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A SUMMARY OF THE KHAMPEPE COMMISSION OF INQUIRY

1. INTRODUCTION

On 1 April 2005 the President appointed Judge Sisi Khampepe as the Chairperson¹ and sole member of the Commission of Inquiry to "inquire into, make findings, report on and make recommendations regarding various matters constituting the terms of reference". The terms of reference of the Khampepe Commission of Inquiry were published in the Government Gazette of 1 April 2005. On 21 July 2005 and 24 January 2006 the Judge submitted the interim reports and the Final Report is dated 3 February 2006.

2. STRUCTURE OF THE KHAMPEPE COMMISSION OF INQUIRY REPORT

The Report starts with an Executive summary followed by an Introduction and a description of the Process that was followed to derive at the findings. The Terms of Reference is explained followed by an exposition of the Approach adopted by the Commission. The Report continues to detail each of the thirteen terms of references by naming and explaining the evidence regarding that specific term of reference, followed by the Findings and the Recommendations in relation to the specific term of reference. Besides these thirteen terms of reference, it also covers other relevant considerations, co-operative governance and the DSO's methodology, and these are followed by a Conclusion. A Compendium of Findings and a Compendium of Recommendations as well as a list of Acknowledgements, conclude the Report.

The approach adopted for this brief is to highlight the Process followed by the Commission and to note the respective terms of reference. The brief will in the main utilise the Findings as depicted in the Compendium of Findings followed by the Recommendations as reflected in the Compendium of Recommendations.

3. PROCESS FOLLOWED BY THE COMMISSION

On 6 May 2005 an invitation was published to various entities to make, by way of affidavit, submissions in respect of each and every aspect of the terms of reference of the Commission. Letters were sent inviting institutions, Government departments and individuals to make submissions, also by way of affidavit, to the Commission regarding each and every term of reference of the Commission. This invitation was further published in the media. The terms of reference required some input by academic institutions regarding constitutional and legal matters relevant to the subject matter of the inquiry and an invitation was extended to these institutions. The Commission received approximately 30 submissions ranging from individuals, stakeholders, academic institutions, political parties, labour movements and non-governmental organisations. The aforementioned submissions were read, analysed and researched further.

To add value to the process and to the discharge of the Commission's mandate, the Commission made on-site visits to the Directorate of Special Operations, National, Gauteng Provincial Region, Natal Regional Division, the South African Police Services, National Intelligence Agency, the Inspector General of Intelligence's office and the Office for Interceptions. The Commission also visited international government

¹ Khampepe Commission into mandate and location of the Directorate of Special Operations ("the DSO"). Final Report, February 2006.



institutions with similar or closely similar models as the DSO. Some of these international institutions have offered and continue to offer training to the members of the DSO.

4. THE THIRTEEN TERMS OF REFERENCE INVESTIGATED BY THE COMMISSION

The following 13 terms of reference were investigated by the Commission:

- i. The rationale behind the establishment of the Directorate of Special Operations ("DSO") and its location;
- ii. The legislative mandate of the DSO;
- iii. The evaluation of the implementation of the legislative mandate;
- iv. The systems for management and control of the DSO;
- v. Systems for communication of the DSO;
- vi. Oversight and accountability in respect of the intelligence and related operations of the DSO;
- vii. The Constitutional and legislative mandates of the South African Police Service;
- viii. The systems for coordination and cooperation between the SAPS and the intelligence agencies and the DSO;
- ix. The effectiveness and efficiency of coordination of intelligence;
- x. The efficacy of co-ordinating systems that exist between intelligence agencies;
- xi. Training or further training on policing or investigating methods;
- xii. Impact of locating investigators and prosecutors within the National Prosecution Agency; and
- xiii. The location of the DSO.

Each is dealt with in the Commission Report under the following headings:

- Background to the term of reference which details the information, evidence and arguments placed before the Commission regarding each of the specific terms of reference.
- Findings in relation to the matter.
- Recommendations in relation to the matter.

5. TERMS OF REFERENCE

5.1 Rationale for the establishment of the DSO

5.1.1 Findings in relation to the Rationale for the establishment of the DSO

In 1999, the President announced the decision to create a multidisciplinary structure that was to be well resourced and was to have the specific mandate to address organised crime. It was accepted that organised crime attacked the fabric of society and the economic standing of the country. It was decided to engage an innovative investigative methodology in fighting organised crime since organised crime entailed legally complex and sophisticated issues. In that regard, a comprehensive answer was to be found in the creation of a multi-disciplinary vehicle. There were various drafts of legislation that sought to create the DSO. The SAPS *inter alia* had certain constraints with regard to its capacity and credibility. The fact that the prosecution service was going to be an important element in combating organised crime, a decision was made to locate the DSO within the National Prosecuting Authority. The NPA Act was accordingly amended to create the DSO and to collapse into it various other directorates that were in place at the time.



