COMMISSION OF INQUIRY INTO THE MANDATE AND LOCATION OF THE DIRECTORATE OF SPECIAL OPERATIONS

ORAL SUBMISSION

7 October 2005

1. The statement I am making to the commission is on behalf of the Institute for Security Studies and is based on the affidavit submitted in June this year and signed by the Executive Director, Jakkie Cilliers. I have been assigned this task principally because I was responsible for coordinating the drafting of the affidavit which made clear was based on the contribution of a number of members of the staff at the ISS.

2. The credentials of the ISS in this field were set out in the affidavit and can be summarised simply by saying that it is a non-profit research institute that has operated since 1991; that its focus is on peace and security studies; that it has a staff of 64 more than half of whom are professional researchers and trainers; and that in the past 15 years it has produced 28 books, 112 monographs and 107 occasional papers on a wide variety of subjects as well a 2 quarterly journals. In relation to the questions confronting this commission, 4 pieces of work were presented along with our affidavit. As with the affidavit, however, it is necessary to emphasise that our submission to the commission is based as much on our collective professional opinion as it is on the original research work that we have done. Having joined the ISS this year, I was not personally involved in any of these pieces of research and questions pertaining to them will be handled by my colleague, Anton du Plessis.

2.1. We turn now to the substance of our submission which we have divided into 5 sections which we believe to be at the heart of the Commission's mandate:

2.1.1. The rationale for the establishment of the DSO;

2.1.2. Issues relating to the mandate of the DSO, especially in relation to that of the SAPS;

2.1.3. The question of the oversight of the DSO;

2.1.4. Public perceptions regarding the DSO and the impact a change of institutional home would have on these; and

2.1.5. The practical implications of a possible incorporation of the DSO into the SAPS.

3. The establishment of the DSO

3.1. Although the DSO was launched publicly in 1999, formally, it came into existence in January 2001 when the relevant changes to the National Prosecuting Authority Act (32 of 1998) had been made.

3.2. There are, it seems to us, three reasons that account for the decision to establish the DSO and the related decision to house it outside of the SAPS. We deal with each in turn.

3.3. The first reason why the DSO was established outside of the structures of the SAPS followed from a persistent concern—both among the public and among policy-makers—that, for all the efforts that had gone into its transformation, the SAPS was not yet in a position to deal adequately with complex forms of organised crime and corruption. It was widely believed, for instance, that the Police Service had, in the late 1990s, a serious problem of corruption. Indeed, when President Thabo Mbeki announced the decision to create what would come to be called the DSO in his first State of the Nation address, he alluded to the fact that it would investigate police corruption.

3.4. It is clear that the transition to democracy placed enormous burdens on the police. These resulted in part from the high level of criminality in the country that, even in the absence of other pressures, would have made managing the organisation difficult. But these difficulties were heightened by the difficulties that flowed from the amalgamation of the eleven police agencies that existed prior to 1994, the loss of skills (particularly investigative skills) as the organisation's establishment shrunk, the development of a new philosophy of community policing, the need to adjust policing to the demands of the Bill of Rights, and various other factors that inevitably arise when a large organisation embarks on an ambitious transformation process.

3.5. As a result, the belief arose in both the public's mind and among policy-makers that the SAPS was not equipped to drive an innovative programme aimed at tackling the difficult challenges created by rising levels of organised criminality. The urgency with which Government viewed these matters is evident in the fact that the DSO was launched at a public meeting in Gugulethu in September 1999, but the legislation mandating its work only came into effect in January 2001, more than a year later. By that time, Frank Dutton, the first 'CEO' of the Scorpions, had already resigned for health reasons.

3.6. We do not believe that that Government would have treated this process with as much urgency as it did, if there had been adequate confidence that the Police Service, struggling as it was with the demands of transformation, could handle the matters that would become the DSO's principal interests.

3.7. The SAPS of 2005 is clearly not the same organisation it was in the late 1990s. Under new management, and far better resourced, it is no longer struggling to manage the pressures of transformation. Today the argument of police weakness no longer justifies organisational separation from the DSO. Indeed, the Commission is likely to be presented with evidence that the management and administration of the DSO has itself been far from optimal. Concerns about police

failures in this regard cannot, therefore, sustain an argument that the DSO must retain its organisational independence.

