

The South African Police Service Amendment Bill: compliance with *Glenister v President of the Republic of South Africa*

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1. Introduction

1.1 In *Glenister v President of the Republic of South Africa and Others*¹ a majority of members of the Constitutional Court² found the national legislation that brought into being the Directorate for Priority Crime Investigation (DPCI,³ popularly known as the Hawks) and disbanded the Directorate of Special Operations ((DSO,⁴ popularly known as the Scorpions) unconstitutional. The majority declared the Chapter 6A of the South African Police Service Act 68 of 1995 inconsistent with Constitution and invalid *to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation*. The declaration of constitutional invalidity was suspended for 18 months in order to give Parliament the opportunity to remedy the defects.⁵ This memorandum evaluates the South African Police Service Amendment Bill⁶ in order to establish whether it complies with the *Glenister* judgment.

1.2 It is important to note at the outset what the judgment did and did not find. It did not find that section 179 of the Constitution obliges Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else (as was the case with the Scorpions). The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was also not in itself found to be unconstitutional and thus the DPCI legislation

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¹ 2011 (7) BCLR 651 (CC).

² I focus throughout on the majority judgment, because this judgment is binding. I refer to it throughout as the *Glenister* judgment.

³ South African Police Service Act 68 of 1995 (SAPS Act) as amended by the South African Police Service Amendment Act 57 of 2008 (SAPS Amendment Act).

⁴ National Prosecuting Authority Act 32 of 1998 (NPA Act) as amended by the National Prosecuting Authority Amendment Act 56 of 2008 (NPA Amendment Act).

⁵ Par 251.

⁶ As published on 24 February 2012, Bill B7-2012.

was not invalidated “on that ground alone”. The judgment did not ask or answer the question whether, given the provisions of the Public Finance Management Act which requires the National Commissioner of Police to remain the accounting officer of any unit situated within the Police, whether it was indeed possible to situate an independent corruption fighting unit within the Police Service. The judgment failed to consider the import of the problems which emerged regarding the safeguarding of the constitutionally guaranteed independence of the National Prosecuting Authority (which arose during the GInwala Enquiry into whether Adv Vusi Pikoli was a fit and proper person able to continue serving as National Director of Public Prosecutions), which arose from the fact that the Director General believed that he remained the Chief Financial Officer responsible for the finances of the NPA in terms of the Public Finances Management Act. Similarly, the legislative choice to abolish the DSO and to create the DPCI was not in itself found to have offended the Constitution.⁷ The majority in the *Glenister* case *did* find that the Constitution imposed a positive obligation on the state to establish and maintain a sufficiently independent body to combat corruption and organised crime. Second it *did* find that the specialised unit (the Hawks) did not meet the requirement of independence imposed by the Constitution.⁸

1.3 In this memorandum I will first set out the reasons for the majority judgment, distilling the legal requirements that the proposed legislation has to meet to comply with the *Glenister* judgment. I will then discuss the provisions of the draft Bill – first looking at the document as a comprehensive “package” and then focusing on the individual clauses – before concluding whether the proposed Bill comply with the requirements set out in the majority Constitutional Court judgment. I will then provide some suggestions for improvements to the Bill.

2. The obligations imposed by the *Glenister* judgment

2.1 The operational aspects of the *Glenister* judgment can be divided into two distinct parts. First, the judgment sets out general requirements or principles that

⁷ Par 162.

⁸ Par 163.

must be used to judge whether the body is indeed a sufficiently independent corruption fighting body that complies with the Constitution (read with South Africa's International Law obligations). Second, relying on the broad requirements set out in the first part of the judgment, it then proceeds to set out specific reasons why aspects of Chapter 6A of the South African Police Service Act are unconstitutional, and in the process sets out specific requirements that must be met for a sufficiently independent corruption fighting body to comply with the Constitution (read with South Africa's International law obligations). Any legislation purporting to give effect to the *Glenister* judgment needs to comply with both the broad requirements for sufficient independence *and* with the specific requirements highlighted in the second part of the judgment. The two sections are interrelated and the second part amplifies and deals with particular components relating to the general principles set out in the first part, but this second part of the judgment does not circumscribe those general requirements set out in the first part, which must be met in its totality. It is therefore not possible to meet the requirements set in the *Glenister* judgment merely by focusing on the specific problems with the existing legislation highlighted in the second part of the majority judgment.

2.2 General Principles

2.2.1 Although the Constitution does not explicitly require it, its scheme taken as a whole imposes a duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. This is because corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms.⁹ At the heart of the inquiry is whether the body will be free from political influence¹⁰ and interference¹¹ so that it can do its job effectively, on the one hand, while remaining financially and politically accountable, on the other hand. What is essential in achieving this balance is to depoliticise the anti-corruption institution

⁹ Par 175.

¹⁰ Par 208.

