

REPUBLIC OF SOUTH AFRICA

SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 31016 of 9 May 2008)
(The English text is the official text of the Bill)*

(MINISTER OF SAFETY AND SECURITY)

[B 30—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 South African Police Service Act, 1995, in order to—

- enhance the investigative capacity of the South African Police Service in relation to organised and serious crime by establishing a Directorate for Priority Crime Investigation to combat those crimes;
- provide for the relocation of special investigators of the Directorate of Special Operations, established in terms of the National Prosecuting Authority Act, 1998, to the South African Police Service; and
- provide for matters connected thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 68 of 1995

1. Section 1 of the South African Police Service Act, 1995 (hereinafter referred to as the principal Act), is hereby amended by the insertion after the definition of “**directorate**” of the following definition: 5

“**Directorate for Priority Crime Investigation**’ means the Directorate for Priority Crime Investigation established in terms of section 16A;”.

Amendment of section 16 of Act 68 of 1995

2. Section 16 of the principal Act is hereby amended— 10

(a) by the deletion in subsection (2) of the word “and” at the end of paragraph (i) and by the insertion of the word “and” at the end of paragraph (j); and

(b) by the addition to subsection (2) of the following paragraph:

“(k) in respect of the commission of any alleged offence referred to in the definition of ‘serious offence’ in the Regulation of Interception of Communications and Provision of Communications-Related Information Act, 2002 (Act No. 70 of 2002).” 15

Insertion of sections 16A and 16B in Act 68 of 1995

3. The following sections are hereby inserted in the principal Act after section 16:

“Directorate for Priority Crime Investigation

- 16A.** (1) There is hereby established a Directorate for Priority Crime Investigation to combat and investigate any criminal conduct or endeavour thereto as set out in section 16(2). 5
- (2) The Directorate for Priority Crime Investigation comprises—
- (a) the head of the Directorate for Priority Crime Investigation, appointed as a Divisional Commissioner by the National Commissioner;
 - (b) selected officials, other than prosecutors, who, immediately before the commencement of the South African Police Service Amendment Act, 2008, or the National Prosecuting Authority Amendment Act, 2008, held office as special investigators of the Directorate of Special Operations contemplated in section 7(4)(a)(iiA) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998); 10 15
 - (c) selected members who, immediately before the commencement of the South African Police Service Amendment Act, 2008, served in the Organised Crime Component of the South African Police Service;
 - (d) selected members who, immediately before the commencement of the South African Police Service Amendment Act, 2008, served in the Commercial Crime Component of the South African Police Service; 20
 - (e) any other member selected on the basis of training, expertise and experience in respect of the combating and investigation of crimes;
 - (f) officers from any government department or institution, seconded to the Directorate for Priority Crime Investigation in terms of laws governing the public service; and 25
 - (g) any other suitable person appointed by the National Commissioner.
- (3) The criteria for selection of members contemplated in subsection (2)(e), apply to subsection (2)(b), (c) and (d). 30
- (4) The head of the Directorate for Priority Crime Investigation shall report to the Deputy National Commissioner responsible for crime detection and investigation and crime intelligence. 30
- (5) The National Commissioner must, in the prescribed form, issue an identity document under his or her signature to each person appointed to the Directorate for Priority Crime Investigation, which shall serve as proof that such person is so appointed. 35
- (6) No person may be appointed to the Directorate for Priority Crime Investigation, unless—
- (a) information with respect to that person has been gathered in a security screening investigation in terms of section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994); and 40
 - (b) the National Commissioner, after evaluating the gathered information, is satisfied that such person may be appointed to the Directorate for Priority Crime Investigation without the possibility that such person might be a security risk or that he or she might act in any way prejudicial to the efficiency of the Directorate for Priority Crime Investigation. 45
- (7) If the National Commissioner is satisfied, he or she must issue such person with a certificate in which it is certified that such person has successfully undergone a security clearance. 50
- (8) A member of the Directorate for Priority Crime Investigation may, from time to time or at such regular intervals as the National Commissioner may determine, be subjected to a further security screening.
- (9) A person who is already in possession of a certificate which reflects that a security clearance at the required level had already been issued to him or her, may be issued with a certificate referred to in subsection (7). 55
- (10) The National Commissioner may withdraw a certificate issued to any person in terms of subsection (7) if the National Commissioner obtains information which, after evaluation by him or her, causes him or her to reasonably believe that the person concerned could be a security risk or 60

could possibly act in any manner prejudicial to the efficiency of the Directorate for Priority Crime Investigation.

