

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND
CONSTITUTIONAL DEVELOPMENT AND THE PORTFOLIO COMMITTEE ON
SAFETY AND SECURITY**

in relation to

- **Overview of the Proposed New Integrated Criminal Justice System**
- **National Prosecuting Authority Amendment Bill (B23-2008)**
- **South African Police Services Amendment Bill (B30-2008)**

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The Committees are requested to note that The Helen Suzman Foundation wishes to make a verbal presentation during the hearings on 5 to 8 August 2008.

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1. Introduction

- 1.1 This submission is made by The Helen Suzman Foundation (the "**Foundation**"), in response to notifications by the Portfolio Committee for Justice and Constitutional Development and the Portfolio Committee for Safety and Security (collectively the "**Committees**") inviting stakeholders and interested parties to make written submissions to the Committees on the following:
- 1.1.1 Overview of the Proposed New Integrated Criminal Justice System (the "**Overview**");
 - 1.1.2 National Prosecuting Authority Amendment Bill (the "**NPA Amendment Bill**"); and
 - 1.1.3 South African Police Services Amendment Bill (the "**SAPS Amendment Bill**").
- 1.2 The Foundation is an independent, non-partisan think-tank dedicated to promoting liberal democratic values and human rights in post-apartheid South Africa through its research and publications. The primary goal of the Foundation is to safeguard and strengthen South Africa's new democracy and respect for the Constitution of the Republic of South Africa, 1996 (the "**Constitution**"). In pursuit of such goals, the Foundation endeavours to analyse the dangers to open and responsive democracy and civic freedoms as well as criticise governance and policy that prejudices development, human dignity, the basic rights of individuals and the special needs of the poor, cultural minorities and the powerless.
- 1.3 The proposed legislative measures strike at fundamental constitutional principles, the rule of law and South Africa's rights-centred democracy. The Foundation has a direct interest in the subject matter of this legislative process.
- 1.4 **The Foundation requests a meaningful opportunity for it to make full oral submissions when this matter comes before the Committees from 5 to 8 August 2008.**

2. **Executive Summary**

- 2.1 *The NPA Amendment Bill and the SAPS Amendment Bill (the "**Bills**") seek to dissolve the Directorate of Special Operations (the "**DSO**") and establish the Directorate for Priority Crime Investigation (the "**DPCI**").*
- 2.2 *The practical consequences of the Bills are far-reaching:*
- 2.2.1 *the Bills disestablish and do not merely relocate a highly successful and widely acclaimed organised crime-fighting unit, contrary to the recommendations of the only comprehensive government-sponsored assessment of the location and mandate of the DSO;*
- 2.2.2 *the mandate of the DPCI is overbroad and results in the loss of focus on organised crime (which remains rampant in South Africa);*
- 2.2.3 *the prosecution-led and intelligence-driven investigative approach (the "troika" principle) – which accords with international best practice – will be lost;*
- 2.2.4 *the Bills concentrate power in the hands of the National Commissioner of the South African Police Service ("**SAPS**");*
- 2.2.5 *co-operation and integration within the DPCI and among departments/organs of state will diminish;*
- 2.2.6 *powers of search and seizure will weaken;*
- 2.2.7 *national security vetting provisions will not improve; and*
- 2.2.8 *terms and conditions of DSO personnel's employment may be adversely affected.*
- 2.3 *It is apparent that the South African government ("**government**"), in initiating this legislative process, is not acting in the best interests of South Africa and is motivated by ulterior purposes and instructions of third parties. In light of all the circumstances, the inescapable conclusion is that the government is simply giving effect to a dictates of the Polokwane Conference of the African National Congress (the "**ANC**") and the ANC's National Executive Committee, made with a view to shielding key ANC members from effective investigation and prosecution.*

- 2.4 *The genesis and consequences of the Bills breach the Constitution of the Republic of South Africa, 1996 (the "**Constitution**") in a number of fundamental respects:*
- 2.4.1 *the Bills violate the Rule of Law;*
- 2.4.2 *government conduct is not rationally related to a legitimate government purpose;*
- 2.4.3 *the measures which the Bills propose and the practical effects of the Bills are not rationally or reasonably related to the Bills' stated objectives;*
- 2.4.4 *the Bills disproportionately and unjustifiably infringe foundational constitutional rights, including the rights to life, human dignity, freedom and security of the person and property; and*
- 2.4.5 *the Bills breach the government's positive constitutional duty to respect, protect, promote and fulfil the rights in the Bill of Rights.*
- 2.5 *In addition to these core substantive constitutional violations, the process which attended the Bills is fundamentally flawed and amounts to a breach of the constitutional principles of participatory democracy:*
- 2.5.1 *the truncated time periods allowed for the Committees to consider submissions and for interested and affected parties to make verbal presentations vitiate the lawfulness of the legislative process;*
- 2.5.2 *it is procedurally improper for the parliamentary process to continue while the Constitutional Court considers the application by Hugh Glenister; and*
- 2.5.3 *the uncertainties surrounding the origins, status and substance of the Overview deny the public a proper opportunity to comment on the drastic changes proposed by government.*
- 2.6 *In sum, the Bills suffer from incurable constitutional deficiencies and should, in no form, be approved by the Committees.*

3. **The submission process is fundamentally flawed**

3.1 **The public hearings amount to a denial of participatory democracy**

3.1.1 The Committees require stakeholders and interested parties to make written submissions on the NPA Amendment Bill and SAPS Amendment Bill (the "**Bills**") by 28 July 2008. In this regard, it is noteworthy that the NPA Amendment Bill and the SAPS Amendment Bill were only published and introduced to Parliament on 22 May 2008 and 4 June 2008 respectively. The public hearings are scheduled for 5 to 8 August 2008, which is stated to include the "Western Cape provincial process", a mere five days later. This process has already attracted considerable public interest, with the potential for a substantial number of submissions. The period between the deadline for written submissions and public hearings is inordinately truncated and, it is submitted, will not afford the Committee members a proper opportunity to consider the submissions. Likewise, the period does not allow interested parties adequate time to consider the submissions made by other stakeholders and to prepare for the oral hearings. Moreover, in light of the manifest public interest and potential for numerous submissions, the three day period allotted for the national public hearings is plainly insufficient.

3.1.2 We submit that the concerns we have expressed above result in a breach of the principles of participatory democracy vitiating the underlying lawfulness of the whole process.

3.2 **Particular procedural and substantive irregularities relating to the "Overview of the Proposed New Integrated Criminal Justice System" document**

3.2.1 Stakeholders and interested parties have also been invited to comment on an undated and seemingly incomplete document entitled "Overview of the Proposed New Integrated Criminal Justice System" ostensibly published by the Department of Justice and Constitutional Development (the "**Overview**"). The status of the Overview is unclear. Although the Overview refers to Cabinet approval of the "*proposed turn-around strategy for the Criminal Justice System*" on 7 November 2007, there is a conspicuous absence of any such

document, which is likewise is not in the public domain (the "**strategy document**").

3.2.2 The Overview is, in any event, entirely overbroad. Moreover, the objectives to which it refers, in so far as such objectives can be discerned from its substance, are in no way reflected in the Bills nor in any other government measures. In this submission, we accordingly address those aspects of the Overview which bear on the objectives, propriety and lawfulness of the Bills.

3.2.3 The abovementioned features of the Overview, however, render it extremely difficult, if not impossible, to comment meaningfully on its substance and result in a further breach of the principles of participatory democracy. It is not clear why the authors of the Overview have not seen fit to release the strategy document, given its underlying importance to the Overview. One can only speculate on what basis it has been so selectively used in the legislative process.

3.3 **Important issues before the Constitutional Court should first be resolved**

3.3.1 As the Committees are undoubtedly aware, the case of *Glenister v President of the Republic of South Africa and Others* (case number CCT41/08) is scheduled to be heard by the Constitutional Court on 20 August 2008. That case forms part of the broader public participation and debate around the proposed disestablishment of the Directorate of Special Operations (the "**DSO**"), and raises important issues of principle¹. It would be improper for the parliamentary phase of the public participation process to be pursued prior to the conclusion of the Constitutional Court process.

¹ It is noteworthy that the High Court judgment in the *Glenister* case (case number 14386/08; handed down on 27 May 2008) did not deal with the key issues of constitutional principle raised by the applicant, including the lawfulness, reasonableness, proportionality and procedural fairness of the proposed disestablishment of the DSO.

