



For attention: Mr N Ntawana
Civilian Secretariat for the Police Service
Email: Comments.IpidBill@csp.gov.za

15 January 2022

Dear Mr Ntawana

Submission on the Independent Police Investigative Directorate Amendment Draft Bill.

We attach our written submission in response to the invitation for comments on the Independent Police Investigative Directorate Amendment Draft Bill.

We would like to confirm our interest in making oral representations at a later convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: nicole@hsf.org.za .

Yours sincerely

Nicole Fritz
Director



1. Introduction

1.1. The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Civilian Secretariat for the Police Service (“Secretariat”) on the Independent Police Investigative Directorate Amendment Bill - Draft (“Draft Bill”). The HSF sees this engagement as a way of fostering constructive dialogue between civil society and government.

1.2. The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, focusing on the rule of law, transparency and accountability.

1.3. The HSF’s interest in participating in this process centres on our historical participation in issues concerning the independence of policing institutions in South Africa. The HSF participated as *amicus curiae* in *McBride v Minister of Police and Another*,¹ where the Constitutional Court, amongst others things, affirmed that section 206(6) of the Constitution demands the independence of the Independent Police Investigative Directorate (“IPID”).

1.4. The amendments proposed in the Draft Bill are a consequence of that affirmation.

1.5. While the HSF welcomes the Draft Bill’s effort to strengthen IPID’s independence in line with the Constitutional Court’s finding in *McBride*, we submit that the Draft Bill falls short in various key respects.

1.6. In summary, the HSF submits that –

1.6.1. the Draft Bill’s amendments to section 6 of the Independent Police Investigative Directorate Act 1 of 2011 (“IPID Act”), which regulates the appointment of IPID’s Executive Director (“IPID ED”), fail to secure IPID’s independence, because the Draft

¹ 2016 (2) SACR 585 (CC).



Bill proposes an appointment process that is concentrated in the executive and excludes Parliament;

1.6.2. the Draft Bill's amendment to section 6 of the IPID Act should retain the IPID Act's existing obligation to fill a vacancy in the office of the IPID ED within a prescribed period; and

1.6.3. the Draft Bill falls short of securing IPID's independence by subjecting the IPID ED's remuneration to the discretion of the Minister of Police ("Minister") and the Minister of Finance.

1.7. The reasoning supporting these submissions appears below.

2. The Draft Bill's Amendment to Section 6 of the IPID Act – the Proposed Appointment Process of the IPID ED .

2.1. The HSF welcomes the initiative taken to improve the credibility, openness and transparency of the recruitment process in appointing the IPID ED.

2.2. However, the appointment process proposed by the Draft Bill fails to curb undue political influence by the executive – in particular the Minister – and completely removes Parliament's crucial check thereon.

2.3. Section 6 of the IPID Act as it stands requires that the Minister nominate a candidate for the position of IPID ED using a self-determined process. The Parliamentary Committee for Police then either confirms or rejects the nomination. Once confirmed, the candidate is appointed as IPID ED.

2.4. In terms of the process that the Draft Bill proposes, the Minister first appoints an independent panel of reputable persons who then interview and nominate a suitable candidate for IPID ED to the Minister.



- 2.5. Thereafter, the Minister appoints the nominated candidate after receiving Cabinet's concurrence.
- 2.6. While the independent panel is meant to give credibility to the appointment process, the panel is appointed solely by the Minister, whose powers of appointment are 'checked' only by Cabinet.
- 2.7. Contrary to the appointment process currently provided for in section 6 of the IPID Act, the Draft Bill wholly removes Parliament's involvement in appointing the IPID ED.
- 2.8. This appointment process departs significantly from the jurisprudence of the Constitutional Court and the Supreme Court of Appeal.
- 2.9. The Constitutional Court in *McBride* warned that IPID's constitutionally entrenched independence requires it to function without any political interference whether "actual or perceived" by the Minister.² More recently, the Supreme Court of Appeal identified Parliament as a "bulwark" against eroding the independence of bodies like IPID.³
- 2.10. The Draft Bill clearly departs from this guidance by designing an appointment process that is concentrated wholly in the executive – and in the office of the Minister in particular.
- 2.11. This is not only contrary to the jurisprudence of the Constitutional Court and Supreme Court of Appeal, it also produces the anomalous result that Parliament is excluded from the process of appointing the IPID ED but is nevertheless the body to which the IPID ED is ultimately accountable.
- 2.12. Section 6A of the IPID Act prescribes that the IPID ED may only be removed if a Parliamentary Committee finds that the IPID ED committed misconduct, is incapacitated or is incompetent. Following such a finding, the National Assembly – on a two-thirds majority