The rationale for the establishment of the DSO, that is, to create a multi-disciplinary structure using the *troika* principle as a methodology to address organised crime was precipitated by intolerable levels of crime that were threatening our nascent democracy.

The Judge found that despite indications that crime levels are dropping, organised crime still presented a threat that needs to be addressed through a comprehensive strategy. She was not persuaded that the rationale for the establishment of the DSO has since disappeared. The argument that the rationale no longer holds since the levels of crime are showing a decline is without substance. For this reason, it was her considered finding that the DSO still has a place in the government's law enforcement plan.

5.1.2 Recommendations on the Rationale for the establishment of the DSO

The Judge was satisfied that all relevant stakeholders were convinced that a new strategy was necessary to arrest the corrosive impact that organised crime was having on the social and legal structure of the country. There was agreement across board that the law enforcement structures were at the time, inadequate to fully address the challenges presented by organised crime.

She was also satisfied that there was broad consensus that a new independent structure was necessary to launch a fresh and comprehensive answer to the challenges presented by organised crime. Her recommendation is that despite indications that organised crime is being addressed on a concerted basis that the rationale for the establishment of the DSO is as valid today as it was at conception.

5.2. The legislative mandate of the DSO

5.2.1 Findings in relation to the legislative mandate of the DSO.

The argument that the legal mandate of the DSO to investigate and prosecute serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit. The Judge found that it is clear from the reading of the constitutional judgment in the *Minister of Defence v Potsane* 2002 (1) SA 1 (CC), at p.14, para 26 that the meaning of "single" used in the relevant section conveys no more than the fact that various police forces that used to form part of the "independent" homelands such as the Transkei, Bophuthatswana, Venda and Ciskei ("TBVC") would be amalgamated into one single police force. The word "single" does not therefore connote "exclusive".

The argument that the DSO is a police force within the meaning of section 199(1) of the Constitution where it has the legislative competence to investigate and prosecute matters referred to in section 7 of the NPA Act is also without merit. It is evident that most regulatory authorities have the statutory powers to investigate non-compliance and violations relevant to their area.

She accepted that the legislature intentionally drafted the legal mandate of the DSO wide. In her view, this was prudent having regard to the rationale behind the establishment of the DSO and the findings made in relation to this term of reference. An overly prescriptive legal mandate would render itself open to constant jurisdictional attacks and frustrate the objective for which the DSO was established. She was satisfied that there is nothing unconstitutional in the DSO sharing a mandate with the SAPS.



She was also satisfied that there is nothing unconstitutional in having a structure such as the DSO located under the prosecutorial authority. There is ostensibly no legal impediment in having a structure such as the DSO with all the disciplines that it has, falling under one ministry. She refers to international trends that demonstrate that there are various strategies that can be deployed in dealing with overlapping mandates.

5.2.2 Recommendations in relation to the legislative mandate of the DSO

There is nothing impermissible in law to draft the legal mandate of the DSO as broad as it appears in the NPA Act. It is also permissible to have the DSO share the mandate to tackle organised crime with the SAPS. The formidable challenge is to manage tensions and conflicts that may arise from a shared mandate.

The nature of tensions associated with mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a committee with relevant individuals at the appropriate levels of authority who are able to deal with the day-to-day operational issues that are likely to arise and with sufficient mandate to resolve those.

5.3 Evaluation of the implementation of the legislative mandate of the DSO

5.3.1 Findings on the evaluation of the implementation of the legislative mandate of the DSO

The Commission was satisfied that the Ministerial Coordinating Committee (MCC) convened its meetings only from June 2004 and found regrettable that the MCC did not properly discharge its responsibility under the Act. The difficulties of the different law enforcement agencies that are dealt with in this report may have possibly been averted or mitigated had the policies and procedures been put in place as required by section 31 of the NPA Act. The fact that there was no co-ordinated relationship with the SAPS also hindered the smooth implementation of the legal mandate of the DSO. The situation was not assisted by the difficult relationships of the top officials of these institutions.

The scathing criticisms levelled at the DSO cannot be shrugged off easily. The manner in which the legal mandate of the DSO has been implemented does afford the DSO the unfair advantage of case selection for its investigation. It is an act which in itself causes conflict and tensions between the DSO and the SAPS.

The legislature in establishing the DSO and granting it the mandate which is shared with the SAPS was fully appreciative of the potential conflict such mandate would generate and therefore created the MCC as presently composed in terms of section 31 of the Act. However, in the Judge's view, the structure of the MCC is inadequate to fully address the daily operational difficulties that may arise.

