

02 October 2026

To: Hon Mmamoloko Kubayi, MP
Minister of Justice and Constitutional Development

Ms Kalayvani Pillay
Acting Director-General
Department of Justice and Constitutional Development

For attention: Mr M Mokulubete
By email: mmokulubete@justice.gov.za

Dear Minister and Acting Director-General,

SUBMISSION ON THE EXECUTIVE MEMBERS' ETHICS AMENDMENT BILL, 2026

1. INTRODUCTION

- 1.1 The Council for the Advancement of the South African Constitution ("CASAC") welcomes the opportunity to make submissions on the Executive Members' Ethics Amendment Bill, 2026 ("the Bill").
- 1.2 CASAC supports the objective of strengthening the statutory framework governing the ethical conduct of members of the national and provincial Executives. The Executive Members' Ethics Act 82 of 1998 ("the Act") is an important component of the constitutional architecture for executive accountability. Sections 96 and 136 of the Constitution require members of the national and provincial Executives respectively to act in accordance with a code of ethics prescribed by national legislation, and prohibit conduct inconsistent with public office, exposure to situations involving a risk of conflict between official responsibilities and private interests, and the use of public office or information for private enrichment or improper benefit.

- 1.3 The effectiveness of that constitutional scheme depends not only upon the substantive ethical standards contained in the Act and the Executive Ethics Code, but also upon the institutions and procedures by which compliance is monitored, breaches are investigated, reports are acted upon, and appropriate consequences follow.
- 1.4 We therefore welcome the Bill's attempt to address a number of weaknesses in the existing framework. In particular, the Bill would:
- a) formalise the role of the Secretary of the Cabinet and Secretaries of provincial Executive Councils in administering the ethics framework;
 - b) correct the present uncertainty concerning the recipient of a Public Protector report concerning the President;
 - c) establish clearer obligations for the tabling of Public Protector reports in Parliament and provincial legislatures;
 - d) provide an express statutory basis for sanctions following breaches of the Code; and
 - e) strengthen the institutional relationship between executive ethics administration, the Public Protector and the relevant legislatures.
- 1.5 These are worthwhile reforms. Some respond to deficiencies that have been apparent for many years. In her 2016 State of Capture report, the Public Protector directed Parliament, as remedial action, to review the Executive Members' Ethics Act within 180 days to provide better guidance regarding integrity, including the avoidance and management of conflicts of interest, and to clarify the responsibilities of those in authority regarding a proper response to whistleblowing and whistleblowers. The Public Protector further directed the President to ensure that the Executive Ethics Code was updated in line with that review. The absence in the present Act of a proper statutory route for a Public Protector report concerning the President has likewise long been recognised. In 2011, the Department of Justice and Constitutional Development itself proposed that such a report should be submitted to the Speaker of the National Assembly.

1.6 We nevertheless submit that several provisions of the Bill require further refinement if the amendments are to produce a coherent, effective and constitutionally sound enforcement framework. The most significant concerns relate to (i) procedural uncertainty concerning the approval and legal status of the Code; (ii) the removal of the existing time limit for Public Protector investigations without an adequate substitute accountability mechanism; (iii) the continued restriction on who may initiate an Executive Members' Ethics Act complaint; (iv) the relationship between the Secretary and the constitutionally independent Public Protector and Auditor-General; and, most importantly, (v) the absence of a clearly defined decision-maker and procedure for the proposed sanctions.

1.7 CASAC accordingly supports the Bill in principle, but recommends targeted amendments before it is introduced into Parliament.

2. THE CONSTITUTIONAL PURPOSE OF THE EXECUTIVE ETHICS FRAMEWORK

2.1 The Executive Members' Ethics Act performs a constitutional function rather than merely an administrative one. Section 96(1) of the Constitution expressly requires Cabinet members and Deputy Ministers to act in accordance with a code of ethics prescribed by national legislation. Section 136(1) imposes the equivalent requirement on members of provincial Executive Councils. The Act is the national legislation through which those constitutional obligations are principally given effect.

