

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL, 2020

1. BACKGROUND

The review of the South African Police Service Act, 1995 (Act No. 68 of 1995) ("principal Act"), was necessary in view of the following:

- (a) The principal Act was adopted before the Constitution of the Republic of South Africa, 1996 ("Constitution"), and although amendments have been effected to the principal Act, with references to the Constitution, the principal Act had not been totally aligned to the Constitution and all the references to the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), where applicable, need to be aligned with the Constitution.
- (b) Policing in South Africa was based on the principles of the National Crime Prevention Strategy of 1996, and the White Paper on Safety and Security of 1998, adopted by Cabinet and which were based on the prescripts of the Constitution. A number of policies were adopted since then, namely the White Paper on Policing, 2016, the White Paper on Safety and Security, 2016, the Community Policing Policy, the Policy on a Single Police Service, the National Development Plan and the Community Policing Policy. The principal Act therefore needs to be aligned with these policies.
- (c) The Constitutional Court in the judgment of *Helen Suzman Foundation v the President and Others and Glenister v the President and Others* ("**Helen Suzman** judgment") (Cases CCT 07/14 and CCT 09/14) found certain sections of the principal Act to be unconstitutional and ordered the deletion of

those sections with immediate effect. The relevant sections of the principal Act must therefore be repealed in compliance with the *Helen Suzman* judgment. Furthermore, the Constitutional Court in *Mlungwana and Others v The State and Another* [2018] ZACC 45 found section 12(1)(a) of the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993) unconstitutional.

- (d) After the Marikana events, the Commission of Inquiry, headed by Judge Farlam, made recommendations, which included the appointment of a Panel of Experts to investigate various aspects relating to policing in general and crowd management in particular and report to the Minister of Police ("Minister") thereon. The Minister has received the Report of the Panel of Experts and the relevant recommendations made by the Panel have been included in the South African Police Service Amendment Bill, 2020("Bill").
- (e) Subsequent legislation pertaining to the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011), and the Civilian Secretariat for Police Service Act, 2011 (Act No. 2 of 2011) ("Civilian Secretariat for Police Service Act"), further necessitated amendments to the principal Act.
- (f) For the purpose of the practical application of the principal Act, certain provisions of the principal Act require amendments.

2. OBJECTS OF BILL

2.1 To align the principal Act with the Constitution and the policies mentioned above, in particular the National Development Plan, and the Policies on Community Police Forums and a Single Police Service.

2.2 The Bill proposes amendments to the Civilian Secretariat for Police Service Act, to provide for the establishment of neighbourhood patrolling and neighbourhood watch associations, community policing forums, district and provincial community policing boards and the National Community Policing Board.

2.3 The Bill further proposes amendments to the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993) ("Regulation of Gatherings Act"), to provide that in the instance of a gathering or demonstration, a member of the Service may only use minimum force which is reasonably necessary and proportional in the circumstances. In addition, deadly force may only be used if there is a threat of serious bodily harm to the member of the Service or to any other person, which force must only be used when reasonably necessary and proportional in the circumstances. Proposals are also made to address the decriminalisation by the Constitutional Court of not giving notice of a gathering by the convenor thereof.

3. SUMMARY OF BILL

3.1 *Ad clause 1*

This clause provides for the substitution, deletion and insertion of certain definitions.

3.2 *Ad clause 2*

This clause proposes the insertion of Chapter 1A which consists of sections 1A and 1B after section 1 of the principal Act and provides for the purpose of the principal Act and that members of the Service must deal with the public with dignity and

respect of their rights and in particular the rights of women, children and persons with disabilities.

3.3 **Ad clause 3**

Clause 3 proposes the substitution of the heading to Chapter 2 of the principal Act.

3.4 **Ad clause 4**

Clause 4 proposes the repeal of sections 2, 3 and 4 of the principal Act.

3.5 **Ad clause 5**

Clause 5 proposes the insertion of section 4A in Chapter 2 of the principal Act, which concerns the national policing policy, which the Minister must determine in terms of section 206(1) and (2) of the Constitution.

3.6 **Ad clause 6**

Clause 6 amends section 5 of the principal Act in order to align the section with section 199(1) of the Constitution, by referring to the establishment of the police service as the single police service.

