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## **REVISED 2015 POLICY GUIDELINES FOR THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATIONS (DPCI)**

### **1. INTRODUCTION**

The Directorate for Priority Crime Investigation (DPCI) had been the subject of two Constitutional Court challenges<sup>1</sup> since its establishment in 2008, mainly on the grounds of its independence. The most recent challenge was heard by the Constitutional Court in August 2014 and judgement was delivered on 27 November 2014 (hereafter referred to the "2014 judgement"), which expunged all provisions for the issuing of the ministerial policy guidelines for the Directorate from the South African Police Service Act, 1995 (Act No. 68 of 1995). The 2014 judgement held that the power given to the Minister of Police to issue the DPCI policy guidelines afforded the executive unfettered power to interfere in the independent functioning of the DPCI. This also applied to the provisions made for the National Commissioner of Police to refer offences or categories of offences to the DPCI for investigation, who may no longer refer any offences or categories thereof to the DPCI. The 2014 judgement also expunged the sections of the SAPS Act, 1995 that afforded Parliament the power to agree to the DPCI policy guidelines and approve any changes thereto.

As such, the 2014 judgement rendered the 2013 DPCI policy guidelines invalid with no legal force. The SAPS felt it pertinent to develop a revised set of policy guidelines in 2015, which would guide the functions of the Directorate. The 2014 judgement did not state that the DPCI may not have policy guidelines, only that the Minister of Police may not issue such guidelines. It is unclear by whom the revised policy guidelines was developed and should be clarified to the Committee. From the 2014 judgement, it is clear that only the National Head of the DPCI has the sole mandate to decide the national priority offences that will be investigated by the DPCI, outside those legislatively prescribed.

The revised policy guidelines complies with the 2014 judgement, but some concerns remains on the practical application thereof. In short, the revised policy guidelines provides for the selection of national priority offences by the National Head of the DPCI as per the legislation and scope of seriousness, complexity or level. It provides that the selection should be aligned with the strategic priorities of the SAPS and National Commissioner. The policy guidelines also provides direction on the offences or categories of offences that may and must be investigated by the DPCI. Those offences that must be investigated are stated in the legislative schedules attached to the Act, but those offences that may be investigated are not in the legislative schedules and includes other national priority offences that can be referred to the Directorate by a Provincial Commissioner based on the monetary value, complexity, extent, public interest, urgency and organised fashion of the offence. The policy guidelines also provides for national priority

<sup>1</sup> 2014 challenge was brought by the Helen Suzman Foundation and Mr. H Glenister in two separate cases that was heard together CCT 07/04 and CCT 09/14, as such it could be said that there has been three challenges against the DPCI.



offences not selected by the National Head and states that protocols and memoranda of understanding must be established to ensure that those offences not selected are addressed by the SAPS.

Section B of the policy guidelines provides criteria for any offence or category of offences, other than national priority offences, to be referred to the DPCI. However, there are no allowance made for referrals to the DPCI, only requests. The section previously referred to the referrals made by the National Commissioner, but to comply with the 2014 judgement, all references to the "National Commissioner" was removed but the wording of the section remained unchanged. It is unsure where the referrals to the Directorate will originate. The National Head of the DPCI has the sole discretion to accept referrals within the parameters of the legislation and policy guidelines. The last section of the policy guidelines provides some clarity on the operational approach of the Directorate and the transnational focus of the national priority offences the DPCI investigates.

It should be kept in mind that Parliament no longer has any power to approve the policy guidelines, but in light of recent instabilities within the DPCI and it not yet being a budgetary programme of the SAPS, the Portfolio Committee on Police should execute its Constitutional mandate of oversight.

This paper provides a brief overview of the establishment of the DPCI together with the previous and latest Constitutional Court judgements and provides a summary of the 2014 judgement and highlights the sections expunged from the SAPS Act, 1995. The paper also focusses on the 2014 judgement pertaining to the policy guidelines and concludes with an analysis of the content of the revised policy guidelines.

