Date: 27 March 2012

From: Professor Mtende Mhango, University of Witwatersrand, School of Law

To: Ms Zola Vice, the Committee Secretary to the Portfolio Committee on Police

RE: Submission to the South African Parliament on the South African Police Amendment Bill [B7-2012].

1. Background

The Constitutional Court in *Glenister v President of the RSA* ruled that certain sections of the South African Police Service Act 1995 that created the Directorate of Priority Crimes Investigations (aka Hawks) were unconstitutional because they offended the constitutional obligation to create an independent anti-corruption agency. The Court found two main problems with THE Hawks. These include: (1) the lack of employment security for employees of the Hawks; and (2) the imposition of oversight by a Ministerial Committee of political executive (i.e. the Ministerial Committee). Because of these problems, the Court concluded that the Hawks lack structural and functional independence that the Constitution requires it to have. The Court gave Parliament a period of 18 months to correct the defect. In response to *Glenister*, Parliament drafted the South African Police Bill (B7-2012), which seeks to bring the SAPS Act in line with the Constitution as interpreted by the Court in *Glenister.* Beloe I demonstrate how the Bill addresses the constitutional requirements in *Glenister* in several ways.

2. Location of the Hawks

Firstly, the Bill in section 5 establishes the Hawks as a directorate within the SAPS. It is important to note that the Constitution does not create any obligations on Parliament on where to locate the Hawks. Instead, the Constitution as interpreted by *Glenister* leaves this decision to Parliament and the Executive branches to make. The Glenister Court also emphasized this in para 214 when it said 'what is important is not whether the Hawks is placed within the NPA or SAPS, but whether it has sufficient attributes of independence to fulfill its functions required of it under the Bill of Rights'.

3. Security of Tenure

Secondly, in addressing the first main constitutional defect in the SAPS Act, section 6 of the Bill provides that the Head and Deputy Head of the Hawks shall each be appointed for a nonrenewable fixed term of no more than 7 years. This provision is designed to address the concerns raised by the *Glenister* Court. According to the Court, a renewable term of office in contrast to a non-renewable term, heightens the risk that the office bearer may be venerable to political and other pressures. This concern is conceivable. Previously, the Head

and Deputy Head of the Hawks had renewable terms of office, which the Court found to be a problem. The Bill has addressed this defect.

Furthermore, the Bill in section 6 introduces statutory salaries for the Head and Deputy Head of the Hawks to be determined by the Ministers of Police and Finance. The salaries of the other employees of the Hawks will also be determined and regulated separately through regulations issued by the Minister in terms of subsection 13 of the same provision. Section 6 of the Bill is designed to address the concern raised by the *Glenister* Court when it said at para 227 that the absence of statutory secured remuneration levels gives rise to problems similar to those occasioned by the lack of secure employment tenure. The Court found that in general members of the Hawks did not enjoy specially entrenched employment security. It ruled that adequate independence requires special measures entrenching the employee's security and salaries to enable them to carry out their duties vigorously. Thus by including section 6, the Bill has addressed these concerns.

Moreover, section 8 of the Bill provides that the Head of the Hawks will only be removable by the Minister on grounds of misconduct; continued ill health or incapacity, or if he or she is no longer a fit and proper person to hold office. The main constitutional defect identified by the Court was that the grounds for removal under the SAPS Act, which were applicable to the Hawks employees as well, were too broad. These grounds have now been narrowed by the inclusion of section 8 in the Bill. It is important to point out that these grounds for removal are identical to the ones applicable to the Director of the NPA, which is a high standard to remove a public official.

Additionally, employees of the Hawks will now be required to take an oath of office. This new requirement is a demonstration by the Bill that the employees of the Hawks are regarded as independently bound by the oath to uphold the Constitution and perform their duties without fear, favor or prejudice and to be impartial. It is important to point out that under the defunct Directorate of Special Operations (Scorpions) only the Head of Scorpions, directors, deputy directors and prosecutors had to take an oath of office. By contrast, the Bill in terms of section 9(c) requires all employees of the Hawks to take an oath of office, which suggests a higher indicator of independence than what was available to employees of the Scorpions. Moreover, in terms of section 8 of the Bill, the Head of Hawks is empowered to appoint the staff of the Hawks. These changes, in my view, comply with the Constitution as interpreted by the *Glenister Court* because they entrench the functional and operations independence of the Hawks. They provide the security of tenure on the Head and Deputy Head as well as other employees by requiring them to take an oath of office, which is an indicator of independence.[1]

