



**KHAMPEPE COMMISSION OF  
INQUIRY INTO THE MANDATE AND  
LOCATION OF THE DIRECTORATE OF  
SPECIAL OPERATIONS (“THE DSO”)**

**FINAL REPORT  
FEBRUARY 2006**

**THE KHAMPEPE COMMISSION OF INQUIRY  
REPORT**

**THE PRESIDENT**

**THE COMMISSION OF INQUIRY INTO THE MANDATE AND LOCATION OF THE DIRECTORATE OF SPECIAL OPERATIONS ('THE DSO') HAS THE HONOUR TO SUBMIT TO YOU ITS FINAL REPORT PURSUANT TO ITS TERMS OF REFERENCE.**

**Signed on this the 3<sup>rd</sup> day of February 2006.**

**THE HONOURABLE JUSTICE SISI KHAMPEPE  
COMMISSIONER**

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## EXECUTIVE SUMMARY

The aim of this report is to create a guideline and provide direction into the mandate and location of the Directorate of Special Operations (“DSO”). It is intended that this document, will provide a comprehensive analysis of the array of data and evidence presented before the Commission which provides a basis for the conclusions reached in respect of the mandate and location of the DSO.

The history of the establishment of the DSO stems from the need to curb rampant organised crime which was threatening the political and economic integrity of the country. Some corrupt elements in the police force which existed at the time, necessitated the creation of a *de novo* entity, designed with the specific intent to pursue the elusive elements of organised crime.

The founding of the DSO in terms of the NPA Act sought to confer limited investigative capacity on the DSO in relation to priority crimes, address the issue relating to the role and functioning of the DSO, provide mechanisms for coordination and cooperation of the activities of the DSO and other relevant government institutions and further provide the requisite infrastructure and resources to enable it to effectively tackle organised crime.

However, the subsequent transformation of the South African Police Force (“SAPS”), as well as the unheralded success of the DSO made conflict inevitable.

The commission of inquiry was established to respond to varied concerns and questions which have been raised across the Criminal justice system and within the Intelligence Community relating to the role and functioning of the DSO.

These concerns related, *inter-alia*, to-

- ◆ the perceived institutional nightmare of the DSO mandate to:
  - (i) investigate and to carry out any function incidental thereto,
  - (ii) gather, keep and analyse information; and
  - (iii) institute criminal proceedings, relating to offences or unlawful activities

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committed in an organised fashion, or such other offences as determined by the President by proclamation in the gazette.

- ◆ the jurisprudential soundness of housing the investigative and prosecutorial capacities of the DSO in one structure under the authority of the National Director of Public Prosecution , with the minister for justice and constitutional development exercising final political responsibility over the DSO.
- ◆ the overlapping mandates of the DSO and the SAPS with regard to the investigation of national priority crimes including organised crime and the duplication of resources resulting there-from.
- ◆ the existence within the DSO of an information [intelligence] gathering capacity that functions outside the legislative framework of the designated intelligence structures, the uncertainty and the exclusion of the DSO from the Intelligence oversight Act, 40 of 1994, thereby making its intelligence activities not subject to the oversight functions of the Inspector General of Intelligence and the joint standing committee on intelligence.
- ◆ lack of coordination and cooperation between the DSO on the one part, the SAPS and the designated intelligence structures, such as the NIA and the SASS on the other.
- ◆ the location of the DSO within the National Prosecuting Authority and consequently under the Department of Justice was argued to be in conflict with the provisions of the Constitution. The amalgamation of both law enforcement (policing) as well as justice (prosecuting) elements in the DSO were exacerbated due to the competition over jurisdictional territory and the concurrence of mandates.

It was thus the Commission's express mandate to obtain clarity in respect of the location, mandate and operation of the DSO vis-à-vis other relevant government departments or institutions.

The Commission was presented with varying and conflicting evidence dependant entirely on the positional perspective of the source. Since the prosecution service was going to be an important element in the combat against organised crime, a decision was made to locate the DSO within the National Prosecuting Authority. The NPA Act was accordingly amended to create the DSO and to collapse in it various other directorates that were in place at the time.

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The rationale for the establishment of the DSO, that is, to create a multi-disciplinary structure using the *troika* principle as a methodology to address organised crime was precipitated by intolerable levels of crime. I am satisfied that all relevant stakeholders were convinced that a new strategy was necessary to arrest the corrosive impact that organised crime was having on the socio-economic and legal structure of the country.

There was agreement across board that the law enforcement structures were at the time, ineffectual to fully address the formidable challenges presented by organised crime. There was broad consensus that a new independent structure was necessary to launch a fresh and comprehensive answer to the challenges presented by organised crime.

Despite the indications that crime levels are dropping, it is my considered view that organised crime still presents a threat that needs to be addressed through an effective comprehensive strategy. The argument that the rationale no longer holds since the levels of crime are showing a decline is therefore devoid of merit. For this reason, it is my considered finding that the DSO still has a place in the government's law enforcement plan.

It is my recommendation that notwithstanding indications that organised crime is being addressed on a concerted basis, the rationale for the establishment of the DSO is as valid today as it was at conception.

With regard to the location of the DSO, there were many who endorsed the SAPS argument in favour of locating the DSO within its ranks. This contention, was however, not supported by cogent constitutional or factual argument. The two pronged argument was based firstly on the fact that the DSO did police work. This, it was argued, was inconsistent with the provisions of section 199(1) of the Constitution that provided for a single police force.

There was reference in this regard to section 205(3) of the Constitution as fortification for the constitutional argument. This section stipulates that the objects of the SAPS are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold the law.

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The second argument was that the legal mandate of the DSO to investigate organised crime in terms of section 7(1) (a) (i) was in conflict with the constitutional and statutory mandate of the SAPS thereby creating what was referred to as an institutional nightmare.

After careful consideration of the evidence as well as the arguments submitted by various stakeholders, I am persuaded that no compelling argument has been made to point to the DSO's establishment as unconstitutional. For reasons that are in the body of the report, it is my considered conclusion that the location of the DSO within the NPA is constitutional and jurisprudentially sound.

Regarding the mandate *per se*, I accept that the legislature intentionally drafted the legal mandate of the DSO to be wide. In my view, this was prudent. An overly prescriptive legal mandate would render itself open to constant jurisdictional and other legal technical attacks and frustrate the objective for which the DSO was established.

The nature of tensions germane to mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a sub-committee with relevant individuals at the appropriate levels of authority who are able to deal with the day-to-day operational issues that are likely to arise and who would be empowered by the MCC with sufficient mandate to resolve those issues.

With regard to the evaluation of the implementation of the mandate of the DSO, the evidence tendered before the Commission raised a number of concerns relating to the manner in which the DSO discharged its mandate. The evidence pointed to numerous incidence of DSO conduct which went beyond the legislative mandate of the DSO or threatened to do so. In instances, the shared legal mandate with the SAPS gave rise to unfortunate competition over territory.

The unhappy relationship between the DSO and other law enforcement agencies was exacerbated by the malfunctioning of the Ministerial Co-ordinating Committee. This body did not do what section 31 of the NPA Act enjoined it to do. Under the previous Minister of Justice, it did not even convene, alternatively, there was no evidence that it convened. It is recommended that this committee be mandated to effectively perform its functions.

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It is my considered opinion that the workings of the DSO would be enhanced by clarity in regard to the location of its political and financial accountability. Whilst I am satisfied that the rationale for locating the DSO under the NDPP and the Minister for Justice and Constitutional Development in 2002 was necessary and still pertains there is merit in considering a deconfliction mechanism proposed hereunder and elsewhere in the report. I am otherwise satisfied that there is nothing unconstitutional in the DSO sharing a mandate with the SAPS.

The Minister for Justice and Constitutional Development has identified the relationship between the DSO and that of the SAPS to have irretrievably broken down. The reasons for the breakdown are not as important as the appropriate solution to that problem

Under the present legal regime, the Minister for Justice and Constitutional Development is not only responsible for the NPA but is politically responsible and held accountable for the work of the DSO including the latter's vital 'policing' functions which overlaps with the political responsibility of the Minister of Safety and Security regarding organised crime.

It is recommended that the President exercise the power conferred on him in terms of section 97(b) of the Constitution with a view to harmonising this problem. Section 97(b) provides that the President may transfer any power or function conferred upon a member of the Cabinet to another member.

With the exercise of this power the President may confer political responsibility over the law enforcement component of the DSO entrusted to the Minister for Justice and Constitutional Development by the NPA Act to the Minister of Safety and Security. No great alarm would arise concerning the independence of the prosecutors who work for the DSO. They would continue to receive instructions only from and be accountable only to the NDPP. I am fortified that this will ensure that the government's objective to provide effective and efficient law enforcement delivery is attained

The need for all law enforcement agencies to have a joint purpose in addressing all law enforcement responsibilities in the interest of the country and its people cannot be sufficiently emphasised. I have indicated in the body of the report that the tensions that bedevil the

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relationship of the DSO and the SAPS are incompatible with the constitutional responsibilities of these institutions. It is critical that these institutions answer positively to the constitutional mandate for co-operative governance required of all organs of state. It is also of vital importance that these institutions complement each other in addressing law enforcement challenges particularly those arising from organised crime. When joint credit results from every successful investigation and prosecution can be claimed by all law enforcement agencies, the public confidence in the capacity of the government to address serious and violent crime will be much high.

The other concern raised in the evidence relate to the possible suggestions of abuse by the DSO in the manner in which it handles the media around the work that it does. Very early in its investigations, it publishes the subject matter of its investigations to the possible prejudice of the persons under investigation. This may also point to a possible violation of the rights and freedoms protected under the Bill of Rights.

The work of the DSO also points to a possible tendency to go beyond the “information” gathering mandate conferred upon it in terms of section 7(a) (ii) of the NPA Act. The evidence points to intelligence gathering. This would be in conflict with the Constitution. I make recommendations in the body of the report regarding this matter.

It is my considered conclusion that the way to address some of the concerns relating to the shared mandate as well as the tensions that exist between the DSO and SAPS would be to create a multi-disciplinary vetting structure, (MVS) whose responsibility would include management of the day to day operational activities of the DSO; review of the investigations of the DSO and the task to refer matters that must be handled by the DSO.

I have not been able to address the duplication of resources among the intelligence agencies and the DSO. There was evidence that there are areas of duplication of resources. It is my conclusion and recommendation that a proper audit be done by a requisite expert in order to optimise the gains that can be made in this regard.

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## INTRODUCTION

1. On 1 April 2005 the President appointed me as the Chairperson and sole member of the Commission of Inquiry to “inquire into, make findings, report on and make recommendations regarding various matters constituting the terms of reference.
2. In terms of Regulation 5 issued under Proclamation No.R317 in the Government Gazette dated 1 April 2005, the terms of reference of the Commission were published and couched in the following terms:

“to inquire into, make findings, report on and make recommendations regarding the following matters:

- The rationale behind the establishment of the Directorate of Special Operations (“DSO”) and its location;
- The mandate of the DSO and an evaluation of the implementation thereof;
- The systems for management, control, communication, oversight and accountability by the DSO;
- The accountability, effectiveness, efficiency and oversight in respect of the intelligence operations of the DSO;
- The Constitutional and legislative mandates of the South African Police Service (“SAPS”) and the intelligence agencies, with particular reference to their roles in respect of organised and high level priority crimes;

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- The systems for coordination and cooperation between the SAPS and the intelligence agencies on the one hand and the DSO on the other;
- The efficacy of coordinating systems that exist between the above structures (DSO and the SAPS), including matters related to –
  - ❖ the rationalisation of resources,
  - ❖ approaches to and standards related to training,
  - ❖ minimising undue duplication,
  - ❖ the coordination of operations,
  - ❖ priority setting mechanisms,
  - ❖ liaison with foreign law enforcement and intelligence structures and where relevant private sector entities,
  - ❖ the impact of locating investigators and prosecutors within the National Prosecuting Authority.
- The need to review the present legislative framework and to make recommendations on –
  - ❖ remedial actions, if any, to address deficiencies identified in line with the terms of reference,
  - ❖ various options regarding the suitable location of the DSO, including the appropriate legislative framework.

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3. The regulations for the conduct of the Commission were issued under Proclamation No.R317 in the Government Gazette dated 1 April 2005.
4. On 21 July 2005 and 24 January 2006 I submitted interim reports which I request to be incorporated herein.

## PROCESS

5. In the discharge of my mandate, I report the following process to have informed the work of the Commission as well as the findings and recommendations that will follow in the report:
  - 5.1. On 6 May 2005 and in terms of Notice No.434 published in the Government Gazette No.27568 of even date, I published an invitation to various entities to make, by way of affidavit, submissions in respect of each and every aspect of the terms of reference of the Commission. A copy of the notice forms part of the Commission's documentation.
  - 5.2. In addition to the invitation referred to in sub-paragraph 5.1 above, I sent letters inviting institutions, Government departments (stakeholders) and individuals to make submissions, also by way of affidavit, to the Commission regarding each and every term of reference of the Commission. This invitation was further published in the media. Copies of the invitations and a list of the invitees form part of the Commission's documentation.
  - 5.3. The terms of reference, by their very nature, required some input by academic institutions regarding constitutional and legal matters relevant to the subject matter of the inquiry. To that end, I extended an invitation to these institutions. A list of these institutions appears in the annexure hereto. Copies of the invitations as well as the responses received from these academic institutions form part of the Commission's documentation.

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- 5.4. The Commission received approximately 30 submissions ranging from individuals, stakeholders, academic institutions, political parties, labour movements and non-governmental organisations. The aforementioned submissions were read, analysed and researched further.
- 5.5. To add value to the process and to the discharge of the Commission's mandate, the Commission made on-site visits to the Directorate of Special Operations, National, Gauteng Provincial Region, Natal Regional Division, the South African Police Services, National Intelligence Agency, the Inspector General of Intelligence's office and the Office for Interceptions.
- 5.6. The Commission also visited international government institutions with similar or closely similar models as the DSO. Some of these international institutions have offered and continue to offer training to the members of the DSO.
- 5.7. Having obtained submissions by various individuals and entities, it became apparent that greater clarity was required in respect of some of the terms of reference. I caused a request for further particulars to be issued and further particulars were then furnished. The request for further particulars and the further particulars form part of the Commission's documentation.
- 5.8. The nature of the matters with which the terms of reference relate also dictated a different format for the Commission. None of the issues required to be determined on credibility and, for that reason, it was not going to be prudent to address the issues through *viva voce* evidence.
- 5.9. The principal stakeholders were invited to a pre-hearing conference with a view to establish a method by which the further submissions were to be

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received during the open hearings. Ultimately, the decision was to receive written heads of argument.

- 5.10. At the commencement of the open hearings, the SAPS brought an application to have the Commission's hearing conducted in camera. The rationale behind the application centred on the fact that it was not possible to separate confidential elements of its submissions from elements that could be ventilated in an open hearing.
- 5.11. The application was opposed by the DSO, the Foundation for Human Rights ("FHR"), the National Intelligence Agency ("NIA") as well as by counsel representing the Commission. After hearing argument, I was persuaded that no sufficient basis had been established to exclude any section of the public from the proceedings of the Commission. I, however, directed that confidential elements of the submissions were to be excluded from public disclosure. As a result, confidential elements which would have been undesirable to expose to the general public were consequently redacted and expunged from submissions.
- 5.12. The public hearings were held during the weeks of 3 to 14 October 2005. The principal stakeholders who made oral presentations included the SAPS, the National Intelligence Co-ordinating Committee ("NICOC"), the parliamentary Joint Standing Committee on Intelligence ("JSCI") together with the Institute for Security Studies ("ISS") the FHR and POPCRU. In addition, oral evidence was given by the National Director of Public Prosecutions ("NDPP") and the Head of the DSO.
- 5.13. After the conclusion of the oral hearings, I received further submissions and documentation from the SAPS and the DSO. I thereafter collated all the information and submissions received, evaluated the information and the evidence presented, drew factual conclusions from the totality of such information and evidence and, with the benefit of additional research, submit, this, my final report.

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## THE TERMS OF REFERENCE

### THE APPROACH

6. I do not consider it necessary to repeat the submissions made by the various submitters. I only mention those salient aspects of their submissions that bear relevance to my factual findings as well as the recommendations. I also point out the contending submissions made by the various submitters where relevant.
7. A complete understanding of the report requires the reading of support documentation submitted to the commission. To avoid prolixity, I do not propose to annex documents to the report. I refer in the report to excerpts of some of the documents merely for purposes of emphasis.

### RATIONALE BEHIND THE ESTABLISHMENT OF THE DSO

8. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:
  - 8.1. The majority of the principal stakeholders and interested parties generally agree with regard to the rationale behind the establishment of the DSO.
  - 8.2. There appears to be four principal reasons behind the establishment of the DSO. First, the perceived incapacity of the SAPS to investigate high level priority crimes resulting in low conviction rates in the investigation and prosecution of these offences. Second, the need to develop a multi-disciplinary approach in the fight against corruption, including police corruption. Third, the need to establish an entity that would be able to attract, recruit, reward and retain highly-skilled personnel. Lastly, the

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perceived illegitimacy of the SAPS arising from historical and political reasons.

- 8.3. The multi-disciplinary approach to establishing the structure was to be based on the *troika* principle. The *troika* principle refers to a methodology that combines the expertise of prosecutors, the expertise of crime data analysts as well as the expertise of the police investigators.
- 8.4. The rationale for the establishment of the DSO can also be gathered from the relevant speeches and announcements made by members of Cabinet responsible for Justice and the Security cluster and the process undertaken with regard to the drafting of the Directorate of Special Operations Bill, 2000.
- 8.5. The rationale for the establishment of the DSO can also be gleaned from reading the Directorate of Special Operations Bill that followed the guidelines determined by the Inter-Ministerial Security Committee when the Bill was introduced in the National Assembly on 11 August 2000. The deliberations before the Portfolio Committee on Justice and Constitutional Development and the preamble to the National Prosecuting Authority Act, 32 of 1998 (“the NPA Act”) also sheds light on this aspect.
- 8.6. On 25 June 1999, the President announced the establishment of an adequately staffed and equipped investigating unit to deal with all national priority crimes including police corruption in order to reduce the impermissibly high levels of crime and violence. A number of Cabinet members, including the Cabinet members responsible for Safety and Security and Justice and Constitutional Development, were instructed to attend to all that was necessary for the immediate establishment of the proposed unit.

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- 8.7. The former Minister of Safety and Security indicated on 28 June 1999 that the new structure would focus on crime intelligence gathering, investigation and prosecution of persons and groups involved in priority crimes; and once operational, the new structure would allow normal detective structures to deal more effectively with ordinary crime investigation at local level.
- 8.8. On 11 November 1999 the former Minister for Justice and Constitutional Development in respect of preventing and fighting crime pointed out that a number of challenges existed, namely, corruption among certain officers in law enforcement agencies, callous murder of police officers on duty, unsatisfactory conviction rates and lack of co-ordinated attack on organised and syndicated crime by investigation, intelligence and prosecution authorities.
- 8.9. The former Minister for Justice and Constitutional Development explained the DSO's organisational structure, location and mandate amongst others, as:

*“...to compliment and, in some respects, supplement the efforts of existing law enforcement agencies in fighting national priority crimes.*

*The successes achieved by the Investigating Directorate: Organised Crime and Public Safety ... have highlighted the effectiveness of the troika approach to fighting organised crime. It is for this reason that the Directorate of Special Operations will employ special investigators, intelligence operatives and specialist prosecutors who will work together in project teams. ... A Deputy National Director of Public Prosecutions will be responsible for assigning specialist prosecutors to direct investigations to ensure that the Directorate's investigations are court directed. This approach reflects international best*

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*practice and has resulted in improved conviction rates worldwide.”*

- 8.10. On 7 February 2000, the former Minister of Safety and Security, during a Parliamentary briefing stated in relation to prosecution-led and intelligence driven investigations, that:

*“Prosecution-led and intelligence driven investigations are key elements in the fight against crime and corruption. All prosecutions are being brought into line with national strategy concerning crime and crime prevention. The legislative framework for the Directorate of Special Operations (Scorpions) is nearing finalisation and will be tabled in Parliament later this month.*

*The creation of this unit gives effect to the Cluster’s determination to increase national conviction rates through prosecution-led investigations. This unit will direct its energies at priority crimes, including vehicle hijacking, syndicated drug and arms dealing, trans-national crimes, money- laundering and corruption. Cases are given priority according to clear guidelines, and the resources and services of several Departments are being brought together where required, in a structured manner.”*

- 8.11. The crisp argument by the principal stakeholders alluded to above, is that there was a clear consensus by the government that something drastic had to be done to curtail impermissible levels of organised crime and the strain on law enforcement compounded by certain corrupt elements within the police force. For that reason, there was a need to create a multi-disciplinary unit such as the DSO incorporating the *troika* principle. There was also consensus that the unit should be placed outside the SAPS.

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- 8.12. There were conflicting submissions regarding the rationale for the establishment of the DSO and its subsequent location within the National Prosecuting Authority (“NPA”).
- 8.13. The SAPS, on the one hand, sought to argue that the rationale for the establishment and location of the DSO was pursuant to the articulation of the government’s concern (including those members of Cabinet within the Safety and Security Cluster) regarding the challenges organised crime presented. These concerns related to threats posed by the high levels of violent and serious crimes and the pervasive nature of organised corruption, including police corruption and the need to establish a new structure that would effectively tackle these challenges.
- 8.14. On the whole, the SAPS did not seek to seriously challenge the submissions made by other principal stakeholders in regard to the initial rationale for the establishment of the DSO within the NPA. Instead it contended that the establishment of the DSO was a temporary measure resultant upon a “loss of confidence in the crime combating capacity of the Police, specifically those units dealing with priority crimes”. The SAPS argued that it had subsequently rid itself of the corrupt elements within its structures and was therefore able to effectively tackle organised crime.
- 8.15. The SAPS further argued that it had since become successfully transformed into a professional efficient and effective police service which is regarded as a world leader in various areas of policing. It further submitted that it was able to meet responsibilities in respect of priority crimes and was more able to deal with any complicated, complex and sophisticated investigation. In this regard, it referred to the excellence of its criminal records system, forensic science services and the relevant expertise acquired by its organised crime unit.

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8.16. The Minister for Justice and Constitutional Development on the other hand submitted that the issue for consideration was whether or not the threats faced by the country ten years ago were still in existence. She submitted that there were several indicators which demonstrated the extent to which the country had moved since 1994. She further submitted that the crime statistics between the years 2001/2002 and 2004/2005 demonstrated a real decline in the level of priority crimes. She nevertheless admitted that the challenge to address organised crime still remained. In her view, the threat of serious crime, whilst still requiring attention, had diminished to the extent that it was now proper to reconsider the relocation of the DSO. In support of her argument relating to the reduced crime levels, she referred the Commission to the crime statistics analysis.

8.17. The other principal stakeholders argued to the contrary. They maintained that the initial rationale for the establishment of the DSO, namely the threats posed by organised crime as well as the challenges of successfully prosecuting organised crime were still valid. The argument that the establishment of the DSO was a temporary measure was refuted. The further argument that the levels of organised crime no longer posed the threat that it did, was also challenged.