## **2. BACKGROUND: 2014 CONSTITUTIONAL COURT JUDGEMENT**

The DPCI was established as a result of the disbanding of the Directorate of Special Operations (Scorpions) when the National Prosecuting Authority Amendment Act, 58 of 2008 and the South African Police Service Amendment Act, 2008 (Act No. 57 of 2008) were signed into law. The legislation was subsequently challenged by Mr. Hugu Glenister in 2008 on constitutional grounds. The case, *Hugh Glenister v President of the Republic of South Africa and Others*, was heard in the Constitutional Court in September 2010 and judgement, commonly known as the *Glenister Judgement*, was passed on 17 March 2011, effectively invalidating the above mentioned legislation. The Constitutional Court declared the offending legislative provisions establishing the DPCI constitutionally invalid to the extent that they do not secure adequate independence. The Court granted a period of eighteen months to give Parliament the opportunity to remedy the defect, effectively indicating that the new legislation needs to be implemented no later than 17 September 2012. To remedy the deficiencies, the South African Police Service Amendment Act, 2012 (Act No. 10 of 2012) was approved by Parliament and assented to by the President on 14 September 2012 (within the 18 month deadline provided by the Constitutional Court).



On 27 November 2014, the Constitutional Court delivered its second judgment on the constitutionality of certain sections of the South African Police Service Amendment Act 10 of 2012 (SAPS Amendment Act), which was enacted to remedy the previous defects of the 2008 version. The application was brought to the Constitutional Court by the Helen Suzman Foundations (HSF) and Mr Glenister in order to confirm an earlier High Court judgement which found that some of the provisions of the SAPS Amendment Act were still inconsistent with the constitutional obligation to create a structurally and operationally independent anti-corruption unit.

The 2014 judgment determined that the DPCI was not sufficiently insulated from political interference and in an unusual step decided to delete some provisions of the Act pertaining to the powers granted to the Minister of the Police. In particular, the power of the Minister to determine the appointment and removal of the National Head of the DPCI and to determine the policy guidelines for the selection of priority crimes.

In the majority judgment, by Mogoeng CJ (Moseneke DCJ, Jafta J, Khampepe J, Leeuw AJ and Zondo J concurring), the Constitutional Court held that certain defects highlighted in *Glenister II* have not been cured. These include:

- 1) The unconstitutionality of the provisions relating to the extension of tenure of the National Head of the DPCI;
- 2) The undue political interference in the operations of the DPCI through ministerial policy guidelines; and
- 3) The untrammelled power of the Minister of Police to remove the Head of the DPCI.

As stated above, the specific sections that were found to be inconsistent with the constitutional obligation to create an anti-corruption unit that enjoys adequate structural and operational independence was deleted from the South African Police Service Act 68 of 1995 as amended was declared invalid and deleted from the date of the order, which was 27 November 2014.

The following provisions were deleted:<sup>2</sup>

- a) The words "in accordance with the approved policy guidelines" as contained in section 16(2)(h) and (3).
- b) Section 17CA(15) and (16).
- c) The words "subject to any policy guidelines by the Minister and approved by Parliament" in section 17D(1)(a).
- d) The words "selected offences not limited to" and "and" in section 17D(1)(aA).
- e) Section 17D(1)(b).
- f) Section 17D(1A).
- g) The "(2)" in section 17DA(1) and the whole of section 17DA(2).
- h) Section 17K(4), (7) and (8).

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<sup>2</sup> Paragraph 5



The 2014 judgement held that the deletion of sections of legislation "is appropriate only in circumstances where the removed portion [of the legislation] or section does not so amputate the affected provision as to paralyse it". It further states that the remainder of the sections "must still be capable of effectively advancing the legislative vision" and that it "must allow for the implementation of the purpose of the provision or legislation in question". That part of the legislation or section that is to remain after severance must be self-standing as to be capable of meaningful and effective application even in the absence of the deleted offending part.

