



Centre for the Study of Violence and Reconciliation

Submission to

**The Portfolio Committee on Safety and Security and
The Portfolio Committee on Justice and Constitutional Development**

**Re: South African Police Service Amendment Bill, 30 of 2008 and the
National Prosecuting Authority Amendment Bill, 23 of 2008.**

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Introduction to the Centre for the Study of Violence and Reconciliation

1. The Centre for the Study of Violence and Reconciliation (CSVr) is a multi-disciplinary institute involved in policy formation, community interventions, service delivery, education and training, as well as providing consultancy services. In addition to staff involved in managerial and administrative functions CSVr include researchers, community facilitators, psychologists and social workers. The primary goal of the CSVr is to use its expertise in building reconciliation, democracy and a human rights culture and in preventing violence in South African and in other countries in Africa. CSVr has a website www.csvr.org.za which provides information about the organisation and free access to CSVr publications.
2. This submission has been developed by the Criminal Justice Programme at CSVr. The Criminal Justice Programme is concerned with democratic criminal justice, namely criminal justice which is responsive to the people of South Africa and which conforms to the norms of the Constitution. The Criminal Justice Programme has a history of work in the criminal justice arena in South Africa which goes back to the early 1990s and includes in depth engagements in the policing and correctional and other arenas. This submission is motivated by our concern with the strengthening and consolidation of democratic criminal justice in South Africa.

This submission

3. CSVr is grateful for the opportunity to make this submission to the two Committees regarding the National Prosecuting Authority and South African Police Service (SAPS) Amendment Bills. In essence the bills provide for the closure of the Directorate of Special Operations (DSO), an investigative unit located within the National Prosecuting Authority (NPA). The SAPS Amendment Bill provides that investigators from the DSO are to be selectively incorporated into a newly established Directorate for Priority Crime Investigation within the

South African Police Service (SAPS) which will also incorporate investigators from SAPS Organised Crime units. The submission motivates that:

- a. The two bills are not in the public interest and should be opposed by members of parliament. This is the main focus of this submission.
 - b. In the event that the process of closing the DSO and establishing the Directorate for Priority Crime Investigation continues as envisaged in the Bills, then we would motivate that: - the provisions of Section 16A(15) of the envisaged SAPS Act as provided for in Bill 30 should be modified. This provision severely compounds the problems which follow from the envisaged closure of the DSO as provided for in these Bills. This issue is addressed at the end of this submission (Paragraphs 37-43).
 - c. Other policy issues which follow from our submission are highlighted in the conclusion (Paragraph 44).
4. The key contention of this submission is that it is necessary to maintain the situation where there are a diversity of agencies with independent powers to investigate crime of their own initiative¹ in order to uphold the principle of equality before the law (paragraphs 16-21) as well as for reasons to do with police accountability (paragraphs 13-15), the combating of police corruption (paragraphs 22-24) and organised crime (paragraphs 25-29), and the need to strengthen public trust in state institutions and respect for the law (paragraphs 30-31). In addition it is argued that the closure of the DSO will have a negative impact on the culture and ethics of law enforcement personnel (paragraph 32).

¹ The distinction is important. The Special Investigating Unit which falls under the department of justice and is responsible for the investigation of corruption only enters into investigations when it is authorised to do so by the state president. It also does not carry out criminal investigations but is mainly concerned with civil recovery and refers related criminal such investigations to the SAPS or the Scorpions. Rather than uncovering corruption the SIU generally deals with cases where there is an obvious pattern of a certain type of corruption in a government department and where large numbers of individuals are implicated in such corruption. Where it is apparent that there is such a pattern of corruption the President then usually authorises investigations by the SIU. It does not deal with the complex type of investigations which the DSO deals with

5. This submission acknowledges that there are problems relating to the Scorpions, as detailed in part by the Khampepe Commission (See paragraphs 33 and 35). These problems can and should be addressed without dissolving the Scorpions. In addition it is also important to acknowledge and address concerns that the Scorpions have been used in a politically biased way. However disbanding the Scorpions will compound the potential for political misuse of the criminal justice system (See, inter alia, paragraphs 19-21).
6. Relative to the general aims of the review of the CJS referred to in the overview of the proposed new integrated Criminal Justice system, we believe that the envisaged dissolution of the DSO will:
 - a. Undermine the legitimacy of and public confidence in the CJS.
 - b. Compound alleged existing weaknesses of the CJS relative to its susceptibility to political manipulation.
 - c. Undermine the effectiveness of the criminal justice system by undermining its ability to uphold the principle of equality before the law, making it more vulnerable to police corruption, undermining its ability to address organised crime, and negatively impacting on the culture and ethics of law enforcement personnel.

