

REPUBLIC OF SOUTH AFRICA

**INDEPENDENT POLICE
INVESTIGATIVE DIRECTORATE
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75 Bill); explanatory summary
of Bill and prior notice of its introduction published in Government Gazette
No. 48756 of 7 June 2023)
(The English text is the official text of the Bill)*

(MINISTER OF POLICE)

[B 21—2023]

ISBN 978-1-4850-0881-1

No. of copies printed150

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Independent Police Investigative Directorate Act, 2011, so as to amend and insert certain definitions; to provide for the Directorate’s institutional and operational independence; to provide that the Directorate must be independent, impartial and must exercise its powers and functions without fear, favour, prejudice, or undue influence in order to give effect to the judgment of the Constitutional Court in the case of *McBride v Minister of Police and Another*; to amend the provisions relating to the appointment of the Executive Director of the Directorate; to broaden the Executive Director’s responsibilities in respect of the referral of complaints regarding disciplinary matters; to provide for pre-employment security screening investigations to be conducted by the Directorate; to provide for the conditions of service of investigators to be determined by the Minister; to provide for the Directorate to investigate any deaths caused by the actions of a member of the South African Police Service or a member of a municipal police service, whether such member was on or off duty; to provide for the Directorate to investigate a rape by a member of the South African Police Service or a member of a municipal police service, whether such member was on or off duty; to strengthen the provisions relating to the implementation of disciplinary recommendations; to provide for a savings provision regarding the conditions of service of existing investigators and provincial heads; to amend other provisions of the Independent Police Investigative Directorate Act, 2011, so as to ensure that the Directorate executes its mandate effectively and efficiently; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 1 of 2011

1. Section 1 of the principal Act is hereby amended—
 - (a) by the insertion before the definition of “Committee” of the following definition: 5
 “**buccal sample**’ means buccal sample as defined in section 15E(e) of the South African Police Service Act;”;
 - (b) by the insertion after the definition of “Directorate” of the following definition: 10
 “**Directorate for Priority Crime Investigation**’ means the Directorate for Priority Crime Investigation established in terms of section 17C of the South African Police Service Act;”;

- (c) by the insertion after the definition of “Executive Director” of the following definition:
“‘executive head of a municipal police service’ means the executive head of a municipal police service appointed in terms of section 64C of the South African Police Service Act;”; 5
- (d) by the insertion after the definition of “financial year” of the following definition:
“‘firearm’ means a firearm as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000);”;
- (e) by the insertion after the definition of “Minister” of the following definition:
“‘municipal manager’ means a municipal manager as defined in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);”; 10
- (f) by the insertion after the definition of “municipal police service” of the following definition:
“‘National Commissioner’ means the National Commissioner of the South African Police Service, referred to in section 6(1) of the South African Police Service Act;”; 15
- (g) by the insertion after the definition of “organ of state” of the following definitions, respectively: 20
“‘Programme Manager’ means a person appointed to head a Unit or Programme of the Directorate;
‘Provincial Commissioner’ means the Provincial Commissioner of a province as appointed in terms of section 6(2) of the South African Police Service Act;”; 25
- (h) by the insertion after the definition of “security clearance certificate” of the following definition:
“‘South African Police Service’ means the South African Police Service established under section 5 of the South African Police Service Act;”; and 30
- (i) by the insertion after the definition of “South African Police Service Act” of the following definition:
“‘State Security Agency’ means the State Security Agency as referred to in section 3(1) of the Intelligence Services Act, 2002 (Act No. 65 of 2002);”. 35

Amendment of section 3 of Act 1 of 2011

2. Section 3 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) The Directorate must exercise its functions in accordance with the Constitution, this Act and any other relevant law.” 40

Amendment of section 4 of Act 1 of 2011

3. Section 4 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
“(1) The Directorate [functions independently from the South African Police Service] is institutionally and operationally independent.”; and 45
- (b) by the addition of the following subsection:
“(3) The Directorate must be independent, impartial and must exercise its powers and perform its functions without fear, favour, prejudice, or undue influence.”. 50

Substitution of section 6 of Act 1 of 2011, as amended by section 1 of Act 27 of 2019