(11) If the certificate is withdrawn, the person concerned shall be regarded as unfit to continue to hold such office, and the National Commissioner must transfer such person from the Directorate for Priority Crime Investigation, and if such person cannot be deployed elsewhere in the Service, discharge him or her from the Service.

(12) The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), applies with regard to subsections (10) and (11).

(13) Despite subsection (6), the National Commissioner may provisionally allow the appointment of a person in the Directorate for Priority Crime Investigation, subject to the submission by such person of a completed application form for such screening, and the eventual successful security screening.

(14) (a) The remuneration, allowances and other service benefits of members of the Directorate for Priority Crime Investigation shall be determined by the Minister, in consultation with the National Commissioner and with the concurrence of the Minister of Finance.

(b) All other conditions of service of such members are prescribed in terms of section 24 of this Act.

(15) The Directorate for Priority Crime Investigation must investigate any matter falling within the ambit of subsection (1), assigned to it by the National Commissioner.

(16) The Minister shall establish a forum for government or other institutions which may assist in the combating or investigation of crime, in order to enhance cooperation and coordination between such institutions and the Directorate for Priority Crime Investigation, and such forum shall meet at least twice annually.

(17) Expenditure in connection with the administration and functioning of the Directorate for Priority Crime Investigation must be defrayed from monies appropriated by Parliament for this purpose to the departmental vote in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(18) The National Commissioner shall be the accounting officer for the monies referred to in subsection (17).

Inquiries by Head of Directorate for Priority Crime Investigation

16B. (1) (a) Subject to section 16(4), the Head of the Directorate for Priority Crime Investigation may, if he or she has reason to suspect that an offence under section 16(2) has been or is being committed, or that an attempt has been or is being made to commit such an offence, conduct an investigation or a preparatory investigation contemplated in subsection (11) on the matter in question.

(b) If the Head of the Directorate for Priority Crime Investigation, at any time during the investigation on a matter referred to in paragraph (a), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the investigation so as to include any offence which he or she suspects to be connected with the subject of the investigation.

(c) If the Head of the Directorate for Priority Crime Investigation, at any time during the investigation, is of the opinion that evidence relating to the commission of an offence which is not being investigated by the Directorate for Priority Crime Investigation has been disclosed, he or she must without delay notify the National Commissioner of the particulars of such matter, who shall deal with it in terms of section 16.

(2) (a) The Head of the Directorate for Priority Crime Investigation may, at any time prior to or during the conducting of the investigation in terms of subsection (1), designate any member of the Directorate for Priority Crime Investigation to conduct such an investigation, or any part thereof, on his or her behalf and to report to him or her: Provided that, for purposes of subsections (5), (7) and (8), only a member of or above the rank of Director may be so designated.

(b) A person so designated shall for the purpose of the investigation concerned have the same powers as those which the Head of the Directorate for Priority Crime Investigation has in terms of this section.

(3) All proceedings contemplated in subsections (5), (7) and (8) shall take place in camera and shall be recorded in such manner as the Head of the Directorate for Priority Crime Investigation may deem fit.

(4) The procedure to be followed in conducting an investigation shall be determined by the Head of the Directorate for Priority Crime Investigation at his or her discretion, having regard to the circumstances of each case.

(5) For the purposes of an investigation—

(a) the Head of the Directorate for Priority Crime Investigation may summon any person who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the Head of the Directorate for Priority Crime Investigation at a time and place specified in the summons, to be questioned or to produce that book, document or other object; and

(b) the Head of the Directorate for Priority Crime Investigation or a person designated by him or her may question that person, under oath or affirmation administered by the Head of the Directorate for Priority Crime Investigation, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been retained may, as long as it is in the possession of the Head of the Directorate for Priority Crime Investigation, at his or her request and at his or her own expense, and under the supervision of the Head of the Directorate for Priority Crime Investigation, be permitted to make copies thereof or to take extracts therefrom at any reasonable time.

(6) A summons referred to in subsection (5) shall—

(a) be in the prescribed form;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the Head of the Directorate for Priority Crime Investigation;

(c) be signed by the Head of the Directorate for Priority Crime Investigation or a person authorised by him or her; and

(d) be served in the prescribed manner.

