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GENERAL NOTICE

NOTICE 523 OF 2008

INTRODUCTION OF THE GENERAL LAW AMENDMENT BILL

The Minister for Safety and Security intends to introduce the General Law Amendment Bill, 2008, in the National Assembly shortly. The explanatory summary and the Bill are hereby published in accordance with Rule 241 (1) (c) of the Rules of the National Assembly.

The General Law Amendment Bill proposes:

To amend the South African Police Service Act, 1995, in order to —

- a) 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;
- b) transfer the investigative capacity and operational powers of the Directorate of Special Operations, established in terms of the National Prosecuting Authority Act, 1998, to the South African Police Service; and
- c) provide for matters connected thereto.

Copies of the Bill can be obtained from:

1. Government Printer – Pretoria
2. Mrs. B. Erasmus
Presidia Building 3rd Floor
Pretorius Street
PRETORIA
0002
Telephone No. 012 393 7062
E mail: ErasmusB@saps.org.za
3. On the Internet on the South African Police Service website:
<http://www.saps.gov.za>

REPUBLIC OF SOUTH AFRICA

GENERAL LAW AMENDMENT BILL

(MINISTER FOR SAFETY AND SECURITY)

[B — 2008]

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.

B I L L**To amend the South African Police Service Act, 1995, in order to—**

- (a) 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;**
- (b) transfer the investigative capacity and operational powers of the Directorate of Special Operations, established in terms of the National Prosecuting Authority Act, 1998, to the South African Police Service; and**
- (c) provide for matters connected thereto.**

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

Amendment of Act 68 of 1995

- 1. The South African Police Service Act, 1995, is amended by-**

- (a) The amendment of section 16 of the Act, by-
- (i) the substitution for paragraphs (i) and (j) of subsection (2) of the following paragraphs-
 - (i) in respect of which the investigation in the Republic by the Service is requested by an international police agency or the police of a foreign country; **[and]**
 - (j) in respect of which the prevention or investigation by members under the command of a Provincial Commissioner will detrimentally affect or hamper the prevention or investigation of circumstances referred to in paragraphs (a) to (l); and
 - (ii) the insertion of a new paragraph (k) in subsection (2):
"(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)."
- (b) the insertion of the following new sections 16A and 16B, after section 16:

"Directorate for Priority Crime Investigation

16A.(1) There is hereby established, as a Division in the Service, a Directorate for Priority Crime Investigation in order to combat and investigate any criminal conduct or endeavour thereto as set out in section 16(2).

(2) The Directorate for Priority Crime Investigation comprises—

- (a) the head thereof, appointed as a Divisional Commissioner by the National Commissioner;
- (b) all selected officials, other than prosecutors, who, immediately before the commencement of the General Law Amendment Act, 2008, held office as members of the Directorate of Special Operations

referred to in section 3A of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

- (c) all selected members who, immediately before the commencement of the General Law Amendment Act, 2008, were serving in the Organised Crime Component of the South African Police Service;
- (d) all selected members who, immediately before the commencement of the General Law Amendment Bill, 2008, were serving in the Commercial Crime Component of the South African Police Service;
- (e) any member selected on the basis of training, expertise and experience in respect of the combating and investigation of crimes mentioned in this section and transferred to the Directorate for Priority Crime Investigation;
- (f) any other employee in the Service whose services is required at the Directorate for Priority Crime Investigation, and who is transferred to the Directorate for Priority Crime Investigation;
- (g) any other person seconded from any Government department or institution, to serve in the Directorate for Priority Crime Investigation;
- (h) and any other person appointed, subject to subsection (6), to serve in the Directorate for Priority Crime Investigation.

(3) 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;

(4) 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.

(5) Subject to subsections (8) and (11), 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 as referred to in section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994); and

(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.

(6) If the National Commissioner is satisfied as contemplated in subsection (5)(b), he or she must issue a certificate with respect to such person in which it is certified that such person has successfully undergone a security clearance.

(7) Any 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 as contemplated in subsection (6).

