

SUBMISSIONS ON THE SAPS AMENDMENT BILL [B7-2012]

Presented by:

**OPEN SOCIETY FOUNDATION-SA,
LEGAL RESOURCES CENTRE
& CORRUPTION WATCH**

Portfolio Committee on Police, 25 April 2012

What does independence require?

“Institutional and legal mechanisms, to prevent undue political influence”
(Glenister, para 206)

- ➡ Not insulation from political accountability, but insulation from political management and control
- ➡ Public confidence that institution is independent is constitutive of independence

3 CORE ELEMENTS:

- SECURITY OF TENURE
- FINANCIAL SECURITY (for individuals & the institution)
- INSTITUTIONAL INDEPENDENCE (structural & operational)

Security of tenure:

(i) Appointment of Head & Deputy Head of DPCI

(1) No requirement of Parliamentary approval

- See inserted sections 17C(2)(a) & 17CA(1) (Head); s 17CA(3) (Deputy).
- Compare appointment of Public Protector & Deputy PP: requires 60% supporting vote of all members in the National Assembly (s 193(4)-(5) of the Constitution; s 2A(3) of Public Protector Act 1994)

(2) No criteria for appointment

- Compare sections 1A(3) and 2A(3) of Public Protector Act 1994.
- Compare guidelines for appointment of Acting Head/ Deputy of DPCI under inserted section 17CA(9)(c)-(d).

(3) No minimum fixed term of office

- Section 17CA(1),(3) and (4) provides for a non-renewable fixed term 'not exceeding 7 years'.
- Compare section 189 of the Constitution: provides that the Auditor-General "must be appointed for a fixed, non-renewable term of between five and ten years".

Security of tenure:

(ii) Remuneration & conditions of service

- ✓ Statutorily secured remuneration levels for the Head, Deputy Head and Provincial Heads of the DPCI – section 17CA(5)(b),(6)
- ✓ Section 17CA(13) and (14): Requires Parliamentary approval of any regulations which the Minister may make *“in respect of the remuneration, allowances and other conditions of service of other members of the Directorate”*
- └ BUT CONFLICTS WITH SECTION 17G: provides for Ministerial regulation of conditions of service without Parliamentary approval.

RECOMMENDATION: DELETE SECTION 17G

Security of tenure: (iii) Discipline & removal

- Head of the DPCI – section 17DA(3) is too vague
 - Parliamentary resolution not expressly required, & no time limit
 - No requirement that the Minister *shall restore* the Head of the DPCI on Parliament's recommendation.
 - “Loss of confidence” heading of s17DA(3) is inappropriate
 - Compare removal of PUBLIC PROTECTOR and AUDITOR-GENERAL under s194(2) of the Constitution: 2/3 majority vote in National Assembly required.
- Deputy Head & Provincial Heads – no special protection
- Other DPCI members – no special protection; sections 34 & 35 should not apply

Glenister, paras 221-222: *“In short the members of the new directorate enjoy no specially entrenched employment security In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.”*

Accountability mechanisms

Accountability = “political responsibility”
NOT political control/ management

This distinction is drawn in the Constitution:

Section 206: assigns “political responsibility” for the SAPS to the Minister, who must determine policing policy

Section 207: assigns “control and management” of the SAPS to the National Commissioner

Appointment and tenure of National Commissioner

- In Glenister, Court specifically emphasised problems caused by provisions relating to National Commissioner:

“This [lack of independence] is exacerbated by the fact that the appointment of the National Commissioner of the SAPS is itself renewable. By contrast, the appointment of the National Director of Public Prosecutions (NDPP) — who selected the head of the DSO from amongst the deputy NDPPs — is not. A renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures.”

- ‘Exacerbated’ – a separate and additional criterion for independence.
- despite this, Bill leaves s 7(2) of Act unchanged – as it was when Glenister was decided – permits National Commissioner’s term to be extended for period(s) not exceeding 5 years each

Determining policy guidelines – ss 17D(1) & 17K(4)

THE SCHEME: The Minister shall determine, subject to parliament's approval, policy guidelines in respect of the functioning of the DPCI and the selection of national priority offences.