(7) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (5), and such a person shall not be obliged to answer any question if such answer would expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (9)(b) or (c), or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(8) A person appearing before the Head of the Directorate for Priority Crime Investigation by virtue of subsection (5)—

(a) may be assisted at his or her examination by an advocate or an attorney; and

(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(9) Any person who has been summoned to appear before the Head of the Directorate for Priority Crime Investigation and who—

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the Head of the Directorate for Priority Crime Investigation from further attendance; or

(b) at his or her appearance before the Head of the Directorate for Priority Crime Investigation—

- (i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;
 - (ii) refuses to be sworn in or to make an affirmation after he or she has been asked by the Head of the Directorate for Priority Crime Investigation to do so; or
 - (c) having been sworn or having made an affirmation—
 - (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or
 - (ii) gives false evidence, knowing that evidence to be false or not knowing or not believing it to be true, shall be guilty of an offence.
- (10) If the Head of the Directorate for Priority Crime Investigation considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1)(a), the Head of the Directorate for Priority Crime Investigation may hold a preparatory investigation.
- (11) The provisions of subsections (2) to (8), inclusive, shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (10).
- (12) The powers in this section shall extend, with the changes required by the context, to the Divisional Commissioner: Crime Intelligence in respect of intelligence gathering related to offences referred to in section 16.”

Transfer of functions and redeployment of special investigators

4. (1) In this section—
- (a) any word or expression in respect of which a specific meaning has been assigned by section 1 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), has the same meaning; and
 - (b) “**fixed date**” means the date determined by the President in the *Gazette* for the commencement of section 3 of this Act;
- (2) As from the fixed date—
- (a) all powers exercised and functions performed by special investigators immediately before the fixed date shall be exercised and performed by the Directorate for Priority Crime Investigation;
 - (b) subject to subsection (7), any person, other than prosecutors, who immediately before the fixed date held the office of special investigator, becomes a member of the South African Police Service and must be transferred to the South African Police Service in accordance with the Labour Relations Act, 1995 (Act No. 66 of 1995); and
 - (c) the allocated budget and assets and liabilities of the Directorate for Special Operations must be transferred to the Directorate for Priority Crime Investigation in accordance with section 42 of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (3) The Registrar of Deeds must make the necessary entries and endorsements for the transfer of any property in terms of this section.
- (4) For the purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), no change of employer must be regarded as having taken place when the special investigators take up employment at the Directorate for Priority Crime Investigation.
- (5) The remuneration and other terms and conditions of the special investigators transferred in terms of subsection (2)(b) may not be less favourable than the remuneration and terms and conditions of service applicable to the special investigators immediately before their transfer and such investigators remain entitled to all rights, benefits, including pension benefits and privileges to which they were entitled to immediately before the transfer.
- (6) (a) The special investigators transferred in terms of subsection (2)(b) remain subject to any decisions, proceedings, rulings and directions applicable to those investigators immediately before their transfer to the extent that they remain applicable.
 - (b) Any proceedings against such investigators which were pending immediately before the transfer must be disposed of as if the special investigators had not been transferred.

(7) (a) The special investigators contemplated in subsection (2)(b) may be transferred to the South African Police Service only with their consent.

(b) If any of such investigators do not wish to be transferred to the South African Police Service, those investigators must indicate that in writing to the National Director for Public Prosecutions before the fixed date. 5

(8) This section does not affect the validity of any investigation or prosecution conducted or pending by the Directorate of Special Operations on or before the fixed date.

Short title and commencement

3. This Act is called the South African Police Service Amendment Act, 2008, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 10

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL, 2008

1. BACKGROUND

1.1 The Directorate of Special Operations (DSO), had been established in terms of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), as an investigative capacity under the National Prosecuting Authority. The DSO had been established to function in an intelligence-driven and prosecution-directed fashion. As a result of the fact that the implementation of the DSO's legal mandate was not entirely satisfactory, the mandate and location of the Directorate became the topic of a formal Commission of Inquiry, headed by Judge S Khampepe.