4. The following section is hereby substituted for section 6 of the principal Act:

“Appointment, remuneration and conditions of service of Executive Director

6. (1) The Minister, with the concurrence of Cabinet, shall appoint a person as the Executive Director to head the Directorate in accordance with the responsibilities listed in section 7, for a non-renewable period of not less than seven years and not longer than 10 years. 5
- (2) The Executive Director must—
- (a) be a South African citizen;
 - (b) be a fit and proper person;
 - (c) possess an appropriate qualification in law, safety and security, or in administration of criminal justice or forensic investigation; 10
 - (d) have knowledge of safety and security, the policing environment and public administration for a cumulative period of between eight to 10 years at Senior Management level, at least three years of which must be within an organ of state as defined in the Constitution; and 15
 - (e) with due regard to his or her experience, demonstrate high levels of conscientiousness, integrity and commitment to human rights to be entrusted with the responsibilities of the Directorate.
- (3) The Minister shall table a notice to Parliament on the appointment of the Executive Director within 14 days of the appointment if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. 20
- (4) The remuneration, allowances, benefits and other terms and conditions of service of the Executive Director must be determined by the Minister, with the concurrence of the Minister responsible for Finance. 25
- (5) When the Executive Director is unable to perform the functions of office, or when the Executive Director position is vacant, the Minister may designate another person to act as Executive Director until the Executive Director returns to perform the functions of office, or until the vacant post is filled. 30
- (6) In the event of the Executive Director position being vacant, the position must be filled within six months from the date of such vacancy in accordance with the process contemplated in subsections (1) to (5).”.

Amendment of section 7 of Act 1 of 2011

5. Section 7 of the principal Act is hereby amended— 35
- (a) by the substitution for subsection (2) of the following subsection:
- “(2) The Executive Director is responsible for the appointment of the provincial heads of each province as contemplated in section [22(1)] 20(1).”;
- (b) by the substitution for subsection (6) of the following subsection: 40
- “(6) (a) The Executive Director must ensure that complaints regarding disciplinary matters are referred to the National Commissioner and where appropriate, to the relevant Provincial Commissioner, National Head or Provincial Head of the Directorate for Priority Crime Investigation, the executive head of the relevant municipal police service, or the Minister. 45
- (b) The Executive Director must ensure that complaints regarding disciplinary matters involving—
- (i) a Provincial Commissioner are referred to the National Commissioner; 50
 - (ii) the Deputy National Head or Provincial Head of the Directorate for Priority Crime Investigation are referred to the National Head of the Directorate for Priority Crime Investigation;
 - (iii) the National Head of the Directorate for Priority Crime Investigation are referred to the Minister; 55
 - (iv) the National Commissioner are referred to the Presidency through the Minister; and
 - (v) the executive head of a municipal police service to the relevant municipal manager.

- (c) In the event that the National Commissioner is being investigated by the Directorate, he or she may not directly or indirectly exercise his or her executive functions or authority in relation to such matter.”; and
- (c) by the substitution for subsection 9 of the following subsection:
- “(9) The Executive Director may upon receipt of a complaint, or upon becoming aware of a complaint, cause to investigate any offence allegedly committed by any member of the South African Police Service or a member of a municipal police [services] service, and may, where appropriate, refer such investigation to the National or Provincial Commissioner concerned.”.

Amendment of section 8 of Act 1 of 2011

6. Section 8 of the principal Act is hereby amended—

- (a) by the substitution of the heading for the following heading:
 “[**Composition**] **Appointment of members of national office**”;
- (b) by the deletion of subsection (1); and
- (c) by the substitution of subsections (3), (4), (5), (7) and (8) for the following subsections, respectively:
- “(3) (a) A person may not be appointed as a member of the national office unless information with respect to that member has been gathered in an appropriate pre-employment security screening investigation, as prescribed by the Minister; and
- (b) Once the person has been appointed he or she must be issued with a security clearance certificate after a vetting investigation in terms of the Intelligence Services Act, 2002 (Act No. 65 of 2002).
- (4) The pre-employment security screening investigation contemplated in subsection (3), must be [done in conjunction with the National Intelligence Agency, as referred to in section 3 of the Intelligence Services Act, 2002 (Act No. 65 of 2002)] conducted by the Directorate.
- (5) The [Executive Director] Directorate must issue a pre-employment security [clearance] screening certificate in respect of such person wherein it is certified that such person has successfully undergone a security [clearance] screening and is appointed as an employee of the Directorate.
- (7) The [Executive Director] State Security Agency, after consultation with the [National Intelligence Agency] Directorate, must withdraw a security clearance certificate referred to in subsection [(5)] (3)(b) [if he or she obtains information which], if after evaluation by [him or her] the State Security Agency, causes [him or her] the State Security Agency to believe that the person in question could be a security risk or acted in any manner prejudicial to the objects of this Act.
- (8) If the security clearance certificate referred to in subsection (7) is withdrawn, the person concerned is unfit to continue to hold such office and the Executive Director [must] may discharge him or her from the Directorate.”.

