

Strengthening the independence of the Independent Police Investigative Directorate

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Introduction

This policy paper has been written following the judgment of the Constitutional Court on 6 September 2016 in the matter of *McBride v Minister of Police and Another*.² The case involved an application by Robert McBride, the Executive Director of the Independent Police Investigative Directorate (IPID), to have his suspension and disciplinary action against him by the Minister of Police set aside on the basis of constitutional invalidity. The case was first heard in the Gauteng Division of the High Court. The High Court issued judgment in McBride's favour in December 2015.³ Owing to the fact that the High Court found certain legislative provisions to be unconstitutional, the case was referred to the Constitutional Court for 'confirmation'.⁴ The case is above all concerned with the independence of the IPID in view of the fact that section 206(6) of the Constitution requires that the IPID be independent.

The Constitutional Court judgment declared certain sections of the Independent Police Investigative Directorate Act ('the IPID Act'), Public Service Act and the IPID Regulations to be invalid 'to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate'. The Constitutional Court instructed that Parliament 'cure the defects in the legislation' within 24 months (i.e. by 5 September 2018).

The judgment makes extensive reference to two previous Constitutional Court judgments pertaining to the independence of the Directorate for Priority Crime Investigation (DPCI).

This policy paper is intended to inform debate, by parliamentarians and others, about the legislative amendments that are required. The policy paper discusses the following:

- The general purpose of independent civilian oversight bodies (ICOBs);
- The relevance of independence to ICOBs;

- The history of the Independent Complaints Directorate (ICD) and the IPID;
- Key differences between the ICD and the IPID;
- The debate about the IPID's independence prior to the McBride judgment;
- Constraints on the IPID's independence; and
- Key aspects of the High Court and Constitutional Court judgments.

In the conclusion, the policy paper raises questions about the comparison between the DPCI and the IPID in relation to the issue of 'an adequate level of structural and operational autonomy' that is foregrounded in the Constitutional Court *Glenister* judgment on the DPCI and the *McBride* judgment on the IPID.⁵ The paper notes that, unlike the DPCI, the IPID is institutionally separate from the South African Police Service (SAPS) and, therefore, is 'structurally' more independent. However, as discussed in the section on constraints on the IPID's independence, the IPID does not enjoy a high level of 'operational autonomy' from the SAPS. The independence of the IPID Executive Director is therefore fundamental to the ability of the IPID to assert itself as an independent body.

Terminology and abbreviations

The general term that the policy paper uses for agencies like the ICD and the IPID is independent civilian oversight bodies (ICOBs). The paper also refers to specialised anti-corruption agencies (ACAs) like the Directorate for Priority Crime Investigation (DPCI) (the Hawks).

The general purpose of independent civilian oversight bodies (ICOBs)

The establishment of ICOBs is an international trend that has emerged since the 1970s. ICOBs have been established in many 'developed' countries, but also in 'developing countries' such as Brazil, Kenya, Lesotho⁶ and Sierra Leone.⁷ An ICOB is typically one of a number of bodies responsible for oversight of the police in the country or other jurisdiction in which it operates. A useful (though not watertight) way of distinguishing the role of the IPID from other agencies within the 'architecture of police accountability' is that the IPID, like other ICOBs, is responsible for the accountability of 'individual policing agents', whilst many of the other components of the architecture of accountability focus more on accountability at an organisational level.⁸ In this respect, the functions of ICOBs overlap with those of police managers, who are also responsible for ensuring that individual members of the police are held accountable.⁹

In general terms, the key purpose of ICOBs is:

- To ensure that investigations into the police are carried out effectively, thereby making certain that cases in which it is alleged or possible¹⁰ that there has been criminality on the part of the police are investigated properly (the 'effectiveness function'); and
- To create greater public confidence that investigations against the police are carried out properly (the 'legitimacy function').

As indicated, one purpose of ICOBs is to reassure members of the public that investigations against the police are carried out properly (the 'legitimacy function'). There is a tendency for members of the public to suspect that investigations carried out by police agencies into their own members are not necessarily carried out vigorously or impartially. This suspicion is not without basis, as police throughout the world have been known to protect their colleagues from being held accountable under the law. ICOBs are therefore a vehicle for creating greater public confidence that investigations against the police are carried out properly.

However, caution needs to be exercised in relation to this issue. Most ICOBs do not investigate all complaints against the police, and this appears to be the preferable position.¹¹ The 'ideal' position is that police organisations have effective internal systems and that the ICOB serves as independent

verification that these systems are operating effectively, thereby contributing to trust in, and the legitimacy of, the police. Where police organisations are effective in regulating themselves, this is done, inter alia, through: promoting the awareness of laws and adherence to codes of conduct; the system of recruitment; training; and command and control. Where there is effective internal regulation, the internal disciplinary system serves as a fallback for the management system in addressing disciplinary problems. 'Internal affairs' investigation units may also be a component of effective self-regulation.

An ICOB cannot be the main mechanism for ensuring that the police comply with the law and adhere to principles of discipline. Rather, it should be seen as part of the overall system for ensuring that police officers adhere to the required standards of conduct. ICOBs of necessity therefore exist in a dynamic relationship with police organisations. According to Jones:

Over-reliance on external controls may actually be counterproductive if they foster indifference or resistance within policing organisations and weaken internal monitoring systems... . [I]t is clear that [external controls] can only be effective if they complement well-developed internal forms of control.¹²

Similarly, the United Nations Office on Drugs and Crime (UNODC) states:

It is crucial that the external body does not become a tool for the police that absolves them of responsibility for their own force: an external mechanism cannot and must not replace internal mechanisms. Care should be taken to avoid placing all responsibility for police conduct outside the police.¹³

The task of 'ensuring proper police conduct'¹⁴ should be seen as primarily the task of police management. But this is not an argument for limiting the powers or independence of the ICOB. In order to play their roles effectively, ICOBs must have the power, resources and independence to enable them to subject the police to adequate scrutiny. If they do not, the consequences may be not only a loss of trust in the ICOB, but also a loss of trust in the police.

