

**REPUBLIC OF SOUTH AFRICA**

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**CONSTITUTION EIGHTEENTH AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 74(3); Particulars of the proposed amendments and prior notice of introduction published in Government Gazette No 47478 of 9 November 2022)*

*(The English text is the official text of the Bill)*

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(Adv G Breytenbach, MP)

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## GENERAL EXPLANATORY NOTE:

[            ]        Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_        Words underlined with a solid line indicate insertions in existing enactments.

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## BILL

**To amend the Constitution of the Republic of South Africa, 1996, so as to establish the office of the Cyber Commissioner as an institution supporting and strengthening constitutional democracy in the Republic; and to provide for matters connected therewith.**

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

### **Amendment of section 181 of Constitution, as amended by section 4 of the Constitution Second Amendment Act of 1998**

1. Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the addition in subsection (1) of the following paragraph:

“(g) The Cyber Commissioner.”.

### **Insertion of section 191A into Constitution**

2. The following sections are hereby inserted into the Constitution after section 191:

“Cyber Commissioner

## Functions of the Cyber Commissioner

### 191A. (1) The Cyber Commissioner must—

- (a) in accordance with national legislation, establish and maintain—
  - (i) suitable cyber security capabilities for all organs of state and entities dealing with public information;
  - (ii) capabilities to assist the police service with the necessary capacity to conduct cyber forensic investigations; and
  - (iii) a cyber security hub for the reporting, monitoring and investigation of cyber security incidents and threats in the private and public sectors;
- (b) advise the defence force in establishing and maintaining cyber defence capabilities;
- (c) advise all institutions responsible for the critical infrastructure of the Republic with regards to cyber security;
- (d) promote, monitor and evaluate the compliance of all organs of state and other entities with regard to—
  - (i) cyber security capabilities and standards; and
  - (ii) national legislation relating to protection of personal, or public, information and interception of data; and
- (e) make recommendations to Cabinet and Parliament to amend existing legislation, or develop new legislation, aimed at protecting—
  - (i) the rights to freedom and security of the person contained in section 12;
  - (ii) the privacy rights contained in section 14;
  - (iii) the political rights contained in section 19;
  - (iv) the right to access to information contained in section 32; and
  - (v) the right to just administrative action contained in section 33.

### (2) The Cyber Commissioner has the power, as regulated by national legislation—

- (a) to establish structures for the co-operation between the State and the private sector relating to training standards and the development of national cyber resources and capabilities; and
- (b) to issue regulations and directives to safeguard all organs of state and private sector entities against potential cyber attacks.
- (3) The Cyber Commissioner has the additional powers and functions prescribed by national legislation.
- (4) All interception of data capabilities will vest with the Cyber Commissioner.

### **Tenure**

**191B.** The Cyber Commissioner must be appointed for a fixed five-year term, renewable for one more fixed term of five years.”.

### **Amendment of section 193 of Constitution, as amended by section 4 of the Constitution Second Amendment Act of 1998**

**3.** Section 193 of the Constitution is hereby amended—

(a) by the insertion after subsection (3) of the following subsection:

“(3A) The Cyber Commissioner must be an individual who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, cyber security and cyber forensics must be given due regard in appointing the Cyber Commissioner.”;

(b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:

“The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor General, the Cyber Commissioner and the members of—”; and

- (c) by the substitution in subsection (5) for subparagraph (i) in paragraph (b) of the following subparagraph:

“(i) of at least 60 percent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector [**or**], the Auditor-General or the Cyber Commissioner; or”.

#### **Amendment of section 194 of Constitution**

4. Section 194 of the Constitution is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“The Public Protector, the Auditor-General, the Cyber Commissioner or a member of a Commission established by this Chapter may be removed from office only on—”; and

- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) the Public Protector [**or**], the Auditor-General or the Cyber Commissioner must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or”.

#### **Amendment of section 219 of Constitution**

5. Section 219 of the Constitution is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, [**and**] the

Cyber Commissioner, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.”.

### **Transitional provisions and savings**

6. (1) National legislation envisaged in section 191A of the Constitution, as inserted by section 2 of this Act, must be enacted within two years of the date on which this Amendment Act takes effect.

(2) Any law relating to the protection of personal, and public, information, interception of data and cyber security issues that is in force when this amendment takes effect, remains in force until such time that it is amended or repealed by national legislation envisaged in subsection (1).

(3) Any entity, institution or body which is responsible for—

- (a) the protection of personal information and public information;
- (b) the monitoring of cyber security standards;
- (c) the reporting, monitoring and investigation of cyber security incidents and threats;  
and
- (d) the interception of data,

will continue to report and function in terms of existing laws, directives and prescripts until such time that such reporting duties, accountability and functions are amended by national legislation referred to in subsection (1).