(8) If, on the date of commencement of the General Law Amendment Act, 2008, any person referred to in subsection (2), is in possession of a certificate which reflects that a security clearance at the required level had already been issued to that person, the National Commissioner may issue a certificate referred to in subsection (6) to the person involved.

(9) The National Commissioner may withdraw a certificate referred to in subsection (6) if he or she obtains information which, after evaluation by him or her, causes him or her to believe that the person in question could be a security risk or could possibly act in

any manner prejudicial to the efficiency of the Directorate for Priority Crime Investigation.

(10) If the certificate referred to in subsection (6) is withdrawn, the person concerned shall be unfit to continue to hold such office and the National Commissioner must transfer him or her from the Directorate for Priority Crime Investigation, or if the person involved, in view of a security risk, cannot be employed elsewhere in the Service, discharge him or her from the Service.

(11) Notwithstanding the provisions of subsections (5) and (6), the National Commissioner may provisionally allow the appointment of a person in the Directorate for Priority Crime Investigation, subject to the submission by the person involved of a completed application form for such screening, and the eventual successful security screening referred to in subsection (5).

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

(13) 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.

(14) Expenditure in connection with the administration and functioning of the Directorate for Priority Crime Investigation must be defrayed from moneys appropriated by Parliament for this purpose to the Departmental vote in terms of the Public Finance Management Act, 1999.

(15) The National Commissioner shall be the accounting officer for the monies referred to subsection (14).

16B. Inquiries by Head of Directorate for Priority Crime Investigation

(1) (a) If the Head of the Directorate for Priority Crime Investigation has reason to suspect that an offence under section 16 has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may, subject to section 16(4) and (5), and subsection (13) conduct an investigation, or a preparatory investigation as referred to in subsection (11), on the matter in question.

(b) If the Head of the Directorate for Priority Crime Investigation, at any time during the conducting of an 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, whether or not it is an offence referred to in paragraph (a), 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 conducting of an investigation, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the Directorate for Priority Crime Investigation, he or she must without delay inform the National Commissioner of the particulars of such matter.

(2) (a) The Head of the Directorate for Priority Crime Investigation may, if he or she decides to conduct an investigation, at any time prior to or during the conducting of the investigation designate any member of the Directorate for Priority Crime Investigation, to conduct the investigation, or any part thereof, on his or her behalf and to report to him or her: Provided that, for purposes of subsections (6), (8), and (9), 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.

(c) The Treasury Regulations made under section 76 of the Public Finance Management Act, 1999 (Act No.1 of 1999), in respect of

commissions of inquiry shall apply with the necessary changes in respect of a person so designated.

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place in camera.

(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) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the Head of the Directorate for Priority Crime Investigation may deem fit.

(6) 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;

(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 taken under this section may, as long as it is in the possession of the Head of the Directorate for Priority Crime Investigation, at his or her request be allowed, at his or her own expense and under the supervision of the Head of the Directorate for Priority Crime Investigation, to make copies thereof or to take extracts therefrom at any reasonable time.

(7) A summons referred to in subsection (6) 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 authorized by him or her; and

(d) be served in the prescribed manner.

(8) (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 (6), and such a person shall not be obliged to answer any question upon the ground that the answer would tend to 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 (10) (b) or (c), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(9) A person appearing before the Head of the Directorate for Priority Crime Investigation by virtue of subsection (6)-

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

(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.

(10) 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;

(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 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;

(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;

(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.

(11) 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.

(12) The provisions of subsections (2) to (9), inclusive, shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (11).

(13) 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

2. (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;
- (b) "fixed date" means the date determined by the President for the commencement of section 1 of this Act;
- (c) "National Commissioner" means the National Commissioner of the South African Police Service; and
- (d) "Police Act" means the South African Police Service Act, 1995 (Act No. 68 of 1995).

(2) As from the fixed date all powers exercised and functions performed by Special Investigators immediately before the fixed date, shall be exercised and performed under the control and direction of the National Commissioner or his or her delegate, whether in general or in a specific instance.

