



**FW de Klerk**  
FOUNDATION

**THE FW DE KLERK FOUNDATION**  
*Upholding South Africa's National Accord*

**To:** The Portfolio Committee on Police  
For attention: Ms. Babalwa Mbengo  
Per email [IPIDAmendmentBill@parliament.gov.za](mailto:IPIDAmendmentBill@parliament.gov.za)  
**RE:** Comments on the IPID Amendment Bill [B21-2023]  
**Date:** Deadline for comments: Monday, 02 October 2023

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**FW DE KLERK FOUNDATION SUBMISSION ON THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE AMENDMENT BILL [B21-2023]**

Dear Honourable Minister Bheki Cele

**1. INTRODUCTION**

- 1.1 We refer to your invitation for written submissions on the Independent Police Investigative Directorate Amendment Bill (“the Bill”) submitted to Parliament and referred to the Portfolio Committee on Police.
- 1.2 The FW de Klerk Foundation (“the Foundation”) is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
- 1.3 To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
- 1.4 As such, the Foundation welcomes this opportunity to make a concise submission to the Portfolio Committee on the Bill.
- 1.5 We trust that our submission will assist the Portfolio Committee in its deliberations regarding the Bill. We are also available to make a verbal submission if required.

**2. LEGAL FRAMEWORK**

- 2.1 The Independent Police Investigative Directorate (‘IPID’) Amendment Bill (‘The Bill’) seeks to amend the Independent Police Investigative Directorate Act 1 of 2011 to *inter alia* “provide for the Directorate’s institutional and operational independence”.

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- 2.2 The foundational Act established IPID as an independent oversight body mandated to investigate complaints and allegations against law enforcement agencies, including the South African Police Service (SAPS) and municipal services.
- 2.3 The need for this amendment can be traced back to the Constitutional Court judgment in the case of *McBride v Minister of Police and Another (CCT 100/09 [2010] ZACC 10)*. In this case, the Constitutional Court declared specific sections of the original IPID Act invalid. Particularly, the Court found Section 6(3)(a) and 6(6) of the Act to be unconstitutional, as they granted the Minister of Police unilateral power to suspend, discipline, or remove the Executive Director of IPID without Parliamentary oversight.
- 2.4 In response to the *McBride* judgment, the Amendment Act of 2019 was enacted to address the constitutional shortcomings identified by the Court. However, the need for further comprehensive amendments to the Act became apparent, prompting the current IPID Amendment Bill.
- 2.5 Notably, the current Bill is substantially different from the version that was issued for public comment in 2022.
- 2.6 The initial draft aimed to create a more transparent and independent selection process for the Executive Director of IPID. However, the final version presented to Parliament deviates significantly from this intent, maintaining significant appointment powers vested in the Minister of Police and Cabinet, limiting Parliamentary oversight and involvement in the appointment process.
- 2.7 Section 59(1)(a) of the Constitution mandates public involvement in the legislative and other processes of the National Assembly and its committees. By deviating from the version initially made available for public input, the current IPID Amendment Bill impedes the public's ability to engage effectively in the legislative process. The departure from the version initially presented for public comment may raise questions about adherence to the principles of open governance outlined in Section 59(1)(b) of the Constitution. While the introduction of new Bills is a standard practice, this deviation prompts a closer look at the transparency and inclusivity of the legislative process in comparison to the version made available for public input.
- 2.8 This Bill is in conflict with international instruments, such as the Universal Declaration of Human Rights ('UDHR') and the International Covenant on Civil and Political Rights ('ICCPR'), which outline transparency and public participation as integral to the functioning of democratic societies.
- 2.9 One of the key objectives of the Bill is to entrench the institutional and operational independence of IPID. This includes ensuring that IPID remains independent, impartial, and exercises its powers and functions without fear, favour, or prejudice, aligning with the directives of the *McBride* judgment.
- 2.10 By expanding IPID's investigative mandate to encompass criminal offenses such as rape and murder committed by law enforcement officers, the Bill aligns with international human rights standards, specifically Articles 3 and 5 of the UNDHR and Articles 6 and 7 of the ICCPR, upholding the Right to Life and Freedom from Torture.

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- 2.11 By introducing Clause 4, which grants the Minister of Police substantial authority in unilaterally appointing the Executive Director of IPID with Cabinet concurrence, for a non-renewable term of 7 to 10 years, the Bill significantly influences the appointment process and tenure of a crucial position within IPID. This delegation of appointment authority outlined in Clause 4 may potentially be at odds with democratic principles and constitutional checks and balances, raising important constitutional and governance considerations.
- 2.12 Section 206(6) of the Constitution states that, *“on receipt of a complaint lodged by a provincial executive, an **independent** police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province”*
- 2.13 The intent of Section 206(6) of the Constitution is thus to ensure that oversight bodies operate independently to maintain public confidence and trust. Clause 4 of the Bill, by giving significant appointment powers to the Minister of Police, contradicts this intent by potentially subjecting IPID to political influence, thereby undermining its independence.
- 2.14 This further outlines the conflict between the Bill's stated objective of entrenching the institutional and operational independence of IPID, and the potential undermining of this independence by Clause 4 of the Bill.
- 2.15 Clause 4 of the Bill is also in stark contrast to Section 1(c) of the Constitution as it undermines the foundational principle of the separation of powers, a cornerstone of democratic governance. Section 1(c) of the Constitution emphasises that South Africa's government is based on the supremacy of the Constitution and the rule of law, recognising the distinct roles and functions of the legislative, executive, and judicial branches of government and ensuring that no one branch oversteps its authority or interferes unduly with the functions of another.
- 2.16 In contrast to this, Clause 4 of the Bill concentrates significant appointment power in the hands of the Minister of Police and Cabinet regarding the Executive Director of IPID. It allows the Minister of Police, in concurrence with the Cabinet, to unilaterally appoint the Executive Director of IPID for a non-renewable period of not less than 7 years and not longer than 10 years. This concentration of power in the executive branch contradicts the principle of separation of powers, as it bypasses a more inclusive and balanced appointment process involving other branches of government, particularly the legislative branch.
- 2.17 Such a concentration of power is also fundamentally out of tune with international norms that advocate for a transparent and merit-based selection process for key positions in oversight bodies. The United Nations Guidelines on the Role of Prosecutors ('UNGP') and the Basic Principles on the Independence of the Judiciary ('BJIP Principles') highlights the importance of ensuring that appointments are based on objective criteria and free from any undue influence.
- 2.18 Furthermore, the current Bill before us does not align with the Constitutional Court's judgment in *McBride*, as it fails to conform to the spirit and essence of the Court's directives. While the original judgment emphasised the necessity of maintaining IPID's independence and ensuring oversight mechanisms free from undue political influence, the Bill in its present form grants significant

