REPUBLIC OF SOUTH AFRICA

DEFENCE AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 53680 of 18 November 2025)
(The English text is the official text of the Bill)

(MINISTER OF DEFENCE AND MILITARY VETERANS)

[B 32—2025]

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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.

BILL

To amend the Defence Act, 2002, so as to provide for the exclusion of military judges and senior military judges from boards of inquiry; and to provide for matters incidental thereto.

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

Amendment of heading of section 102 of Act 42 of 2002

1. The following heading is hereby substituted for the heading of section 102 of the Defence Act, 2002 (Act No. 42 of 2002) (hereinafter referred to as "the principal Act"):

"**Attendance of persons at board of [enquiry] inquiry, and witnesses**"

Insertion of section 102A in Act 42 of 2002

2. The following section is hereby inserted after section 102 of the principal Act:

"**Exclusion of military judge and senior military judge from board of inquiry**

102A. A board of inquiry contemplated in sections 101 and 102 does not apply to a military judge or senior military judge referred to in the Military Discipline Supplementary Measures Act, 1999 (Act No. 16 of 1999), and to the content and merits of his or her judgments or rulings.".

Amendment of Arrangement of Act of Act 42 of 2002

3. The Arrangement of Act of the principal Act is hereby amended by the insertion after "Attendance of persons at board of inquiry, and witnesses . . .102" of the following:

"Exclusion of military judge and senior military judge from board of inquiry ..... 102A".

Short title and commencement

4. This Act is called the Defence Amendment Act, 2025, and comes into effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE DEFENCE AMENDMENT BILL, 2025

1. BACKGROUND

1.1 The Defence Amendment Bill, 2005 (''the Bill''), seeks to amend and insert certain provisions in the Defence Act, 2002 (Act No. 42 of 2002) (''the Defence Act''), in compliance with the Constitutional Court judgment in the matter of *O'Brien N.O. v Minister of Defence and Military Veterans and Others* 2024 ZACC 30, (''the judgment'').

1.2 The judgment concerns the independence of military courts, in particular two military courts of first instance established under the Military Discipline Supplementary Measures Act, 1999 (Act No.16 of 1999) (''the MDSMA''), the Court of a Military Judge and the Court of a Senior Military Judge. The applicant, Lieutenant-Colonel O'Brien, a former military judge, challenged in a counter-application before the High Court, Gauteng Division, Pretoria (''the HC''), the constitutionality of sections 101 and 102 of the Defence Act and sections 15 and 17 of the MDSMA (''the impugned provisions'').

1.3 The counter-application consisted of three constitutional challenges against the impugned provisions, which are set out below—

(a) first, in respect of sections 101 and 102 of the Defence Act, the counter-application related to whether it is constitutionally permissible for members of the Executive to have the power to initiate and control boards of inquiry to investigate judicial officers' fitness and the conduct of their cases, as occurred in the applicant's case;

(b) second, whether the power under section 15 of the MDSMA, permitting the Minister and the Adjutant General (''Adj Gen''), to make renewable assignments of military judges, for short periods, at their sole discretion, and without any objective criteria, passes constitutional muster; and

(c) third, relating to the constitutionality of section 17 of the MDSMA, which empowers members of the Executive – the Minister and the Adj Gen – to remove military judges for alleged misconduct or incapacity, without the involvement or oversight of any independent body.

1.4 The Constitutional Court's order comprises the following:

(a) In paragraphs 1- 4 of the order, leave to appeal was granted and the appeal itself was upheld. The order of the Supreme Court of Appeal (''SCA''), was set aside to the extent that that Court dismissed the applicant's appeal against the HC's refusal to grant the declarations of statutory invalidity sought by the applicant in his counter-application in the HC. The costs orders made in the SCA in relation to costs in that Court and in the HC were also set aside.

(b) The Court declared at paragraphs 5a-f of the order as follows:

''*(a) Sections 101 and 102 of the Defence Act 42 of 2002 are unconstitutional and invalid to the extent that they permit members of the Executive to convene boards of inquiry to investigate military judges and the content and merits of their judgments and rulings. Pending the coming into operation of remedial legislation, the phrases "any matter", "any member or employee" and the "affairs of any institution" in section 101 and 102 of the Defence Act and section 136 of the Military Disciplinary Code, read with rule 79 of the Military Discipline Supplementary Measures Act's Rules, must be read as excluding military judges.*

(b) Section 15 of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid to the extent that it empowers the Minister of Defence and Military Veterans (Minister), acting on the recommendation of the Adjutant General, to assign judges for renewable periods.