The issue of a ‘single police service’ and the need for diversity in the policing system

7. Chapter 11 of the Constitution deals with Security Services and includes provisions
 - a. In Section 199(1) that the security services of South Africa shall include ‘a single police service’
 - b. In Section 199(3) that ‘Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation’.

8. Colonial and authoritarian systems tend to rely on centralised policing systems and the fact that South Africa has a centralised national police service is in many ways a legacy of our authoritarian and colonial history. Centrally controlled policing systems are the most appropriate for colonial and authoritarian systems in which policing plays a highly repressive function. Policing in apartheid South Africa was based on the model of a single police service the South Africa Police (SAP). Though additional police agencies were created for each of the 'independent' and 'self-governing' homelands, this did not represent a departure from this model. Other agencies which were created such as the railway police and municipal police were subordinate to the SAP and also essentially consistent with this centralised policing system. The reference to a single police service in Section 199(1) of the Constitution therefore partly reflects the fact that during the transition to democracy the 10 homeland police forces had to be integrated into the already existing 'single police force' (the SAP) to form the SAPS.
9. During the multi-party talks in the early 1990s the policing system was also a subject of controversy as some participants in the talks were in favour of a federal system and therefore motivated for a decentralized system of policing. Due to fears that a more diverse system of control (as in a federal system) would feed into instability and play into the hands of political forces who appeared to pose a secessionist threat, the issue of establishing a single police service was therefore also of considerable political significance at that time. The provision in terms of section 199(3) therefore emphasized that other 'armed organisations or services' could only be established in terms of *national* legislation. Providing provincial legislatures with this authority would potentially also have fed into the risks of secession.
10. In so far as Section 199(1) and 199(3) embodies constitutional principles these are essentially the principles reflected in Section 1 of the Constitution to the effect that South Africa is 'one, sovereign, democratic state'. Beyond the fact that security agencies need to function in such a way as to support South Africa's existence as 'one, sovereign, democratic' state there is no issue of principle which

is upheld by the provision. It is therefore mistaken to talk of Section 199(1) as embodying a constitutional principle or 'constitutional imperative' that there should be a single police service. The creation of the DSO is therefore consistent with Chapter 11 of the Constitution and particularly with the provision in Section 199(3) which enables other security agencies to be created.

11. The creation of the DSO may therefore be seen on a symbolic level as representing a break from the centralised policing system which was inherited as a result of South Africa's colonial and authoritarian past. The establishment of the DSO was essentially a healthy development in terms of the architecture of policing in South Africa in that it brought into being a situation where investigative mechanisms were more diversified rather than falling under a single centralised authority.

International precedents

12. The DSO is essentially an investigative agency though it combines the expertise of prosecutors and analysts with investigators in investigative teams. The existence and operation of the DSO is consistent with practice in other democratic countries and there are several international examples of organisations like the Directorate of Special Operations.
 - a. There are numerous democratic countries in the world with more than one policing agency.
 - i. Countries like the US, Brazil, Canada, Mexico and Germany have a multiplicity of policing agencies at the national, state and local level.
 - ii. In the USA for instance there are numerous policing agencies based at local and state level. In addition '[a]t the federal [national] level some 50 agencies have specialist nationwide law enforcement responsibilities and are authorised to conduct searches, carry

firearms and make arrests'.² Four of these agencies, the FBI, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco Firearms and Explosives, and the US Marshals Service, are located under the Department of Justice while others are located under the Department of the Interior, the Department of Defence, and the Department of Homeland Security

