

# AFTER GLENISTER

## The case for a new dedicated agency

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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)<sup>1</sup> 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’).<sup>2</sup> (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,<sup>3</sup> 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]’.<sup>4</sup> 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.<sup>5</sup> 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’.<sup>6</sup>

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.’<sup>7</sup> It concerned itself solely with the defects in the impugned legislation. This article considers the specific findings of the

\* This article was commissioned by the Council for the Advancement of the South African Constitution ([www.casac.org.za](http://www.casac.org.za)) and written by Christopher Reeves, Research Associate, Democratic Governance and Rights Unit, Faculty of Law, University of Cape Town. The author is indebted to Nick Ferreira, Research Fellow, Wits Centre for Ethics, University of Witwatersrand, for his assistance.

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.<sup>8</sup> But it is also neither necessary nor desirable. A report prepared by the Organisation for Economic Co-operation 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’<sup>9</sup> 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’.<sup>10</sup> 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.<sup>11</sup> It also criticised those provisions that afforded the Ministerial Committee the power to manage the decision-making and policy-making process.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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).<sup>15</sup> There is, therefore, good reason to establish a wholly separate entity untainted by corruption.<sup>16</sup> 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.’<sup>17</sup>

## 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.<sup>18</sup> In accordance with the proposed amendments, the DPCI would remain part of the SAPS.<sup>19</sup> 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.<sup>20</sup> 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.’<sup>21</sup> 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,<sup>22</sup> their limited credibility,<sup>23</sup> the high salaries of some of the commissioners,<sup>24</sup> and their internal conflicts.<sup>25</sup> There have also been accusations of politicisation.<sup>26</sup> 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.'<sup>27</sup> 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.'<sup>28</sup>

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),<sup>29</sup> New South Wales' Independent Commission Against Corruption (NSW ICAC)<sup>30</sup> and Botswana's Directorate on Corruption and Economic Crime (DCEC)<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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 cooperation and exchange of information...<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> Its Operations Department investigates alleged violations of specified offences, and it is allocated almost three-quarters of the Commission's budget.<sup>38</sup> The Commissioner must investigate 'any alleged or suspected offence,<sup>39</sup> and a well-publicised hot-line service enables members of the public to report corruption.<sup>40</sup> 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.<sup>41</sup> 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,<sup>42</sup> but it prioritises complaints and investigates only those that expose significant or systemic corruption.<sup>43</sup> 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'.<sup>44</sup> Moreover, it cannot work in an environment where the anti-corruption entity is vulnerable to charges of partiality.<sup>45</sup> In light of the accusations of partiality made against the DSO,<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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).<sup>49</sup>

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'.<sup>50</sup> 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'.<sup>51</sup> 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;<sup>52</sup> 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;<sup>53</sup> and undertake public information activities to raise awareness of the existence, causes and gravity of the threat posed by corruption.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> Second, it allows for the additional and objective scrutiny of the relevant evidence by the prosecuting authority,<sup>57</sup> 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).<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> In Botswana and Hong Kong, there is a presumptive forfeiture of unexplained wealth.<sup>61</sup> 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'.<sup>62</sup> A president could therefore appoint a weak or compliant director to intimidate or repress critics and shield his supporters.<sup>63</sup>

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.<sup>64</sup> The National Commissioner of the SAPS is empowered to 'discharge' any member of the DCPI, 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.<sup>65</sup> The majority of the Constitutional Court held that the members of an anti-corruption entity should have specially entrenched employment security.<sup>66</sup> It compared the provisions of the



impugned legislation with the legislation establishing the DSO (describing the contrast as ‘signal’).<sup>67</sup> 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.<sup>68</sup> 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.’<sup>69</sup>

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.<sup>70</sup> 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.<sup>71</sup> 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’.<sup>72</sup> The reasons for the removal and the representations of the head of the Directorate must be communicated to Parliament,<sup>73</sup> but whereas Parliament can restore the NDPP to his or her office,<sup>74</sup> 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.<sup>75</sup> 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’.<sup>76</sup> 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.<sup>77</sup> Instead, President Kgalema Motlanthe removed him from office, citing the report’s finding that he was insensitive to matters of national security.<sup>78</sup> Pikoli maintained that he was suspended to stop the prosecution of the National Commissioner of Police,<sup>79</sup> and initiated court proceedings to challenge his removal. He subsequently settled out of court.<sup>80</sup> 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.<sup>81</sup>

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.’<sup>82</sup> In terms of the Amendment Bill, the head of the DPCI is still appointed by the Minister, with the concurrence of Cabinet.<sup>83</sup> 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',<sup>84</sup> it would not be possible to successfully challenge an unsuitable appointment in a court of law (unlike the appointment of the NDPP).<sup>85</sup> 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.<sup>86</sup> The IGG and Deputy Inspectors General in Uganda are appointed by the President with the approval of Parliament.<sup>87</sup> In South Africa, the Public Protector and the Auditor General are appointed by the President on the recommendation of the National Assembly.<sup>88</sup> 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.<sup>89</sup> There must also be clear selection criteria. 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.<sup>90</sup>