The independence of independent civilian oversight bodies (ICOBs)

Both the legitimacy and effectiveness of an ICOB hinge partly on its independence. Public confidence in the independence of the ICOB is necessary for it to be legitimate. Otherwise, cases that it deals with will not be regarded as having been dealt with impartially. However, independence is not 'sufficient' on its own. In addition, for the ICOB to be legitimate, it must also be effective – for instance, it has to have sufficient expertise and resources to do its work. The ICOB's independence and effectiveness are interrelated. However, its ability to be effective is dependent not only on factors such as expertise and resources, but also on its credibility as an independent body. If it is not seen as independent, members of the public will not report cases to it.

The creation of ICOBs often provokes hostility and distrust on the part of police personnel.¹⁵ Part of the ICOB's ability to do its work effectively is also its ability to present itself to the police as acting independently and impartially. To be effective, it must therefore not simply be independent of the police but independent in the sense of being 'neutral' and trusted by the police to deal with cases in an impartial manner.¹⁶

As will be discussed, ICOBs typically have to work to earn the trust of the police. This enables them to avoid being identified as 'out to get' the police and allows them to secure greater cooperation and assistance from the police. As discussed further in the sections that follow, ICOBs depend extensively on cooperation and assistance from the police in order to be effective. However, the manner in which they pursue police cooperation may compromise their work. Ideally, such cooperation should be achieved through projecting themselves as a neutral agency that is solely committed to establishing the truth and not as one that is biased towards or against the police.¹⁷

Brief history of the Independent Complaints Directorate (ICD) and the Independent Police Investigative Directorate (IPID)

During the apartheid years, the police in South Africa came to be seen as brutal both in their response to political protest and resistance and in their dealings with (black) civilians more broadly. During the transition to democracy, one of the key concerns was to ensure that the police in democratic South Africa would serve the people of South Africa and operate in a manner consistent with human rights principles. One of the steps taken to address these concerns was the creation of an ICOB in South Africa.

South Africa's first ICOB was the ICD. The creation of the ICD was first provided for in section 222 of the Interim Constitution (Act 200 of 1993), which stated:

There shall be established and regulated by an Act of Parliament an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the [South African Police] Service are investigated in an effective and efficient manner.

Section 222 of the Interim Constitution was put into effect through Chapter 10 of the South African Police Service Act ('the SAPS Act') 68 of 1995, which established the ICD. In 1996, the year after the passing of the SAPS Act, South Africa adopted the 'new' Constitution, which now provided for 'an independent police complaints body' in terms of section 206(6).

However, it became apparent in 2005 that there was some level of dissatisfaction about the functioning of the ICD. After a series of hearings on the issue, the Portfolio Committee on Police compiled a report which suggested that there was a need for the ICD, as well as the Civilian Secretariat for Police, to be restructured and for the mandate of the ICD to be reconsidered.¹⁸ A 2009 review by the Portfolio Committee also made various recommendations relating to the ICD, including a recommendation that the ICD should be removed from the SAPS Act.¹⁹

A Bill providing for the creation of the IPID was initially tabled by the Minister of Police in 2010.²⁰ After public hearings, including amendments to the Bill, the IPID Act was passed as Act 1 of 2011. On 1 April 2012, the Act came into operation and the ICD became the IPID.

Key differences between the Independent Complaints Directorate (ICD) and the Independent Police Investigative Directorate (IPID)

There are a number of changes brought about by the IPID Act. Some of the key differences between the provisions governing the ICD and those contained in the IPID Act are the following.

Investigative mandate

Although the ICD was designated as a 'complaints directorate', its mandate was not restricted to complaints. Most notably, its mandate included responsibility for investigating 'deaths in police custody or as a result of police action'. The ICD was required to investigate all of these deaths itself, irrespective of whether these deaths were the focus of a complaint or not.²¹ However, the ICD could refer the investigation of other matters to the police for them to investigate.²²

The vast majority of cases that the ICD received were complaints from members of the public about police service delivery. A substantial minority were concerned with complaints of criminal conduct by the police. However, a very large proportion of the time of ICD investigators was dedicated to the investigation of deaths linked to the large number of these cases and the fact that the ICD was by law required to investigate all of these cases.

The legislation creating the IPID²³ was developed at the same time as the legislation governing the Civilian Secretariat for Police.²⁴ These two legislative instruments did the following:

- Changed the designation of the directorate from that of a 'complaints directorate' to that of an 'investigative directorate' and required the IPID to investigate a wider range of serious offences (as listed in section 28) and not only deaths in custody or as a result of police action; and
- Transferred responsibility for monitoring other complaints (not falling within section 28 of the IPID Act) to the Civilian Secretariat for Police.²⁵

By comparison with the ICD legislation, the IPID legislation therefore expands the range of alleged or possible criminal offences that South Africa's ICD must investigate. Alleged criminal offences that are not covered by section 28 are to be investigated by the police internally, though, in terms of section 28(1)(h), the IPID Executive Director may also refer other matters to the IPID at his/her discretion or 'if so requested by the Minister, an MEC or the Secretary'. Other (non-criminal) complaints against the police are also investigated internally by the police. The investigation of some complaints may be monitored by the Secretariat.²⁶

Through the IPID legislation, Parliament has therefore prioritised certain categories of alleged or possible offences for investigation by the IPID. This is presumably because Parliament identifies these types of offences as the most serious offences in which the police are likely to be involved. It seems reasonable to assume that part of the motivation for allotting the investigation of these cases to the IPID was that, *because of its independence*, the IPID would be able to investigate these cases effectively, thereby contributing to ensuring more effective deterrence in respect of violations of the law by the police.