### **Short title and commencement**

7. This Act is called the Constitution Eighteenth Amendment Act, 2022, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

# **MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION EIGHTEENTH AMENDMENT BILL, 2022**

## **1. INTRODUCTION**

- 1.1 Cyber technology is becoming key to the way in which our world operates and is playing a more central role in society. The changing nature of how government and society interacts with technology and the increasing dependence on this resource requires that basic human and other rights should be protected in the process.
- 1.2 At present, South African state departments and critical infrastructure is not sufficiently protected against cyber threats. They are also not properly equipped with protecting sensitive public information against hacks. Furthermore, State entities annually lose billions of rands to cyber-crime. The entities currently tasked with dealing with these problems are either under-funded or lack the proper cyber expertise. They are also scattered across a range of government departments.
- 1.3 Also, current legislation dealing with cyber security is either insufficient, or only deals with the consequences.
- 1.4 There is therefore an increasing need for the rights of South Africans in terms of cyber technology to be protected and for all matters related to cyber security to be addressed.

## **2. OBJECTS OF THE BILL**

The purpose of the Constitution Eighteenth Amendment Bill, 2022 (“the Bill”) is to amend Chapter 9 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) so as to provide for the office of the Cyber Commissioner as an independent institution supporting and strengthening constitutional democracy, which is directly accountable to Parliament. The Cyber Commissioner will be key in safeguarding basic human rights as entrenched in the Constitution.

### **3. CONTENTS OF THE BILL**

- 3.1 Clause 1 of the Bill amends section 181 of the Constitution to provide for the Cyber Commissioner's office to be added as an institution strengthening constitutional democracy in the Republic of South Africa.
- 3.2 Clause 2 of the Bill inserts new sections 191A and 191B into the Constitution. The newly inserted section 191A of the Bill provides for the various powers and functions of the Cyber Commissioner which, *inter alia*, include establishing, promoting and monitoring cyber security capabilities for all organs of state and entities dealing with public information; establishing a cyber security hub for the reporting, monitoring and investigation of cyber security incidents and threats; and advising the defence force in establishing and maintaining cyber defence capabilities. The newly inserted section 191B provides that the Cyber Commissioner must be appointed for a fixed five-year term, renewable for one more fixed term of five years.
- 3.3 Clause 3 of the Bill amends section 193 of the Constitution by adding a new subsection (3A) to provide that the Cyber Commissioner must be a South African woman or man who is fit and proper to hold that office and that specialised knowledge of, or experience in cyber security and cyber forensics, must be given due regard in the appointment of the Cyber Commissioner. This clause also amends section 193 of the Constitution to provide that the President, on the recommendation of the National Assembly, must appoint the Cyber Commissioner and that the recommendation of the Assembly must be approved by a resolution adopted with a supporting vote of at least 60 percent of the members of the Assembly.
- 3.4 Clause 4 of the Bill amends section 194 of the Constitution to provide for the removal of the Cyber Commissioner on the listed grounds contained in section 194(1) of the Constitution, and that any resolution of the National Assembly concerning the removal of the Cyber Commissioner must be adopted with a supporting vote of at least two thirds of the members of the Assembly.

- 3.5 Clause 5 of the Bill amends section 219(5) of the Constitution so that the salary, allowances and benefits of the Cyber Commissioner are also included in the national legislation envisaged in section 219.
- 3.6 Clause 6 of the Bill provides for transitional arrangements and savings until such time that national legislation envisaged in the Bill comes into operation. It is envisaged that national legislation, enacted within two years of this amendment coming into effect, will bring all entities and institutions dealing with, and related to, cyber security, cyber technology, protection of personal information and interception of data, together under the Cyber Commissioner's office.
- 3.7 Clause 7 of the Bill provides for the short title of the Bill and the commencement date.

#### **4. FINANCIAL IMPLICATIONS FOR THE STATE**

Funds will be required to establish the Cyber Commissioner's office as well as to fund some of its functions. Already established entities or capabilities that will be incorporated with the office of the Cyber Commissioner are already funded.

#### **5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

A Cyber Commissioner will need to be recruited and appointed. This office will also require cyber and cyber forensic specialists and administrative support.

#### **6. DEPARTMENTS, BODIES OR PERSONS CONSULTED**

The following stakeholders were consulted:

- 6.1 Experts in the field of cyber security including a cyber forensic specialist;
- 6.2 Cyber criminal law practitioners; and
- 6.3 A senior lecturer in cyber security.

## **7. PARLIAMENTARY PROCEDURE**

- 7.1 The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 74(3) of the Constitution since its object is to amend Chapter 9 of the Constitution of the Republic of South Africa, 1996.
- 7.2 The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not directly affect traditional or Khoi-San communities or contain any provisions pertaining to customary law or customs of traditional or Khoi-San communities. Furthermore, the Bill does not contain any provisions pertaining to any matter referred to in section 154(2) of the Constitution.

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