### **FINDINGS IN RELATION TO THE RATIONALE FOR THE ESTABLISHMENT OF THE DSO.**

9. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

9.1. In 1999, the President announced, the decision to create a multidisciplinary structure that was to be well resourced and was to have the specific mandate to address organised crime.

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- 9.2. Various Ministers of government, responsible for the Justice and Security cluster, echoed the statement of the State President that our nascent democracy was in danger of being undermined by organised crime. It was accepted that organised crime attacked the fabric of society and the economic standing of the country.
- 9.3. There was a decision to employ an innovative investigative methodology in fighting organised crime since organised crime entailed legally complex and sophisticated issues. In that regard, a comprehensive answer was to be found in the creation of a multi-disciplinary vehicle that would address the formidable challenges organised crime present.
- 9.4. There were various drafts of legislation that sought to create the DSO. The SAPS *inter alia* had certain constraints with regard to its capacity and credibility. Since the prosecution service was going to be an important element in the combat against organised crime, a decision was made to locate the DSO within the National Prosecuting Authority. The NPA Act was accordingly amended to create the DSO and to collapse in it various other directorates that were in place at the time.
- 9.5. The rationale for the establishment of the DSO, that is, to create a multi-disciplinary structure using the *troika* principle as a methodology to address organised crime was precipitated by intolerable levels of crime.
- 9.6. Despite the indications that crime levels are dropping, it is my considered view that organised crime still presents a threat that needs to be addressed through a comprehensive strategy.
- 9.7. I am not persuaded that the rationale for the establishment of the DSO has since disappeared. The argument that the rationale no longer holds since the levels of crime are showing a decline is without substance. For this reason, it is my considered finding that the DSO still has a place in the government's law enforcement plan.

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## RECOMMENDATIONS IN RELATION TO THE RATIONALE FOR THE ESTABLISHMENT OF THE DSO

10. Having considered the evidence and the submissions presented to me, as well as the findings that I have made in relation to this term of reference, the following recommendation are made :
  - 10.1. I am satisfied that all relevant stakeholders were convinced that a new strategy was necessary to arrest the corrosive impact that organised crime was having on the social and legal structure of the country. There was agreement across board that the law enforcement structures were at the time, inadequate to fully address the challenges presented by organised crime.
  - 10.2. I am also satisfied that there was broad consensus that a new independent structure was necessary to launch a fresh and comprehensive answer to the challenges presented by organised crime. It is my recommendation that notwithstanding indications that organised crime is being addressed on a concerted basis, the rationale for the establishment of the DSO is as valid today as it was at conception.

## LEGISLATIVE MANDATE OF THE DSO

11. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:
  - 11.1. The mandate of the DSO has to be seen within the relevant provisions of the Constitution of the Republic of South Africa Act of 1996 (“the Constitution”) and the relevant Legislation. There is a need to refer to some legal authorities in addressing this particular aspect.

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- 11.2. Section 179(1) of the Constitution provides for the establishment of a single national prosecuting authority consisting of a National Director of Public Prosecutions, who is the head of the prosecuting authority, and Directors of Public Prosecutions and prosecutors as determined in terms of legislation.
- 11.3. Section 179(2) of the Constitution determines that the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting such proceedings.
- 11.4. The Constitution requires that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice (section 179(4)). The National Director of Public Prosecutions is empowered to determine a prosecution policy which must be observed in the prosecution process, issue policy directives, intervene in the prosecution process when policy directives are not complied with and review a decision to prosecute or not to prosecute (section 179(5)).
- 11.5. Section 2 of the NPA Act establishes a single National Prosecuting Authority as foreshadowed in section 179 of the Constitution.
- 11.6. The NPA Act establishes, in section 7 thereof, an Investigating Directorate formally known as the Directorate of Special Operations in the office of the National Director. The aim of the Directorate of Special Operations as contemplated in section 7(1)(a) of the Act is to—
- “(i) investigate, and to carry out any functions incidental to investigations;*
  - (ii) gather, keep and analyse information; and*

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(iii) *where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings, relating to—*

(aa) *offences or any criminal or unlawful activities committed in an organised fashion;*

(bb) *such other offences or categories of offences as determined by the President by proclamation in the Gazette.”*

11.7. The term “organised fashion”, for purposes of section 7(1) (a) (aa), is defined in section 7(1) (b) of the NPA Act. It includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise is related by distinguishing characteristics.

11.8. Section 28(1)(a) of the NPA Act provides that if the Investigating Director has reason to suspect that a specified offence has been or is being committed he or she may conduct an investigation on the matter. The Investigating Director shall also conduct an investigation on a matter if the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director in terms of subsection (1) (b). An investigating Director may extend an investigation under section 28(1) (a) or (b) to include any offence (whether it is a specified offence or not) if he or she considers it desirable to do so in the interest of the administration of justice or in the public interest and he or she suspects that such offence is connected with the subject of the investigation.

11.9. A specified offence is defined as any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as

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contemplated in section 7(1)(a)(iii)(aa) or any proclamation issued in terms of section 7(1)(a)(bb) or (1A) of the NPA Act.

11.10. Transitional arrangements relating to Investigating Directorates that existed prior to the establishment of the DSO are dealt with in section 43A and, among others, provides that any Investigating Directorate that existed prior to the establishment of the DSO shall cease to exist as a separate Investigating Directorate and become part of the DSO and the proclamation that has been issued in respect of a former Investigating Directorate shall be deemed to have been issued in respect of the DSO.

11.11. The President has issued no proclamation in terms of section 7(1) (a) (bb) of the NPA Act. However, a number of proclamations, which applied to Investigating Directorates that pre-dated the DSO, are in view of the provisions of section 43 A (2) deemed to have been issued in respect of the DSO. They are the following:

11.11.1. the Investigating Directorate: Organised Crime and Public Safety was established on 16 October 1998 by the President in *Gazette* No. 19372 (Regulation No. 6318 of 16 October 1998). A number of offences were specified in the Schedule attached thereto.

11.11.2. on 4 December 1998 the President, under section 43(7) (c) of the Act, further specified certain categories of offences, by way of proclamation in *Gazette* No. 19579 (Regulation No. 6375 of 4 December 1998) in respect of the Investigating Directorate: Serious Economic Offences.

11.11.3. on 24 March 2000 the President, under section 7(1), read with section 7(2) of the Act, established an Investigating Directorate by way of proclamation in *Gazette* No. 20997

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(Regulation No. 14 of 2000) to deal with offences relating to corruption.

11.12. The DSO may also, in addition, investigate any matter specified in an investigating directive issued in terms of section 23(3) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004. An investigating directive may only be issued if the judge concerned is satisfied that, amongst others, there are reasonable grounds to believe that:

11.12.1. a person maintains a standard of living which is disproportionate to his or her present or past known sources of income or assets;

11.12.2. that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities; and

11.12.3. such investigation is likely to reveal information, documents or things which may afford proof that such a standard of living is maintained through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

11.13. The powers and functions of Special Investigators are set out in section 30 of the NPA Act. Subsection (2) thereof provides that a Special Investigator has powers as are provided for in the Criminal Procedure Act, 1977, which are bestowed on a peace officer or police officer, relating to the investigation of offences; the ascertainment of bodily features of an accused person; the entry and search of premises; the

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seizure and disposal of articles; the arrests; the execution of warrants; and the attendance of an accused person in court.

- 11.14. There were conflicting submissions relating to the legal mandate of the DSO. The DSO argued very strongly that the legislature was deliberate in describing the legislative mandate of the DSO as reflected in the Act. It pointed out that any circumscribed and tight legislative mandate would create more difficulties than it would offer solutions. It would, amongst others, offer criminal elements an opportunity to take on technical arguments that may frustrate prosecution of these cases at great cost to the State.
- 11.15. The DSO submitted that the SAPS contention in respect of section 199(1) of the Constitution was flawed. The DSO argued that the interpretation that section 199(1) of the Constitution conferred exclusive jurisdiction on the SAPS to deal with crime was not supported in both fact and law. To buttress its argument, it pointed to various agencies including customs and others who do “police work” when they investigate compliance for specific activities.
- 11.16. The SAPS submitted that it was necessary to view the mandate of the DSO against the general obligation of the SAPS to investigate all crime reported to the SAPS. According to the SAPS the mandate of the DSO is unclear, broad and unlimited. According to the SAPS the DSO’s discretion to take cases, makes for a difficult evaluation of the relevant mandate. The SAPS was critical of the successes claimed by the DSO and submitted that these successes should be viewed against its ability to choose cases with a greater chance of successful prosecution. In addition, it was argued that the fact that police investigations were taken over by the DSO when the investigations were at an advanced stage contributed to the warped success statistics of the DSO. It also criticized the DSO for taking on cases with a high profile and for its media value selection criteria.

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- 11.17. The SAPS argued that the provisions of section 199(1) of the Constitution made reference to a single police service. Relying on the use of the word “single” in the Constitution, the SAPS argued that the DSO was acting unconstitutionally where it purported to do police work particularly when the work it did included the investigation of serious organised crime.
- 11.18. The Institute for Security Studies (“ISS”) submitted that the mandate of the DSO was of such nature that it guaranteed an overlap of mandates between the SAPS and the DSO. The ISS, however, did not view the congruence of mandates in an entirely negative light. It opined that any attempt to change the mandate of DSO would not present any solutions because the establishment of a prescriptive mandate would, according to the ISS, lead to procedural challenges in every case the DSO prosecuted. It pointed out that there were some benefits in overlapping mandates to the extent that competition could raise the quality of work done by both the DSO and SAPS.
- 11.19. The Foundation for Human Rights (“FHR”) expressed the view that the provisions of the Act, which dealt with the mandate of the DSO, provided very little direction to the organisation. The FHR was of the view that a balance should be found between the open-ended statutory provision of the DSO and the need to address serious crime. It submitted that the mandate of the DSO should therefore be restricted to criminal activities that were the most threatening to society and focus not only on the crime but also the criminal.
- 11.20. Before dealing with the findings that are competent to make in this regard, it is useful to look at international trends and see the techniques that are used to manage this challenge.

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- 11.21. The criminal justice system agencies in **England and Wales** consist, in the main, of the Home Office, the Lord Chancellor's Department, the Police, Crown Prosecution Service, the Serious Fraud Office and National Crime Squad. In addition, multi-disciplinary structures, primarily the Financial Service Authority, the Financial Fraud Investigation Network and the Serious Organised Crime Agency also exist.
- 11.22. The Home Office is the government department responsible for internal affairs and leads on criminal policy formulation. It has a specific aim of working closely with the Lord Chancellor's Department and the Crown Prosecution Service. It also oversees the Police, the Youth Justice Board, Prison and Probation Services and supports the work of the charity victim support.
- 11.23. The Lord Chancellor's Department is responsible for effective management of the courts and the appointment of Judges and Magistrates and other judicial office holders.
- 11.24. England and Wales do not have a national police force, but have a Police Force that comprises 43 (forty three) police forces responsible for the investigation of crime, collection of evidence and the arrest or detention of suspected offenders.
- 11.25. The Crown Prosecution Service ("CPS") is a government department responsible for prosecuting criminal cases investigated by the police in England and Wales. It is created by the Prosecution of Offences Act, 1985. It is an independent body that works closely with the police.
- 11.26. The head of the CPS is the Director of Public Prosecutions. The Director is appointed by the Attorney-General who is accountable to Parliament for the Service. The Service operates under a structure of 42 (forty two)

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geographical areas which correspond with the boundaries of the 43 (forty three) police forces.

- 11.27. In 1998 a review of the CPS proposed the bringing together of police and CPS in criminal justice units. This proposal was carried forward and co-location units were set up in which police and CPS staff worked together to prepare cases for prosecution thus reducing duplication and providing ready access to early legal advice for police investigators. By March 2002, 42 (forty two) of such units had been established.
- 11.28. The Serious Fraud Office (“SFO”) deals with most major fraud cases. These are not prosecuted by the CPS but by the SFO, which specialises in such crime.
- 11.29. The SFO was established in 1988 by the Criminal Justice Act, 1987. It is a specialised agency with a specific mandate to address and reduce serious fraud and the cost of fraud. It has within it investigators and prosecutors who receive intelligence and work on that intelligence to make interventions that are required. They do not investigate crime *per se* but rather any person or persons involved in the commission of fraud.
- 11.30. The SFO is an agency with various disciplines within it. Not only does it have investigators and prosecutors, but it has people with specialised skills such as chartered forensic investigators. As a multi-disciplinary team, they co-operate and co-ordinate their effort through the Joint Vetting Committee (“JVC”). The JVC is composed of the CPS, Customs, Financial Services Authority, Revenue Services DTI, City of London Police, Metro Police Services and Asset Recovery Services. The function of the JVC is to receive intelligence and to make the determination with regard to which institution is best placed to do the investigation. The JVC would have meetings at senior level. The process is one agreed upon by the Ministers.

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- 11.31. The SFO does not have police powers. The SFO is specifically mandated to interface with various law enforcement agencies and uses the police in arrests and customs officials in custom related investigations and revenue officials in cases that deal with such matters.
- 11.32. Financial Service Authority (“FSA”) is another multidisciplinary structure in which intelligence is shared amongst Police, Intelligence Agencies, Home Affairs, SFO, National Crime Intelligence Services, National Crime Squad and various regulatory bodies. The FSA’s role is to police the money-laundering regulations. The FSA has a wide range of powers of investigation, and an impressively creative series of sanctions available to it, ranging from withdrawal of authorisation through to unlimited fines, public censure, injunctions, restitution, prohibition orders and banning orders. The Department of Trade and Industry, in its policing of the company sector, can apply for the winding up of a company, and has authority to bring disqualification proceedings. The revenue departments are able to exact harsh financial penalties for revenue fraud.
- 11.33. The Financial Fraud Investigation Network has within it Prosecutors, Chartered Accountants and the Police who would retain their own management line structures. The solution of the work they do is to set up a team headed by a Case Controller who would be a Senior Lawyer who would be responsible for directing the prosecution of the case which is based on the Code for Crown Prosecutors.
- 11.34. The team under this scheme would comprise the case controller, financial investigators, chartered and forensic accountants, forensic computer and IT experts, administrative staff, researchers, etcetera. They would devise the investigation plan and meet regularly to look at the case, keep minutes of the developments in that case and record any decisions that are made. Attached to that are police officers who do the police work. These investigators and prosecutors work together from the earliest

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stages of the investigation right through to sentence and also to confiscation proceedings. Where there is a problem about the decision taken by the case controller the matter is referred to the Director whose decision is final.

11.35. From 1 April 2006 a new agency, known as the Serious Organised Crime Agency will come into operation bringing together the National Crime Squad, the National Criminal Intelligence Service, the Home Office's responsibilities for organised immigration crime and the investigation and intelligence responsibilities of HM Customs and Excise in tackling serious drug trafficking and recovering related criminal assets. It will comprise approximately 4500 (four thousand five hundred) staff, be intelligence-led, and have as its core objective to reduce the harm caused to the United Kingdom by organised crime, including the trafficking of drugs and people.

11.36. The **United States of America** also offers useful guides in this regard. The powers of the Federal Bureau of Investigations ("the FBI") are derived from congressional statutes. The FBI's mandate is the broadest of all federal investigative agencies. The mandate authorises the FBI to investigate all federal criminal violations that have not been specifically assigned by a congress to another federal agency.

11.37. The following statutes prescribe the mandate:

11.37.1. Title 28 United States Code, section 533 authorises the Attorney-General to appoint officials to detect and prosecute crimes against the United States.

11.37.2. Title 18 United States Code, section 3052 specifically authorises special agents and officials of the FBI to make arrests, carry firearms and serve warrants.

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- 11.37.3. Title 18 United States Code, section 3107 empowers special agents and officials to make seizure under warrant for violation of federal statutes.
- 11.37.4. Title 28 Code of Federal Regulations, among others, outlines the investigative and other responsibilities of the FBI including the collection of finger print card and identification records.
- 11.38. Investigations by the FBI are conducted within the Attorney-General's guidelines, which pertain to racketeering enterprises, general criminal investigations, undercover operations, criminal informant matters, extra territorial investigations and domestic security/terrorism matters. The guidelines afford centralised direction, which allows for greater uniformity and control of a national and international law enforcement effort.
- 11.39. A significant number of FBI investigations are conducted in concert with other law enforcement agencies or as part of joint task forces. The philosophy emphasises close relations and information sharing with other federal, state, local and foreign law enforcement and intelligence agencies.
- 11.40. The FBI asserts that the most effective means of combating drug trafficking is to use the enterprise theory of investigation, which focuses investigations and prosecutions on an entire criminal enterprises rather than on an individual. Through this process all aspects of criminal operations can be identified. This supports not only the prosecution of the criminal enterprise, but also the seizure of the enterprises' assets and is intended to disrupt or dismantle entire criminal organisations.
- 11.41. With regards to local and federal mandate, state and local law enforcement agencies are not subordinate to the FBI, and the FBI does not supervise or usurp the investigations. Through co-operation the

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investigative resources of the FBI and state and local agencies are often pooled in a common effort to investigate and solve cases.

- 11.42. Subsequent to an investigation, the information and evidence gathered in the course thereof is presented to the appropriate US Attorney or Department of Justice official who will determine whether or not to prosecute or further action is warranted. Although the FBI is responsible for investigating possible violations of federal law, the FBI does not give an opinion or decide if an individual will be prosecuted. The federal prosecutors employed by the Department of Justice or the US Attorney's offices are responsible for making this decision and for conducting the prosecution case.
- 11.43. In its fight against organised crime, particularly international organised crime, the FBI uses a variety of laws, asset forfeitures, statutes and sophisticated investigative techniques in its domestic and international cases.
- 11.44. An example that is useful in Africa is, amongst others, to be found in **Ghana**. In 1993 the government of Ghana established in terms of the Serious Fraud Act, 446 of 1993, a specialised agency called the Serious Fraud Office with power to monitor, investigate and on authority of the Attorney-General, to prosecute any offence involving serious financial or economic loss to the State. Section 11 of the Act gives all directors of the Serious Fraud Office namely, the executive director, the deputy executive director and any officer of the Serious Fraud Office authorised by the Director all powers and immunities conferred on the police.
- 11.45. **India**, also offers, useful insight on this matter. In July 2002 the Serious Fraud Investigation Office was established in India as an independent office in the Ministry of Company Affairs to professionally investigate financial fraud of a serious nature. It presently functions within the existing provisions of the Companies Act, 1956.

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11.46. The Director of the organisation has been empowered to take a view whether or not an investigation should be taken up by the organisation. Investigations will be taken up if the cases concerned are characterised by –

11.46.1. complexity and having inter-departmental and multi-disciplinary ramifications;

11.46.2. substantial involvement of public interest to be judged by size, either in terms of monetary misappropriation or in terms of persons affected; and

11.46.3. the possibility of investigation leading to or contributing towards a clear improvement in systems, laws and procedures.

11.47. A co-ordinating committee has been set up to review the decisions of investigation taken by the Director and to provide inter-departmental and inter-agency co-ordination and co-operation.

11.48. **New Zealand** is another example that has sought to address organised crime in a particular way. The New Zealand Serious Fraud Office Act, 1990, provides that the Director may, among others, investigate and prosecute serious and or complex fraud and must have regard to the following factors:

11.48.1. the suspected nature and consequences of the fraud;

11.48.2. the suspected scale of the fraud;

11.48.3. the legal, factual and evidential complexity of the matter; and

11.48.4. any relevant public interest consideration.

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- 11.49. The Director has full discretion in the selection of cases. His powers are delegated to investigative staff who conducts investigations on his behalf. He acts independently and is not responsible to the Attorney-General. The office utilises a panel of prosecutors from outside of the office who act as lead counsel in defended matters.

## **FINDINGS IN RELATION TO THE LEGISLATIVE MANDATE OF THE DSO.**

12. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

12.1. The argument that the legal mandate of the DSO to investigate and prosecute serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit. It is clear from the reading of the constitutional judgment in the *Minister of Defence v Potsane* 2002 (1) SA 1 (CC), at p.14, para 26 that the meaning of “single” used in the relevant section conveys no more than the fact that various police forces that used to form part of the “independent” homelands such as the Transkei, Bophuthatswana, Venda and Ciskei (“TBVC”) would be amalgamated into one single police force. The word “single” does not therefore connote “exclusive”.

12.2. The argument that the DSO is a police force within the meaning of section 199(1) of the Constitution where it has the legislative competence to investigate and prosecute matters referred to in section 7 of the NPA Act is also without merit. It is evident that most regulatory authorities have the statutory powers to investigate non-compliance and violations relevant to their area. This, in itself, would not, in my view, qualify these regulatory structures to be police forces within the meaning of the provisions of section 199(1) of the Constitution.

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- 12.3. I accept that the legislature intentionally drafted the legal mandate of the DSO to be wide. In my view, this was prudent having regard to the rationale behind the establishment of the DSO and the findings made in relation to this term of reference. For instance, it is unarguable that organised crime syndicates are not only pervasive but are highly sophisticated and advanced and command huge financial resources; they are therefore able to mount heavyweight legal defences with a view to resisting prosecutions and/or convictions. An overly prescriptive legal mandate would render itself open to constant jurisdictional attacks and frustrate the objective for which the DSO was established.
- 12.4. I am satisfied that there is nothing unconstitutional in the DSO sharing a mandate with the SAPS. Should government considers it appropriate to discharge its agenda within the legal framework as now pertains, it can certainly do so provided that such action is not inconsistent with the Constitution. The legal mandate of the DSO is sufficiently wide to avoid technical arguments that may arise if the mandate was too narrowly defined.
- 12.5. I am also satisfied that there is nothing unconstitutional in having a structure such as the DSO located under the prosecutorial authority. There appears no legal impediment in having a structure such as the DSO with all the disciplines that it has falling under one ministry. Elsewhere in this report I propose a possible de-confliction mechanism.
- 12.6. As international trends demonstrate, there are various strategies that can be deployed in dealing with overlapping mandates. The Serious Organised Crime and Police Act establishing the Serious Organised Crime Agency (“SOCA”) has, as one of its provisions, that SOCA would only have the power in respect of serious fraud where the serious fraud office declines to act in relation to it. It is evident that using this strategy,

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it is possible to assign the authority of one agency to trigger the right of the other agency to act where the jurisdictional facts are present.

- 12.7. The other de-confliction provision in relation to the work of SOCA is to require the agreement of the Commissioners where the investigation and prosecution relates to matters that involve revenue fraud. It is evident that this type of offence would bring into play the powers and competences of the customs office and the revenue office. In this regard, SOCA is enjoined by Statute to tackle these aspects only with the agreement of the Commissioners.

### **RECOMMENDATIONS IN RELATION TO THE LEGISLATIVE MANDATE OF THE DSO**

13. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:
  - 13.1. There is nothing impermissible in law to draft the legal mandate of the DSO to be as broad as it appears in the NPA Act. It is also permissible to have the DSO share the mandate to tackle organised crime with the SAPS. The formidable challenge lies in the proper management of tensions and conflicts that may arise from a shared mandate.
  - 13.2. The nature of tensions germane to mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a committee with relevant individuals at the appropriate levels of authority who are

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able to deal with the day-to-day operational issues that are likely to arise and with sufficient mandate to resolve those.