Amendment of section 9 of Act 1 of 2011

7. Section 9 of the principal Act is hereby amended by the substitution for paragraph (e) of the following paragraph:

- “(e) identify and review legislative needs in consultation with the Secretariat and report on such matters to the [Secretariat] Minister;”.

Amendment of section 10 of Act 1 of 2011

8. Section 10 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) The Executive Director may not delegate any of the powers, functions or duties referred to in sections 7(1), (2), (3), (5), (6), (7), (8) [(9)] and (10), 8, 20, 22, 31(2), 32(1) and (2), and 34 [of this Act].”.

Amendment of section 16 of Act 1 of 2011

9. Section 16 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The Executive Director or Secretary, in consultation with one another, may invite any person or a representative from a government Department or Institution, not mentioned in subsection (1), to a meeting of the forum if a particular matter concerns such a person, government Department or Institution.”.

Amendment of section 19 of Act 1 of 2011

10. Section 19 of the principal Act is hereby repealed.

Amendment of section 21 of Act 1 of 2011

11. Section 21 of the principal Act is hereby amended by the deletion in subsection (1) of paragraph (m).

Amendment of section 22 of Act 1 of 2011

12. Section 22 of the principal Act is hereby amended—

(a) by the deletion of paragraph (a) of subsection (2);

(b) by the substitution for subsection (4) of the following subsection:

“(4) The pre-employment security screening investigation contemplated in subsection (3), must be **[done in conjunction with the National Intelligence Agency, as referred to in section 3 of the Intelligence Services Act, 2002 (Act No. 65 of 2002)]** conducted by the Directorate.”; and

(c) by the substitution for subsection (5) of the following subsection:

“(5) The **[Executive Director or official so delegated by him or her]** Directorate must issue a pre-employment security screening certificate in respect of such person wherein it is certified that such person has successfully undergone a pre-employment security **[clearance]** screening and is appointed as an investigator in terms of this Act.”.

Substitution of section 23 of Act 1 of 2011

13. The following section is hereby substituted for section 23 of the principal Act:

“Remuneration and conditions of service of investigators

23. The conditions of service, including the salary and allowances payable to an investigator appointed under this Act, **[must be on par with members appointed as detectives in terms of the South African Police Service Act]** shall be determined by the Minister in consultation with the Minister responsible for Finance.”.

Amendment of section 24 of Act 1 of 2011

14. Section 24 of the principal Act is hereby amended—

(a) by the insertion in subsection (2) after paragraph (b) of the following paragraph:

“(bA) the taking of buccal samples in terms of the South African Police Service Act;”;

(b) by the substitution in subsection (3) of paragraph (a) for the following paragraph:

“(a) For the purposes of conducting an investigation, an investigator, or a provincial head, may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in that person’s possession or under his or her control which has a bearing on the matter being investigated, and may question such person thereon.”; and

(c) by the addition of the following subsections:

“(6) A directive referred to in subsection (3)(a) must be by way of a subpoena containing particulars of the matter in connection with which the person subpoenaed is required to appear before the investigator, or relevant provincial director, and must be signed by the relevant provincial head. 5

(7) The subpoena referred to in subsection (6) must be served by a person authorised thereto by the relevant provincial director, as prescribed.