3.7 **Ad clause 7**

This clause proposes amendments to section 6 of the principal Act by aligning it with the Constitution.

3.8 **Ad clause 8**

This clause proposes to amend section 8 of the principal Act by including a retired judge of the High Court on a board of inquiry established by the President, which will inquire into the Cabinet's loss of confidence in the National Commissioner.

3.9 **Ad clause 9**

Clause 9 proposes amendments to section 10 of the principal Act by substituting the Board of Commissioners with the Management Forum and including such other senior managers of the management of the Service as determined from time to time by the National Commissioner.

3.10 **Ad clause 10**

This clause proposes the amendment of section 11 of the principal Act by providing for the control and management of the Service by the National Commissioner, in accordance with the national policing policy, and the directions of the Minister, as determined in section 207(2) of the Constitution. The clause further provides for the insertion of subsections (1A) to (1D) in section 11, which reflect the powers of the National Commissioner and provide for the allocation of resources by the National Commissioner, as well as the allocation of a budget for a province and directions issued by the Minister to the National Commissioner in terms of section 207(2) of the Constitution.

3.11 **Ad clause 11**

Clause 11 proposes to amend section 12 of the principal Act by substituting the reference to "areas" in provinces for a reference to "districts". The clause further

inserts subsection (1A) and proposes the addition of subsections (4), (5) and (6), which expand upon the duties of a Provincial Commissioner.

3.12 **Ad clause 12**

This clause proposes amendments to section 13 of the principal Act and provides that where a member of the Service performs an official duty and is authorised by law to use force, such force may only be used if reasonably necessary and proportional in the circumstances. The clause provides that deadly force may only be used if reasonably necessary and proportional in the circumstances and when there is a threat of death or serious bodily harm to the member of the Service or another person. It is proposed that deadly force may not be used to protect property only. Provision is further made for instances in which members make official reports to the Service on the use of force by another member, or members, during the execution of their duties and further provides that no self-incriminating statement made by the member making such a report will be admissible as evidence against that member in criminal proceedings. Moreover, firearms that are fully automatic may not be used for purposes of law enforcement during a gathering or demonstration. In addition, the clause lists the conditions applicable to members who perform services outside the Republic. Paragraph (f) of this clause also proposes to substitute subsection (7) which has been found to be unconstitutional and which judgement will not be appealed. The wording proposed by the High Court in the matter of *The Residents of... and Others v the Minister of Police and Others* are followed, also in line with the judgment of *Minister of Police v Kunjana Case* CCT 253/15.

3.13 **Ad clause 13**

Clause 13 proposes amendments to section 15 of the principal Act and substitutes the reference to the Exchequer Act, 1975, for a reference to the Public Finance Management Act, 1999 (Act No. 1 of 1999), and provides the National Head of the Directorate for Priority Crime Investigation ("Directorate") with the authority to delegate his or her powers

3.14 **Ad clause 14**

This clause proposes the amendment of section 15A of the principal Act, to provide for the use of fingerprints for performing a vetting investigation referred to in section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), and the performance of integrity testing and lifestyle audits, referred to in the proposed section 28A of the principal Act.

3.15 **Ad clause 15**

Clause 15 provides for the substitution for subsection (2) of section 15L to include municipal police recruits in the requirement to submit DNA samples for purposes of forensic profiles to be included in the Elimination Index.

3.16 **Ad clause 16**

Clause 16 amends section 16 of the principal Act by substituting all references to the "Directorate for Priority Crime Investigation" for "Directorate", in accordance with the proposed amendments to section 1 of the principal Act.

3.17 **Ad clause 17**

This clause amends section 17 of the principal Act and substitutes the national public order policing "unit" for the national public order policing "capacity". Furthermore, the clause provides that the National Commissioner must report to Parliament, and shall copy the Civilian Secretariat and Independent Police Investigative Directorate, on a quarterly basis on the details listed in subsection (8), which this clause proposes to add to section 17, on the deployments of the national public order policing capacity. It is further provided that the national public order capacity, when deployed in a Province, shall operate under national command and control.";

3.18 **Ad clause 18**

Clause 18 proposes the amendment of section 17A of the principal Act by the deletion of the definition of "Directorate".

