



African Policing Civilian Oversight Forum

2018/06/19

APCOF SUBMISSION TO THE PORTFOLIO COMMITTEE ON POLICE

DRAFT IPID AMENDMENT BILL

INTRODUCTION

The African Policing Civilian Oversight Forum (APCOF) welcomes this opportunity to make a submission to the National Assembly's Portfolio Committee on Police regarding the draft Independent Police Investigative Directorate (IPID) Amendment Bill.

IPID plays a critical role in democratic South Africa by providing for, *inter alia*, independent and impartial investigations of the most serious violations of the law by officials of the South African Police Service (SAPS) and the Metro Police Services (MPS). The actual and perceived independence of IPID is foundational to its capacity, and its legitimacy, in carrying out its constitutional and legislative mandate. It is crucial, therefore, that IPID's enabling legislation clearly establishes its functional independence and integrity. The decision of the Constitutional Court in *McBride v Minister of Police and Another*¹ found significant challenges inherent within IPID's current legislative framework, and instructed Parliament to address the defects which undermine IPID's operational and structural independence.

APCOF supports the efforts taken by the National Assembly Portfolio Committee on Police to implement the decision of the Constitutional Court through the development of the draft IPID Amendment Bill. However, to ensure that the Constitutional Court decision is implemented in the fullest sense, we make the following observations and recommendations to the Committee.

PROCESS ISSUES

APCOF commends IPID for its considered engagement with the Constitutional Court's decision, which included two stakeholder consultations on proposed amendments to the current IPID Act.

¹ (CCT255/15) [2016] ZACC 30.



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However, APCOF expresses its concern that IPID's partners in the legislative amendment process, the Civilian Secretariat for Police (CSP), did not facilitate the necessary process of ministerial and cabinet review in time to allow the draft Bill to be presented before Parliament. This, despite CSP being appraised of the matter, and being mandated and resourced to support policy and legislative review. APCOF submits that this has compromised the ability of lawmakers to effectively apply their mind to the full gambit of structural and operational issues which impact on the effective and practical independence of IPID.

Finally, APCOF acknowledges and commends the Committee for its initiative to undertake the amendment of the IPID Act as a Committee Bill. However, and further to the concerns noted above, APCOF submits that the IPID Act requires broader amendment than what is currently proposed in order to ensure full implementation of the Constitutional Court decision. This is particularly so when read alongside recent judgments of the Gauteng High Court, and the findings of the Marikana Commission of Inquiry.

APCOF's substantive comments regarding the content of the draft IPID Amendment Bill are as follows.

SUBSTANTIVE ISSUES

Framework for Assessment of the Draft IPID Amendment Bill

In 2010, the then Special Rapporteur (SR) on extrajudicial, summary or arbitrary executions, released a seminal report on police oversight mechanisms in which he benchmarked key indicators for their success.² Central among these is that of being sufficiently independent from the police and the executive. The former SR also noted that external police oversight bodies, in order to be practically independent, must be independent in both fact and law. The practical fulfilment of this independence includes being managerially, operationally, and structurally distinct from SAPS and MPS, and arms of government. Derivative of this, IPID needs to have both the capacity and control to exercise its mandate without fear or favour.

Following on from this broad international guidance on effective independence, in previous submissions to the Committee,³ APCOF has reflected on three 'essential conditions of

² Report to Human Rights Council, Fourteenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Study on police oversight mechanisms. Geneva, 28 May 2010.

³ APCOF Submission to the Independent Police Investigative Directorate Bill, 26 July 2010; and Oral Submission to the Police Portfolio Committee, 'Suggestions from civil society coalition on the appointment criteria for the IPID Executive Director', oral presentation available on request.



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independence’, as identified in earlier Constitutional Court decisions,⁴ and which remain relevant to the analysis of the draft IPID Amendment Bill. These are:

- **Security of tenure**, which requires legislative and institutional mechanisms that protect the primary decision-making of an institution (in this case, the IPID Executive Director) from being removed without just cause. This is dealt with in the section of this submission entitled ‘Security of Tenure’.
- **Institutional independence**, which requires structural relations that secure the independence of the institution from undue influence in the exercise of its functions.⁵ This is dealt with in the section of this submission entitled ‘Institutional Independence’.
- **Financial independence and security**, which operates at both the level of individual staff members and at the institutional level. APCOF submits that issues of financial independence and security are beyond the scope of the current analysis of the draft IPID Amendment Bill and are not covered by this submission in detail, but are nonetheless important considerations to raise before the Committee at this stage in its deliberations.
 - At the level of the individual, this entails a salary level that will attract persons with the requisite skills and integrity, and mechanisms to prevent bargaining between the office-holders and other arms of government, so as to avoid perceptions of interference with the independence of the office through the exercise of the power to determine salaries.⁶
 - At the institutional level, which requires the institution to have requisite funds required to discharge its constitutional mandate, without arbitrary interference by the executive.⁷

