the Directorate, the reason thereof and the representations of the Head of the Directorate, if any, shall be communicated in writing to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) The Head of the Directorate provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the Minister.

(3) The Minister shall also remove the Head of the Directorate from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection(2)(a), is presented to the Minister.

(4) The Minister may allow the Head of the Directorate at his or her request, to vacate his or her office—

(a) on account of continued ill-health; or

(b) for any other reason which the Minister deems sufficient.

(c) The request in terms of paragraph (b) shall be addressed to the

Minister at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the Minister grants a shorter period in a specific case.

77. This section allows the Minister to suspend and/or terminate the services of the Head by reasons of ill health, misconduct, incapacity or no longer being a fit and proper person. This is

the first time the Head's being "a fit and proper" person is raised. This goes back to our earlier submissions on security of tenure and an appropriate appointment process. This section reserves the right of the Minister to terminate the fixed term contract prematurely if there are good grounds for doing so. However, the ability of the Minister to terminate the contract in this manner without paying out the balance of the contract would be questionable.

78. We suggest that termination on these grounds by an independent disciplinary body is more appropriate, but only likely in the context of an indefinite term contract. In reality if the contract is a fixed term one there is more likely to be a "paying out" of the balance of the contract to make the Head resign voluntarily. Instead, a proper procedure should be followed to investigate proper substantive grounds for the action, as is required by South African labour law.
79. Suspension on good grounds may be at the discretion of the Minister, but termination should be the responsibility of an independent chair and disciplinary panel. We also submit that the suspension should be on full pay rather than "no salary or such salary as may be determined by the Minister", with the condition that full disciplinary hearings should then be held and concluded within a reasonable period of the beginning of the suspension. It is crucial to note that the principle of "paid suspension" is based on the presumption of innocence.

80. Section 17DB is amended as follows -

"17DB. The Head of the Directorate must—

(a) 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; and

(b) appoint the staff of the Directorate: Provided that where a member of the Service is appointed to the Directorate, the Head must do so after consultation with the National Commissioner."

81. If the Head only has the obligation to consult the National Commissioner before the appointment of a member of staff of SAPS then, arguably, while the Head's authority and independence is strengthened, the National Commissioner's constitutional function is diluted.

Clause 9 - Amendment of section 17E(2)(a) & (c) and Substitution of subsection (4):

SECURITY SCREENING AND INTEGRITY MEASURES

82. Section 17E(2)(a) & (c) is amended as follows –

"(a) a security clearance has been issued to that person in terms of section 2A (6) of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), by **[the Head of the Crime Intelligence Division of the Service]** any Intelligence Structure referred to in that Act as may from time to time be determined by the Minister;

(c) a temporary security clearance has been issued by **[the Head of the Crime Intelligence Division of the Service]** any Intelligence Structure referred to in the National Strategic Intelligence Act determined by the Minister after the person had submitted an application to such Intelligence Structure **[the Head of the Crime Intelligence Division]** to have a security screening investigation conducted."

83. The substitution for subsection (4) of the following subsection—

*"(4) Whenever the **[Head of the Crime Intelligence Division of the Service]** head of the Intelligence Structure referred to in subsection (2)(a) and (c) acting in terms of section 2A(6) of the National Strategic Intelligence Act, 1994, upon reasonable grounds, degrades, withdraws or refuses a security clearance, the **[Head of the Directorate]** National Commissioner may transfer such person from the Directorate, or if such person cannot be redeployed elsewhere in the Service, discharge him or her, subject to the provisions of section 34."*

84. The following subsections are added -

"(9)(a) A member of the Directorate shall serve impartially and exercise his or her powers or perform his or her functions in good faith.

(b) Subject to the Constitution of the Republic and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct a member of the Directorate, in the exercise, carrying out or performance of its, his or her powers, duties and functions.

(10) The Head of the Directorate, the Deputy Head of the Directorate and any person seconded to or employed in the Directorate, must before commencing with their functions in terms of this Act, take an oath or make an affirmation, which shall be subscribed by them, in the form set out below:..."