(8) The investigator, or a provincial director, may require any person appearing as a witness before him or her under subsection (6) to give evidence under oath or after having made an affirmation. 10

(9) Any person appearing before the investigator or a provincial head by virtue of subsection (6) may be assisted at such examination by a legal representative. 15

(10) Notwithstanding anything to the contrary contained in any law, no person may disclose to any other person the contents of any document in the possession of a member of the office of the Executive Director, or his or her representative, or the record of any evidence given to the Executive Director, or his or her representative, during an investigation, unless— 20

(a) the Executive Director or his or her representative determines otherwise;

(b) the disclosure of such information is required by law; or

(c) the disclosure is for purposes of legal presentation. 25

(11) Notwithstanding anything to the contrary contained in any law, no person interviewed as a witness by the Directorate may disclose to any other person the contents of any interview or questioning by the Programme Manager, provincial director or an investigator conducting an investigation in terms of this Act, unless it is required by law or for the purpose of legal presentation.”. 30

Amendment of section 27 of Act 1 of 2011

15. Section 27 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1):

“(2) A member of the Directorate is not 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 this Act, and submitted to Parliament, the National Prosecuting Authority, or any other relevant authority.”. 35

Amendment of section 28 of Act 1 of 2011

16. Section 28 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Directorate must investigate—

(a) any deaths in **[police]** the custody of a member of the South African Police Service, or a municipal police service; 45

(b) deaths as a result of **[police]** the actions of a member of the South African Police Service or a member of a municipal police service, whether such member was on or off duty;

[(c) any complaint relating to the discharge of an official firearm by any police officer]; 50

(d) rape by a **[police officer]** member of the South African Police Service or a member of a municipal police service, whether [the police officer is] such member was on or off duty;

(e) rape of any person while that person is in **[police]** the custody of a member of the South African Police Service or a member of a municipal police service; 55

- (f) any complaint of [torture or assault against a police officer in the execution of his or her duties]—
- (i) torture, as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), committed by a member of the South African Police Service or a member of a municipal police service; and
 - (ii) assault of any person, with the intention to cause grievous bodily harm, by a member of the South African Police Service or a member of a municipal police service;
- (g) corruption, **[matters]** as contemplated in the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and any other applicable law, within the **[police]** South African Police Service, or a municipal police service initiated by the Executive Director, or a provincial head, on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC, the National Commissioner, or the appropriate Provincial Commissioner, National Head or the appropriate Provincial Head of the Directorate for Priority Crime Investigation, executive head of the relevant municipal police service, municipal manager or the Secretary, as the case may be; **[and]**
- (gA) attempted murder in relation to a discharge of a firearm by a member of the South African Police Service or a member of a municipal police service; and
- (h) any other matter referred to it as a result of a decision by the Executive Director, or a provincial head, or if so requested by the Minister, an MEC, National Commissioner, or the appropriate Provincial Commissioner, National Head or the appropriate Provincial Head of the Directorate for Priority Crime Investigation, executive head of the relevant municipal police service, municipal manager, or the Secretary, as the case may be, in the prescribed manner.”; and
- (b) by the addition of the following subsection:
“(3) The Directorate shall investigate allegations of the commission of an offence which a member of the South African Police Service or a member of a municipal police service committed together with any law enforcement agency or civilian.”.

Amendment of section 29 of Act 1 of 2011

17. Section 29 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
“The Station Commander, or any member of the South African Police Service, **[or municipal police service]** a municipal manager, an executive head of a municipal police service, or any member of a municipal police service, must—”; and
 - (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
“(a) immediately after becoming aware, notify the Directorate of any matters referred to in section 28(1)(a) to **[(f)](gA)**; and”.

Amendment of section 30 of Act 1 of 2011

18. Section 30 of the principal Act is hereby amended—
- (a) by the substitution for the words preceding paragraph (a) of the following words:
“The National Commissioner, or the appropriate Provincial Commissioner, National Head or the appropriate Provincial Head of the Directorate for Priority Crime Investigation, or the executive head of the relevant municipal police service, to whom recommendations regarding disciplinary matters were referred, as contemplated in section 7(6) **[and (7)]**, must—”;

- (b) by the insertion after paragraph (a) of the following paragraph:
 “(aA) only initiate disciplinary proceedings after the investigation of allegations has been finalised by the Directorate and upon receipt of an investigation report from the Directorate;”;
- (c) by the deletion of the word “and” at the end of paragraph (b);
- (d) by the substitution of paragraph (c) for the following paragraph:
 “(c) immediately on finalisation of any disciplinary matter referred to it by the Directorate, **[to inform]** submit a report, in the prescribed manner, to the Minister in writing of the outcome [thereof] and provide a copy thereof to the Executive Director and the Secretary[.]; and”;
- (e) by the addition of the following paragraph:
 “(d) specify in the report contemplated in paragraph (c) whether the disciplinary recommendations of the Directorate were implemented and the extent of the implementation thereof and if not implemented, provide reasons in the report, in the prescribed manner, for the disciplinary recommendations not being implemented.”.