(c) The existing practice of assigning judges for renewable periods of one to two years is unconstitutional and unlawful. Pending the coming into operation of remedial legislation, the assignment of a

military judge may not be renewed until the lapse of at least two years since that person's last assignment.

(d) Section 17 of the Military Discipline Supplementary Measures Act 16 of 1999 is unconstitutional and invalid to the extent that it empowers the Minister, acting on the recommendation of the Adjutant General, to remove a military judge and that the Minister may do so without any independent inquiry into the fitness of the military judge to hold office.

(e) Pending the coming into operation of remedial legislation, the Minister may devise processes for an inquiry into the fitness of a military judge and the composition of the inquiry body, provided that:

(i) it is an independent inquiry; and

(ii) a military judge may not be removed except on the recommendation of the independent inquiry.

(f) The declarations of constitutional invalidity above are suspended for a period of 24 months to allow remedial legislation to be enacted and brought into operation.''

1.5 As a result of the judgment, the Department has drafted this Bill so as to correct the impugned provisions of the Defence Act, in line with the judgment.

2. OBJECTS OF BILL

The main object of the Bill is to provide for the exclusion of military judges and senior military judges and the content and merits of their judgments and rulings, from investigation by boards of inquiry in compliance with the judgment; to make technical amendments and to provide for matters incidental thereto.

3. DISCUSSION OF BILL

3.1 Clause 1 seeks to provide a technical amendment to the heading of section 102 of the Defence Act.

3.2 Clause 2 inserts a new section in the Defence Act, to provide for the exclusion of military judges and senior military judges and the content and merits of their judgments or rulings from investigation by boards of inquiry.

3.3 Clause 3 amends the Arrangement of the Act by including reference to the newly inserted section 102A.

3.4 Clause 4 seeks to provide for the short title and the commencement of the Act.

4. PARTIES CONSULTED

4.1 The Bill has been finalised in consultation with the following relevant stakeholders:

- The Defence Force Service Commission;
- Military Ombud;
- Department of Military Veterans;
- Defence Force Unions;
- Departmental Services and Divisions;
- Reserve Force Council; and
- Defence Community.

4.2 The Cabinet Memorandum was finalised with the JCPS Cluster Sub-Committee (''the Development Committee''), the JCPS DGs Cluster and JCPS Ministerial Cluster.

5. FINANCIAL IMPLICATIONS

There will be financial implications for the *adhoc* sitting of the Military Judicial Advisory Committee, relating to two of its members who are not employed within government. These funds will be sourced from the Departmental baseline.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 Four categories of Bills are distinguished in the Constitution: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it is constitutionally invalid.

6.3 All the provisions of the Bill has been considered against the provisions of the Constitution relating to tagging, and the functional areas listed in Schedules 4 and 5 to the Constitution.

6.4 The Constitutional Court explained the importance of tagging in *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (''Tongoane judgment'') and confirmed and upheld the ''substantial measure'' test as formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).

6.5 The Constitutional Court held in the Tongoane judgment as follows:

> ''*[58] . . . What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in Schedule 4'.*
>
> *[59] . . . the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.*
>
> *[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government . . .*
>
> *[70] . . . Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.*
>
> *[72] . . . Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.''. (Our emphasis)*

6.6 The ''substantial measure test'' entails that any Bill whose provisions in substantial measure affect the provinces must be dealt with in terms of the procedure set out in section 76 of the Constitution.

6.7 To determine whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4, the Bill needs to be considered against the provisions of the Constitution relating to the tagging of Bills as well as against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

6.8 This test compels the consideration of the substance, purpose and effect of the subject matter of the Bill.

6.9 In our view the provisions of the Bill do not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution, or within the matters listed in section 76(3)(a) to (f) of the Constitution. The Bill seeks to amend the Defence Act, so as to provide for the exclusion of military judges and senior military judges and the content and merits of their judgments and rulings, from investigation by boards of inquiry in compliance with the judgment; to make technical amendments and to provide for matters incidental thereto.

6.10 The Bill does not in any measure fall within a concurrent provincial legislative competence and the State Law Advisers and the Department are of the opinion that this Bill is an ordinary Bill not affecting provinces and must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

6.11 The State Law Advisers and the Department are of the view that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)*(a)*(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions which directly affect traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities.

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