3.19 **Ad clause 19**

Clause 19 proposes the amendment of section 17C, by the addition of subsections (4) and (5), to ensure a cooperative approach between the National Commissioner and the National Head of the Directorate in drafting National Instructions, taking into account the particular circumstances of the Directorate.

3.20 **Ad clause 20**

Clause 20 proposes amendments to section 17CA of the principal Act by including academic qualifications as a factor which must be considered by the Minister in the appointment of the National Head, Deputy National Head and a Provincial Head of the Directorate. The clause also proposes to delete subsections (15) and (16) in line with the *Helen Suzman* judgment. The clause further proposes an amendment to

subsection (19) and provides that where circumstances so require, the services of any person within or outside the Service may be utilised for a disciplinary action within the Directorate.

3.21 **Ad clause 21**

Clause 21 proposes amendments to section 17D of the principal Act in compliance with the *Helen Suzman* judgment, which includes the deletion of section 17D(1A).

3.22 **Ad clause 22**

Clause 22 proposes an amendment to section 17DA(1) and the deletion of subsection (2) in accordance with the *Helen Suzman* judgment.

3.23 **Ad clause 23**

Clause 26 amends section 17E of the principal Act by substituting the reference to Head of the Directorate with "National" Head of the Directorate and propose to align the Act with the consequences of a refusal to issue a security clearance.

3.24 **Ad clause 24**

Clause 24 proposes to substitute subsections (2) and (3) of section 17F, to provide that the National Head of the Directorate may request a service arrangement regarding the performance of services of personnel from any other government department or government institution. The clause further proposes the insertion of subsection (3A), which provides that when the services of private service providers are required by the Directorate, such services must be obtained through the governmental procurement processes. Moreover, the clause substitutes the

reference to "Crime Intelligence Division of the Service" for a reference to "Intelligence Division of the Service".

3.25 **Ad clause 25**

This clause amends section 17J of the principal Act and proposes the substitution of the reference to the "Crime Intelligence Division of the Service" for a reference to the "Intelligence Division of the Service".

3.26 **Ad clause 26**

This clause proposes the deletion of subsections (4), (7) and (8) of section 17K of the principal Act in accordance with the **Helen Suzman** judgment.

3.27 **Ad clause 27**

Clause 27 proposes to amend section 17L of the principal Act by substituting the reference to the "Independent Complaints Directorate" for a reference to the "Independent Police Investigative Directorate". The clause extends the powers of the retired judge in respect of the investigation of complaints by members of the public and complaints by members of the Directorate in terms of section 17L(4). In addition, the clause provides for the appointment of an office manager in the office of the retired judge who will be responsible for all administrative, financial and clerical functions of the office of the retired judge.

3.28 **Ad clause 28**

Clause 28 proposes the insertion of Chapter 6B into the principal Act, which provides for the establishment of specialised units within the Service by the National

Commissioner, and the insertion of a Chapter 6C which provides for the establishment of an Intelligence Division for the Service, the line of reporting of the Divisional Commissioner of the Intelligence Division of the Service to the National Commissioner and when in the public interest to the Minister. The clause further provides for the determination of security classifications of members and employees by the Intelligence Division the discharge of members in respect of whom a security clearance had been degraded, withdrawn or refused.

3.29 **Ad clause 29**

This clause substitutes the heading to Chapter 7 of the principal Act with the following heading: "**Community Policing Forums and Boards**".

3.30 **Ad clause 30**

Clause 30 proposes an amendment to section 18 of the principal Act in order to substitute community police forums and boards for community "policing" forums and boards. Furthermore, the clause provides that the station commander, district commanders and the Provincial Commissioner shall be *ex officio* members of the community policing forum, sub-forum and board established at the police station concerned.

3.31 **Ad clause 31**

Clause 34 proposes the repeal of sections 19, 20, 21, 22 and 23 of the principal Act, as the content of the said provisions find more application in the Civilian Secretariat for Police Service Act and the Bill proposes amendments to the aforesaid Act to address the aforesaid.

3.32 **Ad clause 32**

Clause 32 proposes the amendment of section 24, by the insertion of a new paragraph (kA) in subsection (1), which empowers the Minister to make regulations, supplementing the Occupational Injuries and Diseases Act, 1993, in respect of injuries and diseases sustained or contracted by members in the course of their employment, or death as a result of such injury or disease.