3.8. A second reason for the creation of the DSO and its organisational separation from the SAPS, relates to the distinction between the investigative methodology it uses from that of traditional policing.

3.9. The principal innovation of the DSO-method is team-based, multi-disciplinary investigations that involve, amongst others, detectives, intelligence analysts, forensic accountants and prosecutors who, typically, lead its investigations. This approach is essential when the target of an investigation is an organised crime syndicate, the nature of the crimes committed are sophisticated and legally complex, and if those targeted by the investigation have sufficient resources to mount a sustained legal defence. Since this is precisely the type of target envisaged in the mandate of the DSO, it is crucial that the capability to mount these investigations be retained.

3.10. The crisp question, therefore, is whether this capability needs to exist in a separate institution or could be made to function effectively in the SAPS? For the purpose of this section, we want to emphasise two issues: (a) the potential difficulties associated with seeking to employ prosecutors in the Police Service, and (b) the extent to which the organisational culture of the police is likely to facilitate the continued use and improvement of this methodology if the DSO were to be incorporated into the police.

3.10.1. One problem with having prosecutors work on police investigations is constitutional. The Constitution provides that there may be only one prosecution authority in the country and, as a result, procedural challenges to investigations led by prosecutors in the employ of the police would be inevitable. This problem should not be over-blown. It might be mitigated, for instance, if prosecutors working on police investigations were to be seconded to the SAPS, rather than employed by them. Another approach

would be for the police to employ lawyers and former prosecutors to lead investigations that are then prosecuted by the NPA. The legal difficulty is not, therefore, the most serious problem. Having said that, it is our contention that it is undesirable in principle to have prosecutors who must decide whether to take a case to court answer to police officers as this would undermine the independence of the prosecution, an important check and balance in our criminal justice system.

3.10.2. A more serious challenge is the extent to which a policing agency, however well intended it might be, would be an organisational home in which an ambitious, highly-skilled prosecutor would want to work. Police agencies, the world over, find it difficult to accommodate civilians because 'cop culture' (as it is often called), like all organisational cultures, is exclusive. Although we are not aware of any empirical research focused directly on this question, from our experience in working with the SAPS, it seems to us that this is also true of the SAPS. Just as importantly, prosecutors themselves also have a professional culture and, it is submitted, would not work as effectively if they were asked to spend large portions of their professional lives outside the ranks of fellow prosecutors. In addition, it is far from clear that the SAPS would be able to create a viable career-path for prosecutors. We believe that it will be quite difficult to attract and retain lawyers, prosecutors, and former prosecutors to work as part of the SAPS. This relates to the third issue we believe to be behind the original decision to build the DSO outside of the police, *viz* the difficulties that the SAPS has in attracting and retaining highly-skilled personnel.

3.11. One of the most pressing problems confronting the Police Service over the past decade has been how to attract and retain highly-skilled professionals. This has been apparent in a variety of contexts from detectives in the Fraud and Serious Economic Crimes units to

scientists in the Forensic Science Laboratories. Part of the problem is that its pay structures that cannot compete with the private sector. Indeed, the creation of the DSO, which, from the outset, offered more attractive salaries to investigators, appears to have been partly explained and justified by this fact. And, although salaries have improved in the Police Service and various efforts have been made to allow for differentiated pay to provide room for such skills, there remain concerns about the extent to which these are adequate. Indeed, the SAPS has, in recent years, resorted to paying once-off bonuses to skilled staff in order to encourage them to remain in the organisation.

3.12. Pay, however, is not the only reason why attracting and retaining high-skill individuals is difficult in the police. This is, after all, an organisation in which rising through the ranks has historically been a relatively slow process; one in which long and varied experience has been seen as the key requisite for most managers and leaders. In strongly hierarchical organisations, it is always difficult to insert people laterally, however skilled, if only because all other members' experience of the organisation is so different. Because of this, it is hard to conceive of a recruitment process for a DSO-type institution in the Police Service that would not lead to some degree of animosity, and hence institutional resistance, among career police officers. This is particularly so if salary-differentials are to be retained in order to attract staff. We return to some of these issues later.

3.13. Although the context in which the DSO was created has changed because the Police Service is now not as hamstrung by the difficulties of transformation, many of the reasons for establishing the DSO beyond the organisational walls of the Police Service remain. Nor is it easy to see how these can be overcome.

