**COMMENTS: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE AMENDMENT BILL, 2018**

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| **Clause** *(Indicate clause/ regulation Number)* | **Comment** *(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)* | **Suggestion** *(Suggested deletion/amendment/ addition)* |
| General | The Western Cape Government has reviewed the Independent Police Investigative Directorate Amendment Bill, 2018, (the “Amendment Bill”).  The Constitutional Court in *McBride v Minister of Police and Another [2016] ZACC 30* declared sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act, 2011, (the “IPID Act”), invalid to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director of IPID.  The proposed repeal of section 6(6) of the IPID Act, which empowered the Minister of Police, without parliamentary oversight, to remove the Executive Director of IPID on account of misconduct, ill-health or inability to perform the functions and duties of that office, is supported. The proposed insertion of section 6A which sets out the procedure to be followed when removing the Executive Director is also supported, subject to the drafting comments, below.  The fact that the Amendment Bill does not deal with the comments of the Constitutional Court in relation to section 6(3)(a) is of concern. Your attention is drawn to the comment in this regard below. |  |
| General | Section 206(6) of the Constitution provides for the establishment of an independent police complaints body by national legislation. In *McBride*, the Constitutional Court stated that section 4(1) of the IPID Act requires it to function independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's oversight role is of cardinal importance. This is aimed at ensuring accountability and transparency by SAPS and Municipal Police Services in accordance with the principles of the Constitution. See paragraph 24 of the judgment.  IPID’s independence is, however, constrained by certain provisions in the IPID Act which are not in keeping with its oversight role. The Amendment Bill is a good opportunity to consider the aspects of the IPID Act which could be improved by way of further amendments. Your attention is drawn to the proposals on certain sections of the IPID Act in this regard below. | See the proposals to improve the oversight role of IPID, below. |
| Clause 2 | In the proposed section 6A(3)(b), the reference to “a resolution calling for the removal of the Executive Director’s removal” should be “the resolution” so that it refers to the resolution of the National Assembly referred to in sections 6A(1)(b) and 6A(2) which precede section 6A(3)(b). | Delete “a” in “a resolution” and replace with “the”. |
| Clause 2 | Delete the comma in line 2 of the proposed section 6A(5). | Delete the comma in line 2. |
| Proposed amendment to section 6(3)(a) | The issue in *McBride* was whether section 6(3)(a) (and section 6(6)) was inimical to the independence of the Executive Director as demanded by both the Constitution and the IPID Act.  As presently constituted, section 6(3)(a) provides as follows:  “(3) In the event of an appointment being confirmed-   1. the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister…” (Underlining supplied).   In *McBride*, the Minister of Police relied on sections 6(3)(a) and 6(6) of the IPID Act to authorise him to invoke “the laws governing the public service” to remove the Executive Director of IPID from office. The laws governing the public service include the Public Service Act, 1994 (Proclamation No. 103 of 1994), (the “PSA”).  Section 16A(1)(a) of the PSA authorises the executive authority to take appropriate disciplinary steps against the head of the department and to report such non-compliance to the Minister. The Executive Head of IPID is listed as a head of department in Schedule 1 to the PSA.  Section 16B authorises the institution of disciplinary proceedings against such a head, whilst section 17(1) vests the power to dismiss in the relevant executive authority.  This is contrary to the reasoning of the Constitutional Court in *McBride* and the Court, for this reason, ordered that sections 16A(1), 16B, 17(1) and 17(2) of the PSA were invalid to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director of IPID.  It is noted that the Amendment Bill does not amend or delete section 6(3)(a). This means that with its unqualified retention, the IPID Act can be interpreted to mean that the Executive Director is still subject to the offending sections of the PSA and there will be a contradiction between the judgment of the Constitutional Court and the IPID Act. This reasoning extends to operational matters relating to the appointment of the Executive Director, such as salary, and from where these monies are paid. These matters are not generally known to the public and can be interpreted to mean a reference to the PSA.    It is proposed that section 6(3)(a) be qualified to properly reflect that the Executive Director is appointed in terms of the IPID Act. The precise intersection with the “laws of the public service” must be considered and, if applicable in any way, must be adequately explained. | It is proposed that section 6(3)(a) be qualified to properly reflect that the Executive Director is appointed in terms of the IPID Act. The precise intersection with the “laws of the public service” must be considered and, if applicable in any way, must be adequately explained. |
| Proposed amendment to section 4(1) | Section 4(1) of the IPID Act provides that the Directorate functions independently from the South African Police Service (“SAPS”). Section 2(b) of the IPID Act specifically states that its object is to ensure independent oversight of the South African Police Service and Municipal Police Service (“MPS”).  It is therefore proposed that in order for section 4 of the IPID Act to properly reflect IPID’s independence, section 4(1) should be amended to include a reference to the Municipal Police Services. | It is suggested that section 4(1) be amended to state that the Directorate functions independently from the South African Police Service and the Municipal Police Service. |
