SUBMISSION TO PARLIAMENT

1. The Council for the Advancement of the South African Constitution (CASAC)[1] is pleased to make this submission to the Portfolio Committee on Police to assist the Committee in its deliberations on the South African Police Service Amendment Bill, B7 - 2012. The Bill seeks to respond to the judgment of the Constitutional Court in the matter between *Hugh Glenister v President of the Republic of South Africa* (*Glenister*).[2]

2. CASAC is a non-governmental organization, functioning as a voluntary association. It is an initiative led by progressive people who seek to advance the South African Constitution as a platform for democratic politics and the transformation of society and who believe in the advancement of a society whose values are based on the core principles of the Constitution – the promotion of socio-economic rights, judicial independence and the rule of law, public accountability and open governance. It has undertaken research in the sphere of approaches to tackling the scourge of corruption, and has advocated the establishment of a dedicated, independent anti-corruption body with a triple mandate of investigation, prevention and public education.

[1] www.casac.org.za
[2] CCT 48/10

3. This submission begins with a summary of the research conducted by CASAC proposing the establishment of such an independent body. It then proceeds to comment on the specifics of the Bill before the Committee.

A DEDICATED INDEPENDENT ANTI-CORRUPTION BODY

4. South Africa is not the only country that is grappling with strategies to combat and prevent corruption. It is a worldwide phenomenon. International recognition of the scale of the problem has recently led to a range of important international and regional conventions aimed at preventing corruption. South Africa has signed and ratified six of these agreements:

   i) The United Nations Convention against Corruption (UNCAC);

   ii) The African Union Convention on Preventing and Combating Corruption (AU Convention);

   iii) The Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention);

   iv) The UN Convention against Transnational Organised Crime (UNTOC);

   v) The Southern African Development Community Protocol against Corruption (SADC Protocol); and

   vi) The Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol).

The primary anti-corruption functions identified by international instruments are: investigation and prosecution; prevention; education and awareness-raising; co-ordination; monitoring and research; international co-operation in criminal matters including mutual legal assistance and extradition. [3]

5. In summary, an analysis of the treaties makes plain that South Africa has inter alia, the following obligations:

- To establish an independent anti-corruption agency or agencies;[4]
- To ensure that steps are taken to investigate and where appropriate prosecute corrupt acts;[5] to prevent corruption by removing obvious opportunities for corruption;[6] and to educate the public on the harms of corruption.[7]
- To ensure transparency and access to information in the fight against corruption;[8]
- To establish mechanisms that encourage participation in the fight against corruption by the media, civil society and non-governmental organisations;[9]
- To adopt measures that address corruption not only in the public sector but also in the private sector;[10] and

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[3] "Specialised Anti-Corruption Institutions: Review Of Models", OECD Report (2007) at p 5-6: http://www.oecd.org/dataoecd/7/4/39971975.pdf

[4] See article 20 of the AU Convention, article 6(2) of the UNCAC and article 9(2) of UNTOC.

[5] See chapter 3 of UNCAC; articles 1 and 3 of the OECD Convention.

[6] See art 5(2) and art 5(3) of UNCAC.

[7] See article 5(8) of the AU Convention.

[8] See articles 9 and 10 of the UNCAC and article 4(1)(d) of the SADC Protocol.

[9] See articles 5(1) and 13 of UNCAC and article 13 (4) of the SADC Protocol.

- To co-operate with other states in criminal matters, and to afford other states "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings" in relation to corruption.[11]

6. Of particular note is the clear obligation to establish independent, well-resourced bodies to combat corruption through investigation, prevention and education established by these binding international agreements. The United Nations Convention against Corruption (UNCAC) obliges States Parties to ensure the existence of a body or bodies to prevent corruption and oversee the implementation of the obligation to prevent corruption and to increase and disseminate knowledge about the prevention of corruption.[12] The body or body must be granted the necessary independence and material resources to carry out its functions effectively and free from any undue influence.[13] States Parties are also required to ensure "the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence.

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[10] See article 11 of the AU Convention and article 12 and 21 of UNCAC.

[11] See Chapter 4 generally and more specifically articles 43 and 46(1) of the UNCAC.

[12] Article 6(1) of UNCAC.

[13] Article 6(2) of UNCAC.

7. The AU Convention requires Parties to "establish, maintain and strengthen independent national anti-corruption authorities or agencies and to designate such agency to the Chairperson of the Commission of the African Union at the time of signing or ratifying the Convention.[14] It also obliges States Parties to take measures to educate the public and to: "Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics."[15]

8. There are several existing institutions mandated to address corruption in South Africa in addition to the Directorate for Priority Crime Investigation[16]). The Special Investigating Unit (the SIU)[17], and the Asset Forfeiture Unit (which is based in the office of the National Director of Public Prosecutions) have the power to investigate matters and refer them to the National Prosecuting Authority (the NPA) for prosecution. The Public Protector and Auditor-General also have an important investigative and monitoring role to play but their primary function is not to address corruption. In addition, the National Treasury has significant powers of prevention, as it is tasked with prescribing the frameworks and systems in terms of which organs of state manage their finances. The Financial Intelligence Centre investigates money laundering crimes.

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[14] Article 20(1) of AU Convention.

[15] Article 5(8) of AU Convention.