4. **The DSO is exceptionally successful in combating complex crime which continues to threaten South Africa**

- 4.1 In the seven years since its establishment, the DSO has been extremely successful in combating crime. The threats to South African society that led to the DSO's creation by the South African government² in 1999 are prevalent today and are, in fact, heightened by the increasing sophistication of criminal activities including the transnational nature of organised crime.
- 4.2 The DSO has been widely acclaimed for its crime-fighting capacity and ability.³ This is amply borne out by the published results for 2007: the DSO had finalised 1 500 complex financial crime cases, executed 1 600 arrests and had an average conviction rate of between 80 and 90%.⁴ In addition, DSO investigations led to the seizure of R5 billion in contraband and, together with the Asset Forfeiture Unit ("**AFU**"), the civil forfeiture of R1.5 billion, making it one of the major contributors to the Criminal Asset Recovery Account.
- 4.3 In these circumstances, the Bills' proposal to disestablish the DSO requires a proper and convincing explanation by the Government, which established the DSO in the first place in response to the country's endemic levels of crime – much of it organised – which has continued its upward spiral. It is wholly irrational to disestablish the DSO, an agency with uncontroverted and unprecedented levels of success in combating organised crime, whose members have received specialised training in their areas of work, and propose to "substitute" it with an entity the introduction of which has not been subjected to any analysis, research, transparent justification or meaningful consultation. In fact, the experience with other units under the direct control of the South African Police Service ("**SAPS**") clearly suggests that the new directorate will be considerably less effective than the DSO.

² The establishment of and rationale underlying the DSO was first announced by President Thabo Mbeki in his State of the Nation Address on 25 June 1999. See, too, the speech by Dr PM Maduna in Parliament on 11 November 1999, as well as the Khampepe Commission report, paragraph 9.

³ The full ambit of the DSO's success is set out in the NPA Annual Reports and the DSO's Annual Reports to the Portfolio Committee on Justice and Constitutional Development.

⁴ G Wannenburg "Putting paid to the untouchables? The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime Units" *SA Crime Quarterly* No 24, June 2008, 19.

5. Key features of the legislative and operational framework of the DSO that account for its effectiveness

5.1 Structure and placement

5.1.1 The DSO officially came into legal existence on 12 January 2001 when the National Prosecuting Authority Amendment Act, 2001 (the "**Amendment Act**") entered into force. . The major difference between the DSO and its predecessors is that the DSO is located firmly in the newly established National Prosecuting Authority (the "**NPA**") under the NPA Act, 1998 (the "**NPA Act**"), rather than forming an independent police organisation.⁵

5.1.2 While the DSO is a division within the NPA and thus accountable to the National Director of Public Prosecutions ("**NDPP**"), it also has its own head who has the status of a Deputy National Director of Public Prosecutions.⁶ The chain of accountability in this regard is clear and uncomplicated: the head of the DSO reports directly to the NDPP who in turn is accountable to the Minister of Justice and Constitutional Development.

5.1.3 The head of the DSO is assisted by an Investigating Director who is appointed by the NDPP. In terms of section 28 of the NPA Act, the Investigating Director authorises preparatory investigations and has the power to institute an investigation. The power conferred on the Investigating Director and the head of the DSO to determine which matters to investigate allows the DSO to be functionally independent and to act swiftly to investigate matters without bureaucratic obstacles. This ability to act swiftly is particularly important due to the highly sophisticated nature of modern criminal syndicates, who are able to anticipate and avoid detection.⁷

⁵ Jean Redpath "The Scorpions: Analysing the Directorate of Special Operations" *Institute for Security Studies Monograph Series* No 96, March 2004.

⁶ Section 1A of the NPA Act.

⁷ G Wannenburg "Putting paid to the untouchables? The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime Units", *SA Crime Quarterly* No 24, June 2008, 19.

5.1.4 Owing to its placement within the NPA and the power that the DSO has to initiate its own investigations, the DSO's operations are completely separate from those of the SAPS. This separation of investigative powers between the SAPS and the DSO has meant that the two organisations can provide checks and balances for each other. In particular, the DSO's autonomy has enabled it to investigate a number of cases of police corruption, including its well publicised investigation into the conduct of the National Police Commissioner, Mr Jacob (Jackie) Selebi ("**Selebi**") as well as other investigations which might not otherwise have been pursued, for instance the indictment issued against the African National Congress (the "**ANC**") President, Mr Jacob Zuma ("**Zuma**").

5.2 **Legislative and operational mandate**

5.2.1 Section 7(1)(a) of the NPA Act provides that the DSO's specific mandate is to investigate serious *criminal or unlawful conduct committed in an organised fashion*, or certain other offences proclaimed by the President,⁸ with the objective of prosecuting such offences and investigating unlawful conduct in the most efficient and effective manner. The definition of "*organised fashion*" contained in section 7(1)(b) of the NPA Act is sufficiently broad to empower the DSO to investigate crimes that do not fall within the traditional notion of organised crime without giving room for criminals to contest its jurisdiction.⁹

5.2.2 Chapter 5 of the NPA Act, as amended, deals specifically with the powers, duties and functions of the DSO. Section 28 provides that once the Investigating Director has initiated an investigation under section 28, members of the DSO designated to that particular investigation have powers beyond those of ordinary police officials,

⁸ No further offences have been proclaimed as falling within the ambit of the DSO's jurisdiction.

⁹ Section 7(1)(b) of the NPA Act defines the term 'organised fashion' as:

the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.

which include expanded powers of search and seizure.¹⁰ The DSO is accorded further powers of search, seizure and investigation under the Prevention of Organised Crime Act, 1998 ("**POCA**").¹¹

- 5.2.3 In order to manage the wide legislative mandate conferred upon it, the DSO has developed its own criteria for investigating and managing cases, which are contained in Circular One (the "**Circular**").¹² The Circular provides general and particular criteria which the Investigating Director must consider before authorising an inquiry.¹³
- 5.2.4 Under the Circular, the Investigating Director may investigate any matter which involves a 'specified offence', viz one which is related to organised crime. The Investigating Director must first decide whether the relevant matter falls within the strategic focus areas of the DSO, namely, drug trafficking, organised violence, precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime or organised public corruption, and then consider a further fourteen factors, including the seriousness and scope of the offences to be targeted and the outcome of previous law enforcement efforts (including the SAPS) in neutralising the syndicate, and whether the DSO's team or multidisciplinary approach is more appropriate.¹⁴
- 5.2.5 In addition to the above criteria, the Circular articulates further considerations that need to be taken into account which pertain to the specific types of offences involved and the attainment of certain thresholds. For instance, a corruption matter has a threshold of

¹⁰ Redpath (*op cit*, fn 5), 27. See s 29 of the NPA Act, which provide considerably more extensive powers to officers of the DSO than the powers granted to SAPS members under Chapter 2 of the Criminal Procedure Act, 1977.

¹¹ Section 72 of Prevention of Organised Crime Act, 1998 ("**POCA**"), read with section 1 of POCA and section 1 of the NPA Act, provides that if the head of the DSO or a Director of Public Prosecutions ("**DPP**") appointed to the DSO has reason to believe that a person has information or documentary material that is relevant to the commission or intended commission of an offence under POCA, they may institute an investigation under Chapter 5 of the NPA Act

¹² The Office of the Head of Operations: DSO Circular: 1 (effective date of 8 November 2001), signed by then Acting Investigating Director Advocate Leonard F McCarthy.

¹³ Redpath (*op cit*, fn 5), 46.

¹⁴ *Ibid*, 46-7.