4. The mandate of the DSO

4.1. One of the most fraught issues with which the DSO and other state institutions have had to grapple has been the mandate of the DSO and how this relates to the work of other state agencies, particularly the SAPS.

4.2. The statutory mandate of the DSO is set out in s7 of the National Prosecuting Authority Act (32 of 1998 as amended) which provided for the establishment of a DSO which would investigate organised crime and "such other offences or categories of offences as determined by the President."

4.3. It is apparent that this mandate is wide and permissive and, in order to provide greater direction to the organisation, the DSO has adopted a set of guidelines, known as Circular One, which directs decision-making in relation to the nature of the cases that the DSO takes up. This sets out 14 factors which are to be considered when making this decision, covering questions about the nature of the offence alleged, the value or impact of the crime, the extent to which there is public interest in the matter, and the degree to which the operations of the syndicate might have led to the compromising of state institutions.

4.4. The existing mandate is ambitious and this, together with the fact that the DSO was to be built from scratch, made it inevitable that there would be some disappointment with its performance in the short-term. This should be borne in mind when assessing its achievements.

4.5. The nature of the DSO's mandate is such that it virtually guarantees conflict between itself and the SAPS because the jurisdictional rules it creates do not delineate a set of cases that are the exclusive preserve of either body. Added to this, the fact that it is the DSO that decides which cases it will investigate and then declares its jurisdiction over them, means that it will often be perceived to be selecting only cases that suit it – either because these might reflect well on the DSO or because they are relatively straightforward. There have also been concerns expressed that the DSO sometimes takes cases on which

members of the Police Service have already worked and then takes the credit for their successful conclusion.

4.6. This approach to determining jurisdiction also creates the basis for the allegation sometimes levelled at the DSO that its approach to its work can be, or has been, inappropriately politicised. Recently, the potential for this kind of abuse was implicitly acknowledged when the Hefer Commission was charged with reviewing whether the former National Director of Public Prosecutions had misused his office for political ends as a result of his alleged involvement in spying for the apartheid regime. This is a matter to which we will return.

4.7. While we have access to no information that might throw light on the degree to which any specific allegation might or might not have any substance, we submit that the problems that are sometimes alleged to exist, could, indeed, have arisen. It is true that the DSO's mandate is likely to generate conflict, that it creates the space for the DSO to accept only the cases it wants, and that the politicisation of its work is a danger. We believe, however, that these problems are inevitable and that they cannot be resolved simply by changing the mandate of the DSO or its institutional location. We would submit, therefore, that, in seeking to define a mandate and establish a *modus vivendi* between the DSO and SAPS, the Commission should not allow the perfect to become the enemy of the adequate. It should not, in other words, seek to overturn a workable system in the hope of perfecting it because, however carefully crafted, any future mandate of the DSO would continue to suffer from some of these defects. We offer the Commission three reasons why we believe this to be the case.

4.8. The first reason to think changing the mandate and of the DSO will not resolve the problems already alluded to is operational. Any attempt at establishing a prescriptive mandate for the DSO that would seek to eliminate all potential for conflict between it and the SAPS is bound to lead to time-consuming and energy-sapping procedural challenges in every court case the DSO might bring to trial. In every case, the

accused person would seek to persuade the court that the DSO had no jurisdiction over the matter and that the case mounted against him or her was, for that reason, unlawful. The jurisdictional conflict between the SAPS and the DSO would, therefore, be eliminated at the expense of creating procedural difficulties for the organisation in court. This, we believe, would be a step backwards. Furthermore, it is frequently impossible to establish at the outset of an investigation precisely the nature of the charges that might eventually be put to any suspects. It is, therefore, not possible to say at the beginning whether a case falls within or without the boundaries of the DSO's mandate.

4.9. Apart from this problem, we submit that were the Commission to seek to find a way to prevent all jurisdictional conflict, it will have set itself a task that is unachievable. Consider, in this regard, how difficult it would be to design a mandate which admitted of no ambiguity and which did not require the application of the minds of any decision-makers. This could, we believe, only be done on three conceivable bases. The first is that the DSO would be confined to investigating only certain categories of criminality and the police, in order to avoid any potential for conflict, would be precluded from investigating those same crimes. The second is that the DSO would be limited to investigating certain categories of offenders, which, once again, the police would be precluded from investigating. The third is that the DSO would be confined to conducting only those investigations that required particular skills or investigative techniques. Once again, the police would have to be precluded from using those skills and techniques.