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appointment powers to the Minister of Police and Cabinet regarding the Executive Director of IPID. It is for these reasons that the State Law Advisor has refused to certify the Bill as constitutionally sound, specifically highlighting that Clause 4 of the Bill conflicts with the Constitution's principle of entrenched independence for IPID.

2.19 The Bill's departure from the Constitutional Court's directives also raises concerns in line with international standards. International human rights instruments emphasise the importance of establishing and maintaining independent oversight mechanisms to ensure accountability and transparency in law enforcement agencies. The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, for instance, underscore the necessity of independent and impartial investigations into alleged human rights violations by law enforcement.

### **3. THE FW DE KLERK FOUNDATION'S VIEWS:**

- 3.1 The Foundation acknowledges the IPID Amendment Bill's commendable effort to broaden the scope of crimes falling within the IPID's investigative mandate, including heinous offences such as rape and murder committed by law enforcement officers while on or off duty. This expansion aligns with international human rights standards, such as the UNDHR and ICCPR, that emphasise the importance of accountability and justice, especially concerning severe violations of human rights.
- 3.2 However, the Foundation expresses grave concerns regarding Clause 4 of the Bill, which concentrates appointment powers of the Executive Director of IPID in the hands of the Minister of Police and Cabinet, contrary to the foundational principles outlined in the Constitution.
- 3.3 The Constitution upholds the doctrine of separation of powers, a cornerstone of democratic governance, which delineates distinct roles for the executive, legislative, and judicial branches to prevent the undue consolidation of authority. The concentration of appointment powers within the executive, as proposed in Clause 4 of the Bill, fundamentally contradicts this constitutional objective.
- 3.4 One of the fundamental objectives of the Bill is to entrench the institutional and operational independence of IPID, ensuring impartiality and freedom from undue influence. However, Clause 4 undermines this objective by granting unilateral appointment authority to the Minister of Police and Cabinet. This provision risks compromising the agency's autonomy, potentially subjecting IPID to political pressures that could compromise its independence. This erosion of institutional independence could impede IPID's ability to effectively oversee law enforcement agencies.
- 3.5 The Bill's appointment process, envisioned in Clause 4, lacks the necessary checks and balances that should be integral to such a critical selection. In a democratic system, a balanced and more inclusive appointment process involving multiple branches of government is crucial to uphold transparency and accountability. The absence of broader scrutiny and involvement potentially compromising the credibility of this oversight mechanism.

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- 3.6 The concentration of appointment powers within the executive stands in contrast to established international norms and best practices. International human rights instruments, including the UNGP and the BJIP Principles emphasise that appointments to key positions in oversight bodies should be based on objective criteria and remain free from undue influence or control by the executive branch. The proposed appointment mechanism in Clause 4 does not align with these fundamental principles set forth by international law.
- 3.7 Furthermore, the Foundation is deeply troubled by the deviation of the Bill, specifically Clause 4, from the directives of the Constitutional Court. In *McBride*, The Court emphasised the need for IPID's independence and a transparent selection process for the Executive Director, aligning with democratic principles. Currently, The Bill grants excessive appointment powers to the Minister of Police and Cabinet, conflicting with the court's emphasis on transparency and independence.
- 3.8 Adherence to the Constitutional Court's guidance is vital for the Bill's constitutionality and alignment with democratic principles. Clause 4 warrants careful reevaluation to uphold constitutional intent and democratic values.

#### **4. CONCLUSION**

- 4.1 In light of the arguments presented, the Foundation recommends a reconsideration of Clause 4 of the Bill. Specifically, we propose a redraft that ensures a more balanced and transparent appointment process for the Executive Director of IPID, in line with constitutional principles and international best practices.
- 4.2 The Foundation thus recommends the following revisions to Clause 4:
- The appointment of the Executive Director of IPID should involve a consultative and merit-based selection process, with input from multiple stakeholders, including the National Assembly and civil society organisations specialising in law enforcement oversight.
  - The appointment should require the approval of the National Assembly, reinforcing democratic accountability and reflecting the importance of legislative oversight in critical appointments within the criminal justice system.
  - The appointment process should be guided by transparent and objective criteria, ensuring that the candidate possesses the necessary qualifications, experience, and commitment to uphold IPID's independence and impartiality.
- 4.3 Consistent with the constitutional principles underpinning democratic governance, the rule of law, and reflecting the Constitutional Court's directives, a revised Bill should prioritise the separation of powers, public participation, and adherence to international human rights standards. This approach will fortify IPID's independence, reinforce oversight in law enforcement, and ultimately enhance public trust and confidence in the South African criminal justice system.

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