R500,000.00, while serious economic offences should involve an actual loss of R5 million.¹⁵

5.2.6

It is evident from the contents of the Circular that although the DSO's legislative mandate is stated in wide terms, in practice the DSO, unlike the SAPS, focuses on specific types of high level crime, that is organised crime, high level corruption, complex financial crimes and offences under POCA.¹⁶ Owing to its narrow focus, the DSO has been able to investigate and prosecute incidents of high level crime with a high success rate. For example, the DSO is the first South African crime fighting organisation to have prosecuted successfully auditors and financial directors for financial statement fraud, secured convictions for money laundering and racketeering and co-operated with international law enforcement agencies to carry out drug seizures.¹⁷ Indeed, the benefit of having an organisation that focuses on specific types of high level crime was the principal reason for the creation of the DSO. This is evident from the statement made by the then Minister of Safety and Security Steve Tshwete in 1999 as the government was in the process of establishing the DSO:

[A] decision has been taken to ensure that the investigation of priority crimes receives better attention...The new structure will focus, with the back-up of highly skilled personnel, effective equipment and adequate resources, on intelligence gathering, investigation and the prosecution of persons and groups committing or involved in priority crimes ... I am confident that this initiative will establish the type of capacity that is necessary to give organised crime, particularly the criminal elements committing violent and commercial crime a severe blow.¹⁸

¹⁵ *Ibid*, 47.

¹⁶ NPA Annual Report briefing before the Portfolio Committee on Justice and Constitutional Development, 26 February 2008.

¹⁷ NPA Annual Report 2006/2007, 53.

¹⁸ S Tshwete, parliamentary briefing, 28 June 1999, Cape Town as quoted in P Masehele "The Khampepe Commission: the future of the Scorpions at stake", *Institute for Security Studies Paper No 126*, June 2006.

5.2.7 It is submitted that the government's rationale for the establishment of the DSO nearly ten years ago remains equally valid today.¹⁹ Given the success of the DSO's focused approach and the fact that experience from foreign jurisdictions indicates that there is a global trend towards creating specialist units to deal with organised crime,²⁰ to absorb this successful and specialist unit into the SAPS appears not only to make no sense, but is completely counter-intuitive..²¹

5.3 **Multidisciplinary and prosecution-led approach**

5.3.1 The DSO employs a multidisciplinary and team-based approach to its investigations. Teams consist of special investigators,²² prosecutors²³ and intelligence analysts²⁴ who work together on investigating and prosecuting specific matters.²⁵ The *troika* approach, which consists of using prosecutors, investigators and intelligence analysts together has been fundamental to the success of the DSO.²⁶ This approach, which is not utilised within the SAPS, allows for a diverse range of skills to be brought to bear on each investigation.. The prosecutors provide structure and direction to the investigation, whilst the analysts collect and analyse crime information using sophisticated software. The analysts provide focused information (for example profiles of syndicates

¹⁹ Khampepe Commission report, 8.

²⁰ For example in the United Kingdom, the Serious Organised Crime Agency assumed its functions in 2006 and is an intelligence-led agency that exists to prioritise the prevention and detection of serious organised crime.

²¹ Cf Khampepe Commission report, 128.

²² Special investigators are defined in the NPA Act as persons who are appointed by the NDPP on the recommendation of the head of the DSO. Their function is essentially the same as police investigators; indeed s30 (2) of the NPA Act provides that special investigators have the same powers as bestowed upon police officials under the Criminal Procedure Act, 1977.

²³ Prosecutors in the DSO have job titles that are similar to those of prosecutors in the NPS, and their salaries are the same as those with equivalent rank and on similar salary scales in the NPS. The prosecutors are generally responsible for guiding cases. For prosecutor's salary ranges, see GN R1299, GG 25450, 9 September 2003.

²⁴ Intelligence analysts are divided into senior analysts and junior analysts, each playing a distinct role. A senior analyst is a strategist who will analyse the criminal climate and trends in the region concerned and provide strategic directions, whilst a junior analyst has a more technical role and is involved with the actual cases through analysis of data and computer software. See Redpath (*op cit*, fn 5) 35.

²⁵ Redpath (*op cit*, fn 5) 26-39.

²⁶ See generally Wannenburg (*op cit*, fn 7) and Minaar (*op cit*, fn 17).

and their members) to the special investigators, who then carry out properly targeted investigations.²⁷

5.3.2 One of the main reasons for the DSO's separate existence from the SAPS is the use of a prosecution-led approach as opposed to traditional policing. In practice, when a specific case is under consideration, an investigator, analyst and prosecutor discuss the case collectively, with the prosecutor leading the process. The investigator places recovered evidence with the analyst, who then considers crime intelligence or other implications arising from existing evidence. The prosecutor advises both the investigator and the analyst on aspects of the case needing revalidation or further investigation, in order to build a effective legal case in court.²⁸

5.3.3 The prosecution-led approach has been fundamental to the success of the DSO because, as explained by acting head of the NPA, Advocate Mokededi Mpshe ("**Mpshe**"),

*[i]t is important in that, right at the beginning of the investigation, the prosecutor ...will be able to guide the investigator as to what statements to get, what kind of evidence to obtain, and also advise on unconstitutionally obtained evidence...In that way it puts the prosecutor in better stead when he takes the case to court because he will have been on board from the beginning and will know the case inside out.*²⁹

5.3.4 The hands-on involvement of prosecutors also ensures that the investigation is focused on collecting the evidence necessary to establish a prima facie case and pursue a successful prosecution.³⁰ This approach is in sharp contrast with that of the SAPS, where

²⁷ Wannenburg (*op cit*, fn 4) 18.

²⁸ P Mashele "Will the Scorpion still sting? The future of the Directorate of Special Operations" Institute for Security Studies, *SA Crime Quarterly* No 17 September 2006.

²⁹ "NPA boss Mokotedi Mpshe", *The Times*, 2 February 2008.

³⁰ Adv Vusumzi Pikoli, Submission to the Khampepe Commission, 17 June 2005, 38 as quoted in P Mashele "The Khampepe Commission: the future of the scorpions at stake" *Institute for Security Studies Paper No 126*, June 2006.

investigators work alone and present dockets to prosecutors only when, in their opinion, they have gathered sufficient evidence to charge the accused. The SAPS's investigation model often leads to dockets being rejected by prosecutors and cases being struck off the roll for lack of preparation, which is far less likely to occur in DSO-initiated prosecutions.³¹

5.3.5 It is submitted that, as illustrated above, the DSO's multidisciplinary and prosecution-led approach has been key to its success. Indeed the DSO's operational model has been so successful that at least 15 countries, spread across Africa, Asia the Americas and Europe, have requested advice from the DSO and are considering how to emulate the DSO's operating model.³²

5.4 Training and resources

5.4.1 The resources allocated to the DSO as well as its current status as a specialised unit have permitted the DSO to attract and retain highly skilled professionals through payment of competitive salaries and providing a conducive work environment.³³ The high success rate, profile and competitive salaries also contribute to the high morale within the DSO, which in turn assists in producing better results.³⁴

5.4.2 The DSO's resources also permit it to utilise the services of specialist consultants, such as forensic auditors, which are necessary due to the complex nature of organised crime, and, where appropriate, to pursue international and trans-national investigations.³⁵

5.4.3 In addition to being better resourced, DSO personnel are also better trained and experienced as compared with SAPS officers. Many of the DSO's investigators come from the ranks of the SAPS's most

³¹ A Minaar "The scorpions lose their sting: challenges to incorporation of the DSO into the SAPS" *SA Crime Quarterly No 24*, June 2008, 25.

³² Affidavit of acting NPA head Mpshe submitted in the *Glenister* application to the High Court to prevent the disestablishment of the DSO.

³³ Affidavit of Jacobus Cilliers submitted to the Khampepe Commission on behalf of the Institute for Security Studies, 14 June 2005, at p 6-8.

³⁴ Minaar (*op cit*, fn 31), 25.

³⁵ *Loc cit*.

experienced officers who opted to join the DSO. In addition, several DSO investigators have received training from the Federal Bureau of Investigations ("FBI") as well as the London Metropolitan Police.³⁶ The team structure of the DSO has further resulted in the development of highly specialised units because specific teams have tended to focus on the same types of crimes.³⁷

5.5 Domestic and international co-operation

5.5.1 One of the factors that has fortified the DSO's investigations has been its close co-operation with the AFU³⁸ and the Special Investigation Unit ("SIU").³⁹ As the SIU does not have the power to arrest or prosecute suspects, it often refers matters to the DSO for further action. In turn, the DSO often refers matter to the SIU and the AFU. As a consequence of the close co-operation between these agencies, it is clear that disbanding the DSO will have a negative impact on the effectiveness of AFU and the SIU.⁴⁰

5.5.2 In addition to its domestic partnerships, the DSO has co-operated with several international agencies including: the FBI; the Attorneys General of Switzerland, Mauritius and the Ukraine; police agencies in Hong Kong, Australia, Sweden, Namibia and Mozambique; the United Kingdom's Serious Organised Crime Agency and Nigeria's successful Economic and Financial Crimes Commission. The DSO's relationships with these agencies has facilitated trans-national investigations which have assisted the DSO to bring international syndicates operating in South Africa to book.⁴¹

³⁶ Minaar (*op cit*, fn 31), 26.

