

Do the Professionalization of policing in South Africa deter political interference? A need to confer greater powers on the independent police investigative directorate

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Abstract

This article appraises the significance of an independent civilian oversight body over the conduct of the officers of the South African Police Service (SAPS). It became equally important that the legislative powers conferred upon this oversight body are clearly segregated from that of the responsible political principal. In the Constitutional Court (CC) of South Africa, it was held that certain legislative provisions authorising the police minister to suspend, take disciplinary steps or remove the Independent Police Independent Directorate (IPID) head were invalid. It is particularly argued that the IPID Act must be amended as to clearly mandate the Directorate to retain a solid degree of institutional and functional independence in order to not be politically controlled by the Minister. This study adopted a qualitative content analytical approach. The research employed secondary research methodologies: desk-based analysis of academic articles, policy briefs, strategic documents from IPID website, newspaper reports and journals on existing oversight bodies.

This study revealed that following the CC's judgment in McBride case and the signing of the IPID Amendment Bill into law, the IPID was given more independence from the Police Minister. The Amendment Act restrict political influence in the removal and suspension of the police oversight body's Executive Directors and the authority to do so rest with the Portfolio Committee on Police, at least for now, as the matter is before the Supreme Court of Appeal (SCA).

Keywords: Independent Police Independent Directorate, Independent Civilian Oversight Bodies, South African Police Service, Constitutional Court, South Africa.

Introduction and problem identification

The notion of police professionalism gained currency in the United States (US) and United Kingdom (UK) in the mid-20th century as police departments sought to move beyond the idea of a police officer as an unskilled night watchman to someone with a more substantial, respectable, societal role. In the past decade, the idea of police professionalism has altered somewhat in most modern democratic states, where police agencies are supported by codes of ethical behaviour, professional policies, formal training and career development (Faull & Rose, 2012:2), with South Africa being such one state. In 1996, a year after the passing of the South African Police

Service Act ('the SAPS Act') 68 of 1995, South Africa adopted the 'new' Constitution, which provided for 'an Independent Police Complaints (ICD) body' in terms of section 206(6). However, in 2005, there was some level of dissatisfaction about the functioning of the ICD and a Bill providing for the creation of the IPID was tabled by the Minister of Police in 2010. Subsequently, the Independent Police Investigative Directorate Act ('the IPID Act') 1 of 2011 was passed. On 1 April 2012, the Act came into operation and the ICD became the IPID (Bruce, 2017:4).

In its first Annual Performance Plan (APP) 2012/13, it is stipulated that the IPID may investigate matters relating to systemic corruption involving the police (IPID, 2012:5). Furthermore, the IPID Annual Report 2013/14, provides that the IPID Act empowers the IPID to play an essential role in promoting a transparent and accountable policing in South Africa by investigating serious criminal offences by SAPS and Municipal Police Service (MPS) members (IPID, 2013:5-6). In addition, the IPID's powers in terms of the Act are not only limited to investigation but the Act provides for disciplinary recommendations to be made to the SAPS or MPS and the enforcement of non-compliance with the Act. However, in the watershed Constitutional Court judgment (*McBride v Minister of Police and Another* [2016] ZACC 30) (McBride case), the court instructed that Parliament 'cure the defects in the legislation' within 24 months (i.e. by 5 September 2018) (IPID, 2020:7). The case is above all concerned with the independence of the IPID since section 206(6) of the Constitution requires that the IPID be independent (Bruce, 2017:1). The latest development is that on 20 November 2019, the IPID Committee Bill was unanimously adopted by the National Council of Provinces (NCOP) and as a section 75 Bill, it was referred to the National Assembly for its adoption (IPID, 2020:7). The proposed legislation flows from the Constitutional Court finding that certain legislative provisions authorising the police minister to suspend, take disciplinary steps or remove the IPID head were invalid (McBride case, 2016:29).