- iii. England and Wales have 43 local police forces, each with a distinct geographical area of jurisdiction. In addition the Police Act of 1997 created the National Crime Squad to detect serious crime which is of relevance to more than one police force area.
- iv. Italy has a number of different police agencies, but in 1991 also established the *Direzione Investigativa Antimafia*, to carry out investigations related to organised crime or mafia offences.
- v. Despite being a federation, Nigeria has a national rather than state policing system. In addition Nigeria has two special agencies, the National Drug Law Enforcement Agency (NDLEA) and the Economic and Financial Crimes Commission (EFCC). Similarly to the DSO, and the American FBI, the EFCC also falls under the Department of Justice though it reports directly to the President. It has full crime investigation and prosecution powers.
- vi. In addition to a national police (and regional police in Catalonia and the Basque Country), Spain has a Special Office for the Repression of Economic Offences related with Corruption which falls under the Attorney General.

² Mawby, R (1999) Variations on a Theme: the Development of Professional Policing in the British Isles and North America. In Mawby, R (Ed) Policing Across the World. P. 49. See also the Wikipedia entry http://en.wikipedia.org/wiki/Federal_police

- b. In various democratic countries there are also examples of institutional arrangements which provide for prosecutors to work directly with police investigators.
 - i. Italy's DIA, Nigeria's EFCC, and the Spanish Attorney General's Special Office all use investigators who are drawn or seconded from policing agencies.
 - ii. The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime, while located within the national police agency, is subject to the authority of the Director of Public Prosecutions in relation to the investigation of individual cases.
 - iii. In countries such as Germany or the Netherlands, the prosecution service also has direct authority over police investigations. The German Federal Prosecution Service also coordinates the analysis of organised crime assisted by prosecutors involved in working with the police. In some German states prosecutors, police and other experts are involved in joint structures focused on economic and financial crimes.

Accountability

- 13. Accountable government is a core principle of the Constitution. It is referred to as one of the values on which the South African state is founded in Section 1(d) of the Constitution.
- 14. As a general rule it may be said that those countries in which police are most accountable are not countries with highly centralised policing systems. While there are countries (for example Sweden, South Korea, Poland, Ireland, Ghana) which only have a single national police force, this does not represent a healthy model for South Africa to follow.

15. Some of the criticisms that have been levelled at the DSO concern issues of accountability. The memorandum on the SAPS Amendment Bill for instance refers to ‘a disjunction in police accountability and oversight’ and a lack of oversight over the DSO by the Independent Complaints Directorate.
- a. It is self evident that the most meaningful steps to take to address problems of accountability would be to strengthen systems of accountability pertaining to the DSO. This is one of the issues which was addressed by the Khampepe Commission. It makes sense to ensure that there is a specific accountability mechanism in place which is focused on the DSO.
 - b. Because of the nature of their work, police agencies are particularly difficult to hold accountable unless there is an investigative agency which can deepen the level of scrutiny which they are subject to. In the case of the SAPS the problems of accountability are compounded due to the size of the organisation and complexity of its mandate. The SAPS is by the standards of police agencies elsewhere in the world a giant of an organisation, and therefore exceptionally difficult to subject to scrutiny. Few, if any, of the formal accountability agencies which are provided for in the South African constitution have been able to subject the SAPS to meaningful scrutiny.³ (See further on this point paragraph 23 below in relation to the Independent Complaints Directorate).
 - c. Due to the fact that they are an investigative agency with sophisticated investigative capacity and powers to investigate crime independently the DSO has been relatively effective in subjecting the SAPS to scrutiny.

³ Bruce, D., Newham, G. and Masuku, T. (2007). In service of the people’s democracy – an assessment of the South African Police Service. Centre for the Study of Violence and Reconciliation in association with the Open Society Foundation for South Africa. <http://www.csvr.org.za/papers/papsaps.htm>. See especially pages 45-48.

