

REPUBLIC OF SOUTH AFRICA

**NATIONAL PROSECUTING
AUTHORITY AMENDMENT BILL**

*(As agreed to by the Portfolio Committee on Justice and Correctional Services (National
Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 29B—2023]

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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 National Prosecuting Authority Act, 1998, so as to insert certain definitions; and provide for the establishment of the Investigating Directorate against Corruption and its powers and functions; the appointment of investigators in the Investigating Directorate against Corruption; the vetting of investigators; the remuneration and conditions of service of investigators; the establishment of a mechanism to deal with complaints of a serious nature pertaining to persons appointed at or assigned to an investigating directorate; the powers and functions of investigators; to provide for transitional arrangements; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Amendment of Preamble to Act 32 of 1998, as substituted by section 1 of Act 61 of 2000 and amended by section 14 of Act 56 of 2008

1. The Preamble to the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (hereinafter referred to as the “principal Act”) is hereby amended by the addition after paragraph 8 of the following paragraphs: 5

“AND WHEREAS systemic corruption in society requires specialised, dedicated, multi-disciplinary measures to combat corruption; AND TO ENSURE that the national prosecuting authority fulfils its constitutional mandate to provide, without limiting the investigative powers of the South African Police Service or the Directorate for Priority Crime Investigation, for— 10

- the establishment of the Investigating Directorate against Corruption, with investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in serious, high-profile or complex corruption, commercial or financial crime; and 15
- the necessary infrastructure and resources to perform these functions.”. 20

Amendment of section 1 of Act 32 of 1998, as amended by section 2 of Act 61 of 2000 and section 1 of Act 56 of 2008 20

2. Section 1 of the principal Act is hereby amended—
(a) by the substitution for the definition of “*head of an Investigating Directorate*” of the following definition: 25
“*‘head of an Investigating Directorate’* means an Investigating Director referred to in section 7(3)(b);”;

- (b) by the substitution in the definition of “*Investigating Director*” for paragraph (a) of the following paragraph:
 “(a) means a Director of Public Prosecutions appointed under section 13(1)(b) as the *head of an Investigating Directorate* established in terms of section 7[(1)]; and”;
- (c) by the insertion after the definition of “*Investigating Directorate*” of the following definition:
 “‘*Investigating Directorate against Corruption*’ means the *Investigating Directorate against Corruption* established by section 7(1A);”;
- (d) by the insertion after the definition of “*investigation*” of the following definition:
 “‘**member of the prosecuting authority**’ includes—
 (a) a member referred to in section 4;
 (b) a member of the prosecuting authority appointed at or assigned to the Office of the *National Director* as contemplated in section 5(2)(d);
 (c) an investigator referred to in section 5(2)(f);
 (d) financial investigators and analysts referred to in section 43B;
 (e) a member of the administrative staff appointed and employed in the Offices referred to in section 37;
 (f) a person engaged to perform services contemplated in section 38(1) or (3); and
 (g) a person performing services for the prosecuting authority in terms of a secondment or any other consultancy agreement in line with prosecutorial and investigation powers.”.

Amendment of section 5 of Act 32 of 1998, as amended by section 3 of Act 61 of 2000 and section 2 of Act 56 of 2008

3. Section 5 of the principal Act is hereby amended—
 (a) by the substitution in subsection (2) for paragraph (d) of the following paragraph:
 “(d) other members of the prosecuting authority appointed at or assigned to the Office; **[and]**”;
- (b) by the substitution in subsection (2) for paragraph (e) of the following paragraph:
 “(e) members of the administrative staff of the Office; **and**”;
- (c) by the insertion in subsection (2) after paragraph (e) of the following paragraph:
 “(f) investigators.”.