[1] *See*, *De Lange v Smuts NO*, 1998 (7) BCLR 779 (1998 (3) SA 785) (CC); *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, 2008 (2) BCLR 158 (2008 (2) SA 24)

4. The Oversight Role by the Ministerial Committee

Thirdly, the Bill addresses the constitutional defect surrounding the oversight role played by the Ministerial Committee, over the operations of the Hawks, in a number of ways. Firstly, the Bill in section 7 provides that the operations of the Hawks will be guided by the policy guidelines issued by the Minister of Police and approved by Parliament. Previously, the policy guidelines were issued by a Ministerial Committee made up of at least 6 Ministers (Finance, Justice, Intelligence, Police, Home Affairs and another designated Minister). The Court found that the power of the Ministerial Committee to issue policy guidelines for the functioning of the Hawks created a plain risk of executive and political influence on the Hawks functioning.

To address this defect, the Bill has removed the oversight role by the Ministerial Committee and replaced it with the Minister of Police. Under the Bill, policy guidelines (and the necessary political oversight role) will be issued by the Minister of Police and subject to the approval of Parliament. While the Ministerial Committee has been retained to play some role in section 12 of the Bill, that role is limited to determining procedures for conducting the activities of the Hawks and other government department. It is important to emphasize that section 12 of the Bill uses the word "may" and not "shall" to further emphasize the limited role of the Ministerial Committee.

Therefore under the proposed Bill, the Ministerial Committee shall no longer oversee the functioning of the Hawks as was previously the case. This was one of the major constitutional defects in the SAPS Act because the *Glenister* Court interpreted the Ministerial Committee's powers to oversee the Hawks; meet regularly; and request for reports from the Hawks, as creating the possibility for the Ministerial Committee to be responsible for the hands on management, supervision and interference. Now that the Ministerial Committee no longer has that power, it is my view that the fears raised by the Court no longer exist.

In light of these changes in the Bill, it is my views that if the legislature passes this Bill it will pass constitutional muster. The replacement of the Ministerial Committee with the Minister of Police is an important introduction in the legal framework for the Hawks. In fact, it is necessary in terms of section 206(1) read with sections 207(2) and 208 of the Constitution for the legislature to include this oversight role. Section 206(1) of the Constitution provides that a member of Cabinet must be responsible for policing and must determine national policing policy after consulting with provincial governments. Therefore, through these provisions the framers of the Constitution contemplated the need for the executive branch through the Minister of Police to play a role in all matters dealing with policing in the

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(CC); *R v Valente* (1985) 24 DLR (4th) 161; and Fina*ncial Services Board and Another v Pepkor Pension Fund and Another* [2000] 4 BPLR 347 (PFA).

Republic. It is my view that the replacement of the Ministerial Committee with the Minister of Police is consistent with Constitution.

Glenister also acknowledged this in para 236 where the Court said that the executive plays the ultimate oversight role. The Court goes on to say in para 216 that in the modern polis, it would be impossible to insulate an anti-corruption agency such as the Hawks from the political accountability. The Court explains that to insulate the Hawks from political accountability or executive control would be averse to our constitutional structure. According to the Court, what is required is not insulation from political accountability, but only insulation from a degree of management by political actors, namely the Ministerial Committee, that threaten the independent functioning of the Hawks.

Furthermore, section 5 of the Bill puts emphasis that the management and direction of the Hawks shall be the responsibility of the Head of the Hawks. This means that the Head of the Hawks will no longer be subordinate to the National Commissioner in relation to the management or direction of the Hawks. The only time when the Head may require approval from the National Commissioner on day to day matters is when the Head seeks to hire employees from the SAPS.

5. Chapter 9 Institutional Standard

According to media reports, there are some who have argued that the Bill does not meet constitutional muster because it fails to create the Hawks in similar terms as chapter 9 institutions. My response to this claim is that neither the Constitution nor *Glenister* mandates parliament to establish the Hawks as a chapter 9 institution.

