

REPUBLIC OF SOUTH AFRICA

FINANCIAL AND FISCAL COMMISSION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76; explanatory summary of Bill
published in Government Gazette No. 38188 of 14 November 2014)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 1—2015]

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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 Financial and Fiscal Commission Act, 1997 (“the principal Act”), so as to insert, substitute and delete certain definitions; to correctly describe the role of the Financial and Fiscal Commission; to affect changes to the provisions dealing with the functions of the Commission to ensure that the terminology used and consideration of the Commission’s recommendations are aligned to the Constitution of the Republic of South Africa, 1996 (“the Constitution”), and other legislation; to refer in the provision on the legal force of an assignment of a power or function by an organ of state from one sphere of government to an organ of state in another sphere of government, to the requirement to request the recommendation of the Commission; to specify how an organ or state making such assignment must reflect on a recommendation of the Commission; to adjust the period for filling of vacancies in the Commission; to provide for the appointment basis of members of the Commission; to provide that a person may not hold office as a member of the Commission for more than 10 consecutive years; to give effect to section 219(5) of the Constitution by introducing measures for the determination of the remuneration, allowance and other service benefits of the members of the Commission similar to the other constitutional institutions as provided for in the Determination of Remuneration of Office-bearers of Independent Constitutional Institutions Laws Amendment Act, 2014; to provide for the appointment of a person, other than a member or chairperson of the Commission, to the newly created administrative position of the chief executive officer, shift the chief executive officer’s and accounting officer’s responsibilities from the Chairperson to the person appointed as the chief executive officer of the Commission, who must also function as the secretary to the Commission; to enable delegations and instructions by the chief executive officer; to insert new provisions regulating the conduct of members of the Commission; to align terminology used in the principal Act with that of the Public Service Act, 1994, in respect of employees seconded from the public service to the Commission; to align the date for the submission of the Commission’s audited financial statements and annual report to Parliament with the provisions in the Public Finance Management Act, 1999; to substitute the reference to the Central Statistical Service for the Statistic South Africa; to enable the Commission to obtain information from any person; to replace the Minister’s power to make regulations with a power for the Commission to make rules regarding its functioning; to repeal transitional arrangements; 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 99 of 1997

1. Section 1 of the Financial and Fiscal Commission Act, 1997 (hereinafter referred to as the principal Act), is hereby amended—
- (a) by the insertion before the definition of “Commission” of the following definition:
- “**‘chief executive officer’** means the chief executive officer appointed in terms of section 19(1);”;
- (b) by the substitution for the definition of “financial year” of the following definition:
- “**‘financial year’** means the financial year **[of the Commission, which is the same as that of state departments]** beginning 1 April and ending 31 March the ensuing year;”;
- (c) by the insertion after the definition of “financial year” of the following definition:
- “**‘Independent Commission’** means the Independent Commission for the Remuneration of Public Office-bearers established by section 2 of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 (Act No. 92 of 1997);”;
- (d) by the insertion after the definition of “President” of the following definition:
- “**‘Public Finance Management Act’** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);”;
- (e) by the deletion of the definition of “state department”.

Amendment of section 3 of Act 99 of 1997, as amended by section 1 of Act 25 of 2003

2. Section 3 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
- “(1) The Commission **[acts as a consultative body for, and]** makes recommendations **[and gives advice]** to organs of state **[in the national, provincial and local spheres of government]** on financial and fiscal matters **in accordance with section 220 of the Constitution.**”;
- (b) by the substitution in subsection (2A) for paragraph (a)(ii) of the following paragraph:
- “(ii) request the recommendation **[or advice]** of the Commission regarding the assignment.”;
- (c) by the substitution in section (2A) for paragraphs (b), (c), (d) and (e) of the following paragraphs, respectively:
- “(b) The Commission must, not later than 180 days from the date of its receipt of the notification and request contemplated in paragraph (a) or such other period agreed with the relevant organ of state, make such recommendation **[or give such advice]** on the intended assignment as may be appropriate.
- (c) An assignment contemplated in paragraph (a) has no legal force unless the organ of state making such assignment has requested and given consideration to the Commission’s recommendation **[or advice]** contemplated in paragraph (b).
- (d) The organ of state assigning any power or function to another organ of state must **[indicate]** in an accompanying memorandum explain to the Commission, the organ of state to which a power or function is being assigned, the National Treasury and any other functionary responsible for authorising such assignment, the extent to which it has considered and taken into account the Commission’s recommendation **[or advice]** contemplated in paragraph (b).
- (e) Despite paragraph (c), if the Commission does not make a recommendation **[or give advice]** within the period contemplated in paragraph (b), the relevant organ of state may, after consultation with the National Treasury, proceed to assign a power or function to another organ of state if such assignment takes into account the measures referred to in subsection (2A)(a)(i).”;

- (d) by the substitution in subsection (2D) for the words preceding paragraph (a) of the following words:
 “Before requesting the recommendation [**or advice**] of the Commission, the organ of state seeking to assign the power or function must, in the case—”.