- 13.3. I deal with possible solutions to address complications that may arise from a shared mandate elsewhere in the report.

### **THE EVALUATION OF THE IMPLEMENTATION OF THE LEGISLATIVE MANDATE OF THE DSO**

14. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

- 14.1. The implementation of the mandate of the DSO has at times raised concerns. The evidence and the argument tendered before the Commission, reveal that the implementation of the legal mandate was not entirely satisfactory.

- 14.2. The NPA Act has made provision for the establishment of the Ministerial Co-ordinating Committee (“MCC”) which is intended to address a number of issues relating to the functioning of the DSO (scope of its operations).

- 14.3. The first responsibility of the MCC is to determine policy guidelines in respect of the functioning of the DSO. In this respect, the legislature must have intended to have the MCC determine the policy guidelines whose theme would have, amongst others, dealt with the interrelationship of the DSO with other law enforcement agencies.

- 14.4. It is notable that the MCC’s composition comprises the cabinet members responsible for the Administration of Justice (Chairperson), Correctional Services, Defence, Intelligence Services, Safety and Security and any other Cabinet members designated from time to time by the President.

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Its composition lends strong support for the view that the legislature intended the Ministries constituting the safety and security cluster to resolve all envisaged policy related issues in order to facilitate the operational activities of the DSO vis-a-vis the other law enforcement agencies.

- 14.5. The other function of the MCC is to determine procedure and to coordinate the activities of the DSO and other relevant government institutions including the procedures for the communication and transfer of information regarding matters falling within the operational scope of the DSO in such institutions; and the transfer of investigations to and from the DSO in such institutions; and where necessary, the responsibility of the DSO in respect of specific matters; and the further procedures to be followed for the referral or assigning of any investigation to the DSO.
- 14.6. The evidence demonstrates that the MCC did not meet from the time of the promulgation of the NPA Act in 2001 until May 2004. The only evidence presented to the Commission related to the minutes of the MCC on 1 and 8 June; 3 August; 3 and 9 November and 9 December 2004. It is safe to conclude that the MCC only met after the current Minister for Justice and Constitutional Development took office. Further, a closer reading of the minutes, save for those relating to 8 June 2004 and 3 and 9 November 2004 respectively, is liable to cause obfuscation whether such meetings were those of the MCC, *stricto sensu*, as contemplated in section 31(2) of the NPA Act. This is principally because the contents of the minutes indicate matters that would not necessarily fall within the ambit of matters referred to in the relevant section.
- 14.7. During the Commission's hearings, the head of the DSO as well as the NDPP indicated an intention to be part of a process that would table a working programme for consideration by the Commission. The DSO, in response to the Commission's request proposed the establishment of an

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operational structure with the objectives to: enhance operational co-operation between the relevant stakeholders; to ameliorate and facilitate communication and co-ordination and to provide a framework for the sharing of information with the Head of the DSO chairing such a body.

- 14.8. The DSO proposed that the composition of the structure should include the head of detectives and crime intelligence (SAPS); the head of operations (NIA); and the head of the DSO.
- 14.9. The proposed powers, duties and functions of the structure would be to recommend the policy guidelines and procedures referred to in section 31(1)(a), (b) and (c) of the NPA Act to the Committee of Directors General for its consideration and to make the necessary proposals to the MCC for its consideration and approval; to propose, for consideration and approval by the said Committee of Directors General and the MCC, the responsibilities of the DSO in respect of specific matters as contemplated in section 31(1)(c)(i) of the NPA Act; and to implement the decisions and guidelines of the MCC and any directives of the Committee of Directors General.
- 14.10. The SAPS has however recommended a de-establishment of the DSO in terms of which only the DSO investigators would be transferred to the SAPS whilst the prosecutors of the DSO remain with the NPA alternatively, that the DSO's investigators and prosecutors be relocated to the SAPS on the basis that:
- “(i) *Such prosecutors of the DSO, who are willing to be seconded to the SAPS on a two to three years basis, can be seconded with the approval of the National Commissioner and the National Prosecuting Authority to the SAPS, to be assigned to Units dealing with priority crimes, to act in an advisory capacity. This will mean that as seconded members they will not be prosecutors, but be able to “service” those units with advice, which will enhance court-directed*

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*investigations. As the secondment will be temporary only, it will not have a negative impact on the career path of those prosecutors. Once they return to the NPA, they will have a better understanding of investigative dynamics, whilst there will also be a transfer of their knowledge and expertise whilst serving with the said Units. If this secondment is done on a rational basis with other prosecutors, it will have a benefit for both the SAPS and the NPA.*

- (ii) *All cases that are presently being investigated by the DSO could be continued under SAPS command, with DSO investigators and prosecutors working on above basis with the investigation, until completion thereof.*
- (iii) *Prosecutors of the DSO who do not want to be seconded to the SAPS as set out above, could be deployed by the NPA to Offices of the Directors of Public Prosecutions, where they can serve to work closely with investigators in priority crime investigations, on the same basis as the Serious Economic Offences Unit, at the Commercial Crime Courts. They could even be re-located, but operate in a fashion, which will ensure the independence of both the prosecutor and the investigator and with a view to do the prosecution themselves.”*

14.11. In the further alternative, the SAPS proposed that the DSO should be retained at its current location subject to certain conditions set out in their submission of 7 November 2005.

### **FINDINGS IN RELATION TO THE EVALUATION OF THE IMPLEMENTATION OF THE LEGISLATIVE MANDATE OF THE DSO**

15. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

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- 15.1. To the extent necessary, I am satisfied that the MCC convened its meetings from June 2004. It is regrettable that the Commission was not favoured with a plausible explanation why the Ministerial Co-ordinating Committee ostensibly did not properly discharge its responsibility under the Act. It still remains an important legislative injunction that the MCC exercise its powers and properly perform its functions in terms of the Act. The difficulties of the different law enforcement agencies that are dealt with in this report may have possibly been averted or mitigated had the policies and procedures been put in place as required by section 31 of the NPA Act.
- 15.2. The fact that there was no co-ordinated relationship with the SAPS also hindered the smooth implementation of the legal mandate of the DSO. The situation was not assisted by the difficult relationships of the top officials of these institutions.
- 15.3. It is common cause that there is resistance by both DSO investigators and prosecutors to relocate to the SAPS. Whilst this may be within their right to do so, it remains a conduct that raises legal eyebrows as it is suggestive of a lack of shared objective amongst officials of the law enforcement agencies to perform their functions in fighting crime irrespective of where one's particular institution is located.
- 15.4. The scathing criticisms levelled at the DSO cannot be shrugged off easily. The manner in which the legal mandate of the DSO has been implemented does afford the DSO the unfair advantage of case selection for its investigation. It is an act which, in itself, causes conflict and tensions between the DSO and the SAPS.
- 15.5. The legislature, in establishing the DSO and granting it the mandate which is shared with the SAPS, was fully appreciative of the potential conflict such mandate would generate and therefore created the MCC as

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presently composed in terms of section 31 of the Act. However, in my view, the structure of the MCC is inadequate to fully address the daily operational difficulties that may arise intermittently.

15.6. The challenges that are presented by the concurrence of the mandate of the DSO as well as that of the SAPS have been comprehensively dealt with in the evidence. They include the dislocation in communication as well as absence of agreement in relation to which agency will be responsible for which investigation. The view of the ISS which, in my view is correct and is relied upon by the DSO, is that the MCC's function was intended to resolve such operational conflicts and it was contemplated that it would determine, in the event such conflicts arose, which institutions would be responsible for what matters.

15.7. The DSO and the SAPS share a legal mandate in respect of the investigation of serious organised crime. This phenomenon is not unique to the DSO and the SAPS. There are numerous examples in foreign jurisdictions where the strategies relating to specific crimes overlap. There are useful techniques that can be employed in the resolution of such tensions.

### **RECOMMENDATIONS IN RELATION TO THE EVALUATION OF THE IMPLEMENTATION OF THE LEGISLATIVE MANDATE OF THE DSO**

16. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:

16.1. The institutional tensions that are explained by the personalities that head these institutions are regrettable in the extreme. Drastic yet propitious measures need to be taken to ensure that the constitutional duties and functions of these structures serve the purpose for which the legislature has created and entrusted on them. It may be necessary for the president

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and or parliament to mete out a reprimand as a mark of displeasure, for the poignant conduct displayed by those heading these profoundly significant institutions.

- 16.2. It is undesirable that the DSO and its sister law enforcement agencies adopt a competitive relationship towards each other. My understanding of the responsibility of the executive arm of government is to have a common purpose in the enforcement of the laws of the nation.
- 16.3. I am mindful of the myriad of problems comprehensively dealt with by other submitters, with regard to the shared mandate (DSO – SAPS) and the conflicts and further potential conflicts that the shared mandate presents. Notwithstanding, I hold the view that tinkering with the legal mandate of the DSO is not likely to fundamentally eliminate these problems.
- 16.4. It is, in my view, evident that even with a functional MCC; a structural lacuna would still exist between the operations of the MCC and the day-to day activities of the DSO. The nature of tensions associated with mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a sub- committee with relevant individuals at the appropriate levels of authority who are able to deal with the day-to-day issues that arise and who would be empowered by the MCC, with sufficient mandate to resolve these issues.
- 16.5. I am persuaded by the submissions of the SAPS and the DSO that a structure below the MCC would be an important instrument to create. Such a structure may be referred to as the Multidisciplinary Vetting Structure “the MVS” or the Operational Committee as suggested by the parties. The introduction of such a structure can effectively address the challenges that currently exist. Fundamentally, it is envisaged that the structure would be a sub committee of the MCC

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## **MVS COMPOSITION**

- 16.6. It is recommended that the MVS should be composed of the National Commissioner of SAPS (as the convenor), the Directors General of NIA and the South African Secret Service (“SASS”), the Head of the DSO, the representative of the SANDF, the representative of the Correctional Service, a representative from the financial sector, such as FIS and a representative from civil society appointed jointly by the Minister for Justice and Constitutional Development and the Minister of safety and security.

## **MVS POWERS /FUNCTIONS /OBLIGATIONS**

- 16.7. The MVS should have the power to deal with matters such as: any abuse of power by the DSO (matters relating to public announcement of the work that the DSO does, at times borders on undermining the fundamental rights of the entities or individuals that are a subject matter of its investigations), and generally ensure that the DSO conduct its activities in compliance with the Constitution (this would exclude the veto power of the NDPP which is constitutionally unassailable).
- 16.8. The functions of the MVS would include matters such as enhancing the operational co-operation and coordination between the relevant stakeholders, facilitating inter-agency communication and to provide a framework for the sharing of information and developing and managing cross functional hi-tech, hi-skill capacity that is relatively localised to tackle organised crime.
- 16.9. In addition to the responsibilities described above, the MVS may have such powers to recommend policy guidelines and procedures referred to in section 31(1)(a),(b) and (c) of the NPA Act for consideration by the MCC; implement the decisions and guidelines of the MCC; to advise the MCC regarding the determination of offences or categories of offences to

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be proclaimed by the President in terms of section 7(1)(a)(iii)(bb) of the NPA Act; to authorise joint task teams in the investigation and prosecution of specific matters thereby heightening law enforcement impact. Further and more importantly, to refer the cases to be investigated and prosecuted by the DSO.

- 16.10. As international trends demonstrate, there are various strategies that can be deployed in dealing with overlapping mandates. The one avenue open is to look into a deadlock breaking mechanism. For instance, the DSO may have jurisdiction to conduct investigation and prosecution only of those cases that are referred to it by the MVS. All cases defined in the mandate of the DSO under the current legal regime would first have to be referred to the MVS for consideration and allocation. This process would confer immense powers on the MVS. There would therefore be a need, in due course, to legislatively strengthen the MVS to do such work and to review the work of the two agencies in respect of organised crime.
- 16.11. Furthermore, the anomaly is that whereas the Independent Complaints Directorate (“ICD”) has the statutory responsibility to investigate complaints against members of SAPS, it does not have jurisdiction relating to the investigative component of the DSO whose members fundamentally do the same type of work as the SAPS. It may very well be that the ICD does not have authority to pronounce itself on the prosecuting element of the DSO without interfering with the constitutionally protected independence of the prosecutor within the DSO. However, it is recommended that the mandate of the ICD should cover the investigative component of the DSO.
- 16.12. In order to contain the conduct of the DSO within its legal mandate in the conduct of its day to day activities, the MVS may be better placed to monitor, review and report on the functions of the DSO to the MCC with particular reference to its conduct in the execution of its duties.

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- 16.13. More significantly, a de-confliction mechanism may be that the President exercises one of his constitutional powers. The Minister for Justice and Constitutional Development has identified the relationship between the DSO and that of the SAPS to have irretrievably broken down. The reasons for the breakdown are not as important as the viable solution to that problem.
- 16.14. It is recommended that the President exercise the powers conferred on him by section 97(b) of the Constitution to harmonise this problem. Section 97(b) provides that the President may transfer to a member of the cabinet, any power or function entrusted by legislation to another member. With the exercise of this power the President may confer political oversight and responsibility of the law enforcement component of the DSO to the Minister of Safety and Security. Prosecutors, who work for the DSO, will continue to receive instructions and be accountable to the NDPP. The NDPP in turn will as currently provided, account to the Minister for Justice and Constitutional Development.
- 16.15. Thus it is my considered recommendation that the responsibility for the DSO should be placed on two cabinet ministers, namely the Minister for Justice and Constitutional Development and the Minister of Safety and Security. It is hoped that the aforesaid recommendation will facilitate co-operation between the two ministries in the functions of the DSO.

### **SYSTEMS FOR MANAGEMENT AND CONTROL OF THE DSO**

17. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:
- 17.1. The head of the DSO is a Deputy National Director, assigned by the NDPP and he or she performs the powers, duties and functions of the DSO subject to the control and directions of the NDPP.

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- 17.2. The head of the DSO is assisted in the exercise of his or her powers and the performance of his or her functions by one or more investigating directors and one or more deputy directors and special investigators. These officials perform their powers, duties and functions subject to the control and direction of the NDPP.
- 17.3. A special investigator exercises and performs his or her powers, duties and functions subject to the control and direction of the head of the DSO and he or she must obey all lawful directions which he or she may from time to time receive from a person having the authority to give such direction.
- 17.4. In terms of Section 36(3) (A) and (b) of the NPA Act, the Chief Executive Officer is the accounting officer of the DSO. He or she must, subject to the PFMA account for money received or paid out for or on behalf of the administration and functioning of the DSO and cause the necessary accounting and other related records to be kept.
- 17.5. The DSO has, as one of its components or units, the Programme Management Office ("PMO") which has been tasked with the running of a simplified management reporting system covering the regional offices and as well as for the management of the authorised projects. In addition, the PMO must assist head office to be able to plan, schedule and monitor projects.
- 17.6. The personnel of the PMO have a responsibility to ensure that projects are registered in one data collection point, applications for projects to be investigated are to be made in the prescribed form.
- 17.7. The PMO must further manage the confidential fund of the DSO as well as its sources and agents and obtain proper reports of authorised projects and also render advice to the investigating director or head of the DSO.

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- 17.8. The DSO has an annual budget allocated to it and such budget is planned by the DSO. It has centralised budget items which includes the payment of consultant fees, specialised equipment, witness fees and secret funds for servicing operations.
- 17.9. There is also a commitment to control the budget and savings measures on the use of cellular phones, travel and entertainment. As a result, entries are required to be made in journals as proof of such expenditures. In order to ensure compliance, all gifts are required to be registered in the gifts register, financial disclosure of any extra income is also required to be made.
- 17.10. The investigations by the DSO are conducted in accordance with an investigation plan and the regional offices are required to provide human resources, finance, logistics and procurement services to all the people in those regions. That means there is a documented system of doing things, so that if a member of one of the various units is to travel from Pretoria to Cape Town to see a source, there should be a motivation for that.
- 17.11. Each of all the regional offices has a head of the office. He or she will be supported by deputy directors, chief investigating officers, project managers, case managers and corporate managers. The DSO have a strategic plan which sets out what it needs or it wants to do or achieve in a particular year, how is it going to achieve it and what its targets are and how they are to be achieved.
- 17.12. Each office will have a functional plan and in its functional plan it describes how it is going to make its contribution. That particular office will be measured by that plan, whether it succeeds or not. The DSO also has a performance management system whereby all the members of the DSO are performance managed every year.
- 17.13. In relation to its finances, the DSO's head further states that all major expenditures exceeding the amount of R100 000.00 must go out on tender.

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Internal amounts below R100 000.00 are procured internally by the DSO's supply chain management office where three codes are required to be submitted before one of the codes could be accepted.

- 17.14. Being a business unit within the NPA the DSO, accounts to the NPA's executive committee for its finances.
- 17.15. The DSO submitted that the NDPP and the DSO exercises internal control over the powers, duties and functions of the DSO. This internal control is exercised through the decisions of the executive committee of the NPA and the NPA's internal policies, procedures, guidelines, circulars and directives.
- 17.16. In this regard the NPA drafted a policy manual, which is intended to provide a framework of guidelines to its employees, including employees of the DSO.
- 17.17. As a compliment to or in addition to the policy manual, the DSO also developed its internal policies and procedures.
- 17.18. The DSO's finances are audited by the Auditor General who also audits the DSO's confidential funds and its financial statements.

### **FINDINGS IN RELATION TO THE SYSTEMS FOR MANAGEMENT AND CONTROL OF THE DSO**

18. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:
  - 18.1. The systems for management and control appear to be coherent and proper, save that the NDPP has not strictly complied with the provisions of section 19B of the NPA Act in that some of the special investigators of the DSO have been appointed as such without any security screening

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investigation by the NIA as provided for in the NPA Act. The NDPP's failure to perform his functions and discharge his obligation in this regard may have exposed the DSO to some security risk and/or to conduct prejudicial to the objectives of the DSO.

- 18.2. The Auditor General ensures sound management systems and controls, together with ensuring compliance with, *inter-alia*, the Public Finance Management Act ("PFMA").
- 18.3. There was, in particular, a disturbing complaint that some of the members of the DSO have not been vetted by the NIA as is required by law. The evidence of the head of the DSO although conceding to such non-compliance nevertheless sought to explain how it came about. His evidence that everything required under law to ensure that its operatives are properly vetted was done was, in my view, unconvincing. There can be little debate that the practice is unacceptable and may ultimately prove to undermine the security of the state. I therefore find that the DSO has not complied with the provisions of section 19B of the NPA Act. That duty, *stricto sensu* lies squarely on the shoulders of the National Director and not on the head of the DSO.
- 18.4. Section 19B of the NPA Act requires that persons who perform their functions in the DSO, as special investigators, must undergo security screening so as to protect the nature of the information that they may come across in the discharge of their functions. The National Director is enjoined not to appoint any special investigator without evaluating information gathered from the security screening by the NIA.
- 18.5. Moreover the National Director is required in terms of this provision to subject those appointed as special investigators to further security screening from time to time. The evidence shows that some special investigators have been appointed without compliance with this requirement. Neither the National Director nor the Head of the DSO

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could proffer the exact numbers in this regard. That notwithstanding, there is an unenviable danger that is posed by such special investigators not vetted in that they might act and may well have acted in a manner prejudicial to the objectives of the DSO and/or might be a security risk. There must be full compliance with the provisions of section 19B.

- 18.6. The NDPP should in the circumstances be strongly reprimanded for his failure to adhere and monitor further adherence to this prescript. I further recommend that urgent appropriate reconciliation be undertaken by the NDPP to establish those special investigators whose appointments do not comply with the provisions of the Act and that the NDPP take remedial action in regard thereto. In view of the obfuscating evidence regarding the Nap's compliance with sub sections 19B (3) and (4) respectively, it may be apposite to further recommend that requisite proof to the satisfaction of the Director General- NIA, the National Commissioner-SAPS and the Minister for Justice and Constitutional Development be produced by the NDPP within a period to be determined by the President.
- 18.7. The risk sought to be covered by the provisions of this section must extend to external contractors who equally come to consider the information sought to be protected under this section. They too, must, in the future be submitted to similar security screening as provided in terms of section 19B. Resultantly I would therefore recommend that the NPA Act be amended accordingly. Legislative amendment should facilitate this end.
- 18.8. Although the NPA Act is silent on the security screening of the Investigating Director, the Heads of the DSO regions and Senior Investigators, there is in my view, no plausible reason I could fathom why the risk sought to be covered by section 19B should only be limited to special investigators.

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- 18.9. There was evidence pointing to the fact that the DSO has liaisons with foreign law enforcement and intelligence structures. If nothing else, this illustrates the dangers that lie in the conduct of the DSO stretching its “information gathering” mandate to include “intelligence”.
- 18.10. This certainly will compromise the security of the state as DSO members have no requisite training in intelligence

### **RECOMMENDATIONS IN RELATION TO THE SYSTEMS FOR MANAGEMENT AND CONTROL OF THE DSO**

19. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:
- 19.1. There was evidence suggesting that the DSO, in the discharge of its legislative mandate, does so through the use of private sector entities which are thereby likely to come into contact with sensitive intelligence. Whereas the DSO would be competent in terms of section 38 of the NPA Act, to solicit such private sector capability, where necessary, such a competence is one that must be exercised within the parameters of the law. I am of the firm view that whenever the DSO engages private sector entities to assist it in performing its duties, it must have such entities properly vetted by the NIA.
- 19.2. It is recommended that the NDPP take immediate steps to ensure that the DSO is compliant with the provisions of section 19B of the NPA Act.

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- 19.3. When the law requires that specific categories of personnel within the DSO must undergo security clearance, by NIA, it is the responsibility of the DSO to respect that legislative injunction. It is unacceptable that the DSO would expose matters of national security envisaged by the NPA Act to people who have not been properly accredited to handle such information.
- 19.4. I therefore recommend that the relevant legislation be amended to provide a wider category of DSO personnel for security vetting, namely Special Investigators; Senior Investigators; Regional Heads and persons engaged from the private sector entities.

### **SYSTEMS FOR COMMUNICATION OF THE DSO**

20. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:
- 20.1. The Head of the DSO testified before the Commission that the DSO's official channel of communication is limited to the National Director of Public Prosecutions, the head of the DSO, the Investigating Director and the official spokesperson of the DSO. This policy is set out in a communication directive.
- 20.2. The circular was issued in January 2004. In a recent instruction by the NDPP, the DSO's communication is limited to the above-named four persons.
- 20.3. The Reverend Chikane of the Office of the Presidency posits that some of the reasons that have been advanced for the poor relations between the SAPS and the DSO are that, among others, the DSO failed to satisfactorily investigate and stop the constant leakages of information to the media from within its ranks.

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- 20.4. In response to the question put to both the National Director of Public Prosecutions and the Head of the DSO, it was admitted that there were indeed some breaches of communication from within the ranks of the DSO.
- 20.5. The NDPP referred to two instances where an internal investigation was authorised. This was in an attempt to deal with the problems of leakages of information to the media. The Head of the DSO also admitted that there were unwarranted disclosures that were made from within their ranks. His view on the matter was that there should have been no disclosures prior to the accused appearing in court except in exceptional circumstances. He further testified that there are three circulars drawn by the DSO which explains what the DSO expects from its employees. The Commission was favoured with reports addressing this aspect.
- 20.6. As a result of the need to keep internal communication on a sound footing between senior management and its employees or staff, a workplace forum has been established within the DSO. It was emphasised that the forum is not a union, but simply a work place forum where people can responsibly raise issues they may have with management.
- 20.7. The employees are issued with a monthly circular and the management meets every two months to check whether it is achieving its business targets. The written submissions of the DSO in this regard do not offer much assistance except to state that what applies to the NPA's office also applies to the DSO.

