

REPUBLIC OF SOUTH AFRICA

**INDEPENDENT POLICE
INVESTIGATIVE DIRECTORATE
AMENDMENT BILL**

*(As amended by the Portfolio Committee on Police)
(The English text is the official text of the Bill)*

(MINISTER OF POLICE)

[B 21B—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 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 recommendations 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 deletion of the definition of “fixed date”. 10
- (f) 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);”;
- (g) 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;”;
- (h) by the insertion after the definition of “organ of state” of the following definition:
“**Provincial Commissioner** means the Provincial Commissioner of a province as appointed in terms of section 6(2) of the South African Police Service Act;”;
- (i) 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 25
- (j) 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);”.

Amendment of section 3 of Act 1 of 2011 35

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.”.

Amendment of section 4 of Act 1 of 2011 40

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.”.

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 must— 5
- (a) appoint a panel to assist the Minister to identify suitably qualified candidates for appointment as the Executive Director, in accordance with a procedure determined by the Minister; and
- (b) nominate a suitably qualified person and submit the name of such person to the relevant Parliamentary Committee. 10
- (2) The relevant Parliamentary Committee must, within a period of 30 parliamentary working days from the date of the submission of the name of the suitably qualified person contemplated in subsection (1)(b), confirm or reject such nomination.
- (3) (a) In the event of the nomination made in terms of subsection (1)(b) being confirmed by the relevant Parliamentary Committee, the Minister must appoint the nominated person as the Executive Director to head the Directorate in accordance with the responsibilities listed in section 7, for a non-renewable period of seven years. 15
- (b) The person to be appointed as Executive Director must— 20
- (i) be a South African citizen;
- (ii) be a fit and proper person;
- (iii) possess an appropriate qualification in law, safety and security, or in administration of criminal justice or forensic investigation;
- (iv) 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 25
- (v) with due regard to his or her experience, demonstrate high levels of conscientiousness, integrity and commitment to human rights. 30
- (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.
- (5) (a) When the Executive Director is unable to perform the functions of office, or when the Executive Director position is vacant, the Minister may, with the concurrence of the relevant Parliamentary Committee, 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; and 35
- (b) 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 (4). 40
- (c) If the vacant Executive Director position is not filled within a period of six months, the Minister must provide the relevant Parliamentary Committee and the Minister for Public Service and Administration with reasons for the delay and request an extension of the period which must not exceed a further period of six months.”. 45

Amendment of section 7 of Act 1 of 2011

5. Section 7 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection: 50
- “(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: 55
- “(6) (a) The Executive Director must ensure that recommendations 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.

(b) The Executive Director must ensure that recommendations regarding disciplinary matters involving—

- (i) a Provincial Commissioner are referred to the National Commissioner; 5
- (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; 10
- (iii) the National Head of the Directorate for Priority Crime Investigation are referred to the Minister;
- (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. 15

(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]** municipal police service, and may, where appropriate, refer such investigation to the National or Provincial Commissioner concerned.”. 20 25

Amendment of section 8 of Act 1 of 2011

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

(a) by the substitution for the heading of the following heading:

“**[Composition] Appointment of members of national office**”;

(b) by the deletion of subsection (1); and 30

(c) by the substitution for subsections (3), (4), (5), (7) and (8) of 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 35

(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. 40

(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. 45

(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]** believes that the person in question could be a security risk or acted in any manner prejudicial to the objects of this Act. 50 55

(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.”. 60

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**.”. 5

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]**.”. 10

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.”. 15

Repeal of section 19 of Act 1 of 2011

10. Section 19 of the principal Act is hereby repealed. 20

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— 25

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

“(1) The Executive Director, in consultation with the relevant provincial head, must, in the prescribed manner, appoint a fit and proper person as an investigator of the Directorate, subject to subsections (2), (3) and (4).” 30

(b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) must have at least a grade 12 or equivalent certificate **[or] and** a relevant diploma or degree; and”

(c) by the substitution for subsection (4) of the following subsection: 35

“(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 40

(d) 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.”. 45

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.”. 5

Amendment of section 24 of Act 1 of 2011

14. Section 24 of the principal Act is hereby amended— 10

(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) for paragraph (a) of the following paragraph: 15

