SUBMISSIONS ON THE SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL, 2012 [B7-2012]

27 March 2012

Presented by: **The Open Society Foundation-South Africa**

The Legal Resources Centre

Corruption Watch

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INTRODUCTION

1 These submissions address the constitutionality of the South African Police Service Amendment Bill, 2012 [B7-2012] ("the Bill").

2 They are made jointly by the following organisations:

2.1 The Open Society Foundation – South Africa

2.2 The Legal Resources Centre

2.3 Corruption Watch

3 We respectfully request the opportunity to make an oral presentation to the Portfolio Committee on the issues raised in these submissions.

4 As the Memorandum accompanying the Bill makes plain, the Bill seeks to give effect to the Constitutional Court's judgment and order in *Glenister v The President of the RSA and Others*[1] handed down on 17 March 2011. The Court declared chapter 6A of the South African Police Service Act, 68 of 1995 ("the SAPS Act") "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".[2]

5 We welcome the improvements made to the SAPS Act, which include:

[1] 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

[2] Para 5 of the Order. The Court suspended the declaration of invalidity for 18 months to give Parliament an opportunity to remedy the defect.

5.1 the inclusion of express requirements of impartiality and good faith, coupled with the prescribed oath or affirmation of impartiality for all members of the Directorate for Priority Crime Investigation ("DPCI") (sections 17E(9) and (10), inserted under clause 9 of the Bill);

5.2 the inclusion of a non-renewable fixed term of office for the Head of the DPCI, Deputy Head and Provincial Heads of the DPCI (sections 17CA(1), (3), (4), inserted under clause 6 of the Bill);

5.3 the allocation of the power to appoint or second personnel to the Directorate to the Head of the DPCI, as opposed to the National Commissioner of the SAPS ("the National Commissioner") (sections 17DB(a) and (b), 17C(2)(b) and section 17F, as amended under clauses 8, 5 and 10 of the Bill respectively);

5.4 the inclusion of statutorily secured remuneration levels for the Head, Deputy Head and Provincial Heads of the DPCI (section 17CA(5)(b) and (6), inserted under clause 6 of the Bill);

5.5 the stipulation of a limited set of grounds on which the Head of the DPCI may be removed from office (section 17DA, inserted under clause 8 of the Bill);

5.6 the requirement that Parliament must approve – and cannot be deemed to have approved – any policy guidelines determined in respect of the functioning of the DPCI and the selection of national priority offences

(section 17D(1)(a) and (b) as amended under clause 7 of the Bill, and section 17K(4) and (5) as amended under clause 14 of the Bill);

5.7 the removal of the Ministerial Committee's power "to oversee the functioning of the Directorate" (section 17I(3) as amended under clause 12 of the Bill); and

5.8 the replacement of the National Commissioner of the SAPS ("National Commissioner") with the Head of the DPCI as chairperson of the Operational Committee (section 17J, as amended under clause 13 of the Bill).

6 Notwithstanding these improvements however, we submit that the current draft of the Bill fails to meet the constitutional standard of 'adequate independence' for the DPCI.

7 In these submissions, we accordingly proceed to—

7.1 highlight the provisions that compromise the independence of the DPCI, and which fall short of the constitutional standard of independence defined by the Constitutional Court in *Glenister*; and

7.2 suggest alternative formulations of these provisions that would meet the constitutional standard, by drawing on relevant South African legislation and case law.

8 We structure our analysis of the provisions of the Bill under the themes of security of tenure and accountability. We address only the provisions that seem to us to compromise the independence of the DPCI, and we thus restrict these submissions to the following issues:

8.1 Security of tenure:

8.1.1 appointment and renewal of tenure in respect of the DPCI;

8.1.2 remuneration and conditions of service in respect of the DPCI;

8.1.3 discipline and removal from office in respect of the DPCI;

8.1.4 appointment and renewal of tenure in respect of the National Commissioner;

8.2 Accountability:

8.2.1 the determination of policy guidelines;

8.2.2 reporting to Parliament;

8.2.3 financial accountability and

8.2.4 security clearance requirement.

9 Before analysing the provisions, however, we set out a brief summary of the core requirements of independence as identified by the Constitutional Court. The Bill must meet these requirements if it is to pass constitutional muster. Accordingly,

the requirements should serve as a guide to the drafters of the Bill, if the object of the redrafting process is to be met.

WHAT DOES INDEPENDENCE REQUIRE?

10 In *Glenister*, the Constitutional Court stated unequivocally that, in order to be constitutionally compliant, the DPCI must have "an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political influence."[3] This means that institutional and legal mechanisms must be established that —

10.1 "limit the possibility of abuse of the chain of command"; and

10.2 "protect the entity against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption".[4]

11 The Constitutional Court emphasised that independence does not require complete insulation from political accountability nor does it conflict with a requirement of ultimate executive oversight. Rather, independence requires "insulation from a degree of management by political actors".[5]

12 In several earlier cases,[6] the Constitutional Court discerned three "essential conditions for independence". These are:

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[3] Para 206 of the judgment. Emphasis added.

[4] Id.

[5] Id para 216. See also paras 235 and 244.

[6] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 ('First Certification Judgment')* 1996 (4) SA 744 (CC); *New National Party of South Africa v Government of the RSA and Others* 1999 (3) SA 191 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC); and *Van Rooyen v The State (General Council of the Bar of SA Intervening)* 2002 (5) SA 246 (CC).