3.33 **Ad clause 33**

Clause 33 proposes the amendment of section 25 of the principal Act by providing for the deletion of the reference to "orders" as only national instructions are issued by the National Commissioner.

3.34 **Ad clause 34**

Clause 34 proposes amendments to section 26 of the principal Act, and provides for the deletion of all references to Provincial "orders" as only Provincial instructions are issued by Provincial Commissioners.

3.35 **Ad clause 35**

Clause 35 substitutes section 27 of the principal Act to align it with the provisions of section 195 of the Constitution.

3.36 **Ad clause 36**

Clause 36 proposes the insertion of subsections (1A) to (1B) in section 28 of the principal Act. The proposed subsection (1A) provides that there may only be a

deviation from the prescribed recruitment process (which stipulates the scope and requirement of a post, the need to advertise a post, the qualifications and requirements for applications for a post, the requirements that a person may not apply for a post if the person has a criminal record and the requirement for a properly constituted panel to assess candidates for a post) and must be based on a justifiable reason which must be recorded in writing. The proposed subsection (1B) requires all posts to be filled following a transparent, competitive and merit-based process to ensure the best-suited person is appointed. It is required that any person appointed as a member of the Service must be a citizen of the Republic.

3.37 **Ad clause 37**

This clause proposes the insertion of sections 28A, 28B and 28C in the principal Act. The proposed section 28A provides for integrity testing and lifestyle audits of every person who is newly recruited or considered for appointment in the Service. Section 28B provides that the National Commissioner must ensure that fingerprints of members are taken and stored on a database maintained in the Division responsible for keeping fingerprints on a Personnel database kept separately from the Criminal Records. The National Commissioner may direct that fingerprints of members must be taken from time to time to enhance a professional police service on the principles of integrity and accountability, which may include establishing whether a member has been convicted of an offence. Section 28C provides that the National Commissioner must secure the integrity of fingerprints of members kept on the database referred to in section 28B, by taking appropriate, reasonable, technical and organisational measures to prevent the loss of, damage to, or unauthorised

destruction of information on the database and any unlawful access to, or processing of, information on the database.

3.38 ***Ad clause 38***

This clause proposes amendments to section 29 of the principal Act and provides that the Minister may designate employees employed in the Service in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994) ("Public Service Act"), and members of the Service appointed as public service members in terms of the Public Service Act, as members of the Service with different terms and conditions of service.

3.39 ***Ad clause 39***

This clause proposes amendments to section 32 of the principal Act by providing that the National Commissioner, in respect of members of the Service, and the National Head of the Directorate, in respect of members of the Directorate, shall determine the criteria for education, training and development that such members must undergo. In addition, the National Commissioner shall determine the criteria for education, training and development of police trainees and lateral appointees.

3.40 ***Ad clause 40***

Clause 40 proposes to amend section 33 of the principal act to provide that in addition to a Deed of Commission, an appointment certificate, issued by the National Commissioner or a President's Minute, bearing the signature of both the Minister and the President is proof of appointment as commissioned officer. The clause further provides that the commission of a commissioned officer shall terminate and be

deemed to be cancelled upon the removal from office of the National Commissioner, Deputy National Commissioner, Provincial or divisional Commissioner, or the National Head of the Directorate on the basis of misconduct. The clause also provides for the addition of subsection (6) to provide for consequences regarding his or her commission or rank, when a member who has left the Service is re-enlisted.

3.41 Ad clause 41

Clause 41 proposes to amend section 34 to provide for the consequences of a member being absent from official duties, without the permission of his or her commander, for a period exceeding one calendar month.

3.42 Ad clause 42

This clause amends section 35 of the principal Act by substituting the reference to the "Government Service Pension Act, 1973", for a reference to the "Government Employees Pension Law, 1996 (Proclamation No.21 of 1996)", and rectifies the reference to the Public Service Act in accordance with its definition, as proposed in clause 1 of the Bill.

3.43 Ad clause 43

Clause 43 proposes to amend section 36 of the principal Act by adding subsection (7), which provides that an application for re-instatement in terms of subsection (2) must be considered and finalised within 60 days of the date upon which such application was received by the National Commissioner.

