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PREVIOUS ISSUES

The articles in this edition of SACQ are concerned with a range of pressing issues for South Africa and the criminal justice sector. David Bruce reflects on the measurement of performance set by the SAPS. Monique Marks and Sean Talton consider the changes that have taken place over the past ten years in policing public events that have led to an increase in human rights abuses by the police during public gatherings. Julie Berg and Jean-Pierre Nouveau offer new thinking about the regulation of the private security industry. Duncan Beven and Juan Nel provide an overview of the context in which the development of hate crime legislation will take place in South Africa, and make suggestions about what the law should cover. Finally, Lorenzo Wakefield assesses the first year of implementation of the Child Justice Act.

In SACQ 37 Leon Holtzhausen argues for a clearer definition of criminal justice-related social work so that social workers in this field can receive the necessary specialised skills and knowledge. Jameelah Omar claims that prisoners have a realisable right to rehabilitation in South African prisons; and Patrick Mataki presents an innovative view of the role of criminal gangs in Kenya. This edition concludes with an interview by Chris Botha with Peter Tinsley, who offers an international perspective on police oversight.
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Relationships can seldom survive failed expectations, and the greater the distance between what was expected and what comes to pass, the greater the feeling of betrayal. So too it is in the relationship between a government and its citizens. Ruling political parties are often stubbornly resilient to the consequences of failed expectations. However, after the Arab spring, and even the riots in England during 2011, it is difficult not to believe that, amongst other things, the democratising effect of instant communication through social networking will undermine that resilience and force those in power to be more responsive to dissatisfaction amongst the electorate.

South Africa is experiencing the effect of failed expectations in several ways. Violent local level protests (misleadingly termed ‘service delivery’ protests) are now an everyday feature of the expression of dissatisfaction with a multiplicity of perceived failures by local, provincial and national government. Rising electricity costs, local government corruption and overcrowded schools are just some of the things that spur the protests that express the frustration, anger, and sometimes the desperation of citizens.

The African National Congress (ANC) set high standards against which it would be measured. A negotiated peaceful transition from white minority rule, one of the most (if not the most) progressive Constitutions in the world, a Truth and Reconciliation Commission and an iconic leader were all elements of the transition that set the benchmark for what South Africans believed they might expect from an ANC government.

In many respects the ANC has retreated from this high ground and in no way more painfully perhaps than through the abuse of state resources for personal gain. Weekly newspapers are replete with examples of tender fraud, abuse of power, and the failure of the state to provide the services citizens expected. As we move towards a national election in 2014, preceded by the ANC’s own elective conference later this year, there is tremendous pressure on the ANC to begin to address this dissatisfaction.

In attempting to deal with corruption, however, the party will be confronted with its demons. Those who hold positions of power and are compromised by involvement in fraud and corruption, as well as their beneficiaries and supporters, will resist efforts to clamp down on corruption. The ANC will thus need to balance increasing public pressure to deal with corruption against the consequences for the party of bringing some of its most powerful and senior members to book.

We now have an opportunity to craft a new body to investigate and respond to corruption. Last year the Constitutional Court found that the Directorate of Priority Crimes Instigation (DPCI), a specialised unit within the South African Police Service (SAPS) that was set up to investigate serious organised crime and corruption, was insufficiently insulated from political influence and interference. In order to meet the requirements of the Constitution and South Africa’s international obligations, a unit responsible for investigating corruption needs to be independent, and needs to be seen to be independent. The Court’s decision requires new legislation to address the shortcomings of the existing structure. The article by Philip Stenning and Melea Lewis in this edition of SACQ discuss the minority and majority judgments from the Constitutional Court, and offers international examples of how a new unit might be structured.

At the time of writing a Bill had been tabled in parliament that was a minimalistic response to the requirements of the Constitutional Court judgment, and fell far short of creating a structure impervious to political influence. The article by Irvin Kinnes and Gareth Newham argues that to meet the
requirements of the judgment, a unit responsible for investigating corruption should be separate from, and independent of, the SAPS. Christopher Reeves, in an article commissioned by the Council for the Advancement of the South African Constitution, makes a case for a dedicated, independent statutory body to investigate corruption.

It is not clear quite how far the ANC will be willing to go in meeting the requirements of the judgment and establishing a highly effective anti-corruption body – not least because the decision to disband the Scorpions, taken at its policy conference in 2007, was a response to the ability of the unit to gather evidence of wide-scale fraud and corruption against its incumbent president. The article by Berning and Montesh sketches the process that was followed to disband the Scorpions and presents the reasons given for its decline. They argue that mistakes made by the unit itself contributed to its decline.

It is somewhat naïve to believe that even the most watertight law will be able to prevent and protect against corruption. Any institution's efficacy is largely dependent on the competence and commitment of its leadership and staff. Even if we adopt the best possible statute to establish a truly independent anti-corruption agency, a great deal will depend on who is appointed to manage and run it.

This special edition of SA Crime Quarterly is funded by the Open Society Foundation of South Africa. It is my hope that it will provide useful and relevant information, analysis and perspective to those who intend to advocate for positive change, and those ultimately responsible for making the decision about the new law.

Chandré Gould (Editor)
In 1999 a new directorate of the National Prosecuting Authority was launched to ‘complement and, in some respects, supplement the efforts of existing law enforcement agencies in fighting national priority crimes’. Over the following seven years the Directorate of Special Operations, nicknamed the ‘Scorpions’, gained public favour; however, they were accused of, amongst other things, exceeding their jurisdiction by performing functions that fell outside their mandate. During the African National Congress conference of 2007, delegates took a decision that the Scorpions should be disbanded. In 2008, Parliament passed the South African Police Service Amendment Bill that replaced the Scorpions with the Directorate for Priority Crime Investigation, located within the South African Police Service. In 2010 this move was challenged in Hugh Glenister v President of the Republic of South Africa & Others [CCT 48/10]. The key question in this case was whether the national legislation that created the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), and disbanded the Scorpions, was constitutionally valid. In March 2011 the Constitutional Court ruled that the legislation establishing the Hawks was unconstitutional and ‘invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.’ The Court gave the government 18 months to rectify the situation. This article provides an overview of the decisions that led to the formation and closure of the Scorpions, and the formation of the Hawks.

In June 1999 former president Thabo Mbeki announced that ‘a special and adequately staffed and equipped investigative unit will be established urgently, to deal with all national priority crime, including police corruption.’ In September 1999 the Directorate of Special Operations (DSO or ‘Scorpions’) was set up. Jean Redpath has argued that ‘one of the motivating factors behind the creation of the Scorpions appeared to be to raise public confidence in the ability of the government to fight crime.’

Shortly after the establishment of the DSO the Scorpions confirmed that they would undertake an investigation into the arms procurement process (hereafter ‘the arms deal’) that had been concluded in 1999 to the value of R43.8 billion and which had been the subject of allegations of corruption by high profile ANC members of government. ‘The Scorpions soon became
increasingly became a target for international drug syndicates, both as a market and as a conduit for onward distribution. The inability on the part of law enforcement to deal with the upsurge in criminal activity provided fertile ground for vigilante groups to fill the gap. The role and rapid expansion of organised crime, both in South Africa and other emerging democracies, has been well documented. Suffice to say that the conventional approach to law enforcement has been notably ineffective in dealing with these developments. This is at least partly what motivated the establishment of a prosecution-led investigation unit within the NPA.

In this article we provide an overview of the DSO, and an assessment of the allegations against the unit that served as justification for its closure and replacement with a directorate located in the SAPS.

WHY THE DSO WAS ESTABLISHED

The Directorate of Special Operations was launched in September 1999 and came into legal operation in January 2001. The Directorate had the mandate to investigate particularly serious organised crime, with the objective of prosecuting such offences. Indeed, the formation of the Scorpions coincided with the signing of the International Convention Against Transnational Organised Crime in Palermo in 2000. Also, the directorate was formed shortly after the passing of the Prevention of Organised Crime Act (Act 121 of 1998). Redpath has argued that it was 'clear from the way the POC Act and the DSO's legislation was drafted, that the DSO was intended to be the primary agency to enforce the racketeering and criminal gang provisions contained in the POC Act, while the Asset Forfeiture Unit would make use of the criminal and civil asset forfeiture provisions, in conjunction with the DSO and SAPS.'

At the time South Africa was characterised in the media both at home and abroad as a place where levels of serious violent crime, as well as crimes committed by organised criminal networks, were rapidly on the increase. It has been argued that, partly as a result of a general liberalisation that came with democratisation in 1994, South Africa
Directorate had the powers to investigate and carry out any functions incidental to investigations, gather, keep and analyse information and, where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings.

The operational mandate was envisaged as being somewhat narrower, and negotiated. It was envisaged that the DSO would discuss and negotiate the kinds of cases it would take on, both with the Minister of Justice and the SAPS. Redpath quoted a highly placed interviewee on the matter as saying that '[t]he DSO must engage with the police and everyone involved; everyone must be on board, there must be buy-in at every level, from the politicians, the police, to intelligence… the DSO must be careful of doing ad hoc "sexy things"; there must be a set programme. 14

Already at that stage then there was awareness about the potential for conflict between the police and the DSO about which cases the DSO could or should take on. This conflict manifested quickly, partly as a consequence of the change in SAPS leadership from George Fivaz (in 2000) to Jackie Selebi, who was less open to the DSO than his predecessor. This was not helped when the DSO, rather than the Independent Complaints Directorate or the SAPS, was asked to investigate police brutality after a video was released showing a police dog attacking an illegal immigrant.15

**DSO METHOD OF OPERATION**

The Directorate of Special Operations was a multidisciplinary agency that investigated and prosecuted organised crime and corruption.16 Its staff of 536 consisted of some of the best police, financial, forensic and intelligence experts in the country. It also recruited a number of new young staff members who received training in the US and UK; something that had both advantages and drawbacks for the Scorpions.18

The methodology used by the Directorate of Special Operations was based on the *troika* principle, which integrated analysis/intelligence, investigation and prosecution.19 A DSO investigative team consisted of investigators, prosecutors and analysts who collected intelligence information. After completing an investigation, investigators would refer a case to court and the prosecutor who was involved in the initial stage of the investigation would lead the prosecution. This approach was often criticised because it was believed that the involvement of prosecutors who were part of the investigation team compromised the separation of powers.20

The South African Constitution prescribes the separation of powers into legislative, executive and the judiciary. According to Du Toit and Van der Waldt21 the legislative authority formulates and adopts policy, whilst the executive authority is responsible for the execution of policy. The judicial authority passes judgment in all cases before the courts. Since the directorate’s investigation teams consisted of prosecutors, investigators and intelligence gatherers, the Minister of Justice and Constitutional Development would later argue that this compromised the separation of powers, creating a ‘player’ that was also ‘referee’ and thereby compromising the doctrine of separation of powers.22

However, with the DSO’s success in high-profile cases, public confidence grew in its ability to impact on organised crime. In 2004, money laundering and racketeering were added to its priorities and the DSO succeeded in obtaining the first-ever convictions for racketeering in South Africa.23 By February 2004, the DSO had completed 653 cases, comprising 273 investigations and 380 prosecutions.24 Of the 380 prosecutions 349 resulted in convictions, representing an average conviction rate of 93,1%.

This apparent success also led to criticism of the DSO. Almost as soon as successful Directorate of Special Operation cases began to be publicised, accusations of the Directorate’s ‘cherry-picking’ arose. Specifically, the Directorate was accused of choosing to investigate and prosecute only matters that they were sure to win.25 Sometimes these accusations went further to suggest that the
Directorate had a tendency to take over cases already substantially investigated by the South African Police Service, taking all the credit for the subsequent successful conclusion of the matter.26 These accusations were easily justified because the legislation creating the Directorate had provided a broad mandate that did not specify which cases were to be investigated by the police and which by the Directorate.27

Yet, Redpath, in describing how the DSO set about defining the scope of its work and, in the stringent process that was followed, how to determine which cases it would take on and which it would not, presents a strong argument to support the counter view. Rather than taking on cases that were ‘easy’ to investigate and that would improve its record and strengthen public opinion in its favour, the unit chose the more difficult cases that came before it.28

THE DOWNFALL OF THE DSO

During the course of the investigation into the arms deal that started in 2001, the DSO uncovered irregularities in the award of tenders by the Department of Defence. Among those who benefited from these irregular deals was Schabir Shaik, then Deputy President Jacob Zuma’s financial adviser and confidante for many years. The DSO investigation led to Shaik being charged on two counts of corruption and one of fraud relating to bribes involving Zuma.

In the S v Shaik & Others,29 the accused, Schabir Shaik, was found guilty of corruption and fraud and was sentenced to fifteen years in jail. The court found that he had contravened the Corruption Act 94 of 1992.30 The first charge related to 238 payments into the account of a politician holding high political office (i.e. fraud). The second charge related to incorrect journal entries in the financial statements of the accused’s companies, and the third charge related to the soliciting of a bribe by the accused.

Throughout the trial, which lasted from 21 January 2002 to 17 February 2005,31 Shaik’s relationship with then Deputy President, Jacob Zuma, was in question, yet Zuma was never called to testify either for the state or the accused. This led to questions being raised in the media about why Zuma was not charged jointly with Shaik. In 2005, when Shaik was found guilty and convicted, President Thabo Mbeki dismissed Zuma as deputy president, a move that led to enormous political tension in the ANC and amongst its alliance partners, as Zuma was the preferred successor of Mbeki for COSATU, the ANC Youth League and others within the ruling party.32 The conviction of Shaik did not signal the end of the Scorpions’ investigation and shortly thereafter, on 18 August 2005, the Scorpions raided Shaik’s house, this time searching for evidence against Zuma. These raids were heavily criticised by the union federation COSATU, who accused the NPA and the judicial system of being manipulated and influenced to take biased political decisions and actions.