¹¹ Par 206.

or institutions.¹² To achieve this a body need not attain the kind of independence guaranteed for the judiciary (“full independence”), but it does need to be sufficiently independent so as to enable the anti-corruption agency to function effectively without being exposed to undue political influence. 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. An effective corruption-fighting unit thus needed to meet two basic interrelated requirements. It needed to be both structurally and operationally independent – in accordance with the fundamental principles of the South African legal system and in line with South Africa’s international law obligations¹³ – to enable it to carry out its functions effectively and free from any undue political influence or undue intervention

2.2.2 First it needs to be *structurally* independent. This relates to the appointment of its members, the conditions under which its members operate and its funding, which must all be regulated in such a manner as to ensure it is independent in fact and is also perceived to be independent by the public. To prevent undue political intervention the proper appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity is required and the body must be free to initiate and conduct investigations.¹⁴ The conditions of service that pertain to its members and in particular its head is pivotal to insulate the body from political interference or influence.¹⁵ This kind of independence is assessed on the basis of factors such as security of tenure and remuneration, and mechanisms for accountability and oversight.¹⁶ Because the international instruments require independence within the South African legal conceptions, it is necessary to look at how South Africa’s own constitutionally-created institutions manifest independence. In this regard the arrangements

¹² Par 188.

¹³ Obligations which the majority found bound South Africa and informed its interpretation of the constitutional duty to create an independent corruption fighting unit. See par 189.

¹⁴ Par 184.

¹⁵ Par 208.

¹⁶ Par 210.

regarding the National Prosecuting Authority, the Public Protector and the Auditor General will be of assistance. All these institutions adequately embody the degree of independence appropriate to their constitutional role and functioning.¹⁷ The necessary material resources and specialized staff, as well as the training that such staff is required to carry out their functions.¹⁸

2.2.3 Second it needs to be *operationally* independent. This relates to the body's relationship with the legislature and executive, oversight over the body, and accountability to the two political branches of government. Where a body is placed within existing police structures special care must be taken to safeguard its operational independence. The judgment quoted approvingly from a report prepared by the Organisation for Economic Co-operation and Development (OECD): *Specialised Anti-corruption Institutions: Review of Models* (OECD Report)¹⁹ which noted that the question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units within the Police requires special attention because police and other investigative bodies are in most countries highly centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice.

“In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals’ abusing the chain of command and hierarchical structure, either to discredit the confidentiality of investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to address this risk. For instance, special anti-corruption departments or units within the police or the

¹⁷ Par 211.

¹⁸ Par 183, quoting from article 6(2) of the United Nations Convention against Corruption, http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. The UN Convention was adopted by South Africa on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004.

¹⁹ Par 188. The quoted section is from page 17 of the Report which can be accessed at <http://www.oecd.org/dataoecd/7/4/39971975.pdf>.

prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor.

2.2.4 A range of possible measures can be adopted to achieve the goal of establishing an independent body and the legislature did have some leeway in this regard. What was required was for the *measures taken to be reasonable*. But in deciding whether the measures fall within this range, the courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. And international law, through the inter-locking grid of conventions, agreements and protocols discussed in the judgment (and whose main features were set out above) "unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence".²⁰ Moreover, it would be difficult to rely on section 36 (the limitation clause) to justify legislation that does not create a sufficiently independent corruption fighting unit. "The need for a sufficiently independent anti-corruption unit is so patent, and the beneficent potential of its operation so incontestable, and the disadvantages of its creation so hard to conceive, that justification would be hard to muster."²¹

2.2.5 An important additional general principle holds that it is not only the actual arrangements that guarantees structural and operational independence that must be met before such a body would comply with the requirements of the Constitution. Additionally, a court will focus on whether "the appearance or perception of independence" is present in evaluating whether independence in fact exists. Public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is therefore important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to

²⁰ Par 192.

²¹ Par 203.

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.²²

2.3 Specific requirements for independence relating to the existing DPCI (Hawks)

2.3.1 As the draft Bill attempts to fix the existing problems with the Hawks not by creating a new body but by proposing amendments to the existing legislation, the specific reasons advanced by the *Glenister* judgment for declaring parts of Chapter 6A unconstitutional, must be instructive in evaluating the proposed amendments as these will provide some guidelines (over and above the general principles set out above) to measure the proposed amendments against. It is thus important to note that against the background of the general principles set out above, the Constitutional Court found that the existing provisions in Chapter 6A of the South African Police Service Amendment Bill were inadequate. The thrust of the reasoning was that the Hawks was insufficiently insulated from political influence.²³ There were primarily two reasons advanced for this conclusion. First, there is an absence of security of tenure protecting the employment of the members of the Hawks and hence its conditions of service were flawed. Second, it found that the structure and functioning of the Hawks allowed for direct political oversight of the entity's functioning in a manner incompatible with independence.²⁴

2.3.2 Security of tenure and institutional safeguards

2.3.2.1 On the first point, it was pointed out that currently the head of the DPCI is appointed by the political head of the Police, namely the Minister and that after appointment neither the head or other persons appointed to the DPCI enjoy any special job security.²⁵ The DPCI is a Deputy National Commissioner of the SAPS, and is “appointed by the Minister in concurrence with the Cabinet”. In addition to the head, the Directorate comprises persons appointed by the National

²² Par 207.