12.1 Security of tenure: This embodies the essential requirement that the decision-maker is removable only for just cause. It requires institutional mechanisms that protect against the abuse of disciplinary and removal procedures, conditions of employment, and the power to renew a term of office as leverage for undue influence.

12.2 Financial security: This principle operates at both the level of individual staff members and at the institutional level:

12.2.1 At the level of the individual, financial security requires an adequate salary, such as will attract persons with the skills and integrity necessary for the discharge of the important functions exercised by the office. It also requires mechanisms to prevent bargaining between the office-holders and the Executive or the Legislature. This is necessary to avoid any perception that, through the exercise of the power to determine salaries, the Executive or the Legislature might be perceived to be interfering with the independence of the office.[7]

12.2.2 At the institutional level, financial security implies the ability to have access to funds reasonably required to enable the office to discharge the functions it is constitutionally obliged to perform. It

[7] *Van Rooyen v The State* at paras 138-141.

also requires protection from arbitrary interference by the Executive.[8]

12.3 Institutional independence: This requires designing structural relations that secure the independence of the office from undue interference in the exercise of its functions.[9]

13 In determining what constitutes an 'independent' institution, the Constitutional Court also drew attention in *Glenister* to the importance of public confidence in the mechanisms that are designed to secure independence. It insisted that,

> *"if Parliament fails to create an institution that appears from a reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."*[10]

14 An important test for determining whether an entity has the requisite degree of independence is therefore to consider "whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features".[11]

15 The Court further held that, in order to understand South Africa's particular conception of institutional independence, regard must be had to the institutional structures of the courts, Chapter 9 institutions, the NDPP and the now-defunct

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[8] *NNP v Government of RSA* at para 98.

[9] *De Lange v Smuts NO* at para 71.

[10] *Glenister* at para 207. See also *Van Rooyen v The State* at para 33-34.

[11] *Glenister* at para 207.

Directorate of Special Operations (DSO). This is so because "all these institutions adequately embody or embodied the degree of independence appropriate to their constitutional role and functioning."[12] The structures of the courts, the NDPP and Chapter 9 institutions thus serve as useful institutional models.

16 We note, finally, the importance of securing the operational and structural autonomy of the DPCI. As an office that inherently entails the investigation of sensitive and potentially criminal conduct of public officials, the effectiveness of the DPCI depends on its institutional independence.[13]

17 Moreover, the importance of establishing an independent DPCI is underscored by the pressing need to combat corruption in South Africa. As the Constitutional Court said in *Glenister* at paragraph 166:

> *"There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights in the Bill of Rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk."*

18 The Court in *Glenister* held that corruption threatens the rights in the Bill of Rights and that the Constitution accordingly imposes a legal duty to create anti-corruption mechanisms that meet the requirements of the Constitution:

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[12] Id at para 211.

[13] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* ('*First Certification Judgment*') 1996 (4) SA 744 (CC) at para 163, where the same point was made in respect of the Public Protector.

> *"The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the state. It requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms."*[14]

19 With these principles in mind, we proceed to analyse the provisions of the Bill.

[14] *Glenister* at para 177.

SECURITY OF TENURE

(i) Appointment and renewal of tenure in respect of the DPCI

20 Under amended section 17C(2)(a), read with section 17CA(1), the Head of the DPCI shall be a Deputy National Commissioner, who is appointed by the Minister in concurrence with the Cabinet. The appointment is made "*for a non-renewable fixed term not exceeding seven years*", and the appointment must be reported to Parliament within 14 days.

21 Sections 17CA(3) and (4) provide that the Deputy Head and Provincial Heads are appointed by the Head of the DPCI, with the concurrence of the Minister, for a non-renewable term not exceeding seven years.

22 All other members of the DPCI are appointed by the Head of the DPCI, at national or provincial level as the case may be (ss 17C(2)(b) and 17F). The Head of the DPCI may determine the number and grading of posts after consultation with the Minister and the Minister for the Public Service and Administration (s17DB(a)). If the staff member appointed is a member of the SAPS, the appointment may be made only after consultation with the National Commissioner (s 17DB(b)).

23 We have three primary concerns with this scheme.

24 First, there is no requirement that Parliament approve the appointment of the Head and Deputy Head of the DPCI. Given that the DPCI has an investigative function that is vital to ensuring effective, accountable and responsible government, the Head of the DPCI must not only be, but must be perceived to be, highly

independent and impartial. Public confidence in the appointment of the DPCI is critical to the effectiveness of the office. We submit that, on this basis, Parliament ought properly to play a role in the appointment process.

25 We submit further that the provisions governing the appointment of the Public Protector and the Auditor-General serve as an appropriate model, particularly given the similarity in the investigative functions of these offices.

25.1 Section 193(4)-(5) of the Constitution provides that the Public Protector and Auditor-General are appointed by the President, after nomination by a committee of the National Assembly composed proportionally of members of all political parties represented in the National Assembly, and approved by a resolution adopted with a supporting vote of at least 60% of all members of the National Assembly. Section 193(6) provides further that the recommendation process must allow for the involvement of civil society. In the light of this, the Bill ought to outline a process that ensures transparency and for the effective involvement of civil society.

25.2 Section 2A(3) of the Public Protector Act, 23 of 1994 requires that the same appointment process be followed in respect of the Deputy Public Protector.

