

# 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,<sup>2</sup> 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'.<sup>3</sup> Being located within the NPA, the Directorate was subject to the constitutional requirement that the NPA 'exercises its functions without fear, favour or prejudice'.<sup>4</sup> 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.<sup>5</sup> 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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(SAPS),<sup>6</sup> as well as with some other law enforcement agencies.<sup>7</sup> But they were not subject to control or direction by the SAPS Commissioner, and were directly accountable only to the National Director of Public Prosecutions (NDPP).

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<sup>8</sup> and the president of the governing African National Congress (ANC), Jacob Zuma, who in 2009 became president of South Africa.<sup>9</sup> At its national conference in 2007, the ANC resolved that the Scorpions should be disbanded<sup>10</sup> and their responsibilities transferred to a new unit within the South African Police Service, accountable to its Commissioner.<sup>11</sup> This was legislatively accomplished through amendments to the NPA Act<sup>12</sup> and the SAPS Act<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> After losing his case in the High Court,<sup>16</sup> 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.'<sup>17</sup> The court gave the South African government 18 months in which to rectify this situation, during which time the Hawks could continue to operate.<sup>18</sup>

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,'<sup>19</sup> 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,<sup>20</sup> and for the Hawks through a reference by the National Commissioner of the SAPS.<sup>21</sup> 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.<sup>22</sup> 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 influenced by the Organisation for Economic Cooperation Development's (OECD) review of specialised anti-corruption institutions, published in 2007.<sup>23</sup>

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,<sup>24</sup> 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.<sup>25</sup> The Constitution ultimately provides the standards against which the adequacy of the structures and location of the unit are to be assessed.<sup>26</sup>

The SAPS Act<sup>27</sup> 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.'<sup>28</sup>

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.'<sup>29</sup>

The minority identified the following provisions<sup>30</sup> 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.<sup>31</sup>
- (2) The DPCI's structural and operational autonomy<sup>32</sup> and the appointment of the head of the DPCI are secured through legal mechanisms, to prevent undue influence.<sup>33</sup>
- (3) Involvement of the NPA and NDPP in investigations conducted by the DPCI<sup>34</sup> 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.'<sup>35</sup>
- (4) Parliamentary oversight over the functioning of the DPCI<sup>36</sup> 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'<sup>37</sup> 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.<sup>38</sup>
- (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.<sup>39</sup>

## 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’,<sup>40</sup> in the following terms:

...[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.<sup>41</sup>

The majority went on to characterise this ‘interpretive injunction’ as ‘potentially feeble’ and ‘not sufficient to secure independence’ for the DPCI.<sup>42</sup> Indeed, this disagreement over the significance of paragraph 17B(b)(ii)<sup>43</sup> 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:<sup>44</sup>

- (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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> These, then, are countries where perceptions of corruption vary considerably.<sup>48</sup>

## 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.<sup>49</sup> In some cases these are broad-based anti-corruption agencies,<sup>50</sup> with government-wide mandates, while in others they are agencies specifically mandated to address police corruption.<sup>51</sup> 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<sup>52</sup> 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,<sup>53</sup> as well as being subject to audit inspections to ensure compliance with the law and respond to complaints.<sup>54</sup> 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).<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

## Indonesia

The role of the *Komisi Pemberantasan Korupsi*<sup>58</sup> (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.<sup>59</sup> 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,<sup>60</sup> following the demise of the Suharto regime,<sup>61</sup> occurred in a reform climate in which there was a demand for enhanced effectiveness and efficiency of anti-corruption efforts,<sup>62</sup> with significant independence from government.<sup>63</sup> 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.<sup>64</sup> 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).<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup> In carrying out the functions of the KPK members must uphold the oath of office<sup>71</sup> and perform the tasks with legal certainty, transparency, accountability, proportionality, and in the public interest.<sup>72</sup> The KPK is legislatively required to have open access to information.<sup>73</sup>

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,<sup>74</sup> with additional appointments and terminations determined by the KPK.<sup>75</sup> The KPK decides the way in which corruption cases are handled.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 2009 saw fabricated evidence against KPK commissioners,<sup>80</sup> and moves within Parliament to reduce the institution's prosecutorial powers.<sup>81</sup> Powerful individuals under investigation launched efforts to discredit both the KPK and the Indonesian Anti-Corruption Court.<sup>82</sup> 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.<sup>83</sup>