The challenges that are presented by the concurrence of the mandate of the DSO as well as that of the SAPS include the dislocation in communication as well as absence of agreement in relation to which agency will be responsible for which investigation. The DSO and the SAPS share a legal mandate in respect of the investigation of serious organised crime. This phenomenon is not unique to the DSO and the SAPS. There are numerous examples in foreign jurisdictions where the mandates relating to specific crimes overlap. There are useful techniques that can be employed in the resolution of such tensions.



5.3.2 Recommendations on the evaluation of the implementation of the legislative mandate of the DSO

The institutional tensions that are explained by the conduct of personalities that head these institutions are regrettable in the extreme. Serious measures need to be taken to ensure that these structures serve with a view to attain the objectives articulated by the legislature, as well as complying with their constitutional duties and functions. The Judge's understanding of the responsibility of the executive arm of government is to have a common purpose in the enforcement of the laws of the nation. She was mindful of the myriad of problems comprehensively dealt with by other submitters with regard to the shared mandate (DSO – SAPS) and the conflicts and further potential conflicts that the shared mandate presents. Notwithstanding this, the view was held that tinkering with the legal mandate of the DSO is not likely to fundamentally eliminate these problems.

It was evident that even with a functional MCC; a structural lacuna would still exist between the operations of the MCC and the day-to day activities of the DSO. The nature of tensions associated with mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a committee with relevant individuals at the appropriate levels of authority who are able to deal with the day-to-day issues that arise and who would be empowered by the MCC, with a sufficient mandate to resolve these issues. Such a structure is to be called the Multidisciplinary Vetting Structure "the MVS" or the Operational Committee as suggested by the parties. The introduction of such a structure can effectively address the challenges that currently exist.

The MVS should have the power to deal with matters such as: any abuse of power by the DSO; public announcement of the work that the DSO does, that at times borders on undermining the fundamental rights of the entities or individuals that are a subject matter of its investigations, and generally ensure that the DSO conduct its activities in compliance with the Constitution. The objectives of the MVS would include matters such as enhancing the operational cooperation between the relevant stakeholders; smooth inter-agency communication and to provide a framework for the sharing of information.

Furthermore, the anomaly is that whereas the Independent Complaints Directorate ("ICD") has the statutory responsibility to investigate complaints against members of SAPS, it does not have jurisdiction relating to the members of the DSO who fundamentally do the same type of work as the SAPS. It is recommended that the mandate of the ICD should cover the investigative component of the DSO. Section 97(b) provides that the President may transfer to a member of the cabinet, any power or function entrusted by legislation to another member. With the exercise of this power the President may confer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security. Prosecutors, who work for the DSO, will continue to receive instructions and be accountable to the NDPP. The NDPP in turn will as currently provided, account to the Minister for Justice and Constitutional Development. Thus it is the Judge's considered recommendation that the responsibility for the DSO- specifically its law enforcement component- should be placed on two cabinet ministers, namely the Minister for Justice and Constitutional Development and the Minister of Safety and Security. It is hoped that the aforesaid recommendation will facilitate co-operation between the two ministries in the functions of the DSO.

5.4 Systems for management and control of the DSO

5.4.1 Findings in relation to the systems for management and control of the DSO



The systems for management and control appear to be coherent and proper, save that the NDPP has not strictly complied with the provisions of section 19B of the NPA Act in that some of the special investigators of the DSO have been appointed as such without any security screening by the NIA as provided for in the NPA Act. The NDPP's failure to perform his functions and discharge his obligation in this regard may have exposed the DSO to some security risk and/or to conduct prejudicial to the objectives of the DSO. Although the head of the DSO conceded in his evidence to such non-compliance, he nonetheless made a flimsy attempt to explain how such non compliance arose. His evidence that everything required under law to ensure that its operatives are properly vetted was done was unconvincing.

There can be little debate that the practice is unacceptable and may ultimately prove to undermine the security of the state. She found that the DSO has not complied with the provisions of section 19B of the NPA Act. That duty, lies squarely on the shoulders of the National Director and not on the head of the DSO. Section 19B of the NPA Act requires that persons who perform their functions in the DSO, as special investigators, must undergo security screening so as to protect the nature of the information that they may come across in the discharge of their function. The National Director is enjoined not to appoint any special investigator without evaluating information gathered from the security screening by the NIA.

Moreover the National Director is required in terms of this provision to subject those appointed as special investigators to further security screening from time to time. The evidence shows that some special investigators have been appointed without compliance with this requirement. Neither the National Director nor the Head of the DSO could proffer the exact numbers in this regard. That notwithstanding, there is inevitable danger that is posed by such special investigators who were not vetted in that they might act and may well have acted in a manner prejudicial to the objectives of the DSO and/or might be a security risk. There must be full compliance with the provisions of section 19B. The NDPP should in the circumstances be strongly admonished for his failure to adhere and monitor further adherence to this prescript. The Judge further recommended that urgent appropriate reconciliation be undertaken by the NDPP to establish those special investigators whose appointments do not comply with the provisions of the Act and that the NDPP take remedial action in regard thereto. The risk sought to be covered by the provisions of this section must extend to external contractors who similarly consider the information sought to be protected under this section. Resultantly, it was therefore recommended that the NPA Act be amended accordingly.