The White Paper on Policing (2016:10) provides that there are challenges that persist within the internal functioning of the SAPS. These problems are associated with poor discipline, criminality and corruption. The methodology of recruitment, selection and appointment of police personnel continue to hamper effective crime combating and service delivery efforts. In 2017, the Ethics Institute found that for the first-time bribes for police matters and criminal charges moved into the top five of categories of bribes reported (African Criminal Justice Reform (ACJR), 2019:1). In 2017, the Portfolio Committee on Police welcomed the dismissal of twelve corrupt police officers who were stationed at the Kosi Bay and Golela Border Posts. The officers were arrested for soliciting bribes to facilitate the movement of illegal vehicles and goods across the border (Parliamentary Communication Services, 2017:np). Faull (2017:1) expresses that despite the SAPS introducing its Code of Conduct in 1997, the organisation has been plagued by complaints of corruption, abuse of force, political capture and other undemocratic and unprofessional practices since its founding.

After two decades of democratic policing in South Africa, policing has taken various approaches with the intention of improving safety and security in communities. Amongst other approaches was professionalization of the SAPS (White Paper on Policing, 2016:11). Faull and Rose (2012:1) admit that the SAPS is progressively

becoming modernised police agency, however, raise a significant question: “*But does this really make it a professional agency?*”. Chapter 12 of the National Development Plan (NDP) released in 2012, recommends that the SAPS demilitarise and that it recruits and train officials to be professional and impartial. To accomplish this, the NDP suggests that the SAPS should develop indicators through which organisational and individual behaviour can be evaluated, with clear disciplinary and career consequences for those whose conduct is judged to be unprofessional or abusive (Faull, 2017:1). Despite professionalization of the police service, the establishment of the ICD in 1996, followed by the coming into effect of the IPID Act in 2012, twenty-four years later into the new democratic dispensation, unethical behaviour within policing continues to rise on a substantial scale. A recent study by ACJR (2019:4) reveals that IPID refers between 980 and 1500 cases to the National Prosecuting Authority (NPA) annually recommending a criminal prosecution. In addition, as per the IPID APP 2020/21 (IPID, 2020:25), during the financial year 2018/19, IPID referred 96% of dockets to the NPA for prosecution. In the same financial year, 85 cases of corruption involving police officials were completed by IPID.

This paper, therefore, does not intend to argue new empirical data in pursuit of professionalism of police in South Africa. Instead, this paper intends to advocate for the need to confer upon the IPID greater powers and the establishment of a body to set and regulate professional standards as recommended by the South Africa’s National Planning Commission (NPC) (NPC, 2012:389). This paper further seeks to explore the operational and hierarchical independence of the IPID from the SAPS and be free from executive or political influence. In so doing, the extent to which the IPID may have the authority to operate like other professional bodies (i.e South African Law Society) will be assessed to test the practicality of the establishment of a “body” as recommended in the NDP. Moreover, it will interrogate the use and understanding of the term “police professionalism” within the context of SAPS.

Methods and materials

This article adopted a qualitative content analytical approach, as supported by these authors (Maluleke, 2020, Mokwena & Maluleke, 2020; and Mokwena, Motsepe, Maluleke & Shandu, 2020). The goal of content analysis is “to provide knowledge and understanding of the phenomenon under study” (Hsieh & Shannon, 2005:1278). Content analysis is an acceptable methodology in social science (Gaur & Kumar, 2018:280) and therefore, classifies textual material by reducing it to more relevant, manageable bits of data (Bahoo, Alon & Paltrinieri, 2020:2). The research employed secondary research methodologies; desk-based analysis of academic articles, policy briefs, strategic documents from IPID website, newspaper reports and journals on existing oversight bodies. To avoid selection bias in considering journal articles, abstract from subject specific articles such as: Institute for Security Studies (ISS), Centre for the Study of Violence and Reconciliation (CSVR) and ACJR to mention few, were critically appraised and the full article sought and read if the abstract was considered robust and relevant (Sibanda, 2014:129). The next step was to choose the sample period and the technique. To filter the depth of literature on role and powers