²³ Par 208.

²⁴ Par 213

²⁵ Par 219.

Commissioner of the SAPS “on the recommendation” of the head, plus “an adequate number of legal officers” and seconded officials. The Minister is required to report to Parliament on the appointment of the head of the DPCI.²⁶ The Commissioner is empowered to discharge a member of the service if, for reasons other than objective criteria like unfitness or incapacity, as long as the discharge “will promote efficiency or economy” in the SAPS, or will “otherwise be in the interest of” the SAPS. The reach of this provision appears to include the head of the Directorate.²⁷ Their dismissal is therefore subject to no special inhibitions, and the grounds for dismissal under the SAPS Act are broad and can occur at a threshold lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health.²⁸ These provisions fail the minimum requirements for the creation of a suitably independent unit that is insulated from political influence or interference. What is required is specially entrenched employment security.²⁹ 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 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.³⁰

2.3.2.2 The majority judgment suggested that the current arrangement in section 179 of the Constitution and the repealed provisions of the National Prosecuting Authority Act relating to the Scorpions, would be a suitable one for the head of a corruption fighting unit. The NPA Act provided that a deputy NDPP (which included the head of the Scorpions) may be removed from office only by the President, on objective grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office. And

²⁶ Par 219.

²⁷ Par 220.

²⁸ Par 221.

²⁹ Par 222.

³⁰ Par 223. This view is in line with the Constitutional Court judgment in *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (10) BCLR 1017 (CC) at par 69.

Parliament held a veto over the removal of a deputy NDPP. The reason for the removal, and the representations of the deputy NDPP, had to be communicated to Parliament, which was allowed to resolve to restore the deputy NDPP to office.³¹

“These protections applied also to investigating directors within the DSO. The special protection afforded the members of the DSO 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.”³²

2.3.2.3 Further institutional safeguards required is “statutorily secured remuneration levels”, the absence of which “gives rise to problems similar to those occasioned by a lack of secure employment tenure”.³³ Such safeguards are not currently in place. 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 compared to the DSO (Scorpions).³⁴ The head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration, which was determined by reference to the salary of a judge of the High Court.³⁵ 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,³⁶ which the Minister for Police determines. This is not compatible with security of tenure for members of the unit.

2.3.3 Insulation from political interference and influence versus accountability

2.3.3.1 The Constitution requires that a member of Cabinet “must be responsible for policing”.³⁷ This requirement must be squared with the requirement that a policing body responsible for investigating corruption with the aim of securing successful criminal prosecution must be insulated from political influence or

³¹ Par 225.

³² Par 226.

³³ Par 227.

³⁴ Par 227.

³⁵ Section 17(1) of the NPA Act before amendment by the NPA Amendment Act.

³⁶ Sections 17G and 24 of the SAPS Act.

³⁷ Section 206(1).

interference. The majority in the *Glenister* judgment emphasized that this constitutional injunction does *not* require “that the anti-corruption unit must itself function under political oversight”. To this end, the particular political oversight arrangements in the impugned legislation were found to be incompatible with adequate independence.³⁸ However, adequate independence does not require insulation from political *accountability* (as opposed to political oversight). What was required was not total “insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit”.³⁹

2.3.3.2 Given these general principles, the following arrangements regarding the powers of the unit to choose which crimes to investigate would not be compatible with the carefully constructed balance between operational independence on the one hand and political accountability on the other. Where Cabinet (or a member of Cabinet) is empowered to coordinate the unit’s activities, this will raise constitutional problems. Co-ordination can be direct or indirect. Direct co-ordination will occur where a member of Cabinet can influence the selection of the crimes to be investigated by the unit. Indirect co-ordination will occur where a member of the Cabinet can issue policy guidelines in respect of the functioning of the unit as well as for the selection of national priority offences. Both issues were found to be problematic in the impugned legislation. First, section 17D(1)(a) determined that the DPCI could investigate “priority crimes” which in the opinion of the DPCI needs to be investigated. This section did not explicitly state that the DPCI could investigate corruption). Furthermore, this discretion was made subject to the policy guidelines issued by a Ministerial Committee. This power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI (which could in theory direct that only some kinds of crimes should be investigated) created a “plain risk of executive and political influence on investigations and on the entity’s functioning” and was therefore

³⁸ Par 215.