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'.<sup>91</sup> 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).<sup>92</sup> The salaries of the Public Protector and the Auditor-General are similarly determined by reference to the salaries of the judiciary.<sup>93</sup> 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'.<sup>94</sup> The political oversight the legislation required was, considered the Court, 'incompatible with adequate independence'.<sup>95</sup> 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'.<sup>96</sup>

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.<sup>97</sup> While the power to prevent, combat and investigate corruption does not appear to be similarly constrained,<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup>

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.<sup>104</sup> 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

1. *South African Police Services Act 1995* (Act 68 of 1995), Ch 6A.
2. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).
3. *Ibid*, 397, 408-409.
4. *Ibid*, 409.
5. *Ibid*, 412.
6. *Ibid*, 424.
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 (Moseneke DCJ and Cameron J (writing for the majority) concurred with Ngcobo CJ (writing for the minority)). See also *Ibid*, 364-366, 386.
9. OECD, *Specialised Anti-corruption Institutions: Review of Models*, Paris: OECD, 2007, 17.
10. *Ibid*.
11. *Glenister v President of the Republic of South Africa*, 417-418.
12. *Ibid*, 419-420.
13. OECD, *Specialised Anti-corruption Institutions*, 17.
14. See, for example, the surveys discussed in Andrew Faull, Oversight agencies in South Africa and the challenge of police corruption, *ISS Paper 227*, November 2011. See also Andrew Faull, Corruption in the South African Police Service: Civilian perceptions and experiences, *ISS Paper 226*, November 2011.
15. Statistics South Africa, *Victims of Crime Survey 2011*, Pretoria: Statistics South Africa, 2011, 34.
16. Hong Kong's Independent Commission Against Corruption (ICAC) was largely a response to entrenched and systematised police corruption. See Patrick Meagher, Anti-corruption Agencies: Rhetoric Versus Reality, *The Journal of Policy Reform* 8(1) (2005), 69-103, 72.
17. *Glenister v President of the Republic of South Africa*, 412.



18. Bill 7 of 2012.
19. South African Police Service Amendment Bill, s.5.
20. Constitution of the Republic of South Africa 1996, Ch. 9.
21. Constitution of the Republic of South Africa 1996, s.181(2).
22. Parliament of the Republic of South Africa, *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*, Cape Town, 2007, 147-164. See also Mmanaledi Mataboge, Gender body on rocks, *Mail & Guardian Online*, 9 April 2010, <http://mg.co.za/article/2010-04-09-gender-body-on-the-rocks> (Accessed 7 March 2012).
23. *Ibid.*
24. SAPA, Public protector's salary questions in Parliament, *Mail & Guardian Online*, 8 February 2012, <http://mg.co.za/article/2012-02-08-pubic-protector-salary-questioned-in-parliament/> (Accessed 7 March 2012).
25. Parliament of the Republic of South Africa, *Report of the ad hoc Committee*, 104, 159.
26. SAPA, Zille steps up HRC criticism, *Mail & Guardian Online*, 8 October 2010, <http://mg.co.za/article/2010-10-08-zille-hits-hard-at-hrc-handberg-probe> (Accessed 7 March 2012).
27. Mpumelelo Mkhabela, ANC's Mantashe lambasts judges, *Sowetan*, 18 August 2011, <http://www.sowetan.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges> (Accessed 7 March 2012).
28. Natasha Marrian, Zuma comments reignite judiciary row, *Business Day*, 14 February 2012, <http://www.businessday.co.za/articles/Content.aspx?id=164827> (Accessed 7 March 2012).
29. Independent Commission Against Corruption Ordinance (Cap 204), Laws of Hong Kong.
30. Independent Commission Against Corruption Act 1988 (NSW).
31. *Corruption and Economic Crime Act 1994*.
32. *Glenister v President of the Republic of South Africa*, 397, 408-409.
33. *Ibid.*, 421.
34. See, for example, Joanna MacMillan, Reformasi and Public Corruption: Why Indonesia's Anti-corruption Agency Strategy Should be Reformed to Effectively Combat Public Corruption, *Emory International Law Review* 25 (2011) 587-630, 615-616. See also Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong*, Cambridge: Harvard University Press, 2004, 40-41.
35. OECD, *Specialised Anti-corruption Institutions*, 9, 14.
36. See CASAC, *Corruption: Towards a Comprehensive Societal Response*, Cape Town: CASAC, 2011, 15-16.
37. Independent Commission Against Corruption Ordinance, s.12.
38. John Heilbrunn, *Anti-corruption Commissions: Panacea or Real Medicine to Fight Corruption*, Washington: World Bank Institute, 2004, 4.
39. Independent Commission Against Corruption Ordinance, s.12.
40. See <http://www.icac.org.hk/en/home/index.html> (Accessed 6 March 2012).
41. OECD, *Specialised Anti-corruption Institutions*, 37. See also [http://www.icac.org.hk/en/operations\\_department/s/index.html](http://www.icac.org.hk/en/operations_department/s/index.html) (Accessed 6 March 2012).
42. Independent Commission Against Corruption Act, s.20.
43. *Ibid.*, s.12A. See also Independent Commission Against Corruption, *Annual Report 2010-2011*, Sydney: Independent Commission Against Corruption, 2011, 23-25.
44. Meagher, Anti-corruption Agencies, 91.
45. *Ibid.*
46. Paul Simao, Scorpions under spotlight again, *Mail & Guardian Online*, 8 March 2007, <http://mg.co.za/article/2007-10-03-scorpions-under-spotlight-again> (Accessed 7 March 2012).
47. Meagher notes that in Hong Kong 'this required a huge, and hugely expensive, agency' Meagher, Anti-corruption Agencies, 90.
48. In accordance with Independent Commission Against Corruption Ordinance, s. 12(d)-(f).
49. 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.
50. *Glenister v President of the Republic of South Africa*, 409.
51. *Ibid.*, 410.
52. United Nations Convention Against Corruption, art. 36.
53. *Ibid.*, arts. 5(2), 5(3), 6(1), 12; Southern African Development Community Protocol Against Corruption, art 4(1).
54. United Nations Convention Against Corruption, art. 13; African Union Convention on Preventing and Combating Corruption, art. 5(8).
55. See Meagher, Anti-corruption Agencies; Heilbrunn, *Anti-corruption Commissions*; Luis de Sousa, Anti-corruption Agencies: Between Empowerment and Irrelevance, *Crime, Law and Social Change* 53, 2010, 5-22.
56. Constitution of the Republic of South Africa 1996, s.179.
57. Robin Theobald and Robert Williams, Combating Corruption in Botswana: Regional Role Model or Deviant Case? *Commonwealth & Comparative Politics* 37(3) (1999), 117-134, 121.
58. Meagher, Anti-corruption Agencies, 96.
59. De Sousa, Anti-corruption Agencies, 16.
60. *Ibid.*
61. Meagher, Anti-corruption Agencies, 96.
62. Corruption and Economic Crime Act, s.4. In Hong Kong, the Commissioner also holds office 'on such terms and conditions as the Chief Executive may think fit.' Independent Commission Against Corruption Ordinance, s.3.
63. Theobald and Williams, Combating Corruption in Botswana, 125.
64. *South African Police Services Act*, s. 17C(2)(a).
65. *Ibid.*, s.35.
66. *Glenister v President of the Republic of South Africa*, 415.
67. *Ibid.*, 416.
68. *Ibid.* These protections applied also to investigating directors within the DSO.
69. *Glenister v President of the Republic of South Africa*,