2.2 The Constitutional Court has repeatedly emphasised the importance of this framework. In *Public Protector and Others v President of the Republic of South Africa and Others* [2021] ZACC 19, the Constitutional Court described the case before it as concerning the enforcement of the Act and the Code, as well as the powers of the Public Protector to investigate breaches of them. In *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*

[2022] ZACC 31, it confirmed that the Code was constitutionally deficient insofar as it failed to require disclosure of donations to campaigns for positions within political parties, underscoring the relationship between meaningful disclosure, transparency and the constitutional ethics regime.

- 2.3 The legislation should accordingly be designed so that the ethics system is not only capable of identifying breaches, but produces timely, transparent and legally competent consequences. An ethics regime in which complaints may remain unresolved indefinitely, where responsibility for sanctions is uncertain, or in terms of which accountability can be avoided through procedural gaps would not adequately serve the constitutional purpose for which the Act exists.

3. APPROVAL AND STATUS OF THE CODE

- 3.1 Clause 2 would significantly alter the process by which the Executive Ethics Code is made. Whereas the existing section 2(1) requires the President to publish the Code after consultation with Parliament, the Bill would require the President, prior to promulgation, to table the Code for approval by Parliament. Parliament would further be empowered to approve the Code either without changes or with such changes as it may effect. CASAC supports, in principle, a stronger role for Parliament in the adoption of the Code. The Code gives effect to constitutional obligations concerning executive ethics and accountability, and section 101(4) of the Constitution expressly contemplates that national legislation may prescribe the manner in which, and the extent to which, instruments of subordinate legislation must be tabled in and approved by Parliament.

- 3.2 The proposed mechanism nevertheless requires greater procedural clarity. The Bill does not specify how approval by “Parliament” is to occur, notwithstanding that Parliament consists of the National Assembly and the National Council of Provinces. It should therefore make clear whether approval by both Houses is required, the procedure to be followed if the Houses take different positions, and

the process through which changes proposed by Parliament are incorporated into a Code that is ultimately promulgated by the President. These questions are particularly important because the Code regulates not only members of the national Executive but also members of provincial Executive Councils, making the role of the National Council of Provinces materially relevant. We accordingly recommend that clause 2 prescribe, or expressly authorise parliamentary rules to prescribe, a clear approval and amendment procedure that preserves meaningful parliamentary scrutiny while avoiding uncertainty as to when and in what form the Code acquires legal effect.

- 3.3 We further recommend clarification of the proposed section 2(4), which provides that the Code serves as the “prevailing standard of ethical conduct” to which members of the Executive must adhere. The meaning and intended legal effect of “prevailing” are unclear. Members of the Executive remain subject to the Constitution, the Act and other applicable legislation imposing ethical, disclosure, anti-corruption and related obligations, and the Code should not be understood to displace any stricter obligation arising from those sources. We therefore recommend that the provision instead characterise the Code as a binding minimum standard of ethical conduct under the Act, without derogating from any obligation imposed by the Constitution or other law.

4. PUBLIC PROTECTOR INVESTIGATIONS

- 4.1 CASAC recognises the difficulty created by the present section 3(2), which requires the Public Protector to submit a report within 30 days of receiving a complaint. Complex ethics investigations may require the consideration of extensive documents, responses from implicated persons and procedural fairness processes that cannot realistically be completed within 30 days. The Public Protector has itself previously stated that Executive Members’ Ethics Act investigations are frequently not completed within this period because of their complexity.