- d. The current situation is that the DSO and SAPS are able to investigate each other thereby enhancing the accountability of both agencies.
- e. Disbanding the DSO and centralising the capacity for investigation of complex crimes within the proposed Directorate for Priority Crime Investigation based within the SAPS will have the consequence that.
 - i. The capacity to hold the SAPS, and particularly its senior members, accountable will be weakened.
 - ii. DSO members will therefore become part of a SAPS that is less accountable than it was before and therefore will also be affected by these lower levels of accountability.
 - iii. South African society overall will lose the ability which currently exists for the SAPS and DSO to investigate each other

Equality before the law

(a) General

16. The principle of equality before the law is a central principle of the Constitution. It is affirmed in the Preamble and Section 9(1) of the Constitution. It is also implicit to the principle of the rule of law which is one of the founding values of the Republic of South Africa referred to in Section 1(c) of the Constitution. It is also a key principle of the 1955 Freedom Charter which states that ‘All shall be equal before the law.
17. While it cannot guarantee equality before the law or the absence of political manipulation, our potential to ensure that all people in South Africa are legally accountable will be far greater if we have a diversity of agencies with the capacity to investigate organised crime and corruption. Dissolving the DSO will concentrate all crime investigation powers under the SAPS national commissioner. Investigators who are located in the SAPS and subject to the authority of the SAPS national commissioner and other senior leaders will not be

able to subject the senior officials of the SAPS to investigation. Without an investigative capacity outside of the SAPS which can subject them to investigative scrutiny, the higher level officials of the SAPS will be above the law. If the senior officials of the SAPS are above the law this also means that anyone that they wish to protect, or who is in a position to pressure or influence them, will also be shielded from justice.

18. This means that the DSO should be maintained separate from the SAPS organised crime unit. Concentrating all investigative power in the SAPS undermines South Africa's potential to uphold the principle of equality before the law. Whatever problems there may be currently, the concentration of investigative power in the SAPS will dramatically increase the risk of corruption and abuse of power at the higher levels of the state, and undermine the potential to address this. The great abuses committed by the SAP under apartheid were facilitated by its monopoly of policing power. It did not have to fear investigative scrutiny from any other agency. Concentrating investigative power in the SAPS increases the risk of the SAPS also becoming a law unto itself.

(b) Allegations of political bias

19. The issue of equality before the law is directly relevant to concerns that have been raised (though they have not been proved) that the DSO has been used as a political instrument.⁴ If it is true that investigative mechanisms have been subject to political manipulation, the key problem has then been that some have been subjected to investigation while other investigations that should have gone ahead were obstructed as a result of interference by high level political officials.⁵ If there is evidence of the criminal justice system being manipulated in this way it should provide the basis for action to ensure that no one is deliberately protected from the course of justice by those in positions of power.

⁴ For instance ANC executive member Sipiwe Nyanda said that the DSO were 'used to pursue a political agenda and to target certain people in the ANC to the benefit of sectarian and foreign interests'. Basson, A (2008) 'Zuma case influenced decision'. *Mail & Guardian*, 11 April, 2.

⁵ Feinstein, A 2007. *After the Party*. Johannesburg: Jonathan Ball.

20. Unless political leaders and others take a firm stand against this type of practice it is likely to continue and intensify. One measure which could reduce the risk of this type of abuse would be the adoption and enforcement of guidelines regulating the relationship between senior political officials and the leadership of investigative and prosecutorial agencies, in order to discourage and prevent this type of political interference. Examples of legislation of this kind, regulating the relationship between government ministers and criminal justice officials, may be found in some Australian states
21. The dissolution of the DSO, will itself do nothing to reduce the risk of this type of abuse. Creating a single agency with a monopoly of investigative power is more likely to accentuate the problem.

Police corruption

22. The issue of accountability and equality before the law overlaps with the issue of corruption. Closing the DSO will compound the weaknesses of current institutional arrangements with respect to combating corruption within the SAPS. The SAPS closed down its anti-corruption unit in 2002.⁶ Since then it has given little attention to addressing corruption. The lack of importance and urgency with which the issue of corruption is viewed is reflected in the fact that the SAPS has spent 5 years on the development of Fraud and Corruption Prevention Plan, which is itself conceptually flawed, doing little else to address corruption during this period.⁷
23. The Independent Complaints Directorate (ICD), which is charged with investigating police misconduct, has toyed with the idea of playing a role in anti-corruption investigations. But it does not have the capacity or systems to do so, particularly at a high level. Where it investigates cases successfully these are

⁶ Newham, G 2003. Bad cops get a break – the closure of the SAPS Anti-corruption unit. *SA Crime Quarterly*, 4:5-9.