85. The requirement for a "security clearance" may be problematic. While the issue of security clearance needs to be resolved in relation to the intelligence community, the HSF is concerned that the Head and his or her staff are not members of the security and intelligence community and therefore there is no reason why they should be subject to the requirement to obtain security clearance from the requisite intelligence community.

86. There is also uncertainty about the state of the security structure at present, particularly given the controversy surrounding the Protection of State Information Bill (POSIB). The enormous

powers of classification proposed by POSIB may have unintended consequences for the ability of the Head and his staff to access the information necessary for the proper performance of their duties.

87. There is no indication of what sort of clearance and at what level is required for the different positions within the Directorate.
88. Section 17E(9)(a) and (10) are appropriate provisions for affirming the independence of the Directorate and accords with one of the requirements of the Judgment – both the obligation to serve impartially and in good faith. So too is the reinstatement of an Oath of Office.

Clause 10 - Substitution of section 17F(2), (5) and (7): MULTI-DISCIPLINARY APPROACH

89. Subsection 2, 5 and 7 are substituted as follows –

*"(2) The **[National Commissioner]** the Head of the Directorate **[shall]** may request the secondment of personnel from any other Government department or institution, whenever **[the Head of the Directorate requests such secondment]** he or she deems it necessary for the effective performance of the functions of the Directorate.";*

*(5) The Director-General of the Government department or Head of the relevant Government institution, referred to in subsection (2), shall upon request by the **[National Commissioner]** 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 **[National Commissioner]** Head of the Directorate and the Director-General of the department or Head of the Government institution concerned."; and*

*(7)(a) If the **[National Commissioner]** Head of the Directorate so requests, any person seconded in terms of subsection (3) 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.*

*(b) A person seconded under paragraph (a) 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 **[National Commissioner]** Head of the Directorate and the Director-General of the Government Department or Head of the Government institution."*

90. Once again the National Commissioner is replaced by the Head, in this case in terms of the authority to seek secondees from other Government institutions. The National Commissioner

now plays no role in this process. This provision does have the intended effect of increasing the independence of the Head on matters of staffing, but it once again clashes with the National Commissioner's authority as granted by Section 207 of the Constitution.

Clause 11 - Substitution of section 17H: FINANCES AND FINANCIAL ACCOUNTABILITY

91. Section 17H(1) is substituted as follows -

"(1) The expenses incurred in connection with—

(a) the exercise of powers, the carrying out of the duties and the performance of the functions of the Directorate; and

(b) the remuneration and other conditions of service of members of the Directorate, shall be defrayed from monies appropriated by Parliament for this purpose to the departmental vote in terms of the Public Finance Management Act, 1999 (Act No.1 of 1999).

(2) The National Commissioner must, after consultation with the Head of the Directorate, prepare the necessary estimate of revenue and expenditure of the Directorate.

(3) The National Commissioner, as the accounting officer of the Service shall, subject to the Public Finance Management Act, 1999—

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the Directorate;

(b) cause the necessary accounting and other records to be kept; and

(c) ensure that the annual report on the performance of the Directorate is included as a distinct program in the annual report of the Service.

(4) Monies appropriated by Parliament for this purpose—

(a) constitute earmarked funds on the Departmental vote of the Service; and

(b) must not be used by the Service for purposes other than that of the Directorate."

92. There is no clearer indication of independence than the right of a body to directly receive and administer its own finances. This section clearly undermines that independence by making the Directorate subject to the financial oversight of the National Commissioner as the accounting officer of the Directorate rather than the Head.

93. Intentional or not, control or oversight of the finances allows the National Commissioner to undermine the Directorate if he so wishes by controlling the flow of financial resources to the Directorate. For example, although the ICD is established in terms of the SAPS Act, Section 52 of the SAPS Act states that the Executive Director of the ICD shall be its accounting officer.

94. As the Public Finance Management Act 29 of 1999 was enacted to promote good financial management in the public sector, leaving this section unchanged is likely to contravene the objects of this Act.