## 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<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

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

1. Case CCT 48/10 [2011] ZACC 6.
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'.
4. Article 179(4) of the *Constitution of the Republic of South Africa Act 1996* (Act 108 of 1996).
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] ZASCA 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.
12. *National Prosecuting Authority Amendment Act 2008* (Act 56 of 2008).
13. *South African Police Service Amendment Act 2008* (Act 57 of 2008).
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).
16. *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* Case CCT 48/10 [2011] ZACC 6, para 251.
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.
20. *National Prosecuting Authority Act 1998* (as amended) Section 7(1)(a)(iii)(bb). Investigation and prosecution of corruption was specifically added to the mandate of the Scorpions by Presidential Proclamation No. R.14, 2000 (South Africa, *Government Gazette*, Vol. 417, No. 20997, 24th March 2000).
21. *South African Police Service Act 1995* (as amended) Section 17D(1)(b).
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).
23. G Klemenčič, J Stusek and I Gaika, *Specialised Anti-Corruption Institutions: Review of Models*, Paris: Organisation for Economic Co-operation and Development, 2007.
24. *Glenister v. The President of the Republic of South Africa*, para 125.
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.
27. Chapter 6A under the guidance of 17B, *South African Police Service Act 1995* (Act 68 of 1995) as amended by the *SAPSA Act 2008* (Act 57 of 2008).
28. *Glenister v. The President of the Republic of South Africa*, para 132 referring to section 17B SAPS Act as amended by *SAPSA 2008* (Act 57 of 2008).
29. *Ibid*, para 133.
30. These provisions are interpreted in light of paragraph 17B of the SAPS Act.
31. Under section 17H, appropriated by Parliament in accordance with the *Public Finance Management Act 1999* (Act 1 of 1999).
32. Section 17D. See section 17I (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.
38. Section 67 SAPS Act 1995.
39. *Glenister v. The President of the Republic of South Africa*, para 149-150.
40. *South African Police Service Act 1995* (Act 68 of 1995) as amended 2008.
41. *Glenister v. The President of the Republic of South Africa*, para. 237.
42. *Ibid*, paragraphs 238 and 248.
43. *South African Police Service Act 1995* as amended 2008.
44. *Glenister v. The President of the Republic of South Africa*, Paragraphs 217 to 247.
45. See <http://www.sfo.gov.uk/>
46. See <http://www.soca.gov.uk/>
47. See <http://cpi.transparency.org/cpi2011/results/#CountryResults>. Britain's score was 7.8.
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.
50. The NSW Independent Commission Against Corruption (NSW also has a separate Crime Commission), the Queensland Crime and Misconduct Commission, Tasmania's Integrity Commission, the Western Australian Corruption and Crime Commission, and the Australian Crime Commission (Commonwealth). The main features of these agencies are summarised in Appendix 9 of D Patten *Report of the Special Commission of Inquiry into the New South Wales Crime Commission*, 2011 – accessible at: [http://www.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0008/133748/SCOI\\_into\\_NSW\\_Crime\\_Commission\\_-\\_PUBLIC\\_REPORT\\_December.pdf](http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0008/133748/SCOI_into_NSW_Crime_Commission_-_PUBLIC_REPORT_December.pdf), and in C Ross, B Merner and A Delacord, Current Issues Brief: Independent Broad-based Anti-corruption Commission Bill 2011, accessible online at [www.parliament.vic.gov.au/publications/research](http://www.parliament.vic.gov.au/publications/research). As this paper indicates, the State of Victoria is soon to establish an Independent Broad-Based Anti-Corruption Commission, which will replace its current Office of Police Integrity: see *Independent Broad-Based Anti-Corruption Commission Act 2011* No 66 of 2011. Further legislation delineating the powers of the new Commission is still to be introduced.
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](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](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 workload, management and resources: setting the context for 'effective' anti-corruption commissions, in L de Sousa et al (eds)

*Governments, NGOs and Anti-Corruption: the new integrity warriors*, Abingdon: Routledge, 2009, 65.

60. Established by Law No. 30/2002 on the Corruption Eradication Commission. Undang-Undang Republik Indonesia Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi.
61. President Suharto resigned the Indonesian presidency in 1998 following social and economic upheaval.
62. Article 4 Law No. 30/2002.
63. S Fenwick, Measuring up? Indonesia's anti-corruption commission and the new corruption agenda, in T Lindsey (ed), *Indonesia: Law and Society*, 2nd ed, Sydney: The Federation Press, 407.
64. Article 3 Law No. 30/2002.
65. Laporan Tahunan KPK, 2010, 13-14, [http://www.kpk.go.id/uploads/PDdownloads/kpk\\_laptah\\_2010.pdf](http://www.kpk.go.id/uploads/PDdownloads/kpk_laptah_2010.pdf).
66. Articles 6 and 8 Law No. 30/2002.
67. Article 40 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.
76. Article 25 Law No. 30/2002.
77. S Davidsen, V Juwono and D G Timberman, *Curbing Corruption in Indonesia 2004-2006: a survey of national policies and approaches* Jakarta: Centre for Strategic and International Studies and United States Indonesia Society, 2006, 54.
78. Butt, Anti-corruption reform in Indonesia: an obituary?, 384.
79. C Von Luebke, The politics of reform: political scandals, elite resistance and presidential leadership in Indonesia, *Journal of Current Southeast Asian Affairs* 29(1) (2010) 79-94.
80. E P Bolongaita, An exception to the rule? Why Indonesia's anti-corruption commission succeeds where others don't – a comparison with the Philippines' Ombudsman, *U4 Issue* 4, August 2010, 20-21.
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).
83. Butt, Anti-corruption reform in Indonesia: an obituary?, 390.
84. For recent proposals for a 'model' agency of this kind, see T Prenzler and N Faulkner, Towards a model public sector integrity commission, *Australian Journal of Public Administration* 69(3) (2010), 251-262.
85. A Brown and B Head, Institutional Capacity and Choice in Australia's Integrity Systems, *Australian Journal of Public Administration* 64(2) (2005).
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.