³⁷ Minaar (*op cit*, fn 31), 25.

³⁸ This Unit was created in May 1999 in terms of POCA. It is mandated to enforce the state's powers to seize assets that are either the instruments or proceeds of crime.

³⁹ The SIU was created in terms of the Special Investigating Units and Special Tribunals Act, 1996. Its mandate relates to the investigation of fraud, corruption and maladministration in public bodies or involving public funds: Minaar (*op cit*, fn 31), 26.

⁴⁰ Minaar (*op cit*, fn 31), 26.

⁴¹ NPA Annual Report 2006/2007 (*op cit*, fn 17), 57.

6. The effect of the Bills

A summary table of the substantive changes appears as annex "A" to these submissions.

6.1 The Bills dissolve the DSO⁴²

6.1.1 The Bills dissolve the structures, framework and personnel of the DSO. All references to the DSO in the NPA Act are excised by the NPA Amendment Bill. The Bills do not merely effect a "relocation" of the DSO, but its complete disbandment as the integrity, structure and function of the DSO are entirely destroyed.

6.2 The Bills concentrate power in the hands of the National Commissioner of the SAPS⁴³

6.2.1 The SAPS Amendment Bill creates a new investigative directorate, the Directorate for Priority Crime Investigation ("**DPCI**"), within the SAPS. The DPCI is accountable to the National Commissioner of the SAPS (the "**National Commissioner**"). The Head of the DPCI is appointed by the National Commissioner, and designated as a Divisional Commissioner of the SAPS, but is accountable to the Deputy National Commissioner of the SAPS (who, in turn, is accountable to the National Commissioner).⁴⁴

6.2.2 The Bills thus concentrate power in the hands of the National Commissioner. The checks and balances inherent in the current system, where both the Deputy NDPP and the National Commissioner are empowered to initiate investigations, will be absent under the model proposed by the Bills. This is all the more relevant and worrying in view of the current serious criminal charges against the National Commissioner of the SAPS, Selebi. These charges would in all

⁴² The NPA Amendment Bill and the proposed section 16A(2) in clause 3 of the SAPS Amendment Bill.

⁴³ Proposed sections 16A(2), (4) and (15) in clause 3 of the SAPS Amendment Bill.

⁴⁴ Proposed sections 16A(2) and (4) in clause 3 of the SAPS Amendment Bill.

likelihood never have been brought had it not been for the independence and the intercession of the DSO.⁴⁵

6.3 **The mandate of the DPCI is overbroad⁴⁶**

The mandate of the DPCI, under proposed section 16A(1) (and echoed in 16A(2)(e) and (3)) in clause 3 of the SAPS Amendment Bill, lacks the focus of the mandate of the DSO under the NPA Act and thus detracts further from the specialised nature of the investigative unit (which has accounted for the DSO's success). It is important to note that the DSO, like many other specialised units dealing with organised crime in foreign jurisdictions, was set up specifically with a view to harnessing skills and expertise to address the distinctive challenges posed to society by organised crime. The changes proposed by the Bills thus have the real potential to diminish South Africa's capacity to deal with organised crime.

6.4 **The prosecution-led and intelligence-driven investigative approach (the "troika" principle) will be lost⁴⁷**

6.4.1 The Bills contemplate that "*selected*" members of the DSO staff will become members of the DPCI. These members will be selected on the basis of their training, expertise and experience in respect of the combating and investigation of crimes. It is not clear who will select these individuals. In light of the overarching authority of the National Commissioner in respect of the DPCI, it is probable that he will have that power.

6.4.2 The DPCI staff will certainly not include prosecutors and will likely not encompass intelligence agents. This altogether destroys the "troika"-centred precepts of fighting organised crime:

⁴⁵ In September 2007, the NPA obtained an arrest warrant for Selebi, with much political manoeuvring following, including the suspension of the NDPP, Mr Vusumzi Patrick Pikoli, by President Mbeki. Ultimately, the new Acting NDPP, Mpshe, proceeded to charge Selebi with corruption and defeating the ends of justice. Selebi was suspended by President Mbeki on 12 January 2008 and Selebi appeared in Randburg Magistrate's Court on 31 January 2008. It would seem, from recent newspaper articles, that the SAPS and the National Intelligence Agency are unwillingly to release information to the NPA which is crucial to Selebi's prosecution: see, for example, Sam Sole "Cops obstruct Selebi investigation" *Mail & Guardian Online* 5 July 2008.

⁴⁶ Proposed sections 16A(1), (2)(e) and (3) in clause 3 of the SAPS Amendment Bill.

⁴⁷ The NPA Amendment Bill and the proposed section 16A(2)(b) in clause 3 of the SAPS Amendment Bill.

- 6.4.2.1 motivated and outlined by the South African government in 1999 and 2001 when the DSO was established;
- 6.4.2.2 universally supported by political parties at the DSO's inception;
- 6.4.2.3 still supported by all political parties bar the ANC, post 2006 (about which more is said below);
- 6.4.2.4 expressly endorsed by the Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations, headed by The Honourable Mrs Justice SV Khampepe (the "**Khampepe Commission**");
- 6.4.2.5 mirrored in many foreign jurisdictions;
- 6.4.2.6 which accord with international best practice; and
- 6.4.2.7 which have been implemented with uncontroverted success in South Africa.

6.5 **Co-operation and integration will be diminished⁴⁸**

- 6.5.1 The disaggregation of the functionaries of the DSO will necessarily result in dissonance between the prosecutorial, intelligence (domestic and international) and investigation functions in the combating of organised crime. The Bills in no way attempt to address this patent conflict, which will have deleterious consequences for the prosecution of organised crime in our country. The deficiency in the Bills is in stark contrast to the integrated approach of these functions within the DSO.
- 6.5.2 It is also unclear how the selected members of the Organised Crime Component ("**OCC**") and Commercial Crime Component ("**CCC**"), who are appointed to the DPCI, will integrate with the former DSO members. In fact, the Bills utterly fail to address the internal structuring and operations of the DPCI. This fundamental omission clearly vitiates the DPCI's capacity to combat crime.

⁴⁸ Proposed sections 16A(2) and (16) in clause 3 of the SAPS Amendment Bill.

6.5.3 The Bills also excise the provisions relating to the establishment of the Ministerial Coordinating Committee (the "**MCC**"). The Bills envisage that the Minister of Safety and Security will establish "*a forum for government or other institutions which may assist in the combating or investigation of crime in order to enhance cooperation and coordination between such institutions and the [DPCI], and such forum shall meet at least twice annually*".⁴⁹ The vague terminology employed in this section, the failure to establish concretely any body to ensure co-operation and integration between various criminal justice agencies, as well as the failure to delineate any responsibilities of the "forum", are wholly inadequate. It is obvious that the proposed arrangement in no way improves the current system and altogether fails to institutionalise the co-ordination imperatives outlined in the Khampepe Commission report.

6.6 **Powers of search and seizure will be weakened**⁵⁰

Although the SAPS Amendment Bill appears to suggest that "all powers exercised and functions performed by special investigators immediately before the fixed date shall be exercised and performed by the Directorate for Priority Crime Investigation", it is unclear how this will be achieved in the light of the repeal of the relevant portions of the NPA Act. Moreover, the SAPS Amendment Bill does not appear to carry over any of the enhanced search and seizure powers conferred on members of the DSO under section 29 of the NPA Act.

6.7 **National security vetting provisions are identical to those in the NPA Act**⁵¹

Despite the Khampepe Commission's findings in relation to the inadequacy of the security vetting provisions in the NPA Act and the Bills professed objects of ensuring appropriate levels of security screening, the Bills go no further than the NPA Act, but merely vest the right to issue security clearance certificates in the National Commissioner rather than the NDPP.

⁴⁹ Proposed section 16A(16) in clause 3 of the SAPS Amendment Bill.