⁷ See the comments of the Policy Advisory Council that ‘No real progress has ... been made with the implementation thereof.’ Policy Advisory Council (2007) Report - for the period November 2006 to October 2007. p. 35. See further Bruce, D (2008) Benign Neglect? The politics and practice of controlling police corruption in South Africa. Annual Bank Conference on Development Economics, Cape Town, 9 June.

generally cases of a much more straightforward and ‘routine’ nature and it has not been able to deal with very complex cases. It also does not have sufficient independence or authority to enable it to deal with the political consequences of investigating senior level officials of the SAPS.⁸

24. Police corruption can only be properly addressed if there are investigative units with the investigative sophistication and with sufficient independence and authority to investigate it. The DSO conforms to this description and is part of our armoury for dealing with police corruption. If the DSO are closed down this will be a further blow to our ability to address police corruption particularly in so far as this involves complex cases and cases involving high level officials of the SAPS. A unit such as the envisaged Directorate for Priority Crimes Investigation which falls under the SAPS does not have sufficient independence. Units dealing with organised crime are themselves highly vulnerable to corruption and the Directorate for Priority Crime Investigation will therefore also be vulnerable to corruption in this way. While the same is true of the DSO, the fact that the DSO is separate from the SAPS means that it can potentially be subject to investigation by the SAPS. This will not be the case if the DSO is disbanded and the Directorate for Priority Crime Investigation is established.

Organised crime and the issue of the separation between investigators and prosecutors

25. It has been argued that the DSO system in terms of which investigators work directly with prosecutors is undesirable as it heightens the risk of abuses.⁹ In criminal justice systems like that in South Africa it is often believed that prosecutors should be kept separate from the police so that they can act as a check on the work of the police, thus limiting the potential for abuses of power.

⁸ Mistry, D. and Lue-Dugmore, M. (2006). “An overview of the Independent Complaints Directorate (ICD) in the light of the parliamentary portfolio committee’s proposals to restructure the organisation”. Pretoria: Institute for Security Studies.

⁹ See for instance Basson, A 2008. Zuma case influenced decision. *Mail & Guardian*, 11 April, p 2.

26. However as has been the case in some of the famous miscarriages of justice in the United Kingdom the police may independently suppress or fabricate evidence.¹⁰ Despite the institutional separation they may also collude with prosecutors for the same purpose. While the system of separation has its benefits it does not provide a guarantee against abuses. The risk of abuses is instead increased by having a single all powerful policing agency with a monopoly of investigative power.
27. Furthermore it is accepted also internationally that investigations of organised crime, sometimes associated with high level corruption, are a special case. Due to the fact that role players in organised crime, as with white collar criminals, often have significant resources at their own disposal, they are not vulnerable in the same way that most ordinary suspects are, and are usually able to hire some of the best and most expensive lawyers, while the cases against them are often complex in nature. In order to tackle the criminal ‘high-flyers’ it is therefore legitimate to put in place special mechanisms to enable the state to effectively prosecute these kinds of criminals. As indicated prosecutors work directly with investigators in many other countries. In South Africa this has not only been done within the DSO but also in other instances such as in special investigative units that were set up to tackle hijacking in the 1990s.
28. Criminal groups and corrupt high level individuals and groups have the most to gain from the disbandment of the DSO. South Africa’s mechanisms for dealing with crime have already been exposed to considerable restructuring most notably in the form of a continuous wave of restructuring exercises within the SAPS. Further restructuring of anti-crime mechanisms will once again have a major destabilising effect on managerial and supervisory systems, undermining morale and detracting from the effectiveness of current systems by undermining the current investigative team approach within the DSO.
29. As highlighted in paragraphs 21-24 neutralizing the DSO will also benefit organised crime by further weakening mechanisms for addressing corruption in

¹⁰ Sanders, A and Young, R (2000) Criminal Justice (2nd Edition). See for instance Chapter 6.

the SAPS. Due to the fact that organised crime, police corruption and other forms of corruption feed off each other, the closure of the DSO is likely to feed into the strengthening of organised crime and corruption in South Africa enhancing the risk of capture of the South African state by corrupt interests.