of ICOBs and unethical behaviour of police in South Africa, a number of articles published between 1996 and 2020 were searched using variety of combination of keywords (i.e role of IPID, professionalism, unethical conduct) to cover the richness of literature on the topic. As stated earlier, this study involves a content analytical approach, aided by Conceptual Analysis (CA). CA deals with the analysis of the existence and frequency of concepts in human communication (Parveen & Showkat, 2017:np; Sibanda, 2014:129). Accordingly, the qualitative content analysis approach enables to provide a detailed and in-depth description of the content (Showkat, 2017:np). As per Zhang & Wildemuth (2009) in Parveen and Showkat (2017:np), *“Through careful data preparation, coding, and interpretation, the results of the qualitative content analysis can support the development of new theories and models, as well as validate existing theories and provide thick descriptions of particular settings or phenomena.”*

Preliminary literature reviews and discussions

The establishment of the Independent Civilian Oversight Bodies

Bruce (2017:2) states that the establishment of Independent Civilian Oversight Bodies (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, Lesotho and Sierra Leone. The creation of independent complaints mechanism in the form of the ICD in 1997 was one of the significant component of SAPS transition to a democratic policing. The ICD was officially created through section 222 of the 1993 Interim Constitution (Berg, 2013:144-145). Its successor, IPID, created in term of section 206(6) of the Constitution provides that, on receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province; AND WHEREAS there is a need to ensure effective independent oversight of the SAPS and MPS (IPID Act, 2011:2). Section 195(1)(f) of the Constitution requires that public officials be accountable (Constitution of the Republic of South Africa, 1996:99). A study by ACJC (2019:2) argues that a democratic society agrees to give extraordinary powers to the police, but only if these powers are subject to external scrutiny. Even if a few police officials abuse their powers, it risks affecting the legitimacy and integrity of an entire police.

Pyo (2008:2) maintains that misbehaviour or inefficiency of an officer or policy causing it may hinder the public trust in the state authorities or even endanger lives of members of the public. In order to prevent and deal with such inefficiency or misbehaviour by securing accountability, various states, in police organisations, have developed oversight bodies. In Africa, the African Police Civilian Oversight Forum (APCOF) was established in 2004 as a coalition of police oversight bodies and practitioners in Africa. It is a network of African policing practitioners drawn from state and non-state institutions. It is active in promoting police reform through civilian oversight over policing (APCOF, 2008:v). On the one hand, Pyo (2008:8) articulates that the most distinguished of the Asian countries or regions in terms of

police oversight mechanisms should be Hong Kong (China) which has actively and vigorously working specialised police complaints handling body – The Independent Police Complaints Council (IPCC). However, unlike IPID in South Africa, IPCC of Hong Kong monitors and reviews the investigations by the Complaints against Police Office (CAPO) of complaints against the Police by the public. The Council does not directly receive complaints nor investigate them Pyo (2008:8).

Bruce (2002:2) notes other international examples to include - Police Ombudsman's offices in Northern Ireland and in 9 of the 27 states in Brazil; the Police Complaints Authority in England and Wales and the Commission for Public Complaints Against the Royal Canadian Mounted Police in Ontario, Canada; and the Special Counsel to the Los Angeles Sheriff's Department. In addition, states like US has Civilian Complaint Review Board in New York City, Australia has Crime and Misconduct Commission in Queensland, and Serious Incident Response Team in Nova Scotia, Canada (Faull, 2013:8). Albeit Attard (2010:1549-1550) argues that the models of civilian oversight may greatly differ, particularly in the US, the author concurs with Bruce (2002:2) who explains the main functions of oversight bodies in two folds. Firstly, to ensure that individual cases of alleged or possible police misconduct are properly investigated and that appropriate disciplinary and/or criminal charges are implemented. Secondly, to ensure that police departments are taking proper steps to prevent wrongdoing (brutality, corruption or other crime or misconduct) by their officers. Whilst in Europe, Byrne and Priestley (2017:3) state that Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has driven the development of police oversight, the Council of Europe. Byrne and Priestley (2017:10) point out that one, amongst other key operational principles of this oversight body is that *"the body should be sufficiently separated from the hierarchy of the police that are subject to its remit"*.