⁵⁰ Clause 4(2)(a) of the SAPS Amendment Bill.

⁵¹ Proposed sections 16A(6)-(13) in clause 3 of the SAPS Amendment Bill.

6.8 Terms and conditions of employment may be adversely affected⁵²

As only selected members of the DSO will be transferred to the DPCI, it is not clear that the Bills adequately safeguard the labour law rights of the members of the DSO. The Bills, therefore, potentially infringe the constitutional rights of members of the DSO to fair labour practices.

7. The substance of and process preceding the public hearings concerning the Bills are irreparably deficient

7.1 The Bills are motivated by ulterior purposes

7.1.1 While the Bills and the Overview purport to place the disestablishment of the DSO within a greater review of the criminal justice system, the context of the formulation of the Bills and their substance clearly betray the true purpose of the Bills. To this end, it is relevant to outline the chronology leading to the publication of the Bills.

7.1.2 The establishment of the DSO, (factually) in 1999 and (statutorily) in 2001, was proposed by the ANC-led government and supported by all political parties in parliament and civil society. The performance of the DSO, since then, has been widely lauded, by South Africans and internationally. In 2005, the Khampepe Commission undertook a comprehensive review of the rationale for and mandate of the DSO at the behest of the government. Crucially, it concluded that the DSO should remain within the NPA and expressly endorsed a multi-disciplinary and prosecution-led approach. It also thoroughly considered and, in part on the basis of Constitutional Court dicta, persuasively dismissed the concern that the Constitution's reference to a "*single police service*"⁵³ proscribes the location of the DSO outside of SAPS. The Khampepe Commission's report identified a number of areas where the DSO co-ordination and accountability could be improved and made several recommendations in this regard. It emphatically, however, endorsed both the constitutional and practical imperative for the DSO.

⁵² Proposed sections 16A(2) and (14) in clause 3 of the SAPS Amendment Bill and clause 4(2)(b) of the SAPS Amendment Bill.

⁵³ Section 199(1).

7.1.3 The Khampepe Commission report was unequivocally endorsed by the Cabinet in June 2006⁵⁴. The report was, however, not released to the public – indeed it was only released by President Mbeki to the public as late as 5 May 2008 – while, regrettably, nothing substantive was done by government to implement the recommendations of the Khampepe Commission. In the meantime, the DSO continued to operate with its customary success. Indeed, the DSO, amongst other cases, pursued a number of high-profile investigations of political figures associated with the ANC. It is the DSO's investigations of ANC members which,, appears to be principally responsible for the current partisan onslaught by the government, at the ANC's behest, on the DSO's very existence.

7.1.4 Some of the most widely publicised DSO investigations are:

7.1.4.1 the "Travelgate Scandal" which involved an investigation of at least 220 Members of Parliament of which 23 were formally charged (of which the vast majority were ANC members) who had defrauded Parliament with regard to their travel expenditure.⁵⁵ This investigation was initially handled by SAPS but was subsequently handed over to the DSO on the basis – which is telling – that SAPS was not well-equipped to deal with the matter;

7.1.4.2 the "Arms Deal" which involves an investigation into alleged illegalities in relation to the strategic defence procurement packages, which involved a number of ANC members(including Zuma, the current President of the ANC and earmarked by the ANC to become the President of the country in 2009, and convicted fraudster Mr Shabir Shaik ("**Shaik**"), Zuma's financial adviser);

7.1.4.3 the successful prosecution of Shaik;

7.1.4.4 the pending prosecution of Zuma, on charges of corruption; and

⁵⁴ Cabinet statement dated 29 June 2006.

⁵⁵ Cape Argus "Travelgate list of shame comes out in court", 24 May 2008; Mail and Guardian "Travel gate: 14 plead guilty", 16 October 2006.

7.1.4.5 the pending prosecution of Selebi on charges of corruption. .

7.1.5 A list of the investigations by the DSO into the dealings of various members of the ANC is also remarkable:⁵⁶

| Member of the ANC | Investigation by the DSO |
|---|---|
| Mr Schabir Shaik ("financial adviser" to Mr Jacob Zuma) | Successfully prosecuted on charges of fraud and corruption |
| Mr Jacob Zuma (ANC President and former Deputy President of South Africa) | Prosecution pending on charges of fraud and corruption |
| Mr Tony Yengeni (former ANC Chief Whip) | Successfully prosecuted on charges of fraud after failing to declare to parliament a 47% discount received on his motor vehicle |
| Mr Jackie Selebi (National Commissioner of Police and former Director-General in the Department of Foreign Affairs) | Pending prosecution on charges of corruption and defeating the ends of justice |
| Ms Brigitte Mabandla (Minister of Justice and Constitutional Development) | Implicated in the Travelgate Scandal |
| Mr Mbulelo Goniwe (former ANC Chief Whip) | Implicated in the Travelgate Scandal |
| Mr Nathi Mthethwa (current ANC Chief Whip) | Implicated in the Travelgate Scandal |
| Ms Bathabile Dlamini (Secretary-General of the ANC Women's League) | As an ANC Member of Parliament, Ms Dlamini abused her parliamentary travel vouchers, which amounted to R254 000. Dlamini was given a 5 year suspended sentence and fined R120 000 payable over 24 months. |

⁵⁶ Mail and Guardian "ANC rogues' gallery", 4 March 2008.

| Member of the ANC | Investigation by the DSO |
|---|---|
| Ms Ruth Bhengu, MP | Also a Travelgate fraudster. Ms Bhengu subsequently resigned as a Member of Parliament after pleading guilty to defrauding the Parliamentary travel scheme of R43 000. She was sentenced to 2 years imprisonment or a R45 000 fine and given a 3 year suspended sentence. |
| Mr Nyami Booi, MP | Also a Travelgate accused. Mr Booi has declined to enter into a plea agreement with the state and is currently facing fraud charges. |
| Mr Thaba Mufamadi (former Limpopo Minister for Public Works) | DSO investigating claims that Mr Mufamadi and Mr Ngoako Ramatlhodi, the former Limpopo Premier (see below), were secret shareholders of Northern Corporate Investment Holdings, which owns 30% of Cash paymaster Services (" CPS "). CPS was awarded a multimillion-rand tender for the disbursement of social grants. Under investigation for receiving bribes in the social grants tender award. |
| Ms Nosiviwe Mapisa-Nqakula (Minister of Home Affairs) | Successfully identified as a fraudster in the Travelgate Scandal but was afforded the opportunity to repay monies illegally taken. Ms Mapisa-Nqakula has since ceased such repayments |
| Mr Ndleleni Duma (MEC for Sport, Arts and Culture in the North West Province) | Successfully prosecuted for his involvement in the Travelgate Scandal. Mr Duma pleaded guilty to theft and was fined R30 000.00 or imprisonment of 3 years. |
| Mr Ngoako Ramatlhodi (former Premier of the Limpopo Province) | Currently under investigation with Mr Thaba Mufamadi for allegations of corruption (see above). |

- 7.1.6 These investigations neatly coincided with the ascendancy of the "anti-Mbeki faction" within the ANC, many of whose adherents have been adversely implicated in the DSO's investigations. The ANC's National Policy Conference in June 2007 (the "**Policy Conference**"), where the anti-Mbeki faction was already predominant, recommended (despite the conclusions reached in the Khampepe Commission report) that the DSO be located in the SAPS and that the relevant legislation be rushed through Parliament. It is interesting to note that, apart from a veiled and disingenuous reference to the "*single police service*", no proper review of the criminal justice system was ever undertaken.
- 7.1.7 At the 52nd National Conference of the ANC in December 2007 in Polokwane, the Policy Conference's recommendations were summarily adopted (namely, the DSO be "*dissolved*"⁵⁷) and the executive and legislative branches of government were instructed to carry out the Polokwane resolution to disband the DSO (the "**Polokwane resolution**") forthwith and no later than June 2008.⁵⁸ In January 2008, the newly elected ANC National Executive Committee (the "**NEC**") decided that the government should move to disband the DSO by June 2008.
- 7.1.8 This triggered an immediate about-turn in "government policy".
- 7.1.9 Barely a month after the NEC meeting, on 11 February 2008, the Minister of Safety and Security, Charles Nqakula stated that the DSO "*will be dissolved*" and its work absorbed into the Organised Crime Unit (the "**OCU**") of the SAPS. A little more guardedly, in the 8 February 2008 State of the Nation Address, President Mbeki alluded that there would need to be a "*restructuring*" of the NPA and the intelligence

⁵⁷ See the ANC 52nd National Conference 2007 Resolutions, resolution 8.

