

MEMORANDUM ON THE OBJECTS OF THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE AMENDMENT BILL, 2022

1. BACKGROUND

1.1 The processes of effecting amendments to the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011) ("principal Act"), commenced in 2016 immediately after the Constitutional Court judgment of *McBride v Minister of Police and Another*¹ ("McBride judgment"). In the *McBride* judgment the Constitutional Court declared section 6(3)(a) and 6(6) of the principal Act invalid to the extent that they authorise the Minister of Police to unilaterally suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate ("IPID") without Parliamentary oversight. As a result, the Constitutional Court directed Parliament to cure this defect in the principal Act, within 24 months from the date of the order. A draft Bill which sought to cure this defect in the principal Act was submitted to Parliament and the Independent Police Investigative Directorate Amendment Act, 2019 (Act No. 27 of 2019) was signed into law by the President on 26 May 2020. This Act provides for Parliamentary oversight in respect of the suspension, discipline or removal of the Executive Director.

¹ 2016 (2) SACR 585 (CC).

1.2 Following the enactment of the 2019 Amendment Act, the process of effecting comprehensive amendments to the principal Act commenced on 30 July 2020, and a draft Bill in this regard was forwarded to the Office of the Chief State Law Adviser for preliminary certification. The Office of the Chief State Law Adviser conducted a scrutiny of the Bill in order to ensure its compliance with the Constitution of the Republic of South Africa, 1996 ("Constitution") and identified certain legal and constitutional concerns with it, and also proposed certain amendments to the Bill. The Bill was then revised in order to incorporate the inputs of the Office of the Chief State Law Adviser and to insert additional amendments which were proposed by the Civilian Secretariat for Police Service and IPID.

1.3 It is important to note that the Bill has been further revised in order to incorporate the inputs which have been received from the National Prosecuting Authority ("NPA") and the South African Police Service ("SAPS"). Further, that the State Law Advisers have provided a legal opinion on the new proposed amendments of the NPA and SAPS on the Bill, and their inputs have been considered and incorporated in the revised version of the Bill.

2. OBJECTS OF THE BILL

2.1 The Bill seeks to entrench the institutional and operational independence of IPID, as well as to make it expressly clear that IPID must be impartial and must exercise its powers and functions without fear, favour or prejudice. This is in order to give effect to the *McBride* judgment, where Judge Bosielo made certain

pronouncements concerning the importance of the independence of IPID, in order for IPID to function independently.²

2.2 A more transparent and open process for the appointment of the Executive Director is provided for in the Bill, which is imperative in view of Judge Bosielo's assertion in the *McBride* judgment that the manner of appointment of the Executive Director is fundamental to its independence.³

The Bill also provides that the Executive Director and the Secretary may invite a person, government Department or Institution to a meeting of the Forum, if there is a matter which concerns such a person, government Department or Institution.

3. SUMMARY OF BILL

The Bill can be summarised in the following respect:

3.1 Ad Clause 1

Clause 1 of the Bill seeks to amend section 1 of the principal Act through the insertion of certain definitions.

3.2 Ad Clause 2

Clause 2 of the Bill seeks to amend section 3(2) of the principal Act in order to provide that IPID must exercise its functions in accordance with the Constitution.

² *Ibid* paragraph 24.

³ *Ibid* paragraph 31.

3.3 Ad Clause 3

Clause 3 of the Bill seeks to amend section 4 of the principal Act in order to provide that IPID must be impartial and must exercise the powers and perform the functions of office without fear, favour, prejudice, or undue influence. The proposed amendment is in line with the pronouncement of Bosiello AJ in the *McBride* judgment that the public should have confidence that IPID will be able, without undue political interference, to investigate complaints against the police fearlessly and without favour or bias.

3.4 Ad Clause 4

Clause 4 of the Bill seeks to substitute section 6 of the principal Act in order to provide for more transparency in the appointment of the Executive Director. The Minister of Police ("Minister") is required to appoint a panel to assist in the selection process of the Executive Director. The requirements for appointment as Executive Director are set out, as well as the procedure to be followed to effect such appointment, which includes that the Minister, with the concurrence of Cabinet, must appoint the nominated person as the Executive Director for a period not shorter than seven years and no longer than ten years.