Amendment of section 7 of Act 32 of 1998, as substituted by section 4 of Act 61 of 2000 and section 3 of Act 56 of 2008

4. Section 7 of the principal Act is hereby amended—
 (a) by the deletion of subsection (1);
 (b) by the insertion after subsection (1) of the following subsections:
 “(1A) There is hereby established, in the Office of the *National Director*, an *Investigating Directorate* to be known as the *Investigating Directorate against Corruption* to investigate, and carry out, any functions incidental to investigations—
 (a) relating to serious, high-profile or complex corruption, commercial or financial crime cases—
 (i) arising from the recommendations of commissions of inquiry;
 (ii) referred to the *Investigating Director* by the *National Director* in terms of section 28(1)(b); or
 (iii) referred to the *Investigating Director* in terms of section 27, subject to section 26(2);
 (b) relating to additional related offences or categories of offences, including common law offences of—
 (i) fraud;
 (ii) forgery;”.

- (iii) uttering;
- (iv) theft; and
- (v) any offence involving dishonesty;
- (c) relating to additional related statutory offences or categories of statutory offences, including contraventions of—
 - (i) the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
 - (ii) the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998);
 - (iii) the Protection of Constitutional Democracy against Terrorist and Related Activities, 2004 (Act No. 33 of 2004);
 - (iv) the Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - (v) the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);
 - (vi) the Financial Intelligence Centre Act 2001 (Act No. 38 of 2001); and
 - (vii) any other statutory offence involving dishonesty; and
- (d) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings relating to any offence contemplated in paragraphs (a) to (c).

(1B) The President may, by proclamation in the *Gazette*, establish one or more additional *Investigating Directorates* in the *Office of the National Director*, in respect of matters that exclude those contemplated in subsection (1A).”;
- (c) by the deletion in subsection (2) of paragraph (a);
- (d) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

“(b) shall be issued and may [at any time] be amended or rescinded by the President on the recommendation of the *Minister*, the Cabinet member responsible for policing and the *National Director*; and;”;
- (e) by the insertion in paragraph (a) of subsection (4) after subparagraph (ii) of the following subparagraph:

“(iiA) investigators;”.

Amendment of section 13 of Act 32 of 1998, as substituted by section 6 of Act 61 of 2000 and amended by section 4 of Act 56 of 2008

5. Section 13 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) shall, in respect of any *Investigating Directorate* established in terms of section 7[1A] appoint a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as a Director of Public Prosecutions as the head of such an *Investigating Directorate*; and”.

Insertion of Chapter 3B in Act 32 of 1998

6. The following Chapter is hereby inserted in the principal Act after Chapter 3A:

“CHAPTER 3B

Appointment, remuneration and conditions of service of investigators

Appointment of investigators

19D. (1) The *National Director* may, on the recommendation of the head of an *Investigating Directorate*, appoint fit and proper persons as investigators of that Directorate.

- (2) A person appointed as an investigator—
 - (a) must have at least a grade 12 certificate or a relevant diploma or degree; and
 - (b) must have—

- (i) knowledge and relevant experience of criminal or forensic financial investigation; or
- (ii) any other relevant experience.

(3) The *National Director* must, in the prescribed form, issue and sign an identity-type document to each person appointed as an investigator of that Directorate, which shall serve as proof that such person is an investigator.

Vetting of investigators

19E. (1) Subject to subsection (2), no person may be appointed as an investigator, unless the person has been issued with a security clearance certificate following a vetting investigation conducted in terms of section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

(2) Any investigator may from time to time, or at such regular intervals as the *National Director* may determine, be subjected to a further vetting investigation as contemplated in subsection (1).

(3) If the certificate referred to in subsection (1) is withdrawn, the *National Director*, after consultation with the State Security Agency and subject to section 2A(8) of the National Strategic Intelligence Act, 1994, may discharge the investigator concerned from the Investigating Directorate, following any disciplinary process.”.

Remuneration and conditions of service of investigators

19F. (1) The remuneration, allowances and other service benefits of investigators are determined by the *Minister*, in consultation with the *National Director*, the Cabinet member responsible for public service and administration and the Cabinet member responsible for finance, by notice in the *Gazette*.

(2) (a) If an officer or employee in the public service is appointed as an investigator, the period of his or her service as an investigator shall be calculated as part of and continuous with his or her employment in the public service, for purposes of leave credits, pension benefits and any other condition of service, and the provisions of any pension law applicable to him or her or, in the event of his or her death, to his or her dependants, which are not inconsistent with this section, shall, with the necessary changes, continue to apply to such officer or employee.