This case and the DSO’s handling of it was arguably the single most important factor leading to its downfall, not least because during the course of the DSO’s investigations several mistakes were made. One of these was to violate the principle of attorney/client privilege. Section 14 of the Constitution33 provides for the right of an individual to refuse to disclose admissible evidence.34 This means that any confidential communication made directly between a client and his/her legal advisor, or made by means of an agent, is privileged and a person cannot be compelled to disclose such communication.35 Neither is s/he compelled to disclose any communication that was obtained with a view to litigation.

In 2006 the Directorate of Special Operations had also raided the offices of Zuma’s lawyers and seized documents for the purpose of an investigation into the alleged corruption charges. Zuma brought a case against the DSO for violating attorney client privilege that was upheld by the court.36 The court ruled that the actions of the Directorate of Special Operations were a direct violation of section 201 of the Criminal Procedure Act37 and section 35 (3) (h) of the Constitution.38

With the DSO having taken on such high profile political cases so early in its existence it was almost
inevitable that it would attract strong criticism, at least from those who saw it as meddling in power broking in the ruling party. Criticism focused on the location and mandate of the Directorate, prompting President Thabo Mbeki in 2005 to establish an independent commission of inquiry to look into these matters, headed by Judge Sisi Khampepe.

THE KHAMPEPE COMMISSION OF INQUIRY

It was the Commission’s express mandate to obtain clarity in respect of the location, mandate and operation of the DSO vis-à-vis other relevant government departments or institutions, and to make findings, report on and make recommendations regarding the accountability, effectiveness, efficiency and oversight in respect of the intelligence operations of the directorate.39

After almost one year of deliberations and research, the Khampepe Commission Report40 was finalised. The Commission found that while the Directorate of Special Operations as a structure was not unconstitutional, it did not have a legal basis to collect intelligence. According to Kanyegirire,41 the Commission found that, although the DSO was mandated to gather, keep and analyse information in terms of section 7(1) (a) (ii) of the NPA Act, the evidence adduced before the Commission as well as the onsite visits to the DSO tended to show that the DSO had established intelligence gathering capabilities. As a result, the Commission found that this was in serious violation of sections 1, 2 and 3 of the National Strategic Intelligence Act 39 of 1994.42

The Khampepe Commission also found that the Directorate lacked oversight. Section 43 of the National Prosecution Act 32 of 199843 made provision for the establishment of a Ministerial Coordinating Committee to develop regulations and standard operating procedures (SOP) for the members of the DSO. However, the same section did not make provision for the establishment of a structure or institution to oversee the DSO, which the Ministerial Committee was not expected to do.

Furthermore, Kanyegirire44 states that the Commission found that neither the Minister of Safety and Security (now Police) nor the Minister of Justice and Constitutional Development exercised practical or effective oversight over the DSO. It is also noted that while the NPA Act made provision for the Minister to exercise oversight over the DSO, such provision was not extended to the Inspector General of Intelligence. Section 7(7) of the Intelligence Services Oversight Act45 makes provision for the establishment of an Inspector General for intelligence, whose primary role and functions are to inter alia monitor and review the intelligence and counter-intelligence activities of any service.

So far it has been shown that mistakes by the Scorpions themselves, the failure of the law and executive to determine appropriate oversight over the unit, as well as intense political pressure as a consequence of pursuing investigations that involved high level politicians, all contributed to the downfall of the DSO.

REPLACING THE SCORPIONS WITH THE HAWKS

During December 2007, the African National Congress held its 52nd National Policy Conference, where it was resolved that the Directorate of Special Operations should be incorporated into the South African Police Service.46

The resolution led to the tabling of the General Law Amendment Bill47 and the National Prosecuting Authority Amendment Bill48 before Parliament. During the second sitting of Parliament in 2008, the National Assembly approved the dissolution of the Directorate of Special Operations and its incorporation into the South African Police Service’s Directorate of Priority Crime Investigation. The dissolution of the unit was decried by the media, organised business, and opposition parties, who argued that the state’s ability to investigate and counter corruption had been severely compromised by the closure of the unit. The Democratic Alliance accused the ANC of merging the Scorpions with
the South African Police Service in order to subvert investigations into the police and protect corrupt ANC officials. However, the ANC felt vindicated when, on the 16th of April 2009, after years of legal wrangling, the Acting Head of the National Prosecuting Authority, Advocate Mokotedi Mpshe, addressed the media and announced the withdrawal of corruption charges against Zuma.

According to Mpshe, the National Prosecuting Authority could not proceed with the charges against Zuma because tape recordings of conversations between Bulelani Ngcuka and Leonard McCarthy recorded by the National Intelligence Agency, and which were submitted by Zuma’s attorney, showed ‘evidence of political interference and abuse of power by the former head of the Directorate of Special Operations, Advocate Leonard McCarthy’. The NPA’s decision was made after Zuma made a representation for a permanent stay of prosecution.

Mpshe argued that it was neither possible nor desirable for the National Prosecuting Authority to continue with Zuma’s prosecution. At the time Mpshe said the decision was one of the most difficult he ever had to make. He was reported in the media as saying:

Using one’s sense of justice and propriety as a yardstick by which McCarthy’s abuse of the process is measured, an intolerable abuse has occurred which compels a discontinuation of the prosecution. In the light of the above, I have come to the difficult conclusion that it is neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma. It is a difficult decision because the NPA has expended considerable resources on this matter, and it has been conducted by a committed and dedicated team of prosecutors and investigators who have handled a difficult case with utmost professionalism.

Zuma’s access to the tapes also raised questions about abuse of power by the ruling party, as he had obtained access to intelligence gathered by the National Intelligence Agency while not a member of the government.

The DPCI, dubbed the Hawks, was established on the 6th of July 2009 and was mandated to prevent, combat and investigate national priority offences as well as any other offence or category of offences referred to the Directorate by the National Commissioner. The DPCI was composed of a Commercial Crime Unit, Financial Investigation and Assets Forfeiture Unit, Organised Crime Unit, the Priority Crime Management Centre, and Support Services. It drew its personnel from the Commercial Crime Unit, the former Hi-Tech Project Centre, the Organised Crime Unit and the former Directorate for Special Operations (DSO).

The Hawks had however only been in existence for a very short time before there was a legal challenge to their location in the SAPS, resulting in the Constitutional Court judgment on 17 March 2011 that ruled that Chapter 6A of the South African Police Service Act, as amended, was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI. The Court made two key findings. First, it held that the Constitution imposed an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While the Constitution did not in express terms command that a corruption fighting unit should be established, it imposed a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. This obligation is sourced in the Constitution and the international law agreements that are binding on the state. The Court also pointed out that corruption undermines the rights in the Bill of Rights, and imperils our democracy. Section 7(2) of the Constitution imposes a duty on the state to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights.

Secondly, the Court found that the DPCI did not meet the constitutional requirement of adequate independence. Consequently the legislation establishing the Hawks did not pass constitutional
muster. The main reason for this conclusion was that the DPCI was insufficiently insulated from political influence in its structure and functioning. This is because the DPCI’s activities must be coordinated by a Ministerial Committee, and ultimately, Cabinet. This form of oversight makes the unit vulnerable to political interference.

Further, the Court held that the safeguards that the provisions created were inadequate to save the DPCI from a significant risk of political influence and interference. This comment referred to independence and freedom to operate without fear of political interference.

Ironically, according to these standards, the DSO was probably also not sufficiently independent. Section 31 of the National Prosecuting Authority Act58 held the NPA accountable to the Minister of Justice and Constitutional Development. Nevertheless, the finding of the Constitutional Court requires the government to amend the legislation relevant to the Hawks to guarantee its independence, amongst other things.

CONCLUSION

It is clear from the above discussion that the demise of the Directorate of Special Operations was a result of a series of mistakes by the DSO as well as a consequence of political interference. In view of the Glenister case, it is clear that the government is duty bound to ensure that an agency responsible for investigating corruption should be sufficiently independent to prevent political interference in the cases it investigates. In March 2012, in response to the judgment, the South African Police Service Bill [B7] of 201259 was published. This Bill will no doubt be the subject of tremendous debate and advocacy in the months to come.

To comment on this article visit http://www.issafrica.org/sacq.php

NOTES

4. Ibid, 16.
5. Ibid.
8. Ibid.
9. Ibid.
11. Redpath, The Scorpions, 44.
12. Ibid.
15. Ibid.
18. Ibid.
19. Montesh, A critical analysis of crime investigative systems.
20. Ibid.
24. Ibid.
26. Montesh, A critical analysis of crime investigative system, 129.
38. Section 35 (3) (h) of the Constitution; National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA).
40. Kanyegirire, Investigating the investigators.
41. Ibid.
42. Section 1, 2 and 3 of the National Strategic Intelligence 1994 (Act 39 of 1994).
44. Kanyegirire, Investigating the investigators.
45. Section 7(7) of the Intelligence Services Oversight Act 1994 (Act 40 of 1994).
47. General Laws Amendment Bill of 2008.
55. Hugh Glenister v President of the Republic of South Africa & Others [CCT 48/10]
56. Ibid.
57. Section 7(2) of the Constitution.
58. Section 31 of the National Prosecuting Authority Act 1998.
CONSIDERING THE GLENISTER JUDGMENT

Independence requirements for anti-corruption institutions

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This article analyses the majority and minority positions in the Constitutional Court's Glenister v President of the Republic of South Africa and Others' decision. It will identify the main differences in approach to the issue of the political 'independence' of an investigative agency such as the Directorate for Priority Crime Investigation (the Hawks), and its predecessor, the Directorate of Special Operations (Scorpions). The article assesses what 'room for manoeuvre' in terms of possible legislation the majority judgment leaves to the South African parliament. The Court's approach and these apparent requirements are compared with current provisions for political 'independence' of anti-corruption agencies in Australia and Indonesia, raising, in particular, an assessment of the arguments for and against (a) the need for an anti-corruption investigative agency to be separate from the 'regular' police and prosecution service; and (b) the proposition that an anti-corruption investigative agency requires a higher level of political independence than the 'regular' police service(s). It also looks at issues of cost and effectiveness in establishing and maintaining dedicated independent anti-corruption agencies.

In 1999,2 a Directorate of Special Operations (which subsequently came to be known as the Scorpions), headed by the Deputy National Director of Public Prosecutions, was established within the National Prosecuting Authority (NPA) of South Africa. The mandate of this autonomous directorate was to investigate, gather and analyse information and, as appropriate, institute criminal proceedings 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'.3 Being located within the NPA, the Directorate was subject to the constitutional requirement that the NPA 'exercises its functions without fear, favour or prejudice'.4 The courts interpreted this language to mean that the NPA (and hence also the Scorpions) was to enjoy political 'independence' in the sense that it would not be subject to political direction by government with respect to the exercise of its investigative and prosecutorial functions in individual cases.5 Of necessity, in order to fulfil their mandate, the Scorpions were required to work closely with the South African Police Service

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During the first decade of the 21st century, the Scorpions undertook a number of very high profile investigations, and initiated prosecutions for corruption against, among others, the SAPS Commissioner and the president of the governing African National Congress (ANC), Jacob Zuma, who in 2009 became president of South Africa. At its national conference in 2007, the ANC resolved that the Scorpions should be disbanded and their responsibilities transferred to a new unit within the South African Police Service, accountable to its Commissioner. This was legislatively accomplished through amendments to the NPA Act and the SAPS Act in 2008. The new unit was called the 'Directorate of Priority Crime Investigation' (DPCI), and quickly came to be known as the Hawks.

The decision to disband the Scorpions and replace them with the Hawks, located within the SAPS rather than the NPA, was highly contentious. In 2009 a private businessman, Mr Hugh Glenister, initiated an action in the courts to have the legislation that led to the disbandment declared unconstitutional and invalid. After losing his case in the High Court, he appealed against this decision to the Constitutional Court, South Africa's highest court. In March 2011 the Constitutional Court, in a 5-4 decision, rendered its judgment, which upheld the appeal and declared the legislation establishing the Hawks unconstitutional and ‘invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.’ The court gave the South African government 18 months in which to rectify this situation, during which time the Hawks could continue to operate.

It is worth noting two features of the legislative mandates of these two units that are potentially of significance in appreciating the implications of the Constitutional Court’s decision in the Glenister case. In the first place, investigation of corruption was not specifically mentioned in the original legislative mandate of either the Scorpions or the Hawks. As noted above, the NPA Act specified the investigation of organised crime as the primary mandate of the Scorpions, while in the SAPS Act the primary mandate of the Hawks is ‘to prevent, combat and investigate... national priority offences,’ which in the opinion of the Head of the Directorate need to be addressed by the Directorate. In each case, however, the legislation did provide for the mandate to be expanded to other specified kinds of offences – for the Scorpions through a presidential proclamation, and for the Hawks through a reference by the National Commissioner of the SAPS. The important point here is that neither of these units was ever conceived as a dedicated anti-corruption unit.

The second feature of the legislative mandates of the two units concerns the role of the Executive in determining these mandates. In the case of the Scorpions, it was specified that a presidential proclamation could expand the mandate to include ‘offences or categories of offences;’ this seemed to leave open the possibility that the president could require the Scorpions to investigate a particular offence as well as any category of offences. In the case of the Hawks, the SAPS Act specifies that the mandate of the Hawks is ‘subject to any policy guidelines issued by the Ministerial Committee’ established to oversee this unit of the SAPS. The legislation, however, is silent as to what may or may not be included in such ‘policy guidelines,’ thus leaving open the possibility that they could be very specific in either mandating or prohibiting investigations by the Hawks.

In this article we examine the historic decision of the Constitutional Court in some detail and consider possible implications for the character and status of any anti-corruption agency that might be established in South Africa as a result. We also compare the Court’s approach with provisions for anti-corruption institutions in two other jurisdictions, Australia and Indonesia.
THE GLENISTER JUDGMENT

As noted earlier, the nine-member South African Constitutional Court split 5-4 in its decision in the Glenister case. In summarising the opinions of the majority and minority of the Court, we begin by identifying the main points of agreement among all the judges in the case. First, both opinions reached the conclusion that the state is under an obligation to establish an anti-corruption institution that has a degree of political ‘independence’. Furthermore, both opinions agreed that the source of this obligation arose not directly from the state’s obligations under the international anti-corruption instruments to which it is a signatory, but from the state’s Constitution, although they were not in agreement as to the precise nature and source of this constitutional obligation. In this sense, the Glenister decision can be regarded as specific to the South African constitutional dispensation and therefore not necessarily or readily applicable in other jurisdictions. It was clearly greatly influenced by the Organisation for Economic Cooperation Development’s (OECD) review of specialised anti-corruption institutions, published in 2007.