The proposed amendments also provide for the remuneration and conditions of service of the Executive Director.

3.5 Ad Clause 5

This clause seeks to ensure that disciplinary matters involving certain provincial and national authorities are referred to the appropriate authorities. In addition, the clause provides that in the event that the National Commissioner of SAPS is being investigated by IPID, he or she may not directly or indirectly exercise his or her executive functions or authority in relation to such matter.

3.6 Ad Clause 6

3.6.1. Clause 6 proposes the deletion of section 8(1) of the Act, which provided for the composition of the national office of IPID.

3.6.2 Subsection 4 of this section of the Act, provides for the conducting of pre-employment security screening investigation by the Directorate.

3.6.3 The clause also effects amendment to section 8(5) of the Act and provides that the security clearance certificate in respect of persons who have successfully undergone a security clearance shall be issued by the State Security Agency, as opposed to the Executive Director as provided for in the Act.

3.6.4 In subsection (7) of section 8 of the Act, a provision is made for the withdrawal of the security clearance certificate by the Directorate after consultation with the National Intelligence Agency.

3.7 Ad Clause 7

Clause 7 of the Bill seeks to amend section 9 of the principal Act in order to indicate that IPID's national office shall identify and review legislative needs in consultation with the Civilian Secretariat for Police Service. Further, for reports on legislative needs to be submitted to the Minister and no longer to the Civilian Secretariat for Police Service.

3.8 Ad Clause 8

Clause 8 of the Bill seeks to amend section 10 of the principal Act by proposing the deletion of the reference to section 7(9) from subsection (3), which will have the effect of the Executive Director being authorised to delegate the initiation of an investigation of any offence allegedly committed by any member of SAPS or a Municipal Police Service, including the referral of such matters to the National or relevant Provincial Commissioner. This is in order that such investigations may be initiated by a provincial head of IPID as well.

3.9 Ad Clause 9

Clause 9 of the Bill seeks to amend section 16 of the principal Act in order to provide that the Executive Director and the Secretary may invite a person, government Department or Institution in a meeting of the Forum, if there is a matter which concerns such a person, government Department of Institution.

3.10 Ad Clause 10

Clause 10 of the Bill seeks to amend section 20 of the principal Act through the insertion of a new paragraph which provides that the conditions of service, including remuneration and benefits, of provisional heads of IPID are to be determined in terms of the Public Service Act."

3.11 Ad Clause 11

Effects amendments to subsection (2) of section 22 of the principal Act, in order to provide that a person appointed as an investigator must have grade 12 certificate and a relevant diploma or degree. Currently the Act provides that a person must have grade 12 certificate or a relevant diploma or degree.

This means that the qualification requirements for appointment as an investigator can no longer be a grade 12 certificate only, the grade 12 certificate must also be accompanied by a relevant diploma or degree.

Amendments are also effected to subsection (4) of this section of the principal Act, in which it is provided that the pre-employment security screening investigation of IPID investigators must be conducted by the Directorate. In subsection (5), it is provided that the pre-employment security screening certificate must be issued by the Directorate.

3.12 Ad Clause 12

Clause 12 proposes amendments to section 23 that conditions of service including salary and allowances payable to an investigator appointed in terms of the Act, must be determined in terms of the Public Service Act and not as determined by directives in the South African Police Service Act.

3.13 Ad Clause 13

3.13.1 Clause 13 of the Bill seeks to amend section 24 of the principal Act in order to bestow upon IPID investigators, the power to take buccal samples in terms of the South African Police Service Act, 1995 (Act No. 68 of 1995).

3.13.2 The clause further proposes the addition of subsections (6), (7), (8), (9), (10) and (11) in order to provide for procedural matters regarding the subpoena of persons for the purpose of conducting an investigation, as well as to prevent the disclosure of the contents of documents or records given during the investigation, and to prevent the disclosure of the contents of any interview or questioning conducted during an investigation.

3.13.3 In order to ensure the protection of the rights of witnesses during such proceedings, the proposed subsection (9) provides that any person appearing before the investigator or a provincial head may be assisted by a legal representative at such examination.