[16] Chapter 6A of the SAPA Act 68 of 1995, as amended.

[17] Special Investigating Units and Special Tribunals Act 74 of 1996.

9. There are several multi-agency initiatives dealing with investigation and prevention. For example, the Anti-Corruption Task Team comprises the Hawks, the SIU, the NPA (through the Asset Forfeiture Unit and the Special Commercial Crimes Prosecutors). There is also a multi-agency initiative working on prevention located in the National Treasury, consisting of the Office of the Accountant-General, South African Revenue Service, and the Financial Intelligence Centre.[18] The Department for Public Service and Administration (the DPSA) has recently announced the established of a Special Anti-Corruption Unit within the DPSA which is to act in partnership with the SIU to investigate cases of alleged corruption.[19]

10. This existing framework has three challenges. First, despite the plethora of institutions in place with the responsibility of enforcing the prohibitions on corruption, one finds that many key provisions aimed at prohibiting corruption are not adequately monitored or enforced. The fact that there are so many institutions responsible for fighting corruption with overlapping mandates means that a coherent and comprehensive response is absent. In its Diagnostic Overview the NPC states:

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[18] See the Department of Public Service and Administration report to the Parliamentary Portfolio Committee in November 2 www.pmg.org.za/files/docs/100519**anticorruption** 0.ppt

[19] Id.

"The numerous anti-corruption agencies and laws and forums also present their own problems due to overlapping mandates and the lack of strategic coordination of investigating bodies."[20]

11. Secondly, despite the large number of organisations mandated to combat corruption, and despite the clear international obligation to educate the public on the harms of corruption, there is no institution in South Africa with a clear mandate to educate South Africans, raise awareness about corruption and to conduct a public campaign of any kind. Civil society bodies including NGOs, professional bodies, trade unions, business groups, religious, cultural and community organisations together and separately they form important elements in the fight against corruption; they possess the expertise and resources to take on the crucial role in developing public awareness of corruption and its implications. But there needs to be a co-ordinating mechanism and an over-arching strategy of public education.

12. Thirdly, despite the existence of the Competition Commission and the Special Commercial Crimes Unit in the NPA, together with a range of legislative provisions dealing with corruption and unethical conduct in the private sector, there remains a lack of focus on this sector. A dedicated anti-corruption agency will allow for the integration of strategies in both the public and private sectors.

[20] NPC Diagnostic Overview, p.26

13. A solution to the problems associated with the existing framework identified above would be to create an independent anti-corruption agency (commission) with a mandate to combat corruption by following a three-pronged strategy of enforcement (including investigation and referral for prosecution), prevention, and education. Such an institution if properly funded and well-staffed would enable decisive and effective action to be taken.

14. The single most important factor in sustaining an independent agency is the existence of political will and support for the agency.[21] Even the most well-crafted institution will fail if the requisite political will does not exist. Tony Kwok Man-wi, the former Deputy Commissioner of the Independent Commission against Corruption (ICAC) in Hong Kong has argued[22] that political will is demonstrated by the following factors:

- The commitment of adequate resources
- Independence of the agency and absence of political interference
- A zero tolerance approach by government to all acts of corruption whether in the public or private sectors
- The presence of a sufficient legal framework to investigate corruption

15. It would be possible for such a dedicated independent commission to be established either as an institution supporting constitutional democracy under Chapter Nine of the Constitution, or as a distinct statutory body

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[21] See "Specialised Anti-Corruption Institutions: Review of Models" OECD Report 2007 p 17 (n 22 above).

[22] Tony Kwok Man-wi, "National Anti-Corruption Strategy: the Role of Government Ministries"

imbued with the necessary structural and operational independence. The latter may be 'housed' in the Presidency for example – this will also serve as a signal of the importance attached to such an entity.

THE SAPS AMENDMENT BILL – B7 - 2012

16. We now comment on the specific provisions of the Bill. We refer to the proposed unit as "the Unit".

17. We comment on the specific provisions in light of the two key imperatives that flow from the *Glenister* judgment. The first imperative is that the Unit created to combat corruption is adequately i*ndependent* and not subject to undue political interference. The second imperative is that the unit is able to combat corruption *effectively.* Notably, on these issues, the Constitutional Court was – in large measure – unanimous. In short, the Court unanimously held that there needs to be an effective response to corruption and that those entrusted to deal with it are not subject to undue political interference. The majority of course went further, imposing a requirement of an independent unit (even if located in the South African Police Service ('SAPS')) and by spelling out specific requirements.

18. When considering the requirement of independence, it is important to highlight various issues.

a. First, there is an important relationship between what might be termed "structural" provisions and ensuring independence. This includes matters such as appointment and dismissal processes, conditions of employment and security of tenure. It also includes the relationship between the unit and other state organs.

b. Secondly, there is an important relationship between what might be termed "operational" provisions and ensuring independence. Operational provisions are those that concern the functioning of the unit and would include its budget, the availability of staff and how operational decisions are taken.[23]

c. Thirdly, it is not only *actual* independence (structural and operational) that matter but also, critically, whether the public will reasonably perceive the unit to be independent. Public confidence in the independence of the unit and its effectiveness is crucial. It is with this latter point in mind that we highlight the importance of the public participation process in this legislative exercise as well as the creation of mechanisms in the Bill itself that will engender public confidence in the system.