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Amendment of section 4 of Act 99 of 1997

- 3. Section 4 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 “The Commission is responsible for determining and overseeing the strategic direction and the operational policy of the Commission, and may do all that is necessary or expedient to perform its functions effectively, which includes the power to—”.

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Amendment of section 5 of Act 99 of 1997, as substituted by section 2 of Act 25 of 2003

- 4. Section 5 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:
 “(3) An appointment to any vacancy on the Commission must be made [**not later than 90 days**] within a reasonable period from the date when such vacancy occurs.”.

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Repeal of section 6 of Act 99 of 1997

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- 5. Section 6 of the principal Act is hereby repealed.

Substitution of section 8 of Act 99 of 1997

- 6. The following section is hereby substituted for section 8 of the principal Act:

“Term of office

- 8. (1) Members of the Commission are appointed for a term of office not exceeding five years on a part-time basis.
- (2) When the term of office mentioned in subsection (1) expires, a member may, subject to subsection (3), be reappointed in accordance with section 5.
- (3) A person may not hold office as a member of the Commission for a period of more than 10 consecutive years.
- (4) Despite subsection (1), a member of the Commission who immediately before the commencement of section 6 of the Financial and Fiscal Commission Amendment Act, 2015, was appointed on a full-time basis continues to serve on a full-time basis until that member’s term expires.”.

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Substitution of section 9 of Act 99 of 1997

- 7. The following section is hereby substituted for section 9 of the principal Act:

“Remuneration, allowances and benefits

- 9. (1) Members of the Commission shall be entitled to such remuneration, allowances and other benefits—
- (a) as determined by the President, from time to time, by notice in the *Gazette*, taking into consideration the recommendations of the Independent Commission; and
- (b) approved by the National Assembly in terms of subsection (5).
- (2) The remuneration of a member shall not be reduced, nor shall the allowances and other terms and conditions of office and service benefits be adversely altered, during the term of office of the member.

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(3) The Independent Commission shall, when investigating or considering the remuneration, allowances and other terms and conditions of office and service benefits of the members of the Commission, consult with the Minister.

(4) A notice in terms of subsection (1)(a) or any provision thereof may commence with effect from a date specified in the notice, which date may not be more than one year before the date of publication of the notice.

(5) (a) A notice issued under subsection (1)(a) shall be submitted to the National Assembly for approval before publication thereof.

(b) The National Assembly shall, by resolution—

- (i) approve the notice, whether in whole or in part; or
- (ii) disapprove the notice.”.

Amendment of section 16 of Act 99 of 1997

8. Section 16 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“Rules [of procedure]”;

(b) by the deletion at the end of paragraph (a) of the word “and”; insertion at the end of paragraph (b) after the word “decisions” of the expression “; and”; and the addition after paragraph (b) of the following paragraph:

“(c) make rules regarding the effective corporate governance of the Commission and the conduct of the employees of the Commission.”; and

(c) by the addition of the following subsection, the existing provision becoming subsection (1):

“(2) The Commission may, after consultation with the Minister, by notice in the *Gazette*, make rules regarding—

(a) requests by organs of state for the Commission to make recommendations in terms of section 3(2)(b)(ii);

(b) a power of the Commission to call for the production of books, documents or other objects, or to summon any person as a witness, cause an oath or affirmation to be administered to the person, or to examine the person; or

(c) any other ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper performance by the Commission of its functions.”.

Insertion of section 18A in Act 99 of 1997

9. The following section is hereby inserted in the principal Act, after section 18:

“Conduct of members

18A. (1) A member of the Commission—

(a) must perform the functions of his or her office in good faith and without fear, favour or prejudice;

(b) must disclose to the Commission any personal or private business interest which that member or that member’s family member may have in any matter before the Commission, and must withdraw from the proceedings of the Commission when that matter is considered, unless the Commission decides that the member’s interest in the matter is trivial or irrelevant;

(c) may not use the position or privilege of a member for private gain or to benefit another person improperly;

(d) may not act in any other way that compromises the credibility, impartiality, independence or integrity of the Commission; and

(e) must comply with the rules of conduct determined by the Minister by notice in the *Gazette*, after consultation with the Commission.