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## FINDINGS IN RELATION TO THE SYSTEMS FOR COMMUNICATION OF THE DSO

21. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

21.1. There has been a myriad of public complaints relating to the leaking of information by the DSO that causes prejudice or embarrassment to those who are the subject matter of the investigations. I accept the legitimacy and validity of this complaint.

21.2. The improper media sensation associated with the investigation and/or arrest of some individuals resulting from the leaks in the DSO may open a practise that is inconsistent with the right to a fair trial guaranteed under section 35 of the Constitution.

21.3. The head of the DSO admitted, in evidence, that the public disclosure of the work they do is a subject matter that requires caution, I agree.

21.4. The DSO in its afore-stated conduct does not seem to have acted properly and lawfully in exercising its powers and has failed to construe those powers in the light and spirit, purport and object of the Bill of Rights. It cannot be overemphasized that the Bill of Rights is the cornerstone of our democracy that enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. An effective and efficient law enforcement agency is required to respect these rights as it constitutes one of the essential foundations of a democratic society.

21.5. Furthermore, I find that there is merit in the concern raised in evidence relating to the alleged abuse by the DSO with regard to the manner in which it publicises its work in the media. This alleged conduct has

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attracted public criticism against the DSO of being “FBI style”, meaning that the DSO conducts its operations as though it were a law unto itself. There is indeed merit to this complaint. There is an urgent need for the DSO to desist from publicising the subject matter of its investigations. There is a potential for prejudice being suffered by persons under investigation. Conduct of this nature points to a possible violation of the rights and freedoms protected under the Bill of Rights. It cannot be emphasized that the DSO must *punctiliously* perform its work within the limits of the law without attracting undue publicity. The DSO sting ought to be in its efficiency and professionalism in the execution of its mandate (investigations/ prosecutions) and not in the publication of its contemplated investigation and/or prosecution.

- 21.6. There was, in my view, no plausible reason furnished for this invidious conduct on the part of the DSO, which is to be frowned upon. The head of the scorpions, Mr McCarthy, was at pains trying to persuade me that this issue was a subject of an ongoing focused internal “sensitive inquiry”. Having regard to the sensitive nature of that inquiry, it suffices to note that this seems to be an inveterate practice. I venture to opine that I find such conduct to be out of kilter with our constitution, reprehensible, unprofessional and corroding the public’s confidence in the law enforcement agencies.
- 21.7. I am convinced that the DSO will, in conducting itself within the parameters of the law, still continue to enjoy the public confidence that is shown towards its work and the efficiency with which it constantly strives for, in the execution of its mandate. I believe that the public confidence will not be eroded but will be enhanced when the DSO does its work within professional ethics and in harmony with the fundamental rights guaranteed in the Constitution and the Bill of Rights.

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## RECOMMENDATIONS IN RELATION TO THE SYSTEMS FOR COMMUNICATION OF THE DSO

22. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:

22.1. It cannot be overemphasised that the DSO as a law enforcement agency and an organ of state is constitutionally bound to act within the law. It is enjoined by the Bill of Rights to respect the rights of every person including those who may fall within its target (sting) of investigation or prosecution.

22.2. The DSO needs to discharge its responsibilities within the parameters of the Constitution and with due regard to the Bill of Rights.

22.3. I recommend therefore that the NDPP pays close attention to how the DSO executes its mandate. Further, should the recommendation relating to the creation of the MVS find favour, such a structure would ensure that the DSO is in full compliance with its obligations under the law.

## OVERSIGHT AND ACCOUNTABILITY IN RESPECT OF THE INTELLIGENCE AND RELATED OPERATIONS OF THE DSO

23. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

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- 23.1. In terms of section 33 of the NPA Act read with section 179(6) of the Constitution, the Minister for Justice and Constitutional Development exercises final responsibility over the prosecuting authority.
- 23.2. Section 33(2) of the NPA Act provides that, to enable the Minister for Justice and Constitutional Development to exercise his or her final responsibility over the prosecuting authority, as contemplated in Section 179 of the Constitution, the National Director shall at the request of the Minister:
- 23.2.1. furnish the Minister with information in regard to any case, matter or subject dealt with by the National Director or a director in the exercise of their powers, the carrying out of their duties and the performance of their functions;
  - 23.2.2. provide the Minister with reasons for any decision taken by a director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
  - 23.2.3. furnish the Minister with information with regard to the prosecution of policy referred to in Section 21(1)(a);
  - 23.2.4. furnish the Minister with information with regard to the policy referred to in Section 21(1)(b);
  - 23.2.5. submit the reports contemplated in Section 34 to the Minister; and
  - 23.2.6. arrange meetings between the Minister and members of the prosecuting authority.
- 23.3. In terms of Section 38 of the NPA Act, if the DSO is to obtain the services of an external professional it can only do so with the concurrence of the Minister to whom it must explain or motivate as to why such external

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professional should be appointed for the services sought to be rendered to the DSO. Notably, the section *inter alia* empowers the Minister to exercise some measure of control over the engagement of consultants by the DSO and the financial implications of such appointments.

- 23.4. Section 35(1) of the NPA Act provides that the prosecuting authority shall be accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecution. In terms of section 35 (2) (a), the National Director must submit an annual report referred to in Section 24(g) to the Minister, which report must be tabled in parliament by the Minister within 14 days.
- 23.5. Section 36 of the NPA Act makes provision for the expenditure of the prosecuting authority. Subsection 36 (3) provides that subject to subsection (3A), the Director General: Justice shall, subject to the PFMA be charged with the responsibility of accounting for state monies received or paid out for or on account of the prosecuting authority; and cause the necessary accounting and other related reports to be kept.
- 23.6. In terms of section 3A of the NPA Act the Minister must appoint a fit and proper person as the Chief Executive Officer of the DSO; appoint the CEO who is to be the accounting officer of the DSO. These functions are exercised by the CEO subject to the PFMA who must account for money received or paid out for or on behalf of the administration and functioning of the Directorate of Special Operations and cause the necessary accounting and other related records to be kept.
- 23.7. The records referred to in subsection (3) (b) and (3A) (b) of the NPA Act shall be audited by the Auditor-General.
- 23.8. Chapter 11 of the Constitution provides for, amongst others, the establishment, structuring and conduct of the security services of the Republic. Section 199(1) of the Constitution stipulates that the security

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services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

- 23.9. The Republic's national intelligence structures consist of the National Intelligence Co-ordinating Committee ("NICOC"), the intelligence division of the National Defence Force, the intelligence division of the South African Police Service, the National Intelligence Agency ("NIA") and the South African Secret Service.
- 23.10. Sections 209 and 210 of the Constitution provide for the establishment and control of intelligence services and the powers, functions and monitoring of the intelligence services, respectively. Section 210 of the Constitution provides for national legislation to regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service providing for the co-ordination of all intelligence services and civilian monitoring of the activities of those services by an inspector appointed by the President.
- 23.11. Section 4 of the National Strategic Intelligence Act, 39 of 1994, establishes the NICOC consisting of the Co-ordinator for intelligence (appointed by the President); the Director-General of the Agency; the Director-General of the Service; the chief of the intelligence division of the National Defence Force and the head of the intelligence division of the Police Service.
- 23.12. The functions of NICOC are, among others, to co-ordinate intelligence supplied by members of NICOC, the detection and identification of any threat to National Security and the promotion and protection of any national interests of the Republic. The purpose of the functions being to co-ordinate and prioritise intelligence activities within the intelligence structures.

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- 23.13. The Intelligence Services Oversight Act, 40 of 1994 (“the Oversight Act”), provides for the establishment of the Joint Standing Committee on Intelligence (“JSCI”) which performs the parliamentary oversight functions in relation to the intelligence and counter-intelligence functions of the services.
- 23.14. In terms of section 7 of the Oversight Act, the President is empowered to appoint an Inspector-General of Intelligence whose functions are in relation to the services, amongst others, to monitor compliance by any intelligence service under the Constitution, applicable laws and relevant policies on intelligence. It also reviews the intelligence and counter-intelligence activities of any service.
- 23.15. The crime intelligence mandate of the SAPS is to gather, correlate, evaluate, co-ordinate and use crime intelligence in support of the objects of the South African Police Service as contemplated in section 205(3) of the Constitution; to institute counter-intelligence measures within the South African Police Service and to supply crime intelligence relating to national strategic intelligence to NICOC.
- 23.16. The National Intelligence Agency is established in terms of section 3 of the Intelligence Services Act, 38 of 1994, the Agency continues to exist in terms of section 3 of the Intelligence Services Act 65 of 2002.
- 23.17. The mandate/functions of the NIA are set out in section 2(1) of the National Strategic Intelligence Act 39 of 1994. These are, among others, to gather, correlate, evaluate and analyse domestic intelligence, in order to identify any threat or potential threat to the security of the Republic or people and supply intelligence regarding any such threat to NICOC.
- 23.18. NIA is further empowered in terms of section 2A of the National Strategic Intelligence Act, 39 of 1994, to conduct security screening investigation in the prescribed manner to determine the security

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competence of a person, if such a person, is employed by or is an applicant to an organ of state or is rendering a service to an organ of state which service may give him or her access to classified information and intelligence in the possession of an organ of state.

- 23.19. The SAPS strenuously argued that it was illogical for the Minister for Justice and Constitutional Development, who has no line function responsibilities in respect of crime intelligence, policing and investigating functions, to be the Minister with the oversight responsibilities in respect of the investigation of national priority crimes. It therefore argued that it was untenable for the DSO to perform investigative functions separate from the Line of Command of the Minister of Safety and Security.

### **FINDINGS IN RELATION TO THE OVERSIGHT AND ACCOUNTABILITY OF THE INTELLIGENCE AND RELATED OPERATIONS OF THE DSO**

24. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to the political oversight and accountability, the financial oversight and accountability and the oversight in respect of the information gathering and/or intelligence gathering of the DSO.

- 24.1. It must be noted that the DSO's information gathering mandate as described in section 7(1) (a) (ii) of the NPA Act, provides that the DSO may gather, keep and analyse information relating to offences or any criminal or unlawful activities committed in an organised fashion or such other offences or categories of offences as determined by the President by proclamation in the Gazette.

- 24.2. The welter of evidence before the Commission as well as the on site visit to the DSO revealed that the DSO has established intelligence gathering

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capabilities. This goes beyond the ambit of its information gathering mandate set out in section 7 of the NPA Act.

- 24.3. The Minister who exercises final responsibility over the work of the NPA is the Minister for Justice and Constitutional Development. She performs this function as a responsible political head under which the administration of the NPA Act falls. She does not however have practical, effective political oversight responsibility in respect of the law enforcement elements of the work of the DSO.
- 24.4. The Minister who exercises final responsibility for law enforcement is the Minister of Safety and Security. He does not have political responsibility in respect of the investigative elements of the work of the DSO.
- 24.5. The disjunction in political accountability for the entire work of the DSO, in part, explains the discord regarding the effective political oversight over and accountability for the DSO.
- 24.6. The CEO of the DSO is, in terms of the Act, responsible for the financial accountability of the DSO. At the same time, the Director-General: Justice is the accounting officer for the Department of Justice to which the NPA (read DSO) fall. As a result, there are technically two financial heads responsible for the financial accountability of the DSO.
- 24.7. Under the PFMA the accounting responsibility will lie with the Director-General: Justice in respect of matters falling under the NPA and at the same time, the CEO in the DSO would equally have the accounting responsibilities under the PFMA
- 24.8. The SAPS pointed out that in terms of determining priorities in a holistic fashion, the Minister of Safety and Security must have authority to determine all priorities and threats in the country. The SAPS decried the

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situation where some of the most important threats relating to organised crime operationally fall out of the command and control of the Minister of Safety and Security.

- 24.9. The SAPS argued that the arrangement did not reflect sound principles of governance. It therefore argued that the DSO was, in this respect, a law unto itself and capable of unilateral action. The DSO was even able to determine crime threats and priorities outside the ambit of the Safety and Security Minister and without any input by the latter.
- 24.10. This argument is, in my view, compelling. It is both untenable and anomalous that the Minister of Safety and Security who has the responsibility to address the overall policing/investigative needs and priorities of the Republic should not exercise any control over the investigative component of the DSO considering the wide and permissive mandate of the DSO relating to organised crime.
- 24.11. The anomaly arises because the Minister for Justice and Constitutional Development does not account to parliament in respect of the law enforcement aspects of the work of the DSO. Whereas the Minister of Safety and Security accounts to parliament in respect of law enforcement activities of the SAPS, he does not do so in respect of the law enforcement aspect of the DSO. There is thus a dichotomy regarding which Minister should ultimately take responsibility for the profoundly significant law enforcement component of the work of the DSO.
- 24.12. The Constitution has decidedly placed intelligence to reside with intelligence agencies that are established in terms of the Constitution.
- 24.13. The legislature was very deliberate when it conferred “information gathering” capabilities to the DSO. This was intended to enable it to gather such information as is reasonably necessary for the purposes of

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investigating and prosecuting the matters with which they are authorised in terms of their statutory mandate.

- 24.14. The head of the DSO admitted, in evidence, that the DSO does not have intelligence gathering mandate. I accept the concession to be one that was properly made. There is a marked difference between intelligence gathering and information gathering.
- 24.15. Having considered the information placed before the Commission and the evidence tendered before me, I have been left with an impression that it is more than probable that the DSO has gone to establish, for itself, intelligence gathering capabilities and in fact gathers intelligence in the pursuit of its mandate. This, if correct, would be unlawful.
- 24.16. It was admitted by all the relevant role players that the activities of the DSO, even within the legal limits of information gathering, should still be matters that ultimately filter through to NICOC. It is pleasing to note that attempts have now been made to admit the DSO into the NICOC structure.
- 24.17. I am not persuaded that the arguments submitted by all the principal stakeholders to the effect that the DSO needs to be included into the intelligence structure of NICOC, cures the difficulty of it being an intelligence gathering agency. If the DSO was to be legally empowered to gather intelligence, it would have to derive its source from the Constitution. The reading of section 199(1) of the Constitution does not permit an interpretation that the DSO is such an intelligence agency contemplated in that provision.
- 24.18. I am alive to the fact that NICOC can, where appropriate, include amongst its members such entities as would be useful for it to carry out its legislative mandate. There is nothing therefore untoward in NICOC

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inviting the DSO into its deliberations in order to be able to compile, amongst others, a comprehensive intelligence analysis.

- 24.19. In part, it would be useful to confine the activities of the DSO to information gathering as the legislation directs, which factor may be an additional leverage to ensure that the DSO not only operates within the limits of the law but is obliged to interface with the intelligence agencies in the discharge of its mandate.
- 24.20. It is both perplexing and perturbing that the DSO views its dependence on the intelligence agencies as a *hindrance* as opposed to an opportunity at greater collaboration and collective effort. The provisions of section 41(h) of the Constitution dealing with the principles of cooperative governance and intergovernmental relations are instructive. All organs of State such as the DSO are enjoined to co-operate with other state organs such as the NIA and SASS in mutual trust and good faith.
- 24.21. Since the Minister of Intelligence would ordinarily have oversight responsibilities in respect of the intelligence agencies, the information gathering activities of the DSO are not within the political authority of the aforesaid Minister. I am not satisfied that the *ad hoc* admission of the DSO in NICOC adequately addresses the oversight relevant to the intelligence functions of the DSO.

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## RECOMMENDATIONS IN RELATION TO THE OVERSIGHT AND ACCOUNTABILITY OF THE INTELLIGENCE AND RELATED OPERATIONS OF THE DSO

25. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:

25.1. There is a compelling reason to harmonise the political oversight over the activities of the DSO. I have indicated the dichotomy that results from the fact that the Minister for Justice and Constitutional Development has political responsibility over the NPA without having political accountability over the 'policing' functions of the DSO. She also does not participate in the threat analysis and the compilation of threat analysis data in relation to safety and security matters. Whereas these functions fall within the political accountability of the Minister of Safety and Security, the latter does not have accountability for the activities of the DSO. This has to be addressed through the invocation of section 97(b) of the Constitution.

25.2. There is an inherent need for all law enforcement agencies to have a joint purpose in addressing all law enforcement responsibilities in the interest of the country and its people. The tensions that bedevil the relationship of the DSO and the SAPS are incompatible with the constitutional responsibilities of these institutions. It is critical that these institutions answer positively to the constitutional mandate for co-operative governance required of all organs of state.

25.3. I have expressed a concern that the competition between the DSO and the SAPS is not in the best interest of the country. It is important that these institutions obsequiously strive to complement each other in addressing law enforcement challenges particularly those arising from organised crime. When joint credit results from every successful investigation and

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prosecution can be claimed by all law enforcement agencies, the public confidence in the capacity of the government to address serious and violent crime will be much higher.

- 25.4. For the reasons outlined hereinabove and those spelt out elsewhere in the report, it is my recommendation that the President exercises that power conferred on him in terms of section 97(b) of the Constitution to transfer the power or function entrusted to the Minister for Justice and Constitutional Development by the NPA Act to the Minister of Safety and Security thereby vesting political authority over the law enforcement component of the DSO in the Minister of Safety and Security.
- 25.5. The Constitution provides that the intelligence services of the Republic, shall reside with such institutions as are established in terms of the Constitution. The legislature has decidedly conferred information gathering powers to the DSO. In so far as the DSO's activities delve into intelligence gathering, as the evidence has demonstrated, such action falls outside its legislative competence. The DSO should act within the parameters of its legislative mandate and not impinge on the territory constitutionally assigned to other entities.
- 25.6. There is a cogent reason that impels various competencies to reside with intelligence agencies, the national prosecuting authority and the police. It is that reason that also ensures greater co-operation and interdependence as well as enhanced skills and expertise between and amongst these agencies. This should be encouraged.
- 25.7. It is not entirely inconceivable that the DSO resides within the Justice Department but the Minister for Justice and Constitutional Development must then take political accountability for the entire work of the DSO that is the law enforcement and prosecutorial elements. The concerns expressed by the Minister for Justice in this regard are both comprehensible and explicable and are therefore valid. There is a need

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for legislative emendation to remedy this anomalous aspect of political responsibility and accountability. The President can rectify same in terms of section 97(b) of the constitution.

### CONSTITUTIONAL AND LEGISLATIVE MANDATES OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)

26. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

26.1. The legislative mandate of the SAPS can be gleaned from the Constitution as well as various legislative instruments. Section 205(3) of the Constitution obligates the SAPS *“to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law”*.

26.2. The Constitution also assigns the control and management of the SAPS to the National Commissioner of the SAPS who must exercise such control and manage the SAPS in accordance with the national policing policy and the directions of the cabinet member responsible for policing.

26.3. The SAPS is established in terms of section 5 of the South African Police Act, 68 of 1995 (“the SAPS Act”).

26.4. Section 16 of the SAPS Act deals with the national prevention and investigation of crime. Subsection (1), read with subsection (2), stipulates those circumstances that amount to criminal conduct that shall be regarded as organised crime. The prevention or investigation of organised crime requires specialised skills.

26.5. Section 16(4) of the SAPS Act provides that Provincial Commissioners, who are responsible for the investigation of all crimes or alleged crimes

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committed in the province concerned, must where an investigation of a crime or an alleged crime reveals that the circumstances referred to in subsection (2) thereof (including organised crime) are present, report the matter to the National Commissioner as soon as possible.

- 26.6. However, section 16(4) (c) of the SAPS Act provides that the National Commissioner may direct that the investigation or any part thereof, be conducted by the Provincial Commissioner.
- 26.7. The Commission has been informed during an on-site visit to the SAPS that prior to 2000 the Division: Detective Service consisted of 534 specialised units which were reorganised into 280 units in that year.
- 26.8. The Organised Crime Unit is staffed by 1173 personnel consisting of 981 police officials and 192 civilian officials. The personnel are based in 52 operational units consisting of 26 Organised Crime Investigation Units; 13 Precious Metals and Diamond Units; 9 Asset Investigation Sections and 4 satellite Organised Crime Units. The Commercial Branch consists of 17 offices and one Serious Economic Offence Office located in Pretoria. In addition there are three National Operational Units which are International Vehicle Crime Investigation; Project Investigation and Cross Border Operations.
- 26.9. A candidate for appointment to an Organised Crime Unit must satisfy certain minimum requirements, namely, four years uninterrupted active functional policing duties with at least three years' appropriate detective experience; successful completion of a basic detective course together with one of the following courses; vehicle course; drug course; FCS course; serious and violent crime course; commercial crime course; undergo psychometric assessment; be awarded a security clearance at a level of at least "secret" and demonstrate willingness to be rotated within Organised Crime environment.

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- 26.10. It would also appear that members of Organised Crime Units must be assessed annually (which assessment include, among others, polygraph testing) to determine their suitability to serve in those units.
- 26.11. The Organised Crime Unit's policy document lays down standards and guidelines with respect to the functioning and responsibilities and setting standards and requirements for the appointment of members. The document sets out the Unit's approach to organised crime which, among others, entails the following: Assessment of Crime Threat Analysis from Station level (CTA); Assessment of Organised Crime Threat Analysis from Area level (OCTA); Processing of Organised Crime Project Investigation at Area level by the Area Organised Crime Secretariat (AOCS); Processing of Organised Crime Project Investigation at Provincial level by the Provincial Organised Crime Secretariat (POCS); Processing of Organised Crime Project Investigation at National level by the National Organised Crime Secretariat (NOCS).

### **FINDINGS IN RELATION TO THE CONSTITUTIONAL AND LEGISLATIVE MANDATES OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)**

27. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:
- 27.1. The constitutional responsibility to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law, resides with the SAPS.
- 27.2. The terrain of organised crime is also the terrain falling within the broad framework of matters covered in section 205 of the Constitution.

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- 27.3. The legal controversy that seems to be created by the reading of sections 205 and 199 read together with section 7 of the NPA is whether the SAPS has exclusive jurisdiction to address law enforcement responsibilities to the exclusion of all others. I am unable to come to the conclusion that it does. There are a number of agencies who acts as “law enforcement” of one type or another. The legislature has clearly seen a need to appropriate these responsibilities to other institutions as well.
- 27.4. I have already dealt with the meaning of the word “single” as it appears in section 199 of the Constitution elsewhere in the report. I am fortified in my conclusion because the Constitutional Court addressed the meaning of the word “single” albeit in a different context. What the court held was that the word should not be interpreted to mean “exclusive”.
- 27.5. I am of the view that there is, in the circumstances, nothing jurisprudentially unsound in conferring law enforcement responsibilities to any agency other than the SAPS. Moreover, the provisions of section 97(b) of the Constitution support that conclusion.