Mandatory notifications

One consequence of the extension of the investigative mandate of the IPID was that the mandatory reporting requirements were also expanded. The SAPS were only obliged to report deaths in custody or as a result of police action to the ICD.²⁷ Mandatory reporting now applies to all of the categories of alleged or possible offences referred to in section 28(1)(a) to (f) of the IPID Act.²⁸

Compliance with IPID recommendations

Another important change is that the IPID Act confers greater powers on the IPID in some respects than were conferred on the ICD. In terms of section 30 of the IPID Act, the SAPS is required to comply with IPID recommendations for disciplinary proceedings to be implemented.

Cooperation with the IPID

The IPID Act also strengthened provisions requiring cooperation by SAPS and municipal police members with the Directorate. For instance, in terms of section 29(2)(a), the members of the SAPS or municipal police services must arrange for an identification parade within 48 hours of the request made by the Directorate.

Significance of change for the independence of the IPID

One of the consequences of the IPID Act was also that the IPID was now governed by a separate legislative instrument. Prior to this, the ICD had been governed by section 10 of the SAPS Act, though this provided that the ICD 'shall function independently from the service'.²⁹ However, though the change has symbolic significance, it does not translate into greater structural or operational independence. For instance, the arrangement with relation to the budgetary allocation to the ICD and the IPID has remained unchanged. The ICD received its budget in the same way as the IPID, that is, as a separate allocation from that awarded to the SAPS. For instance, in 2011, the ICD received its

budget in terms of Budget Vote 23,³⁰ while the SAPS received its budget in terms of Budget Vote 25.³¹ In 2015, the IPID received its budget in terms of Budget Vote 20,³² while the SAPS received its budget in terms of Budget Vote 23.³³ This arrangement goes back at least as far as the 1999 Budget.

Essentially, the IPID enjoys the same degree of independence or lack thereof as was enjoyed by the ICD, except in respect of the following:

- The ICD Executive Director could be 'removed from his or her office under the circumstances and in the manner prescribed by the Minister in consultation with the Parliamentary Committees'; and³⁴
- The Minister may remove the Executive Director of the IPID from office 'on account of (a) misconduct; (b) ill health; or (c) inability to perform the duties of that office effectively'.³⁵

The IPID Act is therefore both more and less restrictive in terms of the provisions governing the removal from office of the Executive Director. While, on the one hand, it restricts the grounds on which the Executive Director may be removed, the Minister is no longer required to consult the Parliamentary Committee about the manner of removal.

As indicated above, the legislation expanded the IPID's investigative mandate and expanded police obligations for cooperation with the IPID, but it had no substantial consequences in enhancing the independence of the IPID.

The debate about independence prior to the McBride matter

The UNODC handbook, *Police Accountability, Oversight and Integrity*, states explicitly that oversight mechanisms like the IPID 'should have full operational and hierarchical independence from the police and be free from executive or political influence'.³⁶

In South Africa, various commentators and analysts have raised concerns about the independence of the ICD and the IPID.³⁷ Thus, for instance, in 1996 an early commentary on the provisions of the SAPS Act pertaining to the ICD, stated:

Although it is clearly essential that the ICD keep the ministry closely informed about its findings, it should be and be seen to be absolutely independent of the ministry, and not only of the police command structure, in its structure and operations. ... Even greater independence would be achieved if the ICD became a free-standing unit in the manner of the Human Rights Commission or Public Protector (or Queensland's Criminal Justice Commission), accountable to parliament rather than the executive. Procedures for appointment and removal of the director, which should be independent of the Minister of Safety and Security,³⁸ should be set out in the Act itself, and it should be specified that the director may not be a current or former police officer.³⁹

Some of these issues were raised by Moshesh and Dintwe in their 2010 submission on the IPID Bill:

Although the establishment of the IPID is through an Act of Parliament, an ideal situation would have been an establishment of an institution very similar to the Chapter nine institutions such as the Public Protector, the Human Rights Commission and others. The latter institutions are more able to exercise independence because their heads are appointed by the Portfolio Committee as opposed to the proposed Bill. The provision of Section 5(1) that the Minister must appoint the Executive Director (ED) is not a best scenario. In the current Bill, the political independence of the ED cannot be guaranteed. ... [T]he same Minister is responsible for the police institution of the country which literally means that both the head of the Police and that of the IPID will be answerable to the same Minister.⁴⁰

Similarly, in 2013, Vawda and Mtshali argued:

Ultimately, it would be beneficial for the IPID to ‘maintain an arms-length relationship’ with the Minister of Police. It would also be desirable if the IPID was, instead of being a part of the Ministry of Police, housed in another ministry, such as Justice and Constitutional Development – as is the case with the public protector. Such a change would do much to alter the public’s perceptions regarding the independence of IPID.⁴¹

As reflected in the quotations above, the concerns that have been raised have tended to focus on the following overlapping issues:

- The level of influence of the Minister of Police over the Directorate, including the Minister’s role in appointing and dismissing the Executive Director of the Directorate and in determining the budget of the Directorate; and
- The location of the Directorate in the Ministry of Police (until 2009, this was known as the Ministry of Safety and Security) and the related fact that the Directorate is accountable to the Minister.