Although the NPA Act is silent on the security screening of the Investigating Director, the Heads of the DSO regions and Senior Investigators, there is, in the Judge's view, no plausible reason why the risk sought to be covered by section 19B should only be limited to special investigators.

There was evidence pointing to the fact that the DSO has liaisons with foreign law enforcement and intelligence structures. If nothing else, this illustrates the dangers that lie in the conduct of the DSO stretching its "information gathering" mandate to include "intelligence gathering" This, certainly, will compromise the security of the state as DSO members have no requisite training in intelligence.

5.4.2 Recommendations in relation to the systems for management and control of the DSO

There was evidence suggesting that the DSO, in the discharge of its legislative mandate, does so through the use of private sector entities which are thereby likely to come in contact with sensitive intelligence. Whereas the DSO would be competent in terms of section 38 of the NPA Act, to solicit such private sector capability,



where necessary, such a competence is one that must be exercised within the parameters of the law. The Judge was of the firm view that whenever the DSO engages private sector entities to assist it in performing its duties, it must have such entities properly vetted by the NIA. It recommended that the NDPP must take immediate steps to ensure that the DSO is compliant with the provisions of section 19B of the NPA Act. When the law requires that specific categories of personnel within the DSO must undergo security clearance, by NIA, it is the responsibility of the DSO to respect that legislative injunction. It is unacceptable that the DSO would expose matters of national security as envisaged in the NPA Act to officials who have not been properly accredited to handle such information.

The Judge recommended that the relevant legislation be amended to provide a wider category of DSO personnel for security vetting, namely Special Investigators; Senior Investigators; Regional Heads and persons engaged from the private sector entities.

5.5 Systems for communication of the DSO

5.5.1 Findings in relation to the systems for communication of the DSO

There has been a myriad of public complaints relating to the leaking of information by the DSO that causes prejudice or embarrassment to those who are the subject matter of the investigations. The Judge accepted the legitimacy and validity of this complaint. The improper media sensation associated with the investigation and/or arrest of some individuals resultant from the leaks in the DSO may open a practise that is inconsistent with the right to a fair trial guaranteed under section 35 of the Constitution. The head of the DSO admitted that the public disclosure of the work they do is a subject matter that requires caution. The DSO in its afore-stated conduct does not seem to have acted properly and lawfully in exercising its powers and has failed to construe those powers in the light and spirit, purport and object of the Bill of Rights.

There are also matters around publicity of the work of the DSO that have attracted public criticism of being "FBI style", meaning that the DSO conducts its operations as though it were a law unto itself. There is indeed merit to this complaint. There is an urgent need for the DSO to do its work within the limits of the law without attracting undue publicity. The DSO sting must be in its efficiency in execution of its mandate (investigations) and not in the publication of its contemplated investigation and or prosecution.

There was no plausible reason furnished for this conduct on the part of the DSO, which conduct is to be frowned upon. The Judge found the conduct to be reprehensible, unprofessional and corroding public confidence in the law enforcement agencies. She believed that the public confidence will not be eroded but will be enhanced when the DSO does its work within professional ethics and in harmony with the fundamental rights guaranteed in the Constitution and the Bill of Rights.

5.5.2 Recommendations in relation to the systems for communication of the DSO

It cannot be overemphasised that the DSO as a law enforcement agency and an organ of state is constitutionally bound to act within the law. It is enjoined by the Bill of Rights to respect the rights of every person including those who may fall within its target of investigation or prosecution. The DSO needs to discharge its responsibilities within the parameters of the Constitution and with due regard to the Bill of Rights. She recommended that the NDPP pays close attention to how the DSO executes its mandate. Further, should



the recommendation relating to the creation of the MVS find favour, such a structure would ensure that the DSO is in full compliance with its obligations under the law.

5.6 Oversight and accountability of the intelligence and related operations of the DSO

5.6.1 Findings on the oversight and accountability of the intelligence and related operations of the DSO

It must be noted that the DSO's information gathering mandate as described in section 7(1) (a) (ii) of the NPA Act, provides that the DSO may gather, keep and analyse information relating to 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.

The welter of evidence before the Commission as well as the on site visit to the DSO revealed that the DSO has established intelligence gathering capabilities. This goes beyond the ambit of its information gathering mandate set out in section 7 of the NPA Act. The Minister who exercises final responsibility over the work of the NPA is the Minister for Justice and Constitutional Development. She performs this function as a responsible political head under which the administration of the NPA Act falls. She does not however have practical, effective political oversight responsibility in respect of the law enforcement elements of the work of the DSO.