### **RECOMMENDATIONS IN RELATION TO THE CONSTITUTIONAL AND LEGISLATIVE MANDATES OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)**

28. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:
- 28.1. I have dealt with the shared legislative mandate that the SAPS has with the DSO in respect of organised crime under the heading Legislative Mandate of the DSO.

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- 28.2. The recommendations as to how the shared mandate is to be managed are repeated in this regard.

### **SYSTEMS FOR CO-ORDINATION AND CO-OPERATION BETWEEN SAPS, INTELLIGENCE AGENCIES AND THE DSO**

29. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

29.1. Co-ordination and co-operation between the NIA and DSO on criminal intelligence is practically non-existent. Any exchange of intelligence relevant to the investigation of crime as well as the interaction between the DSO and NIA in general is incoherent, irregular, inadequate and unsatisfactory.

29.2. NIA submits that the DSO as a relatively new institution does not have any capacity to conduct or carry intelligent activities. Although the DSO is not part of the intelligence agencies nor is it subject to the National Strategic Intelligence Act, 1994, to the extent that it may come into possession of intelligence related information, I hold a firm view that the DSO is obliged to pass on such information to the intelligence agencies or NICOC.

### **FINDINGS IN RELATION TO THE SYSTEMS FOR CO-ORDINATION AND CO- OPERATION BETWEEN SAPS, INTELLIGENCE AGENCIES AND THE DSO**

30. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

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- 30.1. There are no systems of co-ordination and co-operation between the DSO and SAPS, save for a few and *ad hoc* instances.
- 30.2. The Minister for Justice and Constitutional Development states that the relationship between the DSO and SAPS has irretrievably broken down. I accept that this may probably be so. However the Commission has not been provided with the details of the factual matrix relating to the irretrievable breakdown of the relationship or on how the Minister has arrived at the conclusion that the relationship has irretrievably broken down.
- 30.3. My assessment is that much of the co-operation between the DSO and he SAPS occurs at the operational level and they have also co-operated in respect of some training exercises on an *ad hoc* basis. The on-site visit at the DSO's offices in Kwa-Zulu Natal suggests that at provincial level, there is a good relationship with the SAPS; the only problem is at national level, where the relationship is non existent.
- 30.4. There are virtually no co-ordinating systems in place between the DSO and the other structures. The co-ordination and co-operation between SAPS and the intelligence community appears to be somewhat in place but operationally ineffective.
- 30.5. It is only in the recent past that the DSO has been invited into NICOC. This is a welcome development.
- 30.6. Prior to the DSO being invited into NICOC, there was virtually no co-operation between the DSO on the one hand and the SAPS and the intelligence agencies on the other.

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## RECOMMENDATIONS IN RELATION TO THE OF SYSTEMS FOR CO-ORDINATION AND CO-OPERATION BETWEEN SAPS, INTELLIGENCE AGENCIES AND THE DSO

31. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:

31.1. It is recommended that the DSO be placed in a more permanent status within NICOC. This recommendation should not be understood to mean that the DSO becomes an intelligence agency within the meaning of section 199 of the Constitution. The recommendation seeks to convey instead, that the DSO should form part of the family of law enforcement structures and share expertise and information for an overall effective crime combating strategy.

31.2. There is need to have working co-ordination and co-operation structures that must preferably be at the level of documented protocols if not legislated to ensure the efficient discharge of the mandate of these law enforcement structures. The urgency thereof cannot be sufficiently emphasised.

31.3. I have earlier dealt with the creation of the MVS which would again offer a useful platform for co-operation and co-ordination between these various structures.

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## THE EFFECTIVENESS AND EFFICIENCY OF COORDINATION OF INTELLIGENCE: DSO/SAPS/NIA

32. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

32.1. The DSO has a limited information gathering mandate which is to gather, keep and analyse information relating to certain specified offences. This capacity is not subject to the provisions of the National Strategic Intelligence Act, 1994, nor the provisions of the Intelligence Services Oversight Act, 40 of 1994. Therefore the oversight functions of the Parliamentary Committee on intelligence, the Inspector-General and other provisions relating to the functioning of national intelligence structures are arguably not applicable to the DSO.

32.2. The DSO however, argued that its operations are subject to the DSO's limited legislative mandate and internal control. Its Crime Information Collection Unit ("CICU") deals with infiltrating members into criminal organisations, executing counter-intelligence, recruitment and identification of sources in areas of interest for the DSO and providing timely, speedy investigation service to the NDPP in specified matters. It also handles all agents and informants.

32.3. The NPA has conceded, correctly so in my view, that the present situation may lead to ineffective co-operation between the DSO and other relevant intelligences agencies. The NPA therefore supports the amendments proposed to the relevant legislation in terms of which the JSCI and Inspector General ("IG") would have oversight functions relating to the DSO's information gathering capacity. Further that the DSO becomes part of the National Intelligence structure. The latter has however been qualified by the emphasis that such inclusion should not interfere with the DSO's investigative abilities.

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- 32.4. The SAPS submitted that there was no system in place to maintain checks and balances on the intelligence functions of the DSO. The IG does not have oversight functions over the DSO's information gathering functions nor is NICOC in a position and able as the inter-departmental intelligence co-ordinating mechanism to co-ordinate its activities thereby eliminating conflict, rivalry and unhealthy competition. DSO functions do not form part of intelligence estimate or product.
- 32.5. The Inspector-General of Intelligence submitted that the mandate to gather crime intelligence is assigned by law to the SAPS. The purpose of the National Strategic Intelligence Act, 1994, is to define the functional mandates of the members of the national intelligence structures which are NICOC, Defence Intelligence, Crime Intelligence Unit ("CIU"), SASS and NIA. NIA is responsible for domestic intelligence and counter-intelligence in order to enhance national security and to defend the Constitution.
- 32.6. The Minister for Intelligence Services shared the concerns raised by the Inspector General of Intelligence (as do all the other security services). The Minister further submitted that the failure to participate in the structures and discussions of NICOC had the following consequences: the DSO did not share its "intelligence" with NICOC and with the National Intelligence structures; its investigations were not necessarily informed by National Intelligence priorities and its information and intelligence did not contribute to the overall development of the National Intelligence Estimate and the National Intelligence Priorities.
- 32.7. NICOC submitted that the DSO requested an observer status on 8 April 2003 at the NICOC Principals forum. On 12 September 2003, NICOC decided to refuse the request. They however, resolved that NICOC and Intelligence departments should have a relationship with the DSO on matters of mutual concern.

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- 32.8. On 17 June 2005 NICOC Principals reviewed the composition of forum and decided that departments that could add value to intelligence process such as, *inter alia*, Home Affairs, the Department of Trade and Industry, DSO, should be included in the forum. During the oral hearings it was confirmed on behalf of NICOC that those departments are now included within NICOC.
- 32.9. Participation of the DSO enables the latter to contribute to NICOC's risk assessment analysis, the National Intelligence Estimate and National Intelligence Priorities. Minor amendments to the National Strategic Intelligence Act will enable NICOC to co-ordinate intelligence activities of the DSO. In the only meeting of NICOC attended by the DSO they contributed to the process of developing a national intelligence estimate which NICOC is busy with at the time of the writing of this report.
- 32.10. The Joint Standing Committee on Intelligence is a parliamentary oversight established in terms of the Intelligence Services Oversight Act, 40 of 1994, to exercise oversight over intelligence structures. This Committee has, over the past four years, been concerned over intelligence functions of the DSO and lack of oversight over their activities. They submitted that at an initial discussion with the DSO, the latter denied that it was conducting intelligence. This was around 2001.
- 32.11. The principal intelligence stakeholders recommend that if the DSO is to continue conducting intelligence activities, it should be subjected to the same oversight to which other intelligence structures are subjected, as none exists currently.
- 32.12. As indicated, the Joint Standing Committee on Intelligence is a Parliamentary Committee that has been established in terms of the Intelligence Services Oversight Act 40 of 1994. Its function is to exercise oversight over the activities of the intelligence structures, including its operational mandate, intelligence and counter intelligence

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functions as well as their financial administration, management and expenditure. The JSCI reports to Parliament.

- 32.13. “Intelligence” is defined in the Intelligence Services Oversight Act, 1994, as the “process of gathering, evaluation, correlation and interpretation of security information including activities related thereto, as performed by the intelligence agencies (NIA, SASS, Intelligence Division of the SANDF and SAPS). However, this Committee does not have oversight functions over the activities of the DSO.
- 32.14. The Portfolio Committee for Justice and Constitutional Development is part of the National Assembly and serves as a parliamentary oversight body over the Department of Justice and Constitutional Development in which the DSO is located. This Committee has the power to call the Minister for Justice and Constitutional Development to address them on any matter regarding the Department. The Committee deals with departmental budget, considers Bills, oversees the work of the Department, enquires into and makes recommendations about any aspect of the Department, including its structure, functioning and policy. They may also investigate any matter of public interest.
- 32.15. According to the Chief Director: Financial Operations in the Department of Justice and Constitutional Development, the NPA is listed in Part 4 in Vote 23 of the said Department’s Budget. This means that the NPA is a main division within the vote. In terms of section 36 of the PFMA, the Director-General of Department of Justice and Constitutional Development is the Accounting Officer. Section 36 of the PFMA was amended in 2000 by the insertion of section 3A whereby the CEO of the NPA became the accounting officer for the DSO. The legal situation is that the Director General is the accounting officer of the rest of the NPA. The CEO may issue delegations in respect of the DSO and the DG in respect of the rest of the NPA. The Department however still has the

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right to delegate functions in this regard. It is therefore important from an operational point of view to have a single set of delegations.

- 32.16. As indicated above that the DG is the accounting officer of the Department of Justice and Constitutional Development, while section 36 of the NPA Act introduces the CEO of the DSO as its accounting officer. Since 2002 the NPA received approval to prepare its own financial statements. According to the DSO, this does not pose insurmountable problems from an accounting point of view and only requires close co-operation between the NPA and Department of Justice and Constitutional Development. The Department is required to submit, through the Director-General, consolidated financial statements including those of the DSO.

### **FINDINGS IN RELATION TO THE EFFECTIVENESS AND EFFICIENCY OF COORDINATION OF INTELLIGENCE: DSO/SAPS/NIA**

33. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

33.1. The national mandate for the co-ordination of crime intelligence rests with the crime intelligence division of the SAPS. Thus there is need for close co-operation between the crime intelligence division of the SAPS and the remaining members of the intelligence community to ensure the necessary sharing of information and to prevent duplication of their mandates. Such co-ordination does not exist between the DSO and any of the intelligence structures.

33.2. In the light of the Constitutional provisions, the National Strategic Intelligence Act, and the mandate given to the Crime Intelligence

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division of the SAPS, the DSO is not empowered to gather crime intelligence as intended in the National Strategic Intelligence Act.

- 33.3. Upon the DSO's establishment, it [the DSO] was supposed to make use of the existing intelligence structures, something that did not happen.

### **RECOMMENDATIONS IN RELATION TO THE EFFECTIVENESS AND EFFICIENCY OF INTELLIGENCE: DSO/SAPS/NIA**

34. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:

- 34.1. The various intelligence structures, excluding the DSO appear to be effective within the NICOC structure. There appears to be sound inter-relations amongst these units, with clearly defined legal mandates. The SAPS CIU does not have any relationship with the DSO. For units that have a joint mandate to address organised crime, the efficacy of addressing this mandate is seriously undermined.
- 34.2. It is not an answer for the DSO to insist that the work it does is not intelligence when in the ordinary course of its "information gathering" it would come across intelligence which has to be analysed, interpreted and where necessary channelled through the activities of both units.
- 34.3. Save to the extent that the community of intelligence agencies has in the past not included the DSO, the matter has now been addressed to give a limited status to the DSO within NICOC.
- 34.4. I repeat the recommendation that the DSO be included formally within NICOC as proposed.

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## THE EFFICACY OF CO-ORDINATING SYSTEMS THAT EXISTS BETWEEN THE INTELLIGENCE AGENCIES.

35. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

35.1. There were formal joint operations undertaken by the DSO and SAPS. The first of these was the project the Head of the DSO eluded to, *viva voce*, as the “Top 200” project. The project was initiated as a result of the President’s announcement regarding the need to arrest 200 top criminals in the short term, in the fight against crime. Subsequent to this announcement, the DSO and the SAPS met to plan the task of arresting the top 200 criminals and wherein they discussed the joint efforts and actions necessary for the arrest of the identified criminals. The resultant co-operation ensured that the Top 200 project was an unprecedented success. The Head of the DSO testified that, this project had been a roaring success such that, in his view, it should be repeated.

35.2. The second project was the Joint Anti Corruption Task Team which was a joint project based in the Eastern Cape, between the various law enforcement agencies. Although the NIA was somewhat involved, the key players in this operation were, however, the DSO and SAPS. The nature of the operation was to investigate all the case-backlog and to receive further or new complaints from the public. This project also resulted in the successful fulfilment of the joint mandate.

35.3. The DSO also admitted that the SAPS have been useful in a number of their operations where they rescued the DSO in some potentially embarrassing situations. The head of the DSO’s testimony further revealed that the DSO relies on the use of the SAPS’ methods to register case dockets and their crime record centre. The public order policing unit has also been providing support to the DSO whenever it has some operations.

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## **FINDINGS IN RELATION TO THE EFFICACY OF CO-ORDINATING SYSTEMS, THAT EXISTS BETWEEN THE INTELLIGENCE AGENCIES.**

36. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

36.1. Under this term of reference the Commission was to look into various matters including matters related the rationalisation of resources; minimising undue duplication. It is my considered view that the nature of the resources required by these law enforcement agencies as well as the efficacy of the equipment that they use in what they do are matters which require expert knowledge and understanding. At face value, the DSO seems to possess equipment and personnel resources that are duplicated within NIA. Whether the duplication exists as a fact or should exist as a sound co-ordinating structure requires an assessment of skills outside the structure of the Commission.

36.2. It is my view that the Commission could not discharge this task responsibly without such assistance and in the interest of time, I propose to address this aspect under my recommendations.

36.3. Since specialised skill is necessary to do an audit of the resources that are with the various intelligence units, to analyse those resources in comparison to the program of combating organised crime, it is difficult to make any firm finding relating to the efficacy of co-ordinating systems between and amongst intelligence agencies.

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## RECOMMENDATIONS IN RELATION TO THE EFFICACY OF CO-ORDINATING SYSTEMS, THAT EXISTS BETWEEN THE INTELLIGENCE AGENCIES.

37. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:
- 37.1. The terms of reference required that this matter address such issues as the rationalisation of resources; approaches to and standards relating to training; minimising undue duplication; the co-ordination of operations; priority setting mechanisms; liaison with foreign law enforcement and intelligence structures and where relevant, private sector entities and the impact of locating investigators and prosecutors within the NPA.
- 37.2. The relevance of creating a structure such as the MVS or what the SAPS and the DSO call the Operational Committee to deal with co-ordination of operations will be an added tool to facilitate the efficacy of co-ordinating systems between and amongst the law enforcement structures.
- 37.3. In relation to the rationalisation of resources as well as minimising undue duplication, the on-site inspections conducted on the DSO, the SAPS and NIA revealed that the matter requires people with extensive technical knowledge regarding the equipment used by these structures. There was some evidence of apparent duplication of equipment amongst these structures.
- 37.4. It is my recommendation that a suitably qualified person(s) be engaged to properly and eruditely address the issue relating to the rationalisation of resources.

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## TRAINING OR FURTHER TRAINING ON POLICING OR INVESTIGATING METHODS

38. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

38.1. When the DSO was established, it relied on the training provided to it by the FBI of the United States of America as well as the Scotland Yard of the United Kingdom for the training of its recruits.

38.2. SAPS admitted that such institutions may well have much to offer in terms of investigations of organised crime. In South Africa such training is lacking in that the training only provides some general background on the approaches to be followed in investigations.

38.3. In light of the above, SAPS seconded some of its members to attend such training programmes, which they discovered had little practical application in the South African environment and its legal systems. Accordingly, SAPS contended that they were not able to learn anything out of this experience, in terms of investigations, that could be gainfully used to the South African environment and legal systems.

38.4. The only real joint international training the SAPS was involved in, in respect of combating organised crime, was with the Asset Forfeiture Unit, and such co-operation produced useful or concrete results for the SAPS.

38.5. The DSO's recruits did not only receive international training, but they were also trained locally through the assistance of various institutions and agencies such as the SAPS, on a variety of aspects. The DSO's training data for the years 2002 to 2005 attest to this.

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- 38.6. In relation to the training for both agencies, SAPS stated that the approaches of the two agencies are different and the standards are also different; however, there are areas of training initiatives which they have done together.
- 38.7. During 2004, the DSO conducted training in the area of racketeering and about 500 people, who included many police officers, attended the training.
- 38.8. During 2003, the DSO again conducted training on finance investigation with the assistance of the Scotland Yard and the finance intelligence centre and the Asset Forfeiture Unit. This training was also attended by many police officers and DSO investigators. Both the DSO and the SAPS officers shared their respective experiences in the training they attended, which the United States Secret Services conducted on the use of crime equipments. Further training on money laundering and environmental organised crime was conducted, which both agencies attended.
- 38.9. SAPS submitted that its investigators are well trained and equipped to deal with the type of cases and investigations which the DSO does. At the inception of the DSO, a number of members from the SAPS were transferred to the DSO to form its core members and some of them were appointed as senior special investigators without undergoing any external training. Some of these members from SAPS assisted the DSO's recruits with their training. In summary, the SAPS' training follows a holistic approach, SAPS members are developed in policing from a broad based entry level programme to specialised programmes.
- 38.10. The head of the DSO, in response to the questions relating to training, indicated that there should be no reason why the training methodology of the DSO should not be duplicated within the SAPS so that it could have the same results in the work of the SAPS. The same goes for the invaluable experience of the SAPS that should be shared with the DSO.

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## **FINDINGS IN RELATION TO TRAINING OR FURTHER TRAINING ON POLICING OR INVESTIGATING METHODS**

39. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

39.1. Accepting that there is a collective responsibility on all law enforcement agencies to make South Africa safe, I am of the firm view that the DSO's responsibilities under the law are congruent with that of the Commercial Organised Crime Unit of the SAPS and that such units, in general, should also be respected and they should be furnished with the same equipment and resources as well as the same legal powers in order to emulate the same successes of the DSO.

39.2. There are no systems of co-operation and co-ordination between the SAPS and DSO, in terms of which an arrangement between the agencies could be facilitated to formally share their respective training methods in the investigation and combating of organised crime. This should be encouraged and if need be, through legislation.

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## RECOMMENDATIONS IN RELATION TO TRAINING OR FURTHER TRAINING ON POLICING OR INVESTIGATING METHODS

40. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:

40.1. The law enforcement component of the DSO as well as the work of the SAPS relating to organised crime would, in my view, require substantially the same skill for its personnel.

40.2. The evidence demonstrates that the DSO has comprehensive training facilities to enable its personnel to achieve greater impact in the work of combating and prosecuting organised crime. The SAPS has equally developed impressive training strategies to address the challenges of organised crime.

40.3. In the light of the lack of effective cooperation and coordination of the activities between the DSO and the SAPS, it is inescapable that there may be duplication in the resources that are channelled towards training by the DSO and the SAPS. It is my recommendation that the DSO and the SAPS streamline the training of their personnel to achieve greater efficiencies.

## IMPACT OF LOCATING INVESTIGATORS AND PROSECUTORS WITHIN THE NATIONAL PROSECUTING AUTHORITY

41. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

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- 41.1. The Commission invited submissions from the academia relating to this term of reference. The substance of submissions received by the Commission did not reveal jurisprudential objections.
- 41.2. The SAPS has argued that it is unsound to locate the investigators and the prosecutors under one roof. The argument went to suggest that to do so would be a recipe for disaster. The argument was further that the prosecutors should remain within the prosecuting authority and the law enforcement officers be redeployed back to the SAPS.
- 41.3. The Commission was advised that a firewall was usually created in order to ensure that the prosecutors who are involved in investigations did not become involved in “operational matters”. It was understood by this to refer to conduct such as search and seizures as well as arrests.
- 41.4. The head of the DSO argued that the guiding principle was to make sure that the prosecutor does not become a competent and compellable witness.

### **FINDINGS IN RELATION TO LOCATING INVESTIGATORS AND PROSECUTORS WITHIN THE NATIONAL PROSECUTING AUTHORITY**

42. After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:
  - 42.1. The structure of the DSO, within the current legal framework, is not only novel but is also unique in the world. There are enough examples throughout the developed world, of institutions and structures that are created to specifically address the complexities and intricacies associated with organised crime.

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- 42.2. The use of multi-disciplinary structures, meaning, the use of prosecutors, intelligence operatives / analysts as well as investigators in a team effort is common in foreign jurisdictions. In countries such as the USA, multi-disciplinary structures (“Strike Forces”) are created for specific purposes with various elements within it reporting to their respective authorities.
- 42.3. The other distinction with the structures in foreign jurisdiction is that those multi-disciplinary structures do not fall within the normal prosecuting authority. For instance, in England and Wales, the Serious Organised Crime Agency is such a multi-disciplinary structure but does not fall under the Crown Prosecution Service.
- 42.4. There is no legal impediment in having such a structure falling within a prosecuting service as long as the independence of prosecution is safeguarded. There is a thin line between the prosecutor who is “embedded” in the investigation to still have the necessary “distance” to bring his or her mind to a dispassionate decision as to whether a particular matter is prosecutable or not.
- 42.5. It is particularly important that a prosecutor acts independently to enable him or her when conducting investigations to have the neutrality of pursuing exculpatory information and making such information available to an accused person if the prosecution is nevertheless pursued.
- 42.6. Whatever the cogency of the argument that the prosecutors must be protected from work that may expose them to become competent and compellable witnesses may be, it is my considered view that the integrity of a particular prosecutor is a vital factor in the independence of his/her office. It is therefore crucial that the integrity of individual prosecutors be one of the cardinal issues to be closely determined and scrutinized in the appointment to that office.

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## RECOMMENDATIONS IN RELATION TO LOCATING INVESTIGATORS AND PROSECUTORS WITHIN THE NATIONAL PROSECUTING AUTHORITY

43. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:
- 43.1. There were concerns expressed that the working of prosecutors with police such as is the case within the DSO holds a real risk of compromising the independence of the prosecutors and ultimately may corrupt the objectivity of the prosecutors. The basis of this concern is that whereas the prosecutors would be members of the investigating team, they nevertheless owe a duty to court to place all information before the court including information that may exculpate the accused.
- 43.2. I have been advised that the DSO is alive to this risk and that the prosecutors do not engage in aspects of the investigation that may tarnish their independence. It is also important to remember that the duty of the prosecutors to the court is an ethical obligation which goes beyond the desire to achieve a conviction in a particular case.
- 43.3. Having regard to all the evidence and the argument, it is my recommendation that the various disciplines within the DSO must still remain under a single command structure as is the current position.
- 43.4. I am satisfied that the practice of housing multiple disciplines under one command structure is sound practice. The structure of the DSO in this regard, enhances a closer co-operation amongst the various disciplines. The one discipline benefits from the expertise of the other, making the cross-pollination, an effective strategy in combating crime and returning higher conviction ratios.

