



For attention: Ms Babalwa Mbengo

Email: IPIDAmendmentBill@parliament.gov.za

2 October 2023

Dear Ms Mbengo

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

A handwritten signature in blue ink that reads 'Nicole Fritz'.

Nicole Fritz

Director

Executive Director: Nicole Fritz
Trustees: Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Palesa Morudu • Kalim Rajab • Gary Ratfe • Phila Zulu
Patrons: Prof. Thuli Madonsela • Lord Robin Renwick

1. Introduction

1.1. In its explanatory memorandum, the Independent Police Investigative Directorate Amendment Draft Bill ("Bill") lists as its first object to entrench the Independent Police Investigative Directorate's ("IPID") independence, as envisaged by Constitutional Court's judgment in *McBride v Minister of Police and Another* ("*McBride*").¹

1.2. Here, the Helen Suzman Foundation ("HSF") submits, in summary, that:

1.2.1. the Bill falls short by its own measure because it does away with a decisive role for the Parliamentary Committee for Police ("PCP") in appointing IPID's Executive Director ("IPID ED") and instead proposes that he/she be appointed by the Minister of Police ("Minister") in concurrence with Cabinet;

1.2.2. the IPID ED should instead be appointed by the PCP in consultation with the Minister, after a panel of suitably qualified persons that the PCP appoints, also in consultation with the Minister, recommends a candidate – not only to entrench IPID's independence but to give the public confidence that the IPID ED is appropriately qualified;

1.2.3. the President should proclaim into law section 6A of the Independent Police Investigative Directorate Act No. 1 of 2011 ("IPID Act"), which would formalise the Constitutional Court's order in *McBride* that Parliament be given an appropriate role in suspending and removing the IPID ED; and

1.2.4. the IPID ED's remuneration should be set to a statutory minimum and not as the Bill currently proposes that it be determined by the Minister in consultation with the Minister of Finance.

2. The Bill's Constitutional and Statutory Context

2.1. The Constitution requires IPID's independence. Section 206(6) of the Constitution provides:

"On receipt of a complaint lodged by a provincial executive, an *independent* police complaints body established by national legislation must investigate any alleged

¹ *McBride v Minister of Police and Others (Helen Suzman Foundation as Amicus Curiae)* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) ("*McBride*").

misconduct of, or offence committed by, a member of the police service in the province." (Emphasis added)

- 2.2. In *McBride*, the Constitutional Court held that this enshrined independence rendered unconstitutional the Minister's erstwhile power to suspend the IPID ED without Parliamentary oversight,² because it would "... expose IPID to constitutionally impermissible executive or political control."³
- 2.3. Recently, the Supreme Court of Appeal has also made plain that concentrated executive power imperils IPID's independence, explaining in the context of renewing the IPID ED's term of office,⁴ that "the principal threat to IPID's independence lies in the executive having exclusive powers over it, without oversight on the part of the legislature."⁵
- 2.4. Indeed, section 4(2) of the IPID Act, which the Bill leaves unchanged, expressly provides for IPID's institutional independence from the executive when it requires that it operate "independently from the South African Police Service", the political head of which is the Minister.⁶
- 2.5. Yet, while the Constitutional Court and the Supreme Court of Appeal have taken Parliamentary oversight to define IPID's institutional independence from the executive, the Bill has removed it entirely for a crucial moment in IPID's institutional life – appointing the IPID ED.

3. The Bill's Proposed Appointment Process for the IPID ED.

- 3.1. Section 6(1) of the IPID Act currently requires that the PCP confirm the Minister's nominee for IPID ED before he/she is appointed. The Bill removes the PCP from the appointment process entirely, without explanation, concentrating appointment power in the executive by proposing that the Minister appoint the IPID ED in concurrence with Cabinet.

² *McBride* para 40.

³ *Ibid.*

⁴ The Bill, laudably, does away with a renewable term for the IPID ED and instead provides for a single non-renewable term of seven to ten years.

⁵ *Helen Suzman Foundation v Robert McBride and Others* (1065/2019) [2021] ZASCA 36 (7 April 2021) para 26.

⁶ See section 206(1) of the Constitution.