In addition, writing about the ICD, Manby raised the issue of the appointment and dismissal of the Executive Director, in the process arguing that the Director should not be a current or former police officer.

Constraints on the Independent Police Investigative Directorate’s (IPID) independence

This policy paper discusses two broad categories of constraints on, or ‘risks’ to, the independence of the IPID:

- Vulnerability of the IPID Executive Director to interference or pressure from the Minister of Police and the National Commissioner of Police; and
- Vulnerability of the IPID to ‘regulatory capture’.

Vulnerability of the Executive Director to interference by the Minister of Police and the National Commissioner of Police

The need for the independence of specialised anti-corruption agencies (ACAs) like the DPCI partly relates to the fact that their investigations may involve focusing on the political elite and on powerful, ‘politically connected’ individuals. ICOB investigations may also focus on senior police officers who are ‘politically connected’. For instance, two former national commissioners, Jackie Selebi and Bheki Cele, have been prominent members of the ruling party. Jackie Selebi was the subject of investigation by the ICD. Though the ICD’s investigation did not confirm the validity of the allegations against him, he was later found guilty of corruption. Where senior SAPS officials are subject to investigation by the IPID, there may be efforts to protect them from investigation, particularly where they are politically connected.

Owing to the importance of the police organisation in the overall process of governing the country, there is often a very close relationship between the senior political official responsible for the police (the Minister of Police) and the police chief or Commissioner. While this relationship is supposed to be governed by certain principles regarding the respective powers of these two officials, in practice it does not always work this way. Thus, in 2011, a police commissioner in Victoria, Australia, resigned after it was found that he had ‘released misleading crime statistics which were favourable to the government immediately before an election’.⁴² Questions about the influence of the Minister of Police over the National Commissioner were also prominent before the Marikana Commission, which found that the Minister of Police may have influenced the decision to launch the police operation on 16 August 2012 at Marikana.⁴³

The nature of the relationship between the two does not only mean that the police chief may do 'favours' for his/her political heads, but also that the police chief often has a lot of influence with the Minister. The police chief has to try to secure cooperation from rank-and-file personnel. Depending on qualities such as his/her own temperament, values, and understanding of police work, this may involve some orientation towards condoning or 'turning a blind eye' to certain types of abuses by the police. This means that it is not only when the police chief himself/herself, or his/her closest colleagues, are the subject of investigation that the police chief may have an interest in securing 'lenient' treatment for the police. The police chief may also try to interfere with investigations against lower-ranking police officials. This may be to protect his/her own reputation, because he/she condones their behaviour, or it may be a means of maintaining his/her credibility with rank-and-file police members. The police commissioner may try to exert pressure on the head of the ICOB, and also use his/her access to the Minister to secure the support of the Minister in exerting pressure on the ICOB head. The potential for this is enhanced by the fact that the police commissioner typically enjoys greater formal status and informal power than the ICOB Executive Director and also typically has greater access to the Minister of Police.

Vulnerability of the ICOB to 'regulatory capture'

'Regulatory capture' occurs when a group being regulated (in this case the police) subverts the impartiality and zealotry of the regulator (in this case the ICOB). In relation to ICOBs, regulatory capture may manifest itself in various ways, including 'sympathy [by ICOB personnel] with the particular problems that [the police] confront in meeting standards', resulting in an inclination to excuse breaches of standards and an 'absence of toughness'.⁴⁴

According to Savage, 'regulatory capture is the ever-present potential with which independent investigation has to come to terms and which must be constantly addressed'.⁴⁵ Factors that contribute to the vulnerability of ICOBs to regulatory capture include:

- Their reliance on police cooperation, resources and personnel; and
- The tendency for a significant proportion of ICOB personnel to be former police officers.

Reliance on police cooperation, resources and personnel

As indicated above, the creation of ICOBs often provokes hostility and distrust on the part of police personnel. At the same time, ICOBs are reliant on police cooperation in order to do their work effectively. To do so, they need to overcome this distrust and hostility.

Although ICOB investigations may focus on senior police personnel, the role of an ICOB is mostly to focus on rank-and-file police officers. For investigative purposes (or for monitoring, if this is their role), ICOB personnel consistently have to interact not only with these individual officers who are the subject of investigation ('subject officers'), but also with their colleagues and superiors.

Thus, in any investigation into an allegation against a police officer, some or all of the witnesses are likely to be other police officers. It may also be necessary to obtain the assistance of superiors or others in the police department to obtain access to documents such as custody registers or data from vehicle tracking systems.

While legislation requires police to cooperate with the IPID,⁴⁶ the quality of the cooperation that IPID personnel receive is obviously qualitatively different if it is given willingly rather than unwillingly. As with other ICOBs, the ability of the IPID personnel to do their work can be undermined by the police using strategies such as deliberate delays, failing to return telephone calls, or claims that documents have been lost.