- 4.2 The present Act, however, does not simply impose a 30-day final deadline. Read together, sections 3(2) and 3(3) require a report at the 30-day stage and, where the investigation has not yet been completed, a further report once the investigation is completed.
- 4.3 Clause 4 of the Bill removes both safeguards. It deletes the 30-day period and substitutes a requirement that a report be submitted “as soon as is reasonably possible after completion of the report, taking into account the nature of the matter being investigated”. It simultaneously deletes section 3(3).
- 4.4 We consider this formulation too open-ended. In particular, requiring a report to be submitted as soon as reasonably possible after it has been completed does not regulate how long the investigation itself may take. The Bill would therefore contain no statutory benchmark for completing an Executive Ethics investigation and no obligation to account for delay while an investigation remains outstanding.
- 4.5 The practical difficulties associated with an inflexible 30-day deadline should not be resolved by eliminating meaningful time-based accountability altogether. We recommend a calibrated approach. The legislation should retain an early reporting obligation and establish a reasonable presumptive period for completion, while permitting extensions where the nature or complexity of the matter genuinely requires them.
- 4.6 For example, the Act could require the Public Protector to endeavour to complete an investigation within 90 days. Where that is not reasonably possible, the Public Protector should be required to notify the complainant and the appropriate constitutional recipient of the report, give brief reasons for the delay, and thereafter provide periodic progress reports until completion. The precise periods are open to refinement, but the important principle is that an Executive Ethics investigation should never be capable of remaining pending indefinitely without an obligation to explain the delay.

5. ACCESS TO THE COMPLAINT MECHANISM

- 5.1 Clause 5 broadens the class of authorised complainants under section 4. That is welcome. Among other changes, the Secretary, the Speaker of the National Assembly and permanent delegates to the National Council of Provinces would obtain an express ability to lodge certain complaints.
- 5.2 The Bill nevertheless retains the basic structure under which only specified public office-bearers may invoke the Executive Members' Ethics Act complaints procedure. Ordinary members of the public, civil society organisations, journalists and whistleblowers remain unable to lodge a complaint under section 4 in their own right.
- 5.3 CASAC submits that the Department should reconsider this restriction. Section 182(4) of the Constitution requires the Public Protector to be accessible to all persons and communities. While this does not necessarily require every complaint concerning executive conduct to be treated as a formal complaint under the Executive Members' Ethics Act, the present statutory distinction creates an unnecessary gatekeeping mechanism in respect of alleged breaches of a constitutional ethics framework.
- 5.4 A member of the public who possesses credible evidence of a serious breach should not have to persuade a Member of Parliament or another designated office-bearer to adopt the complaint before the mandatory process under the Act can be invoked. We recommend that section 4 permit any person to lodge a sufficiently particularised complaint, accompanied by an appropriate power in the Public Protector to decline complaints that are manifestly frivolous, vexatious, or beyond the scope of the Act.
- 5.5 At a minimum, the amended Act should expressly authorise the Public Protector to commence an Executive Ethics investigation *mero motu* where credible

information indicating a possible breach comes to the Office of the Public Protector's attention.

- 5.6 The accessibility of the complaints mechanism also requires particular consideration where information concerning a possible breach originates from a whistleblower. As noted above, the remedial action in the Public Protector's 2016 State of Capture report specifically called for the review of the Act to define more clearly the responsibilities of those in authority regarding a proper response to whistleblowing and whistleblowers. The Bill does not appear to address this aspect of the proposed reform. CASAC recommends that the Act provide, at minimum, for the confidential handling of information received from a whistleblower; prompt referral to the Public Protector of allegations concerning a possible breach of the Code; protection against unnecessary disclosure of the identity of the person providing the information; and the handling of such information consistently with the Protected Disclosures Act 26 of 2000, where applicable, and any other relevant whistleblower-protection framework. The purpose should not be to confer an investigative function on the Secretary, but to ensure that allegations concerning executive misconduct can enter the ethics process without exposing the person who reports them to avoidable risk or procedural uncertainty.
- 5.7 Clause 5(b) would introduce a new formal requirement in this regard. Whereas the existing section 4(2) requires only that a complaint be "in writing", the Bill would require it to be made by means of an affidavit or affirmed written statement. We question whether this additional formality is necessary. A written complaint containing the prescribed particulars, coupled with a power to require confirmation under oath where necessary, would be more accessible without compromising the integrity of the process. The complaints procedure should, in any event, be designed so as not to create unnecessary barriers to reporting and should accommodate requests for confidential treatment where this is justified.