³⁹ Par 216.

unconstitutional.⁴⁰ Second, in terms of section 17D(1)(b), the National Police Commissioner can also refer matters to the DPCI for investigation, but once again subject to any policy guidelines issued by the Ministerial Committee. This raised the same concerns as above. Indirect influence or interference can occur where the political principles or their politically accountable underlings can influence the operation of the unit. This occurs in two ways in the impugned legislation. First, the head of the DPCI, as a Deputy National Commissioner and a member of the SAPS,²¹⁸ is accountable to the National Commissioner, whose post lacks sufficient security of tenure,²¹⁹ thus inevitably creating vulnerability to political pressure. (This means that the National Commissioner of the SAPS is not suitably independent and cannot play any direct role in the supervision of the work of a truly independent corruption-fighting unit.) Second, in terms of section 17I(2)(a) and (d) a Ministerial Committee is allowed to issue policy guidelines in respect of the functioning of the DPCI and may determine procedures to coordinate the activities of the Directorate and other relevant departments or institutions. This power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates a plain risk of executive and political influence on investigations and on the entity's functioning.⁴¹ Nothing in the statute requires the said policy guidelines to be broad and harmless and the power of the Ministerial Committee to determine guidelines appears to be untrammelled. "The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate – or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating."⁴² This, found the majority, is plainly at odds with a structure designed to secure effective independence. It underscores the conclusion that the legislation does too little to secure the DPCI from interference.⁴³ In this regard the majority stated:

The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the

⁴⁰ Par 229.

⁴¹ Par 229.

⁴² Par 230.

⁴³ Par 231.

*subject of anti-corruption investigations. They “oversee” an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.*⁴⁴

The majority points out that because senior politicians are given competence to determine the limits, outlines and contents of the new entity’s work, these provisions are “inimical to independence”.⁴⁵

2.3.3.3 But the new provisions go further than providing the Ministerial Committee with the competence to determine guidelines. They also make provision for hands-on supervision in section 17I(3) which states that: “(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.”

Once again this is found to be constitutionally problematic:

*These provisions afford the political executive the power directly to manage the decision-making and policy-making of the DPCI. As with the power to formulate policy guidelines, the statute places no limit on the power of the Ministerial Committee in overseeing the functioning of the DPCI. On the contrary – the requirement that the Ministerial Committee must meet regularly, and that on request performance and implementation reports must be provided to it, in our view creates the possibility of hands-on management, hands-on supervision, and hands-on interference. We find this impossible to square with the requirement of independence. We accept that financial and political accountability of executive and administrative functions requires ultimate oversight by the executive. But the power given to senior political executives to determine policy guidelines, and to oversee the functioning of the DPCI, goes far further than ultimate oversight. It lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.*⁴⁶

⁴⁴ Par 232.

⁴⁵ Par 234.

⁴⁶ Par 235 and 236.

Although the South African legal system requires some level of executive involvement in any area of executive functioning, the extent of the involvement here is far reaching and not compliant with the Constitution. .

2.3.3.4 Section 17L does create a safeguard to protect members of the DPCI from undue influence or interference as it allows a retired judge to consider complaints about such influence or interference,⁴⁷ but this safeguard is inadequate to save the new entity from a significant risk of political influence and interference.⁴⁸ The retired judge has the power to refer a complaint for prosecution,⁴⁹ but this mechanism is insufficient as it “operates after the fact”. This does not constitute an effective hedge against interference as it only deals with the past and does not provide for a mechanism that pre-emptively protect investigators against political influence or interference. Moreover the powers of the retired judge is limited. Although section 17L(7) allows the retired judge in the course of this investigation to request information from the NDPP in so far as it may be necessary, but the NDPP may on “reasonable grounds” refuse to accede to such request. That may place a considerable hurdle in the way of the retired judge’s investigation.

In short, an ex post facto review, rather than insisting on a structure that ab initio prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking.

What was therefore required was a mechanism that protected members of the corruption-fighting unit not only after the fact but could also be used to pre-empt political influence and interference. For such a mechanism to be effective the person or body empowered to deal with complaints of prospective or after the

⁴⁷ Section 17L(4)(b) of the South African Police Service Act.

⁴⁸ Par 246.

⁴⁹ Section 17L(5) of the South African Police Service Act.

fact incidences of influence or interference had to be provided with sufficient power and authority to do the job effectively.

3. Proposed amendments to the South African Police Service Act and compliance with the *Glenister* judgment

3.1 Overall assessment of the draft Bill

3.1.1 The Bill opts of a “minimalist approach”, including amendments to several sections of Chapter 6A of the South African Police Service Act but retaining the DPCI, albeit in a slightly different format, instead of creating a completely new body. The amendments represent a rejection of a return to the previous position where the DSO was situated within the National Directorate of Public Prosecutions. The approach also rejects the option of creating an independent body outside the formal structures of the South African Police Service. This approach is not necessarily precluded by the majority judgment in the *Glenister* case (although the judgment did not deal with the difficulties regarding financial independence that will arise because of the non-independent National Commissioner of Police’s role as the Chief Financial Officer of the “independent” unit). As long as the amendments create an independent corruption-fighting unit free from potential political influence and interference, a body that – judged in its entirety – is not only in fact sufficiently independent but is also reasonably perceived as being independent, the amendments will comply with the judgment.