- 416.
70. *National Prosecuting Authority Act 1998* (Act 32 of 1998), s.12(6)(a).
  71. South African Police Service Amendment Bill, s.8.
  72. *Ibid.*
  73. *Ibid.*
  74. *National Prosecuting Authority Act 1998*, s.12(6)(c).
  75. *Glenister v President of the Republic of South Africa*, 416.
  76. *Mail & Guardian* online reporter, Reuters and SAPA, Mbeki suspends prosecutions chief, *Mail & Guardian Online*, 24 September 2007, <http://mg.co.za/article/2007-09-24-mbeki-suspends-prosecutions-chief> (Accessed 7 March 2012).
  77. Frene Ginwala, Report of the Enquiry into the Fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, November 2008.
  78. SAPA, Reuters, Motlanthe decides against reinstating Pikoli, *Mail & Guardian Online*, 8 December 2008, <http://mg.co.za/article/2008-12-08-motlanthe-decides-against-reinstating-pikoli> (Accessed 7 March 2012).
  79. Ginwala, Report of the Enquiry into the Fitness of Advocate VP Pikoli, 11.
  80. *Mail & Guardian* online reporter and SAPA, Pikoli walks away with R7,5million, *Mail & Guardian Online*, 22 November 2009, <http://mg.co.za/article/2009-11-22-pikoli-walks-away-with-r75million> (Accessed 7 March 2012).
  81. Constitution of the Republic of Uganda 1995, art. 224.
  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.
  87. Constitution of the Republic of Uganda 1995, art. 223(4).
  88. Constitution of the Republic of South Africa, s.193. The NDPP is appointed by the President alone.
  89. The Judicial Service Commission appoints judges in this way. See Constitution of the Republic of South Africa, s.178.
  90. 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.
  91. *Glenister v President of the Republic of South Africa*, 416.
  92. *National Prosecuting Authority Act 1998*, s.17(1). See *Glenister v President of the Republic of South Africa*, 417.
  93. 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).
  94. *Glenister v President of the Republic of South Africa*, 417.
  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.
  101. Reports of ICAC Advisory Committees 2010, 2, [http://www.icac.org.hk/filemanager/tc/Content\\_1238/2010.pdf](http://www.icac.org.hk/filemanager/tc/Content_1238/2010.pdf) (accessed on 7 March 2012).
  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).