| Proposed insertion of section 4(3) | The IPID Act should reflect that IPID staff serve impartially and independently and perform their functions without fear, favour, bias or prejudice. Similar provisions are found in section 3(13) of the Public Protector Act, 1994 and section 4(1)(a) of the South African Human Rights Commission Act, 2013. | The insertion of section 4(3) is proposed to provide that members of IPID staff must serve impartially and independently and exercise or perform their powers and functions in good faith and without fear, favour, bias or prejudice. |
| Proposed amendment of section 6(1) | The removal of the Executive Director, in light of clause 2 of the Amendment Bill, can only occur on a finding to that effect by a committee of the National Assembly and the adoption of a resolution calling for that person’s removal.  There is a great similarity between this proposal and section 194 of the Constitution which sets out the procedure to be followed when the Public Protector, the Auditor-General or a member of a Commission established by Chapter 9 of the Constitution is to be removed from office. This highlights the importance of the office of IPID’s Executive Director in our constitutional democracy, which is similar to the oversight role of the Chapter 9 institutions.  The proposed procedure to remove the Executive Director does not resonate with the procedure to appoint the Executive Director which occurs in terms of sections 6(1) and (2) of the IPID Act. Under these provisions, the Minister, in the first instance, nominates a suitably qualified person for appointment in accordance with a procedure determined by the Minister. The relevant parliamentary committee confirms or rejects the appointment within 30 parliamentary working days of the nomination. IPID should operate independently and at an arms-length from the Ministry. It is therefore proposed that the executive authority, on the recommendation of the National Assembly, appoints the Executive Director. This is similar to section 193 of the Constitution which sets out the procedure to appoint the Public Protector, the Auditor-General and the members of the remaining Chapter 9 institutions.  It is also recommended that the Executive Director of IPID must not have been or be a police official. This would reinforce the independence of IPID, by ensuring that the Executive Director would in no manner be or be perceived to be unduly influenced by his or her former colleagues. | It is proposed that sections 6(1) and (2) be amended in line with the recommendation in column 2. |
| Proposed amendment to section 7(5) | Section 7(4) of the IPID Act provides that the Executive Director must refer criminal offences revealed as a result of an investigation to the National Prosecuting Authority (“NPA”) for criminal prosecution and notify the Minister of such referral. Essentially, IPID opens a docket and refers the matter to the NPA. Section 7(5) of the IPID Act currently provides that the NPA only informs IPID of its intention to prosecute, but not of its intention not to prosecute.  It is proposed that section 7(5) of the IPID Act be amended to provide for the NPA to inform IPID of its intention both to prosecute and not to prosecute, and should require from the NPA to provide reasons for not prosecuting (as per the current NPA Prosecution Policy and the basic values and principles governing public administration reflected in section 195 of the Constitution).  This amendment would address current levels of impunity of SAPS officials and increase prosecutorial accountability in relation to the prosecution of police officials for serious criminal offences. Between the 2012/13 and 2016/17 financial years, based on data from IPID Annual Reports, an average of 9% of all IPID referrals to the NPA resulted in a verdict, and an average of 6% of IPID referrals to the NPA resulted in a conviction. The fact that the NPA declines to prosecute police officials in 91% of cases on average should be remedied through increased prosecutorial accountability provided for in legislation. | It is proposed that section 7(5) of the IPID Act be amended to reflect:  (1) that the NPA must notify the Executive Director of its intention to prosecute or not to prosecute. The Executive Director must notify the Minister and provide a copy thereof to the Secretary.  (2) that if the National Prosecuting Authority decides not to prosecute, it must provide the Executive Director with the reasons for not prosecuting. |
| Proposed amendment of section 28(1)(f) | Section 28 of the IPID Act deals with the type of matters to be investigated by IPID. Section 28(1)(f) stipulates that the Directorate must investigate any complaint of torture or assault against a police officer in the execution of his or her duties.  The Prevention and Combating of Torture of Persons Act, 2013, came into effect after the IPID Act and the IPID Act should refer to it in section 28(1)(f).  Furthermore, allegations of torture and assault should not be subject to the victim laying a complaint in order to be investigated by IPID but should also be investigated if a SAPS or MPS member is made aware of the allegation. The latter is already the case in relation to allegations of deaths in police custody and as a result of police action and allegations of rape in police custody or by a police official. | It is proposed that section 28(1)(f) be amended to refer to the offence of torture as defined in the Prevention and Combating of Torture of Persons Act 13 of 2013. It should also provide for IPID to investigate all allegations of torture and assault, and not only those that are subject to a complaint. This would in effect make it mandatory for police officials to notify IPID if they are made aware of an allegation of assault or torture. |
| Proposed insertion of section 28(3) | It is proposed that section 28 of the IPID Act be amended by the insertion of a section 28(3) to ensure that IPID be permitted to continue its investigations even if a police official resigns or is dismissed from the police service. | The insertion of section 28(3) is proposed to ensure that if a member of SAPS or the MPS who is subject to an investigation by the Directorate for a matter referred to in section 28(1) is suspended, resigns or dismissed from the police service, the Directorate must nevertheless conclude its investigation and, if a criminal offence is revealed as a result of the investigation, the Executive Director must refer the matter to the NPA in terms of section 7(4) of the IPID Act. |