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Centre for
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CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

The Honourable Mrs Lydia Sindisiwe Chikunga, MP
Chairperson
Portfolio Committee on Police
Parliament of the Republic of South Africa
Parliament Street
Cape Town
8000

Attention: Ms Zola Vice
Per email: zvice@parliament.gov.za

18 April 2012

Dear Mrs Chikunga

CONCISE SUBMISSION ON THE SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL [B7-2012]

Introduction

1. The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation – a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (the Constitution). To this end, the Centre seeks to promote the values, rights and principles provided for in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.

2. CFCR accordingly welcomes the opportunity to make concise submissions to the Committee on the South African Police Service Bill [B7-2012] (the Bill) in response to your call for submission as published on www.parliament.gov.za.

3. It is not the purpose or intention of this submission to provide a comprehensive legal analysis or technical assessment of the Bill, but rather to highlight key concerns deriving from the Bill in relation to specific constitutional matters as were raised by the Constitutional Court in its judgement handed down in *Glenister v President of the Republic of South Africa & Others 2011 (7) BCLR 651 (CC).*

Background

4. Corruption, especially in the public sector, is a threat to development, to our constitutional democracy and to the rule of law itself. The primary international law instrument aimed at combating corruption – the *United Nations Convention against Corruption* (General Assembly Resolution A/RES/58/4 dated 31 October 2003) which came into force on 14 December 2005 and to which South Africa is a State Party – reflects in its Preamble that:

> *"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."*

5. The Directorate for Special Operations (DSO), originally established as a directorate of the National Prosecuting Authority (NPA) in terms of the National Prosecuting Authority Amendment Act 61 of 2000, was tasked with, among others, anti-corruption investigations and was, based on countless public and media reports, highly efficient and successful in effecting its mandate.

6. On 1 April 2005, former President Thabo Mbeki appointed The Honourable Justice Sisi Khampepe to head the Khampepe Commission of Inquiry into the location and mandate of the Directorate for Special Operations (DSO), originally established as a directorate of the National Prosecuting Authority (NPA) in terms of the National Prosecuting Authority Amendment Act 61 of 2000.

7. Apart from a number of specific findings contained in its final report (available at http://www.info.gov.za/view/DownloadFileAction?id=80441 and for the sake of brevity not included in this submission), the Commission contended that the legal framework regulating the mandate and location of the DSO was not in conflict with the Constitution.

8. The Commission furthermore in principle found that the rationale for the establishment of the DSO remained valid and that the DSO was unique in its structure and function (a structure and function also successfully adopted by a number of other governments globally) in comparison to other government entities.

9. The Commission recommended that the DSO be retained within the NPA, but that in the interest of enhanced oversight, the President should confer political oversight and responsibility for the law enforcement component of the DSO to the Minister of Safety and Security as it was then known.

10. With reference to a statement issued by the Government Communications and Information Service on 29 June 2006 (http://www.info.gov.za/speeches/2006/06062915451001.htm), Cabinet accepted the recommendations of the Commission, including the recommendation to retain the DSO within the NPA but to subject its law enforcement responsibilities to political oversight by the Minister of Safety and Security.

11. However, in 2008 and ostensibly purely based on a political policy decision ignoring the recommendations of the Khampepe Commission of Inquiry, the South African Police Service Amendment Act 57 of 2008, amending the South African Police Service Act 68 of 1995, was adopted and promulgated establishing the Directorate for Priority Crime Investigation (DPCI) as a division of the South African Police Service (SAPS) and effectively disbanding (read with the National Prosecuting Authority Amendment Act 56 of 2008) the DSO.

12. Following a lengthy litigation spanning a number of years, the Constitutional Court finally in *Glenister v President of the Republic of South Africa & Others 2011 (7) BCLR 651 (CC)*, provided clear guidance in the matter when it held that the aforementioned amendments to the South African Police Service Act 68 of 1995 – more specifically Chapter 6A of the Act – were inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI.