Beyond this, however, the majority and minority opinions diverged with respect to what is required to satisfy the requirement for ‘independence’ that each identified. We consider each opinion in turn.

The minority opinion

For the anti-corruption unit to discharge its responsibilities effectively in accordance with the Constitution, and avoid undue influence, institutional and legal mechanisms are needed to secure ‘an adequate level of structural and operational autonomy’ for the unit and its members. The Constitution ultimately provides the standards against which the adequacy of the structures and location of the unit are to be assessed.

The SAPS Act stipulates the ‘need to ensure that the Directorate [DPCI]... has the necessary independence to perform its functions... [and] is equipped with the appropriate human and financial resources to perform its functions.”

The minority held that this provides ‘the framework...[and] sets the standard against which the proper implementation and application of the provisions of chapter 6A must be assessed.”

The minority identified the following provisions as indicative that the DPCI enjoys sufficient independence and protections against undue influence to satisfy the requirements of the Constitution.

1. The financial autonomy of the DPCI gives it the necessary independence to perform its functions.
2. The DPCI’s structural and operational autonomy and the appointment of the head of the DPCI are secured through legal mechanisms, to prevent undue influence.
3. Involvement of the NPA and NDPP in investigations conducted by the DPCI is a key element that enhances the operational and structural autonomy of the DPCI, as ‘investigators under the NPA Act do not report to the National Commissioner of Police or the head of the DPCI.”
4. Parliamentary oversight over the functioning of the DPCI and the Ministerial Committee’s policy guidelines relating to the functioning of the DPCI.
5. Judicial oversight through the appointment of a retired judge who investigates complaints to prevent ‘improper influence or interference’ that may result in criminal sanctions.
6. Legislative sanctions that criminalise resistance, hindrance or obstruction of a member of the police force in the exercise of his or her functions, or such actions intended to induce a member not to perform duties or to act in conflict with them.
7. Involvement of the executive, legislature and judiciary in the structures and operations of the DPCI ensures that there are checks and
balances in relation to the independence of the DPCI, and that any encroachment by a single branch of government is checked by another.\(^3\)

### The majority opinion

In contrast to the minority opinion, the majority interpreted paragraph 17B(b)(ii) of the Act creating the DPCI, which refers to ‘the need to ensure [that the DPCI] has the necessary independence to perform its functions’,\(^4\) in the following terms:

\[\ldots[T]his injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification – power to determine policy guidelines and to oversee the functioning of the DPCI.\(^5\)

The majority went on to characterise this ‘interpretive injunction’ as ‘potentially feeble’ and ‘not sufficient to secure independence’ for the DPCI.\(^6\) Indeed, this disagreement over the significance of paragraph 17B(b)(ii)\(^7\) lies at the heart of the different opinions of the majority and minority opinions in this case.

The majority identified the following seven features of the legislation as insufficient for an independent anti-corruption unit:\(^8\)

1. No requirement that members of the DPCI take an oath of office committing to impartiality etc.
2. No job security for members of the DPCI, given the broad powers of the SAPS Commissioner to discharge persons to ‘promote efficiency and economy’ or ‘otherwise... in the interests of’ SAPS. Nor does the Commissioner himself enjoy adequate security of tenure: ‘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, and ‘the absence of specially secured employment may well disincline members of the Directorate from reporting undue interference in investigations for fear of retribution’.
3. The absence of statutorily secured remuneration levels, which ‘gives rise to problems similar to those occasioned by a lack of secure employment tenure’.
4. Decisions of the head of the DPCI, as well as the power of the SAPS Commissioner to refer offences or categories of offences to the DPCI, are subject to guidelines issued by a Ministerial Committee. The majority refer to the powers of the Ministerial Committee variously as ‘untrammelled’, creating ‘a plain risk of executive and political influence on investigations and on the entity’s functioning,’ ‘unavoidably inhibitory’, not ‘conducive to independence, or to efficacy’, ‘inimical to independence’, and creating ‘the possibility of hands-on management, hands-on supervision, and hands-on interference’.
5. ‘Parliament’s powers [of oversight] are insufficient to allow it to rectify the deficiencies of independence that flow from the extensive powers of the Ministerial Committee. This diluted level of oversight, in contrast to the high degree of involvement permitted to the Ministerial Committee in the functioning of the Directorate, cannot restore the level of independence taken at source’. Also: ‘[T]he Ministerial Committee and the head of the DPCI have power to determine what reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI’. The majority also noted that ‘parliamentary committees function in
public... The Ministerial Committee by contrast comprises political executives who function out of the public gaze. The accountability they seek to exact is political accountability. It is inimical to an independent functioning of the DPCI.

(6) The power to involve independent prosecutors in investigations is at the discretion of the National Commissioner of SAPS, who himself does not enjoy adequate independence from political influence... ‘it is a limping and partial mechanism, which underscores the inadequacy of the arrangements to secure the overall independence of the DPCI.’

(7) The complaints mechanism under the statute ‘operates after the fact’ and ‘does not constitute an effective hedge against interference’. The NDPP may ‘on reasonable grounds’ refuse to accede to the complaints judge’s request for information.

The majority did not set out a specific list of requirements for the adequate independence of an anti-corruption unit or agency, but these requirements can only be inferred from their accounting of the deficiencies of the current legislation establishing the DPCI. Any new legislation that may be introduced as a result of the Glenister decision will presumably be open to further scrutiny by the Constitutional Court, should anyone choose to challenge its conformity with constitutional requirements.

SOME INTERNATIONAL COMPARISONS

Unlike South Africa, many countries have established anti-corruption agencies that are independent in the sense that they do not form part of police or prosecutorial agencies. Britain, for instance, established its Serious Fraud Office in 1988. The Office has a mandate that includes anti-corruption investigations, and has prosecutorial as well as investigative responsibilities. It is accountable to the Attorney General, but is separate from the Office of the Director of Public Prosecutions, which also reports to the Attorney General. In 2006 Britain’s Serious Organised Crime Agency was established. Its mandate also includes anti-corruption investigations. It reports to the Home Secretary (who is also the Minister responsible for police), but is not part of any police force and does not have prosecutorial responsibilities.

In this section we consider anti-crime agencies in two other countries, Australia and Indonesia. We have chosen these countries not only because we are familiar with them, but also because they compare interestingly with South Africa in terms of the institutional architectures they have adopted in light of their experiences with corruption. The non-governmental organisation Transparency International publishes a Corruption Perception Index (CPI) based on surveys in countries around the world each year, providing some evidence of these experiences. In its 2011 CPI, on a scale of 0 (= highly corrupt) to 10 (= highly clean), South Africa was assigned a score of 4.1; Indonesia was assigned a score of 3.0; and Australia 8.8. These, then, are countries where perceptions of corruption vary considerably.

Australia

Australia is a federal state consisting of six states and two territories. Anti-corruption provisions differ significantly between the different states, and at the federal (Commonwealth) level. Five of the six states (New South Wales, Queensland, Tasmania, Victoria and Western Australia), as well as the Commonwealth jurisdiction, have established various independent anti-corruption agencies, which are neither part of their police services nor their prosecution services. In some cases these are broad-based anti-corruption agencies, with government-wide mandates, while in others they are agencies specifically mandated to address police corruption. In the state of South Australia anti-corruption investigations are the responsibility of the state police service.

Of the legislation establishing these Australian anti-corruption commissions, only the most
recent legislation providing for the soon to be established Independent Broad-Based Anti-Corruption Commission (IBAC) in Victoria\textsuperscript{52} includes provisions specifically addressing the issue of independence. Section 12 provides that ‘[t]he IBAC is not subject to the direction or control of the Minister in respect of the performance of its duties and functions and the exercise of its powers’, and subsections 6 and 7 of Section 13, Independence of the Commissioner, provide that:

(6) Subject to this Act and other laws of the State, the Commissioner has complete discretion in the performance or exercise of his or her duties, functions or powers.

(7) In particular and without limiting subsection (6), the Commissioner is not subject to the direction or control of the Minister in respect of the performance or exercise of his or her duties, functions or powers.

None of these independent agencies meets all of the independence requirements that can be inferred from the majority opinion in the Glenister decision. But they do all score well on those criteria that seemed to be of greatest importance to the majority. Specifically, all these agencies experience minimal direct government (ministerial) oversight and direction, substantial and robust parliamentary oversight and accountability,\textsuperscript{53} as well as being subject to audit inspections to ensure compliance with the law and respond to complaints.\textsuperscript{54} All publish detailed annual reports.

These independent agencies, however, are not cheap. The state of New South Wales, for instance, has a population (7.23m) that is one-seventh the size of the population of South Africa (50m).\textsuperscript{55} Its Independent Commission Against Corruption (ICAC) received just over $20m in government funding in 2011, and its Police Integrity Commission (PIC) received just under $19m of such funding in the same year.\textsuperscript{56} In considering these costs, it must be borne in mind that the cost of prosecuting corruption is borne by the offices of Directors of Public Prosecutions rather than by the anti-corruption commissions in each of these states. For obvious reasons, it would be very difficult to measure the cost effectiveness of these independent agencies, and as far as we are aware no one has yet succeeded in doing so, nor devised a satisfactory methodology for the purpose.\textsuperscript{57}

**Indonesia**

The role of the Komisi Pemberantasan Korupsi (KPK) as a central anti-corruption agency makes it a particularly interesting institution to analyse and compare with anti-corruption bodies operating in South Africa, Indonesia and Australia. While one single agency cannot operate in isolation to effectively prevent corruption, there may be a case for the usefulness of powerful anti-corruption bodies where there have been particular historical and political experiences of corruption.\textsuperscript{59} The KPK has a significant mandate that makes it a particularly powerful anti-corruption agency in a country recognised both domestically and internationally over time as facing endemic corruption.

The establishment of the KPK in 2003,\textsuperscript{60} following the demise of the Suharto regime,\textsuperscript{61} occurred in a reform climate in which there was a demand for enhanced effectiveness and efficiency of anti-corruption efforts,\textsuperscript{62} with significant independence from government.\textsuperscript{63} In contrast to most of the Australian anti-corruption institutions discussed previously, the legislation establishing the KPK specifically enshrines its institutional independence from the Indonesian government with regard to the performance of its duties and authority.\textsuperscript{64} The KPK’s budget has increased significantly each year since it was first established. In 2010, its allocation from the state budget was just over Rp431bn (approx. ZAR377m). It receives additional funding from external donors; for example in 2010 this amounted to a further Rp77.4bn (approx. ZAR68m).\textsuperscript{65}

The KPK is both an investigative and prosecutorial body that can initiate cases and also take over corruption cases from other agencies,
excluding those agencies from involvement and requiring full disclosure of case information.66 A reflection of the history of corruption within the Indonesian government and public sector is the provision that prevents the KPK from withdrawing an indictment.67

The KPK coordinates other government institutions involved in anti-corruption measures, supervises their activities, conducts its own investigations and prosecutions, implements preventative measures, and monitors the government and public sector.68 Within its authority the KPK has wide-ranging investigative powers, ranging from information requests to wire tapping and financial and travel controls over alleged perpetrators.69

Relevant to the majority’s apparent expectations for independence in the Glenister case, there is minimal direct oversight of the KPK by the Indonesian government or parliament enshrined in the enacting legislation. The legislation makes the KPK responsible to the people and requires regular and transparent reports to the President, Parliament and State Auditor.70 In carrying out the functions of the KPK members must uphold the oath of office71 and perform the tasks with legal certainty, transparency, accountability, proportionality, and in the public interest.72 The KPK is legislatively required to have open access to information.73

The legislation enshrines the institution’s autonomy by stipulating that policies and procedures relating to the authority of the KPK are to be determined by the institution itself. Recruitment is comprehensively detailed in the law,74 with additional appointments and terminations determined by the KPK.75 The KPK decides the way in which corruption cases are handled.76

Given the KPK’s operational environment, the institution has been largely successful. However, early criticism of the KPK was that it avoided high profile cases – initially cases selected by the KPK were deemed by observers to be ‘easy’ and simpler to prosecute.77 The selection of such cases is likely to have been an important strategic decision, considering the KPK was newly established in a setting likely to be hostile to its actions, as it would have given the institution time to build a sound track record and garner public support.78 In an environment hostile to investigations into corrupt activities, taking this approach may have ensured the institution some longevity.

This is particularly interesting when considering the period from 2008-09, when the KPK investigated more high profile cases, with prosecutions and convictions. Since then there have been moves to reduce the independence and powers of the institution.79 2009 saw fabricated evidence against KPK commissioners,80 and moves within Parliament to reduce the institution’s prosecutorial powers.81 Powerful individuals under investigation launched efforts to discredit both the KPK and the Indonesian Anti-Corruption Court.82 Tools designed to protect the integrity of the institution were used by prosecutors or police linked to KPK investigations to manipulate and weaken the anti-corruption institution. The ease with which KPK operations can be restricted by people in power is evidenced by the provisions that allow for the suspension of KPK commissioners as a result of police charges, and dismissal when or if they are brought to trial.

Proposals for legislative amendments designed to weaken the independence of the KPK have been made to the Indonesian parliament. Concerns have been raised that the elements of strength associated with the institution, such as its combined investigative and prosecutorial powers, will be substantially weakened if its prosecutorial powers are to be removed.83

CONCLUSION

The reasoning in the Glenister decision is particular to the South African context, and government and Parliament will need to devise a new integrity system that will meet its interpretation of constitutional requirements. Nevertheless, consideration of the legislative foundations of recently established anti-corruption agencies in Australia and Indonesia might provide some helpful clues as to how this challenge might
best be met. Our brief descriptions of the integrity systems in these two jurisdictions highlight the varied degrees to which independence is legislatively enshrined, and sheds some light on the issues facing independent commissions, compared with units based in prosecutorial (Scorpions) or police (Hawks) services.