26 In the light of this constitutional model, we submit that Parliamentary approval should be required for the appointment of both the Head and Deputy Head of the DPCI, and that a threshold of a 60% supporting vote should be established.

27 Second, no criteria are provided to guide the appointment of the Head and Deputy Head of the DPCI. Again, this is in stark contrast to the provisions of the Public Protector Act, which provides:

> *"(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who-*
>
> *(a) is a Judge of a High Court; or*
>
> *(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or*
>
> *(c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a 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 combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years."*

28 Further, it is striking that section 17CA(9) of the Act, which provides for the appointment of an acting Head or Deputy Head of the DPCI, offers more guidance than section 17CA(1) and (3) which govern the fixed appointment of the Head and Deputy Head of the DPCI. Section 17CA(9)(c) and (d) provides:

> *"(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 Deputy Head of the Directorate are absent or if both those offices are vacant, the Minister shall, with the concurrence of Cabinet, appoint a suitably qualified and experienced person as the acting Head of the Directorate."*

29 We submit that, given the vital importance of the DPCI to the functioning of our democracy and the fulfilment of our fundamental constitutional values, the process of appointing the Head and Deputy Head must be rigorous and guided.

30 The importance of stipulating criteria for appointments has been emphasised by our courts. For instance, in *Freedom of Expression Institute and Others v President of the Ordinary Court Martial NO*,[15] the High Court invalidated provisions of the Defence Act, 44 of 1957 on the basis that it allowed the military to "appoint somebody ill-equipped to perform the function of a prosecutor", which invited arbitrariness and executive interference in the judicial process.

31 There can be no dispute that the persons who hold the offices of the Head and Deputy Head of the DPCI must be of the highest integrity, and must have the requisite skills, experience and specialised knowledge to enable them to hold the office effectively. That being so, these requirements ought to be stipulated in the Bill.

32 Third, we submit that providing for a non-renewable fixed term "*not exceeding seven years*" provides inadequate security in respect of the appointments of the Head, Deputy Head and Provincial Heads of the DPCI. In particular, the wording of sections 17CA(1),(3) and (4) does not foreclose the possibility that the Minister may appoint persons to these offices for terms too short to be effective. This would undermine the objects of the Bill entirely.

[15] 1999 (3) BCLR 261(C) at paras 19-21. See also, by analogy: *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) at paras 54-56; *Janse van Rensburg NO v Minister of Trade & Industry* 2001 (1) SA 29 (CC).

33 Accordingly, we submit that an appropriate model, which ought to be adopted – at least in respect of the Head and Deputy Head of the DPCI – is that which applies to the Auditor-General. Section 189 of the Constitution provides that the Auditor-General "*must be appointed for a fixed, non-renewable term of between five and ten years*". Such framing of tenure is preferable in that it prevents any abuse at the appointments stage, while maintaining sufficient flexibility in respect of the duration of tenure.

(ii) Remuneration and conditions of service in respect of the DPCI

34 The regulation of the remuneration and conditions of service in respect of the DPCI is considerably improved under the Bill. In particular, as mentioned at the outset, we welcome the inclusion of statutorily secured remuneration levels for the Head, Deputy Head and Provincial Heads of the DPCI (sections 17CA(5)(b) and (6), inserted under clause 6 of the Bill).

35 We also welcome the inclusion of sections 17CA(13) and (14), which require Parliamentary approval of any regulations which the Minister may make "*in respect of the remuneration, allowances and other conditions of service of other members of the Directorate*". This provision must presumably also be read with section 17DB(a), which provides 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 for the Public Service and Administration".*

36 However, the continued applicability of section 17G, which was not amended under the Bill, is cause for much confusion and concern. Section 17G provides in virtually identical terms, that –

> *"The remuneration, allowances and other conditions of service of members of the Directorate shall be regulated in terms of section 24".*

37 Section 24 in turn provides that the Minister may make regulations on a broad spectrum of matters, including remuneration, allowance and conditions of service. It covers, *inter alia* —

> *". . .*
>
> *(b) the recruitment, appointment, promotion and transfer of members;*
>
> *(c) the training, conduct and conditions of service of members;*
>
> *. . .*
>
> *(f) labour relations, including matters regarding suspension, dismissal and grievances;*
>
> *. . .*
>
> *(i) the establishment of different categories of personnel, components, ranks, designations and appointments in the Service;*
>
> *. . .*
>
> *(l) the resignation or reduction in rank of members;*
>
> *(m) the grading of posts and the remuneration structure, including allowances or benefits of members;*
>
> *. . .*
>
> *(r) the deductions to be made from salaries, wages or allowances of members"*

38 Unlike section 17CA(13) and (14), section 24 does not require that the Minister submit any such regulations to Parliament for approval. Section 24(4) provides

only that "*Any regulation which affects State revenue or expenditure shall be made with the concurrence of the Minister of Finance".*

39 The difficulty that arises is the inevitable confusion over which procedure governs the making of regulations concerning "*the remuneration, allowances and other conditions of service*" of members of the DPCI other than the Head, Deputy Head and Provincial Heads. While ordinarily in a case of statutory ambiguity, the more specific provision would be deemed to apply, the difficulty with sections 17G and 17CA(13) and (14) is that <u>both</u> provisions are intended to apply <u>only to the DPCI</u>. Moreover, the relevant matters for regulation are very specifically enumerated under section 24.