3.44 Ad clause 44

Clause 44 proposes the repeal of section 37 of the principal Act, in view thereof that police trainees are not appointed as members during the period of training and there is thus no need for the discharge of such trainees if they do not successfully complete their basic training.

3.45 **Ad clause 45**

Clause 45 proposes to substitute section 40 of the principal Act by providing for the establishment of a disciplinary system by the National Commissioner, which involves dedicated, properly qualified and trained units to perform functions related to presiding officers and disciplinary officers.

3.46 **Ad clause 46**

Clause 46 proposes to amend section 43 of the principal Act, by providing that a member who is being detained is deemed to be suspended from the Service for the period of such detention, and proposes to delete instances where a member is serving a term of imprisonment, as section 36 provides for dismissal in the case of a sentence of imprisonment.

3.47 **Ad clause 47**

Clause 47 proposes amendments to section 45 of the principal Act by deleting the reference to section 212 of the Constitution and deleting subsection (10).

3.48 **Ad clause 48**

Clause 48 proposes to amend section 49(1) of the principal Act by aligning it with the relevant sections of the Constitution.

3.49 Ad clause 49

Clause 49 proposes to substitute section 60 of the principal Act to provide that property of the Service may only be seized or attached in consequence of a judgment or order of a court of law.

3.50 Ad clause 50

Clause 50 proposes to substitute section 63 of the principal Act to delete the reference to sections 215, 2018 and 219 of the Constitution.

3.51 Ad clause 51

Clause 51 proposes to amend section 64 of the principal Act by providing that Chapter 12 of the principal Act shall not be interpreted so as to derogate from the powers of the Minister responsible for local government or the members of the Executive Council responsible for transport, traffic matters and local government.

3.52 Ad clause 52

This clause amends section 64A(3) by adding paragraph (d), which adds to the requirements that must be met before the member of the Executive Council may approve an application for the establishment of a municipal police service, and provides that the member of the Executive Council must consider the feasibility of establishing a municipal police service. The decision must be taken in consultation with the National Commissioner and should the National Commissioner and the Member of the Executive Council be unable to agree on an application for the

establishment of a municipal police service, the Minister shall mediate between the parties.

3.53 **Ad clause 53**

Clause 53 proposes to amend section 64B of the principal Act by substituting the references to "chief executive officer" for references to "municipal manager".

3.54 **Ad clause 54**

Clause 54 proposes to amend section 64C of the principal Act by substituting the references to the "executive head of the municipal police service" for the "Chief of the municipal police service", and providing that the Chief of the municipal police service shall report to the Provincial Commissioner in order to ensure co-ordination of operational activities.

3.55 **Ad clause 55**

Clause 55 proposes the substitution of section 64D of the principal Act and provides that when a municipal police service is established, the municipal council, after consulting with the National Commissioner, shall appoint a fit and proper person as the Chief.

3.56 **Ad clause 56**

Clause 56 amends section 64E of the principal Act by adding the enforcement of the Regulation of Gatherings Act to the functions of a municipal police service. It is also made clear that the crime prevention function of municipal police officers does not include the investigation of crime.

3.57 Ad clause 57

Clause 57 proposes the insertion of sections 64EA and 64EB into the principal Act, which provides for the establishment of a public order policing capacity for a municipal police service and making section 13(3) of the principal Act, which concerns the use of force, applicable to members of a municipal police service. This corresponds with the provisions inserted in section 13 of the principle Act on the use of force. The proposed section 64EC provides that law enforcement officers and inspectors employed by a municipal council and who are appointed as peace officers by the Minister of Justice and Constitutional Development in terms of section 334 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), must within three months from the commencement of the South African Police Service Amendment Act, 2020, be integrated into a municipal police service, and shall serve as members of the municipal police service.

3.58 Ad clause 58

This clause proposes amendments to section 64K of the principal Act and inserts subsection (1A), which provides for the appointment of a national policing co-ordinating committee by the National Commissioner and the insertion of subsection (1B), which provides how the national policing co-ordinating committee will be constituted. The clause further amends section 64K(2), which provides that the National Commissioner, or a person designated by him or her, shall act as chairperson at a meeting of the national policing co-ordinating committee. The Bill provides for a reporting function of the national policing coordinating committee to the National Commissioner and the Minister.