Establishing one powerful anti-corruption commission seems to be a preferred strategy in the immediate aftermath of anti-corruption scandals and an endemic problem. But there appears to be a growing belief that multi-agency ‘integrity systems’ in which, for instance, dedicated independent anti-corruption agencies share responsibility with police, prosecutors and ombudsmen, and are themselves subject to robust parliamentary oversight and regular audit and inspection, are most likely to be effective. Such multi-agency integrity systems may offer stronger resistance to unwanted partisan control or influence, and reduce opportunities for corruption, when compared over time with ‘one-stop-shop’ agencies. The fact that neither the Scorpions nor the Hawks were dedicated anti-corruption units (each having much broader investigative – and, in the case of the Scorpions, prosecutorial – mandates) raises the question as to whether either of these two models could be adapted to meet the Constitutional Court’s implicit requirements for political independence, and whether meeting those requirements may necessitate the creation of a dedicated anti-corruption criminal investigation unit in South Africa.

There does not appear to be any consensus on the advantages and disadvantages of combining investigative and prosecutorial responsibilities in a single agency. In Australia the preference has been against this, while in the UK and Indonesia it has been embraced, although it has recently met with some opposition (albeit with questionable motives) in Indonesia. The majority in the Glenister decision does not appear to express any preference as far as meeting the requirements of the South African Constitution is concerned.

Finally, there are the issues of cost and effectiveness. The Australian experience illustrates that establishing and maintaining dedicated independent anti-corruption agencies tends to be expensive even when their functions are limited to investigation, monitoring and education, and that no adequate methodology has yet been devised for satisfactorily assessing either their effectiveness or their cost-effectiveness. In this respect it is noteworthy that none of these Australian agencies entirely meets the ‘gold standard’ of independence that may be inferred from the majority opinion in the Glenister decision. This seems to have left the South African government with the daunting task of trying to determine, on the basis of little and inadequate information, and no significant research, what would be the best, affordable and most cost-effective architecture for an integrity system that would comply with the Constitution’s requirements for independence, as interpreted by the Constitutional Court.

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NOTES

2. Legislative provision for the establishment of the DSO was provided for in Section 4 of the National Prosecuting Authority Amendment Act 2000 (Act 61 of 2000), so the DSO did not officially come into existence as a legal entity until January 2001.
3. Section 7 of the National Prosecuting Authority Act 1998 (Act 32 of 1998) as amended. ‘Organised fashion’ is defined in the Act as ‘the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics’.
5. Ex Parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the RSA, 1996 (4) SA 744 (CC), para 146. And most recently see Democratic Alliance v The President of the RSA & others (263/11) [2011] ZASC 241.
6. The Khampepe Commission of Inquiry Final Report, February 2006, 78 (see endnote 10, below) noted the absence of systems of cooperation and coordination between the DSO and SAPS, and that interactions occurred on an ad hoc basis at an operational level. The Commissioner recognised the likelihood that relations had ‘irretrievably broken down’.
7. For example, the National Prosecuting Service, Asset Forfeiture Unit and the Specialised Commercial Crime Unit, all situated within the NPA.
8. The Commissioner, Jackie Selebi, was eventually convicted, and his appeal against this dismissed, in 2011.
9. Charges against Zuma were dropped, on grounds of prosecutorial improprieties, one month before the election in which he became President of South Africa. Mpshe, Zuma decision not an acquittal, Mail & Guardian, 6 April 2009, http://mg.co.za/article/2009-04-06-mpshe-zuma-decision-not-an-acquittal.
10. Prior to the ANC decision to disband the Scorpions the organisations had been subject to review under the Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations. See Khampepe Commission of Inquiry Final Report, February 2006. The Khampepe Commission of Inquiry examined the legislative and constitutional mandate for the DSO, legislative frameworks, implementation, oversight and accountability and cooperation and coordination relationships among the different intelligence/security agencies. It recommended that the DSO should continue to be located within the National Prosecuting Authority (para. 47.4, 104).
11. We should note that these are not the only anti-corruption units in South Africa. There is also a Special Investigating Unit (SIU) within the NPA, created in 2000, which is charged with investigating corruption. Its focus, however, is on civil litigation, and it does not undertake criminal investigations or prosecutions.
14. For a contemporary view on this, see D Bruce, Without fear or favour: the Scorpions and the politics of justice, SA Crime Quarterly 24, 2008, 11-15.
15. He had earlier unsuccessfully challenged, in the courts, the decision of the Cabinet to initiate these legislative measures: Glenister v President of the Republic of South Africa and Others (Glenister I) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC), Glenister v The President of the Republic of South Africa, Case No 7798/09, 26 February 2010, Western Cape, Cape Town, unreported.
17. Glenister v. The President of the Republic of South Africa.
18. Glenister v. The President of the Republic of South Africa.
19. An offence under chapter 2 and Section 34 of the Prevention and Combating of Corrupt Activities Act 2004 (Act 12 of 2004), however, is defined as a ‘national priority offence’ by Sections 16 and 17, and the Schedule, of the Act.
22. The majority held that this obligation derives from the obligation under Section 7 of the Constitution to ensure that the rights in the Constitution’s Bill of Rights are protected and fulfilled, ‘and that this obligation is constitutionally enforceable’ (para 197 of the judgment). The minority argued that ‘there is no constitutional obligation to establish an independent anti-corruption unit as contended by the applicant and the amicus (para. 113), but went on to argue that ‘for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence’ (para 116). They subsequently referred to this as a requirement for ‘independence’ (para 117) which ‘in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency’ (para 118). Both opinions were in agreement, however, that the state’s international obligations need to be taken into consideration in interpreting the Constitution (as required by the Constitution itself).
25. Ibid, para 124.
26. Ibid, paras 126 and 128 with reference to the police provisions under s205 Constitution. See also para 108 referring to the requirement under section 39(1)(b) of the Constitution to ‘consider international law’ for the purposes of interpreting the scope of the constitutional obligations as they relate to corruption and note 22 above.
29. Ibid, para 133.
30. These provisions are interpreted in light of paragraph 17B of the SAPS Act.
32. Section 17D. See section 171 (2) for policy guidelines determined by the Ministerial Committee and section 17K for parliamentary oversight. Glenister v. The President of the Republic of South Africa paras 142-144 for minority consideration of the Ministerial Committee as a political body undermining the effectiveness of the DPCI and constitutional basis for ministerial oversight. Head of DPCI to decide on investigation of national priority offences in line with policy guidelines as determined by the Ministerial Committee.
33. Section 17C appointment of the head of the DPCI, Deputy National Commissioner by the Minister of Police and the Cabinet, with reporting of appointment to Parliament. Head of DPCI to decide on investigation of national priority offences in line with policy guidelines as determined by the Ministerial Committee.
34. Section 17D (3), DPP is required to invoke the extension of power of investigation under section 28 of the NPA Act.
35. In Glenister v. The President of the Republic of South Africa para 139, Section 17F(4), the NDPP is required to ‘ensure that a dedicated component of prosecutors is available to assist and cooperate with members of the [DPCI] in conducting its investigations.’
36. Glenister v. The President of the Republic of South Africa para 141 referring to Section 17K of the SAPS Act.
37. Section 17L SAPS Act 1995. Appointment may be made by the Minister and also by the head of the Directorate. Under section 17L(12) the minister is to ensure that the retired judge has sufficient personnel and resources to fulfil his or her actions.
42. Ibid, paragraphs 238 and 248.
44. Glenister v. The President of the Republic of South Africa, Paragraphs 217 to 247.
45. See http://www.soca.gov.uk/
46. See http://www.sfo.gov.uk/
47. See http://cpi.transparency.org/cpi2011/results/
48. We recognise, of course that the CPI measures perceptions of corruption rather than the actual extent of it, and that measuring the latter poses serious challenges: see e.g. C Sampford, A Shacklock, C Connors et al (eds), Measuring Corruption, Aldershot: Ashgate, 2006. See also L De Sousa, P Larmour and B Hindess (eds), Governments, NGOs and Anti-Corruption: The new integrity warriors, Abingdon: Routledge, 2009.
49. The arguments for and against separate agencies, as opposed to units within police or prosecutorial agencies, were rehearsed in A Brown, and B Head, Institutional capacity and choice in Australia’s integrity systems, Australian Journal of Public Administration 64(2) (2005), 84-95. See also A Brown et al, Chaos or Coherence? Strengths, Opportunities and Challenges for Australia’s Integrity Systems, Brisbane: Griffith University, Key Centre for Ethics, Law, Justice and Government, and Transparency International Australia, 2005.
51. The NSW Police Integrity Commission, the Victorian Office of Police Integrity, and the Australian Commission for Law Enforcement Integrity.
52. See Note 50. Section 3 of the New South Wales Police Integrity Commission Act 1996 provides that one of the principal objects of the Act is to ‘establish an independent, accountable body’ (the Police Integrity Commission), and of course that state’s Independent Commission Against Corruption (ICAC) includes the word ‘independent’ in the title of the Commission. But in neither case are the meanings or implications of this ‘independent’ status elaborated upon.
53. The independent agencies in New South Wales, Victoria, Queensland and Western Australia are overseen by special purpose parliamentary committees established under the relevant legislation creating these agencies. See e.g. Part 3 of Queensland's Crime and Misconduct Act, 2001, establishing the Parliamentary Crime and Misconduct Committee.
54. The New South Wales legislation establishes independent Inspectors for the ICAC and the PIC. The CMC in Queensland is subject to audit by the Parliamentary Crime and Misconduct Commissioner, who also has powers to investigate complaints against the Commission. In Western Australia there is a similar Parliamentary Inspector of the CCC.
55. Corruption, of course, does not correlate directly with population, but tax revenue roughly does.
56. See http://www.icac.nsw.gov.au/annual-reports?option=com_pubsearch&view=search&task=doSearch&Itemid=4270#results and http://www.pic.nsw.gov.au/files/reports/PIC_Annual_Report_2011_LR.pdf. Costs of the other broad-based commissions in 2011 were: Queensland (population 4.5m) Crime and Misconduct Commission – $49m; Tasmanian (population just over 0.5m) Integrity Commission – $2.8m; Western Australian (population 2.3m) Corruption and Crime Commission – $26m. The Victorian (population 5.6m) government has allocated $170m over four years for the establishment and operation of the new Independent Broad-Based Anti-Corruption Commission there. Currently AU$1 = approx. ZAR8.3.
57. See J Uhr, How do we know if it’s working? Australian Journal of Public Administration 64(2) (2010), 69-76. As noted in Note 35 above, however, some of these independent agencies have been the subject of formal reviews.
58. Corruption Eradication Commission.
59. A Doig, Matching workforce, management and resources: setting the context for ‘effective’ anti-corruption commissions, in L de Sousa et al (eds)


61. President Suharto resigned the Indonesian presidency in 1998 following social and economic upheaval.


64. Article 3 Law No. 30/2002.


66. Articles 6 and 8 Law No. 30/2002.


68. Articles 6 and 8 Law No. 30/2002.

69. Article 7 Law No. 30/2002.

70. Article 15 Law No. 30/2002.

71. Ibid.

72. Article 5 Law No. 30/2002.

73. Article 20 Law No. 30/2002.

74. See Articles 30-31 Law No. 30/2002 for appointments of commissioners.

75. S Butt, Anti-corruption reform in Indonesia: an obituary? Bulletin of Indonesian Economic Studies, 47(3) (2011), 381-394, suggests that competition for seconded positions from police and prosecutions and the use of professional recruitment services underpin the successful recruitment practices of the institution. Fenwick, Measuring up?, 411, raising concerns about transferral of corrupt police and prosecutors to the KPK and incompetence.


81. Von Luebke, The politics of reform: political scandals, elite resistance and presidential leadership in Indonesia, 89.

82. Butt, Anti-corruption reform in Indonesia: an obituary? Discussing current issues facing the Pengadilan Tindak Pidana Korupsi (Tipikor Court).


84. For recent proposals for a ‘model’ agency of this kind, see T Frenzler and N Faulkner, Towards a model public sector integrity commission, Australian Journal of Public Administration 69(3) (2010), 251-262.


86. The idea that anti-corruption investigation and prosecution require a higher level of political independence because of the nature, locus and implications of corruption could arguably be implied from the language of the Court’s decision and the tenor of its argument. As noted in endnote 11, above, the SIU, which is a dedicated anti-corruption unit, does not currently have criminal investigation responsibilities, and arguably does not currently meet the Court’s requirements for political independence either.
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Last year, the Constitutional Court held that the state has an obligation to establish and maintain an independent anti-corruption entity and that the Directorate of Priority Crime Investigation (DPCI), which is located within the South African Police Service (SAPS), does not have an adequate degree of independence. A Bill has recently been introduced in the National Assembly to address the issues raised in the judgment. In accordance with the proposed amendments, the DPCI would remain part of the SAPS. This article argues that this is a mistake and that a wholly separate anti-corruption entity should be established. It also examines the legal and institutional framework required to establish an effective, specialised anti-corruption entity through a comparative analysis of other anti-corruption agencies.

On 17 March 2011, a bare majority of the Constitutional Court declared that the legislation establishing the Directorate of Priority Crime Investigation (DPCI)¹ was inconsistent with the Constitution and invalid because it failed to secure an adequate degree of independence for the DPCI (colloquially known as ‘the Hawks’).² (For a more detailed discussion of the majority judgment and the dissenting opinion, please see the article by Stenning and Lewis in this edition.) Located within the South African Police Service (SAPS), the DPCI replaced the disbanded Directorate of Special Operations (DSO), a specialised crime-fighting unit located within the National Prosecuting Authority (NPA) that investigated organised crime and corruption. (See also the article by Berning and Montesh in this edition.)