40 We submit that in order to avoid any confusion, and to give proper effect to the purported amendment in section 17CA(13) and (14), section 17G ought to be deleted from the Act in its entirety.

(iii) Discipline and removal from office in respect of the DPCI

41 We address the regime applicable to the Head and Deputy Head of the DPCI and that which applies to all other members of the DPCI separately.

<u>The Head, Deputy Head and Provincial Heads of the DPCI</u>

42 Section 17DA (inserted under clause 8 of the Bill) governs the suspension or removal from office of the Head of the DPCI. This provision ostensibly replicates section 12(5)-(9) of the National Prosecuting Authority Act, 32 of 1998 ("NPA Act"),

which regulates the suspension and removal of the National Director of Public Prosecutions (NDPP) and Deputy NDPP. However, we submit that there are several differences between the provisions, which are cause for serious concern.

43 The amended section 17DA(1)-(3) provides:

> *"**Loss of confidence in Head of Directorate***
>
> *(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 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;*
>
> *(iv) on account thereof that s/he is no longer a fit and proper person to hold the office concerned.*
>
> *(b) The removal of the Head, the reasons therefore, 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 in session or, if Parliament is not 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."*

44 By comparison, section 12(5)-(6) of the NPA Act provides:

> *"**Term of office of National Director and Deputy National Directors***
>
> *. . .*
>
> *(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).*

(6) (a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President 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 National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message 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) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President."

45 There are at least four notable differences between these provisions, which call for amendment of section 17DA.

45.1 First, section 17DA applies only to the Head of the DPCI, and does not extend to protecting the Deputy Head or Provincial Heads of the DPCI from unjust removal from office. This is contrary to the scope of section12 of the NPA Act (which protects both the NDPP and Deputy NDPP), and it contradicts the entire logic of the Act. Section 17CA of the Act purports to provide security of tenure not only to the Head of the DPCI, but also to the

Deputy Head and Provincial Heads in respect of remuneration and appointment. The efficacy of these provisions is seriously undermined by the omission of any special protection in respect of their removal from office. Moreover we submit that there can be no good reason for this omission. Given the nature of the powers and functions of the Deputy Head and Provincial Heads, these offices are particularly vulnerable to undue political interference, and must be protected accordingly. The close mutuality between the offices is clear from the following provisions:

45.1.1 Under sections 17CA(7) and (8) respectively, the Deputy Head and Provincial Heads "*shall exercise such powers and perform such functions as the Head of the Directorate . . . assigns to him or her*".

45.1.2 Under section 17CA(9), the Deputy Head may be appointed by the Minister, with the concurrence of the Cabinet, as acting Head of the Directorate whenever the Head is "*absent or unable to perform his or her functions*", or whenever the office of the Head of the DPCI is vacant.

45.2 Second, the wording of s17DA(3) is vague in respect of what is required of Parliament to remove the Head of the DPCI. It provides that Parliament may "*pray"* for the removal of the Head of the DPCI. Unlike the NPA Act, it does not require that Parliament <u>pass a resolution</u> to this effect, nor does it establish a <u>time period</u> in which such a decision by Parliament must be taken. Accordingly, the Head of the DPCI is vulnerable to suspension

without pay indefinitely. We submit that a 30-day limit for the taking of a Parliamentary resolution, akin to section 12(6)(c) of the NPA Act, must be included in section 17DA(3).

45.3 Third, there is no equivalent provision to section 12(6)(d) of the NPA Act to require that the Minister "*shall restore*" the Head of the DPCI on Parliament's recommendation. Again, this seems to afford the Minister the power to suspend the Head of the DPCI indefinitely, and threatens to render toothless any 'prayer' by Parliament under section 17DA(3). As the Bill stands, Parliament is unable to play an effective oversight role, which role is critical to ensuring that the suspension and removal powers afforded the Minister are not abused.

45.4 Fourth, the heading of section 17DA ("*Loss of confidence in Head of Directorate"*) is highly problematic in that it is suggestive of a subjective enquiry by the Minister or Parliament into the Head of the DPCI's fitness to hold office. The heading colours the entire provision, and implies that the test is whether the Minister or Parliament has 'lost confidence' in the Head of the DPCI simply *on the belief* that one of the criteria under section 17DA(2)(a) is met. However, to meet the constitutional standard of institutional independence, the test must be an objective one – requiring that one of the criteria under section 17DA(2)(a) is indeed met on an objective evaluation of all the relevant facts (and regardless of any subjective belief). In this regard, the heading of section 12 of the NPA Act is far more appropriate, and an equivalent should be adopted in the Act.

46 In addition to the above discrepancies between the Act and the NPA Act, we submit that, given the particular sensitivities associated with an effective anti-corruption unit, the threshold for a Parliamentary resolution confirming a removal from office of the Head or Deputy Head should be a two-thirds majority vote, at least in the National Assembly. This submission is made in the light of the finding of the Constitutional Court in the *First Certification Judgment*.[16]

46.1 The Court held that the draft provision of the new text of the 1996 Constitution (referred to in the quote below as "NT"), which allowed for the removal from office of the Public Protector and the Auditor-General on the basis of a simple majority vote in Parliament, was inadequate and failed to meet the constitutional standard of institutional independence (then enshrined in Constitutional Principle XXIX of the interim Constitution). The Court explained at paragraphs 163-5 of the judgment:

> *[163] The question which then arises is whether the requirements of CP XXIX have been satisfied. The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing the removal of the Public Protector from office do not meet the standard demanded by CP XXIX. NT 194 does require that a majority of the NA resolve to remove him or her, but a simple majority will suffice. We accept that the NA would not take such a resolution lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken. These considerations themselves suggest that NT 194 does provide some protection to ensure the independence of the office of the Public Protector. Nevertheless we do not think it is sufficient in the light of the emphatic wording of CP XXIX, which requires both provision for and safeguarding of independence and impartiality. We cannot certify that the terms of CP XXIX have been met in respect of the Public Protector.*
>
> . . .