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

members of the unit as well as effective mechanism to report and investigate allegations of political influence and interference in its work. Both in fact and in terms of a reasonable perception of independence the proposals for a reconfigured Hawks fail to safeguard independence as required by the judgment. In this regard, the following are the main problems with the proposed amendments.

3.1.3 The amendments provide insufficient guarantees to safeguard the structural independence of the Directorate as it fails to provide security of tenure for all the members of the Directorate and fails to establish statutory secured levels of remuneration for all members of the Directorate.

3.1.3.1 In terms of a newly created section 17M all members of the Directorate remain members of the South African Police Service “with all the powers, duties and functions of other members of the South African Police Service”. Section 17G which states that the remuneration, allowances and other conditions of service of members of the Directorate shall be regulated in terms of section 24 of the Act (a section which allows the Minister to make regulations about the reduction in rank of members as well as the remuneration structure of members), falls short of the security of tenure for all members discussed in the judgment and raised in section 2.3.2 above. As the majority judgment in *Glenister* made clear, in the absence of explicit provisions entrenching the employment security and remuneration levels of members of the Directorate, “individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution”, which would be inimical to structural independence. Ordinary members of the Hawks would therefore remain subject to the hierarchical structure and discipline of the SAPS and could be removed by the National Police Commissioner (who is not an independent person). The National Commissioner would retain the power to “discharge” any member of the DPCI from the SAPS on account of redundancy or the interests of the SAPS. The Commissioner would also still be empowered to discharge a member of the service if, for reasons other than unfitness or

incapacity, the discharge “will promote efficiency or economy” in the SAPS, or will “otherwise be in the interest of” the SAPS. Ordinary members of the Directorate therefore would not be sufficiently protected in terms of job security as required by the *Glenister* judgment and as discussed in section 2.3.2 above.

3.1.3.2 Moreover, although a newly inserted section 17DA provides limited protection for the employment security for the Head of the Directorate, and the newly inserted section 17CA(c) provides limited remuneration protection for the Head, Deputy Head and Provincial Heads of the Directorate, it contains no such protection for other members of the Directorate. This means that ordinary members of the Directorate will be subject to the ordinary remuneration regime of the SAPS in exactly the same manner as other members of the SAPS, rendering them insufficiently independent in a structural sense. This falls foul of the *Glenister* judgment as discussed in section 2.3.2.3 above.

3.1.3.3 The security of tenure of the Head of the Directorate is not sufficiently protected as required by the judgment as discussed in section 2.3.2 above. A newly inserted section 17DA deals with this matter, but provides wide discretion for the Minister in suspending and removing the Head of the Directorate from office. In terms of the proposed amendment, the Minister is empowered in terms of section 17DA(2)(a) provisionally to suspend the Head of the Directorate, pending an “enquiry into his or her fitness to hold office as the Minister deems fit” and then may then remove him or her from office for misconduct; on account of ill-health; on account of incapacity to carry out his or her duties of office efficiently; or on account thereof that he or she is no longer a fit and proper person to hold the office concerned. Subsection (3) allows removal from office by an address of the two Houses of Parliament for the same reasons as set out above. Where the Head is suspended, he or she shall receive no salary or such salary as the Minister will determine. Four aspects of this provision might cause problems. First, any enquiry into the fitness of the Head of the Directorate to hold office will be conducted as the Minister sees fit. There are no formal requirements for how this enquiry

should be conducted or who should conduct the enquiry. This wide discretion means that an enquiry could be conducted by the Minister him or herself or by someone in the Minister's office watering down the safeguard of an objective determination on whether one of the four criteria for removal is in fact present. Second, the third requirement relating to the Head's possible incapacity to carry out his or her duties of office efficiently, is exceedingly broad and not easily susceptible to objective determination. The notion of efficiency renders the subsection overbroad and potentially allows the Minister to remove the Head of the Directorate if, in his or her opinion (or, in his or her stated opinion), the Head has not been efficient, opening the door for removal on non-objective grounds, which is not compatible with actual independence or perceived independence. Third, when the Head of the Directorate is preliminary suspended, he or she could be suspended without a salary and could therefore in effect be punished even before he or she is formally removed, placing considerable potential power in the hands of the Minister to put pressure on the Head of the Directorate, and thus rendering the independence of the Head of the Directorate tenuous at best. Lastly, the two Houses of Parliament can remove the Head of the Directorate by "praying for such removal on any of the grounds" referred to above. No enquiry is required in this regard and the wording is vague, which means the section could be interpreted as not requiring the two Houses of Parliament actually to have established as objective fact that one or more of the grounds listed is actually present. In one reading of this section, this would render this power as little more than the exercise of a political discretion which may not easily be reviewed by a Court, rendering the security of tenure and hence the independence of the Head of the Directorate. These fears are reinforced by the heading of this section, which states that the section relates to "Loss of Confidence in Head of Directorate". A "loss of confidence" is a subjective standard, not an objective standard, as it relates to whether the Minister or the Parliament had stopped having confidence in the Head of the Directorate and such loss of confidence could just as well relate to political reasons as to objective criteria reviewable by a court of law.