(2) For the purposes of this section, “family member” means a person’s—

(a) spouse;

(b) permanent life partner; or

- (c) child, parent, brother or sister, whether such a relationship results from birth, marriage or adoption.
- (3) A member of the Commission who contravenes or fails to comply with subsection (1) commits misconduct.”.

Amendment of section 19 of Act 99 of 1997

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10. Section 19 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
“[Administrative responsibilities of Chairperson] Chief executive officer and other staff of Commission”;
- (b) by the substitution for subsection (1) of the following subsection: 10
 “(1) The Commission must, in accordance with section 4(1)(a) and for a renewable period not exceeding five years at a time, appoint a suitable qualified and experienced person, other than a member of the Commission, as the chief executive officer, who must also be the accounting officer of and the Secretary to the Commission.”; 15
- (c) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 “As chief executive officer [**the Chairperson**] of the Commission, the person referred to in subsection (1) is responsible for—”;
- (d) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words: 20
 “As accounting officer [**the Chairperson**] of the Commission, the person referred to in subsection (1) is responsible for—”;
- (e) by the insertion at the end of subsection (3)(c) after the words “Part 5” of the expression “; and”; 25
- (f) by the addition after subsection (3)(c) of the following paragraph:
 “(d) all the functions and duties of an accounting officer of a constitutional institution in terms of the Public Finance Management Act.”; and
- (g) by the addition of the following subsections, respectively: 30
 “(4) The chief executive officer may—
 (a) delegate any of his or her powers to any other employee of the Commission; or
 (b) instruct any other employee of the Commission to perform any of his or her duties. 35
 (5) A delegation or instruction in terms of subsection (4)—
 (a) is subject to any conditions the chief executive officer may impose; and
 (b) does not divest the chief executive officer of the responsibility concerning the exercise of the power or the performance of the duty. 40
 (6) The chief executive officer may confirm, vary or revoke any decision taken by an employee in consequence of a delegation or instruction in terms of subsection (4).”.

Amendment of section 20 of Act 99 of 1997

11. Section 20 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 45

- “(2) Persons in the public service seconded to the Commission perform their duties subject to the control and discipline of the [**Chairperson**] chief executive officer of the Commission.”.

Amendment of section 21 of Act 99 of 1997

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12. Section 21 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) An employee of the Commission who becomes a member of that pension fund, is entitled to pension and retirement benefits as if that person is an [**official**] employee in the public service, as defined in section 1 of the Public Service Act, 1994.”.

Amendment of section 24 of Act 99 of 1997, as amended by section 4 of Act 25 of 2003

13. Section 24 of the principal Act is hereby amended—
- (a) by the substitution for the words preceding paragraph (a) of the following words: 5
 “As accounting officer of the Commission, the **[Chairperson] chief executive officer** must—”; and
- (b) by the substitution for paragraph (d) of the following paragraph: 10
 “(d) within two months after the end of each financial year, prepare annual financial statements as required by the Public Finance Management Act [**1999 (Act No. 1 of 1999)**].”.

Amendment to section 26 of Act 99 of 1997, as amended by section 5 of Act 25 of 2003

14. Section 26 of the principal Act is hereby amended—
- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 15
 “The report must be submitted **[within six months after the end of the financial year to which it relates]** in accordance with section 40(1)(e) of the Public Finance Management Act, and must include—”; and
- (b) by the substitution in subsection (2) for paragraph (b) of the following paragraph: 20
 “(b) audited financial statements reflecting the Commission’s financial affairs during the year, as required by the Public Finance Management Act [**1999 (Act No. 1 of 1999)**].”.

Amendment of section 27 of Act 99 of 1997 25

15. Section 27 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 30
 “(1) The Commission may obtain information it requires for the performance of its functions from the **[Central Statistical Service]** Statistic South Africa, referred to in section 4(1) of the Statistics Act, 1999 (Act No. 6 of 1999), or any other organ of state or person the Commission considers appropriate.”.

Repeal of sections 30, 31, 32, 33 and 34 of Act 99 of 1997

16. Sections 30, 31, 32, 33 and 34 of the principal Act are hereby repealed.

Amendment of law

17. The law mentioned in the Schedule is hereby amended to the extent set out in the third column of the Schedule. 35

Amendment of Arrangement of Sections to Act 99 of 1997

18. The Arrangement of Sections to the principal Act is hereby amended—
- (a) by the substitution for item 16 of the following item: 40
 “16. Rules **[of procedure]**”;
- (b) by the insertion after item 18 of the following item:
 “18A. Conduct of members”; and
- (c) by the substitution for item 19 of the following item: 45
 “19. **[Administrative responsibilities of Chairperson]** Chief executive officer and other staff personnel of the Commission”.