13. The Court, in handing down judgement, held that the Constitution and international obligations in terms of international law instruments to which South Africa is a State Party to, created a positive obligation on the state to establish and maintain an independent entity to combat acts of corruption and organised crime. Thus, in failing to do so, the Court held, South Africa would not only be in contravention of its international obligations, but that the government could also not give full effect to the Bill of Rights under conditions where corrupt activities were allowed to go unchallenged.

14. More importantly, the Court held that the current structure and functions of the DPCI as provided for in the aforementioned legislation, did not meet constitutional muster as the DPCI was not sufficiently insulated in structure and function from possible undue political influence. In brief, the Court based this finding on the following principles which were lacking in the current structure and functions of the DPCI:

    a. Structural independence;
    b. Operational independence;

c. Security of tenure;
d. Insulation from political interference; and
e. Accountability.

15. The Constitutional Court as per paragraph 191 of its judgement, however, held that it "*will not be prescriptive as to what measures the state takes*" (as has consistently been the Court's posture expressed in a number of previous judgements). It rather assert that "*[a] range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable*".

16. With reference to paragraph 251, sub-paragraph 6, of its judgement, the Court suspended the declaration of constitutional invalidity for 18 months in order to give Parliament, with its responsibility of holding the Executive accountable, the opportunity to remedy the defective Act.

17. It is hence respectfully contended, bearing in mind responsibility given to Parliament by the Court in the aforesaid paragraph, that where the provisions of the Bill before the Committee do not, in principle, address the deficiencies as highlighted by the Court in its aforementioned judgement, the Bill (and the structure and functionalities created in terms thereof) will again not meet constitutional muster, potentially seeing the matter returned to the Constitutional Court.

Key concerns

18. The Bill before the Committee was an attempt by the Executive to address and correct the inadequacies raised by the Court in its aforementioned judgement. It is, however, contended that even with reference to only the structural and operational independence (as will be succinctly motivated hereunder), the route followed by the Executive to address the concerns of the Court, is inherently flawed and primarily driven by a political policy decision to maintain the anti-corruption structure and functionality within the SAPS, rather than to give full effect to its constitutional and international obligations based on international norms and standards as referred to by the Court.

<u>Ad clause 4 – 6 and clause 16</u>

19. Regardless of the drafters' attempt to create an independent position of "Head of the Directorate", the Head will also be a Deputy National Commissioner (albeit appointed by the Minister in concurrence with Cabinet) in the SAPS and will hence remain (as a constitutional prerequisite in terms of section 207 of the Constitution), subject to the ultimate authority of the National Commissioner. Should the Head of the Directorate (a Deputy National Commissioner responsible for a directorate located within the SAPS) not be subject to the authority of the National Commissioner, it could be contended that this provision is, in principle, unconstitutional in terms of section 207 of the Constitution.

20. This argument is of course all the same in relation to the structure, functionality and accountability (including financial accountability) of the Directorate as long as it is located within the SAPS, as evidently remains the case in terms of the Bill. Moreover and with reference to clause 11, the National Commissioner as accounting officer in terms of the Public Finance Management Act 1 of 1999, will ultimately determine the budget for DPCI, creating potential for manipulation and infringement of operational independence.

21. With reference to paragraph 19 above, one thus has to question, at the outset, the structural independence, constitutionality and functionality of the proposed structure as provided for in the Bill.

Ad clause 7, clause 12 and clause 14

22. The Minister, with the concurrence of Parliament, shall in terms of the Bill determine policy guidelines for the selection of national priority offences as well as policy guidelines for the referral of any offences to the Directorate by the National Commissioner. Furthermore, a Ministerial Committee may determine procedures to coordinate the activities of the Directorate and other government entities.

23. The Head of the Directorate's decision to determine national priority offences to be addressed by the Directorate will thus be subject to the aforesaid policy guidelines issued by the Minister as approved by Parliament. Furthermore, the Head is in terms of the Bill obliged to ensure that the Directorate observes all policy guidelines issued by the Minister, leaving the Head with no option but to interpret his or her mandate in terms of the policy guidelines.