The Minister who exercises final responsibility for law enforcement is the Minister of Safety and Security. He does not have political oversight responsibility in respect of the investigative elements of the work of the DSO. The disjuncture in political accountability for the entire work of the DSO, in part, explains the discord regarding the effective political oversight and accountability for the DSO. The CEO of the DSO is, in terms of the Act, responsible for the financial accountability of the DSO. At the same time, the Director-General: Justice is the accounting officer for the Department of Justice to which the NPA (read DSO) fall. As a result, there are technically two financial heads responsible for the financial accountability of the DSO.

Under the PFMA the accounting responsibility will lie with the Director-General: Justice in respect of matters falling under the NPA and at the same time, the CEO in the DSO would equally have the accounting responsibilities under the PFMA. The SAPS decried the situation where some of the most important threats relating to organised crime operationally fall out of the command and control of the Minister of Safety and Security. The SAPS argued that the arrangement did not reflect sound principles of governance. It therefore argued that the DSO was, in this respect, a law unto itself and capable of unilateral action. The DSO was even able to determine crime threats and priorities outside the ambit of the Safety and Security Minister and without any input by the latter. This argument was found by the Judge to be compelling. It is both untenable and anomalous that the Minister of Safety and Security who has the responsibility to address the overall policing/investigative needs and priorities of the Republic should not exercise any control over the investigative component of the DSO considering the wide and permissive mandate of the DSO relating to organised crime.

The Constitution has decidedly placed intelligence to reside with intelligence agencies that are established in terms of the Constitution. The legislature was very deliberate when it conferred "information gathering" capabilities to the DSO. This was intended to enable it to gather such information as is reasonably necessary for the purposes of investigating and prosecuting the matters with which they are concerned. The head of the



DSO admitted, in evidence, that the DSO does not have an intelligence gathering mandate. She accepted the concession to be one that was properly made. There is a marked difference between intelligence gathering and information gathering. Having considered the information placed before the Commission and the evidence tendered, the Judge has been left with an impression that it is more than probable that the DSO has gone to establish, for itself, intelligence gathering capabilities and in fact gathers intelligence in the pursuit of its mandate. This, if correct, would be unlawful. It was admitted by all the relevant role players that the activities of the DSO, even within the legal limits of information gathering, should still be matters that ultimately filter through to NICOC. It is pleasing to note that attempts have now been made to admit DSO into the NICOC structure. She was not persuaded that the arguments submitted by all the principal stakeholders to the effect that the DSO needs to be included into the intelligence structure of NICOC, cures the difficulty of it being an intelligence gathering agency. If the DSO was to be legally empowered to gather intelligence, it would have to derive its source from the Constitution. The reading of section 199(1) of the Constitution does not permit an interpretation that the DSO is such an intelligence agency contemplated in that provision.

It is both perplexing and perturbing that the DSO views its dependence on the intelligence agencies as a hindrance as opposed to an opportunity at greater collaboration and collective effort. The provisions of section 41(h) of the Constitution are instructive. All organs of State such as the DSO are enjoined to co-operate with other state organs such as the NIA and SASS in mutual trust.

5.6.2 Recommendations in relation to the oversight and accountability of the intelligence and related operations of the DSO

There is a compelling reason to harmonise the political oversight over the activities of the DSO. A dichotomy results from the fact that the Minister for Justice and Constitutional Development has political responsibility over the NPA without having political accountability over the 'policing' functions of the DSO. She also does not participate in the threat analysis and the compilation of threat analysis data in relation to safety and security matters. Whereas these functions fall within the political accountability of the Minister of Safety and Security, the latter does not have accountability for the activities of the DSO. This has to be addressed through the invocation of section 97(b) of the Constitution.

The Constitution provides that the intelligence services of the Republic shall reside with such institutions as are established in terms of the Constitution. The legislature has decidedly conferred only information gathering powers to the DSO. In so far as the DSO's activities delve into intelligence gathering, and there has been evidence of this, such action goes outside its legislative competence. The DSO should act within the parameters of its legislative mandate and not impinge on the territory constitutionally assigned to other entities.

There is a cogent reason that impels various competencies to reside with intelligence agencies, the national prosecuting authority and the police. It is that reason that also necessitates greater co-operation and inter-dependence between and amongst these agencies. This should be encouraged.

5.7 The constitutional and legislative mandates of the SAPS

5.7.1 Findings on the constitutional and legislative mandates of the SAPS



The constitutional responsibility to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law, resides with the SAPS. The terrain of organised crime also falls within the broad framework of matters covered in section 205 of the Constitution.