In addition to the above structural considerations, the perception of an institution’s independence is an important consideration, and speaks to the extent to which the institution will enjoy public confidence in the mechanisms that are designed to secure its independence.⁸ In *Glenister*, the Constitutional Court held that independence requires ‘insulation from a degree of management by political actors’, which becomes an important

⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (‘First Certification Judgment’) 1996 (4) SA 744 (CC); *New National Party of South Africa v Government of the RSA and Others* 1999 (3) SA 191 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC); and *Van Rooyen v The State (General Council of the Bar of SA Intervening)* 2002 (5) SA 246 (CC).

⁵ *De Lange v Smuts NO* at para 71.

⁶ *Van Rooyen v The State* at paras 138-141.

⁷ *NNP v Government of RSA* at para 98.

⁸ *Glenister* at para 207. See also *Van Rooyen v The State* at para 33-34.



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test against which the effective independence of IPID, as structurally envisaged in the draft Amendment Bill, will achieve this aim.⁹

Security of Tenure

APCOF considers the issue of security of tenure at IPID, and its relationship with the question of effective independence, from two perspectives: the appointment of the Executive Director, and the removal of the Executive Director. Each are discussed in turn below.

Appointment of the Executive Director

APCOF submits that consideration should be given by the Committee to the appointment of the Executive Director with specific regard to the following.

- Whenever there is a vacancy, a committee established by the National Assembly shall initiate the appointment of the Executive Director through an open, transparent and competitive recruitment process.
- The recruitment process referred to above shall be by way of applications, invitations or nominations.
- That the Executive Director must –
 - be a South African citizen;
 - be a fit and proper person;
 - be a suitably qualified person; and
 - have knowledge and experience in the administration of justice, public administration and public finance management for a cumulative period of at least 10 years.
- The Executive Director shall be appointed for a period of non-renewable fixed term of not shorter than seven years and not exceeding ten years.
- The committee must submit its report and recommendations to the National Assembly after concluding the recruitment process.
- The report and recommendations referred to shall be submitted within 14 days to the National Assembly if Parliament is in session or if Parliament is not then in session, within 14 days after its next ensuing session.

⁹ *Glenister* at paras 207, 235 and 244.



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- The National Assembly shall, within 30 working days of the receipt of the report and recommendation by the committee referred to confirm or reject such recommendation which shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.
- The Executive Director shall not perform remunerative work outside their official duties.
- The Minister shall after confirmation of the National Assembly take steps to formalise the appointment a person as the Executive Director.
- In the case of a vacancy, the National Assembly shall, fill the vacancy within a reasonable period of time, which must not exceed six months.
- While the appointment of a person to the office of the Executive Director is pending, any of the persons appointed respectively, shall be appointed by the Minister subject to the approval of the National Assembly to perform such functions.

Removal of the Executive Director

APCOF supports the proposed amendments in Section 6 of the IPID Act 'to provide for Parliamentary oversight in relation to the suspension, discipline or removal of the Executive Director.

APCOF is however concerned that **no criteria or direction is provided for the suspension discipline or removal of the Executive Director** on grounds which can include:

- misconduct;
- incapacity;
- incompetence; or
- that they are no longer a fit and proper person to hold the office concerned.

Further, given that the suspension, discipline or removal of the Executive Director is premised on a finding by the Committee of the National Assembly, APCOF submits that it is **crucial that a process for such a finding is established in the Act.**

Such a process should include that:

- Any complaints relating to allegations contemplated in the Act must be communicated in writing to the Speaker of the National Assembly and copied to the Minister within 14 days after the receipt of such complaint.



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- The Speaker of the National Assembly must ensure that a committee is constituted within 30 days to deal with the complaint and matters related thereto.
- The inquiry shall be led by the chairperson of the committee constituted under section 6C(4) and shall perform its functions subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), in particular to ensure procedurally fair administrative action.
- The committee so constituted must consider the complaint made against the Executive Director to determine whether there is substance in the complaint.
- Once the committee finds that there is substance in the complaint, the chairperson of the committee shall notify the Executive Director of the allegations against them and invite the Executive Director to make written representations within 14 days of receipt of the notification.
- The committee must consider the complaint and any representations submitted by the Executive Director within 30 days of receipt of the representations by the Executive Director.
- Any decision and the reasons therefor by the committee must be communicated to the complainant, the Executive Director, the Speaker of the National Assembly and the Minister.
- In the event of an inquiry, Executive Director may –
 - be assisted and represented by a legal representative;
 - be present at the inquiry;
 - make an opening statement;
 - cross-examine witnesses not called by them;
 - give evidence;
 - call witnesses;
 - have access to documents relevant to the inquiry;
 - make written representation at the conclusion of the hearing; and
 - may present mitigating factors.
- Where there is an intention to suspend or dismiss, the chairperson of the committee must invite the Executive Director to submit representations, if any, within 14 days of receipt of the notice of intention to suspend why he or she should not be suspended.