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## THE REVIEW OF THE PRESENT LEGISLATIVE FRAMEWORK

44. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:

44.1. The body of evidence tendered by the principal stakeholders accept that legislation needs to be amended to include the DSO in the legislative framework dealing with intelligence.

44.2. How the legislation must be amended is a matter falling within a specialised field that I propose should be engaged in order to draft the relevant amendment and ensure that it is in harmony with existing legislations. I am informed by the Minister of Intelligence that there is already a draft Bill in this regard.

44.3. I am satisfied that the mandate of the DSO as described in section 7 of the NPA Act and in particular relating to the information gathering capabilities of the DSO should be left as is and not be amended. There is no basis for the DSO to conduct intelligence gathering work. This must be left to agencies which have the requisite expertise and legislative responsibility.

44.4. There is a need to create a legislative framework to ensure that the co-operation and co-ordination of all law enforcement agencies including the DSO is done in a structured fashion. I have postulated various methods by which these can be done. However, I believe it to lie within the domain of the legislature with its immense technical capability to explore which technique would best achieve the legislative intent.

44.5. In legislating suitable systems of control and co-ordination within the DSO and within all relevant law enforcement agencies, it is profoundly important that the legislation addressing this matter should look at the

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priority setting mechanisms that would best achieve the legislative intent having regard to the need for proper ministerial accountability over the activities of the DSO.

- 44.6. I have also made recommendations relating to the creation of the **MVS** and the powers/functions/obligations that such a structure is to have. In the light of the difficult relationships between the SAPS and the DSO and since there will still be a shared mandates in respect of combating organised crime, it is important that this matter be dealt with through legislation. It is my direction that the proposed **MVS** structure be constituted by people with the requisite expertise.

### THE LOCATION OF THE DSO

45. The information, evidence and arguments placed before the Commission regarding this term of reference are summarised hereunder:
- 45.1. The current location of the DSO is supported by, The Minister for Intelligence Services; The Inspector General of Intelligence; NICOC; The Institute of Security Studies; The Foundation for Human Rights; Prof. Kader Asmal; Ms Fatima Chohan as well as by the DSO.
- 45.2. The translocation of the DSO to SAPS is supported by: the SAPS; NIA; and POPCRU.
- 45.3. In regard to the location of the DSO, it is noteworthy that the DSO was officially launched on 1 September 1999. Furthermore, it deserves noting that the launch was welcomed by the then Ministers of Justice and Constitutional Development as well as for Safety and Security.
- 45.4. During this period a Task Team was created under the auspices of the former NDPP and the Inter-Ministerial Security Committee to facilitate

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the establishment of the DSO. The Task Team was also mandated to prepare draft legislation. To do its work, the Task Team was assisted by a Drafting Team comprising officials of the Department Justice and Constitutional Development, South African Police Services and the National Intelligence Agency.

- 45.5. The mandate to the Task Team for the establishment of the DSO was to do so along the guidelines determined by the Inter-Ministerial Security Committee. These guidelines were, among others, that the DSO should have investigation, intelligence and prosecution capacities; the head of the DSO should be accountable to the NDPP; the Minister for Justice and Constitutional Development should bear line-function political responsibility; existing Investigating Directorates established under the NPA Act, should be incorporated in the provisions of the draft legislation; and an Inter-Ministerial Security Committee should be established, to, among others, have the responsibility for making policy directives in terms of which the DSO should operate and, subject to the constitutional independence of the prosecution process, the Executive should have supervision over the DSO.
- 45.6. A draft Bill, in line with the guidelines determined by the Executive, was submitted to Cabinet during June 2000. The approval of the Bill by the Cabinet was communicated on 28 June 2000. The Bill was introduced in the National Assembly on 11 August 2000.
- 45.7. The Portfolio Committee on Justice and Constitutional Development met during October 2000 and deliberated on the possible legislative framework and ultimately decided that the DSO should be included under the ambit of the NPA Act.
- 45.8. The reasons presented by the Portfolio Committee in its report to Parliament for the decision included the fact that the DSO was already functioning under the control and direction of the NDPP; the prosecuting

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authority already had investigative capacity in the Investigating Directorates established in terms of section 7 of the NPA Act; further that it would be in the interests of both sound administration and enhance the efficient prosecution of matters dealt with by the existing Investigating Directorates and the DSO, to merge the Investigating Directorates with the DSO.

- 45.9. The consideration of the Portfolio Committee was also the fact that the enactment of separate legislation in respect of the DSO would have necessitated the duplication of substantial parts of the NPA Act, which might in turn lead to legal uncertainty and administrative difficulties;
- 45.10. The NPA Act established clear lines of authority and accountability relating to the members of the prosecuting authority, the NDPP, the Minister and Parliament. For the reasons that there was a clear consensus amongst the Cabinet members representing the Security Cluster that the mandate of the DSO should be founded on the *troika* principle; that in terms of the *troika* principle, the DSO would be empowered to investigate, gather information and prosecute national priority crimes including police corruption, under the authority of the NDPP, it was therefore logical that its location should form part of the portfolio of the Minister for Justice and Constitutional Development.
- 45.11. Having regard to the submissions of the DSO regarding its rationale and location, the DSO submitted that the NPA Act be amended to make provision for its establishment and location in the Department for Justice and Constitutional Development.
- 45.12. The amendment to the NPA Act was pursuant to the active involvement and agreement of the cabinet members of Safety and Security and Justice and Constitutional Development.

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## FINDINGS IN RELATION TO THE LOCATION OF THE DSO

46. Having considered the evidence and the argument presented before the Commission, I make the following findings in relation to the location of the DSO:

46.1. The body of the information and evidence strongly suggested a need by the government to have in place a coherent effective strategy in the fight against organised crime. Foreign jurisdictions that I visited in the course of the Commission's work also indicate a global trend at creating instruments of a specialised nature in addressing and combating or mitigating the effects of organised crime. For instance, Britain was in the process of passing legislation to create the Serious Organised Crime Agency ("SOCA").

46.2. Whereas the recent statistics show promising levels indicating some decline of criminal behaviour generally, I am not persuaded that the rationale for the establishment of the DSO has since disappeared to justify the translocation of the DSO to the SAPS.

46.3. The argument that the DSO was established as a temporary structure is not consistent with the body of evidence submitted before the Commission. I am satisfied that there is ample evidence indicating to the contrary.

46.4. There is no cogent argument offered indicating that the establishment of the DSO was meant to be a temporary structure as argued by, amongst others, the SAPS and the Police, Prisons, Civil Rights Union ("POPCRU"). It is difficult to understand why the legislature would have incorporated into a statute, a structure whose purpose was meant to have a limited lifespan without including provisions specifically addressing the temporary status thereof.

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- 46.5. Instead, the legislature has expressly provided for transitional arrangements that were to address the interim period. Had the legislature intended the DSO to have a limited lifespan, it would have plainly said so when making provision for the transitional arrangements under section 43A of the NPA Act.
- 46.6. The argument that the establishment of the DSO was to be a temporary structure is further undermined by the fact that the reading of the NPA Act clearly points to the contrary. There is instead, evidence as evinced above that the incorporation of the DSO in the NPA was deliberate.
- 46.7. It must be remembered also that the amendment resulted in the collapse of other specialised directorates that were, till then, operating as separate investigating directorates within the NPA.
- 46.8. The argument that the DSO was established until such time as SAPS would have legitimised itself or transformed does not hold merit either. A careful consideration of all evidence presented demonstrates that government was concerned that the capacity of the SAPS structures to deal with organised crime was suspect, in part, because of the corrupt elements that were within the SAPS structures and the transformation challenges it faced. The evidence now shows that the transformation challenges that presented the SAPS in the past have been radically mitigated. Ineluctably the SAPS of 1999 have been fundamentally and successfully transformed.
- 46.9. Notwithstanding the commendable transformation of the SAPS, I am satisfied that had this been the only rationale to locate the DSO within the NPA, such an intention by the Legislature would have been apparent from the reading of the NPA Act. I am unable to find support for this argument from the reading of the NPA Act.

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- 46.10. Another argument sponsored in this regard was that crime levels have since dropped to justify the translocation of the DSO to the SAPS. It is trite that the establishment of the DSO was precipitated by rampant levels of organised crime including violent crime. In as much as the evidence in this regard lends credence to the argument that levels of organised crime are no longer as high, I am not persuaded that organised crime is no longer a threat to our democracy.
- 46.11. It is important to emphasize that the crime information analysis that the Minister for Justice and Constitutional Development seeks to rely upon for her contention in this regard is, with respect, unhelpful. This is so simply because the figures relied upon, for example, murder or robbery with aggravating circumstances, does not indicate whether such figures relate to offences that were committed in an organised fashion. Accepting that the figures included offences committed in an organised fashion, it is interesting to note that the figure for drug related crime in 2001/2002 represented 52.900 whilst in 2004/2005 the figure was 84.001. This shows an increase of approximately 33.9%. The statistical information forms part of the Commission's documentation.
- 46.12. It was argued that as the relationship between the DSO and the SAPS had irretrievably broken down, the DSO should be de-established and the resultant separation of prosecutorial and policing powers preserved. Whereas I accept that there is ample evidence indicative of an unhappy relationship and serious tension between the two structures, there appears no reason in law why the idiosyncrasies of individuals should rank higher than the constitutional imperatives imposed on those institutions, in part, by section 41 of the Constitution to offer co-operation and co-ordinate their activities with one another. There is a compelling reason for these structures to co-operate as they are, in law, obliged to do.
- 46.13. The importance of doing so is highlighted by the submissions of the DSO as late as 26 October 2005 and 7 November 2005 read together with the

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submissions of the SAPS dated 20 October 2005 and 7 November 2005. These documents form a part of the Commission's documentation.

- 46.14. It was conceded by all stakeholders that there were initially good grounds to locate the DSO under the NPA.
- 46.15. A comprehensive process was undertaken to debate the suitable location of the DSO. There were various legislative instruments that were considered to locate the DSO. Ultimately, for reasons already alluded to, it was decided that the NPA Act must be amended to locate the DSO within the National Prosecuting Authority and under the Minister for Justice and Constitutional Development.

## **RECOMMENDATIONS REGARDING THE LOCATION OF THE DSO**

47. Having considered the evidence and the submissions presented to me, as well as my findings I have the following recommendations to make with regard to this term of reference:
- 47.1. Until such time as there is cogent evidence that the mandate of the Legislature (to create a specialised instrument with limited investigative capacity to prosecute serious criminal or unlawful conduct committed in an organised fashion) is demonstrably fulfilled, I hold the view that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO.
- 47.2. I am satisfied that the rationale for locating the DSO under the NDPP and the Minister for Justice and Constitutional Development in 2002 still pertains. As already submitted, this was a logical locus where the DSO could be situated since the NPA already had investigative directorates (Independent Directorate: Serious Economic Offences and Independent Directorate: Organised Crime) and because the DSO was to be

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prosecution led, its concomitant location could only be with the prosecuting authority, which constitutionally, is authorised to institute prosecutions.

47.3. The two institutions, namely the SAPS and the DSO still do not appreciate the legal imperative for co-operation. There will therefore be need for decided executive action to compel a realignment of attitudes by these institutions.

47.4. Having considered the totality of the evidence and the law relevant to the terms of reference, it is my considered view, for reasons that have already been comprehensively canvassed, that the DSO should continue to be located within the NPA.

47.5. I have considered the totality of the evidence and argument and am satisfied that the DSO should remain within the NPA but certainly with such adjustments as are recommended in the body of the report including the recommendation relating to the power of the President under section 97(b) of the Constitution to transfer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security in order to clear the anomaly already alluded to herein.

### **OTHER RELEVANT CONSIDERATIONS**

48. The DSO has, in broad terms, unilaterally drafted a direction that interprets its legislative mandate and points to methods by which it intends to discharge that mandate. Both the SAPS and NIA have decried this conduct. It is popularly referred to as Circular One. A copy of the circular forms part of the Commission's documentation.

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49. The circular divides the work of the DSO into various areas of focus. It establishes four operation management desks. The circular also deals with the criteria for the selection and the initiation of investigations and the procedural requirements relating to these processes, including the reporting responsibilities of the regional heads. It also deals with the referral of monitoring and interception applications and requests in terms of section 252A of the Criminal Procedure Act.
50. Finally, the DSO may carry out functions incidental to investigations and the institution of criminal proceedings. The unilateral drafting of Circular One is, in my view, one of the influential factors that led to the deterioration of the relationship between the SAPS and the DSO. NIA and the SAPS have bemoaned the DSO conduct in this regard, (of unilaterally drafting the Circular) accusing it of being “a law unto itself.” Furthermore, they have alleged that the implementation of the Circular enables the DSO to select cases with media value and with a high rate of possible conviction; of deciding which matter to investigate and then declare investigations of those matters that will bring publicity to the DSO even though they do not comply with section 7(1) (a) (iii)(aa) of the NPA Act.

### CO-OPERATIVE GOVERNANCE

51. I am of the view that this matter requires specific reference and treatment. The following matters flow from the information and evidence presented before the Commission:
- 51.1. It is apposite to deal with this aspect, having regard to the provisions of section 41 of the Constitution in particular, that outline the principles of cooperative government and inter-governmental relations. The Constitution enjoins structures such as the DSO, the SAPS and the intelligence agencies to, *inter alia*, cooperate with one another in mutual trust and good faith by fostering relations, assisting and supporting one

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another, informing one another of and consulting one another on matters of common interest; coordinate their actions and legislation with one another.

51.2. As the evidence was presented to the Commission, it is disturbing to note that the constitutional injunction on the DSO, SAPS and the Intelligence Agencies were not heeded.

51.3. There has been no sound relationship between the DSO and SAPS in particular. The evidence of the NDPP confirms that the relationship between the DSO and the SAPS was an unhappy relationship. The head of the DSO ascribed the tension to be institutional jealousy and personality differences.

51.4. As I point out hereunder, the lack of co-operation between the DSO and SAPS was fuelled, in part, by the MCC not carrying out its duties to determine policies and procedures to coordinate the activities of the DSO vis-à-vis the other relevant institutions that would have helped resolve the turf conflicts for each of these agencies. As already noted hereinabove the legislature was very deliberate when it stipulated that the procedures to co-ordinate the work of the DSO and other relevant institutions were to deal, amongst others, with the transfer of investigations to or from the DSO and other institutions.

51.5. I cannot express myself more than to indicate clear dismay why high ranking officials within the DSO and the SAPS made their personal issues cloud their statutory responsibilities. I can find no plausible reasons to justify this behaviour. It is difficult even to conceive circumstances that would justify such dereliction of duty. I do not find it acceptable that whatever “constitutional” problems that were imagined or harboured by the SAPS could have remained a hindrance to co-operation that is required of these agencies by law, in the interest of the security of the well being of the people of the country.

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51.6. It is the primary function of the executive whose constitutional responsibility is to implement legislation to ensure that the provisions of the law and, in this regard, section 31 is adhered to. It is also important that corrective action through appropriate admonition, by you Mr President, be brought to bear on the officials that are at the helm of the DSO and SAPS to comply with the provisions of the various pieces of legislation.

### THE DSO'S METHODOLOGY

52. It is useful to compare the traditional methods of investigation and prosecution with the novel methodology of using the troika approach which entails using the investigators, analysts as well as prosecutors in collaboration. What follows are relevant aspects in this comparison:

52.1. The traditional system of criminal investigations and prosecutions works with the detectives being housed in communities they serve. The detectives operate separately from prosecutors who are housed at court or as near to the courts as possible and, for the most part, are court-bound during the day.

52.2. The detectives use a formal evidence docket and SAP13 exhibit register and a storage system backed up by a docket investigation diary and policy pocket books systems of recording actions taken during the investigative process. A senior police officer, sometimes with legal and investigative knowledge, oversees the investigation including the gathering of the evidence in building the docket. This officer is the direct manager of the investigators. He or she guides, oversees and disciplines

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the investigation process. He or she is also responsible for reviewing evidence docket to check on the quality of the investigative work and gives instructions to investigators regarding further investigation to be done.

- 52.3. The first time a prosecutor reviews a docket of evidence is when the investigator goes so far as to arrest a suspect and brings him or her to court or when the investigator seeks a warrant for the arrest of a suspect. It is traditionally only from that time onward when the prosecutor is able to bring his or her professional expertise to bear on the investigative product and to assess what potential offences the evidence in the docket reveals, whether such evidence is admissible, the degree of reliability and strengths of the evidence in the docket and the extent to which the evidence in the docket covers all the elements of the offences sought to be prosecuted.
- 52.4. In terms of the traditional means of investigation and prosecution of offences, the prosecutor communicates with the investigator by and large through making entries in the investigation diary, the docket, or where necessary, by providing detailed letters of instructions to the investigation diary. The instructions may entail further investigation required, the taking of additional statements, rectifying errors, the addressing of evidentiary queries, if any.
- 52.5. Under the traditional system, it is not unusual that the investigator will meet with the prosecutor just shortly before the actual trial preparation stage. There will not, at that time, have the same understanding of the investigation and the strategies for the prosecution of that matter.
- 52.6. The practical limitations of the traditional methods of investigations is that the investigator is often left to use his own individual discretion in collecting the evidence without sufficient legal skill to know what information is necessary and relevant for that particular offence. The

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investigators are furthermore not sufficiently qualified to make difficult decisions of law.

- 52.7. A multi-disciplinary approach holds the advantages that it gives the team an opportunity to: assume early, continuous and direct control and responsibility for the creation and maintenance of the formal evidence docket and formal record of the investigative process and of all actions taken by investigators in the investigative process; directly, immediately and continually, receive all evidence products produced by the investigation team for inclusion in the evidence docket.
- 52.8. The *troika* principle uses the skills of a prosecutor in directing the investigation and uses the skills of the analyst in interpreting the information that is revealed by the investigation and the skill of an investigator to collate the evidence for a successful prosecution. Collectively, the three skills are able to plan and chart a way in which the investigation of a particular offence can be conducted as well as protecting the nature of the information to enable such information to have relevant evidential value in the criminal proceedings that follow.
- 52.9. Under the *troika* system the responsibilities of the prosecutor are *inter alia* to ensure that all statements surrounding search and seizure, under-cover operations and arrests are submitted and in order, including all required statements concerning the marking and handling of exhibits; thoroughly examine the products produced from search and seizure and under-cover operations for relevance and evidential value; ensure that all investigation entries or affidavits covering the relevant actions taken by investigators during the investigative process in relation to the evidence products produced, are provided in acceptable and adequate form and are supplied with the evidence products produced and, at the same time, that the evidence products are included in the formal evidence docket; and generally, ensure that evidence produced is admissible.

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- 52.10. In addition, in order to assess what potential offences are revealed by the evidence, the prosecutor would research same and identify all the elements of such offences convey same to the senior investigating officer and, if necessary, the investigation team so that the senior investigating officer, together with his or her team, may continue to investigate the matter with the specific elements of the identified potential offences in mind.
- 52.11. The prosecutor has to conduct ongoing reviews and evaluations of the evidence received in the formal evidence docket and to give further investigative instructions arising from such review and evaluation exercises, including calling for additional statements whenever factual gaps or a lack of important factual detail in original statements are identified or where elements of potentially relevant offences are later identified as not having been covered in original statements.
- 52.12. The prosecutor would also provide legal advice and contribute opinions and recommendations with regard to strategies to be adopted during the investigative process. In short, the investigation and prosecution of the offences would be intelligence driven, and court directed with all the disciplines working in concert.
- 52.13. The one telling element of the workings of the DSO that sets it apart from the conventional methods used in the investigation and prosecution of offences is the methodology of using teams involving prosecutors, information analysts and investigators in the ultimate prosecution of their cases. It is a principle that is proving to be an effective tool in addressing complex and organised crime.
- 52.14. The DSO has implemented this principle with the resultant conviction rate of over 90% standing as testimony to its effectiveness. In developing this capacity, the DSO obtained the skills training from international agencies such as the Federal Bureau of Investigation

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(“FBI”) as well as the London Metropolitan Police (“Scotland Yard”). Most impressive, the DSO has built a significant skills training capacity of its own and uses the facility in the induction of new staff and the ongoing training of its personnel.

- 52.15. There appears to be no reason why the skills base that has been built by the DSO cannot be broadened to include other law enforcement agencies such as the Organised Crime Unit (“OCU”) of the SAPS. The body of evidence tendered at the Commission indicated a willingness to share this skills base with other relevant law enforcement agencies. It is particularly more apposite to the OCU whose mandate is identical to that of the DSO.
- 52.16. Admittedly, the OCU would not have, within its fold, prosecutors who are ordinarily located with the National Prosecuting Authority. Whatever structural differences may be, there appears to be no reason why it is not possible to co-locate prosecutors with investigators and analysts that do work for the OCU. The practice of co-location is one that is implemented by foreign governments who are effectively tackling crime of like nature and the method is proving to be quite efficient.
- 52.17. The argument by the DSO is that the *troika* principle is enhanced where the three disciplines operate under one command structure such as the DSO. Whatever the cogency of this argument may be, the efficacy of the *troika* principle seems to lie more with the continuous collaboration of these three disciplines working in concert. The Commission was informed that it is not unlikely that the team investigating a particular matter may, at one stage or other, be headed by either an investigator or a prosecutor depending on a given stage of the investigation.
- 52.18. I hold a firm view that the NPA is duty bound to provide adequate prosecutorial services to the SAPS. It has a key role in the prevention and combating of all crimes including organized crime. Adequate

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resources in terms of prosecutorial expertise, service and equipment, amongst others, must be afforded to the SAPS to enable it to be effective in the discharge of its duties, in the interest of the safety and security of the South African inhabitants.

### CONCLUSION

53. The inexorable quest for an effective and efficient strategy to tackle organised crime must run like a golden thread through the whole tapestry of the law enforcement/ prosecutorial and intelligence structures. The attainment and maintenance of that efficacy lies with the law enforcement/ prosecutorial structures cooperating and coordinating their activities closely with one another as well as with the requisite statutory intelligence structures.
54. The imperfections in the inter-relationship of the law enforcement structures including the relationship of the DSO with such structures giving rise to the establishment of the Commission derive largely to operational matters. It is necessary therefore to create- on an ongoing basis- a review mechanism to manage the constant challenges that may arise in the execution of the work of these structures.
55. The report deals with various aspects that would require the Legislature's consideration to give effect to these recommendations and to harmonise the implementation of these recommendations with existing legal provisions of the relevant pieces of legislations and government policies.
56. The threat that organised crime presents to the democratic institutions and economic integrity of the country poses a formidable challenge that will continually require creative and determined strategies to address. These strategies will include, by definition, enhanced co-operation among the various law enforcement structures whose primary constitutional responsibility is to secure the country and its people.

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57. I trust that the Commission has, to this extent, made an earnest endeavour to be of meaningful assistance to the President and I thank you for the opportunity.

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**THE HONOURABLE JUSTICE SISI KHAMPEPE  
COMMISSIONER**

## **COMPENDIUM OF FINDINGS**

### **FINDINGS IN RELATION TO THE RATIONALE FOR THE ESTABLISHMENT OF THE DSO.**

In 1999, the President announced the decision to create a multidisciplinary structure that was to be well resourced and was to have the specific mandate to address organised crime.