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[23] The distinction between operational and structural provisions is helpfully drawn in a paper prepared by Professor Pierre de Vos '*The South African Police Service Amendment Bill: compliance with Glenister v president of the Republic of South Africa'* prepared for the Institute of Security Studies. We draw on this excellent paper in various instances.

19. In considering what are the requirements flowing from the *Glenister* judgment, (whether general or specific) we wish to emphasise that the judgment ought not, indeed cannot be regarded as providing a definitive or comprehensive checklist against which the Bill can be tested for constitutional validity. This is because the Court, when considering the impugned provisions of the SAPS Act only considered whether those provisions breached the Constitution or not. The Court, quite appropriately, did not venture to spell out a definitive blue print for what must be done. However, what this means is that there must now be a holistic assessment of whether the proposed unit is independent and able to perform its crucial functions effectively. Of course, the *Glenister* judgment imposes certain specific requirements, but these requirements are neither comprehensive nor, in all respects, definitive. There may be other and new problems or provisions that might have seemed innocuous at the time. These may assume greater prominence and become problematic in view of the scheme now adopted, and viewed as a whole.

20. It is important also to emphasise at the outset that the majority in *Glenister* held that there are many reasonable (and thus constitutionally permissible) ways in which Parliament might remedy the defects identified in the previous SAPS Act. It did so in deference to the roles of the executive and the legislature in line with the accepted constitutional principle of the separation of powers. Put differently, it is not the role of the Court to determine policy or to

legislate, only to determine compliance with the Constitution. Thus, the Court – in effect – enjoined Parliament to engage in a meaningful debate about what is the most appropriate and effective way to secure the critical objectives of fighting corruption. Thus, while it is important always to bear in mind what are the minimum requirements imposed by the judgment, our submissions are made ultimately with a view to finding the best, or most appropriate, way to structure a corruption fighting unit.

21. In making our submissions, we have had regard to other legislation passed by the post democratic Parliament where Parliament has sought to create independent structures to deal with particular social issues. More particularly, we have had regard to the legislation governing the Independent Electoral Commission, the Independent Complaints Directorate, the Auditor General and the Human Rights and Gender Commissions.

22. Regretfully, however, CASAC has concluded not only that the proposal that has been tabled is neither the optimal solution, but that it falls short of the specific requirements imposed by the *Glenister* judgment in very material respects. Indeed, it is difficult to resist the conclusion that the government, in preparing the amendments, has adopted a minimalist approach and sought to do as little as possible to alter the status quo. One cannot but be mindful that the judgment is one of the legal events that has triggered some of

the criticisms recently leveled at the judiciary, and which has prompted a review of the judgments of the Constitutional Court. Ironically, when regard is had to the contents of the judgment, much is left to Parliament to decide. Contrary to popular perception, it is – quite simply – not a prescriptive judgment.

23. Nevertheless, while these debates – which cannot be ignored – are a matter of deep concern, these submissions are advanced in the spirit of taking the debate forward and to improve the legislation currently before the Portfolio Committee on Police. It cannot be disputed that it is in the interests of the country to have an effective response to corruption. And it cannot be disputed that it is important to protect the men and women who are charged with the responsibility of combating corruption from undue interference in the performance of their important tasks. It would be naïve not to accept that there is a real threat of such interference when powerful people in both the public and private spheres become the subject of investigation, as is almost inevitable when dealing with the investigation of serious corruption.

Much is at stake. Corruption threatens to destabilize our democratic institutions and it threatens to undermine the realization of the transformative goals of the Constitution. It has a deleterious effect on the realization of social and economic justice because resources earmarked for delivery to marginalized and

poor communities lands up in the pockets of a few who see their personal advancement as more important than the good of our country. The Court itself noted:

"There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfill its obligations to respect, protect, promote and fulfill all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk."[24]

24. Knowing that all political parties in Parliament have committed themselves to eradicating and responding effectively to corruption, we place our trust in Parliament to ensure that the legislative process will create a meaningful space to debate the SAPSA Bill and to remedy what, unfortunately, are patent difficulties with the new proposals.

25. Our comments appear under the following headings:

[24] Glenister v President of the Republic of South Africa and Others CCT 48/10 [2011] ZACC 6, Para 166

a. The location of the unit;
b. Institutional protections of a general nature against political interference
c. The mandate of the unit
d. The appointment process
    i. Key staff
    ii. Other staff
e. Tenure
f. Dismissal provisions
g. Minimum secured remuneration levels

The location of the unit

26. CASAC's views on the establishment of a comprehensive and dedicated anti-corruption fighting unit are set out above. CASAC is of course mindful that the Constitutional Court did not hold that there is a constitutional imperative to locate the unit outside of the SAPS. On the contrary, location within SAPS was stated to be a permissible route provided the requirements of independence and effectiveness are met.

27. It does not follow, however, that the decision to locate the unit within the SAPS is a good political decision. It would, in CASAC's submission be far more preferable to properly explore other

options within constitutional bounds. Indeed it is a matter of some concern that there has not been an opportunity for meaningful public debate on this issue. The decision to locate the unit within the SAPS appears to have been taken politically evidenced by a late introduction of the Bill in Parliament at a time when it is vital that legislation be enacted with relative expedition.