In order to fulfil the role of these oversight bodies, the United Nations Office on Drugs and Crime (UNODC) recommends that all complaints against police are reported to an independent oversight agency whether that agency investigates the complaint or not. This allows for the agency to monitor complaints over time in order to identify patterns or underlying causes of misconduct. Subsequent analysis enables agencies to make informed recommendations to the police agencies they oversee and help them learn from their mistakes (Faull, 2013:8).

Sajor Jr (2015:3) states that the primary goal of independent oversight bodies is to provide a sense of accountability to the community through a complaint process that is open and transparent. Ajilore (2018) says that investigation-focused agencies are typically more successful at holding police forces accountable for wrongdoing or misbehaviour because they focus on individual complaints. Ajilore (2018) and Finn (2001) concur that for any oversight agency to succeed; however, three factors are necessary:

1. **Independence.** A civilian oversight agency should be independent from the police department so that recommendations can be trusted.
2. **Resources.** Investigating complaints and issuing reports can be time consuming and expensive. A successful civilian oversight agency needs adequate funding to function.

3. Power. Civilian oversight agencies need some teeth so that law enforcement can't simply ignore recommendations from reports or investigations.

According to Srinivas and Siddiqui (2009:6), the establishment of the Police Complaint Authorities (PCAs) was intended that these would function as robust, independent mechanisms designed to make the police accountable for their actions. To ensure their effectiveness, Srinivas and Siddiqui (2009:7) suggests that one of the surest ways to strengthen the PCAs is for citizens to be aware of their mandates and powers and use them effectively whenever necessary.

The significance of the decisional independence in the context of the Independent Police Investigative Directorate

In any kind of an organisation, decision-making is the one of the most important functions of managers. Accordingly, successful strategic decision making enables an organisation to maintain competitive position, align internal operations with external environment and survive threats and challenges, while conversely, because of their magnitude, a single, poorly made strategic decision can lead to the demise of an organisation and result in corporate embarrassment, large economic losses for stakeholders or even bankruptcy (Alhawamdeh & Alsmairat, 2019:95). Public institutions therefore have a duty to make decision free from any force of influence. At the helm of the organisation, the Executive Director (ED) who steers the direction of the organisation, have to take either favourable or unfavourable decisions. The fact remains, decisions need not only to be made, but to be implemented as well.

Albeit the argument raised in this article is not legally pinned, it is important to clarify the question of decisional independence in the context of the IPID. In his article, Sibanda (2019) makes reference to what has been acknowledged by people such as Justice Edwin Cameron, Judge of the Constitutional Court (CC) of South Africa, who in 2010 at *Middle Temple and SA Conference: Judicial Independence* said that "[d]ecisional independence means protecting judges from undue external pressures from politicians, the public, and the media, to allow them to decide cases on the law and the facts before them" and allows them "to make decisions freely, without being swayed by concern for *political or career consequences, or for public backlash*".

A report by the Organisation for Economic Co-operation and Development titled: *Specialised Anti-Corruption Institutions: Review of Models*, proffers the following definition of independence: "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference.*" (McBride case, 2016:21).

Dr Walker, a police accountability researcher, defines independent oversight "*as a*

procedure for providing input into the complaint process by individuals who are not sworn officers" (Sajor Jr, 2015:3). Srinivas and Siddiqui (2009:3) assert that when those who are supposed to uphold the law, themselves break it by treating the public in an unlawful or inappropriate manner, the public needs to have an avenue to complain and get prompt redress. This assertion was inspired by the Indian Supreme Court that directed that Police Complaints Authorities (PCA) should be established, which are as follows:

- Are independent of the police.
- Have their own powers of investigation.
- Can make binding recommendations for action.
- Can deal exclusively with complaints of serious misconduct and dereliction of duty by the police.

In the context of the IPID, the CC held *Glenister II* (The African Union Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, 2006) expressly stated that this definition was not part of international law, but accepted that it serves as a useful interpretive tool against which IPID's independence may be measured (McBride case, 2016:21). For several years, the IPID suffered political interference that haunted its decisional and operational independence. For instance, former National Commissioner, 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 (Bruce, 2017:7). In 2019, this was evidently brought to the public's attention through the evidence presented by the then ED of IPID, Mr McBride, at the Zondo Commission¹. The evidence suggests that the IPID independence was compromised by ministerial interference for the period spanning 2015 and 2016 (Corruption Watch, 2019).