² *McBride v Minister of Police and Another* 2016 (2) SACR 585 (CC) para 41.

³ *Helen Suzman Foundation v Robert McBride and Others* (1065/2019) [2021] ZASCA 36; [2021] 2 All SA 727 (SCA); 2021 (5) SA 94 (SCA) (7 April 2021) para 54.



vote – decides to remove the IPID ED from office and the Minister merely gives effect to the decision.

2.13. Moreover, the Draft Bill amends section 31(1)(b) of the IPID Act to render the IPID ED accountable to Parliament.

2.14. It, therefore, stands to reason that Parliament should be involved in appointing the IPID ED so that it need not rest too heavily on its removal powers to hold the IPID ED accountable. For Parliament's accountability function to be fully realised, it must be able to prevent improper appointees as well as discipline appointees who have failed in their constitutional duties.

2.15. To cure this defect, the HSF submits that the Draft Bill should be amended to include a role for Parliament in the process for appointing the IPID ED. This should at least involve the Parliamentary Committee for Police's concurrence in the appointment of the IPID ED but could also include a role for it to oversee the appointment of the independent panel.

3. The Draft Bill's Amendment to Section 6 of the IPID Act – the Omission Requiring an IPID ED Vacancy to Be Filled in a Specified Period.

3.1. A notable omission in the Draft Bill is a provision obliging the Minister to fill a vacancy in the office of the IPID ED within a prescribed period.

3.2. Section 6(5) of the IPID Act required the Minister to fill the vacancy within a reasonable period not exceeding one year. The HSF submits that this provision should be inserted in the Draft Bill.

4. The Draft Bill's Amendment to Section 6(3) - The Executive Director's remuneration

4.1. Security of tenure and remuneration are essential factors to consider in assessing IPID's independence. While the Draft Bill sufficiently secures the IPID ED's tenure, it falls short in securing the IPID ED's remuneration.



4.2. In *Glenister II* the Constitutional Court held that:

“the absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. Not only do the members not benefit from any special provisions securing their emoluments, but the absence of secured remuneration levels is indicative of the lower status of the new entity.”⁴

4.3. In terms of section 6(3) of the Draft Bill, the IPID ED’s remuneration is determined by the Minister of Police with the concurrence of the Minister of Finance. This provision does not sufficiently insulate the IPID ED’s remuneration from political interference, nor does it determinatively prescribe, at least at a minimum level, the IPID ED’s remuneration.

4.4. The HSF submits that comparative legislation, which subjects the remuneration of heads of other independent institutions such as the National Prosecuting Authority and the Office of the Public Protector, to statutory minimum should be considered.

5. Conclusion

5.1. The HSF welcomes the opportunity to engage with the Secretariat in order to comment on the Draft Bill and the initiative taken to bolster IPID’s independence.

5.2. However, the HSF has submitted that by only involving the Minister and Cabinet, and removing Parliament from the processes to recruit and appoint the IPID ED, the Draft Bill leaves IPID vulnerable to undue political interference.

5.3. Further, the HSF has submitted that the Draft Bill does not adequately secure the IPID ED’s remuneration and insulate it from political influence nor does it determinatively prescribe the IPID ED’s remuneration.

5.4. These shortcomings threaten IPID’s independence. Therefore, it is essential, in light of IPID’s constitutionally demanded independence and to ensure compliance with the jurisprudence

⁴ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 227.



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of the Constitutional Court and Supreme Court of Appeal, that threats of political influence, whether actual or perceived, are removed from IPID's structure and operations.