28. Insofar as Parliament is intent upon pursuing the strategy of locating the unit within the SAPS, it then becomes absolutely imperative to adopt whatever measures are possible to make the unit as effective and independent as possible. It is also imperative to ensure that the particular risks or problems with locating the unit within the SAPS are identified and measures taken to minimize or neutralize these risks and problems.

29. These include ensuring adequate financial and budgetary autonomy while maintaining appropriate political accountability; ensuring that executive interference in operational decision-making is minimized insofar as there is any risk that there will be political interference in investigating politically sensitive criminal conduct; ensuring that those who staff the unit are not subjected to the ordinary conditions of service of the SAPS and ensuring that investigations about police involvement in any priority crime can be investigated without hindrance .

Institutional protections of a general nature against interference

30. Notably absent from the Bill are adequate institutional protections that constitute a bulwark against interference. In this regards the Constitutional Court held that it is important to ensure a structure that creates an "*effective hedge against interference*". The difficulty with the initial bill was that it only created backward looking remedies such as the creation of a complaints mechanism headed by a retired judge backed up by a power to refer a complaint for prosecution. That was regarded to be an important but a limited and ultimately insufficient protection against interference.[25] The only concession made in the Bill is to remove the discretion from the National Director of Public Prosecutions to refuse a request for information from a retired judge who is investing a complaint of undue influence.

31. The Bill does include provisions which are aimed at addressing this concern but which, in CASAC's assessment, are insufficient. We refer to the new proposed Clause 17E(9) which requires the Directorate to serve "*impartially and exercise his or powers or perform his or her functions in good faith*". It also prohibits organs of state or any person from improperly interfering with, hindering or obstructing a member of the Directorate in the exercise,

[25] See paras 246 and 247 of the judgment.

carrying out or performance of its, his or her powers, duties and functions and requires Directorate staff to take an oath of office.

32. We propose that Parliament include stronger protections. When viewed against safeguards included in other legislation these are relatively weak.

33. The provisions governing the Independent Complaints Directorate are helpful in this regard. More particularly, sections 50(2) to 50(4) of the SAPS Act impose some important safeguards for independence.

a. Section 50(2) of the SAPS Act provides that the ICD "shall function independently from the Service."
b. Section 50(3) has a provision similar to the new 17E(b) but importantly refers not to a prohibition against "improper" interference but against any interference. The qualifying word "improper" suggests that some interference is not improper, which cannot be so. Interference, per se, ought to be prohibited.
c. Furthermore, and in our submission, critically, section 50(3)(b) makes it a criminal office willfully to interfere with the functioning of the ICD.[26]

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26 (b) Any person who wilfully interferes with the Executive Director or a member of the personnel of the directorate in the exercise or performance of his or her powers or functions, shall be guilty of an offence

d. Also helpful is section 50(4) which imposes a positive duty on organs of state to assist the ICD in protecting its independence, impartiality, dignity and effectiveness in the exercise and performance of its powers and functions. [27]

34. A further helpful comparator is section 181(2) to 181(4) of the Constitution which legislates for the governing principles for the state institutions supporting constitutional democracy, such as the Public Protector, the Human Rights Commission, the Gender Commission, the Auditor General, the Electoral Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

a. Section 181(2) provides as follows:

"These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."

b. Section 181(3) provides as follows:

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and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

[27] (4) All organs of state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the directorate and in the exercise and performance of its powers functions.

"Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."

c. Section 181(4) provides: "No person or organ of state may interference with the functioning of these institutions."

35. These provisions are, in turn, strengthened in the legislation creating the institutions in question. For example, the Human Rights Commission Act both repeats the provisions in the statute and makes it a criminal offence improperly to interfere with any investigation or to fail to provide assistance to ensure independence of the institution. See section 18(g) and (i) of the Human Rights Commission Act.

36. In summary, we propose that Parliament consider the introduction of further institutional safeguards to protect the autonomy of the unit. The proposals made above are of a general nature. Several proposals made below will also serve this purpose, for example methods to increase the financial autonomy of the unit while retaining political accountability.

The mandate of the Unit

37. The Unit is intended to be a unit to "*prevent, combat and investigate*" "*national priority offences*" and more particularly "*serious organized crime, serious commercial crime and serious corruption*".

38. The mandate of the unit is thus delineated in the first place by the requirement of "seriousness". What needs to be acknowledged; however is that all corruption is serious in some senses. Indeed, low level corruption in small amounts can undermine the integrity of our systems as seriously as corruption involving large amounts of money. Take the example of a poor rural villager who asks the local police to investigate stock-theft, or who is unable to obtain an ID document from the local home affairs office, or proof of address from her traditional leader and thus cannot access social grants or open a bank account unless succumbing to the pressures of corruption. These are very serious matters for individuals. If South Africa does not effectively root out corruption at all its levels, it is the most vulnerable who will pay the highest price.

39. It must also be recognised that in the nature of things, a complaint that might on the face of it seem minor, if investigated properly, may well reveal corruption of a more serious sort. For example, an individual may complain that she was asked to pay a bribe of R50 to get her ID book . On its own it may seem relatively minor

but on investigation it may transpire that the complaint is symptomatic of widespread corrupt activities within the Department of Home Affairs affecting millions of people.