Writing for the majority, Moseneke DCJ and Cameron J held that the Constitution itself imposes an obligation on the state to establish and maintain an independent body to combat corruption,³ and a failure on the part of the state to create ‘a sufficiently independent anti-corruption entity infringes a number of rights [in the Bill of Rights]’.⁴ Having considered the impugned legislation, the majority concluded that the DPCI did not have an adequate level of structural and operational autonomy to prevent undue political interference.⁵ The legislation was therefore held to be inconsistent with the Constitution. However, the declaration of constitutional invalidity was suspended for 18 months in order to give Parliament the opportunity to ‘remedy the defect’.⁶

The majority judgment emphasised that ‘the form and structure of the entity in question lie within the reasonable power of the State, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence.’⁷ It concerned itself solely with the defects in the impugned legislation. This article considers the specific findings of the
majority of the Constitutional Court and examines the legal and institutional framework required to establish an effective, specialised anti-corruption entity through a comparative analysis of other anti-corruption agencies.

**LEGAL STATUS**

The legal status of an anti-corruption entity, its form and structure, have lasting implications for its effectiveness and its capacity to insulate itself from undue political interference. The Constitutional Court unanimously agreed that locating a separate anti-corruption unit within the SAPS was not in itself unconstitutional. But it is also neither necessary nor desirable. A report prepared by the Organisation for Economic Cooperation and Development (OECD Report) noted that the independence of anti-corruption entities ‘institutionally placed within existing structures in the form of specialised departments or units requires special attention.’ Within highly centralised, hierarchical structures like the SAPS, there is a risk that individuals will abuse the chain of command ‘either to discredit the confidentiality of the investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions.’ Under the statutory provisions that created the DPCI, the risk of undue political interference was significantly higher. Specifically, the majority of the Constitutional Court criticised the fact that the DPCI’s activities were expressly subordinated to policy guidelines issued by a Ministerial Committee. It also criticised those provisions that afforded the Ministerial Committee the power to manage the decision-making and policy-making process.

There are, as the OECD Report noted, ways of insulating an anti-corruption unit institutionally placed within the police force: by creating separate hierarchical rules and appointment procedures, for instance. But if the anti-corruption unit is effectively insulated, why locate it within the SAPS at all? What purpose does it serve? Corruption within the SAPS is perceived by many, if not most, South Africans to be endemic. The 2011 Victims of Crime Survey found that 21.4% of those who said a government or public official had asked for money, favours or a gift for a service he or she was required to perform, said a police officer had solicited the bribe (52.8% said they had to bribe a traffic officer). There is, therefore, good reason to establish a wholly separate entity untainted by corruption. As the majority of the Constitutional Court observed: ‘…public confidence that an institution is independent is a component of, or is constitutive of, its independence.’

**The legal status of a wholly independent anti-corruption unit**

In response to the Constitutional Court’s judgment, the Minister of Police recently introduced the South African Police Service Amendment Bill (the Amendment Bill) in the National Assembly. In accordance with the proposed amendments, the DPCI would remain part of the SAPS. This article reflects the view that, for the reasons offered above, the anti-corruption unit should not be located within the SAPS. And in the light of the DSO’s disbandment, locating the entity within the NPA is politically unimaginable. Instead, a wholly separate anti-corruption unit should be established. But what form should it take?

The unit could be established as a new Chapter 9 institution. Recognising that certain institutions ‘strengthen constitutional democracy’, the Constitution established a range of state institutions, including the Public Protector and the Human Rights Commission, that are independent of government. They are subject only to the Constitution and the law and ‘must exercise their powers and perform their functions without fear, favour or prejudice.’ Establishing a new Chapter 9 institution would require a constitutional amendment (as well as enabling legislation) but it would secure the unit’s independence, and as importantly, signal the government’s genuine commitment to the unit’s independence. It would also mean that the anti-corruption unit is less susceptible to the whims of Parliament.
However, some Chapter 9 institutions have been criticised for their poor performance, their limited credibility, the high salaries of some of the commissioners, and their internal conflicts. There have also been accusations of politicisation. It is therefore highly unlikely that Parliament would establish another. Furthermore, the ANC’s response to the Constitutional Court’s judgment suggests that the political will is simply not there. For example, the ANC Secretary-General, Gwede Mantashe, said the judgment itself “cast aspersions on the work of Parliament” and “once you have that kind of judgment that ventures into political weighting of views, then… it’s quite a slippery road we have embarked on.”

President Jacob Zuma also made a thinly veiled reference to the Court’s judgment while proposing a review of the Constitutional Court’s powers: “There are dissenting judgments which we read. You will find that the dissenting one has more logic than the one that enjoyed the majority.”

An alternative would be for Parliament to enact legislation establishing an anti-corruption agency (ACA) entirely separate from the SAPS and the NPA. A number of successful ACAs have been established as separate statutory bodies. Hong Kong’s Independent Commission Against Corruption (ICAC), New South Wales’ Independent Commission Against Corruption (NSW ICAC) and Botswana’s Directorate on Corruption and Economic Crime (DCEC) were all established as independent statutory bodies. A statutory body would have to have an adequate level of structural and operational autonomy to be compatible with the Constitution. And, although such a body could easily be disbanded by an Act of Parliament (as happened with the Directorate of Special Operations), it would have to be replaced, because the state must maintain an independent anti-corruption entity. While it must be conceded that establishing a separate statutory body is also unlikely to enjoy the support of the ANC, it avoids the complications of a constitutional amendment, is likely to enjoy more support than establishing a new Chapter 9 institution, and is preferable to a specialised unit located within the SAPS.

A wholly separate anti-corruption entity could provide centralised leadership in core areas of anti-corruption activity but it would have to work closely with other institutions, including the NPA and the SAPS. After all, an ACA’s success depends largely on cooperative relationships with other state institutions.

**Relationship with other institutions**

The majority of the Constitutional Court commended the provisions of the impugned legislation that stipulated that the SAPS National Commissioner could request that prosecutors from the NPA assist the DPCI in conducting investigations. Similar provisions providing for inter-agency cooperation should be retained for any future anti-corruption entity. In other jurisdictions, ACAs have encountered resistance from law enforcement officers. As the OECD Report noted:

> “The main challenge of institutions mandated to fight corruption through law enforcement is to specify their substantive jurisdiction (offences falling under their competence), to avoid the conflict of jurisdictions with other law enforcement agencies and to ensure efficient co-operation and exchange of information…”

Therefore, if Parliament is to establish a wholly separate anti-corruption entity, the enabling legislation must specify the entity’s substantive jurisdiction to avoid a conflict of jurisdictions and the duplication of functions and resources with the SAPS and the NPA. South Africa also has a number of other institutions with a mandate to address corruption in some way. These include the Special Investigating Unit (SIU), the Asset Forfeiture Unit (located within the NPA), the Public Protector, the Auditor-General and the National Treasury. Some of the functions performed by these institutions – for example, the Treasury’s preventative role of prescribing effective working systems – could be transferred to the new entity. Others, for example, the work of the Asset Forfeiture Unit, should remain with the other agency. This utilises the experience and expertise of other institutions. It also ensures that the anti-
corruption entity does not needlessly undermine the other institutions nor overstretch.

Ultimately, however, an anti-corruption entity’s relationship with other institutions will largely depend upon its mandate.

**MANDATE**

In Hong Kong, the ICAC’s mandate includes investigation, prevention and education.\(^37\) Its Operations Department investigates alleged violations of specified offences, and it is allocated almost three-quarters of the Commission’s budget.\(^38\) The Commissioner must investigate ‘any’ alleged or suspected offence,\(^39\) and a well-publicised hot-line service enables members of the public to report corruption.\(^40\) The Department also receives complaints from regional offices and government departments. In recent years, it has taken a more proactive approach, for instance by deploying informants and undercover agents.\(^41\) In other jurisdictions, ACAs choose cases selectively. The NSW ICAC may conduct an investigation on its own initiative or as a result of a complaint,\(^42\) but it prioritises complaints and investigates only those that expose significant or systemic corruption.\(^43\) A selective approach may be necessary if resources are limited, but as Meagher notes, it ‘require[s] both a strong ability to justify such choices, and capable alternative institutions to pursue cases on referral’.\(^44\) Moreover, it cannot work in an environment where the anti-corruption entity is vulnerable to charges of partiality.\(^45\) In light of the accusations of partiality made against the DSO,\(^46\) and the corruption within the SAPS, a selective approach is not appropriate for South Africa. The anti-corruption entity should therefore investigate all allegations of corruption. It will, however, require significant resources to do so.\(^47\)

The ICAC’s other two departments are the Corruption Prevention Department and the Customer Relations Department. The Corruption Prevention Department reviews and revises the practices and procedures of government departments to identify and remove weaknesses. It also provides free, confidential corruption prevention advice to private organisations.\(^48\) Finally, its Customer Relations Department builds awareness of the evils of corruption and the role of the Commission in combating it. Other ACAs have more restrictive mandates and only a few have powers to prosecute, for example Nigeria’s Economic and Financial Crimes Commission (EFCC) and Indonesia’s Komisi Pemberantasan Korupsi (KPK).\(^49\)

Having held that the Constitution itself imposes an obligation on the state to establish and maintain an independent body to combat corruption, the majority of the Constitutional Court considered South Africa’s obligations under international law to be of ‘the foremost interpretive significance’.\(^50\) Section 39(1)(b) of the Constitution states that when interpreting the Bill of Rights a court ‘must consider international law’, and section 233 states that every court ‘must prefer any reasonable interpretation of… legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. There was, therefore, ‘no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law’.\(^51\) It is therefore instructive to consider South Africa’s obligations under international law when considering what the appropriate mandate of the anti-corruption entity should be.

Under the various international agreements signed and ratified by South Africa, the state must investigate allegations of corruption;\(^52\) ensure the existence of a body or bodies that prevent corruption by, *inter alia*, establishing and promoting effective practices and by increasing and disseminating knowledge about the prevention of corruption;\(^53\) and undertake public information activities to raise awareness of the existence, causes and gravity of the threat posed by corruption.\(^54\) To comply with its obligations under international law, South Africa could emulate the Hong Kong model of investigation, prevention and education. Parliament will need to be mindful, however, of the limited success others have had replicating this model and consider very carefully what made the ACAs succeed or fail.\(^55\)
It is not, however, advisable for the anti-corruption entity to be mandated to prosecute cases directly, unless it is relocated within the NPA. Instead, it should refer its findings to the NPA. There are several reasons for this. First, the Constitution states that there is a single national prosecuting authority in South Africa and it has the power to institute criminal proceedings on behalf of the state. Second, it allows for the additional and objective scrutiny of the relevant evidence by the prosecuting authority, and avoids the problems that may arise with jurisdiction. Third, a narrower mandate would enable the unit to focus on three primary functions: to investigate all allegations of corruption, prevent corruption and educate the public about the dangers of corruption. But the anti-corruption entity must be given the powers it needs to make these things happen.

POWERS

To be effective, an anti-corruption entity needs investigative powers comparable to those of the SAPS. This would include the authority to enter and search any premises, to seize evidence during the course of an investigation, and to arrest and detain a suspect or suspects. It should also have the power to subpoena witnesses, intercept communications, access financial data and freeze assets. Additionally, the anti-corruption entity will need the legal authority to refer matters to other bodies (including the SAPS) if it has uncovered evidence of malfeasance, maladministration or criminality outside of its substantive jurisdiction (see Relationship with other institutions above).

Some of the more successful ACAs, including Hong Kong’s ICAC and Singapore’s Corrupt Practices Investigation Bureau (CPIB), have special investigative/coercive powers. The CPIB may, for example, examine bank accounts and require explanations of unexplained or disproportionate wealth (as well as certain asset transfers). De Sousa describes other coercive powers attributed to various ACAs, most of which are incompatible with the Bill of Rights, due process and the rule of law. For example, certain ACAs can hold hearings in public or private without the rules of evidence applying. Others can require a person to answer any question, regardless of the possibility of self-incrimination. In Botswana and Hong Kong, there is a presumptive forfeiture of unexplained wealth. South Africa should eschew such measures, limiting any special investigative powers to those that are strictly necessary, proportionate and constitutional.

In addition to comprehensive investigative authority, the structural and operational autonomy of an anti-corruption entity is a key factor in its success or failure. The process for appointing and removing the director of an anti-corruption entity is therefore of singular importance.

APPOINTMENT AND REMOVAL OF THE DIRECTOR

The appointment and removal of the director of the anti-corruption unit can fundamentally compromise the unit’s independence if sufficient safeguards are not in place. In Botswana, the president appoints the director of the DCEC ‘...on such terms and conditions as he thinks fit’. A president could therefore appoint a weak or compliant director to intimidate or repress critics and shield his supporters.

The majority of the Constitutional Court held that the DPCI’s conditions of employment were incompatible with the level of independence required. Under the impugned legislation, the head of the DPCI is ‘appointed by the Minister in concurrence with the Cabinet’ as a Deputy National Commissioner of the SAPS. The National Commissioner of the SAPS is empowered to ‘discharge’ any member of the DPCI, including the head of the Directorate, if, for reasons other than unfitness or incapacity, the discharge ‘will promote efficiency or economy’ or will ‘otherwise be in the interest of’ the SAPS. The majority of the Constitutional Court held that the members of an anti-corruption entity should have specially entrenched employment security. It compared the provisions of the
impugned legislation with the legislation establishing the DSO (describing the contrast as ‘signal’). It noted that the head of the DSO was appointed by the National Director of Public Prosecutions (NDPP) (whose own appointment was non-renewable) and that he or she could only be removed from office on grounds of misconduct, continued ill-health or incapacity, or if he or she was no longer a fit and proper person to hold the office. These protections ‘served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.’

The Amendment Bill tabled in the National Assembly aims to rectify this by replicating the protections enjoyed by the NDPP and previously enjoyed by the head of the DSO. The Bill specifies that the head of the Directorate may only be suspended or removed from office for misconduct, on account of continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office. However, the proposed amendments do not provide the head of the DPCI with sufficient protection, nor would they protect senior members of a separate anti-corruption unit.