“(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 20

(c) by the deletion of subsection (5); and

(d) by the addition of the following subsections:

“(6) A directive referred to in subsection (3)(a) must, where the person is not cooperative, 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 head, and must be signed by the relevant provincial head. 25

(7) The subpoena referred to in subsection (6) must be served by a person authorised thereto by the relevant provincial head, as prescribed. 30

(8) The investigator, or a provincial head, 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. 35

(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. 40

(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— 45

(a) the Executive Director or his or her representative determines otherwise; 45

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

(c) the disclosure is for purposes of legal presentation. 50

(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 provincial head or an investigator conducting an investigation in terms of this Act, unless it is required by law or for the purpose of legal presentation.”. 50

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.”.

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 member of a municipal police service;
- (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;]**
- (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;
- (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; or
 - (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, or through the use of any weapon or instrument, 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.”

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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”.

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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]—”; and

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

“(aA) may 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 substitution for paragraph (b) of the following paragraph:

“(b) must quarterly submit a written report to the Minister on the progress regarding disciplinary matters made in terms of paragraph (a) and provide a copy thereof to the Executive Director and the Secretary; **[and]**”.

(d) by the substitution for paragraph (c) of the following paragraph:

“(c) must 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 paragraphs:

“(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; and

(e) where the sanction is considered inappropriate the Directorate may request 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 review the sanction.”.

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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) for paragraph (b) of 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.”. 5

Amendment of section 33 of Act 1 of 2011

20. Section 33 of the principal Act is hereby amended—

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

“(3) Any **[police officer]** member of the South African Police Service or a member of a municipal police service who fails to comply with section 29 is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.”; and 10

(b) by the addition of the following subsection:

“(6) The National Commissioner, or appropriate Provincial Commissioner, national Head or appropriate Provincial Head of the Directorate for Priority Crime Investigation or the Executive Head of the relevant municipal police service who fails to comply with section 30 is guilty of an offence and liable to a fine or to imprisonment for a period not exceeding two years.”. 15
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Amendment of section 34 of Act 1 of 2011

21. Section 34 of the principal Act is hereby amended—

(a) by the deletion in subsection (1) of the word “and” at the end of paragraph (o); and

(b) by the insertion in subsection (1) after paragraph (o) of the following paragraphs: 25

“(oA) the procedure to be followed in respect of the report contemplated in section 30(c) and (d), as well as the format and time-frames of the said report;

(oB) the code of conduct for the employees of the Directorate; 30

(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) the criteria to be followed in appointing investigators; 35

(oF) any matter that must or may be prescribed in terms of this Act; and”.

Substitution of section 35 of Act 1 of 2011

22. The following section is hereby substituted for section 35 of the principal Act:

“**[Transitional arrangements] Savings** 40

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.”. 45

Amendment of Arrangement of sections of Act 1 of 2011

23. 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”; 50

- (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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24. 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 process of effecting amendments to the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011) (“principal Act”), commenced in 2016 immediately after the Constitutional Court judgment of *McBride v Minister of Police and Another** (“*McBride* judgment”). In the *McBride* judgment, the Constitutional Court declared sections 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 (“Amendment Act”) was signed into law by the President on 26 May 2020. The aforesaid Amendment 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* judgment.
- 1.2 After the enactment of the Amendment Act, the process of effecting comprehensive amendments to the principal Act commenced. Consultations on the draft version of the Independent Police Investigative Directorate Amendment Bill, 2023 (“Bill”) with relevant stakeholders such as the National Prosecuting Authority (“NPA”) and the South African Police Service (“SAPS”) were conducted.
- 1.3 The Bill was introduced in Parliament on 20 July 2023. It was published for public comments by the Portfolio Committee on Police (“PCOP”) on 26 September 2023. The public comments received on it have been considered in 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 must 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 the 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 the investigation of rape by a member of the SAPS or a member of a municipal police service, including the investigations of any deaths caused by the actions of such members, whether such member was on or off duty.
- 2.3 The salary dispensation of IPID investigators shall be determined by the Minister of Police (“Minister”) in consultation with the Minister responsible for Finance and it shall no longer be on par with South African Police Service members appointed as detectives.
- 2.4 Proposed amendments have also been made to section 30 of the principal Act in order to strengthen the provisions concerning the implementation of the disciplinary recommendations of IPID.