Clause 12 – Insertion of section 17I to substitute subsection (2) and (3): CO-ORDINATION BY CABINET

95. Section 17I is inserted as follows –

"(2) The Ministerial Committee may determine—
[(a) policy guidelines in respect of the functioning of the Directorate;
(b) policy guidelines for the selection of national priority offences by the Head of the Directorate in terms of section 17D (1) (a);
(c) policy guidelines for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the Directorate in terms of section 17D (1) (b);] procedures to coordinate the activities of the Directorate and other relevant Government departments or institutions.

(3)(a) The Ministerial Committee [shall oversee the functioning of the Directorate and] shall meet as regularly as necessary, but not less than four times annually.

(b) 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."

96. Despite having been removed from earlier provisions, the Ministerial Committee makes a re-appearance here, with no definition or explanation as to who comprises the Committee. We submit that this is simply executive oversight in another guise and that it is still inappropriate for necessary levels of independence. The HSF argues that oversight by Parliament rather than by the Executive is required. Indeed in the Judgment at 228, the Court held that, ***“Our gravest disquiet with the impugned provisions arises from the fact that the new entity’s activities must be coordinated by Cabinet.”*** Yet this very provision remains in the Bill at 17I(2).

Clause 13 - Amendment of section 17J(1)(a) and (b), and (2): OPERATIONAL COMMITTEE

97. The insertion in subsection (1)(a) of the following paragraph:

(i) the [National Commissioner,] Head of the Directorate, as chairperson;
(iii) the Deputy Head of the Directorate, as deputy chairperson;

98. The insertion in subsection (1)(a) of the following subparagraphs, after subparagraph (ii):

“(iiA) a Deputy National Commissioner of the South African Police Service designated by the National Commissioner;
(iiB) the Head of the Crime Intelligence Division of the South African Police Service.”

99. The substitution in subsection (1) for paragraph (b) of the following paragraph:

(b) An official at the rank of at least [an Assistant Commissioner] a Major General or Chief Director may be designated on a permanent basis to represent any official mentioned above if he or she is not available: Provided that the official listed in paragraph (a) may also attend."

100. The substitution in subsection (2) for paragraph (a) of the following paragraph:

"(a) review, monitor and facilitate the support and assistance of the respective Government departments or institutions to the Directorate as well as secondments to the Directorate, and address problems which arise regarding such support and assistance;" and

101. The deletion in subsection (2) of paragraphs (b) and (c).

102. There is nothing inherently wrong with an operations committee to oversee the work of the Directorate but who should be on such a committee is open to question. Even though the National Commissioner has been removed, a Deputy National Commissioner, who is a direct subordinate of the National Commissioner, is there, effectively as a proxy. The issue of the operational independence of the Directorate thus arises again.

Clause 14 - Amendment of section 17K: PARLIAMENTARY OVERSIGHT

103. Section 17K is amended as follows –

"(2) 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 [activities] performance of the Directorate as a programme of the Service."

(b) by the deletion of subsection (3);

(c) by the substitution for subsection (4) of the following subsection:

(4) The Minister shall —

(a) determine, with the concurrence of Parliament—

(i) policy guidelines for the selection of national priority offences by the Head of the Directorate referred to in section 17D (1) (a);

(ii) 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);

(b) submit to Parliament any policy guidelines referred to in section [17I (2) (a), (b) and (c)] 17D(1)(a) and (b) for [approval] concurrence."

(d) the deletion of subsections (5) and (6);

(e) the addition of the following subsections:

(7) 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.

(8) Any changes to the policy guidelines referred to in subsection (4) must be submitted to Parliament for consideration and approval for implementation.

(9) The Minister shall report to Parliament on the appointment of the Head of the Directorate."

104. Clause 14 further highlights the problems which we raised in relation to Clause 7. It appears that the operations of the Directorate will be limited by the policy guidelines which are to be issued by the Minister with the concurrence of Parliament. As suggested in paragraph 63 above, the guidelines should be drafted by the Directorate with the concurrence of Parliament. This is currently what is provided for with regards to the NPA in the NPA Act. The head of the NPA is responsible for policy with the concurrence of Parliament.