The legal controversy that seems to be created by the reading of sections 205 and 199 read together with section 7 of the NPA is whether the SAPS has exclusive jurisdiction to address law enforcement responsibilities to the exclusion of all others. The Judge was unable to come to the conclusion that it does. There are a number of agencies which act as "law enforcement agencies" of one type or another. She was of the opinion that the legislature has clearly seen a need to appropriate these responsibilities to other institutions as well.

She was of the view that there is nothing jurisprudentially unsound in conferring law enforcement responsibilities to any agency other than the SAPS. Moreover, the provisions of section 97(b) of the Constitution support that conclusion.

5.7.2 Recommendations in relation to the constitutional and legislative mandates of the SAPS

The Report dealt with the shared legislative mandate that the SAPS has with the DSO in respect of organised crime under the heading Legislative Mandate of the DSO.

5.8. Systems for co-ordination and co-operation between SAPS, Intelligence Agencies and the DSO

5.8.1 Findings on the systems for co-ordination and cooperation between SAPS, Intelligence agencies and the DSO

There are no systems of co-ordination and co-operation between the DSO and SAPS, save for a few and *ad hoc* instances. The Minister for Justice and Constitutional Development states that the relationship between the DSO and SAPS has irretrievably broken down. However the Commission has not been provided with the details of the factual matrix relating to the irretrievable breakdown of the relationship or on how the Minister has arrived at the conclusion that the relationship has irretrievably broken down.

The assessment was that much of the co-operation between the DSO and the SAPS occurs at the operational level and they have also co-operated in respect of some training exercises on an *ad hoc* basis. The on-site visit at the DSO's offices in Kwa-Zulu Natal suggests that at provincial level, there is a good relationship with the SAPS. The only problem is at national level, where the relationship is non-existent. There are virtually no co-ordinating systems in place between the DSO and the other structures. The co-ordination and cooperation between SAPS and the intelligence community appears to be somewhat in place but operationally ineffective. It is only in the recent past that the DSO has been invited into NICOC. Prior to the DSO being invited into NICOC, there was virtually no co-operation between the DSO on the one hand and the SAPS and the intelligence agencies on the other.

5.8.2 Recommendations in relation to the of systems for coordination and co-operation between SAPS, Intelligence Agencies and the DSO



It is recommended that the DSO be placed in a more permanent status within NICOC. This recommendation should not be understood to mean that the DSO becomes an intelligence agency within the meaning of section 199 of the Constitution. The recommendation seeks to convey instead, that the DSO should form part of the family of law enforcement structures and share expertise and information for an overall effective crime combating strategy. There is need to have functional co-ordination and co-operation structures that must preferably be documented protocols if not legislated to ensure the efficient discharge of the mandate of these law enforcement structures. The urgency thereof cannot be sufficiently emphasised. The creation of the MVS would offer a useful platform for co-operation and co-ordination between these various structures.

5.9 Effectiveness and efficiency of coordination of intelligence: DSO/SAPS/NIA

5.9.1 Findings in relation to the effectiveness and efficiency of coordination of intelligence: DSO/SAPS/NIA

The national mandate for the co-ordination of crime intelligence rests with the crime intelligence division of the SAPS. There is need for close co-operation between the division of the SAPS and the remaining members of the intelligence community to ensure the necessary sharing of information and to prevent duplication of their mandates. Such coordination does not exist between the DSO and any of the intelligence structures.

In the light of the constitutional provisions, National Strategic Intelligence Act, and the mandate given to the Crime Intelligence division of the SAPS, the DSO is not empowered to gather crime intelligence as intended in the National Strategic Intelligence Act. Upon the DSO's establishment it was supposed to make use of the existing intelligence structures, something that did not happen.

5.9.2 Recommendations on the effectiveness and efficiency of coordination of Intelligence: DSO/SAPS/NIA

The various intelligence structures appear to be effective. Save to the extent that the community of intelligence agencies has in the past not included the DSO, the matter has now been addressed to give a limited status to the DSO within NICOC. The recommendation that the DSO be included formally within NICOC as proposed is repeated.

5.10 Efficacy of co-ordinating systems that exists between the intelligence agencies

5.10.1 Findings in relation to the efficacy of co-ordinating systems, that exists between the intelligence agencies

Under this term of reference the Commission was to look into various matters including matters related the rationalisation of resources; minimising undue duplication. The nature of the resources required by these law enforcement agencies as well as the efficacy of the equipment that they use in what they do is matters which require expert knowledge and understanding. The Commission could not discharge this task responsibly without such assistance and in the interest of time, proposed to address this aspect under the recommendations.

