

REPUBLIC OF SOUTH AFRICA

MILITARY DISCIPLINE SUPPLEMENTARY MEASURES 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)

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 Military Discipline Supplementary Measures Act, 1999, so as to insert and substitute certain definitions; to provide for the establishment of the Military Judicial Advisory Committee; to provide for the assignment and removal of military judges and senior military judges; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 16 of 1999

- 1.** Section 1 of the Military Discipline Supplementary Measures Act, 1999 (Act No. 16 of 1999) (hereinafter referred to as the “principal Act”), is hereby amended— 5
- (a) by the deletion of the numbering preceding each definition; and
 - (b) by the insertion after the definition of “commanding officer” of the following definition: 10
- “‘Committee’ means the Military Judicial Advisory Committee established by section 6A;”.

Insertion of sections 6A, 6B, 6C and 6D in Act 16 of 1999

- 2.** The following sections are hereby inserted in the principal Act after section 6:

“Establishment and composition of Committee

- 6A.** (1) There is hereby established a Military Judicial Advisory Committee which must function in the prescribed manner. 15
- (2) The Committee consists of—
- (a) any judge or retired judge contemplated in section 7, appointed as chairperson by the Minister;
 - (b) one practicing advocate and one practicing attorney of the High Court of South Africa, designated by the Minister, after consultation with the Legal Practice Council; 20
 - (c) the Adjutant General;
 - (d) the Chief of Defence Intelligence; and
 - (e) the Sergeant Major of the Defence Force. 25
- (3) The chairperson shall designate one of the persons contemplated in subsection (2)(b) as vice-chairperson of the Committee to perform the

functions assigned to the chairperson by or under this Act, when the chairperson is not available.

Functions of Committee

6B. The Committee must—

- (a) receive nominations for assignment of officers to the function of military judge and of senior military judge as prescribed; 5
- (b) provide a recommendation to the Minister on—
 - (i) the assignment of officers to the function of military judge or senior military judge; and
 - (ii) the removal of a military judge or senior military judge from their function after following the prescribed disciplinary process; 10
- (c) receive, consider and deal with complaints brought against military judges and senior military judges as prescribed on matters emanating from their judicial functions; 15
- (d) consider the fitness of a military judge or senior military judge to hold office as prescribed; and
- (e) consider objections against the assignment of any military judge or senior military judge as prescribed.

Remuneration and expenses of members of Committee

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6C. (1) The member of the Committee referred to in section 6A(2)(a) may be paid such allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions in terms of this Act as the Minister may determine, with the concurrence of the Minister in the national sphere of government responsible for State expenditure. 25

(2) A member of the Committee referred to in section 6A(2)(b), may be paid such remuneration, including allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions in terms of this Act, as the Minister may determine with the concurrence of the Minister in the national sphere of government responsible for State expenditure. 30

Term of office of members of Committee

6D. (1) Members of the Committee contemplated in section 6A(2)(a) and (b) shall be appointed or designated for a period not exceeding five years, and any such appointment or designation may be withdrawn by the Minister, at any time after consultation with the Committee if there are sound reasons for doing so. 35

(2) Any person whose term of office as a member of the Committee has expired, may be reappointed or designated by the Minister. 40

(3) *Ex officio* members contemplated in section 6A(2)(c), (d) and (e) shall be members of the Committee as long as they hold office.”.

Amendment of section 14 of Act 16 of 1999

3. Section 14 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (b) and the words that follow on it of the following: 45

“(b) of [senior military judge or] military judge [referred to in section 13(2)(a)] or senior military judge,

on the recommendation of the [Adjutant General] Committee: Provided that the Director: Military Judges shall be deemed to have been assigned the function of senior military judge.”; and 50

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

“(2) The [Adjutant General] Committee shall not recommend any officer for assignment to any function referred to in subsection (1)(a) unless, upon due and diligent enquiry, the [Adjutant General] Commit- 55

tee is convinced that the officer is a fit and proper person of sound character, who meets the requirements prescribed in this Act for such assignment.”.