40. In creating a unit with a mandate only of dealing with *serious* corruption, the unit can only be seen as a limited intervention, important as it may be. The ability of state institutions effectively to deal with *all* corruption, however remains critical. If Parliament ultimately limits its enquiries into how to deal only with "serious" corruption, it will be failing in its duties.

41. Nevertheless, insofar as it is decided that this particular unit will deal only with *serious* corruption what is critical, CASAC submits, is to ensure that "seriousness" be given a determinable meaning that acknowledges the devastating impact it can have on people's lives at all levels of society. A definition might be included in the legislation that highlights the factors that would be considered in determining whether a matter is serious. The types of considerations, (non-exhaustive) would be:

a. The amounts of money involved;
b. The nature of the impact of the activity on the public or a section of the public;

c. The impact of the activity on the realization of the goals of the Constitution or realization of State policy or other important societal objective;
d. The position, public or private, held by those implicated;
e. The extent of the activity in question;
f. Any other relevant consideration;
g. The role of the Ministerial Committee;
h. Accountability;
i. Budget and financial control.

42. It is also critical that the Unit be empowered to conduct preliminary investigations in respect of *any* complaint referred to it, however minor it may appear, so that the Unit itself is empowered to assess whether the conduct complained of might yield evidence of a sort that can be termed "serious". The Unit needs to be properly resourced to do this.

43. Also critical is that if a complaint is made to the Unit, and it is determined not to constitute "serious" corruption, then referral systems need to be in place to ensure that the complaint will nevertheless be investigated and responded to by other state organs, also endowed with adequate independence. A duty to refer a complaint that won't be investigated by the Unit ought to be imposed together with the provision of information as to who else might be able to assist a whistleblower or complainant in dealing with the issue. Clearly, the protection of whistleblowers must be considered in tandem with such processes.

44. A second important determinant of the mandate of the Unit is its subjection to "policy guidelines" which are to be issued by the Minister and approved by Parliament. It is not entirely clear what these policy guidelines will deal with save that they will facilitate the identification of national priority offences. Section 17K purports to deal with this issue by stating that the guidelines are "for the selection of national priority offences …; for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the Directorate …"

45. In CASAC's submission, these provisions contemplate an impermissible level of interference in the operational autonomy of the Unit.

46. The provisions considered by the Constitutional Court in the *Glenister* judgment conferred the power to determine policy guidelines on a Ministerial Committee. As with the current Bill the discretion to investigate priority offences was expressly subject to those policy guidelines as was the power to refer offences for investigation. In substance, the effect of the new Bill is to remove the power from the Ministerial Committee and now vest it in the Minister of Police subject to parliamentary approval.

47. In CASAC'S submission, this does not meet the requirements of *Glenister*. The Court held that while political accountability of a unit is important,

these powers create a plain risk of executive and political influence on investigations and on the entity's functioning.[28] It was regarded as an insufficient check that parliament had to approve any policy guidelines for approval.[29] The Court held that the competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives, who could themselves be the subject of corruption investigations. Their power over the entity, the Court held "is unavoidably inhibitory".[30] Notably the Court adversely remarked on the fact that the power included the power to determine whether corruption would be treated as a priority offence and accordingly the "anti-corruption nature" of the Directorate. [31]

48. It is thus clear that the unit must be expressly empowered to investigate serious corruption without any hindrance. The definition of the mandate of the unit cannot, in our submission, be subject to policy guidelines. There may be an important role for the determination by the Executive of policy that affects the work of the Unit but this requires much closer scrutiny and evaluation. The present proposals encroach upon the operational autonomy of the Unit to an impermissible degree.

[28] See para 229
[29] See para 231.
[30] See para 232.
[31] See para 233.

49. CASAC accordingly proposes the following:

a. The mandate of the unit must be spelt out in the legislation and not subjected to policy guidelines to be determined by the Minister and Parliament. It is through the legislative process, i.e. during this process, that Parliament and the Executive must determine policy.

b. If the mandate of the unit is to be limited to serious corruption, etc, this should be defined in the legislation. A provisional proposal that might facilitate further discussion is made above.

c. The Unit must be mandated to conduct preliminary investigations in order to assess whether the corruption alleged is of a serious nature or might reveal corruption of a serious nature.

d. Where corruption that falls outside of the mandate is drawn to or comes to the unit's attention then referral procedures must be in place to ensure its investigation and, if required prosecution. Consideration must be given to whether whistleblowers are adequately protected in the process.

e. The Unit ought not to be subjected operationally to determinations of its mandate by the Minister or by Parliament. That is especially so when the corruption in question might implicate political actors. Thus, if any guidance or input is to be received from

political actors, the unit must retain the overall discretion to determine whether or not a matter should be investigated.

50. Finally, CASAC submits that consideration be given to imposing duties on the unit to investigate referrals from specific sources, at least to establish whether or not there is *prima facie* evidence that a crime that may constitute corruption (whether serious or not) has been committed. The Unit must not be dependent on referrals from other State bodies in order to act but must be able to act upon referral from any individual, as well as initiating its own preliminary investigations. Indeed, the Unit ought to be endowed with adequate capacity to ensure that it can conduct "corruption detection". Without such a broad mandate, the effectiveness and independence of the unit will be seriously compromised.

51. This in turn highlights the importance of creating adequate capacity within the unit. In a sense, what may be warranted is a sort of clearing house, where an assessment is made either to investigate a matter more fully within the unit or to refer a matter elsewhere for further investigation and handling.

