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**SUBMISSION TO POLICE PORTFOLIO COMMITTEE**  
**Suggestions from civil society coalition on the appointment criteria for the IPID**  
**Executive Director**

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**RATIONALE FOR SUBMISSION**

- 1 The November 2013 nomination of Robert McBride as the Executive Director of the Independent Police Investigative Directorate (IPID) by the Minister of Police, Nathi Mthethwa has highlighted the lack of any meaningful appointment criteria for the position.
- 2 Neither the IPID Act nor the Regulations provide any appointment criteria beyond the requirement that the Executive Director be a 'suitably qualified person'.
- 3 Due to the relatively recent establishment of IPID (1 April 2012) there has not yet been the need to interrogate the legislation. These deliberations are now timely and offer the Police Portfolio Committee an important opportunity to refine and strengthen the appointment criteria.
- 4 We submit that, given the vital importance of IPID to the functioning of our democracy and the fulfilment of our fundamental constitutional values, the process of appointing the Executive Director must be rigorous and guided.
- 5 The importance of stipulating criteria for appointments has been emphasised by our courts. For instance, in *Freedom of Expression Institute and Others v*

*President of the Ordinary Court Martial NO,*<sup>1</sup> the High Court invalidated provisions of the Defence Act, 44 of 1957 on the basis that it allowed the military to “appoint somebody ill-equipped to perform the function of a prosecutor”, which invited arbitrariness and executive interference in the judicial process.

6 These submissions seek to provide the Police Portfolio Committee with suggestions so as to assess the Minister’s nomination.

7 We respectfully request the opportunity to make an oral presentation to the Portfolio Committee on the issues raised in these submissions.

8 In the spirit of transparency, we respectfully urge the portfolio committee to request that the Minister provides the rationale for the nomination and clarifies the criteria used.

#### **SUITABLY QUALIFIED PERSON**

9 There can be no dispute that the person who holds the offices of the Executive Director of IPID must be of the highest integrity, and must have the requisite skills (including change management), experience and specialised knowledge to enable them to hold the office effectively.

10 The IPID legislation is silent in terms of what ‘suitably qualified’ means in practice. We therefore look to existing case law and other similar institutions’ appointment criteria.

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<sup>1</sup> 1999 (3) BCLR 261(C) at paras 19-21. See also, by analogy: *Dawood and Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) at paras 54-56; *Janse van Rensburg NO v Minister of Trade & Industry* 2001 (1) SA 29 (CC).

## 11 CASE LAW

- 11.1. Pickering J in *MLOKOTI v AMATHOLE DISTRICT MUNICIPALITY AND ANOTHER* 2009 (6) SA 354 (E) at 362 quoted from a municipal recruitment policy: A 'suitably qualified person' is defined in para 3.7 as meaning: 'any one of, or any combination of that person/s: A) Formal qualifications B) Prior learning C) Relevant experience D) Capacity to acquire, within a reasonable time, the ability to do a job.'
- 11.2. At the minimum that 'suitably qualified' means qualified to comprehend the scope and nature of the work; and to do the specific work in question. See: *MANONG & ASSOCIATES (PTY) LTD v DEPARTMENT OF ROADS AND TRANSPORT, EASTERN CAPE, AND OTHERS* (No 2) 2009 (6) SA 589 (SCA) at 608.
- 11.3. The phrase is also likely to mean 'properly experienced'. See: *MOKOENA v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE* 2011 (2) SA 556 (GSJ) at 559.

## 12 SIMILAR INSTITUTIONS' CRITERIA

- 12.1. We submit that the provisions governing the appointment of the Public Protector and the Auditor-General serve as an appropriate model, particularly given the similarity in the investigative functions of these offices.
- 12.2. Section 193(4)-(5) of the Constitution provides that the Public Protector and Auditor-General are appointed by the President, after nomination by a committee of the National Assembly composed proportionally of

members of all political parties represented in the National Assembly, and approved by a resolution adopted with a supporting vote of at least 60% of all members of the National Assembly. Section 193(6) provides further that the recommendation process must allow for the involvement of civil society. In the light of this, the appointment process for the Executive Director of IPID ought to outline a process that ensures transparency, public participation and for the effective involvement of civil society.

12.3. The fact that no criteria are provided to guide the appointment of the Executive Director of IPID is in stark contrast to the provisions of the Public Protector Act, which provides:

*“(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who-*

*(a) is a Judge of a High Court; or*

*(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or*

*(c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or*

*(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or*

*(e) has, for a cumulative period of at least 10 years, been a member of Parliament; or*

*(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.”*

13. The Head of IPID functions as the Accounting Officer for the Directorate. This requires that the appointment criteria include a high level of financial literacy.

