

REPUBLIC OF SOUTH AFRICA

NATIONAL PROSECUTING AUTHORITY AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development;
having conferred with the Portfolio Committee on Safety and Security (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 23B—2008]

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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 repeal the provisions relating to the Directorate of Special Operations; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 32 of 1998, as amended by section 2 of Act 61 of 2000

1. Section 1 of the National Prosecuting Authority Act, 1998 (hereafter referred to as the principal Act), is amended— 5
- (a) by the deletion of the definition of “*Directorate of Special Operations*”;
 - (b) by the substitution for the definition of “*head of an Investigating Directorate*” of the following definition:
 - “ ‘*head of an Investigating Directorate*’ means [**the Deputy National Director referred to in section 7(3)(a), or**] an *Investigating Director* referred to in section 7(3)(b)[**, as the case may be**];”;
 - (c) by the substitution for the definition of “*Investigating Director*” of the following definition:
 - “ ‘*Investigating Director*’—
 - (a) means a Director of Public Prosecutions appointed under section 13(1)[**(aA) or**] (b)[—
 - (i) **to the Directorate of Special Operations; or**
 - (ii)] as the head of an *Investigating Directorate* established in terms of section 7(1)[**(1A)**, **as the case may be**]; and 15
 - (b) in Chapter 5, includes [**the head of the Directorate of Special Operations**] any *Director* referred to in section 13(1), designated by the *National Director* to conduct an investigation in terms of section 28 in response to a request in terms of section 17D(3) of the South African Police Service Act, 1995 (Act No. 68 of 1995), by the Head of the Directorate for Priority Crime Investigation;”;
 - (d) by the deletion of the definition of “*special investigator*”; and
 - (e) by the substitution for the definition of “*specified offence*” of the following definition: 20
- 25

“ ‘*specified offence*’ means any matter which in the opinion of the *head of an Investigating Directorate* falls within the range of matters as contemplated in [section 7(1)(a)(aa) or any proclamation issued in terms of section 7(1)(a)(bb) or (1A)] section 7(1A), and any reference to the commission of a specified offence has a corresponding meaning;”.

Amendment of section 5 of Act 32 of 1998, as amended by section 3 of Act 61 of 2000

2. Section 5 of the principal Act is amended by the deletion in subsection (2) of paragraph (dA).

Substitution of section 7 of Act 32 of 1998, as substituted by section 4 of Act 61 of 2000

3. The following section is substituted for section 7 of the principal Act:

“Investigating Directorates

7. (1) [(a) There is hereby established in the *Office of the National Director* an Investigating Directorate, to be known as the Directorate of Special Operations, with the aim to—

- (i) investigate, and to carry out any functions incidental to investigations;
- (ii) gather, keep and analyse information; and
- (iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings,

relating to—

- (aa) offences or any criminal or unlawful activities committed in an organised fashion; or
- (bb) such other offences or categories of offences as determined by the President by proclamation in the *Gazette*.

(b) For the purpose of subparagraph (aa), ‘organised fashion’ includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.]

The President may, by proclamation in the *Gazette*, establish not more than two [additional] Investigating Directorates in the *Office of the National Director*, in respect of [matters not contemplated in subsection (1)(aa) or (bb)] such offences or criminal or unlawful activities as set out in the proclamation.

(2) Any proclamation issued in terms of this section—

- (a) shall be issued on the recommendation of the *Minister*, the Cabinet member responsible for policing and the *National Director*;
- (b) 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
- (c) must be submitted to Parliament before publication in the *Gazette*.

(3) The head of—

- (a) the Directorate of Special Operations, shall be a Deputy National Director, assigned by the National Director; and
- (b) any other] an Investigating Directorate, shall be an Investigating Director, and shall perform the powers, duties and functions of the Investigating Directorate concerned subject to the control and directions of the *National Director*.