(b) If a member of the South African Police Service, or the Directorate for Priority Crime Investigation referred to in Chapter 6A of the South African Police Service Act, 1995 (Act No. 68 of 1995), or the Independent Police Investigative Directorate, is appointed as an investigator under this Act, the period of his or her service as a member shall be calculated as part of and continuous with his or her employment under the South African Police Service Act, 1995, or the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011), as the case may be, for purposes of leave, deemed pensionable service accrued and any other condition of service, and the provisions of any pension law applicable to him or her or, in the event of his or her death, to his or her dependants, which are not inconsistent with this section, shall, with the necessary changes, continue to apply to such officer or employee.

(3) The services of investigators in the *Investigating Directorate* shall, for the purposes of the application of Chapter IV of the Labour Relations Act, 1995 (Act No. 66 of 1995), be deemed to have been designated as an essential service in terms of section 71 of that Act.

(4) Subject to the provisions of this Act, the other conditions of service of investigators shall be determined in terms of the provisions of the Public Service Act: Provided that if a member of the South African Police Service, the Directorate for Priority Crime Investigation, or the Independent Police Investigative Directorate is appointed as an investigator under this Act, the conditions of service, including remuneration, allowances, pension and other service benefits applicable to such investigator, must be equal to, or not less favourable than, those conditions of service applicable to such

person under the South African Police Service Act, 1995, or the Independent Police Investigative Directorate Act, as the case may be.”.

Amendment of section 22 of Act 32 of 1998

7. Section 22 of the principal Act is hereby amended by the substitution for subsection (7) of the following subsection: 5

“(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister*, and the Directors, training programmes for *prosecutors and investigators*.”.

Insertion of section 22A in Act 32 of 1998

8. The following section is hereby inserted in the principal Act after section 22: 10

“Complaints mechanism and accountability

22A. (1)(a) The *Minister* shall, after consultation with the *Chief Justice*, appoint a retired judge for a non-renewable period of five years in order to investigate complaints or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of any person referred to in section 7(4)(a). 15

(b) For purposes of paragraph (a) ‘retired judge’ shall mean a judge discharged from active service as referred to in the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

(2) The performance of the functions provided for in respect of a retired judge does not derogate from the powers of the South African Police Service or Directorate for Priority Crime Investigation to investigate any criminal conduct in respect of any person referred to in section 7(4)(a). 20

(3) The retired judge shall not investigate complaints about intelligence matters falling under the jurisdiction of the Inspector-General of Intelligence. 25

(4) The retired judge may receive complaints in the prescribed form and manner from—

(a) any person who may provide evidence of a serious and unlawful infringement of his or her rights caused by the conduct of a person referred to in section 7(4)(a); or 30

(b) any person referred to in section 7(4)(a), who may provide evidence of any improper influence or interference, hindrance or obstruction, whether of a political or any other nature, exerted upon him or her in the exercise, carrying out or performance of his or her powers, duties and functions. 35

(5) The retired judge may, upon receipt of a complaint in terms of subsection (4), investigate such complaint or refer it to be dealt with by the National Commissioner of Police, the relevant Director, the *National Director* or the Inspector-General of Intelligence. 40

(6) The retired judge shall report to the *Minister* the outcome of any investigation undertaken by him or her or any referral in terms of subsection (5).

(7)(a) The retired judge may request and obtain information from any member of the prosecuting authority in so far as it may be necessary for the retired judge to conduct an investigation. 45

(b) The refusal to comply with a request by the retired judge in terms of paragraph (a) shall be a criminal offence for which a person, upon conviction, may be sentenced to a fine or imprisonment of two years, or to both a fine and such imprisonment. 50

(8) To the extent that it is reasonably necessary for the performance of the functions of the retired judge, he or she—

(a) may obtain information and documents under the control of the prosecuting authority; 55

(b) may enter any building or premises under the control of the prosecuting authority in order to obtain such information and documents; and

(c) shall be entitled to all reasonable assistance by any person referred to in section 7(4)(a) or any other member of the *prosecuting authority*.