Amendment of section 31 of Act 1 of 2011

- 19.** Section 31 of the principal Act is hereby amended by the substitution in subsection (1) of paragraph (b) for the following paragraph:
 “(b) may exercise such powers and perform such duties as may from time to time be conferred upon or assigned to him or her, and in respect thereof be accountable to the Minister and Parliament.”.

Amendment of section 34 of Act 1 of 2011

- 20.** Section 34 of the principal Act is hereby amended—
- (a) by the deletion of the word “and” at the end of paragraph (o) of subsection (1); and
- (b) by the insertion in subsection (1) after paragraph (o) of the following paragraphs:
 “(oA) the procedure to be followed in respect of the report contemplated in section 30(c) and (d), as well as the format of the said report;
 (oB) the code of conduct for the employees of the Directorate;
 (oC) the human resource policies of the Directorate;
 (oD) the procedure to be followed for an appropriate pre-employment security screening investigation contemplated in sections 8 and 22;
 (oE) any matter that must or may be prescribed in terms of this Act; and”.

Substitution of section 35 of Act 1 of 2011

- 21.** The following section is hereby substituted for section 35 of the principal Act:

“[Transitional arrangements] Savings

35. The conditions of service, including the remuneration and other benefits payable to the employees of the Directorate before the commencement of the Independent Police Investigative Directorate Amendment Act, 2023, may not be less favourable upon the commencement of the said Act.”.

Amendment of Arrangement of sections of Act 1 of 2011

- 22.** The Arrangement of sections of the principal Act is hereby amended—
- (a) by the substitution for item 6 of the following item:
 “**6.** Appointment, remuneration and conditions of service of Executive Director”;

- (b) by the substitution for item 8 of the following item:
“**8. [Composition]** Appointment of members of national office”; and
- (c) by the substitution for item 35 of the following item:
“**35. [Transitional arrangements]** Savings”.

Short title and commencement

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23. This Act is called the Independent Police Investigative Directorate Amendment Act, 2023, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE INDEPENDENT
POLICE INVESTIGATIVE DIRECTORATE AMENDMENT BILL,
2023**

1. BACKGROUND

- 1.1 The processes of effecting amendments to the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011) (“the Act”), commenced in 2016 immediately after the Constitutional Court judgment of *McBride v Minister of Police and Another** (“the *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 Act, within 24 months from the date of the order. Consequently a draft Bill which sought to cure this defect in the Act was submitted to Parliament, and as a result 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, as directed by the Constitutional Court in the *McBride* case.
- 1.2 After the enactment of the 2019 Amendment Act, the process of effecting comprehensive amendments to the Act commenced. Consultations on the draft version of the Bill with relevant stakeholders such as the National Prosecuting Authority (“the NPA”) and the South African Police Service (“the SAPS”) were conducted.
- 1.3 The Bill was published in the *Gazette* for public comments. The public comments received have been considered while revising the current 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 independent, impartial and 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 independence of IPID, in order for IPID to function without any favour or bias.
- 2.2 The mandate of IPID shall in terms of the Bill also include investigation of allegation of offences of rape and murder that have been committed while on or off duty.
- 2.3 The salary dispensation of IPID investigators shall in terms of the new amendments to the Act be determined by the Minister in consultation with the Minister responsible for Finance, it may not be less favourable upon the commencement of the said Act.
- 2.4 Amendments have also been made to section 30 of the Act in order to strengthen the provisions concerning the implementation of the disciplinary recommendations of IPID.

* CCT 100/09 [2010] ZACC 10.