4.10. The defects with each of these possible approaches are so manifest as to require no commentary. Suffice it to say that to approach a jurisdictional question in this way would inevitably result both in continued conflict and, more importantly, in the hamstringing of the state's fight against crime since its law enforcement agencies would have continually to assess whether their quarry fell within their mandate. This cannot be desirable.

4.11. In any event, were any of these approaches to be implemented, it would still require the exercise of professional judgment about whether a matter was likely to fall in the province of either the SAPS or the DSO since, as has already been pointed out, matters do not present themselves to law enforcement agencies in a manner that makes their full nature apparent at the outset. The substantive jurisdictional question (is this a matter that falls in the DSO or SAPS mandate?) would, therefore, quickly resolve itself into a procedural one (who decides whether this is a matter for which agency?). The propensity for substantive jurisdictional questions to become procedural ones is, in our view, inevitable. Indeed, this is as much a phenomenon inside law enforcement agencies as it is between them. Even within the SAPS, the precise location of an investigation is often an open matter since different units, different levels of the organisation and even different officers within a unit might all see a matter as falling within—or, indeed, falling outside of—their particular sphere of responsibility. Uncertainties of this nature can be resolved only by the ruling of a more senior officer. In this manner substantive questions become procedural. Some of these difficulties were acknowledged by the SAPS itself when, as a result of the fact that crimes and criminals do not keep to tidy boundaries, the institution rationalised numerous specialised investigation units into a smaller number of units with broader mandates to investigate organised crime in general.

4.12. The fact that jurisdictional questions always become procedural, is the seed from which all the defects already notedgrow. There is, however, no approach to dealing with this question that would remedy these defects. Indeed, even were the DSO to be incorporated into the SAPS, there is no reason to think that jurisdictional questions would be eliminated. All that would occur is that these would now be resolved through the office of the National Commissioner of the SAPS or whomever he was to designate to fulfil this function. The jurisdictional question would remain but become a matter for internal processes.

4.13. We have dealt with the operational reasons for doubting the desirability of setting a prescriptive mandate to the DSO, as well as some of the reasons why we think that finally resolving this question may be unachievable. We deal now with the third reason for avoiding trying to set an overly prescriptive mandate. This is the often under-estimated benefits that derive from the existence of two organisations with overlapping mandates.

4.14. Although inter-agency competition can be pernicious, competition can also raise the quality of work done in both agencies. Part of the reason for this is that distinct agencies will often seek to outdo each other. If this is done without undermining each other's work, this can lead to an overall improvement in performance. But there is also another reason why the existence of two organisations might improve the performance of both. This is that, in the absence of outside comparators, the development and spread of innovations of technique may be stunted. With two organisations in the field, it seems likely that more effective and efficient techniques will develop more quickly. Each organisation, in other words, can learn from the other.

4.15. We have argued that changes to the mandate of the DSO will be difficult to effect and will not eliminate many of the problems said by some to arise from the mandate in its current form. That does not imply, however, that the current system is optimal. In this regard it appears to us as outsiders that neither the SAPS not the DSO has approached the matter of their overlapping mandates with due regard to the sensitivities, pressures and constraints on the other institution or, indeed, with sufficient concern about optimising the performance and impact of the country's law enforcement machinery. The existence of the Commission is ample testimony to that fact. In this regard, we would suggest that the Commission should consider recommending that mechanisms to foster inter-organisational cooperation must be found, and that the s31 Committee, envisaged by the National Prosecuting Authority Act, must play a far more active role in ensuring

that the scarce resources of the state are optimally directed. We would also recommend that the Commission consider requiring the two agencies to develop further mechanisms to build trust and confidence at all levels , and that they must negotiate the outlines of a jurisdictional protocol to be agreed either by the Commission or the s31 Committee. That Committee, in any event, should meet to resolve disputes as and when they arise.

4.16. It must be acknowledged, however, that even if these mechanisms, protocols and committees had functioned, and even if more clarity about the mandate existed, this would not have entirely immunised the DSO from allegations of excessive politicisation. The fact is that profound powers are vested in senior officials in law enforcement agencies and they can misuse their positions to advance or retard a political agenda or, indeed, the career of individual politicians, should they choose to do so. This raises the issue of how the DSO is, should and can be, overseen.