5.10.2 Recommendations on the efficacy of co-ordinating systems that exists between the intelligence agencies



The terms of reference required that this matter address such issues as the rationalisation of resources; approaches to and standards relating to training; minimising undue duplication; the co-ordination of operations; priority setting mechanisms; liaison with foreign law enforcement and intelligence structures and where relevant, private sector entities and the impact of locating investigators and prosecutors within the NPA. The relevance of creating a structure such as the MVS or what the SAPS and the DSO entitle the "Operational Committee" to deal with co-ordination of operations will be an added tool to facilitate the efficacy of co-ordinating systems between and amongst the law enforcement structures.

In relation to the rationalisation of resources as well as minimising undue duplication, the reports considered pursuant to on-site inspections conducted on the DSO, the SAPS and NIA revealed that the matter requires people with extensive technical knowledge regarding the equipment utilised by these structures. There was some evidence of duplication of equipment amongst these structures. The recommendation was that a suitably qualified person, with extensive technical knowledge in the field of intelligence, be engaged to specifically address the proper rationalisation and minimising duplication of resources, in a focussed erudite manner.

5.11 Training or further training on policing or investigating methods

5.11.1 Findings in relation to training or further training on policing or investigating methods

Accepting that there is a collective responsibility on all law enforcement agencies to make South Africa safe, the Commission was of the firm view that the DSO's responsibilities under the law are congruent with that of the Commercial Organised Crime Unit of the SAPS and that such units, in general, should also be respected and should be furnished with the same equipment as well as the same legal powers in order to emulate the same successes of the DSO.

There are no systems of co-operation and co-ordination between the SAPS and DSO, in terms of which arrangement both agencies could be enabled to formally share their respective training methods in the investigation and combating of organised crime. This should be facilitated and encouraged and if need be, through legislation.

5.11.2 Recommendations in relation to training or further training on policing or investigating methods

The law enforcement component of the DSO as well as the work of the SAPS relating to organised crime would require substantially the same skills for its personnel. The evidence demonstrated that the DSO has comprehensive training facilities to enable its personnel to achieve greater impact in the work of combating and prosecuting organised crime. The SAPS has equally developed impressive training strategies to address the challenges of organised crime.

There may exist duplication in the resources that are channelled towards training by the DSO and the SAPS. The Report recommended that the DSO and the SAPS streamline the training of their personnel to achieve greater efficiencies.



5.12 Locating investigators and prosecutors within the NPA

5.12.1 Findings in relation to locating investigators and prosecutors within the NPA

The structure of the DSO, within the current legal framework, is not only novel but is also unique in the world. There are enough examples throughout the developed world, of institutions and structures that are created to specifically address the complexities and intricacies associated with organised crime. The use of multi-disciplinary structures, meaning, the use of prosecutors, intelligence operatives/analysts as well as investigators in a team effort is common in foreign jurisdictions. In countries such as the USA, multi-disciplinary structures ("Strike Forces") are created for specific purposes with various elements within it reporting to their respective authorities.

There is no legal impediment in having such a structure falling within a prosecuting service as long as the independence of prosecution is safeguarded. The prosecutor who is "embedded" in the investigation faces the challenge to still have the necessary "distance" to bring his or her mind to a dispassionate decision as to whether a particular matter is prosecutable or not. It is particularly important that a prosecutor acts independently to enable him or her when conducting investigations to have the neutrality of pursuing exculpatory information and making such information available to an accused person if the prosecution is nevertheless pursued.

Whatever the cogency of the argument that the prosecutors must be protected from work that may expose them to become competent and compellable witnesses, it was the Judge's considered view that the integrity of a particular prosecutor is a vital factor in the independence of his/her office. It is therefore crucial that the integrity of individual prosecutors be one of the cardinal issues to be closely determined and scrutinised in the appointment to that office.

5.12.2 Recommendations in relation to locating investigators and prosecutors within the NPA

There were concerns expressed that the working of prosecutors with police such as is the case within the DSO, holds a real risk of compromising the independence of the prosecutors and ultimately may corrupt the objectivity of the prosecutors. The basis of this concern is that whereas the prosecutors would be members of the investigating team, they nevertheless owe a duty to a court of law, to place all information before the court including information that may exculpate the accused.

The Judge has been advised that the DSO is alive to this risk and that its prosecutors do not engage in aspects of the investigation that may tarnish their independence. It is also important to be mindful that the duty of the prosecutors to the court is an ethical obligation which goes beyond the desire to achieve a conviction in a particular case. Having regard to all the evidence and the argument, it was recommended that the various disciplines within the DSO must still remain under a single command structure as is the current position.

The Judge was satisfied that the practice of housing multiple disciplines under one command structure is sound practice. The structure of the DSO in this regard, enhances a closer co-operation amongst the various disciplines. The one discipline benefits from the expertise of the other, making the cross-pollination an effective strategy in combating crime and ensures a return of higher conviction ratios.