* 2016 (2) SACR 585 (CC)

3. SUMMARY OF BILL

The Bill can be summarised as follows:

3.1 *Ad Clause 1*

Clause 1 of the Bill seeks to amend section 1 of principal Act through the insertion of certain new definitions.

3.2 *Ad Clause 2*

Clause 2 of the Bill seeks to amend section 3(2) of the principal Act in order to provide that IPID must exercise its functions in accordance with the Constitution.

3.3 *Ad Clause 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. Further amendments are proposed to section 4 of the principal Act 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 amendments seek 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 *Ad Clause 4*

Clause 4 of the Bill seeks to substitute section 6 of the principal Act to provide for the appointment of a panel to assist the Minister with the nomination of a candidate for the Executive Director post and the submission of the name of the candidate to the relevant Parliamentary Committee for approval.

3.5 *Ad Clause 5*

Clause 5 seeks to amend section 7 of the principal Act, in order to ensure that recommendations regarding disciplinary matters which involve certain provincial and national executives are referred to all appropriate authorities, including the municipal manager and the executive head of municipal police service.

The clause is further amended in order to provide for the initiation of investigations by the Executive Director upon becoming aware of the commission of any alleged offences by a member of the SAPS or a municipal police service, and not only upon receipt of complaints.

3.6 *Ad Clause 6*

Clause 6 proposes the deletion of section 8(1) of the principal 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 proposes further amendments to section 8(4) and provides for the conducting of pre-employment security screening investigations by IPID and not by the State Security Agency as provided for in the principal Act. The rationale for this amendment is that, it is not necessary for the State Security Agency to conduct security screening investigations, as it merely involves criminal and credit record checks.

In subsection (5), a provision is made for the issuing of pre-employment security screening certificates by IPID in respect of the security screening investigation.

3.7 *Ad Clause 7*

Clause 7 of the Bill seeks to amend section 9 of the principal Act in order to provide that the report on the identification and review of legislative needs shall be reported to the Minister and not to the Civilian Secretariat for Police.

3.8 *Ad Clause 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 the 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 *Ad Clause 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 concern the exercise by the forum of its powers and duties.

3.10 *Ad Clause 10*

Clause 10 of the Bill proposes the repeal of section 19 of the principal Act which provides for the salary level of the Provincial Heads of IPID, as it has been considered that it is not necessary to provide for same in the principal Act.

3.11 *Ad Clause 11*

This clause seeks to amend section 21 of the principal 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 *Ad Clause 12*

Clause 12 seeks to amend section 22 of the principal Act, which includes amendments to subsections (4) and (5) to provide that the pre-employment security screening investigation of IPID investigators must be conducted by the Directorate. This amendment is informed by the fact that such screening consists of a mere criminal and credit record check that may be conducted internally and not necessarily by the State Security Agency.

3.13 *Ad Clause 13*

Clause 13 seeks to amend section 23 of the principal Act to provide that the conditions of service of IPID investigators will be determined by the Minister in consultation with the Minister responsible for Finance.

3.14 Ad Clause 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).

Further amendments seek to address the concern in public comments about the inadmissibility in criminal proceedings of a self-incriminating answer, with the result that a decision has been taken to delete subsection (5) of this section of the Act.

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 Ad Clause 15

Clause 15 of the Bill seeks to strengthen section 27 of the principal Act which provides for the 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 Ad Clause 16

Clause 16 of the Bill seeks to amend section 28 of the principal Act in order to indicate that IPID shall investigate the allegations of the commission of crimes of rape and murder by members of the SAPS or members of municipal police services, that have been committed on or off duty.

Further amendments are proposed to section 28(1) 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 utilised 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 is attempted murder, in relation to the discharge of an official firearm, which has been inserted in the Bill.