### **3. FOCUS ON POLICY GUIDELINES AND RATIONALE FOR DELETION BY CONCOURT JUDGEMENT**

The 2014 judgement was highly critical of the complicated nature of the jurisdiction of the DPCI and subsequent functions. The Judgement stated that there was a "need and urgency to put an end to the uncertainty about the particular functions that the DPCI is required to perform" and that it "requires direct and immediate judicial intervention, without usurping the legislative powers of Parliament".<sup>3</sup> The Judgement further stated that the deletion of the impugned sections "will usher in the clarity that the necessity for the efficacy of the DPCI has been crying out for, for some years now".

#### **3.1. Jurisdiction of the DPCI**

One of the main concerns of the judgement was the undefined jurisdiction of the DPCI. Section 17B(a) of the SAPS Act stated that the purpose of the DPCI is "to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption." However, the judgement stated that the "sections that provided for the jurisdiction of the DPCI are scattered in different parts of the SAPS Act."<sup>4</sup> And as such, it "makes it difficult to identify the offences that the DPCI is empowered to prevent, combat and investigate."<sup>5</sup> The judgement further criticised the fact that section 1 of the SAPS Act does not define the meaning of "national priority offences", as is normally the practise, but that section 17A attempts to define a "national priority offence", only to refer to section 16, in which section 16(2)(IA) in turn refers to the Schedule of the Act.

Section 17D(1) provides for the functions of Directorate and states:

- (1) The functions of the Directorate are to prevent, combat and investigate-
  - (a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, **[subject to any policy guidelines issued by the Minister and approved by Parliament];**
  - (aA) **[selected offences not limited to offences referred to]** in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004); and

<sup>3</sup> Para. 108

<sup>4</sup> Para. 93 (ConCourt 2014)

<sup>5</sup> Para. 93 (ConCourt 2014)



[(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament.]

[(1A) The National Head of the Directorate shall ensure that the Directorate observe the policy guidelines referred to in subsection (1).]

The judgement contended that in order to understand the nature and scope of function to be performed, "it is necessary to examine the meaning of 'national priority offences', the nature and effect of 'policy guidelines' as well as 'selected offences', the scope of 'any other offence or category of offences referred to it from time to time by the National Commissioner'". These will be discussed in the sections below.

### **3.2. National priority offences**

National priority offences are defined as "organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof, as referred to in section 16(1)" of the SAPS Act. It lists a series of offences, including corruption, which constitute national priority offences. The Judgement stated that previous concerns were raised that some of those national priority offences do not deserve the attention of an anti-corruption agency if that agency were to pay adequate attention to its core mandate, but that this assumption is not correct. The Judgement found that the "DPCI has the primary duty to prevent, combat and investigate those national priority offences that are intimate to its core business like corruption, crimes against humanity, organised crime or serious commercial crime 'which in the opinion of the National Head of the Directorate need to be addressed by the Directorate'.

The Judgement found that the ministerial policy guidelines could compromise the operational independence of the DPCI in relation to national priority offences and that the power to issue policy guidelines for the operation of the DPCI has already been found to create "a plain risk of executive and political influence on investigations and on the entity's functioning" in the previous Constitutional Court judgement (2011) in relation to the Ministerial Committee. The 2014 judgement found that the "fact that the policy guidelines were previously issued by a Ministerial Committee and now by the Minister of Police alone, does not subtract from the gravity of these concerns. They are all political actors whose role in influencing the functional activities of the DPCI is very likely to undermine its independence. The power to determine these guidelines is as untrammelled and objectionable under a single Minister as it was under a Committee of Ministers."<sup>6</sup>

The legislation should itself spell out the parameters of the operational scope of the DPCI, not the Minister's policy guidelines. The Judgement held that only the National Head of the DPCI should have the discretion to decide which of the national priority offences, defined by section

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<sup>6</sup> Para. 96



17A and set out in section 16, to prioritise for investigation and that the provision puts the National Head, not political actors or their proxies, firmly in charge of the operations of the DPCI.