Short title

19. This Act is called the Financial and Fiscal Commission Amendment Act, 2015.

Schedule

Laws amended (section 17)

Number and year of law	Short title	Extent of amendment	
Act No. 92 of 1997	Independent Commission for the Remuneration of Public Office-bearers Act	<p>Amendment of section 1 of Act 92 of 1997, as amended by section 7 of Act 28 of 2003 and section 8 of Act 22 of 2014</p> <p>Section 1 of the Independent Commission for the Remuneration of Public-bearers Act, 1997, is hereby amended—</p> <p>(a) by the substitution for the definition of “constitutional institution” of the following definition: “constitutional institution” means the Public Protector, the Auditor-General and any commission established by Chapter 9 of the Constitution, including the Independent Communications Authority of South Africa [referred to contemplated in section 192 of the Constitution and the Financial and Fiscal Commission referred to in section 220 of the Constitution;”]; and</p> <p>(b) by the substitution for paragraph (f) of the definition of “office-bearer” of the following paragraph: “(f) any member or office-bearer of [an independent] the constitutional institution, including the Deputy Public Protector;”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p>

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL AND FISCAL COMMISSION AMENDMENT BILL, 2015

1. BACKGROUND

- 1.1 The Financial and Fiscal Commission (“the Commission”) was established by section 198 of the Constitution of the Republic of South Africa, 1993 (“the previous Constitution”), which section was later repealed by section 242 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), read with Schedule 7 thereto.
- 1.2 The objects and functions, constitution, expertise and impartiality, meetings, committees, co-option of persons by committees, remuneration and allowances of members and other persons co-opted to and the appointment of staff, of the Commission, were respectively dealt with in sections 199(1), 200(1), (3) and (5) to (11), 201, 202, 203, 204 and 205 of the previous Constitution, which sections, according to item 20(3) of Schedule 6 to the Constitution, continued in force until repeal by an Act of Parliament passed in accordance with section 75 of the Constitution.
- 1.3 Section 206 of the previous Constitution, on the other hand, empowered the President to make regulations regarding procedures in connection with the performance of any function, and any matter in connection with the achievement of the objects, of the Commission.
- 1.4 Similarly, sections 199(1), 200(1), (3) and (5) to (11), 201, 202, 203, 204, 205 and 206 of the previous Constitution were also later repealed by section 1 of the Financial and Fiscal Commission 1993 Constitutional provisions Repeal Act, 1997 (Act No. 96 of 1997), an Act of Parliament passed in accordance with section 75 of the Constitution, as provided for in item 20(3) of Schedule 6 to the Constitution.
- 1.5 Therefore, section 220(1) of the Constitution read with section 2 of the Financial and Fiscal Commission Act, 1997 (Act No. 99 of 1997) (“the principal Act”), provided for the continued existence and functioning of the Commission under the Constitution and the principal Act.
- 1.6 Accordingly, section 220(3) of the Constitution stipulates that the Commission must function in terms of an Act of Parliament and the principal Act was specifically enacted to give effect to section 220(3) of the Constitution.
- 1.7 In terms of section 220(1) of the Constitution, the Commission’s function is to make recommendations envisaged in Chapter 13 of the Constitution (sections 213 to 230 inclusive), or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.
- 1.8 In terms of section 220(2) and (3) of the Constitution, the Commission is independent and subject only to the Constitution and the law, and must be impartial, on the one hand, and, on the other hand, must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214(2) of the Constitution.

2. OBJECTS OF BILL

- 2.1 The main objects of the Bill are to propose amendments to the principal Act to enhance the institutional and other governance arrangements and functioning of the Commission and to fully align the principal Act with the Constitution and the Public Finance Management Act, 1999 (Act No. 1 of 1999) (“the PFMA”).
- 2.2 The above-mentioned objects are sought to be achieved by—
 - (a) shifting the chief executive and accounting officer’s functions of the Chairperson to a newly created administrative position of the chief

executive officer, who must also fulfil the function of the accounting officer of and the secretary to the Commission. This shift will remove the anomaly of the Chairperson of the Commission being also the chief executive and accounting officer while the Commission should exercise oversight with respect to the chief executive officer and accounting officer. A suitable qualified and experienced person will be appointed as the chief executive officer for a renewable period not exceeding 5 years at a time, and will be enabled to respectively delegate any of his or her powers to any other employee of the Commission or instruct any other employee of the Commission to perform any of his or her duties subject to any conditions imposed by the chief executive officer;