5. The oversight of the DSO

5.1. A fundamental fact about law enforcement is that law enforcement officials have a great deal of discretion. This is true of all law enforcers, from the lowliest health inspector to the National Commissioner of the SAPS, from traffic-patrolmen on their beats to the officials in the South African Revenue Service. The result is that there are always, at least in principle, grounds to doubt whether any particular act or omission by any law enforcement official reflects some form of partiality.

5.2. Motives for failing to do one’s duty differ. Some officials may accept bribes. Some may choose to ignore some infractions of the law out of misplaced sympathy with the offender or from laziness. Some may use the race or class or gender of the victim or offender as an unconscious trigger leading to the more or less rigorous application of the law. And some may use their authority to protect the interests of some or attack

the interests of others. This they may do either at the behest of the politicians to whom they account, or on the basis of their own interests and ambitions. It is why some law enforcement agencies preclude their members from holding office in political parties.

5.3. The problem of managing the exercise of discretion by law enforcement officers is, we submit, unavoidable. Nor is it confined to the DSO. All law enforcement agencies and all their officials exercise considerable powers and, while a society needs these institutions, there is always some risk that these powers might be misused. Naturally, the more authority conferred on an individual, the greater the resources at his or her command, the greater will be the impact of any abuse of his or her authority.

5.4. For all of these reasons the challenge of overseeing and holding to account officials, especially senior ones, for decisions taken for questionable reasons is a real one. This is particularly so when, as is case with the DSO, the organisation in question has the power to decide for itself whether or not the matter should be investigated and, having investigated it, whether or not charges should be brought.

5.5. There are only two kinds of defence a society has against the potential for the abuse of office in this way. The first is the existence of formal checks and balances. The second is by ensuring that the selection of people to serve in these positions includes a rigorous evaluation of their integrity and impartiality. Neither method is fool-proof and the difficulties may be most profound in a young democracy in which institutions are still developing the organisational culture and professional ethos needed. Nor does it help that there is little track record on which to rely when motives for decisions are challenged.

5.6. In a democratic society, checks and balances on the actions of those who wield state power exist in numerous forms. The most obvious and most important is an independent judiciary. This, we submit, is the principal protection each of us has against being wrongly investigated

and charged, because whatever evidence that exists can be tested in court and because civil proceedings can be instituted if necessary.

5.7. In this regard, it has sometimes been alleged that the nature of the DSO's method itself violates one of the checks and balances that usually exists. This, so the argument goes, is because the prosecutor, usually seen as an officer of the court, loses his or her independence and objectivity when drawn into the investigative process.

5.8. This argument, it seems to us, is premised on a misconception about the role prosecutors normally play in police investigations, a role that is, in many cases, far more proactive than is suggested by those who would prefer a stricter separation between officials of the two agencies. We would, in any event, submit that, in the context of skills and resource shortages in the police, the public interest in ensuring that the kinds of investigations the DSO runs are prosecute-able far outweighs the potential harm that the blurring of roles associated with prosecutor-led investigations. Indeed, incorporating the DSO into the police, as some have suggested as a remedy for this problem, would, we think, make matters worse since seconded prosecutors would find it harder to maintain their objectivity so far beyond the organisational and professional influence of prosecutors in the NPA, particularly if they were answering to senior police officers.

5.9. In any event, the protection afforded by independent prosecutors and courts cannot check any abuse of power when inappropriate decisions are taken **not** to investigate or charge an individual. Under these circumstances, it would be desirable if other mechanisms were to exist to assess the decision of the law enforcement agency (or prosecution service) concerned. It is easier to state this need, however, than it is to propose how such mechanisms might work. In order to function effectively, they would have to overcome the inevitable constraint that any decision not to proceed would be presented and justified by the very officials who had made it. Those same officials would also control all relevant information pertaining to their decision. For this reason,

testing whether a decision not to proceed with an investigation or prosecution was made *male fide* may not be possible unless the evidence placed by the complainant before the investigative body was so strong and that the complainant could use the courts to force the prosecuting authority to revisit its decision not to prosecute. This, we submit, will not be the case all that often, however. This is why the independence and impartiality of a law enforcement agency rests so heavily on the character and integrity of those who run it.