- 3.2. This runs counter to the notion of IPID's institutional independence from the executive developed by the Constitutional Court and the Supreme Court of Appeal.
- 3.3. It is no answer that the Bill's proposed appointment process mirrors that provided for the Head of the Directorate for Priority Crime Investigation ("DPCI") because the Constitutional Court, in *McBride*, held that:

"In contradistinction to the DPCI, the satisfying independence in respect of IPID is arguably more stringent given that the Constitution expressly demands its independence."⁷
- 3.4. Indeed, section 4(2) of the IPID Act, which requires that IPID operate independently from the South African Police Service, the political head of which is the Minister, also suggests that parity with the DPCI is not the measure of IPID's independence.
- 3.5. As such, the least that IPID's constitutionally enshrined independence demands is that the PCP is left with its current role in appointing the IPID ED set out in section 6(1) of the IPID Act.
- 3.6. Nonetheless, HSF suggests that the appointment process can be optimised if the PCP, in consultation with the Minister, appointed a panel of suitably qualified persons to first interview applicants and then suggest a candidate that the PCP would ultimately approve or reject in consultation with the Minister.⁸
- 3.7. This would retain a constitutionally compelled role for Parliament in the appointment process of the IPID ED, afford a meaningful role for the Minister therein and offer the added benefit of assisting the PCP and the Minister in finding qualified candidates.

⁷ *McBride* para 37.

⁸ The Civilian Secretariat for the Police ("Secretariat") suggested inserting such a panel into the process for appointing the IPID ED in a previous iteration of the Bill. However, the Secretariat suggested that the panel be appointed solely by the Minister, who would in turn make the final decision of appointing the IPID ED. Since such an arrangement voids any role for Parliament in appointing the panel and in making the ultimate appointment, it would suffer the same defects that we suggest the Bill does here.

4. The Importance of Appointment Procedures

- 4.1. Concentrating the power to appoint the IPID ED in the executive simply increases the risk that the Minister appoints a politically aligned IPID ED, to the detriment of IPID's institutional integrity.
- 4.2. HSF appreciates that the Bill leaves in place the Constitutional Court's remedy in *McBride*, which gave a critical role to Parliament in suspending and removing an incumbent IPID ED for "misconduct, incapacity or incompetence" until Parliament rectified the IPID Act's constitutional defects.
- 4.3. However, it simply stands to reason that if the IPID ED is ultimately accountable to Parliament, it should be able to screen potential appointees, *as well as* remove appointees who have failed in their constitutional duties.
- 4.4. Indeed, as we have seen all too clearly with the recent removal of Adv. Busisiwe Mkhwebane as Public Protector, parliamentary processes for removing heads of key constitutional institutions are imperfect accountability mechanisms and are liable to draw the courts, at their peril, into political disputes.
- 4.5. Sensible, transparent appointment processes are not nearly as fraught and should be used as far as possible to prevent improper appointments, rather than relying on parliamentary removal processes that, in any event, generally commence when the institutional damage is done.

5. The President Should Proclaim Section 6A of the IPID Act into Effect

- 5.1. In *McBride*, the Constitutional Court held that sections 17DA(3) to 17DA(7) of the South African Police Services Act 68 of 1995 ("SAPS Act") should govern the suspension and removal of the IPID ED until Parliament could craft a constitutional suspension and removal process of its own.
- 5.2. That process came in the form of section 6A of the IPID Act,⁹ which provides that "a Committee of the National Assembly" may initiate removal proceedings against an

⁹ Section 6A was proposed in the Independent Police Investigative Directorate Amendment Act No. 27 of 2019, which was signed into law on 26 May 2020.

incumbent IPID ED for "misconduct, incapacity or incompetence" and that the Minister may only suspend an IPID ED once those removal proceedings have commenced.

5.3. However, over three years later, the President has not yet proclaimed section 6A of the IPID Act into effect, leaving the suspension and removal of the IPID ED still governed by the Constitutional Court's order in *McBride*.

5.4. HSF submits that the President should proclaim section 6A of the IPID Act into effect to complete the legislative response to the Constitutional Court's order in *McBride*.

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

6.1. 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."¹⁰

6.2. The Bill proposes that the IPID ED's remuneration be determined by the Minister with the concurrence of the Minister of Finance and thus does not heed the Constitutional Court's warning in *Glenister II*.

6.3. As such, HSF submits that comparable 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 a statutory minimum should be considered instead.

7. Conclusion

7.1. HSF has submitted that by concentrating power to appoint the IPID ED in the executive, the Bill falls short of its stated object to entrench IPID's independence as envisaged in *McBride*.

¹⁰ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 227.

- 7.2. We propose instead that the IPID ED be appointed by the PCP in consultation with the Minister, after a panel of suitably qualified persons that the PCP appoints, also in consultation with the Minister, recommends a candidate. This would not only better entrench IPID's independence, it would also give the public confidence that the IPID ED is appropriately qualified.
- 7.3. We have submitted further that the Bill falls short of entrenching IPID's independence by failing to provide a statutory minimum for the IPID ED's remuneration and that the President should proclaim into effect section 6A of the IPID Act to complete the legislative response to the Constitutional Court's order in *McBride*.