

Executive Summary

The Criminal Justice System: Radical reform required to purge political interference

In an effort to ensure the future transparency, efficiency and independence of the criminal justice system, the *Helen Suzman Foundation* has identified essential gaps in legislation which have been exploited to allow for the appointment or retention of questionable heads of key institutions. This has greatly assisted in the deterioration of the system over the past decade.

Legislation regulating the appointment and removal of the National Director of Public Prosecutions (“**NDPP**”), the National Commissioner of the South African Police Service (“**SAPS**”), the National Head of the Directorate for Priority Crime Investigation (commonly known as “**the Hawks**”), the Executive Director of the Independent Police Investigation Directorate (“**IPID**”), the Head of the Special Investigating Unit (“**SIU**”), the judiciary, the Public Protector and the Director of the Financial Intelligence Centre (“**FIC**”), have all been analysed.

According to the National Prosecuting Authority Act (“**NPA Act**”), the NDPP is required to have legal qualifications to practice in court, and must be a fit and proper person with due regard given to experience, conscientiousness, and integrity. The NDPP is appointed by the President (with no oversight) according to the Constitution. Only in 2012 was the President’s unfettered discretion curtailed by the Constitutional Court when it held that the NDPP’s appointment could be challenged on the basis of a rationality test, as the criteria were objective and not subject to “*the President’s view*”. The NPA Act also provides that the NDPP may be removed by the President subsequent to an inquiry into his/her fitness to hold office. A resolution must, however, be passed by Parliament confirming the recommendation.

The National Commissioner of SAPS is appointed at the sole discretion of the President without any oversight or eligibility criteria. This is according to both the Constitution and the SAPS Act. According to the SAPS Act, the National Commissioner may only be removed by the President upon the recommendation of a board of inquiry established to determine his/her fitness to hold office. The board of inquiry must consist of a judge of the Supreme Court of Appeal.

The National Head of the Hawks is required to be a fit and proper person with due regard given to experience, conscientiousness and integrity. The SAPS Act stipulates that the National Head be appointed by the Minister of Police in concurrence with Cabinet. The High Court in 2017 confirmed that the same objective test that the Constitutional Court confirmed was applicable to the appointment of the NDPP was also applicable to the National Head. Subsequent to another Constitutional Court decision, which deleted sections of the SAPS Act, the National Head may now only be removed by resolution of the National Assembly with a supporting vote of at least two thirds. This resolution must follow a finding of a Committee of the National Assembly requiring his/her removal.

The Minister of Police nominates a “*suitably qualified*” person to be appointed as the Executive Director of IPID in accordance with a procedure determined by the Minister. The Parliamentary Committee on Police confirms or rejects this nomination, according to the IPID Act. The removal provisions of the IPID Act were declared unconstitutional in 2016 and were substituted with the remaining valid removal provisions for the National Head of the Hawks in SAPS Act.

The Head of the SIU must be a fit and proper person with due regard given to experience, conscientiousness and integrity, according to the SIU Act. The Head is appointed by the President at his discretion without oversight. The President may also remove the Head from office at “*any time*” if there are “*sound reasons*” for doing so. The SIU Act does not define “*sound reasons*”.

The appointment and removal of judges is provided for in the Constitution. They are appointed by the President from a list of nominees prepared by the Judicial Service Commission (“**JSC**”). They can be removed by the President when a finding of the JSC results in the adoption of a resolution by the National Assembly with a supporting vote of two-thirds. Magistrates are appointed by the Minister of Justice after consultation with the Magistrates’ Commission. According to the Magistrates’ Courts Act, a magistrate is only required to be a fit and proper person. No qualifications are required for such an appointment (not even legal qualifications). The Magistrates Act only allows for the removal of a magistrate by the Minister of Justice on recommendation of the Magistrates’ Commission, after the passing of a resolution by Parliament confirming the recommendation.

The appointment and removal of the Public Protector is enshrined in the Constitution. The Public Protector is appointed by the President on recommendation of the National Assembly. The National Assembly puts forward a candidate nominated by one of its committees. The nomination must attain a supporting vote of 60% in the adoption of a resolution by the National Assembly for such nomination. Additional to the usual requirement that the appointee be a fit and proper person, the Public Protector Act has detailed eligibility criteria for the position. The Public Protector can only be removed by the President after a finding to that effect by a committee of the National Assembly which results in the passing of a resolution by it with a supporting vote of two thirds.

The Director of FIC is appointed by the Minister of Finance in consultation with the Money Laundering Advisory Council. The Director, again, need only be a fit and proper person according to the FIC Act (commonly known as **FICA**). The Minister of Finance may remove the Director from his/her office subsequent to an inquiry into his/her fitness to hold it. On a reading of the wording in the relevant removal provision in FICA, the inquiry does not appear to be a mandatory prerequisite for removal.

It is clear that all of the heads of the aforementioned criminal justice system institutions (with the exception of the judiciary and the Public Protector) may be appointed and removed, for the most part, at the behest of the President or one of his ministers (subject only in some cases to Parliamentary

approval). An overhaul of relevant legislation is required to provide for new appointment and removal procedures/mechanisms that will ensure the appointment of competent and independent heads, while simultaneously enabling the removal of those that are not. General application of the JSC appointment model (which relies on a broad-based committee to appoint judges) throughout the criminal justice system and the establishment of independent disciplinary/complaints committees should be put in place in order to avoid appointments and removals being subject to the decision of a single political office holder.