5.10. In relation to checks and balances, however, one under-appreciated benefit of having multiple agencies with overlapping mandates is that the sheer multiplicity of institutions offers some protection against the failure of one or other of those institutions to act as it should. This is a benefit derived from current arrangements that, we submit, the Commission should not under-estimate since it makes the inappropriate redirection of investigations harder to effect.

5.11. On a different note, we would also suggest that that Commission consider recommending that the mandate of the Independent Complaints Directorate to investigate deaths in custody or as a result of police action which currently covers only the SAPS, be extended to cover the DSO as well. We think that this desirable in principle since it would be inappropriate for either the DSO or the SAPS to handle such investigations. We would suggest that the Commission make recommendations to remedy this situation.

5.12. Given the importance of the integrity of law enforcement officials, particularly those in senior positions, one area of fruitful enquiry might be whether the current mechanisms for appointing senior officials go far enough in ensuring that all aspects of their integrity and impartiality are tested. Equally important, the Commission might enquire as to whether adequate mechanisms exist to ensure that the public has confidence in the integrity and impartiality of those officials. Having said that, the fact that officials will be called on to exercise their discretion, will always leave open the possibility that

some will call into question the motives for any particular decision. It may be, therefore, that special attention should be paid to how decisions that are likely to be controversial are taken and justified.

5.13. The extent to which a society accepts the *bona fides* of those who run its law enforcement agencies cannot be taken for granted. On the contrary, we believe that it is only through the evidence of the actions of these agencies that the public can develop confidence in their impartiality and disinterestedness. The willingness to treat everyone equally, however, once demonstrated, can generate confidence in the institutions that will inform assessments of the integrity of subsequent decisions. It is, in other words, only the credibility that is built up through the impartial enforcement of the law that can form the basis of public trust. It is for this reason that we now turn to the risks that might be run to the credibility of state institutions were a change to be made now to the mandate and location of the DSO.

6. Public perceptions and the institutional locus of the DSO

6.1. In a survey conducted at the request of the NPA at the end of 2001, the ISS asked nearly 4,000 people to rate the performance of the various components of the criminal justice system. The results suggested that far more people rated the DSO positively (and far fewer rated it negatively) than was the case for any other component of the criminal justice system.

6.2. The fact that this survey was conducted nearly 4 years ago, combined with the fact that there has been some controversy about the DSO's performance and decisions in the intervening years, makes the relevance of these findings somewhat debatable. It is reasonably clear, for instance, that there is now, in some quarters at least, a suspicion that the DSO has not dealt impartially with some of the more controversial matters that have come before it. How widespread this belief is, is impossible to tell without undertaking additional research.

6.3. We have already argued that it is not possible to guarantee that all decisions made by a law enforcement agency are impartial or to reassure the public that even decisions taken in good faith were, in fact, impartially made. It is, therefore, impossible to avoid all controversy about DSO decision-making, as it is for all other law enforcement agencies. The fact that there are some who doubt the DSO's impartiality, however, may well mean that the positive ratings achieved in 2001 may not be attained today.

6.4. By the same token, however, we would caution against repositioning the DSO simply because of the controversy that has broken out about some of its decisions. Such controversy cannot always be avoided and the fact that the DSO has demonstrated unequivocally that it has the will and capacity to investigate and prosecute individuals of the highest profile is of enormous importance in building confidence in the institutions of the law in South Africa. The benefits of the demonstration that no-one is above the law far outweigh whatever price has been paid by any reduction in the DSO's popularity (if any).

6.5. In our view this is the single strongest reason to avoid making substantive changes to the structure or mandate of the DSO. Were changes to be recommended and implemented, the public, the international community and, indeed, law enforcement agencies themselves, would find it hard to resist the conclusion that it was taken precisely because the DSO had investigated and prosecuted high-profile individuals. This would squander the gains made in assuring the public that, after centuries of the unequal application of the law, South Africa is now developing a system in which even the most well-connected must answer for their misdeeds, that South Africa is strongly committed to a separation of powers and that it is steadfast in its commitment to justice and equality before the law. The risks run in this regard by relocating the DSO are, we believe, hard to over-state.

6.6. There is, however, one more issue we want to address before concluding. This is the argument that might be put to the Commission

that any change to the institutional home of the DSO would be a mere technicality and would not impact on the nature of the work they do or on the methods they apply. In our opinion, matters are not that simple.