### **3.3. Selected offences**

Section 17D(1)(aA) states that the functions of the Directorate are to prevent, combat and investigate “[selected offences not limited to] offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004). The Judgement found that the words “selected offences” (as stated in section 17D(1)(aA)) are neither defined nor cross-referenced to any other section of the Act, which makes it impossible to know what “selected offences” are, how they are selected and by whom. The Judgement also found that “a very important institution like an anti-corruption agency should never be left to guess what its functions are, as it is now forced to do in relation to this category of offences”. And that the undefined nature of “selected offences” poses a threat to the operational independence of the DPCI. As such, the defect was remedied through the deletion of the words “selected offences not limited to”. As a result of the severance of the words “selected offences not limited to” from section 17D(1)(aA), it now reads that the functions of the Directorate are to prevent, combat and investigate “offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004).<sup>7</sup>

### **3.4. Any other offence or category of offences**

Section 17D(1)(b) of the SAPS Act further provided that the DPCI must prevent, combat and investigate “any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament.” The Judgement raised concern about the power given to the National Commissioner to prescribe part of the functions of the DPCI, as it did with the power of the Minister of Police to determine the policy guidelines. It stated that “the fluidity of the situation and the vagueness in relation to the nature of the offences contemplated, the National Commissioner’s license to interfere in the operational space of the DPCI and the preponderance of the policy guidelines in the determination of the DPCI’s functions, are all at odds with the imperative to establish an adequately independent anti-corruption unit”. As a result, the Judgement held that the entire section 17D(1)(b) should be deleted.

The Judgement went further to state that functions of the former Directorate for Special Operations (DSO or Scorpions) was also not clearly defined, as it had to investigate “offences or any criminal or unlawful activities committed in an organised fashion; or such other offences or categories of offences as determined by the President by proclamation in the Gazette.”<sup>8</sup> The Judgement stated that it was disturbed by the fact that the National Head of the DPCI does not seem to have any say in the determination of the offence or category of offences to be referred from time to time by the National Commissioner. Moreover, it was stated that “the National

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<sup>7</sup> Para. 102

<sup>8</sup> Para. 105



Commissioner, who is far below the level of the President who had the same powers, has an unfettered discretionary power to prescribe to the DPCI what additional responsibilities she would like it to undertake”.

#### 4. AMENDED POLICY GUIDELINES (2015)

The first set of DPCI Policy Guidelines was tabled before Parliament on 30 April 2013 (ATC No 48) for concurrence by Parliament under section 17K(4) of the SAPS Act and adopted by the Portfolio Committee of Police on 28 May 2013. However, the 2014 judgement deleted these provisions and left no oversight functions in terms of the agreement to it by Parliament. This however does not subtract from the Constitutional obligation of Parliament in terms of Chapter 4 of the Constitution.

The 2014 judgement came out strongly against the drafting of Policy Guidelines by the Minister of Police and deleted all provisions made in reference thereto.<sup>9</sup> Importantly, the 2014 judgement also determined that the referral of offences or categories of offences by the National Commissioner of Police as an impediment to the independence of the DPCI and was subsequently removed from the SAPS Act.

According to the 2014 judgement, only the National Head of the DPCI may decide the selection of offences to be investigated by the Directorate (guided by the legislative provisions).

As a result of the Judgement, the 2013 policy guidelines are no longer in effect and has no legal force. The 2013 and 2015 versions reads similarly with some changes effected to adhere to the 2014 judgement. The changes will be highlighted in the section below. The change that should raise particular concern is on Section B of the guidelines relating to the referral of offences to the Directorate. This section of the 2013 guidelines provided for the referral of offences to the DPCI by the National Commissioner. But since the provision was struck from the Act, the National Commissioner may no longer refer offences to the Directorate. This section of the 2015 Guidelines reads the same as the 2013 version with only the words “National Commissioner” removed.