6. THE ROLE OF THE SECRETARY

- 6.1 CASAC supports the creation of a clearly identified administrative custodian for the Executive Ethics framework. The proposed section 2A would require the relevant Secretary to administer the Register of Financial Interests, provide compliance advice, report annually to the relevant legislature, and refer allegations of breaches to the Public Protector.
- 6.2 The establishment of these functions creates an opportunity to improve institutional consistency and compliance. The annual reporting obligation should, however, be more specific. At minimum, the annual report should include information on compliance with disclosure deadlines, outstanding or incomplete disclosures, the number of matters referred to the Public Protector, material systemic compliance problems, and steps taken to improve administration of the Code. Information concerning pending investigations can be appropriately anonymised where necessary.
- 6.3 We further recommend that the Act expressly require the public component of the Register of Financial Interests to be made available electronically in an accessible and searchable form, with appropriate historical records retained. Transparency serves little purpose if disclosure information exists formally but cannot readily be accessed and scrutinised. The Constitutional Court's decision in *AmaBhungane* reinforces the importance of meaningful financial transparency within the executive ethics framework.
- 6.4 The proposed section 2A(2), however, requires particular care. It provides that the Secretary may obtain "advice and views" from the Public Protector or Auditor-General in order to perform responsibilities under the Act. Both institutions are constitutionally independent, and the Public Protector may subsequently be required to investigate the very conduct about which advice was sought. Section

181 of the Constitution requires Chapter 9 institutions to function independently and impartially and prohibits interference with their functioning.

- 6.5 The provision should therefore make clear that consultation with these institutions is confined to general, systemic or administrative questions and does not contemplate case-specific advice on the merits of an existing or anticipated complaint. Neither institution should be placed in a position of advising the Executive on whether particular conduct complies with an ethical standard and subsequently being required to investigate or audit that conduct independently.
- 6.6 The relationship between proposed sections 2A(3) and 4 also requires clarification. Section 2A(3) requires the Secretary to report an allegation of a breach to the Public Protector, but prescribes no period within which that referral must be made. Given that prompt referral is necessary if the mandatory investigative process is to operate effectively, the provision should require the Secretary to report an allegation without delay and should prescribe a short outer time limit for doing so. In addition, amended section 4 would require a complaint to be made by affidavit or affirmed written statement. The legislation should therefore identify how an allegation received by the Secretary becomes a complaint for purposes of sections 3 and 4, and should avoid creating unnecessary formal disputes about whether the Public Protector's mandatory investigative jurisdiction has been triggered.

7. TABLING AND CONSIDERATION OF PUBLIC PROTECTOR REPORTS

- 7.1 CASAC strongly supports the proposed section 4A, particularly the requirement that reports concerning the President be tabled in the National Assembly within 14 days and that reports concerning a Premier be tabled in the relevant provincial legislature.

- 7.2 This accords with the constitutional allocation of executive accountability. Cabinet members are collectively and individually accountable to Parliament, while members of provincial Executive Councils are accountable to their provincial legislatures. The National Assembly, moreover, elects the President and possesses two distinct constitutional mechanisms capable of bringing the President's tenure to an end: removal under section 89, on the specified constitutional grounds and with the support of at least two-thirds of its members; and a motion of no confidence under section 102(2), which, if supported by a majority of the members of the National Assembly, requires the President, the other members of Cabinet and any Deputy Ministers to resign.
- 7.3 The obligation in section 4A(5) that a report must be "considered" by the relevant legislature is nevertheless capable of being strengthened. Merely tabling a report does not necessarily result in effective accountability. In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, the Constitutional Court emphasised the National Assembly's constitutional responsibility to scrutinise executive action and respond appropriately to a Public Protector report.
- 7.4 We propose that section 4A require the relevant legislature, in accordance with its rules, to refer an adverse report to an appropriate committee or other designated mechanism for consideration within a stipulated period and to record the outcome of that consideration. Where a report contains remedial action directed at the President or Premier, that remedial action must be dealt with consistently with its binding legal effect unless and until set aside by a court. Where the report calls for other executive or legislative follow-up, the responsible office-holder should be required to state the action taken and provide reasons for the response adopted.
- 7.5 The section should also make clear that the 14-day tabling process does not postpone or qualify the constitutional principle in section 182(5) that Public Protector reports must be open to the public unless exceptional circumstances, as

determined in terms of national legislation, require that a report be kept confidential.