(9) The retired judge shall report annually to Parliament on the performance of his or her functions.

(10) The *National Director* may request the retired judge to investigate any complaint or allegation referred to in subsections (1) and (4) relating to a prosecution or an investigation conducted by an *Investigating Directorate*.

(11) If a structure contemplated in section 22(5) receives any complaint or allegation referred to in subsections (1) and (4), such structure shall refer the complaint or allegation to the retired judge to investigate.

(12) Any person who makes a complaint in terms of this section shall not be entitled to use this section to establish whether there is an investigation against him or her, nor be entitled to any delay, interference or termination of such investigation on the basis that such complaint has been made.

(13) The *Minister* shall ensure that the retired judge has sufficient personnel and resources to fulfil his or her functions.”.

Insertion of section 29A in Act 32 of 1998

9. The following section is hereby inserted in the principal Act after section 29:

“Powers and functions of investigators

29A. (1) An investigator may, subject to the control and direction of a *head of an Investigating Directorate*, exercise such powers and must perform such duties as are conferred or imposed upon him or her by or under this Act, or any other law and must obey all lawful directions which he or she may receive from a person having the authority to give such directions.

(2) An investigator has the same powers as a peace officer or a police official as provided for in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), including—

- (a) the investigation of offences;
- (b) the ascertainment of bodily features of an accused person;
- (c) the entry and search of premises;
- (d) the seizure and disposal of articles;
- (e) arrests;
- (f) the execution of warrants;
- (g) the attendance of an accused person in court; and
- (h) the service or execution of any subpoena or summons.

(3) An investigator has the same powers as if he or she had been appointed deputy sheriff or deputy messenger or other similar officer of the court.

(4)(a) The *Minister* may, in consultation with the Cabinet member responsible for police, by notice in the *Gazette*, confer upon investigators any power—

- (i) which is conferred by applicable law upon specified persons or a category of persons; and
- (ii) which relates to the prevention, investigation or combating of any offence or other criminal or unlawful activity.

(b) Any notice referred to in paragraph (a)—

- (i) may be amended or rescinded by the *Minister* in consultation with the Cabinet member responsible for police; and
- (ii) must be submitted to Parliament before publication in the *Gazette*.”.

Insertion of section 43C in Act 32 of 1998

10. The following section is hereby inserted in the principal Act after section 43B:

“Transitional arrangements relating to Investigating Directorates

43C. (1) For purposes of this section, the phrase “the *Investigating Directorate*” means the *Investigating Directorate*, established by Proclamation No. 20 of 2019.

(2) The *Investigating Directorate* shall, as from the date of the commencement of the National Prosecuting Authority Amendment Act, 2023, cease to exist as a separate *Investigating Directorate* and shall become part of the *Investigating Directorate against Corruption*.

(3) Proclamation No. 20 of 2019, in respect of existing offences or categories of offences as determined by the President therein, which had been issued under section 7(1) in respect of the *Investigating Directorate* prior to the amendment of section 7(1) by the National Prosecuting Authority Amendment Act, 2023, shall, as from the date of the commencement of that Act, be deemed to have been issued under section 7(1A) with the necessary changes in respect of the *Investigating Directorate against Corruption*.

(4) Subject to the provisions of this Act, the *Investigating Director* and all staff of the *Investigating Directorate* shall be retained, remain in office and continue their functions under this Act in the *Investigating Directorate against Corruption*.

(5) From the date of the commencement of the National Prosecuting Authority Amendment Act, 2023, all pending matters pertaining to the *Investigating Directorate* shall be dealt with as if that Act had at all times been in force.”.

Law amended

11. The law referred to in the second column of the Schedule is hereby amended to the extent indicated in the third column of the Schedule.