105. We note that the word "approval" has been replaced by the word "concurrence" in Section 17D(1)(a) and (b). This suggests that the more active approval of Parliament is replaced by a more passive concept that suggests that Parliament plays a less active, more docile role in the process. Is this what the drafters intended?

Clause 16 - Insertion of section 17M: COMMAND AND CONTROL OF THE DIRECTORATE

106. The insertion of section 17M as follows –

Subject to the provision of this Act, members of the Directorate are members of the South African Police Service with all the powers, duties and functions of other members of the South African Police Service."

107. The addition of Clause 16 is problematic. On a simple reading of this section it appears that it may serve to undermine the independence of the Directorate as it equates members of the Directorate with members of the SAPS. In addition, to empower the Directorate with authority to act as a police force when some of them may not have received the necessary training as they have been employed directly to the Directorate, subjects both the SAPS and Directorate to potential unwanted liability. It is also neither necessary nor desirable for all Directorate employees to be trained as police.

108. Does this section also allow the National Commissioner to dismiss members of the Directorate by virtue of them being said to be members of the SAPS? The reach of this provision appears also to extend to the head of the Directorate, and this could be problematic.

109. Furthermore, Clause 16 read with Clause 2 of the Amendment bill provides that "***The National Commissioner must exercise control over and manage the police service in accordance with section 207(2) of the Constitution ...***"

110. Clause 16 also makes the amendment made at Clause 4 superficial. The amendment made at Clause 4 changes the word "***Division***" to "***Directorate***".

111. As the amendment currently stands, the members of the Directorate appear not to enjoy any specifically entrenched employment security. Furthermore they, like other members of the SAPS, have employment rights under the SAPS Act and under labour and employment statutes, but no special provisions secure their employment. Such an arrangement was pointed out as being problematic in the Judgment at paragraph 222 and is not amended in the Bill as it currently stands.

The Appropriate Positioning of the DPCI

112. In 2005 the legality of the DSO's mandate was called into question and problems were raised about the apparently strained relationship between the DSO and the SAPS. At this point former President Mbeki appointed the Khampepe Commission of Inquiry to '**inquire into, make findings, report on and make recommendations**' regarding the mandate and location of the DSO.

113. The recommendations were adopted by Cabinet in 2006 but the Khampepe Commission Report was only made public in May 2008. Soon after, however, Cabinet endorsed draft laws to dissolve the DSO and integrate it into the Police.

114. The Khampepe Commission Report highlighted four principal reasons for the establishment of the DSO:

- the perceived incapacity of the SAPS to investigate high-level priority crimes;
- the need to develop a multi-disciplinary approach in the fight against corruption;
- the need to establish an entity that would be able to attract and retain highly skilled personnel; and
- the perceived illegitimacy of the SAPS for historical and political reasons.

115. The report concluded that the rationale for the establishment of the DSO was as valid then (2006) as it was at conception, and the HSF would argue that this is still the case.

116. The general conclusions reached by the Commission were as follows:

- The legal framework regulating the mandate and location of the DSO was **not** inconsistent with the Constitution. In this regard it emphasized that there were no legal obstacles in having a structure such as the DSO located within the NPA, provided that the independence of the prosecution was safeguarded.
- The DSO should be retained within the NPA, but political control and oversight of the law enforcement component (policing functions) of the DSO reside in the Minister of Safety and Security (Now the Ministry of Police) in order to improve the oversight of investigative operations (prosecutors would continue to receive instruction from the NDPP and would remain accountable to the Minister of Justice).
- The capacity within certain SAPS units should be enhanced by investing them with the same powers as the DSO and co-locating prosecutors with its investigators and analysts.
- The DSO should desist from making public announcements on the subject matter of their investigations.

117. In February 2008 the Government announced that it would pursue an alternative option aimed at improving the fight against organised crime in SA – and that it would not be following the recommendations of the Khampepe Commission.