8. SANCTIONS

8.1 CASAC welcomes the decision to address sanctions expressly in the Act. It goes without saying that an ethical rule without a credible consequence for breach is unlikely to provide an adequate accountability mechanism.

8.2 The proposed section 4B nevertheless requires substantial revision. It states that, upon a breach of the Code, one or more penalties “may be imposed”, including a warning, fine, apology, compensation, counselling, suspension, reduction of salary or allowances, another appropriate penalty, or dismissal or removal.

8.3 The provision does not specify what determination constitutes an operative finding of breach for purposes of section 4B; who determines whether a sanction must be imposed; who is empowered to impose each category of sanction; the procedure to be followed before a sanction is imposed; the considerations relevant to selecting an appropriate sanction; the maximum amount of a fine; what “compensation” entails, by whom it is quantified and to whom it is payable; the legal meaning and effect of “suspension” for each category of executive office-holder; the relationship between a sanction and remedial action taken by the Public Protector; or how “dismissal or removal” operates within the constitutional allocation of removal powers.

8.4 These are not merely matters of administrative detail. Different members of the Executive hold office under different constitutional arrangements. The President appoints and may dismiss the Deputy President and Ministers in terms of section 91(2) of the Constitution, and appoints and may dismiss Deputy Ministers in terms of section 93(1). A Premier appoints and may dismiss members of the provincial Executive Council in terms of section 132(2). By contrast, the President may be

removed from office by the National Assembly under section 89 only on the grounds specified there and by a resolution supported by at least two-thirds of its members. Separately, section 102(2) provides that, where a majority of the National Assembly passes a motion of no confidence in the President, the President, the other members of Cabinet and any Deputy Ministers must resign. The Constitution makes a corresponding distinction at provincial level: a Premier may be removed by the provincial legislature under section 130(3), subject to its specified grounds and two-thirds threshold, while a motion of no confidence supported by a majority under section 141(2) requires the Premier and the other members of the Executive Council to resign. Sections 102(2) and 141(2) are, however, political accountability mechanisms rather than sanctions for a breach of the Code. The sanctions framework under section 4B should therefore neither purport to replicate those mechanisms nor constrain the separate constitutional powers of the National Assembly and provincial legislatures to invoke them.

- 8.5 Section 4B cannot therefore treat “dismissal or removal” as a generic disciplinary sanction available to an unidentified decision-maker. Nor can “suspension” necessarily have the same legal meaning for a President, Deputy President, Minister, Deputy Minister, Premier and MEC. This need for clarity is reinforced by the existing section 5 of the Act, which expressly preserves the constitutional powers relating to the appointment and termination of appointment of Cabinet members, Deputy Ministers and MECs.
- 8.6 We recommend that the provision expressly map the available consequences to the constitutionally competent authority. In broad terms:
- a) where dismissal of the Deputy President, a Minister or Deputy Minister is contemplated, that power lies with the President; the Act should expressly identify the competent authority for any lesser statutory sanction;
 - b) where dismissal of an MEC is contemplated, that power lies with the Premier; the Act should expressly identify the competent authority for any lesser statutory sanction;

- c) a finding against the President should be referred to and considered by the National Assembly, which must determine the appropriate response within the powers conferred upon it by the Constitution;
- d) a finding against a Premier should similarly be dealt with by the relevant provincial legislature where the consequence sought requires legislative action; and
- e) where the seriousness of a finding may warrant constitutional removal, the statute should provide for referral to the constitutionally competent body rather than purporting itself to impose removal.