In terms of the functions of the DPCI, section 17D(1) states the following:

- (1) The functions of the Directorate are to prevent, combat and investigate-
  - (a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, **[subject to any policy guidelines issued by the Minister and approved by Parliament];**
  - (aA) **[selected offences not limited to offences referred to] offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004); and**

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<sup>9</sup> Sections 17K(4)(a) and (b), (7) and (8) was deleted by the Constitutional Court Judgement (2014)



**[(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament.]**

**[(1A) The National Head of the Directorate shall ensure that the Directorate observe the policy guidelines referred to in subsection (1).] (Highlighted sections were deleted by the 2014 judgement from the SAPS Act)**

The central question and difficulty facing the operations and independent functioning of the DPCI is the referral of national priority offences to the DPCI by a Provincial Commissioner (the DPCI is under no obligation to address or investigate such referrals). The dichotomy of this provision is that the National Commission may not refer offences or categories of offences to the DPCI, as per the 2014 judgement, and the line of office places a Provincial Commissioner under the National Commissioner, which may lead to an indirect referral from the National Commissioner.

The 2015 Policy Guidelines contains three (3) main sections, which are:

- Section A: Selection of national priority offences by the National Head of the Directorate
- Section B: Referral of any offences or category of offences to the Directorate; and
- Section C: Operational Approach

### **3.1 Section A: Selection of offences by the National Head of the Directorate**

The National Head of the Directorate shall give consideration to the offences that **must** be addressed by the Directorate (below) to ensure the execution of the mandate of the Directorate. The Policy Guideline states that the Directorate “must focus on crimes of a considerable extent and scope, in other words ‘**serious or high level crimes**”.

The Policy Guidelines state that the National Head of the Directorate must select national priority offences based on a **crime threat analysis** of these offences to be investigated. The National Head must also establish operational protocols with **relevant** Provincial Commissioners and Divisional Commissioners to identify matters that will be addressed by the Directorate. The National Head may also conclude Memoranda of Understanding with relevant government departments, law enforcement agencies and external stakeholders in order to identify matters that will be addressed by the Directorate.

It is further stated that the offences selected by the National Head of the Directorate must be aligned with the strategic operational priorities of the Department of Police and the National Commissioner of the SAPS. These must also comply with the following criteria:

- 1) The offence is committed by a person, group of persons or syndicate acting in an organised fashion or a manner which could result in substantial financial gain for the person, group of persons or syndicate involved and must comply with the requirements set out in section 16(2A) of the Act;





- 2) The offence is committed or planned in more than one province or outside the borders of the country by the same perpetrators;
- 3) The offence has an impact on the revenue or expenditure of the national government;
- 4) The offence has an impact on the national economy or the integrity of currencies;
- 5) An offence in respect of which the investigation in the Republic by the Service is requested by an international police agency or the police of a foreign country;
- 6) An offence that involves mutual legal assistance and/or extradition proceedings; or
- 7) An offence in respect of which the prevention or investigation requires the application of specialised skills which are only available in the Directorate or can be sourced by the Directorate.

#### **Comments and questions**

- 1) The Committee should ascertain what is meant by a 'crime threat assessment'. Also how these will be done and how the assessments will impact on the selection of offences.
- 2) The Policy Guideline state that Operational Protocols must be established with 'relevant' Provincial Commissioners to identify what matters will be addressed by the Directorate. The wording of this provision should be engaged further, as it is not clear what is meant by 'relevant Provincial Commissioners'. The protocols should ideally be developed with all nine Provincial Commissioners.
- 3) The Committee should also ask when these protocols will be established. Will it be as and when the need arises or will it be done as a matter of course?
- 4) The Guideline further state that selected offences must be aligned with the strategic operational priorities of SAPS and the National Commissioner. This makes the selection of offences subject to a broad range of issues/priorities to be established by the SAPS as a whole as well as the National Commissioner. The Committee should establish what the impact of this will be and the degree to which this limits the selection of offences by the National Head of the Directorate. The concern should be that these operational priorities will dictate the selection of offences by the National Head.
- 5) Clarity should be sought on who the relevant government departments, law enforcement agencies and external stakeholders is with which the National Head may conclude Memoranda of Understanding in order to identify matters that will be addressed by the Directorate. The National Head should provide examples and hypothetical situations in which these will be needed.