24. It is contended that the aforesaid clauses are problematic in principle. Although the notion of "policy guidelines" to be issued by the Minister and to be approved by Parliament appears to be of a guiding nature and higher function, it will effectively provide the Minister with the competency to determine key matters such as the genus and type of activity to be investigated and specific persons or groups of people who could and who could not be investigated. "Policy guidelines" in this instance become potential political guidelines open for abuse. In the rare event of Parliament not rigorously scrutinising, questions and even rejecting such policy guidelines as determined by the Minister, the Head of the Directorate and the Directorate itself will effectively be limited in its operational functionality by such unchallenged political "policy guidelines".

Conclusion

25. In conclusion, it is submitted that the very principle of maintaining an anti-corruption entity within the SAPS will remain to be flawed in law as it will, as was briefly discussed above, directly and negatively affect the structural and operational independence of that entity and as such, will continue to fall short of constitutional muster as required by the Constitutional Court.

26. Moreover, as effective anti-corruption measures are based both on fact and perception and with reference to well reported matters in the public domain in relation to former National Commissioner, Jackie Selebi, (convicted of corruption and serving a 15-year sentence in this regard), current National Commissioner, Bheki Cele, (under investigation for alleged misconduct involving large amounts of money as based on the findings of the Public Protector) and serious allegations against the current Head of Crime Intelligence, Richard Mdluli and Minister of Police, Nathi Mthethwa, (both allegedly inappropriately benefitting at state's expense), the SAPS may hardly be perceived to be the most appropriate entity to combat corruption.

27. It is respectfully submitted that Parliament needs to take cognisance of the relevant aforementioned judgement by the Constitutional Court and although the Court did not express itself on how the Executive and Legislature should correct the constitutional deficiencies, it has clearly provided guidelines in terms of which an anti-corruption entity should be measured so as to determine constitutional prerequisites based on South Africa's international obligations, but also international norms and best practices.

28. It is furthermore respectfully argued, albeit in a concise submission, that the Bill before the Committee is falling short of even the key elements for constitutional muster as held by Constitutional Court.

29. Finally, CFCR submits that in order to adhere to the constitutional requirements as provided by the Court in the aforementioned judgement, but also to ensure credibility and public trust in such entity, it is necessary to establish an anti-corruption entity with, at the very least, an adequate degree of independence and insulation from undue political interference – both in fact and public perception. This could be achieved through, and we are strongly contending that the most certain manner to ensure the outcomes as addressed above, the creation of an independent entity in terms of Chapter 9 of the Constitution along the lines of the Public Protector and Auditor-General as established in terms of Chapter 9.

30. The creation of an independent entity in terms of Chapter 9 of the Constitution, as argued here above, will require a constitutional amendment, albeit a fairly uncomplicated amendment to such effect, but will go a long way in creating an anti-corruption entity which will be independent, subject only to the Constitution and the law (as opposed to politicians) and which can exercise its powers and functions impartially and without fear, favour or prejudice.

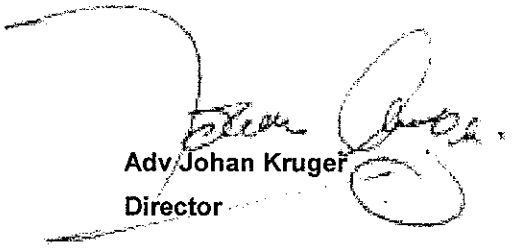
31. Alternatively, although not ideal, such anti-corruption entity could again be established within the NPA, or for that matter, any other relevant government department where an adequate degree of independence and insulation from undue political interference can be guaranteed. As discussed above, however, the Bill before the Committee does not provide for the latter.

32. CFCR would like to contribute positively to the promotion and protection of our constitutional democracy by ensuring that all necessary measures to give effect to the judgement of the Constitutional Court in creating and maintaining an effective anti-corruption entity, are considered, weighed and implemented. In this regard and if required, CFCR will be available to engage in oral submissions to the Committee in

order to elaborate on this submission, whether during the public hearings or at any such time as the Committee may see it fit.

We trust that our succinct submission will be of assistance in guiding your deliberations on the Bill before the Committee.

Yours sincerely



Adv Johan Kruger
Director