3. SUMMARY OF BILL

The Bill can be summarised as follows:

- 3.1 Clause 1 of the Bill seeks to amend section 1 of the Act through the insertion of certain new definitions, such as the definition of a firearm, municipal manager and executive head of municipal police service.
- 3.2 Clause 2 of the Bill seeks to amend section 3(2) of the Act in order to provide that IPID must exercise its functions in accordance with the Constitution.
- 3.3 Clause 3 of the Bill seeks to amend section 4 of the principal Act in order to provide that IPID is institutionally and operationally independent. Section 4 of the principal Act is further amended in order to provide that IPID must be independent, impartial and must exercise the powers and perform the functions of office without fear, favour, prejudice or undue influence. This proposed amendment is in order to give effect to the *McBride* judgment in which Judge Bosielo AJ pronounced 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 Clause 4 of the Bill seeks to substitute section 6 of the Act. In terms of these amendments, the Executive Director shall be appointed by the Minister with the concurrence of Cabinet, for a non-renewable period of not less than seven years and not longer than 10 years.

The Minister shall thereafter report to Parliament on the appointment of the Executive Director within 14 days of the appointment if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

- 3.5 Clause 5 seeks to amend section 7 of the Act in order to ensure that disciplinary matters are referred to all the relevant authorities.

The section is further amended in order to provide for initiation of investigation by the Executive Director upon becoming aware of any alleged commission of an offence by a member of the South African Police Service or municipal police service, and not only upon receipt of complaints.

- 3.6 Clause 6 proposes the deletion of section 8(1) of the Act, which provided for the composition of the national office of IPID, as it is a matter that could be dealt with through IPID's internal policies and procedures.

The clause further amends subsection (4) of this section of the Act, and it provides for the conducting of pre-employment security screening investigation by the Directorate and not by the State Security Agency as provided for in the Act. The rationale for this amendment is that, it is not necessary for the State Security Agency to conduct securing screening investigation, as it merely involves criminal and credit record checks.

In subsection (5), a provision is made for the issue of a security clearance certificate by the Directorate, in respect of the security screening investigation.

- 3.7 Clause 7 of the Bill seeks to amend section 9 of the principal Act in order to provide that the report on identification and review of legislative needs shall be reported to the Minister and not to the Civilian Secretariat for Police as provided for in the Act.
- 3.8 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) of section 10, 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 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 or Institution. This is in order to cater for instances where the Forum needs to engage with a certain government Department or Institution on matters which concerns the exercise by the Forum of its powers and duties.
- 3.10 Clause 10 provides for the repeal of section 19 of the principal Act which provides for the salary level of Provincial Heads of IPID, as it has been considered that it is not necessary to provide for such in the principal Act.
- 3.11 Clause 11 effects amendments to section 21 of the Act through the deletion of paragraph (*m*) which provides that the provincial head of IPID must prepare financial statements for submission to the Executive Director within two months after the end of the financial year. During consultations with IPID officials on the public comments received on the Bill, it was proposed that paragraph (*m*) be deleted as IPID provincial offices do not have to undertake this duty, as financial statements of IPID are prepared by the national office of IPID and not by Provinces.
- 3.12 Clause 12 provides for the deletion of paragraph (*a*) of subsection (2) of section 22 of the principal Act, which provides for qualification requirements of IPID investigators, as it has been considered that it is not necessary to provide for such in the principal Act.

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. Again, this amendment is informed by the fact that such screening consists of a mere criminal and credit record checks that may be conducted internally and not necessarily by the State Security Agency.

- 3.13 Clause 13 amends section 23 of the Act. The published version of the Bill provided that the conditions of service including salary and allowances payable to investigators must be determined in terms of the Public Service Act.

IPID investigators raised a concern in their comments on the Bill, in that being subject to the Public Service Act as envisaged in the published version of the Bill shall be detrimental to them as the Public Service Act salary scales are lower than their current salary dispensation. Further, that the Employer Pension contribution in terms of the Public Service Act is 13% whereas in terms of their current salary dispensation it is 16%.

The Department has considered the concerns of IPID investigators and decided to amend section 23 of the Act in order to provide that their conditions of service including remuneration and benefits shall be determined by the Minister in consultation with the Minister of Finance.

- 3.14 Clause 14 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).

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 the disclosure of the contents of any interview or questioning conducted during an investigation.