First, the Minister may remove the head of the Directorate on the grounds specified following ‘an enquiry into his or her fitness to hold such office as the Minister deems fit.’ The reasons for the removal and the representations of the head of the Directorate must be communicated to Parliament, but whereas Parliament can restore the NDPP to his or her office, the Amendment Bill does not confer on Parliament a similar power. The majority judgment specifically referred to Parliament’s veto over the removal of the NDPP when it detailed the special protections afforded the members of the DSO. Its absence from the Amendment Bill may therefore be an oversight, but if Parliament cannot restore the head of the Directorate, what purpose does it serve communicating the reasons for the removal and the representations of the head of the Directorate?

Second, the Minister may remove the head of the Directorate ‘if he or she is no longer a fit and proper person to hold the office.’ This is too vague and affords the Minister unnecessary and excessive discretion. In September 2007, President Thabo Mbeki suspended the NDPP, Vusi Pikoli, because of ‘an irretrievable breakdown in the working relationship between the Minister of Justice and Constitutional Development and the NDPP.’ An enquiry into his fitness to hold the office of NDPP concluded that the government had failed to demonstrate that Pikoli was no longer a fit and proper person to hold the office of NDPP and recommended that he be restored. Instead, President Kgalema Motlanthe removed him from office, citing the report’s finding that he was insensitive to matters of national security. Pikoli maintained that he was suspended to stop the prosecution of the National Commissioner of Police, and initiated court proceedings to challenge his removal. He subsequently settled out of court. As a ground for removal, the meaning of the term ‘no longer a fit and proper person to hold the office’ is so vague that it is susceptible to abuse and its previous application does little to reassure the head of the DPCI and the public that he or she is adequately protected from political interference.

Instead, senior members of a wholly independent anti-corruption agency should only be removed on the grounds of misconduct, continued ill-health or incapacity. Other jurisdictions provide a similar level of job security. In Uganda, the Inspector General of Government (IGG) and the Deputy Inspector General can only be removed from office by the President, on the recommendation of a parliamentary tribunal, for specified causes.

The appointment process for the head of the anti-corruption entity must be transparent to ensure the entity’s credibility. The OECD Report noted that ‘appointments by a single political figure (e.g. a Minister or the President) are not considered good practice.’ In terms of the Amendment Bill, the head of the DPCI is still appointed by the Minister, with the concurrence of Cabinet. There are no criteria to be satisfied. As it does not
require the appointment of ‘a fit and proper person, with due regard to his or her experience, conscientiousness and integrity,’ it would not be possible to successfully challenge an unsuitable appointment in a court of law (unlike the appointment of the NDPP). In other words, it does nothing to ensure the appointment of a person of integrity.

There are, however, a number of alternatives. The Commissioner of NSW ICAC is appointed by the Governor (the state representative of the Australian monarch) with the approval of a parliamentary joint committee. The IGG and Deputy Inspectors General in Uganda are appointed by the President with the approval of Parliament. In South Africa, the Public Protector and the Auditor General are appointed by the President on the recommendation of the National Assembly. The head of the anti-corruption entity could be appointed in a similar way. Alternatively, and preferably, the appointment could be made by a selection committee consisting of persons designated by the National Assembly, the President and other key stakeholders. This would ensure the appointment of a person of integrity on the basis of a wide consensus and would avoid the appearance of partiality. The head of the anti-corruption entity should be appointed for a fixed, non-renewable term.

The majority of the Constitutional Court also held that ‘[t]he absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure.’ The impugned legislation stipulated that the conditions of service are governed by regulations determined by the Minister of Police. By contrast, the head of the DSO enjoyed a minimum rate of remuneration (determined by reference to the salary of a High Court judge). The salaries of the Public Protector and the Auditor-General are similarly determined by reference to the salaries of the judiciary. The Amendment Bill adequately addresses this issue by stipulating the minimum rates of remuneration for senior members of the DPCI (determined by reference to the salary level of the highest paid Deputy National Commissioner of the SAPS).

ACCOUNTABILITY/OVERSIGHT

According to the majority of the Constitutional Court, its ‘gravest disquiet’ with the impugned legislation arose from the fact that the DPCI’s activities were to be ‘coordinated by Cabinet.’ The political oversight the legislation required was, considered the Court, ‘incompatible with adequate independence.’ It accepted that ‘ultimate oversight by the executive’ may be required, but it held that ‘the power given to senior political executives to determine policy guidelines, and to oversee the functioning of the DPCI… lays the ground for an almost inevitable intrusion into the core function of the [DPCI] by senior politicians, when that intrusion is itself inimical to independence.’

And yet the Amendment Bill retains an element of executive control. In terms of the proposed amendments, the head of the Directorate’s power to determine national priority offences is expressly subordinated to policy guidelines issued by the Minister and approved by Parliament. While the power to prevent, combat and investigate corruption does not appear to be similarly constrained, the fact that the head of the Directorate must ensure that the DPCI observes the policy guidelines issued by the Minister risks overwhelming the DPCI and introduces an unhealthy dynamic between the Minister and the head of the Directorate.

Parliament will need to ensure that the anti-corruption entity has an adequate level of structural and operational autonomy, but it must also ensure that the entity is held accountable. The question then, is how, and by whom, should the anti-corruption entity be held accountable?

According to the OECD Report, employing ‘special external oversight committees’, which include representatives of different state and civil society bodies, is an example of good practice. In Hong Kong, three citizen oversight committees oversee each of ICAC’s departments, and a fourth
is the principal advisory body and oversees all ICAC's activities. These committees are chaired by civilians and their members are prominent citizens appointed by the executive in recognition of their distinguished achievements. The Operations Review Committee oversees the department that investigates alleged violations of specified offences. It receives reports about all complaints of corruption made to the ICAC and an investigation cannot be terminated without its approval. The NSW ICAC operates under the scrutiny of a parliamentary joint committee and an Inspector. The Inspector is independent of NSW ICAC and is responsible for investigating complaints against its officers and overseeing the use of its powers.

Parliament should carefully consider the institutional and political context in which the anti-corruption entity will operate. A parliamentary committee, similar to the parliamentary joint committee in New South Wales, and citizen oversight committees, similar to those in Hong Kong, would ensure that the anti-corruption entity's activities are carefully scrutinised and, if necessary, restrained, while strengthening its independence.

FINANCING

The United Nations Convention against Corruption requires State Parties to provide adequate resources to anti-corruption agencies. A common cause of failure (or limited success) is an expanded mission with modest or inadequate resources. Establishing and maintaining an effective, independent anti-corruption entity therefore requires considerable resources. The anti-corruption entity must control its own finances and, like other organs of state, it must be audited by the Auditor-General and be subject to oversight by the Standing Committee on Public Accounts.

CONCLUSION

The Constitutional Court has compelled Parliament to reconsider and amend the legislation establishing the DPCI. Parliament should go further. It should facilitate a genuine dialogue with civil society and other stakeholders, and enact legislation establishing an effective, independent, specialised anti-corruption entity. In doing so, it should be mindful of the state’s international and constitutional obligations, and should carefully consider the successes and failures of foreign agencies and the contributing factors (including focus, resources, and institutional framework). If it merely remedies the defects in the legislation, as it has proposed to do, it will have missed another opportunity to establish an anti-corruption entity that could successfully and fearlessly combat corruption in South Africa.

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NOTES

2. Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC).
5. Ibid, 412.
7. Ibid, 409. See also 423 (‘We do not prescribe to Parliament what [the obligation to create an independent anti-corruption entity] requires.’)
8. Ibid, 397 (Moseneko DCJ and Cameron J (writing for the majority) concurred with Ngcobo CJ (writing for the minority). See also Ibid, 364-366, 386.
10. Ibid.
13. OECD, Specialised Anti-corruption Institutions, 17.
14. See, for example, the surveys discussed in Andrew Faul, Oversight agencies in South Africa and the challenge of police corruption, ISS Paper 227, November 2011. See also Andrew Faul, Corruption in the South African Police Service: Civilian perceptions and experiences, ISS Paper 226, November 2011.
17. Glenister v President of the Republic of South Africa, 412.
19. South African Police Service Amendment Bill, s.5.
23. Ibid.
29. Independent Commission Against Corruption Ordinance, s.12.
33. Independent Commission Against Corruption Ordinance, s.12.
35. Meagher, Anti-corruption Agencies, 91.
36. Meagher notes that in Hong Kong ‘this required a huge, and hugely expensive, agency.’ Meagher, Anti-corruption Agencies, 90.
37. In accordance with Independent Commission Against Corruption Ordinance, s. 12(d)-(f).
38. For Nigeria, see Economic and Financial Crimes Commission (Establishment) Act 2004, ss. 6(m), 13(2); for Indonesia, see Law on the Commission for the Eradication of Criminal Acts of Corruption 2002 (Law 30 of 2002), art. 6.
40. Ibid, 410.
41. United Nations Convention Against Corruption, art. 36.
42. Ibid, arts. 5(2), 5(3), 6(1), 12; Southern African Development Community Protocol Against Corruption, art 4(1).
47. Meagher, Anti-corruption Agencies, 96.
49. Ibid.
50. Meagher, Anti-corruption Agencies, 96.
52. Glenister v President of the Republic of South Africa, 397, 408-409.
53. Ibid, 421.
56. Independent Commission Against Corruption Ordinance, s.12.
57. OECD, Specialised Anti-corruption Institutions, 9, 14.
58. Ibid.
59. Ibid, s.35.
60. Ibid.
62. Ibid, s.35.
63. Ibid.
64. Ibid.
65. Glenister v President of the Republic of South Africa, 415.
66. Ibid, 416.
67. Ibid. These protections applied also to investigating directors within the DSO.
68. Ibid. These protections applied also to investigating directors within the DSO.
69. Glenister v President of the Republic of South Africa,
416.
71. South African Police Service Amendment Bill, s.8.
72. Ibid.
73. Ibid.
75. Glenister v President of the Republic of South Africa, 416.
82. OECD, Specialised Anti-corruption Institutions, 18.
83. South African Police Service Amendment Bill, s.6.
84. See National Prosecuting Authority Act 32 of 1998, s.9(1).
85. See Democratic Alliance v President of the Republic of South Africa and Others 2012 (1) SA 417 (SCA).
86. Independent Commission Against Corruption Act, ss.5, 5A.
89. The NDPP is appointed by the President alone.
91. The majority of the Constitutional Court held ‘the existence of renewable terms of office…[is] incompatible with adequate independence’. Glenister v President of the Republic of South Africa, 423.
92. Glenister v President of the Republic of South Africa, 416.
94. The Public Protector’s remuneration must not be less than that of a High Court judge (and cannot be reduced, nor can the terms and conditions of employment be adversely altered during his or her term of office). Public Protector Act 1994 (Act 23 of 1994), s.2(2). ‘The Auditor-General’s salary, allowances and other benefits’ must be ‘substantially the same as those of the top echelon of the judiciary’. Public Audit Act 2004 (Act 25 of 2004), s.7(2).
95. Ibid, 414.
96. Ibid, 419.
97. South African Police Service Amendment Bill, s.7(a).
98. Ibid, s.7(b).
99. Ibid, s.7(d).
100. OECD, Specialised Anti-corruption Institutions, 19.
102. Reports of ICAC Advisory Committees 2010, 12.
103. Independent Commission Against Corruption Act, ss.57A-57G.
104. See, for example, United Nations Convention against Corruption, art. 6(2).
The Directorate for Priority Crime Investigation (DPCI), commonly known as the ‘Hawks’, is currently at a crossroads. The Constitutional Court judgment in Glenister vs the President of South Africa and Others has called into question the Directorate’s continued existence in its current form. One of the most important questions raised by the Constitutional Court judgment is whether the DPCI can be sufficiently independent while located within the SAPS. This article presents arguments in support of the view that separating the unit from the SAPS is essential to build public confidence in the unit and to meet the requirements of the judgment.

International experience suggests that combating organised crime and corruption can only be successful if there is a strong political commitment on the part of governments to tackle these challenges. Unsurprisingly, countries that experience a high level of corruption by politicians and high-ranking civil servants are unlikely to formulate a suitable institutional response to corruption. It follows that those who abuse state resources will not be dealt with effectively.

In the case of Glenister vs. the President of the Republic of South Africa and Others (hereafter referred to as ‘the Glenister case’), the South African Constitutional Court noted that:

Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.

Organised crime and drug syndicates also pose a real threat to our democracy.

This, then, is the situation, despite the South African government undertaking to tackle organised crime and corruption through the ratification of a range of UN instruments aimed at committing member states to doing so. Included in these international agreements is the requirement for states to establish an independent body to fight organised crime and corruption.

The Directorate for Priority Crimes Investigation (DPCI), commonly known as the ‘Hawks’, was established in South Africa in 2009 to fight ‘priority crimes’, including organised crime and corruption. The unit took over from its predecessor, the Directorate of Special Operations (DSO), commonly known as the ‘Scorpions’. The Scorpions were disbanded following a decision by the ruling African National Congress (ANC) during its 2007 National Conference at which Jacob Zuma was elected president of the party.

As a consequence of the Constitutional Court judgment the DPCI is now at a crossroads.
Important decisions need to be made by the legislature with respect to the mandate, location and structure of the unit. Key to these decisions is whether the Directorate can be adequately independent, as required by the Constitution and international law, while remaining a unit of the SAPS. This article argues that in order for the DPCI to be effective as an organised agency fighting crime and corruption, it has to exist separately from the SAPS.

CONTEXT

In a report to the Portfolio Committee for Justice and Constitutional Development in October 2011, the head of the Special Investigating Unit (SIU), Willie Hofmeyr, stated that corruption involving government procurement was costing South Africa as much as R30 billion each year. He noted that his unit was investigating 588 procurement contracts to the value of R9.1 billion and 360 conflict of interest matters to the value of R3.4 billion. These were matters related to public sector corruption only, and did not include corruption in the private sector where no public money was involved (for instance, through collusion to reduce competition). In addition, the 2010/11 SAPS Annual Report recorded that the police were investigating 179 organised crime groups, up from 145 groups two years previously. In a Justice Crime Prevention and Security Cluster (JCPS) briefing on 18 February 2012, the Minister of Justice and Constitutional Development, Jeff Radebe, reported that the total value of assets frozen, involving 157 suspects under investigation for priority crimes, was R579 million.