The appointment process: the Head of the Directorate, the Deputy Head and Provincial Heads

52. The key appointees to the unit will be the Head of the Directorate, the Deputy Head and Provincial Heads. However, the Head of the Directorate

is institutionally, the central figure. It is of utmost important that these key positions be filled following a credible appointment process that lends the institution legitimacy and instills public confidence that an appointee has not been installed to frustrate rather than further investigation of corruption.

53. The Constitutional Court in *Glenister,* while not prescriptive of any requirements for an adequate appointment process, clearly indicates that an appointment that is ultimately controlled by the executive may undermine the independence of the Unit.

54. The Bill in its current form contemplates that the Head of the Directorate be appointed by the Minister in concurrence with Cabinet. The Deputy head is appointed by the Head of the Directorate with the concurrence of the Minister, this also being the process of appointment for the Provincial Heads. In short, the appointments are political appointments. The ability of senior politicians to appoint compliant individuals is thus a real threat absent the introduction of checks and balances to ensure a credible process.

55. This issue has often been considered by Parliament, which has, in times gone by, created a range of creative and effective appointment processes that can now be drawn on to inform this process. CASAC proposes that Parliament now draws on other precedent to inform the manner of

appointment of the key staff to the unit. A system that would be suitable would, in CASAC's submission entail:

a. The creation of either:
    i. An appropriately composed appointment panel (or evaluation panel) alternatively
    ii. the appointment of the key staff by a multi-party parliamentary committee with a super-majority such as 60%.[32]

b. A system ensuring the participation of civil society in the appointment of key staff. This will ensure legitimacy and credibility.[33]

c. The adoption of criteria in legislation germane to the appointment of the key staff.

d. The adoption of a system of disclosure of any business or political party associations in advance of an appointment process (and thereafter).

[32] See section 193(5) of the Constitution. The appointment of the head of the unit, at least would be analogous to an office such as the Public Protector or the Auditor-General.

[33] See section 193(6) of the Constitution in connection with the appointment of Chapter 9 institutions.

56. One mechanism to guard against undue politicization of the process while maintaining political accountability and appropriate involvement would be to create a short-listing system whereby appointments must be made by a political actor but on the recommendation of a panel made up of non-political actors in accordance with set criteria. Such an approach is followed (though linked to a parliamentary process) in appointing the IEC where a panel composed of the Chief Justice, the Public Protector and a representative of the Gender Commission and Human Rights Commission conduct initial appointment recommendations.[34] Parliament then considers the nominees.

57. Notably even the appointment of the Head of the ICD is subject to parliamentary confirmation, presumably recognizing the importance of immunizing the appointment process from undue political control. [35]

58. The appointment process processed for the head of the Unit (and other key staff) thus fails to guarantee independence. On the contrary, it encourages political manipulation of the Unit.

Other staff

59.

[34] See section (2) of the Independent Electoral Commission Act 1996.
[35] See section 51 of the SAPS Act.

Section 17M provides that all members of the Directorate are members of the SAPS "with all the powers, duties and functions of other members of the South African Police Service". This has implications for the security of tenure as well as the remuneration of members of the Directorate. De Vos states that: "As the majority judgment in *Glenister* made clear, in the absence of explicit provisions entrenching the employment security and remuneration levels of members of the Directorate, 'individual members could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution', which would be inimical to structural independence. Ordinary members of the Hawks would therefore remain subject to the hierarchical structure and discipline of the SAP and could be removed by the National Police Commissioner (who is not an independent person)."

Tenure

60. The Court in *Glenister* holds that adequate independence requires special measures entrenching the employment security of the staff of the entity to enable them to carry out their duties vigorously.[36] This includes renewability of the term of office of the person seized with overall responsibility for the unit and its staffing.[37] By implication it also includes measures to secure the position of other staff.

[36] See para 222
[37] See para 223.

61. The Court noted that a renewable term of office in contradistinction to a non-renewable term heightens the risk that an office holder may be vulnerable to political and other pressures.

62. The Bill contemplates some measure of improvement to the previous legislation in that there is now a proposed non-renewable fixed term. However the Bills as it stands still poses very serious risks to the office holder rendering him or her vulnerable to political and other pressures. In short, while adhering to the letter of the *Glenister* judgment in removing the complaint at that stage, new and different problems have now been created.

63. Firstly, the term of office is a term "not exceeding seven years." This means that the person may be appointed for a short term, for example one year or four years. Given the importance of post tenure career options it is vital that an incumbent is given job security for a reasonable period of time. We submit that a term of seven or even ten years should be prescribed. This issue is a matter of concern viewed from the perspective of independence but it is also a matter of concern viewed from the perspective of effectiveness. Should an appointment endure for only a short period of time, say one or three years, this is grossly inadequate time for an incumbent to perform their functions effectively. The turnover will be too frequent for the Unit to function effectively.