14. The Sierra Leone Anti-Corruption Commission requires that the Head ‘be a legal practitioner having not less than ten years’ practice in his profession with proven managerial experience and of conspicuous probity’ (S.3.(2)).
15. Similarly, the Mauritius Independent Commission against Corruption requires that the Head ‘be a person who – (a) has served as a Judge of the Supreme Court; (b) has served as a Magistrate in Mauritius for not less than 10 years; (c) is, or has been, a practising barrister or law officer for not less than 10 years (4. (a) – (c)).

### **THE EXECUTIVE DIRECTOR SHOULD BE ‘INDEPENDENT’**

16. The IPID legislation has a specific “Independence and Impartiality” clause, Ch1. (4). “The Directorate functions independently from the South African Police Service”. This independence clause has implications for the appointment of the Executive Director of IPID.
17. In several earlier cases,<sup>2</sup> the Constitutional Court discerned three “essential conditions for independence”. These are:
  - 17.1. Security of tenure: This embodies the essential requirement that the decision-maker is removable only for just cause. It requires institutional mechanisms that protect against the abuse of disciplinary and removal procedures, conditions of employment, and the power to renew a term of office as leverage for undue influence.

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<sup>2</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (‘First Certification Judgment’) 1996 (4) SA 744 (CC); *New National Party of South Africa v Government of the RSA and Others* 1999 (3) SA 191 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC); and *Van Rooyen v The State (General Council of the Bar of SA Intervening)* 2002 (5) SA 246 (CC).

17.2. Financial security: This principle operates at both the level of individual staff members and at the institutional level:

17.2.1. At the level of the individual, financial security requires an adequate salary, such as will attract persons with the skills and integrity necessary for the discharge of the important functions exercised by the office. It also requires mechanisms to prevent bargaining between the office-holders and the Executive or the Legislature. This is necessary to avoid any perception that, through the exercise of the power to determine salaries, the Executive or the Legislature might be perceived to be interfering with the independence of the office.<sup>3</sup>

17.2.2. At the institutional level, financial security implies the ability to have access to funds reasonably required to enable the office to discharge the functions it is constitutionally obliged to perform. It also requires protection from arbitrary interference by the Executive.<sup>4</sup>

17.3. Institutional independence: This requires designing structural relations that secure the independence of the office from undue interference in the exercise of its functions.<sup>5</sup>

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<sup>3</sup> *Van Rooyen v The State* at paras 138-141.

<sup>4</sup> *NNP v Government of RSA* at para 98.

<sup>5</sup> *De Lange v Smuts NO* at para 71.

18. In determining what constitutes an ‘independent’ institution, the Constitutional Court also drew attention in *Glenister* to the importance of public confidence in the mechanisms that are designed to secure independence. It insisted that,

*“if Parliament fails to create an institution that appears from a reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.”*<sup>6</sup>

19. An important test for determining whether an entity has the requisite degree of independence is therefore to consider “whether a reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy-protecting features”.<sup>7</sup>

20. The Constitutional Court emphasised that independence does not require complete insulation from political accountability nor does it conflict with a requirement of ultimate executive oversight. Rather, independence requires “insulation from a degree of management by political actors”.<sup>8</sup>

21. However, there is an inherent independence weakness in that the Head of IPID is nominated by the Minister of Police, and the Parliamentary Portfolio Committee are then able to confirm or reject the nomination. The Minister appears to have almost full discretion in terms of the appointment and termination of the Head.

22. IPID’s annual strategic plan and budget are still approved by the Minister of Police. The Head of IPID must submit the Annual Report to the Minister of

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<sup>6</sup> *Glenister* at para 207. See also *Van Rooyen v The State* at para 33-34.

<sup>7</sup> *Glenister* at para 207.

<sup>8</sup> *Id* para 216. See also paras 235 and 244.

Police, who then tables it in Parliament. These provisions appear to conflict with principles of operational independence.

23. Given these weaknesses it is of utmost importance that all measures are taken to ensure that the appointment of the Executive Director is as transparent as possible. Also, the Executive Director should be seen as free from political interference and influence.
24. In addition, we urge the Portfolio Committee to remind all organs of state to respect the independence of IPID. They must assist and protect IPID to ensure its impartiality and effectiveness. No person or organ of state may interfere with the functioning of IPID.