Trust in the state and respect for the law

30. The concerns raised in the previous paragraphs about organised crime overlap with issues about the need to strengthen trust in the South African state. There are strong indications that the DSO have been widely respected and have contributed to confidence by South Africans about the integrity not only of law enforcement but of the overall institutional framework of government. This has been healthy for democracy and the rule of law in South Africa. British criminologist Michael Levi indicates that the success of organised crime in countries like Italy and Russia depends partly on the lack of trust between citizens and government. When serious crime groups come up against societies in which there is firmer trust between citizens, governments and policing agencies 'Mafia type organisations find an infertile soil in which to grow and ... are unsuccessful in the long term'.¹¹
31. The current crisis of crime and violence in South Africa is fed by a generalised lack of respect for the law which is a legacy of the apartheid era.¹² Such respect depends in part on the legitimacy of government and the social system. A crucial element of this is the credibility of criminal justice institutions themselves. Recent surveys by the Institute for Justice and Reconciliation and the Human Sciences Research Council point to a problem of declining trust in state institutions in South Africa.¹³ Respect for the law and for the institutions of

¹¹ Levi, M 2007. Organised crime and terrorism. In Maguire, M, Morgan, R and Rainer, R (eds) *The Oxford Handbook of Criminology* (4th Edition). Oxford:Oxford University Press.

¹² See for instance Irish-Qhobosheane, J. (2007). Gentlemen or Villains, Thugs or Heroes? The social economy of organised crime in South Africa. South African Institute of International Affairs, 60-63, 86-88, 135-137. Also Standing (2006). *Organised Crime – A study from the cape flats*. 2006: Institute for Security Studies, Chapter 4 especially 194- 231.

¹³ See Mthethwa, B,2008a. SA losing trust in public institutions. Sunday Times, 6 April 2008, 11 and and Omarjee, H 2008a Declining trust 'a threat to democracy'. Business Day, 23 January 2008.

government, and therefore the resilience of South African society against organised and other crime, can only be built if there is confidence amongst South Africans that all people are accountable before the law. Retaining a diversity of investigative agencies with independent investigative authority will help to build such confidence.

Impact on the culture and ethics of law enforcement personnel

32. In order to build and sustain a commitment to the norms embodied in the Constitution, including the principles of respect for the law and equality before the law, and basic principles of integrity amongst law enforcement personnel, these values have to be promoted and nurtured in a purposeful way. But rather than contributing to building these values the closure of the DSO will have the opposite effect.

- a. The SAPS currently does not provide an environment where such values are given priority. Unlike the DSO it has inherited the culture of the former SAP in terms of which deference to political authority takes precedence over the need to uphold the law. This has been accentuated by an environment of intimidation and the fear of arbitrary censure within the organisation.
- b. The current culture within the DSO which has, at least in part, upheld the principle of equality before the law, will therefore be undermined when members of the DSO are incorporated into the SAPS. If it is true that the DSO has been guilty of political bias then the incorporation of DSO members into the SAPS will also do nothing to address this problem. Instead the problem will be reinforced by the prevailing culture within the SAPS. 'Changing the structure of organisations rarely affects operational behaviour because it does not touch the 'culture' of an organisation, that

is, what the workers themselves think is expected of them. Reform in policing must be managed, not structured, into existence.’¹⁴

- c. In addition closing the DSO will in itself reinforce these problems by sending out a message to investigative personnel that the DSO was punished for subjecting powerful individuals to investigation further undermining the potential to uphold the principle of equality before the law. The enduring impact of the closure of the DSO will be profoundly negative for the attitudes of law enforcement personnel. One of the lessons that will be internalised throughout the law enforcement community is that those who subject high level political and government officials to investigative scrutiny will be punished for this, further contributing to the impunity of such officials from the exercise of the law. This will feed into a cynicism amongst law enforcement personnel about the values which they are supposedly intended to uphold. Cynicism about the values of the organisation in turn feeds into corruption and other abuses.