The aforementioned paragraph has been further amended in order to take into account a proposal in public comments, that attempted murder should not be limited to the use of a firearm, but should include any allegation of attempted murder. As a result, the wording “through the use of any weapon or instrument” has been inserted in paragraph (gA).

Furthermore, a provision is also made for IPID to have a mandate to initiate investigation in instances where a member of the SAPS or a 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 the SAPS and municipal police services are also empowered to refer matters to IPID for investigation, this shall no longer be the sole responsibility of the Executive Director of IPID.

3.17 Ad Clause 17

Clause 17 of the Bill seeks to amend section 29 of the principal Act in order to make provision for a Station Commander and a municipal manager to also refer matters for investigation by IPID.

3.18 Ad Clause 18

Clause 18 of the Bill seeks to amend section 30 of the principal Act in order to strengthen the provisions relating to the implementation of IPID recommendations to achieve the following objectives:

- (a) An obligation to submit a report of the outcomes of disciplinary matters to the Minister as well as 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) Disciplinary proceedings may be initiated after the investigation of allegations has been finalised by the Directorate and upon receipt of an investigation report from the Directorate.
- (c) Further amendments are proposed to section 30 which provide 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's disciplinary recommendations are not only implemented, but that IPID is informed of the reasons why its disciplinary recommendations have not been implemented.
- (d) In order to address the proposal in the public comments of imposing a penalty for failure to comply with section 30 of the principal Act, a new subsection is to be inserted in the Bill in which it is provided that where the sanction is considered not appropriate, IPID may request the appropriate authorities of the SAPS and a municipal police service to review the sanction.

3.19 Ad Clause 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 Ad Clause 20

Clause 20 seeks to amend section 33 of the principal Act by providing that members of the SAPS as well as members of municipal police services will be guilty of an offence for failure to comply with sections 29 and 30 of the principal Act.

3.21 Ad Clause 21

Clause 21 of the Bill seeks to amend section 34 of the principal Act and provides for additional matters which the Minister may make regulations in relation to, such as 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.

The clause has been further amended in order to empower the Minister to make regulations in relation to a procedure to be followed when appointing investigators.

3.22 Ad Clause 22

Clause 22 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 savings clause in relation to changes to be made in determining the remuneration and benefits of investigators and provincial heads of IPID has been inserted.

The Saving clause will ensure that the conditions of service, including remuneration and benefits payable to the employees of IPID before the commencement of these amendments to the principal Act, may not be less favourable upon the commencement of the envisaged Act.

3.23 Ad Clause 23

Clause 23 of the Bill provides for the substitution of the headings of certain sections of the principal Act.

3.24 Ad Clause 24

Clause 24 of the Bill provides for the short title and commencement of the envisaged Act.

4. DEPARTMENTS AND BODIES CONSULTED

The PCOP has received comments on the Bill from the following individuals, Civil Organisations and government institutions:

African Policing Civilian Oversight Forum (APCOF), Association for the Prevention of Torture, Independent Policing Union of South Africa, South African Policing Union (SAPU), Western Cape Government, Afriforum, Action Society, Catholic Parliamentary Liaison Office (CPLO), Helen Suzman Foundation, FW de Klerk Foundation, Freedom of Expression Institute, Centre of Criminology, South African Human Rights Commission, Institute for Security Studies, Africa Criminal Justice Reform, POPCRU, Ndifuna Ukwazi, Gun Free SA, Daneel Knoetze, Willy Dithlake, Mary De Haas and Emmanuel Chauke.

5. FINANCIAL IMPLICATIONS

The Bill merely seeks to strengthen the principal Act and as such, there are no envisaged financial implications for IPID in the daily exercise of their mandate of conducting investigations of the alleged commission of offences by members of the SAPS and by members of municipal police services.

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 *Tongaone and Others v National Minister for Agriculture and Land Affairs and Others CCT 100/09 [2010] ZACC 10* (“*Tongaone* 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 *Tongaone* 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 It is therefore the opinion of the Department: Civilian Secretariat for Police Service, 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.