3.1.4 Despite the proposed amendments, the possibility of political influence and interference in the work of the Directorate looms large, both in fact and in terms of reasonable perceptions about such influence and interference. The requirements set out in the *Glenister* judgment (as discussed in section 2.2.3 above) have therefore not been met. Section 17CA(1) proposes that the Minister of Police, with the concurrence of the Cabinet, appoint the Head of the Directorate for a non-renewable term “not exceeding seven years”, while section 17CA(3) requires that the Deputy Head be appointed by the Head with the concurrence of the Minister of Police and section 17CA(4) requires that the Provincial Head of the Directorate to be appointed by the Head with the concurrence of the Minister of Police. This means that the Minister has a veto right over the appointment of the Deputy Head and the Provincial Heads of the Directorate. No objective minimum criteria are prescribed regarding the skills, experience or commitment to independence of any of the men or woman appointed to these positions. In theory the Minister could appoint an outgoing member of Parliament of the governing party (or another political party) or a sitting member of the highest decision making body of the governing political party (or another political party), somebody without any police experience or someone embroiled in allegations of corruption, in any of these positions. Absent a mechanism that provides for safeguards against the appointment of individuals who are in fact or are perceived not to be politically partial, the perception may well be created that the Directorate is not in fact independent and will thus fly in the face of the requirement that the body should be independent in fact and in terms of perceptions (as discussed in 2.2.5 above). The amendments also do not include any legally binding requirement that the Head of the Directorate or any other member of the Directorate need to fulfill his or her duties independently (or, alternatively) without fear, favour or prejudice. A proposed insertion of section 17E(9)(a) states that a member of the Directorate “shall serve impartially and exercise his or her powers or perform his or her functions in good faith” while section 17E(1) requires members to take an oath to “enforce the Law of the Republic without fear, favour or prejudice and, *as the circumstances of any particular case may require*, in accordance with the Constitution and the Law”. There are

several problems with this section. First, there is a distinction between serving impartially and acting in good faith, on the one hand, and being independent on the other. Second, there is no sanction for anyone not acting independently and impartially. Third, the oath seems to be at best ambivalent as it states that one needs to act without fear favour or prejudice but only “as the circumstances of any particular case may require” leaving open the possibility that this means that in certain cases one need not act so and need not act in accordance with the Constitution and the law if the circumstances of the particular case requires it.

3.1.5 A new proposed section 17D(1)(a)(A) states that the functions of the Directorate are, inter alia, to prevent, combat and investigate “in particular selected offences contemplated in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act.” It is unclear what these “selected offenses” are intended to be and who will select the offenses. However section 17D(1)(a) and 17D(1)(c) states that national priority offenses and other offences can be investigated at discretion of Head or if it is referred to the unit by the National Commissioner, but this remains subject to policy guidelines issued by the Minister (currently the guidelines are to be issued by the Ministerial Committee). The insertion of a specific focus on charges in terms of the Corruption Act, goes some way to allay fears of political influence and interference. However, corruption is often closely aligned with other offenses such as fraud. The fact that the Minister therefore would retain broad discretion to issue policy guidelines on which priority crimes to investigate might potentially hamstrung investigations in which fraud and corruption are intertwined. As was pointed out in 2.3.3.2, such a broad discretion provided to apolitical actors was not compatible with independence as required by the judgment.

3.1.6 As was discussed in 2.3.3.5 above, the judgment required far more effective mechanism to protect members of the Directorate from political influence and interference, both prospectively and retrospectively. The judgment thus found that section 17L did not meet the requirements for independence in this regard as the retired judge empowered to investigate allegations of undue influence could

only deal with retrospective complaints of interference. Curiously, the proposed amendments wholly fail to address these concerns. Although it is proposed that section 17L(7) be amended to allow a retired judge to obtain information from the NDPP, there are no proposals to create a structure that *ab initio* prevents political interference in the work of the corruption-fighting unit. As the judgment found, in some cases irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. That is why it was necessary to create “adequate mechanisms designed to prevent interference in the first place” as this was *required* to ensure that political interference does not happen from the start. This failure renders the proposed Bill unconstitutional.

