

**BRIEFING DOCUMENT ON THE JUDICIAL MATTERS AMENDMENT BILL, 2012, FOR  
PURPOSES OF THE MEETING OF THE PORTFOLIO COMMITTEE ON JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT ON 25 APRIL 2012**

**1. Overview of proposed amendments**

This Bill, like other Judicial Matters Amendment Bills, is intended to address practical challenges and enhance organisational efficiency. The amendments relating to the SIU Act will also contribute to the fight against fraud and corruption. The Memorandum on the Objects of the Bill spells out what the Bill is about in considerable detail.

The Bill seeks to –

- (a) amend the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) (the SIU Act), in order to—
- further regulate the litigation functions of a Special Investigating Unit (the SIU) (clauses 1,3,4, 5 and 8);
  - provide for the secondment of a member of an SIU to another State institution (clause 2); and
  - provide for the funding of an SIU, which includes expenses and fees for services rendered in the course of, or in connection with the exercise of the powers and the performance of functions of the SIU in terms of the SIU Act, and to validate any such fees or expenses levied or defrayed prior to the amendments proposed in the Bill (clauses 4, 6 and 7);
- (b) amend the National Prosecuting Authority Act, 1998 (ActNo. 32 of 1998) (the NPA Act), in order to—
- do away with the requirement for the Minister of Justice and ConstitutionalDevelopment to consult with the National Director of Public Prosecutions (the NDPP), the Minister for the Public Service and Administration and the Minister of Finance in the event of ordinary cost-of-living remuneration increases for Deputy Directors of Public Prosecutions and prosecutors; and
  - provide for the appointment, continued employment and conditions of service of persons employed in the National Prosecuting Authority as financial investigators and analysts.

**2. Discussion of proposed amendments**

**2.1 (Litigation functions of SIU) Clauses 1, 3, 4, 5 and 8**

Clauses 1, 3, 4, 5 and 8 of the Bill aim to further regulate the litigation functions of an SIU in terms of the SIU Act. The original purpose behind the enactment of the SIU Act was to

create a mechanism in terms of which civil litigation flowing from the investigations by an SIU into serious cases of malpractice (including corruption) and maladministration could be dealt with more speedily. The mechanism for this, namely a dedicated Special Tribunal created by sections 2(1)(b) and 7 to 10 of the SIU Act, is intended to adjudicate on matters brought before it by a dedicated SIU which, in turn, was directly involved in the investigation of the matters in question.

This intention manifests itself clearly in the long title and in section 4(1)(b) and (c) of the SIU Act, which provides for—

- the establishment of SIU's for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money, as well as any conduct which may seriously harm the interests of the public or any category thereof, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by any SIU; and
- the functions of an SIU, which are, among others, to collect evidence regarding acts or omissions relevant to its investigations and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned, and to present evidence in proceedings brought before a Special Tribunal.

However, this clear purpose has been affected by some decisions of our courts that limit the *locus standi in iudicio* of an SIU. See in this regard: *Special Investigating Unit and Another v Mfeketo and twenty similar matters 2001 (1) SA 1089 (SpT)* and *Special Investigating Unit v Ngcinwana and Another [2001] 1 All SA 392 (E)* at P 397, where the following was said:

**“There is no provision in the Act that empowers the appellant to institute proceedings in the Special Tribunal on behalf of public state institutions. Given the constitutional context within which the Act must be applied I can find no purpose why the Act should be interpreted to give the appellant such a power. In my view the express provisions of the Act also belie any such purpose: where applicable evidence regarding the commission of an offence must be referred to the relevant prosecuting authority (section 4(1)(d)) and where the institution of legal proceedings by a State institution against any person is justified, the head of the appellant may bring the matter to the attention of the State Attorney or the institution concerned (section 5(7))”.**

The proposed amendments are therefore intended to allow an SIU to litigate on behalf of State institutions. One of the reasons for affording an SIU this power to litigate on behalf of State institutions is to assist with the recovery of losses suffered by State institutions as a result of serious malpractice (including corruption) and maladministration. Generally, a State institution may recover losses through the Office of the State Attorney. However, in instances where the State institution does not recover such losses, an SIU can be used for this purpose.

Clause 1 amends section 2(1)(b) of the SIU Act, which empowers the President to establish one or more Special Tribunals to adjudicate on “justiciable civil disputes” emanating from any SIU investigation. The amendment changes the phrase “justiciable civil disputes” to the phrase “civil proceedings”.

Clause 3 amends section 4(1)(b) and (c) of the SIU Act. Section 4 sets out the functions of an SIU. In terms of paragraphs (b) and (c), at the moment, an SIU must –

- “(b) collect evidence regarding acts or omissions which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned;
- (c) present evidence in proceedings brought before a Special Tribunal.”