The impact of this ministerial interference was evident when the then Minister of Police, Nathi Nhleko, suspended McBride in March 2015. The squabbles of this case landed a landmark case which saw McBride emerging victorious at the CC in 2016. The CC held that pursuant to section 206(6) of the Constitution, Parliament established IPID. The latter's independence is bolstered by section 4 of the IPID Act which provides that the Directorate functions independently from the SAPS (McBride case, 2016:5). In his unanimous judgment, the late Acting Justice Bosielo, Judge of the CC of South Africa, stated that however, section 4 of the IPID Act must be contrasted with section 206(1) of the Constitution, which provides for a member of the Cabinet to be responsible for policing and the determination of national policing policy. Connected to this is section 6(3) of the IPID Act which makes IPID's ED subject to the laws governing the public service as well as section 6(6) which authorises the Minister to remove the ED from office on specified grounds. But this section is silent on oversight of the Minister's action by Parliament (McBride case, 2016:5-6).

The CC emphasises is that strengthening the independence of the IPID does not undermine the principle that the IPID should be 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 (Bruce, 2017:11). Concluding on the question of adequate independence, Chetty (2020) notes the position of both the High Court and CC in *McBride* case. The judgments affirm that both actual and perceived independence is important. It is crucial that IPID retain its separateness from the SAPS and must therefore retain a strong degree of institutional and functional independence in order to not be politically controlled by the minister. Ajilore (2018) asserts that independence is particularly important because civilian oversight agencies aim to improve the operations of police departments and correct mistakes. Without independence, it's impossible to form nonbiased recommendations and implement reforms.

Operational performance of the Independent Police Investigative Directorate

Operationally, IPID has 3 programmes aimed at achieving its mandate. These programmes are Administration; Investigation and Information Management; and Compliance Monitoring and Stakeholder Management (IPID, 2018:20-30). This article reflected on these programmes to gain an overall performance of the Directorate between 2012 and 2019.

Table 1: IPID cases submitted for prosecutions as reflected in the IPID data on 'manner of closure' (April 2012–March 2019)

	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	Total	Percentage (%)
Acquitted	35	45	64	56	132	122	33	487	4.9
Convicted	52	79	137	72	124	135	26	625	6.3
Declined	127	469	1 034	1 041	2 480	2 601	1 051	8 803	88.8
Total	214	593	1 235	1 169	2 736	2 858	1 110	9 915	100.0
% of all cases (7 years)	2.2	6.0	12.5	11.8	27.6	28.8	11.2	100.0	
% of cases in a year convicted	24.3	13.3	11.1	6.2	4.5	4.7	2.3	6.3	
% of cases in a year declined	59.3	79.1	83.7	89.1	90.5	91	94.7	88.8	

Source: (Bruce, 2020:21)

From the depicted data in table 1; cases are classified as 'acquitted', 'convicted' and 'declined to prosecute'. However, it is unclear whether these categories refer only to criminal cases referred to the NPA or whether they also include cases referred only for disciplinary action. The categories nevertheless imply that these are all cases referred for consideration of either a criminal or disciplinary prosecution (Bruce, 2020:21).

The IPID Act in Section 7(4-5) reads: "(4) The Executive Director must refer criminal offences revealed as a result of an investigation, to the NPA for criminal prosecution and notify the Minister of such referral. (5) The NPA must notify the Executive Director of its intention to prosecute, where after the Executive Director must notify the Minister thereof and provide a copy thereof to the Secretary". The ACJR contends that the core problem here is that the NPA is not obliged by law to provide any reasons for not prosecuting a particular case nor is it bound by a time frame to make a decision to prosecute or not, or to provide regular updates to IPID on progress with cases (ACJR, 2018:4).