PROBLEMS WITH THE SCHEME:

1. The Head of DPCI plays no role in determining policy guidelines:
 - Inconsistent with section 17C(1) which provides: *“the Head of the Directorate at national level shall manage and direct the Directorate.”*
 - Compare the powers of:
 - (i) the NDPP who can determine national prosecution policy, with the concurrence of the Minister (section 22(1)(a) of the NPA Act);
 - (ii) the Auditor-General and the Public Protector who are empowered to determine the scope of their own investigations
2. The scope of the guidelines power remains overbroad – allows for unlawful dictation as to DPCI's mandate
3. Inclusion of section 17D(1)(aA) – ‘selected offences’ too vague

Reporting to Parliament – section 17K

’. THE CONCERN: NO DIRECT ACCOUNTABILITY LINK BETWEEN THE HEAD OF THE DPCI AND PARLIAMENT
REPRESENTATIONS ON DPCI ACTIVITIES ARE MADE ONLY BY THE NATIONAL COMMISSIONER (Section 17K(2))



Amendments to section 17K DILUTED rather than promoted, the political responsibility of the DPCI as an independent entity:

Section 17K(3) was deleted. This provision obliged the Head of the DPCI to report to Parliament on the Directorate's activities on Parliament's request.

RECOMMENDATION: Section 17K(2) should be amended to replace 'National Commissioner' with 'the Head of the DPCI'

Financial accountability – Section 17H

THE PROBLEM:

FINANCIAL CONTROL IS VESTED IN THE NATIONAL COMMISSIONER

1. Section 17H provides that the National Commissioner, after consultation with the Head of the DPCI, shall prepare the estimate of revenue and expenditure of the DPCI for Parliament. No agreement from Head of DPCI is required.

Compare Constitutional Court in *NNP case* (1999):

an independent entity must “*be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.*” (para 98)

2. The National Commissioner also serves as the accounting officer of the DPCI.
Compare the Independent Police Investigative Directorate Act, 2011 (s7(1)) and the Civilian Secretariat for Police Service Act, 2011 (s 4(3)).

In these Acts, the Executive Director and the Secretary of the respective Directorates is designated as its accounting officer.

RECOMMENDATIONS:

1. Amend section 17H to afford Head of the DPCI the power to prepare and defend the DPCI’s budget before Parliament.
2. Designate Head of the DPCI as the Accounting Officer of the DPCI.

Security clearance – section 17E

- No equivalent screening requirements apply to rest of the SAPS. But there is nothing inherently related to national security in the investigation of corruption.
- The sweeping requirement under section 17E is unnecessary and could well create a well-founded perception that the unit is not independent.

RECOMMENDATION:

- Delete section 17E(4).
- Alternatively, transfer the power of the National Commissioner under s 17E(4) to Head of the DPCI to protect against political abuse.

Section 17E(4) is incompatible with sections 17E(5) and (6) which provide that the Head of the DPCI may determine that a member of the DPCI must be subjected to further security screening.

Location of DPCI

- We urge the Committee to re-consider the location of the DPCI in the SAPS.
 - Situating the DPCI in the SAPS creates a disharmonious structure that is damaging not only to the effective functioning of the DPCI, but also to that of the SAPS.
 - It creates unclear and overlapping lines of authority, and disrupts the hierarchy within the SAPS for no good reason.
 - The relationship between the National Commissioner and the DPCI is particularly problematic for the independent functioning of the DPCI.
 - In practical terms, renders it almost impossible to achieve the detailed independence requirements set out by the Constitutional Court
- We recommend establishing the DPCI as an independent institution structurally akin to the Independent Police Investigative Directorate or Chapter 9 institutions such as the Auditor-General or the Public Protector. The IPID model for instance, could be adjusted to meet the independence requirements of the judgment and meet the committee's concerns.