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.

- 3.15 Clause 15 of the Bill seeks to strengthen subsection (1) of section 27 which provides for limitation of liability of IPID officials by providing 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.
- 3.16 Clause 16 of the Bill seeks to amend section 28 of the Act in order to indicate that IPID shall investigate the allegations of commission of crimes of rape and murder by the member of SAPS or municipal police service, that have been committed on or off duty.

Section 28(1) is further amended in order to provide that IPID shall investigate the allegations of assault only if it is with intention to cause grievous bodily harm. The proposal for investigation of only serious assault allegations is informed by concerns that IPID is inundated with minor assault allegations which takes away time and resources which could be utilized to investigate more serious allegations.

The complaint of a discharge of an official firearm has been deleted as it was thought that investigation should only be conducted if the discharge of an official firearm is linked to an allegation of attempted murder. As such, a new type of matter to be investigated by IPID, which is attempted murder in relation to a discharge of an official firearm has been inserted in the Bill.

Furthermore, a provision is also made in this section of the Act for IPID to have a mandate to initiate investigation in instances where a member of SAPS or municipal police service has allegedly committed an offence, together with a member of any other Law Enforcement Agency or a civilian.

Provincial heads of IPID as well as certain executive authorities of SAPS and municipal police service are also empowered to refer matters to IPID for investigation, this shall no longer be the responsibility of only the Executive Director of IPID.

- 3.17 Clause 17 amendments are effected to section 29 of the Act in order to make provision for the Station Commander and municipal manager to also refer matters for investigation by the Directorate. This is after a proposal was made in the public comments that the Bill be revised in order to cater for the recent changes in ranks of municipal police service as published in Government Gazette 46267, Notice 2041 dated 22 April 2022.
- 3.18 Clause 18 of the Bill seeks to amend section 30 of the principal Act in order to strengthen the provisions relating to implementation of IPID recommendations. To achieve this objective—
- (a) An obligation to submit a report of the outcomes of disciplinary matters to the Minister is placed to also the National Head or the appropriate Provincial Head of the Directorate for Priority Crime Investigation, and the executive head of a municipal police service.
 - (b) In order to prevent the challenge of disciplinary proceedings being instituted before the Directorate can submit a report of the outcomes of its investigation, it is provided in the amendments that the immediate Station Commander or a municipal manager must only initiate disciplin-

ary proceedings after the investigation of allegations has been finalised by the Directorate and upon receipt of an investigation report of the Directorate.

- (c) Furthermore, it is also provided in section 30 that the report must specify whether the disciplinary recommendations of IPID were implemented and the extent of 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 disciplinary recommendations are not only implemented, but also that IPID is informed of the reasons why its disciplinary recommendation/s are not implemented.

3.19 Clause 19 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.

3.20 Clause 20 provides for additional matters which the Minister may make Regulations in relation to, such the procedure to be followed in respect of the report to the Minister, the Executive Director and the Secretary for Police Service on the outcomes of disciplinary matters, as well as the format of such a report.

3.21 Clause 21 of the Bill seeks to substitute section 35 of the principal Act as the transitional provisions provided therein have now been fully implemented. Instead, a new saving clause in relation to changes to be made in determining the remuneration and benefits of investigators and provincial heads of IPID, has been inserted.

3.22 Clause 22 of the Bill provides for the substitution of Headings of certain sections of the 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. Consultations on the Bill were conducted with relevant stakeholders such as SAPS and the NPA.

4.2 It was published for public comments and the comments received on the Bill have been considered in the current version of the Bill.

4.3 Cabinet approved the Bill on 24 May 2023, and it is scheduled to be introduced in Parliament.

4.4 The Exemption Certificate which exempts the Bill from the application of the Socio-Economic Impact Assessment System has been issued by the Department of Presidency.

5. FINANCIAL IMPLICATIONS

The Bill merely seeks to strengthen the Act and as such, there are no envisaged financial implications for IPID in their daily exercise of their mandate of conducting investigations of alleged commission of offences by members of SAPS 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 *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] ZACC 10* (“*Tongoane* judgment”), is that any Bill with provisions which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The *Tongoane* 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 The State Law Advisers and the Department: Civilian Secretariat for Police Service are of the opinion 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.