1.2 Particular aspects that were inquired into by the Commission related to the lack of coordinated relationships between the DSO, the South African Police Service and the intelligence structures of the Republic, a lack of oversight over the DSO by the Independent Complaints Directorate in respect of their law enforcement functions, a lack of oversight by the Inspector-General of Intelligence in respect of intelligence activities, non-compliance with the vetting procedures required by the National Prosecuting Authority Act, 1998, in respect of DSO members, liaisons by the DSO with foreign intelligence structures, the alleged leaking of information to the media on investigations of the DSO, and the concomittant media sensation created thereby, the fact that the DSO had established crime intelligence gathering capabilities outside its mandate, and the disjunction in political accountability and oversight. In respect of the last-mentioned issue, the DSO functions totally separate from the Minister of Safety and Security, which Minister has the overall responsibility to address the overall policing or investigative needs and priorities of the Republic.

1.3 In its statement on decisions taken as a result of the Report of the Khampepe Commission of Inquiry, dated 29 June 2006, Cabinet already alluded to conferring the political oversight and responsibility for the law enforcement component of the DSO to the Minister of Safety and Security. Cabinet also decided at that stage that the capacity of the relevant entities within the SAPS should be enhanced by investing them with the same legal powers as the DSO.

1.4 Various decisions were taken by Cabinet on the future of the DSO. Cabinet eventually decided that there was a need to address organised crime in a more comprehensive fashion, and to that end to amalgamate special investigators of the DSO with the selected members of the Commercial Crime Component of the South African Police Service and the selected members of the Organised Crime Component, into a new crime-combating unit to be established within the South African Police Service as the Directorate for Priority Crime Investigation.

1.5 On the fixed date (a date to be determined by the President), the relevant members of the DSO will become members of the SAPS. This will not include prosecutors, who will remain with the National Prosecuting Authority to strengthen the prosecutorial service in prosecuting cases which are being investigated by the Directorate for Priority Crime Investigation. The Bill provides that all members of the Directorate for Priority Crime Investigation must undergo a security screening, as provided for in the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

1.6 The Directorate for Priority Crime Investigation will investigate matters referred to in section 16 of the South African Police Service Act, 1995. These cases include organised crime as well as matters which require specialised knowledge. In terms of section 16 of the South African Police Service Act, 1995, all crimes must be investigated by the Provincial Commissioner.

1.7 However, the Provincial Commissioner may request the National Commissioner to coordinate a particular matter, or the National Commissioner may decide that a particular case should be coordinated nationally. In the event of any difference of opinion, the National Commissioner has the final say on who shall investigate a particular matter.

1.8 The Bill provides that the Minister of Safety and Security shall establish a forum of governmental and other institutions with an interest in combating organised crime to improve coordination of and cooperation with the Directorate for Priority Crime Investigation, which forum shall meet at least twice annually.

1.9 The Bill confers additional investigative powers to the Head of the Directorate for Priority Crime Investigation.

2. OBJECTS

The objects of the Bill are to provide for the establishment of a Directorate for Priority Crime Investigation. The Directorate for Priority Crime Investigation shall be headed by a Divisional Commissioner, appointed by the National Commissioner and who reports to the Deputy National Commissioner responsible for crime detection and crime intelligence. The Directorate for Priority Crime Investigation will consist of selected members of the DSO, selected members of the Organised Crime Component of the SAPS and selected members of the Commercial Crime Component of the SAPS, and such other members of the SAPS selected to serve in the Directorate for Priority Crime Investigation. Members of the DSO who are involved in intelligence matters will be considered for deployment in the SAPS Crime Intelligence Division. The Bill provides for the transfer of members of the DSO (excluding prosecutors) to the SAPS, for the vetting of members of the Directorate for Priority Crime Investigation, and for transitional measures in respect of the relocation of the DSO to the SAPS.

The Bill also provides that the validity of investigations of the DSO will not be affected by the relocation of the DSO to the SAPS. The transfer of members of the DSO to the SAPS will be done without negatively affecting their conditions of service or remuneration.

3. BODIES CONSULTED

The Bill was drafted in close liaison between the Department of Justice and Constitutional Development and the Department of Safety and Security. The National Prosecuting Authority and the DSO were also consulted in the process.

4. FINANCIAL IMPLICATIONS FOR STATE

Financial implications cannot be determined exactly at this stage. Additional funds may be required to acquire parity of the remuneration of SAPS investigators with that of DSO investigators. Provision must also be made for incidental costs such as information systems, data transfers and other incidental costs. Joint audit teams will assess the budget, assets and liabilities, as well as investigations of the DSO.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the South African Police Service are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 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 contains no provision pertaining to customary law or customs of traditional communities.

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