3.2 Specific questions and issues with the proposed amendments

3.2.1 In terms of a proposed section 17CA, the Head of the Directorate, the Deputy Head and the Provincial Heads are to be appointed by the Minister for a non-renewable fixed term for a period “not exceeding seven years”. There are several problems with this section. First, the appointment is to be made by the political head of the South African Police Service, namely the Minister of Police. It was found that the National Commissioner, appointed by the Minister of Police, was not an independent person as the appointment was done by the political head of the Police and could be renewed. It is inappropriate that the political head of the Police, a politician whose colleagues may be investigated by the unit, has the sole discretion to appoint the Head. This would render the Head insufficiently independent both in fact and in terms of perception by the public. Another mechanism for appointment will have to be found to ensure that the Head is not a political appointee with political loyalties that would render him or her in fact and in terms of perception not independent. Second, the wording of the proposed section means that a person could be appointed for any period of less than seven years. There are two potential problems with this sections, First, the discretion provided to the Minister to determine the term of office of the Head, Deputy Head and Provincial Heads (as long as this term is no longer than

seven years) is open to abuse and impractical and could, arguably, be used to render the Directorate less effective or ineffective. If appointments are made for short periods it would make it difficult for the individuals appointed to gain the necessary knowledge, skill and confidence to do their jobs effectively, thus rendering the Hawks less effective than required. Whether the provision of this discretion rises to the level of a constitutional problem, by not guaranteeing that the Hawks act effectively to combat corruption, is a close call. Second, the term of office of seven years is arguably too short. Given the fact that the members remain members of the Police Service, are subject to the other provisions of this Chapter employed in terms of the South African Police Services Act, and are therefore not guaranteed any special pension benefits at the end of the seven year term, might place the Head, the Deputy Head and the Provincial Heads in a vulnerable position as they may have to return to the ordinary Police Service after the completion of their seven year stint, rendering them susceptible to political influence and interference. If these appointees need to return to the ordinary Police Service in order to secure for themselves a livable pension on retirement, they might tread carefully regarding politically sensitive cases in order not to jeopardize their chances for such “redeployment”. Moreover the proposed section 17CA(12) provides that the Head and Deputy Head, who would normally have to retire at the age of 60, may be retained at the Discretion of the Minister for a period of up to two years. If a person of suitable age is thus appointed to one of these positions it would render such a person vulnerable to political influence or interference as the person, rightly or wrongly, might believe that the Minister will not exercise his or her discretion in his or her favour unless politically sensitive cases are handled to take account of the wishes of the Minister.

3.2.2 Section 17E deals with the requirement that every member of the Directorate needs to obtain security clearance in terms of the relevant legislation in order to work and to continue working at the Directorate. Other members of the Police Services are not subjected to the same requirement. Moreover in terms of subsection (4) the National Commissioner (not the Head of the Directorate) may transfer an individual or if such a person cannot be redeployed elsewhere

may discharge such a person if his or her security clearance is degraded, withdrawn or refused “on reasonable grounds”. This provision is open to abuse, 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 (given the politicization 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. Second, the power and hence also the discretion to remove the individual from the Directorate is retained by the National Commissioner, a political appointee who is not independent and who might exercise his or her discretion wrongly for political reasons. At the very least, this power needs to be transferred to the Head of the Directorate in order to ensure that the exercise of this discretion to some degree protected from political abuse. Third, it is unclear why security clearance is required for all members of the unit. Ordinary members of the Police Service need not obtain security clearance of this sort. There is nothing inherently related to national security in the investigation of corruption (even the corruption of high powered business people or politicians) and most investigators would not encounter issues of national security. While a minimum number of members of the Directorate may be required to obtain security clearance in order to deal with matters of national security, this sweeping requirement is unnecessary and could well create the well founded perception that the unit is not independent.

3.2.3 A new section 17H is proposed, dealing with “Finances and Financial Accountability” of the Hawks. Some degree of financial security is guaranteed in that the section provides for ring-fenced funds allocated to it by Parliament, money that cannot be used by the rest of the Police Service (see section 17H(4)). But because the proposals envisage that the Hawks remains part of the SA Police Service, in terms of the Public Finance Management Act the National Commissioner remains the accounting officer for the Hawks and is also required “after consultation with the Head of the Directorate” to prepare the budget of the unit (see section 17H(2)). This means that the National Commissioner (and not

the Head of the Directorate) is responsible for the drafting the budget of the Hawks. The National Commissioner (not an independent person) must consult with the Head but need not follow the advice of the Head. This means that the National Commissioner is entitled to ignore the advice of the Head of the Directorate as far as the drafting of a budget for the Hawks will be concerned, meaning that a political appointee who is politically open to influence and interference by politicians, will in effect have a final say on the budget of the Hawks, leaving open the possibility of indirect political influence and interference coming into play via the threat of starving the unit of the funds required to to its job without fear, favour or prejudice.