118. The alternative option was described as follows:

- Amalgamation of the best investigators from both DSO and the Organised Crime Unit(SAPS);
- More material resourcing, and all the powers that only the DSO had enjoyed previously;
- The new unit will only deal with complex cases **referred** to it.

119. In 2008 the HSF, under the directorship of Raenette Taljaard, made a submission about the dissolution of the DSO. The location of the DSO within the NPA conformed to the “Troika principle” of international best practice. The “Troika principle” consisted of using prosecutors, investigators and intelligence analysts together. This approach was hailed as being fundamental to the success of the DSO as it allowed for a diverse range of skills to be brought to bear on each investigation. In addition, the entire investigative process was prosecutor-led. This served to

ensure that investigations were focused on collecting the evidence necessary to establish a prima facie case and pursue a successful prosecution.

120. When the Directorate was created the “Troika principle” fell away, thus undermining the ability of the Directorate to re-create the same successes enjoyed by the DSO. The disbanding of the DSO destroyed the “Troika” approach to fighting organised crime which was:

- motivated and outlined by the South African government in 1999 and 2001 when the DSO was established;
- universally supported by political parties at the DSO's inception;
- still supported by all political parties bar the ANC, post 2006;
- expressly endorsed by the Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations, headed by The Honourable Mrs Justice SV Khampepe;
- mirrored in many foreign jurisdictions;
- in accord with international best practice; and
- implemented with uncontroverted success in South Africa.

121. The DSO was seen to be successful by the public and its record attests to this. The experience with other units housed in the SAPS suggests that the Directorate would be considerably less effective, irrespective of the constitutional invalidity of this unit.

122. The DSO was empowered to institute an investigation through the Investigating Director and supported by the Head of the DSO (functional independence).

123. Locating the Directorate as a Chapter 9 institution would require a constitutional amendment; this is not necessary. Housing the new unit within the NPA creates the necessary conditions of adequate independence asked for by the Court. As to whether there is merit in having the prosecutorial and investigatory functions separately defined and headed by different heads (a National Director of Public Prosecutions and a National Head of Public Investigations), this would require some changes to the NPA in its current form.

124. The new unit can also be an entirely new and separate legislated body falling under one or other appropriate ministry.

125. The only option that cannot be pursued, for the reasons set out in detail in this submission, is for the Directorate to remain housed within the SAPS.

126. The Khampepe Commission Report considered the argument that section 199 of the Constitution envisages a single police force. This meant that any functions that may fall into this definition, had to fall under the SAPS including the DSO.

127. The Commission took the view that a “single” police force meant one South African police force instead of separate regional police forces as existed in terms of the homeland system. The single police force, however, could comprise a range of different and independent bodies. Court judgments have accepted the location of the DSO in the NPA, most famously the judgment of *Thint Holdings (Southern Africa) (Pty) Ltd and another v National Director of Public Prosecutions* and *Jacob Gedleyihlekisa Zuma v National Director of Public Prosecutions* 2009 (1) SALR 141 (CC) where the Court stated at paragraph 37:

"In order to determine the area of application of section 2(2), it is necessary to understand how crime is investigated. It is important to note that the process of investigation is not divided into two mutually exclusive processes: the first process being to determine whether a crime has been committed; and the second process being to gather evidence to prosecute the crime. These two processes happen simultaneously and both fall within the scope of "investigation". To understand "investigation" as referring only to the former process and not the latter would be to adopt a meaning of section 2(2) incompatible with the manner in which criminal investigations are undertaken. In our view, a more functional and appropriate understanding of section 2(2) would recognize that the two processes are inevitably intertwined and that "investigation" in section 2(2) should be read accordingly."

This judgment and the *Glenister* Judgment found no difficulty in accepting the role of a primarily investigative agency – the DSO – within the NPA.

Conclusion

128. We trust that our submission has been presented lucidly and comprehensively.

129. We wish to request that the HSF be invited to make further oral submissions to the Portfolio Committee at the appropriate stage.

Submission by Francis Antonie, Sara Gon, Timothy Kenny and Lewis Mash