5.13 Location of the DSO

5.13.1 Findings in relation to the location of the DSO

At the relevant point in time, the body of the information and evidence strongly suggested a need by the government to have in place a coherent effective strategy in the fight against organised crime. Foreign jurisdictions visited in the course of the Commission's work also indicate a global trend towards creating instruments of a specialised nature in addressing and combating or mitigating the effects of organised crime.

Whereas the recent statistics indicate some decline of criminal behaviour generally, she not persuaded that the rationale for the establishment of the DSO has since disappeared to justify the translocation of the DSO to the SAPS. The argument that the DSO was established as a temporary structure is not consistent with the body of evidence submitted before the Commission. She was satisfied that there is ample evidence indicating the contrary. No cogent argument was offered indicating that the establishment of the DSO was meant to be a temporary structure as argued by, amongst others, SAPS and the Police, Prisons, Civil Rights Union ("POPCRU"). It is difficult to understand why the legislature would have incorporated into a statute, a structure whose purpose was meant to have a limited lifespan without including provisions specifically addressing the temporary status thereof. Instead, the legislature expressly provided for transitional arrangements that were to address the interim period. Had the legislature intended the DSO to have a limited lifespan, it would have plainly so stated when making provision for the transitional arrangements under section 43A of the NPA Act.

The argument that the establishment of the DSO was to be a temporary structure is further undermined by the fact that the reading of the NPA Act clearly points to the contrary. There is instead, evidence that the incorporation of the DSO in the NPA was deliberate. It must be remembered also that the amendment resulted in the integration in the DSO of other specialised directorates that were, till then, operating as separate investigating directorates within the NPA.

The argument that the DSO was established until such time as SAPS would have legitimised or transformed itself does not hold merit either. A careful consideration of all the evidence presented demonstrates that government was concerned that the capacity of the SAPS structures to deal with organised crime was suspect, in part, because of the corrupt elements that were within the SAPS structures and the transformation challenges it faced.

Notwithstanding the commendable transformation of the SAPS, the Judge was satisfied that had this been the only rationale to locate the DSO within the NPA, such an intention by the Legislature would have been apparent from the reading of the NPA Act. She was unable to find support for this argument from the reading of the NPA Act.

Another argument sponsored in this regard was that crime levels have since dropped to justify the translocation of the DSO to the SAPS. It is trite that the establishment of the DSO was precipitated by rampant levels of organised crime including violent crime. In as much as the evidence in this regard lends credence to the fact that organised crime are no longer as high, the Judge was not persuaded that



analysis that the Minister for Justice and Constitutional Development seeks to rely upon for her contention in this regard is, with respect, unhelpful.

It was argued that as the relationship between the DSO and the SAPS had irretrievably broken down, the DSO should be de-established and the resultant separation of prosecutorial and policing powers preserved. Whereas the Judge accepted that there was ample evidence indicative of an unhappy relationship and serious tension between the two structures, there appears no reason in law why the idiosyncrasies of individuals should rank higher than the constitutional imperatives imposed on those institutions. There is a compelling reason for these structures to co-operate as they are, in law, obliged to do.

It was conceded by all stakeholders that there were initially good grounds to locate the DSO under the NPA. A comprehensive process was undertaken to debate the suitable location of the DSO. There were various legislative instruments that were considered to locate the DSO. Ultimately, for reasons already alluded to, it was decided that the NPA Act must be amended to locate the DSO within the National Prosecuting Authority and under the Minister for Justice and Constitutional Development.

5.13.2 Recommendations regarding the location of the DSO

Until such time as there is cogent evidence that the mandate of the Legislature (to create a specialised instrument with limited investigative capacity to prosecute serious criminal or unlawful conduct committed in an organised fashion) is demonstrably fulfilled, the Judge held the view that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO. She was satisfied that the rationale for locating the DSO under the NDPP and the Minister for Justice and Constitutional Development in 2002 still pertains. As already submitted, this was a logical locus where the DSO could be situated since the NPA already had investigative directorates (Independent Directorate: Serious Economic Offences and Independent Directorate: Organised Crime) and because the DSO was to be prosecution led, its concomitant location could only be with the prosecuting authority, which constitutionally, is authorised to institute prosecution.

The two institutions, namely the SAPS and the DSO still do not appreciate the legal imperative for co-operation. There will therefore be need for decided executive action to compel a realignment of attitudes by these institutions. Having considered the totality of the evidence and the law relevant to the terms of reference, the Judge's considered view was that the DSO should continue to be located within the NPA. She considered the totality of the evidence and argument and were satisfied that the DSO should remain within the NPA but certainly with such adjustments as are recommended in the body of the report including the recommendation relating to the power of the President under section 97(b) of the Constitution to transfer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security in order to clear the anomaly already alluded to herein.