The data on manner of closure indicates that the number of prosecutions that were completed with a verdict increased in the two years subsequent to 2015–16 (Only 128 were completed in

2015-16, but 256 were completed in 2016-17 and 257 in 2017–18). Nevertheless, in terms of

other measures, the increased rate of referrals did not translate into an improvement in results: During this period, the percentage of cases that culminated in a decision not to prosecute increased to over 90%. In addition, convictions declined not only as a percentage of all cases referred for prosecution, but also relative to cases prosecuted and finalised with a verdict. According to this IPID data, 2016–17 was the first year in which the number of acquittals (132) exceeded the number of convictions (124). In the following year, the number of convictions (135) was only slightly greater than acquittals (122) (Bruce, 2020:22).

The ACJR (2018:1-2) submitted that the lack of prosecutions initiated by the NPA emanating from criminal recommendations by IPID to the NPA fundamentally undermines the purpose of IPID, as articulated by the IPID Act. The ACJR (2018:2) argues that if there are no or few actual prosecutions relative to the number of recommendations for prosecutions as is the case, it places the purpose of both institutions into question. It is in this sense then that one can conclude that the accountability value chain is broken, resulting in a de fact situation of impunity. Moreover, table 2 below depicts docket referrals submitted to the NPA and convictions that were secured from 2014/15 to 2018/19 financial years. In the past five financial years a total of 6 552² docket referrals were submitted to the NPA for decision on whether to prosecute or not. A total of 390 criminal convictions were secured (IPID, 2020:12).

Table 2: Docket referrals and criminal convictions

Docket Referrals to NPA and Criminal Convictions						
Description	2014/15	2015/16	2016/17	2017/18	2018/19	Overall Total
Dockets referred to NPA ³	983	957	1 140	1 428	2 044	6 552
Criminal Convictions	58	97	45	99	91	390

Source: (IPID, 2020:12)

Once an investigation is completed and IPID is of the view that a criminal prosecution is warranted, the case is referred to the NPA for a decision to prosecute or not. For instance, table 2 reflects that in 2016/17 IPID referred a total of 1 140 cases to the NPA. Although 45 criminal convictions were secured, as per IPID Annual Report 2016/17, IPID was still expecting response from the NPA in nearly 97% of cases referred with a recommendation to criminally prosecute (ACJR, 2018:6).

Table 3: Disciplinary recommendations and departmental convictions

³ These are dockets that were referred to NPA for decision whether to prosecute or not.

Disciplinary Recommendations and Departmental Convictions						
Description	2014/15	2015/16	2016/17	2017/18	2018/19	Overall Total
Disciplinary Recommendations to SAPS/MPS ⁴	1 004	1 297	968	734	890	4 893
Disciplinary Convictions	200	243	276	234	207	1 460

Source: (IPID, 2020:12)

Table 3 depicts departmental recommendations referred to SAPS/MPS and departmental convictions that were secured from 2014/15 to 2018/19 financial years. During this period 4 893 departmental recommendations were referred to SAPS/MPS for implementation and 1 160 disciplinary convictions were secured (IPID, 2020:12). Moreover, zooming in the financial year 2016/17, ACJR (2018:9) argues that even if the details of the specific cases are not available, it appears at least at face value that these are shockingly lenient sanctions. This is based on the data available from the 2016/17 IPID Annual Report (ACJR, 2018:10) as depicted in table 4 herewith:

Table 4: Awarded sanctions

Sanctions	Number(s)	Percentages (%)
Written warning	145	52.5
Verbal warning	38	13.8
Fine	27	9.8
Dismissal	19	6.9
Corrective counselling	17	6.2
Suspended without salary	14	5.1
Final written warning	12	4.3
Reprimanded	4	1.4
Total	276	100

Source: (ACJR, 2018:10)

Criminal prosecutions against police officials cannot be detached from internal discipline in SAPS as they form part of the accountability architecture (ACJR, 2018:9). The data above indicates that a written warning is the most frequently used sanction and that there were only 19 dismissals or 6.9% of the total, indicating that dismissal is a rare event (ACJR, 2018:10). To conclude, although IPID does not have authority over the implementation of the recommendations made to SAPS, there should be effective internal control measures to monitor the progress and implementation of such recommendations, otherwise, this will amount to waste of state resources and