(4) (a) The head of an Investigating Directorate shall be assisted in the exercise of his or her powers and the performance of his or her functions by—

- (i) [in the case of—
 - (aa) the Directorate of Special Operations, one or more Investigating Directors and one or more Deputy Directors; and

- (bb) any other Investigating Directorate,] one or more *Deputy Directors*;
- (ii) *prosecutors*;
- [(iiA) in the case of the *Directorate of Special Operations, special investigators*];
- (iii) officers of any Department of State seconded to the service of the *Investigating Directorate* in terms of the laws governing the public service;
- (iv) persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the *Investigating Directorate*; and
- (v) any other person whose services are obtained by the head of the *Investigating Directorate*,
- and the persons referred to in subparagraphs (i) to (v) shall perform their powers, duties and functions subject to the control and direction of the head of the *Investigating Directorate* concerned.
- (b) For the purposes of subparagraphs (iv) and (v) of paragraph (a)—
- (i) any person or body requested by the *head of an Investigating Directorate* in writing to do so, shall from time to time, after consultation with the *head of an Investigating Directorate*, furnish him or her with a list of the names of persons, in the employ or under the control of that person or body, who are fit and available to assist the head of that *Investigating Directorate* as contemplated in the said subparagraph (iv) or (v), as the case may be; and
- (ii) such a person or body shall, at the request of, and after consultation with, the head of the *Investigating Directorate* concerned, designate a person or persons mentioned in the list concerned so to assist the head of the *Investigating Directorate*.”.

Amendment of section 13 of Act 32 of 1998, as amended by section 6 of Act 61 of 2000

4. Section 13 of the principal Act is amended by the deletion in subsection (1) of paragraph (aA).

Repeal of Chapter 3A of Act 32 of 1998

5. Chapter 3A of the principal Act is repealed.

Amendment of section 23 of Act 32 of 1998, as amended by section 9 of Act 61 of 2000

6. Section 23 of the principal Act is amended by the deletion of subsection (2).

Amendment of section 26 of Act 32 of 1998, as substituted by section 10 of Act 61 of 2000

7. Section 26 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) Nothing in this Chapter or [section 7(1), or any proclamation issued in terms of] section 7, derogates from any power or duty which relates to the prevention, combating or investigation of any offences and which is bestowed upon the South African Police Service in terms of any law.”.

Amendment of section 28 of Act 32 of 1998, as substituted by section 12(a) of Act 61 of 2000

8. Section 28 of the principal Act is amended by the substitution for paragraph (a) of subsection (2) of the following paragraph:

“(a) The *Investigating Director* may, if he or she decides to conduct an investigation, at any time prior to or during the conducting of the investigation designate any person referred to in section 7(4)(a) or, in the case of an investigation requested by the Head of the Directorate for Priority Crime Investigation in terms

of section 17D(3) of the South African Police Service Act, 1995 (Act No. 68 of 1995), any member of the *prosecuting authority* or a member of that Directorate, to conduct the *investigation*, or any part thereof, on his or her behalf and to report to him or her.”.

Repeal of sections 30 and 31 of Act 32 of 1998 5

9. Sections 30 and 31 of the principal Act are repealed.

Amendment of section 36 of Act 32 of 1998, as amended by section 15 of Act 61 of 2000

10. Section 36 of the principal Act is amended—
- (a) by the substitution for subsection (3) of the following subsection: 10
 - “(3) [**Subject to subsection (3A), the**] The Director-General: Justice shall, subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999)—
 - (a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the prosecuting authority; 15
 - and
 - (b) cause the necessary accounting and other related records to be kept.”;
 - (b) by the deletion of subsection (3A);
 - (c) by the substitution for subsection (4) of the following subsection: 20
 - “(4) The records referred to in subsection (3)(b) [**and (3A)(b)**] shall be audited by the Auditor-General.”; and
 - (d) by the substitution for subsection (5) of the following subsection:
 - “(5) The Director-General: Justice [**or, in respect of a matter dealt with by the Directorate of Special Operations, the Chief Executive Officer,**] 25
 - may, on the recommendation of the *National Director* and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an *investigation* contemplated in section 28 (1) be paid from State funds to that person.”. 30

Amendment of section 40 of Act 32 of 1998, as substituted by section 17 of Act 61 of 2000