Corruption appears to have permeated the executive itself. Two Cabinet members were fired towards the end of 2011 for their roles in scandals in which it was alleged that they had abused their powers to irregularly benefit themselves or those connected to them. Minister for Public Works, Gwen Mahlangu-Nkabinde, was removed for her role in the awarding of two tenders worth R1,116 billion and R604 million respectively to a politically well-connected businessman, Roux Shabangu, for the lease of new premises for the SAPS at well above market-related prices. In addition, Minister for Cooperative Governance and Traditional Affairs, Sicelo Shiceka, was fired, amongst other things for misusing hundreds of thousands of rands in state resources to visit a girlfriend in a Swiss prison.

Between 2007 and 2011 South Africa fell ten points (from a rating of 5.1 to 4.1) on the Transparency International Corruption Index. This resulted in the country’s lowest score since the establishment of the index. Thus the Constitutional Court judgment on the DPCI comes at a time when there are indications that levels of organised crime and corruption are worsening. Consequently, pressures on the executive to deal with corruption have increased, with citizens starting to take the initiative to hold government to account. For example, the Constitutional Court judgment on the legislation establishing the Hawks was the result of a case brought by a private citizen, Hugh Glenister. Early in 2012, the trade union federation COSATU, in partnership with other organisations, formed Corruption Watch, a new non-governmental organisation to expose corruption and hold government to account for acts of corruption by civil servants and politicians. (See the interview with David Lewis, Director of Corruption Watch, in this edition of SACQ.)

At the end of 2012 the African National Congress will hold its elective congress in Mangaung. The last conference, held in 2007, saw President Thabo Mbeki ousted from his position as president of the ruling party, and replaced by Jacob Zuma. The conference this year is likely to be as highly contested and fraught, as factions within the ruling party and its alliance partners (the South African Communist Party and COSATU) fight each other for position.

Any structure that investigates corruption and organised crime, as the DPCI is mandated to do, is sure to find itself having to investigate politicians, high-level civil servants and politically connected business people. When it does so, it will come under intense political pressure as powerful individuals seek to protect themselves or
their associates. This will place tremendous pressure on the DPCI, as any investigation it may conduct into allegations of corruption by ANC members who hold political office may be interpreted as being politically motivated.13

POLITICAL INTERFERENCE IN THE SAPS

The possibility of political interference in the SAPS was identified in the Glenister Judgment as compromising the independence of the DPCI. In this section of the article we present recent examples of apparent political interference in the SAPS.

Firstly, there is no requirement that the National Commissioner has to be a police officer, or a person who has the skills, experience or personal integrity necessary to effectively manage a large police organisation. The independence of the SAPS is consequently undermined by the fact that the appointment might be based on political position or status. The two most recent SAPS National Commissioners were appointed primarily because of their long-standing membership and political seniority in the ANC, and had no policing experience. Candidates for the post of National Commissioner are also not subject to a transparent screening process to determine whether they are suitable for the position.

At the time of writing the National Commissioner of Police, Bheki Cele, had been suspended and was facing a judicial inquiry to determine whether he was fit for office. His suspension resulted from his authorisation of the deal to lease premises from Shabangu (referred to above in relation to the Minister of Public Works). Although an investigation by the Public Protector into the lease deal found that Cele had acted irregularly and illegally,14 the matter was not referred for criminal investigation (as had been the case when allegations of corruption arose against the former National Commissioner, Jackie Selebi). Rather, the matter was referred to a board of inquiry, which did not have powers of investigation or subpoena, and was thus less likely to find evidence relating to corruption, than if the board had such powers.

One of the clearest signs of direct political interference in the SAPS involves the appointment of the Head of Crime Intelligence, Lieutenant-General Richard Mdluli. Two months after Jacob Zuma was sworn in as president, Mdluli was irregularly appointed to this position. While the SAPS Act requires that the National Commissioner appoint the deputy national and divisional commissioners,15 acting National Commissioner at the time, General Tim Williams, revealed that he was excluded from the process of interviewing and appointing Mdluli. Instead the interview was conducted by a panel consisting of only four cabinet members and no police officials.16 It was reported in the media that Mdluli was appointed to this position because President Jacob Zuma believed he owed Mdluli a favour for having assisted him to escape various criminal charges.17

A short while later, Mdluli was investigated by the Hawks and charged with murder and corruption.18 During his bail hearing Mdluli argued that the charges had no substance but were motivated by a political conspiracy against him. To support this claim, he handed as evidence to the court a ‘ground intelligence report’, providing details about various senior ANC politicians and claiming that they had met to discuss unseating Zuma as president at the upcoming 2012 ANC National Conference.19 Mdluli’s statement that he had presented Zuma with this report could easily be read as evidence of the abuse of state resources, and his official police position, because it showed that he had used police intelligence resources to spy on senior ANC politicians.

However, after representations made by his lawyers behind closed doors, the National Prosecuting Authority (NPA) controversially withdrew the criminal charges against Mdluli.20 What made this particularly controversial is that prior to dropping the charges the NPA had commissioned an independent legal opinion, which found that there was sufficient evidence to prosecute him.

More recently it was reported that the head of the Hawks, Lieutenant-General Anwar Dramat, had
shelved criminal investigations into Mdluli and other members of the SAPS Crime Intelligence Division, involving widespread misuse of police resources, allegedly on instruction from the current Acting National Commissioner, General Nhlanhla Mkhwanazi.22

In another example of possible political interference in the SAPS, the media reported at the end of March that members of the VIP unit protecting Zuma had been irregularly promoted, some jumping as many as six ranks and tripling their salaries in a single promotion, in contravention of current guidelines.23

Whether or not political interference will ultimately be found to have taken place, the very public nature of the various allegations and the refusal of the SAPS to comment on what it has termed an internal matter, has created the perception that the SAPS is subject to political interference.

POLICE CORRUPTION AND PUBLIC PERCEPTIONS

It is important for a unit tasked with investigating corruption and organised crime to have credibility amongst citizens, and to enjoy public confidence.24 Pierre de Vos has argued that the Constitutional Court judgment in the Glenister case held that ‘the state could not create a body that it claimed was independent but that did not appear independent to the reasonable member of the public’:25

Public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.26

Since its establishment in 1995 the SAPS has struggled to contain corruption amongst its own members, not least at the highest level of the organisation. David Bruce has argued that ‘[n]ot only has the SAPS actively undermined its corruption control mechanisms but it has done so whilst management systems, which constitute the basic mechanism of control, have been undermined.27 This seems to be supported borne out by evidence of a high level of reported police corruption. The Minister of Police, Nathi Mthethwa, reported that in the 2010 and 2011 financial years there were 1061 investigations into corruption committed by members of the SAPS.28 In Gauteng alone, 469 police officers were arrested and charged for corruption between September 2010 and October 2011.29

This has had an effect on public perceptions of the police. Studies have shown that for many years, a significant proportion of the public have viewed the SAPS as untrustworthy and corrupt.30 The 2011 Victims of Crime Survey conducted by Statistics South Africa noted that of those who admitted paying a bribe to a public official over the previous 12 months, 21.4% involved the police, representing an increase from the 18.6% who admitted doing so in 2007.31 Of those who stated that they were dissatisfied with the police, 46.6% blamed corruption as the cause of their unhappiness.

This would suggest that for the DPCI (or another anti-corruption agency) to enjoy public confidence it would need to be independent of the police. If the DPCI were to remain a unit of the SAPS, the head of the DPCI would remain subordinate to the National Commissioner, and the National Commissioner would remain responsible for determining the budget of the unit.32 Moreover, DPCI members would wear the same uniforms, drive the same vehicles and be held accountable by the same policies and procedures as the rest of the SAPS. Thus, from the point of view of a member of the public, there would be no reason to view the DPCI differently to any other unit of the SAPS.
THE SAPS AMENDMENT BILL

It took a great deal of time and effort, and a case that went all the way to the Constitutional Court, but in March 2011 businessman Hugh Glenister successfully challenged the legislation that replaced the Scorpions with the Hawks. The Court found that the DPCI was not adequately protected from political interference or influence, for the following reasons:

- The DPCI reported to the National Commissioner, who was a political appointee
- There was inadequate job security and secured remuneration for the head of the DPCI and its members, as the National Commissioner could redeploy them at any time for any reason
- The head of the DPCI was subordinate to a Ministerial Committee and National Commissioner who could determine which cases it investigated
- The SAPS National Commissioner determined whether prosecutors could assist the DPCI with its investigations
- Parliament’s powers of oversight were insufficient to prevent political interference from the executive
- The complaints mechanism of the DPCI was inadequate to prevent interference, as the National Director of Public Prosecutions could refuse requests from the complaints judge to provide information
- The members of the DPCI were not required to take an oath committing to impartiality.

The Court ruled that structural and operational independence of the unit was vital to exclude undue political interference in the DPCI. However, the Court stopped short of indicating where a unit responsible for investigating corruption should be located. In a clear reference to its placement and operational and institutional independence, the judgment noted that it was:

[perm]missible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS. However, the independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. The centralised and the hierarchical nature of their structures and the fact that they report at the final level to a Cabinet minister, as in the case of the police and the NPA, present a risk of interference. The risk of undue interference is even higher when members of the unit lack autonomous decision-making powers and where their superiors have discretion to interfere in a particular case. What is required are legal mechanisms that will limit the possibility of abuse of the chain of command and hierarchical structure or interference in the operational decisions involving commencement, continuation and termination of criminal investigations and prosecutions.

The UN Convention against Corruption determines that the state should facilitate the necessary independence of such structures. Article 6(2) of the Convention states:

Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided.

The SAPS Amendment Bill (Bill 7 of 2012) that was tabled in Parliament in March 2012 retains the DPCI as a directorate of the SAPS, but seeks to address the Constitutional Court’s concerns by making a few structural changes to the DPCI. These are:

- The head of the DPCI will be appointed by the Minister of Police, with the approval of Cabinet (Section 17 C). This means that the National Commissioner cannot appoint or remove the head of the DPCI.
- The head of the DPCI will have the authority to arrange for the secondment of staff from other departments (Section 17F).
The DPCI head, rather than the National Commissioner, will have the authority to accept cases referred by provincial commissioners or the National Commissioner for investigation (Section 17D).

The DPCI head will have the authority to overrule a decision by the National Commissioner should a dispute arise about which cases fall within the remit of the DPCI.

Security vetting of DPCI members may be undertaken by an intelligence structure other than SAPS Crime Intelligence (Section 9A).

While the above clauses may appear to address the issue of the DPCI’s independence, these measures are undermined by the fact that the Bill provides for the budget of the Directorate to be determined by the National Commissioner of Police. Moreover, in terms of the requirements of the Public Finance Administration Act 1999 (Act 29 of 1999), the Commissioner will remain the accounting officer for the SAPS, including the DPCI.

It seems clear that the DPCI cannot be ‘adequately’ independent if its head does not have control over the Directorate’s operational and administrative budget. Moreover, as the accounting officer for the DPCI, the National Commissioner would have reason to assess the performance and functioning of the Directorate in great detail. This may result in a form of indirect interference, which could fall foul of the requirements of the Constitutional Court judgment for independence.

CONCLUSION

Any agency that investigates corruption by politicians, high-ranking civil servants and powerful businessmen will come under tremendous political pressure and interference. It is thus important for such a unit to be insulated, at least as far as possible, from this pressure. This is best achieved if the independence of the agency and its staff is promoted and protected in law. As long as the unit is located within the SAPS it cannot be adequately protected from political influence, and there are many ways in which its work can be interfered with.

It is also necessary for an agency that is tasked with countering corruption to enjoy public confidence. Over the past sixteen years the SAPS has failed to address corruption within its ranks. In addition, two successive National Commissioners of Police have been implicated in unlawful activities (with the former head, Jackie Selebi having been convicted for corruption). It is thus unlikely that the unit will be able to engender public confidence while it is part of the SAPS. This strongly suggests that there is a need to separate the DPCI from the SAPS if it is to be effective. The process of realigning the DPCI with the Constitutional Court provisions should be seen as an opportunity to establish the best possible anti-corruption agency as an investment in the future of South Africa. The SAPS Amendment Bill does not achieve this. It is therefore up to the Portfolio Committee on Police to subject this draft legislation to rigorous scrutiny and strengthen it substantially to avoid the courts having to step in yet again.

To comment on this article visit http://www.issafrica.org/sacq.php

NOTES

3. UN Convention Against Transnational and Organised Crime as adopted on 15 November 2000 and UN Convention Against Corruption, as adopted on 31 October 2003.


12. The Policy Conferences prepare for the National Conference which is held every five years and adopts new policies for the organisation. The National Conference elects new leaders to the National Executive Committee.


15. SAPS Act 1995 (Act 68 of 1995), Chapter 4, Section 6(2).


Chandré Gould (CG): Corruption Watch is the newest NGO on the block in South Africa. Could you tell me a bit about the organisation, who established it, and what you hope to achieve?

David Lewis (DL): The idea for Corruption Watch was initiated in a conversation that Zwelinzima Vavi [head of the trade union movement COSATU] and the COSATU office bearers held a couple of months ago to talk about the steady stream of whistle-blowing complaints that COSATU head office was receiving.

These were coming mostly from COSATU’s members, but also from members of the public. This had arisen largely, I think, from the very outspoken stance that COSATU had taken on the question of corruption and from some very successful hits that they had had on corruption, the SAA one probably being the best known. COSATU itself has taken some severe hits as a result of their whistleblowing, the most notorious being the assassination of union leader, Moss Phakoe. The former mayor of Rustenburg, the mayor’s driver, a member of the mayoral committee and a local businessman are presently on trial, charged with his murder. COSATU wanted to respond to these complaints and to do something about them. There was a need for someone to take these allegations and look at them.