3.59 Ad clause 59

Clause 59 proposes amendments to section 64L of the principal Act by substituting the reference to the "Road Traffic Act, 1989 (Act No. 29 of 1989)", for a reference to the "National Road Traffic Act, 1996 (Act No. 93 of 1996)". The clause further inserts subsection (1A) which provides that the Minister of Transport must consult with the National Commissioner and the national policing co-ordinating committee before determining the curricula for traffic officers. The clause further provides that where a municipal police service has failed to maintain national standards, the National Commissioner shall issue a notice of non-compliance to the relevant metropolitan council. The Minister may, in consultation with the relevant member of the Executive Council, upon consideration of the report referred to in subsection (4), and after considering representations from the municipal police service, repeal the establishment of the relevant municipal police service, if the non-compliance cannot be rectified within a period determined by the Minister and the member of the Executive Council.

3.60 Ad clause 60

Clause 60 proposes to rectify the numbering of the subparagraphs in section 64M(2) of the principal Act, and to substitute the reference to the "Minister for Provincial Affairs and Constitutional Development" for a reference to the "Minister responsible for Co-operative Governance and Traditional Affairs".

3.61 Ad clause 61

Clause 61 proposes to amend section 64O of the principal Act in order to provide for reasonable steps that must be taken by municipal police services in order to comply with certain provisions of the principal Act which apply to the municipal police services as prescribed by the Minister.

3.62 **Ad clause 62**

Clause 62 proposes to amend section 65 of the principal Act to provide for a penalty of imprisonment for a period of five years, as opposed to a period of 12 months, for receipt or possession of certain property.

3.63 **Ad clause 63**

Clause 63 provides for the insertion of section 65A in the principal Act, which provides for a new offence relating to the disposal of property and equipment of the Service, including uniforms, blue lights, radios, electronic equipment and medals, with a penalty of imprisonment of up to five years, if convicted.

3.64 **Ad clause 64**

Clause 64 proposes amendments to section 66 of the principal Act and substitutes the six-month period of imprisonment for a period of five years, if a person is convicted for wearing a uniform, distinctive badge or button when he or she was not entitled to do so. The clause further proposes the addition of subsection (3), which provides that where any business, which after having been ordered to refrain from using any insignia, emblem, title or symbol whether on a uniform, vehicle or otherwise, which may be confused with that used by the Service, fails to comply with such order, is guilty of an offence and if convicted, is liable to a fine of R100 000.

3.65 Ad clause 65

Clause 65 proposes to amend section 67 of the principal Act by providing for a sentence of imprisonment not exceeding 24 months, as opposed to 12 months, in respect of an offence referred to a subsection (1).

3.66 Ad clause 66

Clause 66 proposes to amend section 68 of the principal Act by substituting the six-month period of imprisonment in respect of the offences referred to in subsections (2) and (3) for a period of five years. The clause further proposes the addition of subsection (4), which provides that any person who is not a police official, military policy official or a traffic official and who is in possession of or operates a motor vehicle fitted with a lamp emitting blue light on a public road, is guilty of an offence and is liable upon conviction to a fine or imprisonment for a period not exceeding five years.

3.67 Ad clause 67

Clause 67 proposes to substitute section 70 of the principal Act to include, in addition to a member of the Service, any person employed by the Service, or a reservist, who wilfully discloses information including on a pending investigation in order to warn a suspect or possible suspect of such investigation or imminent arrest; or regarding planned actions or operations of the Service in order to forewarn any persons who may be affected by such action or operation.

3.68 Ad clause 68

Clause 68 proposes amendments to section 71 of the principal Act by proposing the substitution of the two-year period of imprisonment for the offences referred to in subsections (2) and (3), for a period of five years. The clause further proposes to substitute the five-year period of imprisonment for an offence referred to in subsection (4) for a period of 10 years.