11. Section 40 of the principal Act is amended by the deletion of subsection (2).

Amendment of section 43 of Act 32 of 1998

12. Section 43 of the principal Act is amended by the deletion of subsection (7). 35

Substitution of section 43A of Act 32 of 1998

13. The following section is substituted for section 43A of the principal Act:

“Transitional arrangements relating to Directorate of Special Operations

- 43A.** (1) In this section— 40
- (a) any word or expression in respect of which a specific meaning has been assigned by the South African Police Service Act, 1995 (Act No. 68 of 1995), has the same meaning; and
 - (b) ‘fixed date’ means a date to be determined by the President by proclamation. 45
- (2) Prior to a date determined by the *National Director*, any person employed by the *Directorate of Special Operations* must inform the *National Director* whether they consent to be transferred to the South African Police Service.
- (3) As from the fixed date— 50
- (a) any person, who immediately before the fixed date held the office of *special investigator* and who has consented to the transfer, is

- transferred to the South African Police Service and becomes a member of the South African Police Service; and
- (b) such administrative and support personnel employed by the *Directorate of Special Operations* as may be agreed upon between the *National Director* and the National Commissioner, may be transferred to the South African Police Service. 5
- (4) (a) An employee contemplated in subsection (3) may be transferred to the South African Police Service only with his or her consent.
- (b) The remuneration and other terms and conditions of employment of employees transferred in terms of subsection (3) may not be less favourable than those that applied immediately before their transfer. 10
- (c) The transfer contemplated in subsection (3) does not interrupt the employees' continuity of employment and the employees remain entitled to all rights and benefits, including pension benefits and privileges to which they were entitled to immediately before transfer. 15
- (5) (a) An employee referred to in subsection (3) who does not consent to be transferred to the South African Police Service must, prior to the date referred to in subsection (1), notify the *National Director* thereof in writing.
- (b) In respect of such an employee, the *National Director* may—
- (i) after consultation with the *Minister* and the Cabinet members responsible for the public service and for finance, offer to transfer the employee to a reasonable alternative post or position in any government department or state institution in accordance with subsection (4)(b) and (c) and section 14 of the Public Service Act, 1994 (Proclamation No. 103 of 1994) shall, unless the context indicates otherwise, apply to such a transfer; or 20
- (ii) after consultation with the *Minister*, offer to transfer the employee to a reasonable alternative post or position in the *prosecuting authority*, other than any post of *special investigator*, in accordance with subsection (4)(b) and (c). 25
- (c) If the employee does not accept the offer made in paragraph (b) within 30 days of it being made, the employee's employment automatically terminates on the fixed date. 30
- (d) An employee whose employment is terminated in terms of paragraph (c) is entitled to a severance package provided determined by the *Minister* in consultation with the Cabinet members for the public service and for finance. 35
- (e) The severance package provided for in paragraph (d) may not be less favourable than the severance package provided for in the Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service determined in terms section 3 of the Public Service Act, 1994. 40
- (f) Any dispute arising from the interpretation or application of this section in so far as employees are concerned must be referred to the Labour Court for determination. 45
- (6) Any decisions made, directions issued and any proceedings instituted by the employer immediately before the fixed date in respect of an employee referred to in subsection (3), remains applicable to him or her and must be implemented or finalised as if the National Prosecuting Authority Amendment Act, 2008, has not been passed. 50
- (7) Any member of the *prosecuting authority* who was employed in the *Directorate of Special Operations* immediately before the fixed date, shall continue to be employed in the *Office of the National Director*, and shall exercise, carry out and perform his or her powers, duties and functions as conferred, imposed or assigned to him or her by the *National Director* and subject to the control and directions of the *National Director* or a person authorised thereto by the *National Director*. 55
- (8) The National Prosecuting Authority Amendment Act, 2008, does not affect the validity of any *investigation* performed by the *Directorate of Special Operations* before the fixed date, including any functions incidental to such *investigations* or the institution of any criminal proceedings. 60
- (9) (a) *Investigations* by the *Directorate of Special Operations* that are pending immediately before the fixed date must, on that date, be transferred

to and continued by the Directorate for Priority Crime Investigation in accordance with a mechanism to ensure that the *investigations* are not prejudiced by the transfer.

(b) The *Minister*, in consultation with the Cabinet member for police and after consultation with the *National Director* and the National Commissioner, must determine the mechanism referred to in paragraph (a).

(10) As from the fixed date any liability incurred by the *Directorate of Special Operations* as a result of any *investigation* by that Directorate, shall pass to the *prosecuting authority*, unless the *Minister* in consultation with the Cabinet member for police, in a specific instance determines otherwise.