- (b) providing that the Commission is responsible for its strategic management and direction;
- (c) stipulating that vacancies on the Commission must be filled within a reasonable period instead of a period of 90 days after the vacancy arose;
- (d) providing for the appointment basis of members of the Commission;
- (e) providing that a member of the Commission, who may serve a term of up to five years at a time, may not hold office for more than 10 consecutive years;
- (f) regulating the conduct of members of the Commission;
- (g) giving effect to section 219(5) of the Constitution, by introducing procedures for the determination of the remuneration and other conditions of service of members of the Commission;
- (h) affecting changes to the provisions dealing with the functions of the Commission to ensure that the terminology used and consideration of the Commission's recommendations are aligned to the Constitution and other legislation;
- (i) referring, in the provision on the legal force of an assignment of a power or function by an organ of state from one sphere of government to an organ of state in another sphere of government, to the requirement to request the recommendation of the Commission on the assignment;
- (j) specifying how an organ of state from one sphere of government that assigns a power or function to an organ of state in another sphere must reflect on a recommendation of the Commission;
- (k) enabling the Commission to obtain information from any person;
- (l) replacing the Ministerial power to make regulations with a rule-making power for the Commission to accord with its direct reporting to Parliament and provincial legislatures. Rules may be made regarding requests by organs of state for the Commission to make recommendations, its governance, the conduct of employees, the summoning of witnesses to testify or produce any object and related matters necessary for the proper functioning of the Commission; and
- (m) aligning the annual reporting provisions of the Act to that of the PFMA.

2.3 The ancillary objects of the Bill are to propose amendments to the principal Act, among others, to update obsolete terminology, to refer to the constitutional mandate of the Commission and to repeal repetitive provisions relating to the appointment of the chairperson and deputy chairperson of the Commission and obsolete transitional arrangements.

3. DEPARTMENTS, ORGANISATIONS AND PERSONS CONSULTED

The Financial and Fiscal Commission was consulted.

4. FINANCIAL IMPLICATIONS FOR STATE

There will be additional costs associated with the remuneration and other conditions of service of the new chief executive officer position commensurate with its duties, which includes that of accounting officer and secretary to the Commission. The envisaged annual costs associated with the proposed chief executive officer's position is R1.5 million.

5. PARLIAMENTARY PROCEDURE

- 5.1 Sections 74, 75, 76 and 77 of the Constitution regulate the manner in which Bills may be enacted by Parliament and this is accordingly referred to as “tagging” or “classification”.
- 5.2 Section 74 of the Constitution prescribes procedures for dealing with Bills amending the Constitution. Section 75 of the Constitution prescribes procedures for dealing with ordinary Bills not affecting the provinces. Section 76 of the Constitution prescribes procedures for dealing with ordinary Bills affecting the provinces. Section 77 of the Constitution prescribes procedures for dealing with money Bills.
- 5.3 Section 76(4) of the Constitution, in particular, prescribes that a Bill must be dealt with in accordance with the procedure established by section 76(1) of the Constitution if it provides for legislation envisaged in section 44(2) or 220(3) of the Constitution, or in Chapter 13 (sections 213 to 230 inclusive) of the Constitution, and which includes any provision affecting the financial interests of the provincial sphere of government.
- 5.4 Section 44(2) of the Constitution, referred to in section 76(4) of the Constitution, empowers Parliament to intervene and pass legislation in accordance with section 76(1) of the Constitution with regard to any matter falling within a functional area of exclusive provincial legislative competence listed in Schedule 5 to the Constitution, when it is necessary to—(a) maintain national security (b) maintain economic unity (c) maintain essential national standards (d) establish minimum standards required for the rendering of services or (e) prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.
- 5.5 Section 220(3) of the Constitution, referred to in section 76(4) of the Constitution, requires that the Financial and Fiscal Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214(2).
- 5.6 Section 76(4) of the Constitution therefore expressly requires that the legislation envisaged in section 220(3) of the Constitution must be enacted in accordance with the procedure established by section 76(1) of the Constitution. It accordingly follows that this Bill should be dealt with in accordance with the procedure established by section 76(1) of the Constitution.
- 5.7 The National Treasury and the State Law Advisers are therefore of the opinion that the Bill must be dealt with in accordance with the procedure established by section 76(1) of the Constitution since it provides for legislation envisaged in section 220(3) of the Constitution.
- 5.8 The State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.