

REPUBLIC OF SOUTH AFRICA

CONSTITUTION TWENTY FIRST AMENDMENT BILL

(As introduced in the National Assembly (proposed section 74(3)(a); Explanatory summary of the Bill and prior notice of introduction published in Government Gazette No.....of....)

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

(Adv G Breytenbach, MP)

[B 20...]

ISBN

No. of copies printed

GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Constitution of the Republic of South Africa, 1996, so as to establish the Anti-Corruption Commission 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 179 of Constitution of the Republic of South Africa, 1996

1. Section 179 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “principal Act”), is hereby amended—

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

“(1) **[There]** Subject to subsection (2)(b), there is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—”; and

(b) by the substitution for subsection (2) of the following subsection:

“(2) (a) The prosecuting authority has the power, subject to paragraph (b), to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(b) The Anti-Corruption Commission contemplated in section 181(1)(g) has the power to institute criminal proceedings on behalf of the state, relating to incidents of

serious corruption and high-level organised crime, and to carry out any necessary functions incidental to instituting criminal proceedings relating to incidents of serious corruption and high-level organised crime.

(c) The Anti-Corruption Commission and the prosecuting authority must establish principles governing cooperation between them in respect of the exercising of the Anti-Corruption Commission's powers contemplated in paragraph (b), including standard operation procedures.

(d) National legislation must, subject to section 191A(1) and in accordance with section 191A(2), prescribe categories of crimes to be considered as serious corruption and high-level organised crime for purposes of paragraph (b)."

Amendment of section 181 of Constitution of the Republic of South Africa, 1996

2. Section 181 of the principal Act is hereby amended by the addition in subsection (1) of the following paragraph:

"(g) The Anti-Corruption Commission."

Insertion of section 191A, 191B and 191C in Constitution of the Republic of South Africa, 1996

3. The following sections are hereby inserted after section 191 of the principal Act:

"Anti-Corruption Commission

Functions of Anti-Corruption Commission

191A. (1) The Anti-Corruption Commission has the powers, as regulated by national legislation, to:

(a) prevent, combat and investigate any conduct that is alleged, reported or suspected to involve serious corruption and high-level organised crime being conducted by a person holding public office or any other person, that, as a result of corrupt activities or high-level organised crime—

(i) deprives a particular social group or substantial part of the population of the Republic of a fundamental right; or

(ii) causes financial loss or damage that is significant to the Republic;

(b) institute legal proceedings connected with its functions; and

(c) carry out any necessary functions incidental to instituting legal proceedings relating to incidents of serious corruption and high-level organised crime.

(2) (a) National legislation must prescribe categories of crimes to be considered as serious corruption and high-level organised crime that falls in the jurisdiction of the Anti-Corruption Commission.

(b) The Anti-Corruption Commission and the national prosecuting authority contemplated in section 179 must be consulted when national legislation contemplated in paragraph (a) is developed or amended.

(3) Any person may submit information relating to the commission of serious corruption and high-level organised crime to the Anti-Corruption Commission for investigation and the possible institution of legal proceedings.

(4) (a) The Anti-Corruption Commission must submit a report to any legislature that has a direct interest in an investigation contemplated in subsection (1)(a), as well as to any other authority prescribed by national legislation.

(b) A report contemplated in paragraph (a) must further be made available to the public in a manner prescribed by national legislation.

(5) (a) All organs of state must annually in April provide the Anti-Corruption Commission with a written report on the measures that they have taken towards the eradication of corruption and high-level organised crime.

(b) The Anti-Corruption Commission must consider the reports contemplated in paragraph (a) and—

(i) identify successes achieved, and challenges experienced, by any organ of state related to corrupt activities and high-level organised crime;

(ii) make a determination on whether the measures contemplated in paragraph (a) are sufficient to combat corrupt activities and high-level organised crime;

(iii) annually report to the National Assembly on successes achieved, and challenges experienced, by organs of state; and

(iv) in its annual report contemplated in subparagraph (iii), make recommendations, which may include implementing tools successfully used by any organ of state to combat corrupt activities and high-level organised crime in any other organ of state, guidance, where necessary, on how to improve measures contemplated in subparagraph (ii), and steps to deal with challenges experienced.