⁵⁸ See, for instance, Justice and Constitutional Development Director-General Mr Menzi Simelane, cited in "Scorpions to be disbanded by June" *Independent Newspapers Online* 21 January 2008.

services to ensure that the "high conviction rate" attained by the DSO is maintained.⁵⁹

7.1.10 There were strong indications that the government would present draft legislation on the dissolution of the DSO to Parliament by the end of March 2008.⁶⁰ The government's plans might, however, have been derailed by the application by Hugh Glenister launched in the High Court on 18 March 2008. On 30 April 2008 a government press release was published, stating that legislation to "*give effect to the decision to relocate the [DSO] from the [NPA] to the [SAPS]*" was approved by Cabinet.⁶¹ This presumably refers to the decision of the Polokwane conference and the NEC.

7.1.11 The absence of policy direction and rationale for the disestablishment of the DSO is also clearly evidenced by the Bills and the Overview. The Memorandum on the Objects to the SAPS Bill states that:

"Various decisions were taken by Cabinet on the future of the DSO. Cabinet eventually decided that there was a need to address organised crime in a more comprehensive fashion, and to that end to amalgamate selected members of the investigative component of the DSO with selected members of the Commercial Crime Component of the South African Police Service ... into a new crime combating unit which is established within the South African Police Service." (our emphasis)

7.1.12 Contrary to what the Memorandum on the Objects proclaims, there is no attempt whatsoever to deal with organised crime in a more comprehensive fashion under the Bills. In fact, the process of formulating the Bills altogether lacked the "*considered efficiency analysis*", or any analytic assessment, and fails to account for how "*the new model is in the public interest and, judged objectively, does not set back the fight against organised crime*".⁶² This is all apart from the

⁵⁹ Raymond Louw "'Grave' misgivings over DSO fate by business" (2008) 26(8) *Southern Africa Report* 22 February 2008.

⁶⁰ In accordance with the President's State of the Nation Address, 8 February 2008.

⁶¹ Our emphasis.

⁶² In the words of Mpshe in paras 5.4.1 and 5.4.2 of his affidavit in the *Glenister* High Court proceedings.

clear constitutional duty on government to promote the fight against organised crime, rather than simply not retarding it..

7.1.13 In the Overview and Memorandum on the Objects to the SAPS Bill, the government appears to be at pains to emphasise the "*holistic*" and "*integrated*" nature of its legislative effort to "*reform*" and "*review ... the Criminal Justice System*" and rationalises the Bills on that basis. It is evident that this is an unconvincing veneer placed over measures which purely give effect to the improperly motivated measures adopted by the Polokwane conference and the NEC. The nature of the process and the substance of the measures clearly betray the government's failure to apply its mind independently to the best interests of the South African people.

7.2 **The Bills do not fulfil the government's stated objects**

7.2.1 The Memorandum on the Objects of the SAPS Amendment Bill states that the Bill is principally motivated by a "*need to address organised crime in a more comprehensive fashion*". The means that it proposes to achieve this is to "*amalgamate the special investigators of the DSO with the selected members of the Commercial Crime Component of the SAPS and selected members of the Organised Crime Component*" within the new Directorate for Priority Crime Investigation.

7.2.2 Similarly, the Overview advocates a "*holistic*" and "*integrated*" approach in the criminal justice system to address crime. It states that "*[o]ne of the main weaknesses indentified [sic] was a lack of coordination between the different players in the system, namely the [SAPS], [NPA] and the relevant Government Departments*". It also sets out in some length seven "*fundamental and far-reaching transformative principles*". In light of the haphazard nature of the Overview, it is difficult to discern the specific objects and measures which it postulates. It is clear, however, that the Bills take one no further to realising any of the objectives stated in the Overview.

7.2.3 Moreover, the triumphant reference to departmental co-ordination is clearly misplaced. The proposed section 16A(16), contained in clause 3 of the SAPS Amendment Bill, the only provision addressing co-ordination issues, is unclear and compounds such issues. In fact, this

section is substantially inferior and more gnostic than the current co-ordination provisions in section 31 of the NPA Act. It merely makes glib references to the establishment of a "*forum for government and other institutions which may assist in the combating or investigation of crimes, in order to enhance cooperation and coordination between such institutions and the [DPCI], and such forum shall meet at least twice annually*". This cannot possibly meet the requirements of inter-departmental co-ordination contemplated in the Khampepe Commission report and the Overview.

- 7.2.4 In fact, and completely contrary to the government's stated objective, the disaggregation of the prosecutorial, investigative and intelligence dimensions of crime prevention can only lead to dissonance between the various rôle players and further lack of co-ordination.
- 7.2.5 The government also makes no attempt to proffer measures or strategies in pursuance of a broad criminal justice system review. The Bills were not preceded by any discussion or policy documents; nor do they refer to any measures which seek to effect an overarching criminal justice system review. It is noteworthy that neither the Law Commission nor government departments have published any proposals or studies in this area. The review of the type contemplated by the principles set out in the Overview requires substantial theoretical and empirical work and widespread consultation. Moreover, as the Overview itself explains, only a "*holistic*" approach is justified to effect such reform. The implementation of a single potential element of any new system, such as the disestablishment of the DSO, backed by meagre analysis and consultation, clearly contradicts this approach.
- 7.2.6 On a substantive basis, the Overview claims that the Bills maintain the "troika" approach, which it admits has been a pivot in the DSO's success. Yet, the Bills contemplate the disassembling of the DSO's investigative, prosecutorial and intelligence functionalities. The troika principle is premised on the intertwining of prosecution, investigation and intelligence, with investigations being prosecution-led and intelligence-driven from inception, which has had salutary results for organised crime prosecution. The Bills patently fail to achieve this. In

these circumstances, the statements in the Overview are ill-conceived and misleading.

- 7.2.7 In any event, the co-ordinated and integrated approach is further belied by the absence of provisions dealing with the relationships between and functions of the new DPCI staff (that is, officials of the DSO, OCC and CCC, who will be absorbed into the DPCI). Also, the Bills do nothing to address the relationships between the DPCI and the South African intelligence and prosecutorial agencies, or indeed the other organs in the SAPS.
- 7.2.8 The Memorandum on the Objects of the SAPS Amendment Bill suggests that the Bills seek the "relocation of the DSO to the SAPS".⁶³ It is clear, however, that the Bills effect a dissolution of the DSO and a fundamental re-organisation of the nature and methods of combating organised crime. To label such a fundamental reform a mere "*relocation*" is at best to misstate the position entirely, and, more accurately, a gross misrepresentation of the result that the Bills will in reality achieve.
- 7.2.9 Moreover, the Memorandum on the Objects of the SAPS Amendment Bill and the Overview place much emphasis on the Khampepe Commission report foreshadowing the changes contemplated in the Bills. Yet, the amendments effected by the Bills almost universally fail to adopt any of the Khampepe Commission report's recommendations (including, in particular, the location of the DSO within the NPA; co-ordination between organs of state; training in relation to policing and investigating methods; the legislative mandates of the SAPS and the DSO; enhanced national security vetting procedures; and the effectiveness and efficiency of co-ordination of intelligence activities). In the circumstances, the Bills' claimed reliance on the Khampepe Commission report is entirely disingenuous..

⁶³ Our emphasis.

7.3 **The government misrepresents the financial implications of the Bills**⁶⁴

7.3.1 In terms of Chapter 13, Part 3, Rule 243(1)(c)(iii) of the National Assembly Rules, Bills need to give a clear account of the financial implications of the bill for the state. In respect of the Bills, this requirement is largely unmet as the cost implications of the dissolution of the DSO as well as the cost implications of the creation of the DPCI have been inadequately addressed in the Memoranda on the Objects in respect of the Bills.