3.69 **Ad clause 69**

Clause 69 proposes to insert section 71A into the principal Act, providing for an offence in respect of making false reports to the Service, spreading untruthful information or publishing information or hoaxes, knowing that it is false in any form causing a diversion and unnecessary use of resources in order to facilitate the commission of a crime. The penalty for the proposed crime is a fine or imprisonment for a period not exceeding five years or both. In addition, the section provides that a court which convicts a person for the aforementioned offence may, in addition to such a fine or imprisonment, order the accused to remunerate the Service for any unnecessary and wasteful use of resources proven during the trial. The clause further proposes the insertion of section 71B into the principal Act, which prohibits a member of the Service from conducting an investigation, or assisting with such investigation, if he or she has a financial or other interest in the investigation which may preclude him or her from exercising or performing his or her powers in an objective manner. Such a member is obliged to withdraw from the investigation if such a conflict of interest arises and the clause provides that a failure to disclose such a conflict is an offence.

3.70 **Ad clause 70**

Clause 70 proposes amendments to section 72 of the principal Act to ensure alignment with the reference to the repealed Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), and the Constitution. This clause further proposes the addition of subsections (5), (6) and (7). Subsection (5) provides that section 7 of the principal Act is only applicable in respect of Deputy National Commissioners and Divisional Commissioners appointed after the commencement of the envisaged South African Police Service Amendment Act, 2020("envisaged Act"). Subsection (6) provides that the Crime Intelligence Division will continue as the Intelligence Division of the Service after the commencement of the envisaged Act. Subsection (7) provides that personnel designated as members in terms of section 29 prior to the commencement of the envisaged Act shall be deemed to be members in terms of section 28(2).

3.71 **Ad clause 71**

Clause 71 proposes amendments to the Preamble of the principal Act in order to align it with the Constitution.

3.72 **Ad clause 72**

Clause 72 proposes to amend the arrangement of sections in the principal Act.

3.73 **Ad clause 73**

Clause 73 provides for the substitution of all references to the "Constitution of the Republic of South Africa, 1996", and the "Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)", wherever they occur, for the word "Constitution".

3.74 Ad clause 74

Clause 77 proposes an amendment to section 1 of the Regulation of Gatherings Act to amend the definition of "Police".

3.75 Ad clause 75

This clause proposes amendments to section 2 of the Regulation of Gatherings Act, to address the effect of the Mlungwana Constitutional Court Judgment, on decriminalisation of the non-notification of gatherings by the convenor thereof.

3.76 Ad Clause 76

This clause proposes amendments to section 9 of the Regulation of Gatherings Act in order to align same with section 13(3) of the principal Act, as amended in the Bill.

3.77 Ad Clause 77

This clause proposes amendment to section 11 of the Regulation of Gatherings Act, to address the effect of the Mlungwana Constitutional Court Judgment, on decriminalisation of the non-notification of gatherings by the convenor thereof.

3.78 Ad Clause 78

Clause 78 of the Bill proposes to repeal section 12(1)(a) and section 12(2) as well as amending the penalty clause in line with the Constitutional Court judgment of

Mlungwana, where the offence relating to the failure of a convenor of a gathering to notify the local authorities of the gathering, was found to be unconstitutional.

3.79 **Ad clause 79**

Clause 79 proposes an amendment to the Road Traffic Act, 1996 (Act No. 93 of 1996), to insert subsection (2C) in section 75, providing that whenever the Minister of Transport, in terms of this section has made a regulation regarding *curricula* for traffic officers, the National Commissioner and the national policing coordinating committee, referred to in section 64K(1A) of the principal Act, shall be consulted before such *curricula* are published in the *Gazette*.

3.80 **Ad clause 80**

This clause proposes the insertion of the definition of "district" in section 1 of the Civilian Secretariat for Police Service Act.

3.81 **Ad clause 81**

Clause 81 provides for the insertion of Chapter 2A in the Civilian Secretariat for Police Service Act, which provides for the establishment and functioning of neighbourhood patrolling and neighbourhood watch associations, community policing forums, district, provincial and community policing boards and the National Community Policing Board.

3.82. **Ad clause 82**

This clause inserts section 17A into the Civilian Secretariat for Police Service Act, which provides for the oversight and support of community policing forums and community policing boards by the provincial secretariats.

3.83. Ad clause 83

This clause proposes the addition of subsection (8) to section 34 of the Civilian Secretariat for Police Service Act, which provides that the community policing forums and community policing boards already established in terms of the principal Act where the envisaged Act comes into operation, will be regarded as having been established in terms of Chapter 2A of the Civilian Secretariat for Police Service Act.