#### **3.1.1 Offences that MUST be addressed by the Directorate**

The second aspect of the Policy Guidelines relates to the offence that must be addressed by the Directorate and thus is the **exclusive responsibility** of the Directorate. These include the following:

- 1) High treason;
- 2) Sedition (conduct inciting rebellion against a government);
- 3) Any offence referred to in paragraph (a) of the definition of "specified offence" in the **Protection of Constitutional Democracy against Terrorist and Related Activities**



**Act, 2004 (No. 33 of 2004).** The purpose of this Act is to provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to give effect to international instruments dealing with terrorist and related activities; to provide for a mechanism to comply with relevant United Nations Security Council Resolutions, which are binding on member States, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in respect of terrorist and related activities; and to provide for matters connected therewith.

As mentioned, these “**specified offence**” are the exclusive responsibility of the Directorate and according to the above mention Act (reference to section 4, 14) these offences relates to offences of terrorism referred to in section 2 of the Act, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections). The specified offences referred to in this Act include the following:

- Offence of terrorism;
  - Offences associated or connected with terrorist activities;
  - Offences associated or connected with financing of specified offences;
  - Offences relating to explosive or other lethal devices;
  - Offences relating to hijacking, destroying or endangering safety of a fixed platform;
  - Offences relating to taking a hostage;
  - Offences relating to causing harm to internationally protected persons;
  - Offences relating to hijacking an aircraft;
  - Offences relating to hijacking a ship or endangering safety of maritime Navigation;
  - Offences relating to harbouring or concealment of persons committing specified offences;
  - Duty to report presence of person suspected of intending to commit or having committed an offence and failure to so report;
  - Offences relating to hoaxes; and
  - Threat, attempt, conspiracy and inducing another person to commit offence
- 4) Any offence referred to in Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002). The purpose of this Act is to provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute: to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for cooperation by South Africa with the said Court;



and to provide for matters connected therewith. The offences referred to in this Act includes the following:

- Genocide
- Crimes against humanity
- War Crimes

5) Any offence referred to in the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (No. 87 of 1993). The purpose of this Act is to provide for control over weapons of mass destruction; and the establishment of a Council to control and manage matters relating to the proliferation of such weapons in the Republic; to determine its objects and functions; to prescribe the manner in which it is to be managed and controlled; and to provide for matters connected therewith. The offences referred to in this Act, include the following:

- Contravenes or fails to comply with the provisions of a code of conduct issued by the Council;
- Falsely represents that any goods or activities fall outside the purview of this Act;
- Makes any statement regarding a matter with which this Act is concerned to an officer or employee of the Department, an inspector or a person authorized by the Council which statement is false in any material respect, knowing it to be false;
- Falsely holds himself out to be an officer or employee of the Department, an inspector or a person authorized by the Council;
- Refuses or fails to answer to the best of his knowledge any question regarding a matter with which this Act is concerned which an officer or employee of the Department, an inspector or a person authorized by the Council has in the exercise of his powers put to him;
- Refuses or fails to comply to the best of his ability with any lawful requirement, request or order of an officer or employee of the Department, an inspector or a person authorized by the Council.

6) Any offence referred to in the Regulation of Foreign Military Assistance Act, 1998 (No. 15 of 1998). The purpose of this Act is to regulate the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident within the Republic and foreign citizens rendering such assistance from within the borders of the Republic; and to provide for matters connected therewith. The offences referred to in this Act, includes that:

- No person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity.
- No person may within the Republic or elsewhere—
  - (a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorisation to offer such assistance in terms of section 4;
  - (b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5.