3.14 Ad Clause 14

Clause 14 of the Bill seeks to amend section 27 of the principal Act so as to provide that a member of IPID shall not be liable in respect of anything reflected in any report, finding, point of view, recommendation or investigation made or expressed in good faith and without gross negligence in performing a function in terms of the principal Act, and submitted to Parliament, the National Prosecuting Authority, or any other relevant authority.

3.15 Ad Clause 15

Clause 15 of the Bill seeks to amend section 28 of the principal Act in order to indicate that IPID shall investigate the allegations listed in section 28(1), regardless of whether the alleged type of crime was committed on or off duty. Section 28(1) is further amended to include members of Municipal Police Services in order to clarify that IPID's mandate includes conducting investigations in respect of allegations against such members. The clause also empowers provincial heads of IPID to also refer matters to IPID for investigation.

3.16 Ad Clause 17

3.16.1 Clause 17 of the Bill seeks to amend section 30 of the principal Act in order to place an obligation to submit a report of the outcomes of disciplinary matters to the Minister by also the National Head or the appropriate Provincial Head of the Directorate for Priority Crime Investigation, or the Executive Head of a Municipal Police Service.

3.16.2 It is further provided for in section 30 that the report must specify whether the disciplinary recommendations of IPID were implemented and the extent of the implementation thereof. If they have not been implemented, the reasons for not implementing IPID's recommendations must be specified in the report. This is in order to ensure that IPID is informed of the reasons why its disciplinary recommendations are not implemented.

3.17 *Ad Clause 18*

Clause 18 of the Bill seeks to amend section 31 of the principal Act by providing that the Executive Director is accountable to both the Minister and Parliament.

3.18 *Ad Clause 19*

Clause 19 of the Bill seeks to amend section 34 of the principal Act in order to extend the matters upon which the Minister may make regulations on, such as prescribing the security screening investigation of members of IPID.

3.19 *Ad Clause 20*

Clause 20 of the Bill proposes the deletion of section 35 of the principal Act which provides for transitional arrangements concerning the implementation of the principal Act.

3.20 Ad Clause 21

Clause 21 of the Bill seeks to amend certain items in the section which provides for arrangement of sections of the principal Act.

4. DEPARTMENTS AND BODIES CONSULTED

4.1 The Bill was drafted by a drafting team consisting of officials of the Civilian Secretariat for Police Service and IPID. It will be submitted to the relevant Clusters of the Justice, Crime Prevention and Security ("JCPS") Cluster, and to Cabinet for approval to publish it in the *Gazette* for public comments.

4.2 Consultations in respect of the Bill were also conducted with the NPA and SAPS.

4.3 The Exemption Certificate which exempts the Bill from the application of the Socio-Economic Impact Assessment System on it, has been issued by the Department of the Presidency, as the Bill does not have any socio-economic impact.

5. FINANCIAL IMPLICATIONS

The Bill merely seeks to strengthen the IPID Act, and as such it does not have financial implications on the constitutional mandate of IPID of conducting investigations of alleged criminal transgressions that are committed by members of the police service and Municipal Police Service.

6. PARLIAMENTARY PROCEDURE

6.1 The Constitution regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.

6.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

6.3 A Bill falling within a functional area listed in Schedule 4 of the Constitution must be dealt with in accordance with the procedure set out in section 76. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 of the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 and Schedule 5 fall within the exclusive national legislative competence.

6.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of *Tongaone and Others v National Minister for Agriculture and Land Affairs and Others*⁴ ("*Tongaone* judgment"), is that any Bill with provisions which in substantial measure fall within a functional area listed in Schedule 4 to the

⁴ CCT 100/09 [2010] ZACC 10.

Constitution must be classified in terms of that Schedule.⁵ The *Tongaone* judgment therefore laid down the substantial measures test for the tagging of a Bill which requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4 of the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

6.5 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 of the Constitution, we submit that section 44(1)(a)(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on "any matter".

6.6 It is therefore the opinion of the State Law Advisers and the Department: Civilian Secretariat for Police Service, that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

6.7 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), as it does not contain any provisions which directly affect traditional or Khoi-San communities or provisions which pertain to customary law or customs of traditional or Khoi-San communities.

⁵ *Ibid* paragraph 72.