(6) The Anti-Corruption Commission has the additional powers and functions prescribed by national legislation.

Composition of Anti-Corruption Commission

191B. (1) A National Commissioner is the head of the Anti-Corruption Commission and manages the operations of the Anti-Corruption Commission.

(2) National legislation must determine—

(a) the number of Commissioners that must serve as members of the Anti-Corruption Commission; and

(b) the terms of service, subject to section 191C, of the National Commissioner and of the Commissioners.

Tenure

191C. (1) The members of the Anti-Corruption Commission are appointed for a non-renewable period of:

(a) 10 years if that member is the National Commissioner; and

(b) 12 years if that member is a Commissioner.

(2) (a) If a Commissioner is appointed as National Commissioner during the 12-year term contemplated in subsection (1)(b), such appointment as National Commissioner may, in addition to the time limitation contemplated in subsection (1)(a), not exceed 12 years from the date on which the person was appointed as Commissioner.

(b) No person who served either of the periods contemplated in subsection (1)(a) or (b), in full, is eligible for appointment as either National Commissioner or as a Commissioner.”.

Amendment of section 193 of Constitution of the Republic of South Africa, 1996

4. Section 193 of the principal Act is hereby amended—

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

“(3A)Members of the Anti-Corruption Commission must be fit and proper persons who are South African citizens, and who are duly qualified and experienced in law, law enforcement and the forensic countering of corruption.”;

(b) by the deletion in subsection (4) of the word “and” at the end of paragraph (b), the deletion of the full stop at the end of paragraph (c) and the substitution of a semicolon and the word “and”;

(c) by of the addition in subsection (4) of the following paragraph:

“(d) the Anti-Corruption Commission.”; and

(d) by the substitution in subsection (5) for subparagraphs (i) and (ii) of paragraph (b) of the following subparagraphs:

“(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector [**or**], the Auditor-General or a member of the Anti-Corruption Commission; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission, other than the Anti-Corruption Commission.”.

Amendment of section 194 of Constitution of the Republic of South Africa, 1996

5. Section 194 of the principal Act is hereby amended by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs:

“(a) the Public Protector [**or**], the Auditor-General or a member of the Anti-Corruption Commission must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission, other than the Anti-Corruption Commission, must be adopted with a vote of a majority of the members of the Assembly.”.

Short title and commencement

6. This Act is called the Constitution Twenty First Amendment Act, 2024.

MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION TWENTY FIRST AMENDMENT BILL, 2024

1. INTRODUCTION

This Bill aims to amend the Constitution of the Republic of South Africa, 1996 (“the Constitution”), by providing for the establishment of an Anti-Corruption Commission. In the Republic, the National Prosecuting Authority (“NPA”) is the sole prosecuting authority and its functions and powers are set out comprehensively in the Constitution and in the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998). The NPA is required to fulfil its functions independently, and without fear, favour, or prejudice.

It is common cause that the NPA was one of the institutions that suffered the most at the hands of the State Capture project, it being hollowed out to a mere shadow of its intended function. Even under the new leadership of Adv Batohi, it is clear that it is going to take many years for the NPA to recover, and to be in a position to function at the level it should in order to fulfil its mandate. More especially, it will take an unacceptably long time for the NPA (particularly bearing in mind its interdependence on the SAPS and HAWKS for investigative capacity) to deal meaningfully and effectively with the enormous workload of grand corruption that plagues South Africa today.