64. Secondly, while on the one hand the legislation contemplates (in section 17CA(4)) that an incumbent is appointed for *a fixed term*, this is entirely undermined by the provisions dealing with compulsory retirement at the age of 60 years subject to the discretion vested in the Minister to extend the tenure. This creates an obvious way for the Minister to control the performance of functions of any appointee who is appointed at an age approaching 60. And there is, quite simply, no need to create this mechanism. The age of 60 is, by any measure, a very young compulsory retirement age. Judges serve until 70 or 75. Many aged 60 and over are still well able to work and to work well, courageously and wisely. Those who are coming towards the end of their career will also be less susceptible to the political pressure as they will be less likely to need post appointment career support. Any risk of appointing a person who may not be mentally or physically healthy enough at the time of their appointment for the full term of their tenure ought not to be appointed in the first place. In short, these provisions entirely undermine the very purpose of afixed term tenure and create the means for political interference through the appointment and tenure process.

Dismissal provisions

65. In its nature a fixed term presupposes that a person won't be discharged from office save in very exceptional circumstances. Basically, one accepts that some appointees may be stronger and better than others. In this

regard the Constitutional Court, at least by necessary implication, indicates in *Glenister* that the grounds of dismissal ought not to be broad but must be subject to special inhibitions, such as only on objectively verifiable grounds like misconduct or continued ill-health. Grounds such as 'redundancy' or 'the interests of the SAPS', 'promoting efficiency or economy' would undermine independence.

66. It is apparent that the grounds of dismissal in the Bill are based on those that govern the dismissal of the National Director of Public Prosecutions. While that may be a helpful comparator, it cannot be assumed that those provisions are adequate.

67. In CASAC's submission there are two ways in respect of which they are deficient and warrant amendment.

68. First, the Bill permits dismissal on the basis of "misconduct". (See in this regard section 17DA(2)). This is, in CASAC's submission, a relatively weak protection even if it may fall within the bounds of reasonableness as required by the Constitution. It would be far preferable to impose the standard of "gross misconduct" as is applied to judicial officers. (We are mindful that the standards applied to judicial officers need not apply in context of the Unit in terms of *Glenister* but it does not follow that certain attributes of judicial office provide a very good guide.) Misconduct can include minor transgressions and dismissal on that ground accordingly create too ready a platform for those aggrieved with how the Unit is

functioning – whether public or private actors – to lodge complaints that can in effect disable the functioning of the unit by causing the key office holders to be dismissed. It does not follow that minor transgressions should not be dealt with. They should be but this can be achieved via a complaints mechanisms. That would both enhance accountability while preserving independence.

69. Secondly, the proposed section 17DA(2)(a)(iii) effectively enables dismissal on the ground of "inefficiency". This is both far too subjective and insufficiently serious to warrant dismissal. In CASAC's submission, this probably breaches the constitutional requirements imposed by *Glenister*. Accusations of inefficiency can be leveled at most people at various points: it is often leveled at government itself as well as private actors. We all act inefficiently from time to time. It would create a very ready basis for interference in the functioning of the unit if this were to be a ground of dismissal. It ought to be removed from the Bill.

70. Also important is the **process** for removal from office within the fixed term. There are two procedures contemplated. The first contemplates dismissal by the Minister following an enquiry. The outcome of the process must be communicated to but is not subject to the approval of Parliament. This is effectively an executive dismissal. The second procedure contemplates the removal from office by the Minister on the request of Parliament. It does not appear as though any enquiry is contemplated in that instance.

71. In CASAC's submission, there are insufficient safeguards in these processes to preclude their abuse, which must be safeguarded against.

72. CASAC proposes that these processes be improved by drawing on the procedures for dismissal of other independent institutions. A more appropriate process would contemplate:

    a. Dismissal only by Parliament alternatively by the Minister subject to Parliamentary approval, upon a special majority (probably two thirds).
    b. The conducting of an enquiry initially by the Minister and thereafter by Parliament.
    c. A requirement that detailed reasons be provided for dismissal and an opportunity for representations to be made.

73. A helpful comparator is the process for removal of the Auditor General and the Public Protector as set out in section 194(2)(a) of the Constitution. That process contemplates a finding of a ground of dismissal by a parliamentary committee (which would have to conduct an enquiry) and removal by a two -thirds majority.

74. Furthermore, it is a matter of some concern that a head of the directorate can be suspended without pay by the Minister pending an enquiry into fitness to continue holding office. The threat of suspension without pay

creates fertile ground for indirect political interference in the functioning of the unit. Moreover, suspension should only be permitted in exceptional circumstances, for example when ongoing service threatens the very functioning of the unit. It is preferable at least in the usual course that a person continue in office while an enquiry is ongoing.

Minimum secured remuneration levels

75. The Constitutional Court held that the absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. What was regarded as inadequate was the fact that the conditions of service for all members including grading of posts, remuneration (and dismissal) were to be governed by regulations determined by the Minister for Police. While probably not prescribing a system, the Court regarded the system that applies to the former Director of the Scorpions, which was determined with reference to the salary of a judge of the High Court as constituting a secure minimum rate of remuneration. A comparator is not given in the judgment for other staff.

76. The Bill proposes a system whereby minimum secured remuneration levels are secured in section 17CA(5) but the remuneration scale is to determined by the Minister. It is capable of being reduced but only with the concurrence of parliament. CASAC is concerned at the introduction of

measures to reduce remuneration scales. There is no need for this and it creates the possibility of undermining the office through reduction of pay levels.

77. All other members of the Directorate are treated as ordinary members of the SAP and have their remuneration and other conditions of service determined by the Minister of Police with the approval of Parliament. It is recommended that their conditions of service should rather be determined by the Head of the unit with the approval of Parliament.