6. General Observations

Lastly, it is important to make two general points and observations about this matter and what I perceive to be the constitutional obligation of Parliament. Firstly, section 85(1) of the Constitution says that "the executive authority of the Republic is vested in the President". Section 85(1) does not mean some executive authority but all executive authority is vested in the President as Head of the Executive branch. It is a well established principle of constitutional law the world over that government investigations and prosecutions of crimes (including an investigation to decide whether to prosecute) are quintessentially executive functions.[2] Thus, it seems to me that if Parliament were to pass the Bill or any law that would deprive the Minister of Police or put it crudely the executive of its exclusive control of the exercise of that authority, such law would be constitutionally void. The authority for this claim is section 85(1) read together with sections 206(1), 208, 207(2) and 179(6). From this standpoint it is significant that the Bill vests sufficient oversight role on the

[2] See, *Olson v Morrison*, 487 US 654 (1988); *Heckler v Chaney*, 470 US 821 (1985); *Buckley v Valeo*, 424 US 1 (1976); *United States v Nixon* 418 US 683 (1974).

Minister of Police (or broadly the executive) because to do otherwise, would violate the Constitution and principle of separation of powers.

Lastly, Justice Scalia explained in *Olson v Morrison*,[3] that it is not unthinkable that the executive should have exclusive power, even when alleged crimes by the President or his close associate are at issue. In terms of the principle of separation of powers, the other branches enjoy similar exclusive powers. For example, parliament enjoys exclusive law making powers even when what is at issue is its own exemption from the burdens of certain laws. [4]The judiciary also enjoys exclusive powers to pronounce on constitutional cases, even if such cases were to involve the constitutionality of a Bill or Act that sought to reduce the salaries of the justices or challenge their authority to hear a case.[5]

The point made by Justice Scalia, which is applicable to South Africa, is that the principle of separation of powers involves an acceptance of exclusive power that can theoretically be abused. While the doctrine of separation of powers may not always allow us to remedy every wrong, the checks and balances that it provides within the Constitution[6] can assist to guard against abuse of power by the branches. One of the most important checks is the retaliation by the other branches use of exclusive power. For example, Parliament can remove the President or the Cabinet only in terms of section 101(1) or (2) of the Constitution respectively or section 89 of the Constitution if the President willfully fails to enforce the laws passed by parliament or seriously violate the Constitution or law. In the same way, the executive can refuse to assent to Bills that it deems to be unconstitutional.[7]

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[3] *Olson v Morrison*, 487 US 654 (1988).

[4] See, e.g., the Power s, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (giving absolute freedom of expression to members of parliament and exempting them from attending to court proceeding when parliament is in session); and *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)(holding that Parliament had exclusive law making powers which it could not delegate to the executive branch of the state. It found that the Local Government Transition Act was unconstitutional because it violated separation of powers principle in the Constitution by delegating too much power to the executive without sufficient control of its express powers to "make laws for the Republic in accordance with the Constitution").

[5] See, *President of the Republic of South Africa v South African Rugby Football Union* [1999] (4) SA 147; 1999 (7) BCLR 725; and *United States v Will*, 449 US 200 (1980)

[6] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC)(holding that the principle of separation of powers was part of the South African Constitution).

[7] See, *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC)(where the President refused to sign a Bill and submitted it to the Constitutional Court for abstract review)

Equally, the judiciary can dismiss malicious prosecutions.[8] Another significant check is that people will replace those in the political branches who are guilty of abuse of power. I make the latter point in response to what appears to be the troubling rationale of the *Glenister* Court; that is to say it decided the case on the basis of potential abuse and not actual abuse of power by the so-called political actors in the institution of the Ministerial Committee.

7. Conclusions

The Bill complies with the Constitution and *Glenister*. In terms of the Bill, the Hawks have sufficient structural and functional attributes of independent because it:

(1) Provides for sufficient security of tenure of the members of the Hawks.

(2) Removes the Ministerial Committee from playing a day to day oversight role over the Hawks and places such role on the Minister of Police as required by section 206 of the Constitution.

(3) By doing the above the Bill creates a perception of independence of the Hawks.

(4) Creates a reasonable perception of independence on the part of the Hawks.

[8] See, *National Director of Public Prosecutions v Zuma (Mbeki and Another intervening*), 2009 (4) BCLR 393 (2009 (2) SA 277) (SCA); and *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N).