Amendment of Index to Act 32 of 1998, as inserted by section 21 of Act 61 of 2000, and amended by Act 56 of 2008

12. The Index to the principal Act is hereby amended—
(a) by the insertion after “CHAPTER 3A APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF SPECIAL INVESTIGATORS” of the following:

“CHAPTER 3B

APPOINTMENT, REMUNERATION AND CONDITIONS OF
SERVICE OF INVESTIGATORS

19D. Appointment of investigators

19E. Security screening of investigators

19F. Remuneration and conditions of service of investigators”;

(b) by the insertion after “22. Powers, duties and functions of National Director” of the following:

“22A. Complaints mechanism and accountability”;

(c) by the insertion after “29. Entering upon premises by Investigating Director” of the following:

“29A. Powers and functions of investigators”; and

(d) by the insertion after “43B. Transitional arrangements relating to financial investigators and analysts” of the following:

“43C. Transitional arrangements relating to Investigating Directorates”.

Short title and commencement

13. This Act is called the National Prosecuting Authority Amendment Act, 2023, and shall come into operation on a date determined by the President by proclamation in the *Gazette*.

SCHEDULE**LAW AMENDED***(Section 11)*

Number and year of law	Short title	Extent of amendment
Act No. 70 of 2002	Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002	The amendment of section 1 by the substitution for the definition of “ Directorate ” of the following definition: “ ‘ Directorate ’ means [the Directorate of Special Operations] <u>an Investigating Directorate or the Investigating Directorate against Corruption</u> referred to in section 1 of the National Prosecuting Authority Act;”.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL PROSECUTING AUTHORITY AMENDMENT BILL, 2023

1. PURPOSE OF BILL

The Bill seeks to amend the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (“Act”) to facilitate the establishment of a permanent entity within the Office of the National Director of Public Prosecutions (“NDPP”). The proposed amendments include the establishment of the entity known as the Investigating Directorate against Corruption, the appointment of investigators, providing for the remuneration of the investigators, their conditions of service and their powers. The proposed amendments support the independence of the Investigating Directorate against Corruption.

2. SUMMARY OF THE BILL

2.1 Clause 1: Amendment of Preamble

Clause 1 of the Bill seeks to amend the Preamble to provide for the prosecuting authority to fulfil its constitutional mandate in terms of the Constitution and, *inter alia*, to provide, without limiting the investigative powers of the South African Police Service, or the Directorate for Priority Crime Investigation, or the number of Investigating Directorates the President may establish, for the establishment of the Investigating Directorate against Corruption, with investigative capacity, to prioritise and to investigate matters in respect of its specific mandate, with regard to particularly serious criminal or unlawful conduct committed in serious, high-profile, complex corruption, commercial or financial crime.

2.2 Clause 2: Amendment of section 1

Clause 2 seeks to amend section 1 of the Act by amending certain definitions of the Act and inserting new definitions in the Act.

2.3 Clause 3: Amendment of section 5

Clause 3 seeks to amend section 5 of the Act which deals with the Office of the NDPP to include investigators as part of the office of the NDPP.

2.4 Clause 4: Amendment of section 7

Clause 4 seeks to amend section 7 of the Act by establishing an Investigating Directorate, to be known as the Investigating Directorate against Corruption, with the aim to investigate and to carry out any functions incidental to investigations, and where appropriate, institute criminal proceedings and carry out any necessary functions incidental to investigations—

- (a) relating to serious, high-profile or complex corruption or commercial or financial crime cases arising from the recommendations of commissions of inquiry; matters reported to Investigating Director in terms of section 27 of the Act; matters referred by the National Director to the Investigating Director in terms of section 28(1)(b) of the Act; and referred to the *Investigating Director* by the *National Director* in terms of section 27;
- (b) relating to additional related offences or categories of offences including common law offences, as listed;
- (c) relating to additional related statutory or categories of statutory offences, as listed; and
- (d) relating to offences contemplated in paragraphs (a) to (c).

Clause 4 also empowers the President to establish, by proclamation in the *Gazette*, one or more *ad hoc* Investigating Directorates, in the Office of the National Director, in respect of matters that exclude those contemplated in section 7(1A).

2.5 Clause 5: Amendment of section 13

Clause 5 seeks to amend section 13 of the Act, which is a consequential amendment to insert a reference to section 7, which provides for the establishment of the Investigating Directorate against Corruption.