Other issues relating to the Directorate of Special Operations

33. The Khampepe Commission hearings and the recent debate about the DSO has brought to the fore numerous other issues relating to the DSO. These have included:

- i. **Overlapping jurisdiction and coordination** – the overlapping mandates between the SAPS and DSO raise the need for proper coordination and communication between the SAPS, DSO and other investigative bodies. The ministerial committee provided for in the legislation appears fairly cumbersome and has never functioned effectively. A committee is unlikely to be able to perform this function effectively. The Belgian model of an individual ‘National Magistrate’ (Deputy Attorney General) to

¹⁴ Bayley, D (2001) Democratising the Police Abroad: What to Do and How to Do It. National Institute of Justice, p. 21.

ensure the efficiency of national policing activities and international cooperation through coordinating investigations into terrorism, drug-trafficking and organised crime and the supervision of key national policing units, may be preferable.

- ii. **Rivalry with the SAPS** - Some have emphasised rivalry and tensions between the two organisations. As is widely known competition is not necessarily unhealthy. The focus on the tensions between the organisations might also conceal the fact that there has frequently been fruitful cooperation between the two organisations.
- iii. **Effectiveness** - We are of the opinion that the DSO represents a highly sophisticated investigative capacity within the South African criminal justice system. At the same time we acknowledge that there is no simple formula for evaluating the DSO. Evaluating their effectiveness is not simply a question of looking into their conviction rate or case load, but requires an overall assessment of how they have responded to their mandate. A measured assessment of the DSO might help us to highlight weaknesses with the organisation which could be addressed to the benefit of all concerned. One of the major challenges facing South Africa is the development of effective state institutions. In a context where many components of government are struggling with problems of lack of capacity and difficulties in providing services at an adequate standard, it does not make sense that that steps should be taken to dissolve a key component of the criminal justice system which obviously meets reasonable standards of effectiveness, whatever the questions may be about how exactly to evaluate this.
- iv. **Composition of the DSO** - The acting head of the National Prosecuting Authority, Mokotedi Mpshe, has said that ‘most, if not all, the members of the DSO have joined with good and honourable intentions, to serve in the best interests of the

country'.¹⁵ Former apartheid agents do form part of the rank and file of the DSO but also form part of the rank and file of the SAPS. But it does not follow that they have been the guiding force behind the unit. The DSO have been under the authority of officials appointed by the ANC government. Included among its founding core members are investigators involved in bringing apartheid era security force members such as Eugene de Kock to justice. If there is a need for further vetting of members this does not require that the DSO be shut down.

- v. **Intelligence gathering activities** – this was addressed by the Khampepe Commission while the Memorandum on the Objects of the SAPS Amendment Bill refers to 'liaison with foreign intelligence structures' as one of the problems with the organisation which motivate for its closure. The Browse Mole report has also been a source of controversy. The nature of the DSO role in intelligence gathering obviously needs to be looked into. Again this does not require that the organisation be dissolved.
- vi. **Use of the media** – for instance the Memorandum on the Objects of the SAPS Amendment Bill refers to the 'alleged leaking of information to the media on investigations of the DSO, and the concomitant media sensation created thereby'. This is an issue which does not require the closure of the DSO in order to be addressed.

34. Certain issues which pertain generally to the NPA and are not specific to the DSO have also been raised as criticisms of the DSO and motivation for its closure. Thus questions to do with plea bargaining are relevant to the NPA generally.

¹⁵ Maughan, K 2008. DSO fight back. *Sunday Independent*, 18 May, p 1.

Similarly questions about the handling of apartheid era crimes relate to the Priority Crimes Litigation Unit within the NPA and do not relate to the DSO.