7.3.2 In terms of organisational and personnel implications, section 5 of the Memorandum on the Objects of the NPA Amendment Bill states that: "*The special investigator component of the DSO will be transferred to the SAPS, in accordance with the South African Police Service Amendment Bill, 2008*", and in respect of financial implications for the state section 6 of that Memorandum merely states that "*[t]he budget and assets of the DSO will be transferred to the SAPS*".⁶⁵

7.3.3 A 'restructuring' of the nature contemplated by the effective disestablishment of the DSO and the creation of a new DPCI clearly has more far-reaching budgetary consequences than merely shifting the assets and budget of the DSO to SAPS, given that pressures will arise with respect to not altering the conditions of service of existing members of the DSO and therefore having to budget for a new DPCI at salary levels currently in line with that of the existing DSO. This will, in addition, create unequal conditions of service within the SAPS leading to legitimate calls for remuneration parity with the yet-to-be-created DPCI. This will, furthermore, occur during the month prior to the finalisation of the Medium-Term Expenditure Framework as well as the Medium Term Budget Policy Statement – a time when Government is traditionally locked in wage settlement negotiations with public sector unions (including Police and Prisons Civil Rights Union) that will clearly demand parity of pay for all its members commensurate with the salary levels of the new DPCI. This is not an uncomplicated fiscal concern.

⁶⁴ See, proposed sections 16A(14), (17) and (18) of clause 3 of the SAPS Amendment Bill and clauses 4(2)(b) and (c) of the SAPS Amendment Bill.

⁶⁵ See clause 4(2)(c) of the SAPS Amendment Bill.

- 7.3.4 Regrettably, the 'financial implications for the state' provisions in section 4 of the Memorandum on the Objects of the SAPS Amendment Bill are woefully inadequate in addressing these questions and thus fall far short of the requirements of NA Rule 243(1)(c)(iii). According to section 4: *"Financial implications cannot be determined at this stage. Additional funds may be required to acquire parity of the remuneration of SAPS investigators with that of DSO investigators. Provision must also be made for incidental costs such as information systems, data transfers and other incidental costs. Joint audit teams will assess the budget, assets and liabilities, as well as investigations of the DSO."*
- 7.3.5 Rule 243 requires the Committees to have a clear cost estimate of the proposed legislation. In the absence of this vital information, the Committees are not in a position to exercise their constitutional duties.

8. An exposition of the constitutional challenges

8.1 Procedural challenges

- 8.1.1 It is clear that the inception of and process followed in relation to the Bills may be challenged on the basis of a breach of participatory democracy (see paragraph 3 above). The truncated time periods allowed for the Committees to consider submissions and for interested and affected parties to make verbal presentations vitiate the lawfulness of the legislative process. It would also be procedurally improper for the parliamentary process to continue while the Constitutional Court considers the Glenister application.
- 8.1.2 The uncertainties surrounding the origins, status and substance of the Overview deny the public a proper opportunity to comment on the changes proposed by government. The failure by the government to outline the concrete features of its "*holistic*" approach not only destroys the stated object of an integrated review, but also negates the public's opportunity to understand the Bills within the postulated broader legislative context. As such, the opportunity for participatory democracy is (again) drastically curtailed.

8.2 Substantive challenges

8.2.1 The Constitution places constraints on the exercise of public power

8.2.1.1 Under section 73(2) of the Constitution, a Cabinet member is one of a select organs of state which is permitted to introduce a bill in the National Assembly. In exercising this power, however, such Cabinet member is strictly subject to the limitations imposed by the Constitution.⁶⁶ It is trite that if such member exceeds these constraints, his or her conduct will be invalid. The most relevant constraints, in this context, include:

8.2.1.1.1 the requirement that all government conduct must comport with the principle of legality under the rule of law;

8.2.1.1.2 the government's responsibility to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights; and

8.2.1.1.3 the entitlement of all South Africans not to have their rights to human dignity, freedom and security of the person, privacy, life and property unjustifiably or disproportionately infringed.

8.2.2 Rule of law

8.2.2.1 All exercise of public power is constrained by the rule of law.⁶⁷ The rule of law encompasses the "principle of legality". The imperatives that flow from this principle are that all government conduct must be lawful, non arbitrary and it must be rationally related to a legitimate government purpose. The initiation of legislation disestablishing the DSO breaches these imperatives, as explained below.

⁶⁶ Section 92(3)(a) and section 83(b).

⁶⁷ *Pharmaceutical Manufacturers Association of South Africa and another: In Re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC), paras [79] and [89]. See, too, *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC) paras [80] to [82].

In addition, the Rule of Law Index, prepared by the World Justice Project,⁶⁸ describes this as requiring, in the criminal justice area as requiring:

"The government is represented by competent police, prosecutors and other law enforcement and correctional officers who act impartially and are broadly representative of the communities they serve, are adequately trained, are of sufficient number, have adequate resources, adhere to high standards of conduct, and are subject to effective sanctions for misconduct."

8.2.3 **The government conduct is unlawful**

8.2.3.1 As elected representatives of the people, it is incumbent on the President and the Cabinet to prepare and initiate legislation that is in the best interests of the Republic and its people.⁶⁹ The legislation must not be motivated by ulterior purposes⁷⁰ or seek to achieve aims that undermine the Constitution. It is self-evident that any government action which:

8.2.3.1.1 is motivated by a desire to prevent the proper administration of justice, whether directly or otherwise, such as shielding political figures from prosecution; or

8.2.3.1.2 simply gives effect to a decision reached by another body or organisation, without applying independent judgment,⁷¹ such as the apparent obeisant implementation of a direction from the ANC,

is unlawful and liable to be set aside.

⁶⁸ World Justice Project *Rule of Law Index*, www.worldjusticeproject.org, (Vienna, 3 July 2008), paragraph 12.1.

⁶⁹ Section 41(1)(d) and section 83(c) of the Constitution.

⁷⁰ See, for example, dicta in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Hart v Van Niekerk* 1991 (3) SA 689 (W); and *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 (1) SA 387 (C).

⁷¹ *Corner House Research v The Director of the Serious Fraud Office* [2008] EWHC 714 (Admin), para 170.

8.2.3.2 It is submitted that the rationale underlying and the substance of the Bills as well as the methodology used by the government to introduce this legislation exhibit all the traits of unlawful conduct outlined in paragraph 8.2.3.1. For instance, it is clear that it is not the safety and security of South Africa and its people that are guiding the government in introducing legislation to disestablish the DSO, but the apparent compulsion to give effect to the Polokwane resolution, a resolution clearly made in order to shield members of the ANC from investigation by the DSO.

8.2.4 **The government conduct is not rationally related to a legitimate government purpose**

8.2.4.1 Constitutional Court jurisprudence also affirms that government conduct which:

8.2.4.1.1 is arbitrary, capricious or not rationally related to its objects;
or

8.2.4.1.2 by its structure or implementation would unduly infringe constitutional rights,

is unconstitutional and liable to be set aside.⁷²

8.2.4.2 Beyond the evident aim to "*relocate*" (read, disestablish) the DSO, it seems that the ostensible government purpose is to absorb the DSO into the SAPS with a view to "*address[ing] organised crime in a more comprehensive manner*". On this basis, the government's conduct is not rationally connected to a legitimate government purpose, as:

8.2.4.2.1 the imperative for the establishment of the DSO, namely the extremely high levels of crime (particularly organised crime) in South Africa, remains;

⁷² See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1991 (1) SA 374 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers Association of South Africa and another: In re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).