We quickly recognised that this needed an institutional response rather than some sort of ad hoc processing of complaints. And so the idea of setting up an institution was born. To arrive at this point has taken some time. For the last six to eight months we’ve been doing all the things that it takes to set up an institution: from raising the money to buying the desks and chairs. In the process the idea mutated and grew and has changed quite considerably since the original conception.

CG: Who is providing the funding for Corruption Watch?

DL: South African philanthropic foundations, private family foundations. We have some funding from international foundations including the Open Society Foundation and the Sigrid Rausing Trust, foundations who have supported similar efforts in South Africa and around the world. We’ve had some seed money from COSATU and from Business Leadership South Africa, and some money from South African corporations. Not as much as I’d hoped for, but I hope we might get more.

CG: It is nice to know that your funding is coming from South African sources. I think it’s important [David Lewis, who is trained as an economist, worked in the trade union movement throughout the 1970s and 1980s. Since 1994 he has worked in various positions in the public service, most recently serving two terms as Chairperson of the Competition Tribunal from 1999-2009.]

ON THE RECORD...

Interview with David Lewis, Director of Corruption Watch

Chandré Gould speaks to David Lewis,* Director of Corruption Watch, a new non-governmental organisation in South Africa that has thrown its weight behind efforts to reduce corruption.
South African NGOs make a shift away from relying on external donors.

DL: Yes, we really didn’t want to. We’ve not approached foreign governments for aid money, although we might in the long term. But I really do like the idea that we are principally funded by an array of South African sources.

CG: You are essentially a single-issue NGO; your primary role is to take complaints about corruption and to receive reports from whistle-blowers. But the fact that COSATU thought that this was important enough an issue to establish an institution like Corruption Watch seems to suggest that you feel that corruption is South Africa’s single most important problem. Would that be your analysis?

DL: How do you place corruption against poverty, against unemployment or any other important social problem? I would be uncomfortable with constructing a hierarchy of concerns, but corruption is a huge concern. In fact, I don’t think corruption and poverty are unrelated.

I was struck by a very eloquent statement by Deputy President Kgalema Mothlante who was the keynote speaker at the Ruth First memorial lecture a few months ago. He said that second to racism, corruption is the most serious problem that we face. More recently, Jeff Radebe said at the launch of Corruption Watch that corruption is as serious a problem as racism was during apartheid.

There is widespread concern about corruption in South Africa. It is sometimes suggested that this is a suburban kind of concern. But, judging from the thousands of SMSes, e-mails, Tweets, and website postings that we’ve received, it’s clear that’s not the case at all. If anything, people in townships, in the rural areas, in the low-income areas see the consequences of corruption much more starkly than people in the suburbs do. So, yes, I think it’s a huge national concern. Its equation with racism is accurate. Corruption affects everyone; it cuts across class, race, urban and rural.

However, I find myself wishing that it were quite as focused an area as we might have thought it was. Nevertheless, I feel it is important that NGOs have a single focus. I think that in some ways the most successful institutions, successful NGOs, have benefited from having a single focus, such as the Treatment Action Campaign. But I’m beginning to understand that [corruption] is quite a wide single focus.

CG: I’m glad that you raise the issue of racism, because I think one of the reasons I would see it as important that an organisation like Corruption Watch makes it very clear that this is a concern for all South Africans. Very often the conversation that is held in the media about corruption comes across as somewhat self-righteous. And perhaps even racist. How do we get away from having a self-righteous conversation about corruption?

DL: I think by having an inclusive conversation. I’m not sure I agree that the media coverage comes across as self-righteous. They are deservedly, and not inappropriately, standing in judgment of those whom they have discovered to be, in their view, at fault. So there’s almost a necessary or inevitable element of self-righteousness to it. But I think that this is not a racist concern.

Initially I was very worried, for example about our Facebook page and about our reliance on an Internet platform for hearing complaints. I was concerned that it would show the divide between those who are Internet connected and those who are not. That obviously has a racial dimension to it. I was worried that we would become one of those sites that people use to whine about the ‘good old days’, or whine about the current government, forgetting the levels of corruption we experienced under apartheid. But that has just not been the case. Ninety-five percent of our respondents on Facebook are black. And on the short-code SMS I think it’s probably close to a hundred percent. So I think that sometimes corruption is conveniently presented as a racist issue.

CG: We saw through the public hearings that are were held around the State Information Bill, that there is a desperate need for people to feel as
though they are being heard by the state on bread and butter issues. And so the discussion about the Bill turned into a discussion about bread and butter issues. Do you find the same thing happening with your complaints?

**DL:** Definitely. I don’t know whether this requires a process of public education, or better communication, to inform people more accurately than we’ve done up to now, about what corruption is. It’s not always easily definable by any stretch of the imagination. I think that many believe that any unfair treatment is corrupt. The complaints that we’ve been getting cover all issues: from domestic abuse to police brutality to piles of industrial relations-related complaints, to consumer complaints, about banks and cellphone companies, amongst others. So it’s clear that people are dying for a place they can take their problems to.

We’re trying to reach out to fellow NGOs to sign up as part of a network so that we can collectively respond to those complainants, or have a referral network for complaints we can’t attend to. The network should include advice centres, lawyers, human rights institutions and state institutions that are meant to deal with particular complaints. And perhaps partly because we have made a strong point of saying that we’re as concerned with private sector corruption as we are with public sector corruption, people have come to think that means that we are concerned with their relationship with suppliers or firms that they purchase from. But we’re interested in private sector activity to the extent that it abuses public resources.

**CG:** So when you get a corruption-related complaint, what do you do about it?

**DL:** It’s a long answer, I’m afraid. At the outset we started with the idea of responding to allegations of individual acts of corruption that COSATU was receiving. We thought that our principal activity would be investigating individual acts of corruption. Given my experience at the Competition Tribunal I know how difficult it is to do investigations of complex allegations; even if you do have policing powers, subpoena powers and search and seizure powers as the Competition Tribunal has, and the police have. But that’s what we thought we were going to do. We had in mind a kind of civil society shadow police force that would investigate allegations we received, up to the point that we could take them and pass them on to the Public Protector or to the police. The advantage would be that we could follow up and monitor the actions of these bodies. The idea was that we would then be in a better position to demand answers from the authorities, and maybe from individual citizens. That’s going to remain an important part of our activity. People equate dealing with corruption with sending people to jail. And I think that’s right. We’ll try and assist that process to the extent that we’re able to. And I think we’ll be able to do it to a significant extent, but we’re going to have to be very selective in what we take on. We’re going to have to work closely with the law enforcement authorities to do that.

That said, I think that we’re coming to see ourselves as an organisation for mobilising the South African public to speak about their experiences of corruption. We’ll collectivise that voice. We’ll bring together those complaints, information we receive from the public, and from public domain material like the Auditor General’s reports, from research institutions like the ISS, from the media, and we’ll collect those complaints. We’ll analyse them, we’ll pattern them, we’ll identify hot-spots of corruption, if you like.

It might be, for example, complaints about corruption in housing in Tembisa, or it might be corruption in the health care sector, and so on. We’ll feed that information back to the public, using both our own communications mechanisms as well as the media, mainstream media as well as community media, in a manner that is politically useful. By political I mean it will give people the opportunity to act collectively against a systemic problem.

We’ve had a lot of complaints about traffic cops. We’re soon going to release a study on the
Johannesburg Metropolitan Police Department, drawing on the work that ISS has done before us. We’ll release that report together with all the complaints that we received. We’ll ask people to respond to the report and to the solutions that we propose. We will follow that up with a campaign for the rectification of those problems.

Similarly, we’re going to do a report on the health care sector, as we’ve received a lot of complaints related to that sector. Again we’ll ask the public to respond to the report and will take the report to stakeholders. The stakeholders might be a residents’ association in Tembisa if we’re dealing with housing problems there, or it might be a medical association or nurses associations, or trade unions, or companies, or policy experts in a particular area, like health care. We will ask them to respond to what we’ve written, to tell us where our findings are wrong or accurate; to point to things that we may have missed, and to solutions that we may not have considered. I hope we’ll even attract international responses on the website that will lead to sharing of experiences in other countries as well.

We want to be a crowd sourcing platform where people can speak to each other and where they can speak to those in power.

One of the challenges is, I think, that it’s going to be difficult to measure our progress and estimate our impact. But we’re working on that.

CG: I think, in fact, one can spend too much time trying to do that. It can become one’s raison d’être in the end and can even distract from the work. I think organisations have to be very careful about keeping a balance between doing the work that needs to be done, and measuring our impact and progress. Organisations like ourselves are working in a field where it is often very difficult to measure impact, and where perverse incentives very easily arise out of measuring impact.

Turning now to another matter, what do you know that most states around the world face some level of corruption. How bad is our problem in comparison to other countries? And how and why have we reached the point where an organisation like Corruption Watch is necessary?

DL: I think you’re dealing here not with an ordinary problem of criminality, but with a problem on a scale that is beyond ordinary levels of criminality. You’re dealing with a real social problem. And so no matter how strong your policing and enforcement mechanisms are, or how well they work, you need a public voice on this issue. Corruption is a kind of grey area. It’s not always criminal. But it always offends against public norms and public perceptions of what is appropriate conduct. What is the cause of it? Are we worse off than anywhere else?

That doesn’t seem to really matter, because the public are sufficiently worried about it for it to be conversation du jour in South Africa, across dining room tables in Sandton and kitchen tables in much poorer areas. Quite clearly, on most of the measures we are not doing well and we are sliding down the scale. Yesterday somebody from the International Marketing Council told me that a year ago the biggest stain on South Africa’s reputation abroad was violent crime. Now it’s corruption. That’s something to worry about. So whether we’re better off than Russia or worse off than France, or whatever the case may be, doesn’t seem to really matter. The fact is we have a big problem, and its getting worse. This is the perception internationally and nationally.

How did we get there? That is a difficult question to answer, both politically and factually. I was struck when I was fund raising outside the country and speaking to people who really knew and understood the field internationally. They pointed out that we had all the ingredients for a country that should not be very corrupt. We have an independent judiciary, we have a robust media, we’ve had an active civil society, we have a strong constitutional underpinning to our democracy, and so on. These were all the ingredients that they were suggesting to other countries that were corrupt; things they needed to
have in place in order to staunch corruption. Yet they have not had that effect here. So I don’t know the definitive answer to that question.

I think it has something to do with the way in which business and government interact, which has interesting historical roots. It is also a consequence of contemporary policy, which may be well-intentioned and necessary, but which has had the unintended effects of making political connectedness an important part of doing business. This has encouraged a significant degree of corruption.

I also think that to some extent a lack of political competition is responsible for high levels of corruption. Put simply, if a corrupt business or a corrupt politician can take a relatively sure bet on who the next government will be, whether at local, provincial or a national level, then it’s worthwhile investing heavily in the consequences that follow from it. You know who will have control of the public resources with relative certainty, and so you ensure that you develop a relationship with the right people. This is not rocket science.

People like Gwede Mantashe (General Secretary of the ANC) and others – including Zwelinzima Vavi himself – have publicly bemoaned the fact that ANC factions are increasingly divided around access to public resources rather than on ideological grounds. So while it’s not our remit to change the political framework, the strength of the ANC means that it has a difficult task in terms of countering corruption. Because they are strong, I think their rule is certain, and they’re perfectly entitled to keep it, but one of the consequences is that unscrupulous politicians and businessmen and civil servants will take advantage of the certainty in our political system.

CG: That makes sense, but the truth is that there’s been a dramatic erosion of NGOs over the last ten, fifteen years. There are not that many NGOs working in this kind of field any longer. My feeling is that one of the problems we face, the reason why people feel as though their voices aren’t heard about bread and butter issues, is that we no longer have advice offices. We no longer have paralegals to the same extent as they existed in the heyday of Black Sash and Lawyers for Human Rights. And so those avenues for citizens to share and get assistance to resolve their concerns have dried up.

DL: Yes, but they’re starting up again, but under difficult circumstances. The funding situation is difficult, but I think they are starting up again. And I think that’s probably one of the causes of corruption that I should have identified. After hundreds of years of fighting minority rule, we all sat back a bit after 1994. Whether we came from the trade union movement or from the advice office movement, we thought, well great, we’ve got a decent government now, and that is true, but any government has to be held accountable. And if citizens don’t hold it accountable, it will go the way of all institutions that are not accountable to anybody. And so I think South Africans have woken up. I think government has woken up. But in the meantime we’ve allowed corrupt people to become entrenched in important positions. We’ve allowed rules to deteriorate and cease to be enforced. But it is not too late.
NOTES

1. Corruption Watch can be contacted through its website: http://www.corruptionwatch.org.za/

2. A dossier prepared by the shop stewards and their union, SATAWU, eventually resulted in the company parting ways with the CEO and the appointment of a new board of directors.
The rise and fall of the Scorpions and Hawks
Considering the Glenister judgment
The case for a new dedicated agency
Why an anti-corruption agency should not be in the SAPS
Interview with David Lewis, Corruption Watch

The articles in this edition of SACQ are concerned with a range of pressing issues for South Africa and the criminal justice sector. David Bruce reflects on the measurement of performance set by the SAPS. Monique Marks and Sean Tait consider the changes that have taken place over the past ten years in policing public events that have led to an increase in human rights abuses by the police during public gatherings. Julie Berg and Jean-Pierre Nouveau offer new thinking about the regulation of the private security industry. Duncan Beven and Juan Nel provide an overview of the context in which the development of hate crime legislation will take place in South Africa, and make suggestions about what the law should cover. Finally, Lorenzo Wakefield assesses the first year of implementation of the Child Justice Act.

In SACQ 37 Leon Holtzhausen argues for a clearer definition of criminal justice-related social work so that social workers in this field can receive the necessary specialised skills and knowledge. Jameelah Omar claims that prisoners have a realisable right to rehabilitation in South African prisons; and Patrick Matahi presents an innovative view of the role of criminal gangs in Kenya. This edition concludes with an interview by Chris Botha with Peter Tinsley, who offers an international perspective on police oversight.