7. The implications of a possible incorporation of the DSO into the SAPS

7.1. We have already described some of the difficulties we believe would have existed if an institution like the DSO had been established within the SAPS in the late 1990w. In essence, our view is that the organisational culture of a police service, as well as the conditions of employment which the SAPS can offer, are unlikely to get the best out of the kinds of investigators and prosecutors required for the DSO's work. These difficulties, we submit, were among the reasons why the DSO was established outside police structures in the first place.

7.2. We believe that the same problems would arise if the DSO were to be transplanted into the SAPS tomorrow. Indeed, we believe, further difficulties would emerge in the short-, medium- and long-term.

7.3. South Africa's experience with the restructuring of institutions in the security establishment (as well as elsewhere) is that the processes are often longer, messier and more difficult than initially expected. This was the case in the amalgamation of statutory and non-statutory forces into the SANDF. It was also the case with the amalgamation of the 11 policing agencies that existed prior to 1994. These processes, however, were essential to the political transition in South Africa. That being so, there was a willingness to tolerate a temporary decline in performance. The same would not apply to any relocation of the DSO in a post-apartheid era where the requirement for effective delivery of services and efficiency are increasingly important.

7.4. In addition to this, even if the DSO were to be transplanted with relative success in the short-term, in the medium- and long-term, the existence of such a body in the police may well generate a new set of difficulties within that organisation. In particular, it will be extremely

difficult for the Police Service to manage the inevitable tensions that arise when the members of one of its units are paid more and are better resourced than are other members who may well be doing comparable work. It seems to us that these disparities, were they to persist, would generate and even exacerbate the difficulties that are said to exist between the Police Service and the DSO itself.

7.5. Nor is there any guarantee that placing the DSO in the Police Service would facilitate coordination between members of the DSO and members of other units. It is precisely because of the coordination problems that arose from the existence of multiple specialised units that the Police Service has restructured those units over the past 3 or 4 years.

7.6. It seems likely, therefore, that the relocation of the DSO would not solve any of the key problems its existence is said to create and would, in fact, generate a new set of difficulties. These may make uncertain the continued functioning of the DSO into the medium- and long-term. Combine this with the damage that might be done by such a move to public perceptions, and it seems hard to believe that the costs of change would be worth paying.

8. Conclusion

8.1. This submission has been prepared in order to assist the Commission deal with the challenge confronting it. By way of conclusion, we wish to summarise our thinking on these matters.

8.2. The central thesis we wish to offer the Commission is that many of the problems that may appear to have arisen out of the separation of the DSO from the SAPS are, in fact, inherent to the challenge of managing a society's law enforcement machinery. They are, in our view, inevitable, not contingent questions of structure.

8.3. This is true of the jurisdictional question of the DSO's mandate and its overlap with that of the Police Service. We believe that this is not a

matter that can be resolved simply by relocating the DSO since all substantive jurisdictional questions will, sooner or later, become procedural questions about who is to make jurisdictional determinations. Relocating the DSO into the police does not eliminate the problem, it simply shifts the responsibility for dealing with it.

8.4. We believe that the problem of oversight over DSO decisions is another that arises for reasons other than the structural location of the DSO. Once again, we believe that this is a matter that cannot be resolved simply by moving the DSO since it arises from the nature of the discretion granted officials in law enforcement agencies.

8.5. In addition to all of this, we believe that most of the reasons for setting up the DSO in its current form persist and that, in any event, the price that might be paid for restructuring (both as a result of the emergence of new problems and as a result of domestic public and international perceptions) is simply not worth the effort.

8.6. We would conclude, therefore, by repeating a point made earlier. We think that the Commission must not allow the perfect to become the enemy of the adequate. Neither the current system nor the incorporation of the DSO within the SAPS is perfectible. Since we believe the cost of change would not be offset by substantive improvements to the system, we would recommend resisting the temptation to attempt to do so.

8.7. Having said that, we would also recommend that the Commission acknowledge that relations between the SAPS and the DSO are not what they could be and suggest that some improvements might be made if the s31 Committee were to sit and, more importantly, if the DSO and SAPS were actively to seek to find ways to work together constructively. It cannot be to the benefit of this country's efforts in the fight against crime if two of the organisations central to that project are unable to work together optimally.