This clause makes it clear that one of the functions of an SIU is to institute and conduct proceedings before a Special Tribunal or a court of law for any relief to which a State institution is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered, or any relief relevant to an investigation, or any relief relevant to the interests of an SIU. The insertion of the phrase “or any court of law” in section 4(1)(f) of the SIU Act is consequential in nature.

Similarly, clause 4 amends section 5(5) and (7) of the SIU Act, in order to amend existing wording in order to reaffirm that the SIU may institute and conduct civil proceedings in its own name or on behalf of a State institution in the Special Tribunal or a court of law. The amendments proposed to the current section 5(9) are a consequential result of the amendments proposed to sections 4(1)(c) and 5(5) of the SIU Act, in order to further provide for the appearance of advocates or attorneys of the SIU on behalf of the SIU or a State institution in the Special Tribunal or in a court of law.

Section 8(2) of the SIU Act provides that a Special Tribunal has jurisdiction to adjudicate on any “civil dispute” brought before it by an SIU or any interested party, emanating from the investigation by the SIU. Clause 5 amends section 8(2) of the SIU Act, to specifically confer the powers on a Special Tribunal to adjudicate upon “civil proceedings” rather than a “civil dispute” brought before it by an SIU, either in the name of the SIU or on behalf of the State institution or any interested party.

Clause 8 amends the long title of the SIU Act. The Special Tribunal and the courts have used the long title of the SIU Act for interpretation purposes and they have held that the current wording of the long title empowers the SIU to investigate only and, since no reference is made to litigation, they have held that the SIU does not have the authority or

*locus standi* to litigate. The proposed long title now expressly provides that an SIU is empowered to institute and conduct proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions.

## 2.2 (Secondment of a member of an SIU to another State institution) Clause 2

Clause 2 amends section 3 of the SIU Act which deals with the composition of an SIU. It adds a new subsection (6) to provide for the secondment of a member of an SIU to a State institution for a particular task or for a particular period but only if that member consents. This secondment will not adversely affect the rights, privileges and service benefits of the person being seconded. This provision has numerous positive spin-offs in the fight against fraud and corruption, among others, the following: It will -

- assist State institutions with the establishment and enhancing of in-house anti-corruption capacity and procedures;
- assist other law enforcement agencies, including the Asset Forfeiture Unit, in joint operational projects;
- enhance the skills of the members of an SIU through practical exposure to the operational methods of other law enforcement agencies or State institutions; and
- assist State institutions with the planning, directing and conducting of internal forensic investigations.

## 2.3 (Power of SIU to charge and recover fees and expenses from a State institution and funding):

### (a) Clause 4 (in so far as it amends section 5(1) of the SIU Act)

The SIU Act is totally silent on how the SIU is to be funded. A practice has developed in terms of which the SIU has entered into service level agreements (SLA's) with some of the State institutions in respect of which the President has issued proclamations mandating investigations by the SIU. The purpose of the SLA's was to provide for a funding contribution by the State institutions to the SIU to supplement its resources. Without such funding contributions, the SIU would not have been able to undertake all these investigations since its base line budget, received from National Treasury, is insufficient to fund all the investigations the SIU is required to undertake. The validity of these SLA's is also uncertain.

In addition to the amendments discussed above, relating to the litigation functions of the SIU, clause 4(a) amends section 5 of the SIU Act, in order to empower an SIU to charge and recover fees and expenses from a State institution for anything done in terms of the SIU Act in respect of that State institution or a State institution identified by that State institution,

together with legal costs relating to the institution and conducting of civil proceedings in terms of the Act, as well as interest in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975). This amendment must read with the amendment to section 11 of the SIU Act, proposed in clause 6, giving the Minister the discretion to make regulations on the fees to be charged for work done by the SIU and also the proposed insertion of sections 13A, 13B and 13C in the SIU Act, as proposed in clause 7, dealing with funding of SIU's, accountability and audits, respectively.

(b) Clause 6

As already indicated, clause 6 seeks to broaden the power of the Minister when he or she makes regulations in terms of section 11(1) of the SIU Act, to also include the making of regulations regarding fees and expenses recoverable for services rendered in terms of the SIU Act.

(c) Clause 7

Also as already indicated, clause 7 inserts new sections 13A, 13B and 13C in the SIU Act to provide for the funding, accountability and auditing of an SIU:

(i) The proposed new section 13A deals with the funding of SIU's and provides that the funds of an SIU consist of –

- \* money appropriated by Parliament;
- \* money lawfully accruing from any other source, including fees and expenses recoverable for services rendered;
- \* donations or contributions (but which, among others, may not result in a conflict of interests); and
- \* any other money becoming available to an SIU.

It requires the Head of an SIU to open an account with a financial institution and deposit into it any money received. In order to address any uncertainty in respect of SLA's concluded prior to the commencement of the Bill under discussion, in terms of which fees were chargeable, it validates the SLA's in question regarding the payment of the fees.