[16] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), paras 160-165.

> *[165] The function of the Auditor-General is central to ensuring that there is openness, accountability and propriety in the use of public funds. Such a role requires a high level of independence and impartiality, as is recognised by CP XXIX. In the circumstances, it is our view that for the reasons we have given concerning the Public Protector, the prescripts of CP XXIX have not been achieved in the NT."*

46.2 We submit that precisely the same constitutional standard must apply to the Head and Deputy Head of the DPCI, given the nature and importance of its functions. Like the office of the Auditor-General and the Public Protector, the DPCI is central to ensuring accountability and propriety in government, and in particular in the use of public funds.

47 Accordingly, a requirement of a two-third majority vote in the National Assembly ought to be included in the Bill, akin to the provisions under section 194(2) of the Constitution that govern the removal from office of the Public Protector and Auditor-General.

Other members of the DPCI

48 In our view, the suspension and removal regime applicable to the other members of the DPCI is also wholly inadequate. The discipline and discharge provisions under sections 34 and 35, which apply to the SAPS in general, appear to apply equally to the DPCI. These provisions confer very broad powers on the National Commissioner – a political appointee, whose own tenure is far from sufficiently

secure.[17] The powers afforded the National Commissioner thus seriously undermine the security of tenure of members of the DPCI:

48.1 Section 34(1)(a)-(h) provides that the National Commissioner may initiate an inquiry into, inter alia, "the fitness of a member to remain in the Service on account of indisposition, ill-health, disease or injury" or "the fitness or ability of a member to perform his or her duties or to carry them out efficiently". This inquiry may be converted into disciplinary proceedings (under section 34(3) read with section 40).

48.2 Section 35 provides that the National Commissioner may "discharge" any member of the DPCI from the SAPS on account of redundancy or 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.

49 In *Glenister*, the Constitutional Court made it clear that the application of sections 34 and 35 to <u>any member</u> of the DPCI violates the constitutional standard of institutional independence. It stated emphatically that <u>special inhibitions</u> for the dismissal of any member of the DPCI are required to ensure proper employment

[17] The Constitutional Court makes this finding in *Glenister* at paras 222-223 and 229. The problematic provisions are sections 8 and 9 of the SAPS Act, which provide that "if the National Commissioner has lost the confidence of Cabinet", or if there are "allegations of misconduct", the President may establish a board of inquiry to make recommendations, including that of removal from office. The President may act on such a recommendation without any other procedural constraints. Section 7(2) of the Act, which regulates the appointment of the National Commissioner, is also weak. It provides for a five year <u>renewable</u> post. As the Constitutional Court noted in para 223 of *Glenister*, this provision also "heightens the risk that the office-holder may be vulnerable to political and other pressures".

security. At paragraphs 221-222 of the *Glenister* judgment, the Court said the following:

> *"The grounds for dismissal under the SAPS Act are broad. The DPCI members enjoy the same security of tenure as other members of the police force – no more and no less. Their dismissal is subject to no special inhibitions, and can occur at a threshold lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health.*
>
> *In short the members of the new directorate enjoy no specially entrenched employment security . . . . In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously."*

50 The Court also emphasised the importance of the special protection afforded the members of the DSO under the NPA Act. As the Court explained, the provisions under section 12(6) of the NPA Act "served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution".

51 In the light of these dicta, we submit that the lack of special measures to secure the employment of all DPCI members means that the Bill does not meet the constitutional standard of independence.

(iii) Appointment and renewal of tenure in respect of the National Commissioner

52 In *Glenister*, the majority of the Constitutional Court emphasised that the difficulties it had identified with regard to the lack of independence for the members of DPCI

were "exacerbated" by the provisions governing the appointment of the National Commissioner. It held:

> *"In our view, adequate independence requires special measures entrenching ... the employment security [of DPCI members] to enable them to carry out their duties vigorously.*
>
> *This is exacerbated by the fact that the appointment of the National Commissioner of the SAPS is itself renewable. By contrast, the appointment of the National Director of Public Prosecutions (NDPP) — who selected the head of the DSO from amongst the deputy NDPPs — is not. 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*."[18]

53 Subsequent to the *Glenister* decision, the Court has unanimously reiterated that non-renewability of terms of office is essential for independence. It stated as follows in this regard:

> *"It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal."*[19]

54 Yet, despite these firm pronouncements, the Bill does not seek to alter the renewability of the term of the National Commissioner at all. It leaves section 7(2) of the Act as it was at the time of *Glenister* – that is permitting the National Commissioner's term to be extended for a period or successive periods not exceeding five years at a time.

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[18] At paras 222 - 223

[19] *Justice Alliance of South Africa v President of The Republic of South Africa and Others* 2011 (5) SA 388 (CC) at para 73

55 This is at odds with the approach taken to offices such as the Public Protector and the Auditor-General. Sections 183 and 189 of the Constitution provide that the terms of office for these positions are non-renewable.