- 8.2.4.2.2 the DSO troika model is in line with international and foreign best practice;
- 8.2.4.2.3 the DSO has been extremely successful in combating crime;
- 8.2.4.2.4 the only comprehensive review of the DSO's location and mandate, undertaken by the Khampepe Commission, affirmed the propriety of the DSO model and methods;
- 8.2.4.2.5 the Cabinet has back-tracked on its earlier decision – taken less than two years ago – to accept the recommendation of the Khampepe Commission that the DSO should be retained within the NPA;
- 8.2.4.2.6 the inescapable conclusion is that the reason for the about-turn is the Cabinet's desire to give effect to the Polokwane resolution, without applying any independent judgment;
- 8.2.4.2.7 the Polokwane resolution appears to have been motivated by a desire on the part of the ANC to shield its members from investigation by the DSO; and
- 8.2.4.2.8 the government's *post hoc* attempts to rationalise the disestablishment of the DSO as a part of a fundamental review and overhaul of the criminal justice system has no basis in fact, is disingenuous and is fundamentally anti-democratic.
- 8.2.4.3 It is apparent that the means which the government proposes to use to achieve its stated objectives are in no way related to such objectives. The Bills have never been properly canvassed as part of a broader review of the criminal justice system. The Departments of Justice and Constitutional Development, and Safety and Security have not published any research, discussion documents or statements regarding a wide ranging criminal justice system review. The first allusion to such review post-dates the Polokwane resolution and the decision of the NEC. In speeches in February 2008, the President and the Minister of Justice and Constitutional Development foreshadowed the dissolution of the

DSO (on an expedited basis). Both cited as the core reason for proposed legislative measures the need "*to enhance our capacity to fight organised crime*"⁷³ and improve "*co-ordination between the security units of government*"⁷⁴. There is no evidence, and none has been proffered by the government upon whom the burden in this regard rests, that the Bills in any way achieve or are capable of achieving these objectives. Indeed, as the above discussion demonstrates, the Bills are destructive of such objectives. The Bills are far more commensurate with the illegitimate objects underlying and the unlawful dictations constituting the Polokwane resolution and the decision of the NEC.

8.2.5 Violation of constitutional rights and breach of the state's positive constitutional duties

8.2.5.1 Under the Bill of Rights, every person is entitled to the following rights:

8.2.5.1.1 life;⁷⁵

8.2.5.1.2 human dignity;⁷⁶

8.2.5.1.3 freedom and security of the person, including the right to be free from all forms of violence from either public or private sources;⁷⁷ and

8.2.5.1.4 property.⁷⁸

8.2.5.2 These rights can only be infringed by a law of general application to the extent that such law constituted a reasonable, justifiable and proportionate limitation, having regard to all the relevant

⁷³ The President's State of the Nation Address (*op cit*, fn 60).

⁷⁴ The Minister of Justice and Constitutional Development's reply to the State of the Nation Address, 12 February 2008.

⁷⁵ Section 11 of the Constitution.

⁷⁶ Section 10 of the Constitution.

⁷⁷ Section 12 of the Constitution.

⁷⁸ Section 25 of the Constitution.

factors.⁷⁹ The limitation inquiry is essentially one centred on proportionality, where the nature and extent of the limitation is not disproportionate to the nature of the right. This is a relatively high standard of scrutiny where the measures sought to be adopted by the government must be narrowly tailored to the objects of the measures, including that they must not be any more restrictive than is necessary and suitable in the circumstances.⁸⁰

8.2.5.3 The Bill of Rights applies to *"all law, and binds the legislature, the executive, the judiciary and all organs of state"*.⁸¹ As such, no legislation may unjustifiably infringe fundamental rights. Moreover, however, South Africa's Constitution places a duty on the state to take positive measures to *"respect, protect, promote and fulfil the rights in the Bill of Rights"*.⁸² It is thus no answer for the state to stand idly by while the rights of individuals are infringed, when it is within the state's powers to take measures to prevent harm. Equally, the state is not competent to take positive measures that materially undermine its obligation to respect, protect, promote and fulfil the fundamental rights.

8.2.5.4 Furthermore, the following obligations imposed on the state by the Constitution are relevant:

8.2.5.4.1 *"national security must reflect the resolve of all South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life"*,⁸³ and

⁷⁹ Section 36 of the Constitution.

⁸⁰ See for example, *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders and Others* 2005 (3) SA 280 (CC), paragraph [37].

⁸¹ Section 8(1).

⁸² Section 7(2).

⁸³ Section 198(a).

8.2.5.4.2 all spheres of government must "*preserve the peace ... of the Republic*" and "*secure the well-being of the people of the Republic*".⁸⁴

8.2.5.5 The government has not demonstrated, or even attempted to demonstrate, that the Bills will protect, promote or give effect to the rights in the Bill of Rights or fulfil the state's other constitutional duties. Indeed, all the features of the Bills point to a diminished capacity to combat crime and will likely cause or facilitate the infringement of individuals' rights. Thus far from giving effect to the government's positive constitutional duties, the Bills, once implemented, will result in an unjustified infringement of constitutional rights and thus a breach of the state's negative duties under the Bill of Rights. The ulterior motives and irrationality pervading the process leading up to the public hearings on the Bills merely augment the complete absence of justification for the government measures.

8.2.5.6 It is difficult to imagine situations where the state's positive obligation is greater than in relation to the safeguarding of the public against acts of crime, and especially organised crime. This obligation is all the more relevant in a country pervaded by some of the world's highest levels of serious crime, particularly violent crime and property crime, much of which is based on organised crime. In this light it is apt to reflect on the following dictum in the Constitutional Court judgment of Ngcobo J which encapsulates the state's obligations, especially in relation to crime:⁸⁵

"Crime strikes at the very core of the fabric of our society. It undermines some of the fundamental human rights enshrined in our Bill of Rights. It violates the right to life, the right to freedom and security, the right to property and the right to dignity

⁸⁴ Sections 41(1)(a) and (b).

⁸⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro)* 2005 (3) SA 280 (CC), para [144] (footnotes omitted) (our emphasis). The salience of this dictum, though made in a dissenting judgment, was not contested by the majority.

to mention a few. It undermines the rule of law, a foundational value of our constitutional democracy. What is more, those who commit crimes violate their constitutional duties and responsibilities as citizens of this country. The State has a constitutional duty to eliminate crime. This obligation flows generally from its obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

8.2.5.7

In conclusion, it is evident that disbanding the DSO would amount to a serious and unjustified violation of constitutional rights and breach of the state's constitutional obligations.

Annex A
Summary Table of Substantive Changes Effected by the Bills

| Item | Changes proposed by the Bills | Effect of the changes | Reference to relevant paragraph(s) in the submissions |
|------|---|--|---|
| 1. | NPA Amendment Bill | <ul style="list-style-type: none"> ▪ Dissolution of the DSO | Paragraph 6.1 |
| 2. | Proposed sections 16A(1) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Overbroad mandate of the DPCI | Paragraph 6.3 |
| 3. | Proposed section 16A(2) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Power concentrated in the hands of the National Commissioner; ▪ Overbroad mandate of the DPCI; ▪ Prosecution-led and intelligence-driven approach is lost; ▪ Co-operation and integration within the DPCI and among relevant departments/organs of state will diminish; and ▪ Potential adverse effects on terms and conditions of employment. | Paragraphs 6.2, 6.3, 6.4, 6.5 and 6.8 |
| 4. | Proposed section 16A(3) in clause 3 of the | <ul style="list-style-type: none"> ▪ Overbroad mandate of the DPCI | Paragraph 6.3 |

| Item | Changes proposed by the Bills | Effect of the changes | Reference to relevant paragraph(s) in the submissions |
|------|---|--|---|
| | SAPS Amendment Bill | | |
| 5. | Proposed section 16A(4) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Power concentrated in the hands of the National Commissioner | Paragraph 6.2 |
| 6. | Proposed sections 16A(6)-(13) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ No improvement in national security vetting | Paragraph 6.7 |
| 7. | Proposed section 16A(14) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Potential adverse effects on terms and conditions of employment; and ▪ Inadequate analysis of financial implications of the Bills | Paragraphs 6.8 and 7.3 |
| 8. | Proposed section 16A(15) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Power concentrated in the hands of the National Commissioner | Paragraph 6.2 |
| 9. | Proposed section 16A(16) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Co-operation and integration within the DPCI and among relevant departments/organs of state will diminish | Paragraph 6.5 |
| 10. | Proposed sections 16A(17) and (18) in clause 3 of the SAPS Amendment Bill | <ul style="list-style-type: none"> ▪ Inadequate analysis of financial implications of the Bills | Paragraph 7.3 |

| Item | Changes proposed by the Bills | Effect of the changes | Reference to relevant paragraph(s) in the submissions |
|------|--|---|---|
| 11. | Clause 4(2)(a) of the SAPS Amendment Bill | <ul style="list-style-type: none">▪ Weakened powers of search and seizure | Paragraph 6.6 |
| 12. | Clauses 4(2)(b) and (c) of the SAPS Amendment Bill | <ul style="list-style-type: none">▪ Potential adverse effects on terms and conditions of employment; and▪ Inadequate analysis of financial implications of the Bills | Paragraphs 6.8 and 7.3 |