The role of the Ministerial Committee

78. A key concern of the Constitutional Court in *Glenister* related to the accountability and oversight of the activities of the Hawks by a Ministerial Committee, in other words its co-ordination by Cabinet. Elements of its power that were held to undermine independence were a) its control over the policy guidelines of the unit and the selection of national priority offences and b) provision that was made for hands-on supervision.

79. In this regard the Bill is much improved but it remains problematic. The functions of the Committee have been reduced. We have dealt with the problems associated with vesting control over policy guidelines in the hands of the Minister and Parliament. These are no longer powers vesting in the Ministerial Committee.

80. The key function it will now perform is determining "procedures to coordinate the activities of the Directorate and other relevant Government department or institutions."

81. While co-ordination between the Unit and other relevant departments and institutions is, of course, very important, it is far from clear that the mechanism of an inter-Ministerial committee ought (at least for all purposes) to be utilized.

82. While CASAC accepts that there is a role for assistance from an executive committee, the purpose of the function as articulated above is far from clear. And it is difficult to see why what are probably the central concerns cannot be dealt with expressly in legislation at least in some measure.

83. Thus, there would appear to be a need to have a process whereby referrals between different state bodies entrusted with dealing with the investigation and prosecution of corruption are handled. However, this should be effected not through a Ministerial Committee but by co-operation between the state departments in question.

84. There is also a clear need to ensure the prosecution of priority crimes by the National Prosecuting Authority (NPA). It would undermine the effectiveness of the unit if the NPA could, despite adequate investigation, decline to prosecute a matter on the basis that it is not a priority of the

NPA. This however, ought to be dealt with via imposing a duty on the NPA to prosecute priority crimes where there is evidence upon which a reasonable court might convict. If additional capacity is needed within the NPA to do this, then it ought to be provided. Prosecution of corruption charges is self evidently a critical matter.

85. Put differently, we propose that Parliament explore the issues that may require inter-Department co-operation and then attempt to deal with the issues from the perspective of principle in legislation or alternatively, regulations, rather than devise a discretionary body that can undermine the independence of the Unit.

86. The manner in which the "co-ordinating" mandate of the Ministerial Committee has been framed is, quite simply, too vague. It must be recalled that inasmuch as there is a proper role for the exercise of Ministerial discretion, this can be achieved by empowering an appropriate executive functionary to make regulations and in doing so to consult with other affected organs of State.

Accountability

87. Political accountability is a critical matter and all the more so when dealing with a relatively independent Unit as ought to be the case here. Thus, the question is not whether there should be accountability but how this should be achieved.

88. The Bill contemplates a process of reporting by the head of the unit, upon request of the Ministerial Committee by the provision of performance and implementation reports. There is also provision for reporting to Parliament annually. This is achieved by requiring the National Commissioner to include in the annual report to Parliament, in terms of the Public Finance Management Act, a report in respect of the Directorate as a programme of the Service.

89. CASAC is of the view that it would be preferable to emphasise the role of Parliament as a key accountability mechanism. This need not preclude reporting to the Minister. However parliamentary oversight is more transparent and would enhance the legitimacy of the institution. The model is well known as it is contemplated for all Chapter 9 institutions which are accountable to parliament.

Budget and financial controls

90. The Bill contemplates that the Unit's budget be drafted by the National Commissioner after consultation with the head of the unit. It contemplates too that the National Commissioner is the accounting officer for the unit.

91. In CASAC's submission, the budget should be drafted by the head of the unit after consultation with the National Commissioner. That is critical to

ensure that the effective functioning of the unit is not manipulated by withholding the necessary funding to ensure that it is adequately resourced to perform its functions. The budget will have to undergo the usual further processes involving Treasury and ultimately Parliament; thus there is more than adequate provision for political oversight and accountability.

92. Furthermore, the Bill should specifically provide for the head of the unit to be able to perform the functions of accounting officer for purposes of the PFMA.

93. Without these provisions there is far too great a level of financial control by the National Commissioner over the unit. Control over finances will result in control over the effectiveness and the independence of the Unit.

CONCLUSION

94. It is evident from the foregoing that the SAPS Amendment Bill does not sufficiently insulate the Directorate of Priority Crimes Investigation from political influence in its structure and operations. The opportunities for executive and political influence over the Directorate remain, ranging from the appointment and dismissal of the Head of the unit to the determination of policy guidelines by the Minister and the power of the Ministerial Committee to request performance and implementation reports from the National

Commissioner and the Head of the Directorate. The inclusion of these provisions flies in the face of the approach adopted by the Court in *Glenister.*

95. Parliament has a critical role to play in ensuring that whatever legislation emerges meets both the unanimous judgment of the Court that there is an obligation on the state to establish an effective anti-corruption body, as well as the majority judgment's requirements that such a body must be sufficiently independent.
96. Parliament's further role should be that of overseeing the functioning of the unit. Parliament is well placed to do so as it plays such an oversight role in relation to other independent organs of state, including the Chapter 9 institutions supporting constitutional democracy.
97. The *Glenister* judgment created the opportunity for Parliament to initiate a national debate on the kind of anti-corruption machinery we require. CASAC fervently hopes that even though almost a year went by before the tabling of this Amendment Bill