56 The failure to amend section 7(2) of the Act to achieve a similar result in respect of the National Commissioner not only gives rise to constitutional difficulties in and of itself, but also exacerbates the constitutional difficulties described elsewhere in this submission. This is especially so given the significant role in DPCI that the Bill envisages for the National Commissioner.

ACCOUNTABILITY

57 We emphasise at the outset that there is a crucial difference between taking political responsibility for the work of an entity and controlling it. While the responsibility may appropriately entail setting guidelines and monitoring performance at a reasonable remove, it does not extend to interfering in the decisions taken by the entity in the course of fulfilling its mandate.

58 It is clear that the Constitution contemplates this distinction. For instance, section 206 of the Constitution assigns "political responsibility" for the SAPS to the Minister, who must determine policing policy (after consultation at the provincial level). However, section 207 assigns "control and management" of the SAPS to the National Commissioner. The two functions are clearly distinct, and the distinction is designed to contribute to the prevention of undue political interference in the operations of the SAPS.

59 The same distinction informs the accountability mechanisms that apply to the activities of the DPCI. The failure of the SAPS Act to maintain a proper distinction between appropriate executive political responsibility on the one hand, and executive control or interference in the activities of the DPCI on the other hand, lies at the heart of the concerns articulated by the Constitutional Court in *Glenister*.

60 Accordingly, in evaluating chapter 6A of the SAPS Act, the Court stated, "Our gravest concern with the impugned provisions arises from the fact that the new entity's activities must be coordinated by Cabinet".[20] The Court explained that,

> *"[W]e should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence. What is more, the new provisions go further than mere competence to determine guidelines. They also make provision for hands-on supervision. . . . These provisions afford the political executive the power directly to manage the decision-making and policy-making of the DPCI."*[21]

61 In evaluating the new provisions of chapter 6A as amended under the Bill, we submit that in several respects the distinction between political responsibility and control has not been sufficiently maintained.

(i) The determination of policy guidelines

62 The Bill removes the powers of the Ministerial Committee (formerly under section 17I(2)(a)-(c)) to determine policy guidelines in respect of the functioning of the DPCI and the selection of national priority offices. Sections 17D(1)(a)-(b) and 17K(4) specify that these powers are now to be exercised by "the Minister and approved by Parliament". Section 17D(1A) has also been inserted to require that the Head of the DPCI "shall ensure that the Directorate observes the policy guidelines".

63 We identify two problems with the new scheme.

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[20] *Glenister* at para 228.
[21] Id at paras 234-235.

64 First, the Head of the DPCI is afforded no role in determining the policy guidelines.

64.1 This is inconsistent with section 17C(1) of the Act, as amended under clause 5, which provides that: "the Head of the Directorate at national level shall manage and direct the Directorate."

64.2 The curtailed nature of the DPCI's powers also stands in stark contrast to the powers of the NDPP under the NPA Act. Section 22(1)(a) governs the determination of prosecution policy under the NPA Act, and provides that -

> *"(1) The National Director [of Public Prosecutions] shall, in accordance with section 179(5)(a) and (b) of the Constitution and any other relevant section of the Constitution–*
>
> *(a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and*
>
> *(b) issue policy directives. . . ."*

64.3 Similarly, the Auditor-General and the Public Protector are empowered to determine the scope of their own investigations.

64.3.1 Section 13 of the Public Audit Act, 25 of 2004 provides in relevant part:

> *(1) The Auditor-General, after consulting the oversight mechanism, must determine—*
>
> *(a) the standards to be applied in performing audits referred to in section 11;*
>
> *(b) the nature and scope of such audits; and*
>
> *(c) procedures for the handling of complaints when performing such audits.*
>
> *. . .*

(3) The Auditor-General may—

(a) make different determinations on the matters mentioned in subsection (1) for different categories of audits based on recognised best practice; or

(b) issue specific directives on those matters in any specific case."

64.3.2 Section 6(4) of the Public Protector Act provides:

(4) The Public Protector shall, be competent-

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged-

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person"

64.4 We submit that these comparative provisions are indicative of the proper constitutional standard of independence. They reveal that for an investigative body to be independent, it must be able to determine the subject of its investigations within the bounds of its constitutional and statutory mandate. The failure to extend this power to the Head of the DPCI constitutes a serious infringement of the entity's institutional independence.

65 Second, the scope of the guidelines remains overly broad, particularly seeing that the Head of the DPCI is excluded from the process of their determination.

65.1 As the Constitutional Court made plain in *Glenister*, the breadth of the power to determine guidelines allows the DPCI to be dictated to (now by the Minister with the backing of a simple majority in Parliament) with regards to the categories of offences that it may not investigate, and perhaps also the categories of political office-bearers who may not be investigated. This goes to the very heart of the functions of the DPCI, and thus manifestly crosses the boundary between 'responsibility' and 'interference or control'.