⁴ These refers to recommendations where disciplinary action was recommended by IPID; however, IPID has no direct control over the disciplinary process and the outcome thereof.

therefore, lack of accountability. As argued by ACJR (2018:9), “*This situation severely undermines fostering a culture of individual accountability.*”

Strengthening the independence of the Independent Police Investigative Directorate

On 20 to 21 November 2017, the APCOF and the IPID held a workshop to discuss the forthcoming legislative amendments to the IPID Act (APCOF & IPID Workshop, 2017:1). It was argued in this workshop that the initial drafters of the IPID Act had very few yardsticks on how to reform the then ICD into IPID. The notion of the police being investigated was still new and, in many instances, had not filtered into all of police culture in South Africa. In this regard the CC judgment assisted IPID in identifying key deficits in the IPID Act (APCOF & IPID Workshop, 2017:2). It was in this workshop that a comparative study with the IPCC of England and Wales was made. The Commissioner, Cindy Butts, of the IPCC, spoke to issues of complaints handling more specifically. She stated that the IPCC identifies four aspects of effective complaints handling, namely access, the strength of the initial complaints handling process, appeals and learning. In the first instance a complaints system must be accessible and easy to use and operate (APCOF & IPID Workshop, 2017:2).

It was apparent from the judgment of the CC in the *McBride case*, that the legislation (the Act) regulating the establishment and operations of the IPID as an institution supporting constitutional democracy was inconsistent with the provisions of section 206(6) of the Constitution, when it was proclaimed into law (APCOF & IPID Workshop, 2017:4). The CC in *McBride case* (2016:29) declared the following provisions unconstitutional and 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 IPID:

- Section 6(3)(a) and 6(6) of the IPID Act 1 of 2011.
- Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994.
- Regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018 of 10 February 2012), (IPID Regulations).

The APCOF and IPID Workshop (2017:5-7) proposed that the following sections should be considered as a way of strengthening the independence of the IPID in order to be consistent with the provisions of section 206 of the Constitution:

- **Section 1:** Definition of “**Head of Programme**” and “**Programme Manager**” in order to align it with Section 8(1) of the Act. “**police service**” to align it with those provisions of the SAPS Act that define a police service or a member to ensure that there shall be no conflict between the mandate of the IPID and the rest of the IPID Act 1 of 2011 to Section 206(6) of the Constitution in the following: Sections 214, 236(7) of the Interim Constitution.
- **Section 4:** In order to strengthen and give substance to the independence of the IPID and align it with the CC’s judgment in the *McBride case* when it found that “... the threshold for satisfying independence in respect of IPID is arguably more

stringent given that the Constitution expressly demands its independence.” to section 206 of the Constitution.