Based on interviews with personnel from the three main ICOBs in England, Northern Ireland and the Republic of Ireland, Savage states that many interviewees from these bodies indicated that the ICOBs:

have tended to be 'over cautious' in their dealings with the police bodies under investigation, often linked to a concern to maintain good working relationships with them. This might be reflected in, say, a reluctance within the complaints organisation to seize an officer's notebook for investigation, or filing an investigative report on police failings which 'pulls punches' rather than boldly stating the case.⁴⁷

A similar issue is that ICOBs are typically dependent on police resources and personnel to carry out certain specialist functions. For instance, ICOBs frequently do not have the capability to carry out ballistic tests. They may also depend on other specialist capabilities within the police. The IPID (this also applied previously to the ICD) uses the services of experts from the SAPS Local Criminal Records Centre (LCRC) at crime scenes where people have been shot by the police. This includes the use of general crime scene experts, who collect evidence at crime scenes and document the layout of the scene by means of photographs and sketches, as well as ballistics experts.⁴⁸ LCRC units function to some degree separately from crime prevention⁴⁹ and (to a lesser degree) detective units. But there are often both formal and informal links between personnel in these different units.

Even in 'developed' countries where ICOBs may be better resourced, there is a similar dependence. With regard to the United Kingdom and Ireland, for instance, Savage states:

[ICOB] investigations frequently require access to specialist forensic services and technical expertise which are not available as in-house facilities – for example, ballistics expertise, traffic collision expertise, and so on. This can mean that complaints bodies are forced to turn to their local police organisation, with its much more comprehensive range of support facilities, for those analytical services.⁵⁰

The support that ICOBs depend on the police for comprises not only technical support. Owing to the fact that police personnel far outnumber those of ICOBs, they (ICOBs) also rely on police support for guarding crime scenes, even after ICOB investigators reach the scene. This is a feature of the work of ICOBs in South Africa,⁵¹ the United Kingdom and Ireland.⁵²

The implication of this is that there is continuous informal pressure on investigative personnel to treat the police leniently, for instance by conducting interviews in a superficial way rather than pursuing questions in order to ensure that the police answer them in a full and satisfactory way. As Savage puts it, investigators 'sometimes ... do not feel they can use the full range of powers actually open to them because of an organizational concern to maintain good relationships with police bodies'.⁵³

As a result, ICOB investigative personnel have to walk a fine line in order to do their jobs effectively. Their work continually involves 'negotiating' with the police about the extent of their power to scrutinise police actions. To motivate police to cooperate with them, they use strategies such as referring to their formal powers, emphasising that they are fair and impartial, and taking great trouble to present themselves as 'reasonable' in relation to their approach to the work of the police.

The reliance of ICOB personnel on police cooperation and support is therefore one factor that contributes to the risk of regulatory capture (one of the characteristics of which is 'an absence of toughness'). ICOB personnel face continual pressure to be lenient and run the risk that, if they investigate the police in a thorough and vigorous way, they will pay the price for this in the form of non-cooperation on the part of the police.

The fact that the ICD and thus IPID personnel have to perform a 'balancing act' in order to maintain police goodwill was reflected in interviews with ICD investigators carried out in 2010. For instance, the ICD investigators indicated that, among the challenges that they face in investigating the police are that:

- ICD personnel frequently have to appeal for the intervention of senior police (at station commander or even provincial commissioner level) in order to secure cooperation by the police;⁵⁴

- It is not easy to investigate the police and one has to be careful about how one approaches them;⁵⁵
- Though the ICD receives good assistance from LCRC personnel (responsible for documenting evidence at crime scenes), if ICD personnel are asked for more than a routine procedure, they (the LCRC personnel) may become more difficult; and⁵⁶
- The ICD also relies on the police to carry out arrests on their behalf.⁵⁷

ICOB personnel

There is a consistent pattern whereby ICOB personnel, particularly ICOB investigators, are drawn from the ranks of police officers. The primary reason for this is that the biggest pool of people with the appropriate skills to do investigative work is to be found among current and former police personnel. For instance, a review of ICOBs in the United States of America (USA) states that investigators in many jurisdictions have a law enforcement background.⁵⁸

It is likely that as many as 30 to 40% of ICD investigators, and possibly more, were former police officers.⁵⁹ Owing to the fact that there has been a high level of continuity in the transition from the ICD to IPID, the profile of staff is likely to be very similar. The fact that former SAPS personnel are a prominent component of the IPID is reflected in a report that appeared in the press in July 2015. This indicated that the Gauteng head of the IPID had previously been a brigadier in the SAPS. The report stated that two job candidates whose job applications she was involved in considering had also been with her in the SAPS.⁶⁰ The current IPID Executive Director, Robert McBride, is himself also a former police officer, having served as head of the Ekurhuleni Metropolitan Police Department.

Employing former police officers has certain benefits for ICOBs. The employment of former police detectives 'may have its advantages not only because they understand the investigative process but because they have insiders' knowledge of other practises and procedures, such as the details of different kinds of registers, within the police'.⁶¹

According to one former police officer working for an ICOB in the USA, 'knowing proper police procedure saves me a lot of time'.⁶² Another benefit may be that 'the investigators' previous experience as police officers helps address police union and subject officers' concerns that [the ICOB] does not understand police work or is biased against officers'.⁶³

On the other hand, there are clearly substantial risks involved in the employment of former police personnel. One of these is that, if a police agency is known to employ former police personnel, the public may question whether it is genuinely independent.⁶⁴ Another risk here is that 'former police officers will still be aligned with negative aspects of the organisational culture of the police. They may for instance be inclined to excuse human rights violations as justified and necessary in "fighting crime"'.⁶⁵

The fact that ICOBs employ a significant number of former police also increases their vulnerability to 'regulatory capture' due to ICOB officials' 'sympathy with the particular problems that (the police) confront in meeting standards, resulting in an inclination to excuse breaches of standards and an "absence of toughness"'.⁶⁶

Key aspects of the High Court and Constitutional Court judgments

This section of the paper highlights some key aspects of the High Court and Constitutional Court judgments, but should not be seen as a detailed summary of either judgment.