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- The committee must consider the representation by the Executive Director and make a decision on the suspension or dismissal within 14 days of receipt of the representations.
- The recommendation by the committee whether or not to suspend or dismiss the Executive Director shall be referred to the National Assembly for adoption.
- The Executive Director may be suspended or dismissed from office after a resolution of the National Assembly adopted with a supporting vote of at least two thirds of the members of the National Assembly, pending an inquiry into their fitness to hold such office as the National Assembly deems fit.
- The Minister must inform the Executive Director of the National Assembly's decision to suspend or dismiss them pending the disciplinary inquiry.
- The Executive Director provisionally suspended from office shall during the period of such suspension be entitled to such salary, allowances, privileges or benefits to which they are otherwise entitled, unless the National Assembly determines otherwise, which shall not include their salary.
- While the appointment of a person to the office of the Executive Director is pending, any of the persons appointed in terms of the Act respectively, shall be appointed by the Minister subject to the approval of the National Assembly to perform such functions.
- In the event of the removal of the Executive Director, the Minister must take steps to implement the decision of the National Assembly.
- While the appointment of a person to the office of the Executive Director is pending, one of the Programme Managers appointed in terms of the Act shall be appointed by the Minister, subject to the approval of the National Assembly to perform such functions.

Institutional independence and effectiveness

APCOF submits that there are additional considerations that should be made by the Committee regarding strengthening the institutional independence of IPID. Ensuring the institutional independence of IPID requires structural relations that secure the independence of the office from undue interference in the exercise of its functions.¹⁰ Specific comment is made in relation to the following sections of the draft IPID Amendment Bill:

¹⁰ *De Lange v Smuts NO* at para 71.



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Section 4

APCOF suggests that the Committee amend the current section 4 of the draft IPID Amendment Bill to promote more robust institutional independence of IPID, by defining that:

- The Directorate functions institutionally and operationally independent from the SAPS.
- The Directorate has full legal capacity, independent, and is subject only to the Constitution and the law, including this Act.
- The Directorate must be impartial, exercise the powers and perform the functions of office without fear, favour or prejudice.

Other Provisions

APCOF further believes there are two other critical areas of amendment to strengthen the independence of IPID being the ability to make policy recommendations directly to the Minister and in line with the recent advances in the IPIDs efforts to combat systemic corruption to expand the mandate area to further define corruption and provide for bribery and to include attempted murder by a police officer. Further APCOF submits to distinguish between Torture and Assault to provide for the definition of torture now provided by *Prevention and Combating of Torture of Persons Act, 2013* (Act No. 13 of 2013), passed subsequent to the promulgation of the IPID Act. Finally APCOF proposes that the SAPS duty to respond to IPID recommendations in instances of possible administration sanction be strengthened to initiate an enquiry. APCOF believes such an amendment will address the current challenges between the outcomes of an IPID investigation that warrant an internal enquiry and such an enquiry actually being established. Therefore APCOF proposes.

Section 9

To strengthen the ability of IPID to undertake proactive oversight and make submissions on law and policy that will have the effect of strengthening police integrity, section 9 of the draft Bill should be amended to enable the IPID to identify and review legislative needs in consultation with the Secretariat and report on such matters to the Minister.

Section 28

Section 28 of the draft Bill should be amended to provide for the following:

- Distinguish between assault and torture, as contemplated in the *Prevention and Combating of Torture of Persons Act, 2013* (Act No. 13 of 2013).



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- Corruption, as contemplated in the *Prevention and Combating of Corrupt Activities Act, 2004* (Act No. 12 of 2004).
- The inclusion of bribery by a police officer.
- The inclusion of attempted murder by a police officer.

Section 29

Section 29 should be amended to provide for compulsory reporting of specific types of offences committed by members of the police service.

Section 30

APCOF recommends that section 30 be amended to stipulate the initiation of disciplinary enquiry on recommendation from IPID, and providing for the definition of 'initiation'.

CONCLUSION

APCOF commends and supports the work of the Portfolio Committee on Police to critically engage with the issue of IPID independence, and encourages the Committee to consider implementation of APCOF's recommendations, which are directed towards ensuring the fullest implementation of the Constitutional Court's decision. APCOF is available to provide further, or more nuanced and detailed, information to the Committee in relation to this submission, and states its intention to make an oral submission to the Committee should the opportunity be provided.

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