- **Section 6:** To comply with the order of the CC declaring the provisions of Sub-section 6(3)(a) and 6(6) of the IPID Act, 2011 invalid to the extent that they authorise the Minister of Police to suspend, take disciplinary steps pursuant to suspension, or remove from office the Executive Director of the IPID as follows:
 - **6:** The appointment of the Executive Director.
 - **6A:** Remuneration and conditions of service of the Executive Director.
 - **6B:** Suspension of the Executive Director.
 - **6C:** Removal of the Executive Director.
- **Section 7:** To strengthen the structural and operational independence of the Executive Director and the IPID by ensuring that Section 7(3)(b) (amended), 21(1)(Aa) (inserted) and 22(2)(c) (Added) which permit for legislation regulating the conditions of services, remuneration and allowances of staff of the IPID to be determined under the Act, thereby, ensuring that independence of the IPID is consistent with the provisions of section 206(6) of the Constitution and CC judgment.
- **Section 10:** To enable the Executive Director to delegate his powers in order to ensure that the Head of Investigation / Programme Manager is able to assist him with the performance of the Provincial Heads.
- **Section 24:** To strengthen the powers of the investigators in order to align it with the provisions of Section 206(6) of the Constitution and to ensure that members of the police service do not interfere or hinder or counter investigate the investigation of the IPID by using the resources of SAPS.
- **Section 28:** Seeks to amend the provisions in the Act by distinguishing between assault and torture as contemplated in the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013). Corruption as contemplated in the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); and the inclusion of Bribery and Attempted Murder.
- **Section 29:** Providing for the compulsory reporting of specific types of offences/matters committed by members of the police service to include the amended subsections.
- **Section 30:** Seeks to align the provisions in the Act by providing for the definition of the “initiation” to ensure that there shall be no conflict between the mandate of the IPID and the rest of the IPID Act 1 of 2011 to Section 206(6) of the Constitution. In addition, to provide for the initiation of disciplinary inquiry for misconduct committed by National Commissioner, Provincial Commissioner, National Head of DPCI, Provincial Heads of DPCI and Head of Municipal Services as well as other Heads of Law Enforcement Officers.
- **Section 33:** Seeks to amend the penalty clause in order to provide as an offence contravention by members of the police service who interferes or hinders the investigations of the IPID Investigators.
- **Section 34:** Seeks to amend the provisions in the Act in order to strengthen those provisions of the Act dealing with the structural and operational independence of the IPID by providing for Regulations that will deal with conditions of service,

remuneration, allowances and discipline of the IPID (This includes Administration and Investigators as employed in terms of the Act).

Conclusions and recommendations

Following the APCOF and IPID Workshop in 2017, the President of the Republic of South Africa, on 26 May 2020, assented to and signed the IPID Amendment Bill into law. This Act removes the power to dismiss the IPID head from the Minister of Police, and places it in the hands of the Portfolio Committee on Police (Chetty, 2020). Bruce (2011:11) notes that the independence of the IPID Executive Director is therefore fundamental to the ability of the IPID to assert itself as an independent body. Vawda and Mtshali (2013:153) suggest that the Civilian Secretariat for Police Service is potentially the institution best suited to deal with the policy formulation issues regarding systemic corruption. As systemic-corruption investigations are primarily preventative, they should of necessity fall within the mandate of the Secretariat, while corruption-matter investigations, which are primarily punitive, should fall within the competence of the IPID. The hand of the IPID needs to be strengthened to enable it to pursue the outcomes of its investigations to their logical end. It is therefore against this background that Bruce (2011:12) submits that the ability of the Executive Director to affirm the independence of the IPID is therefore pivotal to whether or not IPID personnel are able to assert themselves as representatives of an independent body. Following this submission, Vawda and Mtshali (2013:153) recommends that it would be desirable if the IPID, instead of being a part of the Ministry of Police, was housed in another, unrelated, ministry, such as Justice and Constitutional Development – as is the case with the Public Protector. This would greatly boost the public's confidence in the independence of the IPID.

In an attempt to achieve the latter, on 06 November 2020, the Helen Suzman Foundation (HSF), which was admitted as *amicus curiae* in the *McBride case*, lodged an appeal with the South African Court of Appeal (SCA) asking it to set aside an order of the high court in the matter between McBride, the Minister of Police and the Portfolio Committee on Police. The foundation believes that the court endorsed a “constitutionally impermissible interpretation of section 6(3)(b) of the IPID Act” (Chabalala, 2020). The section in question is exclusively concerned with the appointment of the Executive Director of the IPID. It explicitly provides that: “(3) *In the event of an appointment being confirmed – (b) such appointment is for a term of five years, which is renewable for one additional term only*” (IPID Act, 2011:10). The HSF argued in its Head of Argument in the SCA that: “*This private agreement and agreed interpretation concentrate the power of renewal in the Minister and the committee, thus exposing IPID to political interference or the perception of such interference. It is plainly an unlawful interpretation...*”. It went on further to contents that “*The legality of the agreed interpretation was never ventilated in open court ... Instead, the High Court rubber-stamped the agreement as a consent order, without any consideration as to its constitutionality*” (Dolley, 2020). The proceedings are set to resume during the court's first term in 2021 (Chabalala, 2020 & Dolley, 2020).

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