(3) As from the fixed date, but subject to subsection (6), any person who immediately before the fixed date holds the office of Special Investigator, becomes a member of the South African Police Service.

(4) Notwithstanding the repeal of section 40(2) of the National Prosecuting Authority Act, 1998, any regulation made under that subsection remains valid and applicable to a person referred to in subsection (3) until repealed or amended in terms of a regulation made under section 24 of the Police Act: Provided that the conditions of service applicable to such a person immediately before the fixed date may not be affected to his or her detriment, and no such condition of service may, after that date, be construed or applied in a manner which is less favourable to the person concerned than the manner in which it was construed or applied immediately before that date.

(5) If the salary scale of a special investigator of the Directorate of Special Operations does not fall within existing scales of the South African Police Service, the special investigator involved must be appointed on a personal scale.

(6) The Cabinet member for justice may, in consultation with the Cabinet members for the public service and for finance, and after consultation with the National Director, in respect of any Special Investigator who chooses not to remain in that office until immediately before the fixed date, determine benefits to be awarded to the person concerned in respect of the termination of his or her office as a Special Investigator, but this subsection does not affect the right of such a person to resign from such office in terms of the law as it applied before this Act had been passed.

(7) Any special investigator who does not wish to be transferred to the South African Police Service, must indicate that in writing before the fixed date.

(8) (a) If a former Special Investigator referred to in subsection (6) received any benefits in terms of that subsection

in respect of the termination of his or her office as a Special Investigator, he or she may not—

- (i) without the written consent of the Cabinet member for policing, be appointed as a member of the South African Police Service or perform any remunerated work for the South African Police Service; or
- (ii) without the written consent of the Minister, be appointed as a member of the prosecuting authority or perform any remunerated work for the prosecuting authority.

(b) Written consent as contemplated in paragraph (a) may be given on the conditions that the Cabinet member for policing or the Minister, as the case may be, may determine.

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

(10) The allocated budget and assets of the Directorate of Special Operations, must be transferred to the South African Police Service in terms of and according to the requirements of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

Short title and commencement

3. This Act is called the General Law Amendment Act, 2008, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE GENERAL LAW AMENDMENT BILL, 2008

1. BACKGROUND

1.1 The Directorate of Special Operations (DSO) had been established in terms of an amendment to the National Prosecuting Authority Act, 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, 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, and 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, and 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 concomitant 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 for Safety and Security, which Minister has the overall responsibility to address the overall policing/investigative needs and priorities of the Republic.

1.3 In its statement on decisions taken upon 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 for 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 of 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 organized crime in a more comprehensive fashion, and to that end to amalgamate selected members of the investigative component of the DSO with selected members of the Commercial Crime Component of the South African Police Service, and selected members of the Organised Crime Component, into a new crime combating unit which is established within the South African Police Service as the Directorate for Priority Crime Investigation of the SAPS.

1.6 On the fixed date (a date to be determined by the President), all 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.

1.7 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 organized crime as well as matters which require specialized knowledge or are for example of international nature. In terms of section 16 of the South African Police Service Act, 1995, all crimes must be investigated by the Provincial Commissioner.

1.8 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 event of any difference of opinion, the National Commissioner has the final say on who shall investigate a particular matter.

1.9 The Bill provides that the Minister for Safety and Security shall establish a forum of governmental and other institutions with an interest in combating organized crime to improve coordination of and cooperation with

the Directorate for Priority Crime Investigation, which forum shall meet at least twice annually.

1.10. 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 Division in the SAPS, to be known as the 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 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. The Bill also provides for the vetting of members of the Directorate for Priority Crime Investigation, investing in the Directorate for Priority Crime Investigation and the Crime Intelligence Division the same powers that the DSO has, for transitional measures in respect of the relocation of the DSO to the SAPS. The Bill 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 THE 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 the provisions of section 75 of the Constitution of the Republic of South Africa, 1996.

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.