Both the High Court and Constitutional Court judgments emphasise questions about the comparison between the IPID and the DPCI. Related to this, the *Glenister* judgment is a key source of reference for both. The High Court found that the independence of the IPID is expressly guaranteed and protected under section 206(6) of the Constitution⁶⁷ and that 'the effect of the constitutional entrenchment of the independence of IPID is that the operational and structural independence of IPID must be at least as

strongly protected as that of the DPCI'.⁶⁸ Similarly, the Constitutional Court found that 'the threshold for satisfying independence in respect of IPID is arguably more stringent [than for the DPCI] given that the Constitution expressly demands its independence'.⁶⁹

A further issue highlighted by the High Court was the fact that the DPCI is situated in the SAPS⁷⁰ and that, as a result, the IPID is also responsible for investigating cases against DPCI members. It would therefore make little sense if the IPID was less independent than the DPCI.

As IPID has oversight and accountability responsibilities over the DPCI, affording the DPCI adequate independence without doing the same for IPID appears to be self-defeating. In this regard, the High Court held that IPID's oversight role over the DPCI would be compromised and might create room for political interference to seep through and render the DPCI's independence nugatory.⁷¹

The critical issue that the courts had to decide on concerned the Minister's powers in relation to the suspension, discipline or removal of the IPID Executive Director. The High Court found that 'this amounts to inadequate security of tenure for a national head of an independent body investigating police misconduct, including corruption'.⁷² Speaking on behalf of a unanimous Constitutional Court, Acting Justice Bosielo confirmed this view. The judgment states that Section 6 of the IPID Act:

gives the Minister enormous political powers and control over the Executive Director of IPID. It gives the Minister the power to remove the Executive Director of IPID from his office without parliamentary oversight. This is antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.⁷³

A key point that the Constitutional Court emphasises is that strengthening the independence of the IPID does not undermine the principle that the IPID should be accountable. The Constitutional Court notes various sections of the IPID Act that require reporting by the Executive Director to the Minister.⁷⁴ The Constitutional Court then states:

The fact that IPID is required by both the Constitution and the IPID Act to be independent does not mean that it cannot be held accountable. Like all other organs of state, IPID must be accountable for its actions. To be insulated from undue political interference or control does not mean that IPID should be insulated from political accountability.⁷⁵

Conclusion

In *Glenister*, the Constitutional Court recognised that it is necessary for specialised anti-corruption agencies (ACAs) to enjoy sufficient independence to prevent undue political interference and noted that this requires their 'de-politicisation'.⁷⁶ At the same time, the Court found that specialised ACAs cannot have 'full' or 'absolute' independence. As the Court stated: 'In light of international standards, one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy'.⁷⁷

In the *McBride* case, the Constitutional Court found that the principles applying to the independence of the IPID are similar to those that apply to the DPCI.⁷⁸ The IPID, unlike the DPCI, is not part of the SAPS, though it falls under the same Minister as the SAPS and the DPCI. But, though the IPID has some level of structural autonomy, the operational independence that it enjoys is far more ambiguous.

As this policy paper shows, the IPID is in many ways dependent on the SAPS and depends on cooperation from SAPS members in order to carry out its functions effectively. Former SAPS members also make up a significant proportion of IPID personnel.

The IPID therefore occupies a position of vulnerability in which the ability and willingness of IPID personnel to act 'without fear or favour' in investigating the police cannot be taken for granted. The ability of the Executive Director to affirm the independence of the IPID is therefore pivotal to whether or not ICD personnel are able to assert themselves as representatives of an independent body. As the High Court judgment indicates: 'The Executive Director is at the very heart of IPID's ability to function effectively to fulfil its constitutional mandate, and is critical to ensuring the proper conduct of investigations by IPID.'⁷⁹

By giving effect to the judgment of the Constitutional Court, Parliament will therefore strengthen the Executive Director's protection against being dismissed for arbitrary reasons. In so doing, Parliament will be strengthening the ability of the IPID Executive Director to act independently and will therefore contribute to the overall ability of the IPID to assert itself as an independent entity. This will hopefully contribute to greater public trust in the IPID.

Taking into account the centrality of the Executive Director to the status and independence of the IPID, Parliament should also consider reviewing the provisions of the IPID Act in relation to the appointment of the Director. The 2012 National Development Plan recommends that the SAPS National Commissioner should be appointed on a competitive basis,⁸⁰ and therefore it also seems reasonable for this to be considered in relation to the IPID Executive Director. It may also be worthwhile for Parliament to consider whether it is appropriate for current or former police officers to be eligible for appointment as Director of the IPID.

At the same time, one of the ongoing challenges facing the IPID is that of resources. Related to this is the fact that IPID struggles to maintain the capacity to carry out its functions effectively. In a context of resource constraints, a body like the IPID can never be resourced at the 'ideal' level. But the issue of adequate resourcing of the IPID should itself be recognised as integral to establishing the IPID as a body with the authority to act with confidence in its own independence.