3.84 Ad clause 84

Clause 84 proposes an amendment to the long title of the Civilian Secretariat for Police Service Act, 2011, to include the establishment and functions of neighbourhood patrolling and neighbourhood watch associations and community policing forums and boards to the objects of said that Act.

3.85 Ad clause 85

Clause 85 proposes amendments to the arrangement of sections of the Civilian Secretariat for Police Service Act.

3.86 Ad clause 86

Clause 86 provides the short title and commencement of the envisaged Act and states that it will come into operation on a date determined by the President in the *Gazette*.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

4.1 Requests were made to the following in order to obtain inputs regarding the practical application of the Bill:

- (a) The Department for Public Service and Administration;
- (b) the National Commissioner of the South African Police Service;
- (c) the National Head of the Directorate for Priority Crime Investigation;
- (d) the Judge for the Directorate for Priority Crime Investigation;
- (e) the Executive Director of the Independent Police Investigative Directorate;
- (f) the Heads of the Departments of Community Safety in the respective provinces;
- (g) the Community Police Fora;
- (h) the South African Policing Union (SAPU);
- (i) the Police and Prisons Civil Rights Union (POPCRU);
- (j) the Chief Executive Director: Private Security Industry Regulatory Authority (PSIRA); and
- (k) National Treasury.

4.2 The inputs received from the respective offices which contributed, together with the policy documents, court judgments and report of the Panel of Experts referred to in the background of this memorandum on the objects of the Bill, were used to draft a Working Document setting out the proposed amendments on a complete copy of the Bill, showing the context of the proposed amendments.

4.3 The draft Working Document was sent out for comments to all addressees mentioned in paragraph 4.1.

4.4 The Bill was then developed on the basis of further comments received.

4.5 The Independent Police Investigative Directorate and the retired judge were also consulted.

4.4 The draft Bill was then circulated to all relevant Directors General, including the Department of Transport and the Department of Home Affairs, for comments and their comments addressed.

5. FINANCIAL IMPLICATIONS FOR STATE

5.1 The implementation of the Bill can be accommodated within the MTEF, three year and five year strategic planning and budgets of the South African Police Service and the Civilian Secretariat for Police Service.

5.2 A national policing co-ordinating committee is already being utilised in practice, but the Bill will provide a proper legal basis. It will, however, not require additional funds.

5.3 The proposed stipends and funding of pre-authorized projects of Community Policing Forums will be the responsibility of Provincial Secretariats and provincial budgets.

5.4 It is planned to implement the Bill in a phased manner.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department: Civilian Secretariat for Police Service are of the opinion that the Bill must be dealt with in accordance with the procedure established in section 76 of the Constitution.

6.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.

6.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the Constitutional Court judgment of ***Ex-Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill***¹ (“***Liquor Bill*** judgment”), Cameron AJ held the following:

"[27] *It must be borne in mind that section 76 is headed 'ordinary Bills*

¹ (CCT/12/99) [1999] ZACC 15.

affecting provinces'. This is my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

[29] *Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76 (1) or the section 76(2) procedure...".*

6.4 Following the ***Liquor Bill*** judgment, the Constitutional Court in the judgment of ***Tongoane and Others vs Minister for Agriculture and Land Affairs and Others***² ("Tongoane judgment") confirmed the following:

"[59] *...the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.*"

6.5 Furthermore, the Constitutional Court held that:

"[66] *...procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them...they are fundamental to the role of the NCOP in ensuring that provincial*

² 2010 (8) BCLR 741 (CC).

interests are taken into account in the national sphere of government...".

6.6 As the Court held in the ***Tongoane*** judgment, a Bill must be tagged as a section 76 Bill if its provisions in substantial measure deal with a Schedule 4 functional area. We are therefore of the view that the Bill should be classified as a section 76 Bill, which is an ordinary Bill affecting provinces, as its provisions fall within a functional area listed in Schedule 4 to the Constitution, namely "Police".

6.7 The State Law Advisers are of the opinion that it is not necessary to refer the 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), as the Bill does not contain provisions pertaining to customary law or customs of traditional communities.