35. It is not our view that the DSO should be regarded as without problems. However if we were to itemise the problems with any other government agencies we would find just as many, if not more, problems. The fact that there are problems with the DSO is not unique. None of the issues detailed above serve as a motivation for the DSO to be disbanded.

Conclusion

(a) Retention of the DSO

36. Any specific problems with the DSO need to be addressed with a view to maintaining and strengthening the integrity of South Africa's investigative architecture in terms of South Africa's ability to uphold the principle of equality before the law, ensure the accountability of law enforcement bodies, address police corruption, build trust in state institutions, and foster appropriate values amongst law enforcement personnel. This purpose is best served by institutional arrangements in terms of which there are different investigative agencies with the authority to independently investigate crime of their own initiative. The DSO should therefore be retained as a separate entity from the SAPS.

(b) Specific concerns about the SAPS amendment bill

37. The SAPS Amendment Bill provides for the SAPS Act to include a section 16A(15) which provides that the national commissioner will have the authority to decide which investigations are dealt with by the envisaged priority crimes investigation unit. The proposed section may be seen to strengthen and clarify the existing Section 16 concerning the powers of the national commissioner with regard to 'organised crime, crime which requires national prevention or investigation, or crime which requires specialized skills in the prevention and investigation thereof' (see Section 16(1) of the Act). The existing Section 16(3) already enables the national commissioner to determine whether a matter falls

within the ambit of Section 16(1) effectively excluding the authority of Provincial Commissioners over such matters.

38. In combination Section 16(3) and the envisaged Section 16A(15) means that the national commissioner will be able to veto investigations that do not meet with his approval.

39. As indicated above the proposed closure of the DSO:

- a. Will undermine South Africa's ability to uphold the principles of the rule of law and equality before the law, ensure the accountability of law enforcement agencies, and address police corruption and organised crime.
- b. Undermine the potential for building trust in official institutions and respect for the law. And
- c. Negatively impact on the culture and values of law enforcement

40. The proposed Section 16A(15) will compound and aggravate these problems. The position of National Commissioner, which involves authority over one of the biggest police agencies in the world, already holds enormous power. The proposed Section 16A(15) will have the impact that the totality of power to independently initiative investigations into crime, and particularly into complex criminal matters is under the authority of the National Commissioner, effectively putting the National Commissioner above the law, and rendering him or her, and those whom s/he wishes to protect, immune to investigation.¹⁶

41. At worst this concentration of authority under the National Commissioner will not only enable the National Commissioner to use the monopoly of control over the exercise of investigative power to ensure the selective application of the law but may also provide senior SAPS members with the power to manipulate politicians, and the political process, thus undermining democracy.

¹⁶ See footnote 1 relating to the SIU. A case like the current case against SAPS National Commissioner Selebi originated from intensive investigation into a variety of matters. It is not the type of matter which would have resulted in Presidential authorisation for investigation by the SIU. In the absence of the DSO the investigation would simply not have happened.

42. Such authority is inconsistent with the principles of the Constitution, most notably the principle of equality before the law.
43. In the event that parliament decides to proceed with the closure of the DSO it should nevertheless reject the proposed Section 16A(15) and seek an alternative set of arrangements which do not feed into the monopoly of authority over investigations provided for in the current Bill.
 - a. One option here is suggested by the situation in Norway. The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime, while located within the national police agency, is subject to the authority of the Director of Public Prosecutions in relation to the investigation of individual cases. It might be appropriate to give the National Director of Public Prosecutions or Directors of Public Prosecution generally authority over which matters should be regarded as falling within the mandate of the Directorate for Priority Crime Investigation.

(c) Other issues

44. Though they are not directly relevant to the legislation which is the subject of this submission it may be noted that this submission also raises the need for:
 - a. General strengthening of the systems of accountability relating to the DSO and the SAPS.
 - b. Greater investment in, and clear policies, for addressing police corruption.
 - c. Measures to address the relationship between government ministers and senior officials of law enforcement agencies.
 - d. Measures to strengthen and nurture the values of members of law enforcement agencies relative to questions of the rule of law, equality before the law and broad issues of integrity.

End of CSVr Submission