Or -

Any offence referred to in the Prohibition of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006). The purpose of this Act is to prohibit mercenary activity; to regulate the provision of assistance or service of a military or military related nature in a country of armed conflict; to regulate the enlistment of South African citizens or permanent residents in other armed forces; to regulate the provision of humanitarian aid in a country of armed conflict; to provide for extra-territorial jurisdiction for the courts of the Republic with regard to certain offences; to provide for offences and penalties; and to provide for matters connected therewith. The offences referred to in this Act include the prohibition of the following:

- Prohibition of mercenary activity;
- Prohibition and regulation of certain assistance or rendering of services in country of armed conflict or regulated country;
- Prohibition and regulation of enlistment of South Africans in armed forces; and
- Prohibition and regulation of humanitarian assistance in country of armed conflict.

#### **Comments and questions**

The Committee should engage with the Civilian Secretariat for Police/National Head of the Directorate on these offences that form the exclusive responsibility of the Directorate and establish whether the Directorate has sufficient capacity to investigate these crimes.

#### **3.1.2 Selection criteria for offences that MAY be addressed by the Directorate**

The Policy Guidelines state that the Directorate may investigate other cases identified by the National Head of the Directorate or those referred to the Directorate by a Provincial Commissioner. These cases depend on the following factors:

- Monetary value;
- Complexity of the case;
- Extent of the case;
- Public interest;
- Urgency; and
- Organised fashion.

#### **Comments and questions**

- 1) The Committee should ask why this section only refers to a Provincial Commissioner and not a Divisional Commissioner.
- 2) The Committee should also ascertain what procedures must be followed when Provincial Commissioners refer cases to the DPCI and what the guidelines for this will entail.
- 3) The factors listed above are relatively vague and it remains uncertain how and by whom these factors will be qualified, like what the monetary value must be applicable to the case – must it be in excess of R1 million?



### 3.1.3 National priority offences NOT SELECTED by the National Head of the Directorate

This section of the policy guidelines focuses on those offences not selected by the National Head of the Directorate. The Act provides for the National Head of the Directorate to select national priority offences and as such not all offences will be selected. Thus, protocols between the National Head and relevant Provincial and Divisional Commissioners must be established for the offences not selected by the National Head of the Directorate for investigation by the DPCI. This is to ensure that these crimes are sufficiently addressed by a specific Provincial office or Division of the SAPS, other than the Directorate.

The following are offences that may need to be provided for in the Protocols referred to above:

- Offences which a Provincial Commissioner or other stakeholders requested the National Head of the Directorate to prevent or investigate but was not accepted by the National Head;
- Any offence referred to in Chapters 2, 3 and 4 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998);
- Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 14 of 1992);
- Any offence relating to the dealing in smuggling or ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament;
- Any offence contemplated in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
- In respect of the last mentioned Act, the National Head of the Directorate shall select cases which must be investigated by the Directorate, taking into account the offences mentioned in paragraph 6, and all other matters must be directed to the relevant Provincial Commissioner, Divisional Commissioners: Detectives or other relevant stakeholders for investigation; and
- Any offence where the punishment may be imprisonment for life.

#### Comments and questions

- 1) The Committee should request to see the Protocols established between the Directorate and Provincial and Divisional Commissioners once completed.
- 2) The Committee should ask the National Head of the Directorate on what basis offences will be selected in terms of the Prevention and Combating of Corrupt Activities Act, 2004 and which offences will not be selected.
- 3) The National Head should be asked to explain the meaning of paragraph 5.8.4, especially the reference made to paragraph 6 of the guidelines. Paragraph 5.8.4 states that *"In respect of offences reported to the Directorate under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the National Head of the Directorate shall select cases which must be investigated by the Directorate, taking into account the offences mentioned in paragraph 6, and all other matters must be directed to the relevant Provincial Commissioner, Divisional Commissioners: Detectives or other relevant stakeholders for investigation."* Paragraph 6 does not list any offences and deals with referrals to the D



clearly defined jurisdiction for the DPCI and in the end, the 2014 judgement afforded unencumbered power to the National Head of the DPCI to decide the offences to be investigated that falls outside the legislative scope. In some ways, the policy guidelines bridle this power, especially in terms of Section B regarding referrals to the DPCI. The meaning and practical application of this section should be clarified and assurance sought that it will not impede the independent functioning of the Directorate.



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