Endnotes

- 1 This policy paper is based in part on two affidavits made by the author in 2015 on behalf of the Council for the Advancement of the South African Constitution (CASAC). The affidavits were prepared in support of CASAC's submissions to the High Court after CASAC was admitted as an amicus curiae in the *McBride* case. Certain passages from the original affidavits are quoted or referred to in the High Court judgment (see, for instance, paras 25 to 27 and 30 to 33). The arguments put forward in this policy paper are similar to, and consistent with, those in the original affidavits. A number of the passages from the affidavits have been reworked and restructured for the purpose of producing this policy paper. (CASAC was an amicus when the case was heard in the High Court but was not an amicus in the Constitutional Court case.)
- 2 *McBride v Minister of Police and Another* (CCT255/15) [2016] ZACC 30 (6 September 2016); available at: <http://www.saflii.org/za/cases/ZACC/2016/30.pdf>.
- 3 *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) at para 17.
- 4 In terms of section 172(2) of the Constitution.
- 5 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 121; *McBride v Minister of Police and Another* (CCT255/15) (note 2 above) at para 8.
- 6 Dissel, Masuku, Tshelo & Tait 'The police as friend and helper to the people: Assessing the Lesotho Mounted Police Service performance in terms of the South African Police Chiefs Cooperation Organisation (SARPPCO) Code of Conduct' on pages 8 and 12; available at: <http://www.apcof.org/files/APCOF%20Lesotho%20Indicators%20Final%20Web.pdf>.
- 7 The IPCB website is: <http://ipcb.gov.sl/>.
- 8 Trevor Jones 'The governance and accountability of policing' in Tim Newburn (ed.) *Handbook of Policing*, 603-627 Cullompton, Devon, UK: Willan Publishing 2003 at 605.
- 9 Where cases against the police are investigated (whether by the IPID or internally) and are referred for prosecution, the National Prosecuting Authority and the courts also become involved in the process of holding individual policing agents accountable.
- 10 At various points, the policy paper refers to 'alleged or possible' offences. Cases dealt with by the IPID, or its predecessor, the ICD, include cases where there are allegations that the police have been involved in wrongdoing as well as cases that are referred to them (the IPID or the ICD) in terms of 'mandatory reporting' requirements. For instance, deaths in police custody or as a result of police action are referred to the IPID (and were referred to the ICD) irrespective of whether or not they were alleged to have been 'offences'. The reason for reporting the cases to the ICD/IPID can be assumed to be related to the fact that they are possible offences.
- 11 The only exception to this is Northern Ireland where the Office of the Police Ombudsman for Northern Ireland (OPONI) has responsibility for investigating all complaints against the police.
- 12 Jones (note 8 above) at 605.
- 13 UNOCD *Handbook on Police, Accountability, Oversight and Integrity* 2011 at 56; available at: http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf.
- 14 This was the mission statement of the ICD.
- 15 See, for instance, the case of the New York Civilian Complaint Review Board in UNOCD *Handbook on Police, Accountability, Oversight and Integrity* (note 13 above) at 57.
- 16 S Savage 'Thinking independence: Calling the police to account through the independent investigation of police complaints' *British Journal of Criminology* (2013) 53, 94-112 at 101.
- 17 Office of the Police Ombudsman in Northern Ireland (OPONI) 'The police complaints system in Northern Ireland' 2014; available at: <http://www.policeombudsman.org/PONI/files/f2/f27a5142-0c57-4d30-af26-aa963dfa43a7.PDF> at 8.
- 18 See the 'Report of the Portfolio Committee on Safety and Security on the Independent Complaints Directorate' 24 August 2005.
- 19 M Mpsi & P Whittle 'Review of the Portfolio Committee on Safety and Security, 2004-2009, Parliamentary Research Unit, 7 July 2009 as quoted in APCOF 'Submission on the Independent Police Investigative Directorate Bill' 26 July 2010 at 4; available at: <http://apcof.org/wp-content/uploads/2016/05/2010-APCOF-Submission-on-IPID-Bill-.pdf>.
- 20 The Independent Police Investigative Directorate Bill 15 of 2010.
- 21 In terms of section 53(2)(b) of the South African Police Service Act 68 of 1995 (prior to amendment by Act 1 of 2011).
- 22 South African Police Service (SAPS) Act, section 52(2)(a).
- 23 Independent Police Investigative Directorate Act 1 of 2011.
- 24 Civilian Secretariat for Police Service Act 2 of 2011.
- 25 Section 6(1)(j) of the Civilian Secretariat for Police Service Act 2 of 2011 requires the Secretariats to 'assess and monitor the police service's ability to receive and deal with complaints against its members'.