3.2.3 Proposals for the amendment of section 17I goes some way to allay fears expressed in the *Glenister* judgment about direct management of the work of the Hawks as it proposes the scrapping of almost all the powers of the Ministerial Committee to draft policy guidelines for the functioning and selection of priority crimes which may be investigated by the unit. In the light of the above, it is not clear why the Ministerial Committee is retained at all. Its only power will be to request performance and implementation reports from the National Commissioner and the Head of the Directorate (in terms of section 17I(3)(b)). As the Minister will now take over responsibility for drafting of guidelines regarding the investigation of priority crimes (other than corruption), for the appointment and also the removal of the Head, and as the Minister will take final responsibility for the Hawks, (similar to the Minister of Justice taking final responsibility for the NPA), the Ministerial Committee has become obsolete. Moreover, as was pointed out in section 2.3.3.4, the judgment found that the existing section 17I(3)(a) and (b) left open the danger of political interference in the operation of the unit by a political body, the Ministerial Committee. The Bill proposes to amend section 17I(3)(a) to remove language that would have allowed the Ministerial Committee to oversee the functioning of the Directorate, but it leaves in place section 17I(3)(b), which requires BOTH the National Commissioner (who is supposed to have no influence or oversight whatsoever over the unit) as well as the Head of the Directorate to provide performance and implementation reports to the

Ministerial Committee. It is unclear what performance and implementation reports might entail and whether it would entail reports about specific cases and the evidence gathered in regard such cases. As such it is unclear whether the retention of this section is compatible with the judgment.

3.2.4 Proposed amendments to section 17K(4) include a proposed amendment that makes no sense. Namely a proposed newly inserted section 17L(4)(b) states that the “Minister shall submit to Parliament any policy guidelines referred to in section for concurrence”. The relevant sections are not mentioned which means this section is arbitrary and irrationally vague and does not comply with the basic requirements for adherence to the principle of legality, an incidence of the Rule of Law, and is therefore invalid.

4. Proposed way forward

4.1 The proposed draft Bill purporting to give effect to the *Glenister* judgment falls short of the requirements set out in that judgment. The reasons for this are clear: the drafters aimed at retaining the unit within the general hierarchy and structure of the South African Police Services which generally operates under the assumption of some political control and influence over the work of the various units in the SAPS. Following such an approach, it would be very difficult (but perhaps not impossible) to ensure that an effective, efficient and sufficiently independent corruption-fighting unit is created. This is because, first, the terms of the Public Finance Management Act requires the National Commissioner to remain the accounting officer and hence ultimately the “boss” of the unit. Second, given the hierarchical structure of the South African Police Service it is difficult to provide for structural and operational safeguards – including entrenched tenure security and salary provisions as well as insulation from political influence or even interference in a unit retained within the South African Police Service.

4.2 The judgment suggests that a better model to follow would be the National Prosecuting Authority or the relevant Chapter 9 institutions such as the Auditor General or the Public Protector, institutions that remain accountable to

Parliament, but does not report directly to the political entity (the Minister of Finance or the Minister of Justice) from whose budget these bodies are financed and is 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 with the NPA nor with the Police). Detractors might argue that section 199(1) of the Constitution renders this option a non-starter as this section states that:

The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

But in 2001 in the Constitutional Court in the *Potsane* case⁵⁰ interpreted a similar phrase referring to a single Prosecuting Authority in its historical context and said it did not mean that the Defence Force could not have its own prosecuting arm for military offenses. It only meant that the various prosecuting authorities of the so called homelands had to be amalgamated into one prosecuting authority for the country. As the Kamphephe Commission of inquiry pointed out, this means that there is not constitutional imperative to have only one prosecuting authority for the country. By analogy it would also mean that there is no constitutional imperative to have all investigative policing functions performed by the SAPS.

4.3 It is important to note that the *Glenister* judgment required the creation of a body that was independent in fact and that was perceived to be independent by all reasonable people. This would require extraordinary measures regarding the appointment of the Head of the Unit (perhaps by a super majority of members of Parliament after a process that includes input from civil society); as well as extraordinary protections for the security of tenure of both the Head of the unit and of all the other members of the unit (something that is not possible within the South African Police Service where entrenched job security for ordinary members of the unit will be difficult to square with the practices and culture within the

⁵⁰ *Minister of Defence v Potsane and Another, Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2001 (11) BCLR 1137.

SAPS and with the fact that the National Commissioner remains the Financial Officer of such a unit.

4.4 It would also require the creation of a credible mechanism to actually protect every single member of the unit from both prospective and retrospective political influence and interference and to ensure that this protection is also perceived by all reasonable people to be effective and real. This would require the creation of a mechanism that is in fact and is perceived to be completely free from political influence and interference, one that provides sufficient powers and standing to allow the person or body empowered to safeguard the independence of the unit to do its work without fear, favour or prejudice.