65.2 The inclusion of section 17D(1)*(aA)* exacerbates the problem.[22] The subsection provides that 'selected offences' under the Prevention and Combating of Corrupt Activities Act, 12 of 2004 are to be investigated by the DPCI, but it does not indicate who is responsible for the selection, nor does it offer any guidance as to which offences ought properly to be selected. Without further clarity and guidance on what offences ought properly to be 'selected', section 17D(1)(*aA*) appears to be impermissibly vague and in violation of the principle of legality enshrined under section 1(c) of the

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[22] Section 17D(1)(aA) provides:

(1) The functions of the Directorate are to prevent, combat and investigate —

(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 Minister and approved by Parliament; and

(aA) in particular selected offences contemplated in Chapter 2 of section 34 of the Prevention and Combating of Corrupt Activities Act 2004 (Act No. 12 of 2004)."

Constitution. As the Constitutional Court stated in *Affordable Medicines*, the rule of law "*requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. . . The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*."[23]

(ii) Reporting to Parliament

66 The amendments in the Bill to the 'Parliamentary oversight' provisions (under section 17K) have the affect of diluting, rather than promoting, the political responsibility of the DPCI as an independent entity.

66.1 Section 17K(2) was amended to provide that "*the National Commissioner shall include a report on the performance of the Directorate in the annual report to Parliament as a programme of the Service"*; and

66.2 Section17K(3) has been deleted. This provision obliged the Head of the DPCI to report to Parliament on the Directorate's activities on Parliament's request.

67 Taken together, the above two amendments detract from the role of the Head of the DPCI as the office-holder that is ostensibly responsible for managing and directing the Directorate (section 17C(2)). Indeed, they are suggestive of a

[23] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 108.

deliberate lowering of the stature of this office, which seems contrary to the objects of the Bill: namely, to give effect to the constitutional requirement of establishing an independent and effective anti-corruption investigative body.

68 Moreover, and crucially, the amendments sever the only direct accountability link between Parliament and the Head of the DPCI, and leave all representations to the National Commissioner. Such representations are now made not simply in respect of the DPCI's 'activities', but at an evaluative level and on its 'performance'.

69 Accordingly, the only information, and evaluation, that will be placed before Parliament in respect of the DPCI will be that produced by the National Commissioner. This clearly creates the risk of abuse of the chain of command. We emphasise that we do not to presume that there will in fact be such an abuse, but the relevant enquiry is whether the Bill creates a possibility for abuse. We submit that this is plainly the case.

70 We submit that, to remedy this defect, section 17K(2) should be amended to replace the 'National Commissioner' with 'the Head of the DPCI'.

(iii) Financial accountability

71 Under amended section 17H, the National Commissioner is also made responsible for the budgeting and financial accounting in respect of the DPCI. Section 17H provides that the National Commissioner, after consultation with the Head of the

DPCI, shall prepare the estimate of revenue and expenditure of the DPCI for Parliament. The National Commissioner also serves as the accounting officer of the DPCI. This scheme differs considerably from that which applied to the DSO under the NPA Act. Under sections 3A and 36 of the NPA Act, the DSO enjoyed far greater financial autonomy:

71.1 the Head of the DSO prepared the Annual Budget of the Directorate;

71.2 the Head of the DSO accounted to the NPA executive committee for the Directorate's finances; and

71.3 the Minister was obliged to appoint a CEO of the DSO to serve as the accounting officer.

72 The importance of financial autonomy cannot be over-emphasised: it protects the viability of the entity, as well as the scope of its activities and so too its effectiveness.

73 As the Constitutional Court explained in the *NNP* case,[24] financial independence does not require setting one's own budget – Parliament does this. However, it does require "*that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests."* Importantly, what this implies is that the independent entity

[24] *New National Party of South Africa v Government of the RSA and Others* 1999 (3) SA 191 (CC), para 98.

must "*be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.*"[25]

74 The problem created by section 17H is that the DPCI is not provided with an opportunity to assert or defend its budgetary requirements before Parliament. Rather, the National Commissioner is empowered to determine the DPCI's budget, and is tasked with defending the budget. While section 17H(2) stipulates that the National Commissioner must prepare the budget *after consultation with* the Head of the DPCI, this does not require agreement on the part of the Head of the DPCI.

75 It appears to us that, on this basis, section 17H does not meet the constitutional standard of financial independence as described by the Constitutional Court in the *NNP* case. Section 17H ought therefore to be amended to afford the Head of the DPCI the power to prepare the estimate of revenue and expenditure of the DPCI and to defend this estimation before Parliament. At the very least, section 17H(2) ought to be amended to replace the phrase "after consultation with" to "in consultation with - ".

76 Finally, we note that designating the Head of the DPCI as the Accounting Officer of the DPCI would be congruent with the model adopted in similar legislation, including the Independent Police Investigative Directorate Act, No. 1 of 2011 (section 7(1)) and the Civilian Secretariat for Police Service Act, No. 2 of 2011 (section 4(3). In these Acts, the Executive Director and the Secretary of the

[25] Id.

respective Directorates is designated as its accounting officer. There is no reason why the same structure should not apply to the DPCI.