(ii) The proposed new section 13B provides for the accountability of the SIU. It restates the position under the Public Finance Management Act, 1999 (Act No. 1 of 1999), that the Head of an SIU is the accounting authority for an SIU and is responsible for monies received by or payments made by the SIU, as well as for the keeping of financial records.

- (iii) The proposed new section 13C provides that the accounts, financial statements and records of the SIU must be audited annually as provided for in the Public Audit Act, 2004.

2.4 (Remuneration of Deputy Directors of Public Prosecutions and prosecutors: Cost-of-living increases) Clause 9

Clause 9 seeks to do away with the cumbersome and time-consuming consultation process in respect of cost-of-living increases of Deputy Directors of Public Prosecutions and prosecutors in terms of section 18 of the NPA Act, while simultaneously retaining the existing consultation process when the Minister determines the salary structures of these functionaries, should it become necessary to have such structures reviewed.

Currently, section 18(1) of the NPA Act provides that any Deputy Director of Public Prosecutions or prosecutor must be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister, after consultation with the NDPP and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the *Gazette*. In turn, section 18(4) provides, among others, that a notice containing the Minister's determination contemplated in subsection (1), must be issued if circumstances so justify, for instances circumstances such as the revision and adjustment of salaries and allowances of the NDPP and magistrates since the latest revision and adjustment of salaries of Deputy Directors of Public Prosecutions or prosecutors. This provision is clearly peremptory and requires that, whenever the salaries of the NDPP and magistrates are revised, regard must be had to the salaries of Deputy Directors of Public Prosecutions and prosecutors.

In order to appreciate the import of the provisions of section 18(1) and (4), it is important to point out the following:

- Section 18(1) requires that the consultation process prescribed must also be followed in instances where cost-of-living increases are to be implemented. It is not only limited to salary restructuring.
- Section 18(4) expressly compels the Minister of Justice and Constitutional Development to revise the salaries of prosecutors from time to time and, specifically, to take into account new salary determinations and adjustments made in respect of the NDPP and magistrates.

The purpose of these provisions is to ensure that the Minister maintains the link between the salaries of prosecutors, on the one hand, and the NDPP, Deputy Directors of Public

Prosecutions and magistrates, on the other, and to prevent experienced prosecutors from applying for magistrates' posts as a result of better salary dispensations linked to such posts. Furthermore, experience has shown that cost-of-living increases for Deputy Directors of Public Prosecutions and prosecutors have followed the trend in the Public Service. Therefore, although the Minister and the Ministers for the Public Service and Administration and of Finance may agree to the proposed salary determinations in terms of sections 18(1) of the NPA Act, the process of consultation required in terms of the Act takes time and results in prosecutors receiving their increases long after the increases for public servants have been implemented. The consultation process is cumbersome and every year there is great concern, uncertainty and unhappiness regarding the situation. Furthermore, the Occupational Specific Dispensation for Legally Qualified Personnel in the Public Service was recently introduced and was determined by the Minister, in terms of section 18(1) of the NPA Act, to be applicable to Deputy Directors of Public Prosecutions and prosecutors. As a result, Deputy Directors of Public Prosecutions and prosecutors are now on the same scales that apply to legally qualified personnel in the Public Service.

#### 2.5 (Financial investigators and analysts) Clause 10

Clause 10 seeks to amend the NPA Act in order to further regulate the appointment, remuneration and conditions of service of financial investigators or analysts who are used by the Asset Forfeiture Unit (AFU) in financial investigations or processes relating to the proceeds of unlawful activities or the civil recovery of property contemplated in the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA). These financial investigators or analysts were appointed as special investigators in terms of Chapter 3A of the NPA Act. Section 5 of the National Prosecuting Authority Amendment Act, 2008 (Act No. 56 of 2008) (the NPA Amendment Act), which regulated the transfer of the investigating capacity of the Directorate of Special Operations to the South African Police Service, repealed Chapter 3A of the NPA Act. The unintended consequence of the repeal of Chapter 3A is that the appointment, remuneration and conditions of service of financial investigators and analysts are now not regulated by statute. The amendment proposed by this clause seeks to rectify this oversight through the insertion of Clause 43B in the NPA Act. The proposed clause 43B provides:

- (a) For a definition of the category of persons (financial investigator and analyst) to which the section would apply (subsection (1)).
- (b) That notwithstanding the repeal of Chapter 3A of the NPA Act an employee referred to in subsection (1) shall continue to be so employed and the remuneration, allowances, service benefits and conditions of service of such employee shall

continue to apply in respect of such an employee or a person appointed in terms of subsection (4) (subsection 2).

- (c). For the powers and functions of a financial investigator or analyst (subsection 3).
- (d) For the appointment of future financial investigators and analysts by the NPA in any financial investigation or process relating to the proceeds of unlawful activities or civil recovery of property in terms of Chapter 5 or 6 of the POCA (subsection 4).
- (e) For the conditions of service of financial investigators and analysts (subsections 5 and 6).