Various Ministers of government, responsible for the Justice and Security cluster, echoed the statement of the President of the Republic that our nascent democracy was in danger of being undermined by organised crime. It was accepted that organised crime attacked the fabric of society and the economic standing of the country.

It was decided to engage an innovative investigative methodology in fighting organised crime since organised crime entailed legally complex and sophisticated issues. In that regard, a comprehensive answer was to be found in the creation of a multi-disciplinary vehicle.

There were various drafts of legislation that sought to create the DSO. The SAPS *inter alia* had certain constraints with regard to its capacity and credibility. The fact that the prosecution service was going to be an important element in combating organised crime, a

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decision was made to locate the DSO within the National Prosecuting Authority. The NPA Act was accordingly amended to create the DSO and to collapse into it various other directorates that were in place at the time.

The rationale for the establishment of the DSO, that is, to create a multi-disciplinary structure using the *troika* principle as a methodology to address organised crime was precipitated by intolerable levels of crime that were threatening our nascent democracy.

Despite indications that crime levels are dropping, it is my considered view that organised crime still presents a threat that needs to be addressed through a comprehensive strategy.

I am not persuaded that the rationale for the establishment of the DSO has since disappeared. The argument that the rationale no longer holds since the levels of crime are showing a decline is without substance. For this reason, it is my considered finding that the DSO still has a place in the government's law enforcement plan.

### **FINDINGS IN RELATION TO THE LEGISLATIVE MANDATE OF THE DSO.**

The argument that the legal mandate of the DSO to investigate and prosecute serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit. It is clear from the reading of the constitutional judgment in the *Minister of Defence v Potsane 2002 (1) SA 1 (CC)*, at p.14, para 26 that the meaning of "single" used in the relevant section conveys no more than the fact that various police forces that used to form part of the "independent" homelands such as the Transkei, Bophuthatswana, Venda and Ciskei ("TBVC") would be amalgamated into one single police force. The word "single" does not therefore connote "exclusive".

The argument that the DSO is a police force within the meaning of section 199(1) of the Constitution where it has the legislative competence to investigate and prosecute matters referred to in section 7 of the NPA Act is also without merit. It is evident that most regulatory authorities have the statutory powers to investigate non-compliance and violations relevant to

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their area. This, in itself, would not, in my view, qualify these regulatory structures to be police forces within the meaning of the provisions of section 199(1) of the Constitution.

I accept that the legislature intentionally drafted the legal mandate of the DSO wide. In my view, this was prudent having regard to the rationale behind the establishment of the DSO and the findings made in relation to this term of reference. For instance, it is unarguable that organised crime syndicates are not only pervasive but are highly sophisticated and advanced and command huge financial resources; they are therefore able to mount heavyweight legal defences with a view to resisting prosecutions and/or convictions. An overly prescriptive legal mandate would render itself open to constant jurisdictional attacks and frustrate the objective for which the DSO was established.

I am satisfied that there is nothing unconstitutional in the DSO sharing a mandate with the SAPS. Where government considers it appropriate to discharge its agenda in the framework as now pertains, it can certainly do so provided that such action is not inconsistent with the Constitution. The legal mandate of the DSO is sufficiently wide to avoid technical arguments that may arise if the mandate was too narrowly defined.

I am also satisfied that there is nothing unconstitutional in having a structure such as the DSO located under the prosecutorial authority. There is ostensibly no legal impediment in having a structure such as the DSO with all the disciplines that it has, falling under one ministry.

As international trends demonstrate, there are various strategies that can be deployed in dealing with overlapping mandates. The UK Serious Organised Crime and Police Act establishing the Serious Organised Crime Agency (“SOCA”) has, as one of its provisions, that SOCA would only have the power in respect of serious fraud where the serious fraud office declines to act in relation to it. It is evident that using this strategy, it is possible to assign the authority of one agency to trigger the right of the other agency to act where the jurisdictional facts are present.

The other de-confliction provision in relation to the work of the UK SOCA is to require the agreement of the commissioners where the investigation and prosecution relates to matters that involve revenue fraud. It is evident that this type of offence would bring into play the

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powers and competences of the customs office and the revenue office. In this regard, SOCA is enjoined by Statute to tackle these aspects only with the agreement of the Commissioners.

## **FINDINGS IN RELATION TO THE EVALUATION OF THE IMPLEMENTATION OF THE LEGISLATIVE MANDATE OF THE DSO**

I am satisfied that the MCC convened its meetings only from June 2004. It is regrettable that the Commission was not favoured with a plausible explanation why the Ministerial Co-ordinating Committee did not properly discharge its responsibility under the Act. It still remains an important legislative injunction that the MCC does what the Act imposes on it. The difficulties of the different law enforcement agencies that are dealt with in this report may have possibly been averted or mitigated had the policies and procedures been put in place as required by section 31 of the NPA Act.

The fact that there was no co-ordinated relationship with the SAPS also hindered the smooth implementation of the legal mandate of the DSO. The situation was not assisted by the difficult relationships of the top officials of these institutions.

It is common cause that there is resistance by both DSO investigators and prosecutors to relocate to the SAPS. Whilst this may be within their right to do so, it remains conduct that raises legal eyebrows as it is suggestive of a lack of shared objectives amongst officials of the law enforcement agencies to perform their functions in fighting crime irrespective of where one's particular institution is located.

The scathing criticisms levelled at the DSO cannot be shrugged off easily. The manner in which the legal mandate of the DSO has been implemented does afford the DSO the unfair advantage of case selection for its investigation. It is an act which in itself causes conflict and tensions between the DSO and the SAPS.

The legislature in establishing the DSO and granting it the mandate which is shared with the SAPS was fully appreciative of the potential conflict such mandate would generate and

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therefore created the MCC as presently composed in terms of section 31 of the Act. However, in my view, the structure of the MCC is inadequate to fully address the daily operational difficulties that may arise.

The challenges that are presented by the concurrence of the mandate of the DSO as well as that of the SAPS have been comprehensively dealt with in the evidence. They include the dislocation in communication as well as absence of agreement in relation to which agency will be responsible for which investigation. The view of the ISS which, in my view, is correct and is relied upon by the DSO, is that the MCC's function was intended to resolve such operational conflicts and the legislature contemplated that the MCC would determine, in the event such conflicts arose, which institutions would be responsible for the relevant matters.

The DSO and the SAPS share a legal mandate in respect of the investigation of serious organised crime. This phenomenon is not unique to the DSO and the SAPS. There are numerous examples in foreign jurisdictions where the mandates relating to specific crimes overlap. There are useful techniques that can be employed in the resolution of such tensions.

### **FINDINGS IN RELATION TO THE SYSTEMS FOR MANAGEMENT AND CONTROL OF THE DSO**

The Auditor General ensures sound management systems and controls, together with ensuring compliance with, *inter alia*, the Public Finance Management Act ("PFMA").

The systems for management and control appear to be coherent and proper, save that the NDPP has not strictly complied with the provisions of section 19B of the NPA Act in that some of the special investigators of the DSO have been appointed as such without any security screening by the NIA as provided for in the NPA Act. The NDPP's failure to perform his functions and discharge his obligation in this regard may have exposed the DSO to some security risk and/or to conduct prejudicial to the objectives of the DSO.

Although the head of the DSO conceded in his evidence to such non-compliance, he nonetheless made a flimsy attempt to explain how such non compliance arose. His evidence

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that everything required under law to ensure that its operatives are properly vetted was done was, in my view, unconvincing. There can be little debate that the practice is unacceptable and may ultimately prove to undermine the security of the state. I therefore find that the DSO has not complied with the provisions of section 19B of the NPA Act. That duty, *stricto sensu* lies squarely on the shoulders of the National Director and not on the head of the DSO.

Section 19B of the NPA Act requires that persons who perform their functions in the DSO, as special investigators, must undergo security screening so as to protect the nature of the information that they may come across in the discharge of their function. The National Director is enjoined not to appoint any special investigator without evaluating information gathered from the security screening by the NIA.

Moreover the National Director is required in terms of this provision to subject those appointed as special investigators to further security screening from time to time. The evidence shows that some special investigators have been appointed without compliance with this requirement. Neither the National Director nor the Head of the DSO could proffer the exact numbers in this regard. That notwithstanding, there is inevitable danger that is posed by such special investigators who were not vetted in that they might act and may well have acted in a manner prejudicial to the objectives of the DSO and/or might be a security risk. There must be full compliance with the provisions of section 19B.

The NDPP should in the circumstances be strongly admonished for his failure to adhere and monitor further adherence to this prescript. I further recommend that urgent appropriate reconciliation be undertaken by the NDPP to establish those special investigators whose appointments do not comply with the provisions of the Act and that the NDPP take remedial action in regard thereto. In view of the obfuscating evidence regarding the NDPP's non compliance with sub sections 19B[3] and [4] respectively, it may be apposite to further recommend that requisite proof, to the satisfaction of the NIA and the Minister for Justice and Constitutional Development be produced by the NDPP within a period to be determined by the President .

The risk sought to be covered by the provisions of this section must extend to external contractors who similarly consider the information sought to be protected under this section.

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They too, must, in the future be submitted to similar security screening as provided in terms of section 19B. Resultantly I would therefore recommend that the NPA Act be amended accordingly. Indubitably, the envisaged legislative amendment should facilitate this end.

Although the NPA Act is silent on the security screening of the Investigating Director, the Heads of the DSO regions and Senior Investigators, there is in my view, no plausible reason I could fathom why the risk sought to be covered by section 19B should only be limited to special investigators.

There was evidence pointing to the fact that the DSO has liaisons with foreign law enforcement and intelligence structures. If nothing else, this illustrates the dangers that lie in the conduct of the DSO stretching its “information gathering” mandate to include “intelligence gathering” This, certainly, will compromise the security of the state as DSO members have no requisite training in intelligence.

### **FINDINGS IN RELATION TO THE SYSTEMS FOR COMMUNICATION OF THE DSO**

There has been a myriad of public complaints relating to the leaking of information by the DSO that causes prejudice or embarrassment to those who are the subject matter of the investigations. I accept the legitimacy and validity of this complaint.

The improper media sensation associated with the investigation and/or arrest of some individuals resultant from the leaks in the DSO may open a practise that is inconsistent with the right to a fair trial guaranteed under section 35 of the Constitution.

The head of the DSO admitted, in evidence, that the public disclosure of the work they do is a subject matter that requires caution, I agree.

The DSO in its afore-stated conduct does not seem to have acted properly and lawfully in exercising its powers and has failed to construe those powers in the light and spirit, purport and object of the Bill of Rights. It cannot be overemphasized that the Bill of Rights is the

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corner stone of our democracy that enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. An effective and efficient law enforcement agency is required to respect these rights as it constitutes one of the essential foundations of a democratic society.

There are also matters around publicity of the work of the DSO that have attracted public criticism of being “FBI style”, meaning that the DSO conducts its operations as though it were a law unto itself. There is indeed merit to this complaint. There is an urgent need for the DSO to do its work within the limits of the law without attracting undue publicity. The DSO sting must be in its efficiency in execution of its mandate (investigations) and not in the publication of its contemplated investigation and or prosecution.

There was, in my view, no plausible reason furnished for this conduct on the part of the DSO, which conduct is to be frowned upon. I find the conduct to be reprehensible, unprofessional and corroding public confidence in the law enforcement agencies.

I am convinced that the DSO will, in conducting itself within the parameters of the law, still continue to enjoy the public confidence that is shown towards its work and the efficiency with which it constantly strives for in the execution of its mandate. I believe that the public confidence will not be eroded but will be enhanced when the DSO does its work within professional ethics and in harmony with the fundamental rights guaranteed in the Constitution and the Bill of Rights.

### **FINDINGS IN RELATION TO THE OVERSIGHT AND ACCOUNTABILITY OF THE INTELLIGENCE AND RELATED OPERATIONS OF THE DSO**

It must be noted that the DSO’s information gathering mandate as described in section 7(1) (a) (ii) of the NPA Act, provides that the DSO may gather, keep and analyse information relating to offences or any criminal or unlawful activities committed in an organised fashion or such other offences or categories of offences as determined by the President by proclamation in the Gazette.

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The welter of evidence before the Commission as well as the on site visit to the DSO revealed that the DSO has established intelligence gathering capabilities. This goes beyond the ambit of its information gathering mandate set out in section 7 of the NPA Act.

The Minister who exercises final responsibility over the work of the NPA is the Minister for Justice and Constitutional Development. She performs this function as a responsible political head under which the administration of the NPA Act falls. She does not however have practical, effective political oversight responsibility in respect of the law enforcement elements of the work of the DSO.

The Minister who exercises final responsibility for law enforcement is the Minister of Safety and Security. He does not have political oversight responsibility in respect of the investigative elements of the work of the DSO.

The disjuncture in political accountability for the entire work of the DSO, in part, explains the discord regarding the effective political oversight and accountability for the DSO.

The CEO of the DSO is, in terms of the Act, responsible for the financial accountability of the DSO. At the same time, the Director-General: Justice is the accounting officer for the Department of Justice to which the NPA (read DSO) fall. As a result, there are technically two financial heads responsible for the financial accountability of the DSO.

Under the PFMA the accounting responsibility will lie with the Director-General: Justice in respect of matters falling under the NPA and at the same time, the CEO in the DSO would equally have the accounting responsibilities under the PFMA

The SAPS pointed out that in terms of determining priorities in a holistic fashion, the Minister of Safety and Security must have authority to determine all priorities and threats in the country. The SAPS decried the situation where some of the most important threats relating to organised crime operationally fall out of the command and control of the Minister of Safety and Security.

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The SAPS argued that the arrangement did not reflect sound principles of governance. It therefore argued that the DSO was, in this respect, a law unto itself and capable of unilateral action. The DSO was even able to determine crime threats and priorities outside the ambit of the Safety and Security Minister and without any input by the latter.

This argument is, in my view, compelling. It is both untenable and anomalous that the Minister of Safety and Security who has the responsibility to address the overall policing/investigative needs and priorities of the Republic should not exercise any control over the investigative component of the DSO considering the wide and permissive mandate of the DSO relating to organised crime.

The anomaly arises because the Minister for Justice and Constitutional Development does not account to parliament in respect of the law enforcement aspects of the work of the DSO. Whereas the Minister of Safety and Security accounts to parliament in respect of law enforcement activities of the SAPS, he does not do so in respect of the law enforcement aspect of the DSO. There is thus a dichotomy regarding which Minister should ultimately take responsibility for the important law enforcement component of the work of the DSO.

The Constitution has decidedly placed intelligence to reside with intelligence agencies that are established in terms of the Constitution.

The legislature was very deliberate when it conferred “information gathering” capabilities to the DSO. This was intended to enable it to gather such information as is reasonably necessary for the purposes of investigating and prosecuting the matters with which they are concerned.

The head of the DSO admitted, in evidence, that the DSO does not have an intelligence gathering mandate. I accept the concession to be one that was properly made. There is a marked difference between intelligence gathering and information gathering.

Having considered the information placed before the Commission and the evidence tendered before me, I have been left with an impression that it is more than probable that the DSO has gone to establish, for itself, intelligence gathering capabilities and in fact gathers intelligence in the pursuit of its mandate. This, if correct, would be unlawful.

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It was admitted by all the relevant role players that the activities of the DSO, even within the legal limits of information gathering, should still be matters that ultimately filter through to NICOC. It is pleasing to note that attempts have now been made to admit DSO into the NICOC structure.

I am not persuaded that the arguments submitted by all the principal stakeholders to the effect that the DSO needs to be included into the intelligence structure of NICOC, cures the difficulty of it being an intelligence gathering agency. If the DSO was to be legally empowered to gather intelligence, it would have to derive its source from the Constitution. The reading of section 199(1) of the Constitution does not permit an interpretation that the DSO is such an intelligence agency contemplated in that provision.

I am alive to the fact that NICOC can, where appropriate, include amongst its members such entities as would be useful for it to carry out its legislative mandate. There is nothing therefore untoward in NICOC inviting the DSO into its deliberations in order to be able to compile, amongst others, a comprehensive intelligence analysis for the information of the Cabinet.

It would be useful to confine the activities of the DSO to information gathering as the legislation directs. This factor may provide an additional leverage to ensure that the DSO not only operates within the limits of the law but is obliged to interface with the intelligence agencies in the discharge of its mandate.

It is both perplexing and perturbing that the DSO views its dependence on the intelligence agencies as a hindrance as opposed to an opportunity at greater collaboration and collective effort. The provisions of section 41(h) of the Constitution are instructive. All organs of State such as the DSO are enjoined to co-operate with other state organs such as the NIA and SASS in mutual trust.

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## **FINDINGS IN RELATION TO THE CONSTITUTIONAL AND LEGISLATIVE MANDATES OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)**

The constitutional responsibility to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law, resides with the SAPS.

The terrain of organised crime also falls within the broad framework of matters covered in section 205 of the Constitution.

The legal controversy that seems to be created by the reading of sections 205 and 199 read together with section 7 of the NPA is whether the SAPS has exclusive jurisdiction to address law enforcement responsibilities to the exclusion of all others. I am unable to come to the conclusion that it does. There are a number of agencies which act as “law enforcement agencies” of one type or another. I am of the opinion that the legislature has clearly seen a need to appropriate these responsibilities to other institutions as well.

Elsewhere in the report, I have dealt with the meaning of the word “single” as it appears in section 199 of the Constitution. I am fortified in my conclusion because the Constitutional Court addressed the meaning of the word “single” albeit in a different context. What the court held was that the word should not be interpreted to mean “exclusive”.

I am of the view that there is nothing jurisprudentially unsound in conferring law enforcement responsibilities to any agency other than the SAPS. Moreover, the provisions of section 97(b) of the Constitution support that conclusion. (The recommendations as to how the shared mandate is to be managed are repeated in this regard.)

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## FINDINGS IN RELATION TO THE SYSTEMS FOR CO-ORDINATION AND CO-OPERATION BETWEEN SAPS, INTELLIGENCE AGENCIES AND THE DSO

After careful consideration of the information, evidence and arguments placed before the Commission, I make the following findings in relation to this term of reference:

There are no systems of co-ordination and co-operation between the DSO and SAPS, save for a few and *ad hoc* instances.

The Minister for Justice and Constitutional Development states that the relationship between the DSO and SAPS has irretrievably broken down. I accept that this may probably be so. However the Commission has not been provided with the details of the factual matrix relating to the irretrievable breakdown of the relationship or on how the Minister has arrived at the conclusion that the relationship has irretrievably broken down.

My assessment is that much of the co-operation between the DSO and the SAPS occurs at the operational level and they have also co-operated in respect of some training exercises on an *ad hoc* basis. The on-site visit at the DSO's offices in Kwa-Zulu Natal suggests that at provincial level, there is a good relationship with the SAPS. The only problem is at national level, where the relationship is non-existent.

There are virtually no co-ordinating systems in place between the DSO and the other structures. The co-ordination and co-operation between SAPS and the intelligence community appears to be somewhat in place but operationally ineffective.

It is only in the recent past that the DSO has been invited into NICOC. This is a welcome development.

Prior to the DSO being invited into NICOC, there was virtually no co-operation between the DSO on the one hand and the SAPS and the intelligence agencies on the other.

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## **FINDINGS IN RELATION TO THE EFFECTIVENESS AND EFFICIENCY OF COORDINATION OF INTELLIGENCE: DSO/SAPS/NIA**

The national mandate for the co-ordination of crime intelligence rests with the crime intelligence division of the SAPS. Thus there is need for close co-operation between the division of the SAPS and the remaining members of the intelligence community to ensure the necessary sharing of information and to prevent duplication of their mandates. Such co-ordination does not exist between the DSO and any of the intelligence structures.

In the light of the Constitutional provisions, National Strategic Intelligence Act, and the mandate given to the Crime Intelligence division of the SAPS, the DSO is not empowered to gather crime intelligence as intended in the National Strategic Intelligence Act.

Upon the DSO's establishment it was supposed to make use of the existing intelligence structures, something that did not happen.

## **FINDINGS IN RELATION TO THE EFFICACY OF CO-ORDINATING SYSTEMS, THAT EXISTS BETWEEN THE INTELLIGENCE AGENCIES.**

Under this term of reference the Commission was to look into various matters including matters related the rationalisation of resources; minimising undue duplication. It is my considered view that the nature of the resources required by these law enforcement agencies as well as the efficacy of the equipment that they use in what they do are matters which require expert knowledge and understanding. It is my view that the Commission could not discharge this task responsibly without such assistance and in the interest of time, I propose to address this aspect under my recommendations.

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## **FINDINGS IN RELATION TO TRAINING OR FURTHER TRAINING ON POLICING OR INVESTIGATING METHODS**

Accepting that there is a collective responsibility on all law enforcement agencies to make South Africa safe, I am of the firm view that the DSO's responsibilities under the law are congruent with that of the Commercial Organised Crime Unit of the SAPS and that such units, in general, should also be respected and should be furnished with the same equipment as well as the same legal powers in order to emulate the same successes of the DSO.

There are no systems of co-operation and co-ordination between the SAPS and DSO, in terms of which arrangement both agencies could be enabled to formally share their respective training methods in the investigation and combating of organised crime. This should be facilitated and encouraged and if need be, through legislation.

## **FINDINGS IN RELATION TO LOCATING INVESTIGATORS AND PROSECUTORS WITHIN THE NATIONAL PROSECUTING AUTHORITY**

The structure of the DSO, within the current legal framework, is not only novel but is also unique in the world. There are enough examples throughout the developed world, of institutions and structures that are created to specifically address the complexities and intricacies associated with organised crime.

The use of multi-disciplinary structures, meaning, the use of prosecutors, intelligence operatives / analysts as well as investigators in a team effort is common in foreign jurisdictions. In countries such as the USA, multi-disciplinary structures ("Strike Forces") are created for specific purposes with various elements within it reporting to their respective authorities.

The other distinction with the structures in foreign jurisdiction is that those multi-disciplinary structures do not fall within the normal prosecuting authority. For instance, in England and

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Wales, the Serious Organised Crime Agency is such a multi-disciplinary structure but does not fall under the Crown Prosecution Service.

There is no legal impediment in having such a structure falling within a prosecuting service as long as the independence of prosecution is safeguarded. The prosecutor who is “embedded” in the investigation faces the challenge to still have the necessary “distance” to bring his or her mind to a dispassionate decision as to whether a particular matter is prosecutable or not.

It is particularly important that a prosecutor acts independently to enable him or her when conducting investigations to have the neutrality of pursuing exculpatory information and making such information available to an accused person if the prosecution is nevertheless pursued.

Whatever the cogency of the argument that the prosecutors must be protected from work that may expose them to become competent and compellable witnesses, it is my considered view that the integrity of a particular prosecutor is a vital factor in the independence of his/her office. It is therefore crucial that the integrity of individual prosecutors be one of the cardinal issues to be closely determined and scrutinized in the appointment to that office.

### **FINDINGS IN RELATION TO THE LOCATION OF THE DSO**

At the relevant point in time, the body of the information and evidence strongly suggested a need by the government to have in place a coherent effective strategy in the fight against organised crime. Foreign jurisdictions that I visited in the course of the Commission’s work also indicate a global trend towards creating instruments of a specialised nature in addressing and combating or mitigating the effects of organised crime. For instance, Britain was in the process of passing legislation to create the Serious Organised Crime Agency (“SOCA”).