(11) (a) Any *investigation* that has been instituted under section 28 by the *Directorate for Special Operations*, and all steps taken as a result of such an *investigation*, shall be deemed to have been instituted or taken in consequence of the application of section 17D(3) of the South African Police Service Act, 1995.

(b) The Head of the Directorate for Priority Crime Investigation may, at any time after the fixed date, withdraw such a request.

(c) The *National Director* must designate a *Director* in respect of each *investigation* referred to in paragraph (a), who must assist the Directorate of Priority Crime Investigation in carrying out such an *investigation*.”

Amendment of Preamble to Act 32 of 1998, as substituted by section 1 of Act 61 of 2000

14. The Preamble to the principal Act is amended by the deletion of the ninth, tenth and eleventh paragraphs.

Short title and commencement

15. This Act is called the National Prosecuting Authority Amendment Act, 2008, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL PROSECUTING AUTHORITY AMENDMENT BILL, 2008

1. BACKGROUND AND OBJECTS

1.1 The Bill emanates from the decision to relocate the investigative capacity of the Directorate of Special Operations (DSO) in the South African Police Service (SAPS). The principal aim of the Bill is to repeal the provisions of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (the Act), that deal with the establishment and functioning of the DSO. The relocation of the investigative capacity of the DSO is dealt with in the South African Police Service Amendment Bill, 2008 [B 30—2008] introduced in Parliament by the Minister of Safety and Security. This latter Bill makes provision for the establishment of a new “Directorate for Priority Crime Investigation” in the SAPS, and provides for the inclusion of the investigative component of the DSO in that Directorate.

1.2 Section 7 of the Act established the DSO as an Investigating Directorate in the Office of the National Director of Public Prosecutions, comprising a Deputy National Director of Public Prosecutions (as the head thereof), a number of prosecutors and a number of special investigators. In terms of section 30 of the Act, the special investigators have certain powers and functions which correspond broadly with those of police officials, including (for example) powers relating to the investigation of offences, entry and search of premises, seizure of articles, arrests and execution of warrants. Since this special investigator component constitutes the investigative capacity of the DSO, it is being transferred to the SAPS in terms of the relocation referred to in paragraph 1.1 above.

1.3 The provisions of the Bill are therefore largely aimed at removing the provisions relating to the DSO from the Act.

2. PROVISIONS OF BILL

2.1 Clause 1 seeks to amend the definitions of “Investigating Director” and “specified offence”, and seeks to delete the definitions of “Directorate of Special Operations” and “special investigator”.

2.2 Clauses 2, 3, 4, 5, 7, 8, 10, 11 and 12 contain consequential amendments emanating from the proposed transfer of the investigating functions of the DSO to the Directorate for Priority Crime Investigation.

2.3 Clause 6 seeks to repeal Chapter 3A (sections 19A, 19B and 19C) of the Act. Chapter 3A deals with the appointment, security screening and conditions of service of special investigators.

2.4 Clause 9 seeks to repeal sections 30 and 31 of the Act. Those sections relate to the powers and functions of special investigators (section 30) and the Ministerial Coordinating Committee (section 31). It is envisaged that a similar coordinating mechanism would be provided for in the South African Police Service Amendment Bill, 2008, in respect of the “Directorate of Priority Crime Investigation”.

2.5 Clause 14 seeks to amend the Preamble to the Act, by deleting those paragraphs that were inserted when the Act was amended (in 2000) in order to provide for the establishment of the DSO.

2.6 Clause 13 contains transitional arrangements for the transfer of the special investigator component to the SAPS as well as for the transfer of certain functions of the DSO to the Directorate for Priority Crime Investigation.

3. CONSULTATION

The National Prosecuting Authority and the South African Police Service were consulted in the process of preparing the draft legislation.

4. IMPLICATION FOR PROVINCES

None.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The special investigator component of the DSO will be transferred to the South African Police Service, in accordance with the transitional arrangements contained in the Bill.

6. FINANCIAL IMPLICATIONS FOR STATE

The bulk of the budget and assets of the DSO will be transferred to the SAPS in accordance with transitional arrangements.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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