It is becoming very clear that with the best intentions in the world, the NPA will simply not be in a position to deal with the scale of corruption that we have seen and continue to see. The Covid-19 pandemic and concomitant issues, has meant a further, material, setback in the fight to resurrect an independent and effective prosecuting authority. It has become quite clear that they will need help, and it will have to be the type of assistance that shares or eases the workload. Anything less will simply be cosmetic, and in the end, ineffectual.

The establishment of an Anti-Corruption Commission will remove a large burden off the NPA, allowing them to concentrate on their core function of prosecuting crime independently, without fear, favour, or prejudice, and give them space to rebuild an essential institution. An Anti-Corruption Commission will concentrate on a strictly defined and legislated space, dealing only with large scale grand corruption and high-level organised crime, harnessing the capabilities of the Special Tribunal of the SIU more effectively, and providing a quicker, more efficient and effective method of dealing with the type of

corruption and high-level organised crime we see on a daily basis, but which cannot be dealt with effectively within current existing structures.

2. OBJECTS OF THE BILL

The purpose of the Constitution Twenty First Amendment Bill, 2024 (“the Bill”), is to amend Chapter 9 of the Constitution so as to provide for the Anti-Corruption Commission as an independent institution supporting and strengthening a democracy free of corruption and high-level organised crime. The Anti-Corruption Commission will be key in the eradication of corruption and high-level organised crime in the Republic.

3. CONTENTS OF THE BILL

- 3.1 Clause 1 of the Bill amends section 179 of the Constitution to provide that the national prosecuting authority conducts its work subject to the functions of the Anti-Corruption Commission to deal with matters of serious corruption and high-level organised crime, and to provide for consultation between the national prosecuting authority and the Anti-Corruption Commission.
- 3.2. Clause 2 of the Bill amends section 181 of the Constitution to provide for the Anti-Corruption Commission to be added as an institution strengthening constitutional democracy in the Republic of South Africa.
- 3.3 Clause 3 of the Bill inserts new sections 191A, 191B and 191C into the Constitution. The newly inserted section 191A of the Bill provides for the various powers and functions of the Anti-Corruption Commission. The newly inserted section 191B provides that the number of members of the Anti-Corruption Commission must be prescribed by national legislation. The newly inserted section 191C provides that the members of the Anti-Corruption Commission are appointed for a non-renewable period of 10 years if that member is the National Commissioner; and 12 years if that member is a Commissioner. It also provides practical clarity regarding the maximum prescribed tenure periods.
- 3.4 Clause 4 of the Bill amends section 193 of the Constitution to provide for the appointment of the members of the Anti-Corruption Commission by the President and that, in the appointment of the members of the Anti-Corruption Commission, the recommendation of the Assembly must be approved by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. This clause also amends section 193 of the Constitution by adding a new subsection to provide that the

members of the Anti-Corruption Commission must be fit and proper persons who are South African citizens, and who are duly qualified and experienced in law, law enforcement and the forensic countering of corruption.

3.5 Clause 5 of the Bill amends section 194 of the Constitution to provide for the removal of the members of the Anti-Corruption Commission on the listed grounds in section 194(1) of the Constitution, and that any resolution of the National Assembly concerning the removal of the members of the Anti-Corruption Commission must be adopted with a supporting vote of at least two thirds of the members of the Assembly.

3.6 Clause 6 of the Bill provides for the short title of the Bill.

4. FINANCIAL IMPLICATIONS FOR THE STATE

Funds will be required to establish the Anti-Corruption Commission, to fund salaries and administrative needs of its members and staff, as well as to fund its functions.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

Members of the Anti-Corruption will need to be recruited and appointed. The Commission will also require a secretariat, investigators, researchers, and administrative support.

6. DEPARTMENTS, BODIES OR PERSONS CONSULTED

The following stakeholder was consulted:

6.1. Accountability Now.

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)(a) 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 the 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), as the Bill does not directly affect traditional or Khoi-San communities and does not contain provisions pertaining to customary law or customs of traditional or Khoi-San communities.