2.6 Clause 6: Insertion of Chapter 3B (sections 19D, 19E and 19F)

Clause 6 seeks to insert Chapter 3B (containing sections 19D, 19E and 19F) in the Act. This Chapter provides for the appointment, remuneration and conditions of service of investigators. It provides further for the vetting of investigators before appointment. The remuneration, allowances and other service benefits of investigators are also provided for.

2.7 Clause 7: Amendment of section 22

Clause 7 seeks to amend section 22 of the Act to provide for the development of training courses for investigators by the National Director.

2.8 Clause 8: Insertion of section 22A

Clause 8 seeks to insert a new section 22A in the Act to provide for a complaints and oversight mechanism through the appointment of a retired judge to exercise oversight over the investigators. The retired judge may receive complaints in the prescribed form and manner from—

- (a) any person who may provide evidence of a serious and unlawful infringement of his or her rights caused by the conduct of a person referred to in section 7(4)(a); or
- (b) any person referred to in section 7(4)(a) who may provide evidence of any improper influence or interference, hindrance or obstruction, whether of a political or any other nature, exerted upon him or her in the exercise, carrying out or performance of his or her powers, duties and functions.

2.9 Clause 9: Insertion of section 29A

Clause 9 seeks to insert section 29A in the Act to provide for the powers and functions of investigators. An investigator has the same powers as are bestowed upon a peace officer or a police official in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). These powers relate, *inter alia*, to the investigation of offences, entry and search of a premises, the seizure and disposal of articles, arrests and the execution of warrants. It provides further that the Minister may, by notice in the *Gazette*, and in consultation with the Cabinet member responsible for police, bestow any power which relates to the prevention, investigation or combating of any offence or other criminal or unlawful activity, upon investigators.

2.10 Clause 10: Insertion of section 43C

Clause 10 seeks to insert section 43C in the Act to provide for transitional arrangements and provides that the current Investigating Directorate shall cease to exist as a separate Investigating Directorate and shall become part of the Investigating Directorate against Corruption. It also provides that the Investigating Director and staff of the current Investigating Director shall remain in office and continue their functions in the new Investigating Directorate against Corruption.

2.11 Clause 11: Law amended

Clause 11 seeks to amend the definition of the term “Directorate” in section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002). This is a consequential amendment.

2.12 Clause 12: Amendment to Index

Clause 12 seeks to provide for the amendment of the Index to the Act.

2.13 Clause 13: Short title and commencement

Clause 13 seeks to provide for the short title of the Bill and the date of commencement.

3. CONSULTATION

Consultations with the Justice, Security and Crime Prevention Cluster was undertaken, together with the relevant departments and entities concerned.

4. IMPLICATIONS FOR PROVINCES

There are no implications for the provinces.

5. FINANCIAL IMPLICATIONS FOR STATE

The costs to implement the amended legislation in respect of capacity will be defrayed within the current budget allocation of the Investigating Directorate. Should the need arise to increase the capacity of investigators in the future, the NPA will follow the normal budget process to request additional funding.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the classification of Bills, therefore a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.2 The State Law Advisers 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 competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] ZACC 10* confirmed the “substantial measure” test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 12/99 [1999] ZACC 15*. The test entails that “any Bill whose provisions in substantial measure” falls within a specific Schedule must be classified in terms of that Schedule.
- 6.4 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either subsection (1) or (2) if it falls within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The issue to be determined is whether the clauses as contained in the Bill, in a substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.6 The Bill provides for the establishment of the Investigating Directorate against Corruption to apply to the whole Republic, with the said Directorate aimed at investigating and preventing corruption in the Republic where investigators are sought to have the similar investigative powers as the police in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- 6.7 The State Law Advisers and the Department are of the view that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution as its provisions do not, in a substantial manner, deal with any functional area of concurrent national and provincial legislative competence

listed under Schedule 4 to the Constitution, nor do they deal with any other matter contained in sections 76(3), (4) or (5).

7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS

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 18(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities or pertaining to any matter referred to in section 154(2) of the Constitution.