(iv) Security clearance requirement

77 Section 17E provides that any person who is considered for appointment or secondment to the DPCI shall be subject to a security screening investigation in terms of section 2A of the National Strategic Intelligence Act, 39 of 1994 ("NSI Act"). Section 17E(2) (as amended under clause 9 of the Bill) further provides that no person may be appointed to the DPCI unless that person has been issued with a security clearance (including a temporary one) by an Intelligence Structure referred to under the NSI Act. These are: the National Intelligence Coordinating Committee; the intelligence division of the National Defence Force; the intelligence division of the South African Police Service; the National Intelligence Agency; and the South African Secret Service. The Bill also amends section 17E(4), which provides that –

> *"(4) Whenever the head of the Intelligence Structure . . . 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 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."*

78 It is striking that provisions equivalent to section 17E do not apply to the rest of the SAPS. Only the DPCI is singled out for blanket, mandatory security screening without, we submit, any proper basis. Yet there is nothing inherently related to

national security in the investigation of corruption and most investigators would not encounter issues of national security. While a minimum number of members of the Directorate may be required to obtain security clearance in order to deal with matters of national security, this can properly be accommodated under section 2A(2) of the NSI Act, which provides that the Agency may conduct screening <u>on request of the SAPS</u>.

79 We submit that the sweeping requirement under section 17E is unnecessary and could well create a well-founded perception that the unit is not independent. This is particular so in light of the following considerations:[26]

79.1 First, the decisions of members of the Intelligence Services are kept secret and it will be very difficult, if not impossible to have any decision to degrade, withdraw or refuse security clearance reviewed by a court. This means that (particularly given the politicisation of the Intelligence Services) these provisions would be capable of being used to influence, interfere and even remove members of the Directorate for political reasons.

79.2 Second, the power and hence also the discretion to remove an individual from the DPCI under section 17E(4) is retained by the National Commissioner, a political appointee who is not independent and who might exercise his or her discretion wrongly for political reasons.

[26] P De Vos 'The South African Police Service Amendment Bill: compliance with Glenister v President of the Republic of South Africa' (2012), unpublished discussion paper presented at a roundtable discussion hosted by the Institute for Security Studies and the Nelson Mandela Centre of Memory. Paper available online at http://www.nelsonmandela.org/news/entry/future-of-hawks-debated.

80 We submit that, at the very least, the power under section 17E(4) must be transferred to the Head of the Directorate in order to ensure that the exercise of this discretion to some degree protected from political abuse. The power extended to the National Commissioner under section 17E(4) is, in any event, incompatible with sections 17E(5) and (6) which provides that it is Head of the DPCI that may determine that a member of the Directorate be subjected to a further security screening.

CONCLUSION

81 We conclude with a summary of our main submissions.

82 In respect of security of tenure, we have identified the following inadequacies:

82.1 First, that the appointment process in respect of the Head and Deputy Head of the DPCI lacks —

82.1.1 a requirement that Parliament approve the appointments, which should be subject to the threshold of a 60% majority vote;

82.1.2 any stipulated criteria to guide these appointments; and

82.1.3 a mandatory minimum length of tenure, equivalent to that provided for under section 189 of the Constitution.

82.2 Second, that section 17G conflicts with section 17CA(13) and (14) and ought to be removed from the Act to ensure that the Minister submits regulations made in respect of the remuneration, allowances and other conditions of service of other members of the DPCI for Parliamentary approval;

82.3 Third, that the removal from office of the Head and Deputy Head of the DPCI ought properly to require a resolution passed by Parliament to this effect, subject to the threshold of a two-thirds majority vote; and

82.4 Fourth, that the discipline and discharge provisions under sections 34 and 35 of the SAPS Act should not apply to any members of the DPCI, since the nature of their work demands special employment protection.

83 With regard to accountability, we have identified the following structural problems:

83.1 First, that the Head of the DPCI is afforded no role in determining the policy guidelines;

83.2 Second, that the scope of the power to determine guidelines is overly broad;

83.3 Third, that the wording of section 17D(1)(*Aa)* is impermissibly vague;

83.4 Fourth, that the Head of the DPCI is not afforded the authority to report to Parliament on the Directorate's activities;

83.5 Fifth, that the Head of the DPCI is not afforded the power to prepare the estimate of revenue and expenditure of the DPCI and to defend this estimation before Parliament; and

83.6 Sixth, that the Head of the DPCI is not empowered to remove an individual from the DPCI under section 17E(4).

84 In the light of these submissions, we urge the Committee to re-consider the location of the DPCI in the SAPS. It is plain from our submissions that situating the DPCI in the SAPS creates a disharmonious structure that is damaging not only to the effective functioning of the DPCI, but also to that of the SAPS. It creates unclear and overlapping lines of authority, and accordingly disrupts the hierarchy within the SAPS

for no good reason. As we make clear in these submissions, the relationship between the National Commissioner and the DPCI is particularly problematic for the independent functioning of the DPCI.

85 We therefore urge the Committee to consider establishing the DPCI as a wholly independent institution structurally akin to Chapter 9 institutions such as the Auditor General or the Public Protector. These institutions remain accountable to Parliament, but do not report directly to the political entity (the Minister of Finance or the Minister of Justice) from whose budget these bodies are financed and hence free from the direct political influence or interference which the judgment warned against. It would be far easier to create an efficient, structurally and operationally independent, anti-corruption fighting unit safeguarded from political influence or interference as a separate unit not included within the NPA or within the SAPS.[27]

86 Establishing the DPCI as a wholly independent institution in this way would be calculated to be fully responsive to the Constitutional Court's requirement of structural and operational independence. It would effectively address the Court's requirement that the unit's structural and operational independence must pass the test of a reasonable person's perceptions, objective perception being constitutive of independence.

[27] Nor does any difficulty arise in this regard from section 199(1) of the Constitution. See: *Minister of Defence v Potsane and Another, Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2001 (11) BCLR 1137.