8.7 The legislation should also prescribe criteria for proportionality. We submit that the sanctioning framework should distinguish between, for example, inadvertent or technical non-compliance; negligent non-disclosure; reckless or wilful concealment; repeated breaches; deliberate obstruction or non-cooperation with an investigation; receipt of an improper benefit; and substantive abuse of public office.

8.8 Relevant aggravating and mitigating considerations should include the seriousness and duration of the breach, the degree of fault, the value of any benefit obtained, prejudice to the State or third parties, attempts to conceal the conduct, cooperation with the investigation, corrective action taken, and any previous adverse ethics findings.

8.9 The proposed uncapped “fine” should be replaced by an objectively defined maximum, whether expressed as an amount, a proportion of remuneration, or another ascertainable statutory ceiling. The residual power to impose “such other penalty as may be deemed appropriate” should similarly be confined to penalties that are lawful, proportionate and within the constitutional authority of the decision-maker concerned. Any sanction involving a reduction of salary or allowances should also be expressly reconciled with section 219 of the Constitution and the Remuneration of Public Office Bearers Act 20 of 1998, so that

the relationship between the ethics sanction and the statutory remuneration framework is clear.

- 8.10 Finally, the Act should expressly require procedural fairness before a sanction is imposed, including notice of the proposed sanction, a reasonable opportunity to make representations, a reasoned decision and publication of the outcome, subject to any lawful confidentiality limitation.

9. CONTINUING ACCOUNTABILITY AFTER LEAVING OFFICE

- 9.1 CASAC recommends that the amendment process be used to remove any possible uncertainty as to the continuation of jurisdiction where an Executive member resigns, is dismissed, is redeployed or otherwise ceases to hold office after the relevant conduct occurred.

- 9.2 The decisive fact should be that the alleged breach occurred while the person was subject to the Act and Code. Departure from office should not terminate an investigation or prevent a finding from being made. Resignation or the expiry of a term may otherwise operate, whether intentionally or for some other reason, as a route out of ethics accountability.

- 9.3 The Act should accordingly provide expressly that the Public Protector retains jurisdiction over alleged breaches committed while a person was a member of the Executive notwithstanding that the person subsequently ceases to hold that office. The statutory consequences available thereafter can, of course, be adapted to the fact that some sanctions – such as dismissal – may no longer be applicable.

10. CONCLUDING REMARKS

- 10.1 CASAC supports the Bill's central objective and considers amendment of the 1998 Act overdue. The proposed reforms have the potential to create a more coherent

chain of responsibility from disclosure and compliance, through investigation by the Public Protector, to legislative oversight and consequence management.

10.2 The effectiveness of that chain will, however, depend upon greater precision than the present Bill provides. In particular, we urge the Department to:

- a) clarify the procedure for parliamentary approval of the Code and its relationship with superior legal obligations;
- b) replace the present 30-day investigation requirement with a realistic but accountable timetable rather than an open-ended standard;
- c) broaden access to the complaints mechanism, or at minimum expressly permit own-initiative investigations by the Public Protector, and provide appropriate safeguards for information supplied by whistleblowers;
- d) protect the institutional independence of the Public Protector and Auditor-General when interacting with the Secretary;
- e) prescribe more meaningful reporting and transparency obligations for the Secretary;
- f) strengthen the legislative process following the tabling of adverse Public Protector reports;
- g) substantially redraft section 4B so that sanctions, decision-makers and procedures are constitutionally and legally clear; and
- h) preserve jurisdiction over misconduct committed by persons who subsequently leave executive office.

10.3 The purpose of these proposals is to ensure that the statutory framework is clear enough to operate effectively when tested by a difficult case. Executive ethics legislation should make it possible to determine who must act, within what period, according to what standard, and with what consequence.

10.4 We thank the Department for the opportunity to make these submissions and remain available to participate in any further consultation on the Bill.



Yours sincerely,

Lawson Naidoo

**Executive Secretary
Council for the Advancement of the South African Constitution**