Substitution of section 15 of Act 16 of 1999

4. The following section is hereby substituted for section 15 of the principal Act: 5

“Period of assignment

15. (1) The Minister must assign an officer to the function of military judge or senior military judge for a period of not less than three years. 10
 (2) Upon expiry of the initial period of assignment referred to in subsection (1), a military judge or senior military judge may not be assigned again until the lapse of at least two years since that officer’s last assignment.
 (3) With the exception of the period of assignment of military judges and senior military judges, as contemplated in subsections (1) and (2), an assignment in terms of this Chapter shall be for a fixed period or coupled to a specific deployment, operation or exercise.”. 15

Substitution of section 17 of Act 16 of 1999

5. The following section is hereby substituted for section 17 of the principal Act:

“Removal from assignment

17. (1) The Minister may remove an assigned officer from the function of military judge or senior military judge if the Committee, after affording the military judge or senior military judge a reasonable opportunity to be heard, recommends his or her removal for the reason of the assignee’s incapacity, incompetence or misconduct. 20
 (2) [The] With the exception of officers contemplated in subsection (1), the Minister, acting upon the recommendation of the Adjutant General, may remove a person from the function assigned to him or her for the reason of that assignee’s incapacity, incompetence or misconduct, or at his or her own written request.”. 25

Amendment of Arrangement of sections of Act 16 of 1999 30

6. The arrangement of sections in the principal Act is hereby amended by the insertion after item “6. Establishment of military court system” of the following items:

“6A. Establishment and composition of Committee

6B. Functions of Committee

6C. Remuneration and expenses of members of Committee 35

6D. Term of office of members of Committee”.

Short title and commencement

7. This Act is called the Military Discipline Supplementary Measures Amendment Act, 2025, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 40

**MEMORANDUM ON THE OBJECTS OF THE MILITARY
DISCIPLINE SUPPLEMENTARY MEASURES AMENDMENT BILL,
2025**

1. BACKGROUND

- 1.1 The Military Discipline Supplementary Measures Amendment Bill (the “Bill”) seeks to amend certain sections of the Military Discipline Supplementary Measures Act, 1999 (Act No. 16 of 1999) (the “principal Act”) in compliance of the Constitutional Court judgment in the matter of *O’Brien N.O. v Minister of Defence and Military Veterans and Others* 2024 ZACC 30. (“*O’Brien judgment*”).
- 1.2 The *O’Brien judgment* concerns the independence of military courts, in particular two military courts of first instance established under the principal Act, i.e. the Court of a Military Judge and the Court of a Senior Military Judge.
- 1.3 On 20 December 2024, the *O’Brien judgment* was handed down by the Constitutional Court whereby the Constitutional Court *inter alia* declared sections 15 and 17 of the principal Act 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 and 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. The declaration of invalidity was suspended for a period of 24 months to allow remedial legislation to be enacted and brought into operation.

2. OBJECTS OF BILL

The main object of the Bill is to provide for provisions in the principal Act that will enhance the independence of Military Judicial Services in compliance with the *O’Brien judgment*.

3. DISCUSSION OF BILL

- 3.1 Clause 1 seeks to provide for the deletion of the numbering preceding the definitions in section 1 of the principal Act and to insert a new definition to provide for the Military Judicial Advisory Committee (“Committee”).
- 3.2 Clause 2 seeks to provide for the establishment and composition of the Committee, its functions, the remuneration and expenses of the Committee and the term of office of members of the Committee.
- 3.3 Clause 3 seeks to provide for the Committee, instead of the Adjutant General, to make recommendations to the Minister in respect of the assignment of military judges and senior military judges.
- 3.4 Clause 4 seeks to provide for an amendment to section 15 of the principal Act to also provide for the period of assignment of a military judge and senior military judge.
- 3.5 Clause 5 seeks to provide for an amendment to section 17 of the principal Act to also provide for the removal of a military judge and senior military judge from assignment.
- 3.6 Clause 6 seeks to provide for an amendment to the arrangement of sections in the principal Act.
- 3.7 Clause 7 seeks to provide for the short title and the commencement of the Military Discipline Supplementary Measures Amendment 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 *ad hoc* sitting of the Committee, relating to two of its members who are not employed within government. These funds will be sourced from the Departmental budget.

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 of the Republic of South Africa, 1996 (the “Constitution”), since it contains no provisions to which the procedure set out in sections 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 have been considered against the provisions of the Constitution relating to the 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 Military Discipline Supplementary Measures Act, 1999, so as to insert and substitute certain definitions; to provide for the establishment of the Military Judicial Advisory Committee; to provide for the assignment and removal of military judges and senior military judges; and to provide for matters connected therewith.*
- 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 the Bill to the National House of Traditional and Khoi-San Leadership in terms of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities.

* CCT 100/09 [2010] ZACC 10.

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