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Whereas the recent statistics indicate some decline of criminal behaviour generally, I am not persuaded that the rationale for the establishment of the DSO has since disappeared to justify the translocation of the DSO to the SAPS.

The argument that the DSO was established as a temporary structure is not consistent with the body of evidence submitted before the Commission. I am satisfied that there is ample evidence indicating the contrary.

No cogent argument was offered indicating that the establishment of the DSO was meant to be a temporary structure as argued by, amongst others, SAPS and the Police, Prisons, Civil Rights Union (“POPCRU”). It is difficult to understand why the legislature would have incorporated into a statute, a structure whose purpose was meant to have a limited lifespan without including provisions specifically addressing the temporary status thereof.

Instead, the legislature expressly provided for transitional arrangements that were to address the interim period. Had the legislature intended the DSO to have a limited lifespan, it would have plainly so stated when making provision for the transitional arrangements under section 43A of the NPA Act.

The argument that the establishment of the DSO was to be a temporary structure is further undermined by the fact that the reading of the NPA Act clearly points to the contrary. There is instead, evidence that the incorporation of the DSO in the NPA was deliberate.

It must be remembered also that the amendment resulted in the integration in the DSO of other specialised directorates that were, till then, operating as separate investigating directorates within the NPA.

The argument that the DSO was established until such time as SAPS would have legitimised or transformed itself does not hold merit either. A careful consideration of all the evidence presented demonstrates that government was concerned that the capacity of the SAPS structures to deal with organised crime was suspect, in part, because of the corrupt elements that were within the SAPS structures and the transformation challenges it faced. The evidence now shows that the transformation challenges that faced the SAPS in the past have

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been radically mitigated. The SAPS of 1999 has been fundamentally and successfully transformed.

Notwithstanding the commendable transformation of the SAPS, I am satisfied that had this been the only rationale to locate the DSO within the NPA, such an intention by the Legislature would have been apparent from the reading of the NPA Act. I am unable to find support for this argument from the reading of the NPA Act.

Another argument sponsored in this regard was that crime levels have since dropped to justify the translocation of the DSO to the SAPS. It is trite that the establishment of the DSO was precipitated by rampant levels of organised crime including violent crime. In as much as the evidence in this regard lends credence to the argument that levels of organised crime are no longer as high, I am not persuaded that organised crime is no longer a threat to our democracy.

It is important to emphasize that the crime information analysis that the Minister for Justice and Constitutional Development seeks to rely upon for her contention in this regard is, with respect, unhelpful. This is so simply because the figures relied upon, for example, murder or robbery with aggravating circumstances does not indicate whether such figures relate to offences that were committed in an organised fashion. Accepting that the figures included offences committed in an organised fashion, it is interesting to note that the figure for drug related crime in 2001/2002 was 52.900 whilst in 2004/2005 the figure was 84.001. This shows an increase of approximately 33.9%. The statistical information forms part of the Commission's documentation.

It was argued that as the relationship between the DSO and the SAPS had irretrievably broken down, the DSO should be de-established and the resultant separation of prosecutorial and policing powers preserved. Whereas I accept that there is ample evidence indicative of an unhappy relationship and serious tension between the two structures, there appears no reason in law why the idiosyncrasies of individuals should rank higher than the constitutional

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Imperatives imposed on those institutions, in part, by section 41 of the Constitution to offer co-operation and co-ordinate their activities with one another. There is a compelling reason for these structures to co-operate as they are, in law, obliged to do.

The importance of doing so is highlighted by the submissions of the DSO as late as 26 October 2005 and 7 November 2005 read together with the submissions of the SAPS dated 20 October 2005 and 7 November 2005. These documents form a part of the Commission's documentation.

It was conceded by all stakeholders that there were initially good grounds to locate the DSO under the NPA.

A comprehensive process was undertaken to debate the suitable location of the DSO. There were various legislative instruments that were considered to locate the DSO. Ultimately, for reasons already alluded to, it was decided that the NPA Act must be amended to locate the DSO within the National Prosecuting Authority and under the Minister for Justice and Constitutional Development.

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## **COMPENDIUM OF RECOMMENDATIONS**

### **RECOMMENDATIONS IN RELATION TO THE RATIONALE FOR THE ESTABLISHMENT OF THE DSO**

Having considered the evidence and the submissions presented to me, as well as the findings that I have made in relation to this term of reference, the following recommendation are made:

I am satisfied that all relevant stakeholders were convinced that a new strategy was necessary to arrest the corrosive impact that organised crime was having on the social and legal structure of the country. There was agreement across board that the law enforcement structures were at the time, inadequate to fully address the challenges presented by organised crime.

I am also satisfied that there was broad consensus that a new independent structure was necessary to launch a fresh and comprehensive answer to the challenges presented by organised crime. It is my recommendation that despite indications that organised crime is being addressed on a concerted basis that the rationale for the establishment of the DSO is as valid today as it was at conception.

### **RECOMMENDATIONS IN RELATION TO THE LEGISLATIVE MANDATE OF THE DSO**

There is nothing impermissible in law to draft the legal mandate of the DSO as broad as it appears in the NPA Act. It is also permissible to have the DSO share the mandate to tackle organised crime with the SAPS. The formidable challenge is to manage tensions and conflicts that may arise from a shared mandate.

The nature of tensions associated with mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a committee with relevant individuals at the appropriate levels of

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authority who are able to deal with the day-to-day operational issues that are likely to arise and with sufficient mandate to resolve those.

I deal with possible solutions to address complications that may arise from a shared mandate elsewhere in the document.

### **RECOMMENDATIONS IN RELATION TO THE EVALUATION OF THE IMPLEMENTATION OF THE LEGISLATIVE MANDATE OF THE DSO**

The institutional tensions that are explained by the conduct of personalities that head these institutions are regrettable in the extreme. Serious measures need to be taken to ensure that these structures serve with a view to attain the objectives articulated by the legislature, as well as complying with their constitutional duties and functions.

It is undesirable that the DSO and its sister law enforcement agencies adopt a competitive relationship towards one another. My understanding of the responsibility of the executive arm of government is to have a common purpose in the enforcement of the laws of the nation.

I am mindful of the myriad of problems comprehensively dealt with by other submitters with regard to the shared mandate (DSO – SAPS) and the conflicts and further potential conflicts that the shared mandate presents. Notwithstanding this, I hold the view that tinkering with the legal mandate of the DSO is not likely to fundamentally eliminate these problems.

In my view, it is evident that even with a functional MCC; a structural lacuna would still exist between the operations of the MCC and the day-to day activities of the DSO. The nature of tensions associated with mandates that overlap suggests that apart from a ministerial structure which would be useful to determine policy directions, it would still be important to establish a committee with relevant individuals at the appropriate levels of authority who are able to deal with the day-to-day issues that arise and who would be empowered by the MCC, with a sufficient mandate to resolve these issues.

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I am persuaded by the submissions of the SAPS and the DSO that a structure below the MCC would be an important instrument to create. Such a structure is to be called the Multidisciplinary Vetting Structure “the MVS” or the Operational Committee as suggested by the parties. The introduction of such a structure can effectively address the challenges that currently exist.

It is recommended that the MVS should be composed of the National Commissioner of SAPS [as the convenor], the Directors General of NIA and the South African Secret Service, the Head of the DSO, the representative of the SANDF, the representative of the Correctional Service, a representative from the financial sector, such as FIS and a representative from civil society appointed by the Minister of Justice and Constitutional Development.

The MVS should have the power to deal with matters such as: any abuse of power by the DSO; public announcement of the work that the DSO does, that at times borders on undermining the fundamental rights of the entities or individuals that are a subject matter of its investigations, and generally ensure that the DSO conduct its activities in compliance with the Constitution [This would exclude the veto power of the NDPP which is constitutionally unassailable.]

The objectives of the MVS would include matters such as enhancing the operational co-operation between the relevant stakeholders; smooth inter-agency communication and to provide a framework for the sharing of information.

In addition to the responsibilities described above, the MVS may have powers to recommend policy guidelines and procedures referred to in section 31(1)(a),(b) and (c) of the NPA Act for consideration by the MCC; implement the decisions and guidelines of the MCC; advise the MCC regarding the determination of offences or categories of offences to be proclaimed by the President in terms of section 7(1)(a)(iii)(bb) of the NPA Act; authorise joint task teams in the investigation and prosecution of specific matters and more importantly refer cases to be investigated and prosecuted by the DSO as contemplated in section 31 of the NPA Act.

As international trends demonstrate, there are various strategies that can be deployed in dealing with overlapping mandates. The one avenue open is to look into a deadlock breaking

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mechanism. For instance, the DSO may have jurisdiction to conduct investigation and prosecution only of those cases that are referred to it by the MVS. All cases defined in the mandate of the DSO under the current legal regime would first have to be referred to the MVS for consideration and allocation. This process would confer immense powers on the MVS. There would therefore be a need to strengthen the MVS to do such work and to review the work of the two agencies in respect of organised crime.

Furthermore, the anomaly is that whereas the Independent Complaints Directorate (“ICD”) has the statutory responsibility to investigate complaints against members of SAPS, it does not have jurisdiction relating to the members of the DSO who fundamentally do the same type of work as the SAPS. It may very well be that the ICD does not have authority to pronounce itself on the prosecuting element of the DSO without interfering with the constitutionally protected independence of the prosecutor within the DSO. However, it is recommended that the mandate of the ICD should cover the investigative component of the DSO.

In order to contain the conduct of the DSO within its legal mandate in the conduct of its day to day activities, the MVS may be better placed to monitor, review and report on the functions of the DSO to the MCC with particular reference to its conduct in the execution of its duties.

More significantly, a de-confliction mechanism may be that the President exercises one of his constitutional powers. The Minister for Justice and Constitutional Development has identified the relationship between the DSO and that of the SAPS to have irretrievably broken down. The reasons for the breakdown are not as important as the viable solution to that problem. Under the present legal regime, the Minister for Justice and Constitutional Development is not only responsible for the NPA but is politically responsible for the work of the DSO which overlaps with the political responsibility of the Minister of Safety and Security regarding organised crime.

It is recommended that the President exercise the powers conferred on him by section 97(b) of the Constitution to harmonise this problem. Section 97(b) provides that the President may transfer to a member of the cabinet, any power or function entrusted by legislation to another member. With the exercise of this power the President may confer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and

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Security. Prosecutors, who work for the DSO, will continue to receive instructions and be accountable to the NDPP. The NDPP in turn will as currently provided, account to the Minister for Justice and Constitutional Development.

Thus it is my considered recommendation that the responsibility for the DSO- specifically its law enforcement component- should be placed on two cabinet ministers, namely the Minister for Justice and Constitutional Development and the Minister of Safety and Security. It is hoped that the aforesaid recommendation will facilitate co-operation between the two ministries in the functions of the DSO.

### **RECOMMENDATIONS IN RELATION TO THE SYSTEMS FOR MANAGEMENT AND CONTROL OF THE DSO**

There was evidence suggesting that the DSO, in the discharge of its legislative mandate, does so through the use of private sector entities which are thereby likely to come in contact with sensitive intelligence. Whereas the DSO would be competent in terms of section 38 of the NPA Act, to solicit such private sector capability, where necessary, such a competence is one that must be exercised within the parameters of the law. I am of the firm view that whenever the DSO engages private sector entities to assist it in performing its duties, it must have such entities properly vetted by the NIA.

It is recommended that the NDPP must take immediate steps to ensure that the DSO is compliant with the provisions of section 19B of the NPA Act.

When the law requires that specific categories of personnel within the DSO must undergo security clearance, by NIA, it is the responsibility of the DSO to respect that legislative injunction. It is unacceptable that the DSO would expose matters of national security as envisaged in the NPA Act to officials who have not been properly accredited to handle such information.

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I therefore recommend that the relevant legislation be amended to provide a wider category of DSO personnel for security vetting, namely Special Investigators; Senior Investigators; Regional Heads and persons engaged from the private sector entities.

### **RECOMMENDATIONS IN RELATION TO THE SYSTEMS FOR COMMUNICATION OF THE DSO**

It cannot be overemphasised that the DSO as a law enforcement agency and an organ of state is constitutionally bound to act within the law. It is enjoined by the Bill of Rights to respect the rights of every person including those who may fall within its target of investigation or prosecution.

The DSO needs to discharge its responsibilities within the parameters of the Constitution and with due regard to the Bill of Rights.

I recommend therefore that the NDPP pays close attention to how the DSO executes its mandate. Further, should the recommendation relating to the creation of the MVS find favour, such a structure would ensure that the DSO is in full compliance with its obligations under the law.

### **RECOMMENDATIONS IN RELATION TO THE OVERSIGHT AND ACCOUNTABILITY OF THE INTELLIGENCE AND RELATED OPERATIONS OF THE DSO**

There is a compelling reason to harmonise the political oversight over the activities of the DSO. I have indicated the dichotomy that results from the fact that the Minister for Justice and Constitutional Development has political responsibility over the NPA without having political accountability over the 'policing' functions of the DSO. She also does not participate in the threat analysis and the compilation of threat analysis data in relation to safety and security matters. Whereas these functions fall within the political accountability of

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the Minister of Safety and Security, the latter does not have accountability for the activities of the DSO. This has to be addressed through the invocation of section 97(b) of the Constitution.

I have also addressed that the Constitution provides that the intelligence services of the Republic, shall reside with such institutions as are established in terms of the Constitution. The legislature has decidedly conferred only information gathering powers to the DSO. In so far as the DSO's activities delve into intelligence gathering, and there has been evidence of this, such action goes outside its legislative competence. The DSO should act within the parameters of its legislative mandate and not impinge on the territory constitutionally assigned to other entities.

There is a cogent reason that impels various competencies to reside with intelligence agencies, the national prosecuting authority and the police. It is that reason that also necessitates greater co-operation and inter-dependence between and amongst these agencies. This should be encouraged.

It is not entirely inconceivable that the DSO resides within the Justice Department but the Minister for Justice and Constitutional Development must then take political accountability for the entire work of the DSO. The concerns expressed by the Minister of Justice in this regard are both comprehensible and explicable and are therefore valid. There is a need for legislative emendation to remedy this anomalous aspect of political responsibility. The President can rectify same in terms of section 97(b) of the constitution.

### **RECOMMENDATIONS IN RELATION TO THE CONSTITUTIONAL AND LEGISLATIVE MANDATES OF THE SOUTH AFRICAN POLICE SERVICE (SAPS)**

I have dealt with the shared legislative mandate that the SAPS has with the DSO in respect of organised crime under the heading Legislative Mandate of the DSO.

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## **RECOMMENDATIONS IN RELATION TO THE OF SYSTEMS FOR CO-ORDINATION AND CO-OPERATION BETWEEN SAPS, INTELLIGENCE AGENCIES AND THE DSO**

It is recommended that the DSO be placed in a more permanent status within NICOC. This recommendation should not be understood to mean that the DSO becomes an intelligence agency within the meaning of section 199 of the Constitution. The recommendation seeks to convey instead, that the DSO should form part of the family of law enforcement structures and share expertise and information for an overall effective crime combating strategy.

There is need to have functional co-ordination and co-operation structures that must preferably be documented protocols if not legislated to ensure the efficient discharge of the mandate of these law enforcement structures. The urgency thereof cannot be sufficiently emphasised.

I have earlier dealt with the creation of the MVS which would again offer a useful platform for co-operation and co-ordination between these various structures.

## **RECOMMENDATIONS IN RELATION TO THE EFFECTIVENESS AND EFFICIENCY OF COORDINATION OF INTELLIGENCE**

The various intelligence structures appear to be effective.

Save to the extent that the community of intelligence agencies has in the past not included the DSO, the matter has now been addressed to give a limited status to the DSO within NICOC.

I repeat the recommendation that the DSO be included formally within NICOC as proposed.

## **RECOMMENDATIONS IN RELATION TO THE EFFICACY OF CO-ORDINATING SYSTEMS, THAT EXISTS BETWEEN THE INTELLIGENCE AGENCIES.**

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The terms of reference required that this matter address such issues as the rationalisation of resources; approaches to and standards relating to training; minimising undue duplication; the co-ordination of operations; priority setting mechanisms; liaison with foreign law enforcement and intelligence structures and where relevant, private sector entities and the impact of locating investigators and prosecutors within the NPA.

The relevance of creating a structure such as the MVS or what the SAPS and the DSO entitle the "Operational Committee" to deal with co-ordination of operations will be an added tool to facilitate the efficacy of co-ordinating systems between and amongst the law enforcement structures.

In relation to the rationalisation of resources as well as minimising undue duplication, the reports considered pursuant to on-site inspections conducted on the DSO, the SAPS and NIA revealed that the matter requires people with extensive technical knowledge regarding the equipment utilised by these structures. There was some evidence of duplication of equipment amongst these structures. It is my recommendation that a suitably qualified person, with extensive technical knowledge in the field of intelligence, be engaged to specifically address the proper rationalisation and minimising duplication of resources, in a focussed erudite manner.

### **RECOMMENDATIONS IN RELATION TO TRAINING OR FURTHER TRAINING ON POLICING OR INVESTIGATING METHODS**

The law enforcement component of the DSO as well as the work of the SAPS relating to organised crime would, in my view, require substantially the same skills for its personnel.

The evidence demonstrates that the DSO has comprehensive training facilities to enable its personnel to achieve greater impact in the work of combating and prosecuting organised crime. The SAPS has equally developed impressive training strategies to address the challenges of organised crime.

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It is my considered view that there may exist duplication in the resources that are channelled towards training by the DSO and the SAPS. It is my recommendation that the DSO and the SAPS streamline the training of their personnel to achieve greater efficiencies.

## **RECOMMENDATIONS IN RELATION TO LOCATING INVESTIGATORS AND PROSECUTORS WITHIN THE NATIONAL PROSECUTING AUTHORITY**

There were concerns expressed that the working of prosecutors with police such as is the case within the DSO, holds a real risk of compromising the independence of the prosecutors and ultimately may corrupt the objectivity of the prosecutors. The basis of this concern is that whereas the prosecutors would be members of the investigating team, they nevertheless owe a duty to a court of law, to place all information before the court including information that may exculpate the accused.

I have been advised that the DSO is alive to this risk and that, ineluctably, its prosecutors do not engage in aspects of the investigation that may tarnish their independence. It is also important to be mindful that the duty of the prosecutors to the court is an ethical obligation which goes beyond the desire to achieve a conviction in a particular case.

Having regard to all the evidence and the argument, it is my recommendation that the various disciplines within the DSO must still remain under a single command structure as is the current position.

I am satisfied that the practice of housing multiple disciplines under one command structure is sound practice. The structure of the DSO in this regard, enhances a closer co-operation amongst the various disciplines. The one discipline benefits from the expertise of the other, making the cross-pollination an effective strategy in combating crime and ensures a return of higher conviction ratios.

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## RECOMMENDATIONS REGARDING THE LOCATION OF THE DSO

Until such time as there is cogent evidence that the mandate of the Legislature (to create a specialised instrument with limited investigative capacity to prosecute serious criminal or unlawful conduct committed in an organised fashion) is demonstrably fulfilled, I hold the view that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO.

I am satisfied that the rationale for locating the DSO under the NDPP and the Minister for Justice and Constitutional Development in 2002 still pertains. As already submitted, this was a logical locus where the DSO could be situated since the NPA already had investigative directorates (Independent Directorate: Serious Economic Offences and Independent Directorate: Organised Crime) and because the DSO was to be prosecution led, its concomitant location could only be with the prosecuting authority, which constitutionally, is authorised to institute prosecution

The two institutions, namely the SAPS and the DSO still do not appreciate the legal imperative for co-operation. There will therefore be need for decided executive action to compel a realignment of attitudes by these institutions.

Having considered the totality of the evidence and the law relevant to the terms of reference, it is my considered view, for reasons that have already been comprehensively canvassed, that the DSO should continue to be located within the NPA.

I have considered the totality of the evidence and argument and am satisfied that the DSO should remain within the NPA but certainly with such adjustments as are recommended in the body of the report including the recommendation relating to the power of the President under section 97(b) of the Constitution to transfer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security in order to clear the anomaly already alluded to herein.

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## ACKNOWLEDGEMENTS

The mandate of the Commission would not have been properly discharged without the unwavering and disciplined support of, inter alia, following individuals to whom and entities to which I express my gratitude, in no order of importance:

- **The Secretariat:**

Dr B. Minyuku (former Secretary) and Ms G. Ncongwane.

- **The regulation 6 appointments:**

**Adv. IAM Semenya SC and Adv. K Moroka SC (Ms)**

- **The Analysts:**

Adv. Y Mabule (Ms) and Adv. H Du Preez.

- **The support services:**

Mr C Tshabalala; Mr N Sihlangu; Mr K Kganyago; Adv. P Ngutshana & Adv N Mayet; Members of the VIP Protection Unit (Static and the In-transit) and Commissioners, Luke and Tokoe.

- **The Principal Stakeholders:**

The Office of the President; Dr De Wee: Chief Operations Officer from the Department of Justice; The Minister for Justice and Constitutional Development; The Minister for Intelligence Services; The Director General- Department of Justice; The Directorate of Special Operations/the National Prosecuting Authority; The South African Police Services; The National Intelligence Agency; The Inspector-General for Intelligence; The Joint Standing Committee on Intelligence; The National Intelligence Co-ordinating Committee.

- **Other Entities:**

The Public Protector; The South African Revenue Services; **The Institute for Security Studies**; The Foundation For Human Rights; The Police and Prisons Civil

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Rights Union; The African National Congress Women's League (submission later withdrawn); The Democratic Alliance; The Inkatha Freedom Party.

- **Individual Submitters:**

Prof. Kader Asmal; Ms F Chohan; Mr M Montesh; Mr G O Hollamby; Mr H Aziz; Messrs R and G Keble; Mr K Groenewald; Mr C Addington; Mr C R C Marion; Mr F M Oehl; Prof. M Makgoba and Prof. Mokgalong.

- **The Local Experts:**

University of South Africa; University of KwaZulu-Natal; University of Limpopo; Walter Sisulu University; University of Zululand; University of Johannesburg and University of Pretoria.

- **The International Experts & Law Enforcement Agencies**

The Metropolitan Police, London, Scotland Yard; the Serious Fraud Office; the Crown Prosecution Services; the Serious Organised Crime Agency (U.K) and the Federal Bureau of Investigators – FBI. (USA)

- **The Diplomats:**

South African Ambassador to the United States of America, Her Excellency: Barbara Masekela; South African High Commissioner to the United Kingdom, Her Excellency, Lindiwe Mabuza; Consular General , New York: Ms Fikile Magubane.

**Legal Representatives for various Submitters:**

Adv M Moerane SC with Adv P Coppin (for the NPA); Adv P Jacobs SC with Adv J F De Beer; (for the SAPS ;) Adv M Madlanga SC with Adv H Varney (for FHR); G Bizos SC with Adv P Mtshaulana SC (for the NIA); Adv D Khumalo SC with Adv A Plat (Ms) (for the Minister for Justice) Ms L Daniels (for the minister of intelligents) Ms Govender (for the Inspector General)