- 26 Section 6(1)(j) of the Civilian Secretariat for Police Service Act 2 of 2011.
- 27 Section 53(8) of the SAPS Act prior to amendment by the IPID Act.
- 28 In terms of section 29(1)(a) of the IPID Act.
- 29 SAPS Act 68 of 1995, section 50(2).
- 30 National Treasury 'Republic of South Africa estimates of national expenditure 2011: Vote 23 – Independent Complaints Directorate' 2011; available at: <http://www.treasury.gov.za/documents/national%20budget/2011/enebooklets/Vote%2023%20Independent%20Complaints%20Directorate.pdf>.
- 31 National Treasury 'Republic of South Africa estimates of national expenditure 2011: Vote 25 – South African Police Service' 2011; available at: <http://www.treasury.gov.za/documents/national%20budget/2011/enebooklets/Vote%2025%20Police.pdf>.
- 32 National Treasury 'Republic of South Africa estimates of national expenditure 2015: Vote 20 – Independent Police Investigative Directorate' 2015; available at: <http://www.treasury.gov.za/documents/national%20budget/2015/enebooklets/Vote%2020%20Independent%20Police%20Investigative%20Directorate.pdf>.
- 33 National Treasury 'Republic of South Africa estimates of national expenditure 2015: Vote 23 – South African Police Service' 2015; available at: <http://www.treasury.gov.za/documents/national%20budget/2015/enebooklets/Vote%2023%20Police.pdf>.
- 34 Section 51(4) of the SAPS Act.
- 35 Section 6(6) of the IPID Act.
- 36 UNOCD *Handbook on Police, Accountability, Oversight and Integrity* (note 13 above) at 70.
- 37 B Manby 'The Independent Complaints Directorate: An opportunity wasted?' *South African Journal of Human Rights* (1996) 12(1), 419-451; M Montesh & S Dintwe 'How independent is South Africa's Independent Complaints Directorate?' *Act Criminologica* (2008) 21(2), 163-175; M Montesh & S Dintwe 'Submission to Parliament – Independent Police Investigative Directorate Bill, 2010' School of Criminal Justice, University of South Africa; Y Vawda & M Mtshali 'Who is watching the watchers?: A critical assessment of the Independent Police Investigative Directorate's prospects of investigating misconduct in the South African Police Service' *Law, Democracy and Development* (2013) 17, 132-156.
- 38 This was the name for the Minister of Police until 2009.
- 39 B Manby 'The Independent Complaints Directorate: An opportunity wasted?' (note 37 above) at 444.
- 40 M Montesh & S Dintwe 'Submission to Parliament – Independent Police Investigative Directorate Bill, 2010' (note 37 above).
- 41 Y Vawda & M Mtshali 'Who is watching the watchers?' (note 37 above) at 152.
- 42 Phillip Stenning 'Governance of the police: Independence, accountability and interference' Ray Whitrod Memorial Lecture 2011 at 3.
- 43 Marikana Commission of Inquiry 'Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West province, 452 at para 74.
- 44 Based on the abstract from Toni Makkai & John Braithwaite (1992), 'In and out of the revolving door: Making sense of regulatory capture' *Journal of Public Policy* 12: 61–78; available at: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=2747524&fileId=S0143814X00005006>.
- 45 S Savage 'Thinking independence' (note 16 above) at 109.
- 46 See section 29(2) of the IPID Act 1 of 2011.
- 47 S Savage 'Thinking independence' (note 16 above) at 104.
- 48 David Bruce 'Basic investigation skills for incident investigation'; unpublished report for the African Civilian Oversight Agency, August 2010.
- 49 Also sometimes called 'uniformed' or 'visible policing'.
- 50 S Savage 'Thinking independence' (note 16 above) at 107.
- 51 David Bruce 'Basic investigation skills' (note 48 above) at 27.
- 52 S Savage 'Thinking independence' (note 16 above) at 105-106.
- 53 Ibid. at 104.
- 54 Interview with ICD investigator, 21 June, Johannesburg.
- 55 Interview with ICD investigators, 25 June 2010 (Mahikeng) and 28 June (Durban).
- 56 Interview with ICD investigator, 21 June 2010, Johannesburg.
- 57 Interview with ICD investigator, 10 June 2010, Pretoria.
- 58 Peter Finn 'Citizen review of police: Approaches and implementation' 2001 National Institute of Justice: Issues and Practice, 89; available at: <https://www.ncjrs.gov/pdffiles1/nij/184430.pdf>.
- 59 Robert David Bruce, affidavit submitted in the High Court of South Africa (Gauteng Division, Pretoria) in the matter between Robert McBride and the Minister of Police, case no. 6588/15 at 55-56.
- 60 Setumo Stone & Lerato Motsa 'Gauteng police watchdog head in nepotism probe' *Business Day*, 2 July 2015; available at: <http://www.bdlive.co.za/national/2015/07/02/gauteng-police-watchdog-head-in-nepotism-probe>.

- 61 David Bruce 'Basic investigation skills' (note 48 above) at 2.
- 62 Peter Finn (note 58 above) at 89.
- 63 Ibid. at 89.
- 64 Ibid.
- 65 David Bruce (note 48 above) at 1-2.
- 66 Based on the abstract for Toni Makkai & John Braithwaite 'In and out of the revolving door: Making sense of regulatory capture' *Journal of Public Policy* (1992) 12; available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=2747524&fileId=S0143814X00005006> at 61-78.
- 67 *McBride v Minister of Police and Another* [2015] (note 3 above) at paras 15-16.
- 68 *McBride v Minister of Police and Another* [2015] (note 3 above) at para 17.
- 69 *McBride v Minister of Police and Another* (CCT255/15) [2016] (note 2 above) at para 37.
- 70 *McBride v Minister of Police and Another* [2015] (note 3 above) at para 21. See also Constitutional Court judgment at para 16.
- 71 *McBride v Minister of Police and Another* [2015] (note 3 above) at para 24. See also Constitutional Court judgment at para 16.
- 72 *McBride v Minister of Police and Another* (CCT255/15) [2016] (note 2 above) at para 17, quoting High Court at para 46.
- 73 *McBride v Minister of Police and Another* (CCT255/15) [2016] (note 2 above) at para 17.
- 74 *McBride v Minister of Police and Another* (CCT255/15) [2016] (note 2 above) at para 27.
- 75 *McBride v Minister of Police and Another* (CCT255/15) [2016] (note 2 above) at para 28.
- 76 *Glenister* (note 5 above) at para 121.
- 77 *Glenister* (note 5 above) at para 121. This passages is quoted from the Organisation for Economic Co-operation and Development (OECD), 'Specialised anti-corruption institutions: Review of models' (2008) at 17 (OECD report).
- 78 *McBride v Minister of Police and Another* (CCT255/15) [2016] (note 2 above) at para 36-37.
- 79 *McBride v Minister of Police and Another* [2015] (note 3 above) at para 51.
- 80 National Planning Commission 'Our future, make it work – National Development Plan 2030', 2012 at 354.



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The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

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