

South African Police Service



Suid-Afrikaanse Polisie

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Your reference/U verwysing:		THE NATIONAL COMMISSIONER
My reference/My verwysing:	3/5/2/157(215)	DIE NASIONALE KOMMISSARIS
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Honourable BL Mashile, MP
Chairperson: Portfolio Committee on Home Affairs
Parliament of the Republic of South Africa
PO Box 15
CAPE TOWN
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Dear Mr Mashile

REQUEST FOR COMMENTS OR SUBMISSIONS: OVERVIEW OF THE BORDER MANAGEMENT AUTHORITY BILL [B9-2016]

Your letter dated 6 June 2016 has bearing on this matter.

The Border Management Authority Bill [B9-2016] ("the Bill") was tabled in Parliament and is presently before the Portfolio Committee on Home Affairs. The Seminal aspects of the Bill may be summarized as follows:

The Bill provides for the establishment, organization, regulation, functions and control of the Border Management Authority ("the BMA"). It also sets out the appointment of officials, their conditions of service, functions and powers. Importantly, Chapter 8 of the Bill establishes an Inter-Ministerial Committee and a Border Technical Committee where matters of practical importance will be dealt with through implementation protocols between the Border Management Authority and affected government organs.

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It is of particular importance to the SAPS to note that the functions of the BMA does not detract in any manner from the powers and functions of the SAPS, as the functions of the BMA is to facilitate the legitimate movement of persons and goods within the border law enforcement area and at ports of entry. The BMA must also co-operate and co-ordinate its border law enforcement functions with other organs of state, border communities and other persons.

Even though the Bill recognizes the unique constitutionally mandated position of the SANDF insofar as border functions are concerned, it does not specifically do so with the functions of the SAPS regarding the illegal movement of persons and goods within the border law enforcement area and at ports of entry. It is submitted that this failure may create the mistaken impression that the BMA will duplicate the performance of policing functions on a “franchised” basis, despite the fact that the policing mandate of the SAPS as the single police service for the RSA, is constitutionally entrenched.

It is submitted that the Bill does not distinguish clearly between functions of the SAPS that relate to “classical policing” and functions that relate to “border control”. It is accepted that the functions related to border control are assigned by national legislation. However, the constitutional functions of the SAPS that relate to “classical policing” are not clearly confirmed.

Chapter 11 of the Constitution establishes the South African Police Service as one of the Security Services of the Republic. Section 199(1) of the Constitution determines that:

“The security services consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.”

Section 205 of the Constitution provides as follows:

“205. Police service - (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

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(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

The South African Police Service Act, 1995 (Act No. 68 of 1995) (“SAPS Act”) represents the national legislation referred to in subsection (2) and refers in the Preamble to the Act to “a need to provide a police service throughout the national territory to ... ensure the safety and security of all persons and property in the national territory”.

It is for that reason that the Preamble of the Bill needs to set out the constitutional position of the SAPS as the single police service referred to in section 199(1) of the Constitution. Similarly, the function of the BMA to co-operate with and co-ordinate its border law enforcement functions as set out in clause 5 of the Bill needs to specifically refer to the SAPS in order to dispel any vagueness in this regard.

When interpreting Chapter 6 of the Bill where the powers of entry, search and seizure are provided for, it is important to note that these powers must be performed within the border law enforcement area or at a port of entry. A normal police function – so-called “classical policing” - in respect of crime therefore remains unaffected as does the constitutional imperative to uphold and enforce the laws of the RSA.

Where any person is arrested or detained by an officer of the BMA, such arrested person must be brought to a police station under the control of the SAPS, unless a warrant stipulates otherwise. There is no provision made for the process after the arrested person is brought to the SAPS. It is submitted therefore that clause 22(1) which deals with issue of bringing an arrested person to the SAPS, should clearly state what must happen to that arrested person i.e. whether the SAPS should detain the

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person, investigate the offence etc. The submission is that clause 22(1) must provide for the further handling of an arrested person in terms of the Criminal Procedure Act No. 51 of 1977. The same applies to goods delivered to the SAPS in terms of clause 22(2).

On a practical level it is clear that the implementation protocols provided for in clause 28 will create a guiding framework where the processes and procedures are clearly stipulated in detail. The co-operation between the BMA and SAPS as well as the Co-ordination of law enforcement functions, exchange of information etc. will be guided by the implementation protocols.

INPUTS ON SPECIFIC CLAUSES OF THE BILL

The Preamble to the Bill

While the constitutional responsibility of the SANDF is specified, there is no mention of the SAPS constitutional responsibility as set out in section 205(3), namely "*The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*"

Furthermore, item 24 of Schedule 6 (1996 Constitution) provides that, among others section 218 the Constitution of the Republic of South Africa Act No. 200 of 1993 ("the previous Constitution") continues in force as if the previous constitution had not been repealed, subject to the amendments to those sections as set out in annexure D, further amendment and any repeal by Act of Parliament or consistency with the new Constitution. Section 218(1)(j) of the previous Constitution provides that the National Commissioner shall be responsible for "*(j) such functions relating to border control and the import and export of goods as may be assigned to the service by law*", subject to the direction of the Minister of Police.

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It is proposed that the underlined portion be inserted:

AND ACKNOWLEDGING FURTHER, the constitutional responsibility of the National Commissioner of the South African Police Service for such functions relating to border control and the import and export of goods as may be assigned to the service by law,

Clause 5

In order to clarify the functions of the BMA as it relates to the SAPS, – reference should be made in paragraph (c) to the SAPS.

It is proposed that the underlined portion be inserted:

(c) Co-operate and co-ordinate with the South African Police Service, other organs of state, border communities or any other persons on its border law enforcement functions.

Clause 22

Clause 22(1) provides that an officer, when detaining or arresting a person, must bring that person to a police station under the control of the South African Police Service as soon as reasonably possible. However, the Bill does not provide for a procedure that guides the SAPS as to how to deal with such person. Unlawful detention may result in civil claims against the Minister of Police.

A good example is the recent High Court judgment in the matter of *Abdul Rahim and Fourteen Others v The Minister of Home Affairs* Case No: 965/2013. While illegal foreigners are detained in police cells, it is important to take note that the SAPS has a legal duty to ensure continued compliance with the Immigration Act as well as internal directives of the SAPS regarding detention, as the SAPS may certainly be joined as a defendant in a civil claim when an illegal foreigner is detained in a police cell.

It is proposed that the underlined portion be inserted:

22. (1) If an officer detains or arrests a person with or without a warrant, that officer must, as soon as reasonably possible, bring that person to a police station under the

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control of the South African Police Service to be dealt with in terms of section 50 of the Criminal Procedure Act, 1977 (Act 51 of 1977) or, if a warrant expressly stipulates another place, bring the person to that place.

Clause 22(2)(b) provides that a seized object must be delivered to a place or relevant organ of state in the manner required by the relevant legislation. The clause does not provide for the further handling of the seized object.

It is proposed that the underlined portion be inserted:

(b) Deliver the object seized in a manner, and to a place or relevant organ of state, as required by the relevant legislation in order to be dealt with in terms of that legislation by that organ of state.

Yours sincerely



A large, loopy handwritten signature in black ink, which appears to be 'JK Phahlane', is written over a large, faint circular watermark or stamp.

**ACTING NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE SERVICE
JK PHAHLANE**

LIEUTENANT GENERAL

Date: 2016-08-12