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**Non-Profit Reg No** 006-981 NPO

**A Non-Profit Trust, Reg No** T1922/91

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**SUBMISSION BY  
THE INSTITUTE FOR SECURITY STUDIES  
TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON POLICE**

**THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE BILL,  
2010**

**26 July 2010**

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## 1. Introduction

The Institute for Security Studies (ISS) is an African non-governmental policy research institute. Our work is aimed at contributing to a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy and collaborative security.

The Crime and Justice Programme of the ISS works to inform and influence policy and public discourse on crime, its prevention and criminal justice by conducting research, analysing policy, disseminating information and providing expertise as a contribution towards a safer and secure society. More information about the ISS can be found on our website: [www.issafrica.org](http://www.issafrica.org).

The ISS would like to thank the Portfolio Committee for the invitation to offer this submission on the Independent Police Investigative Directorate Bill. Over the years we have undertaken various research projects on and in partnership with the Independent Complaints Directorate (ICD) and have developed expertise on civilian police oversight models. We are willing to assist the Committee in whatever way we can, both now and in the future as we believe that parliamentary oversight plays a crucial role in building and consolidating our democracy.

We applaud the development of the Bill as an important step in the right direction for police oversight in South Africa. We welcome separate legislation for the IPID so as to promote the idea of its independence. Notable aspects of the Bill include the clauses on security screening of staff, and provisions allowing for the integrity testing of employees. These and other positive developments aside, we believe there are a number of areas in which the Bill needs strengthening and further development.

In addition to the specific areas where we believe the Bill can be strengthened, there are contextual issues that we would also like to draw the committees' attention to as it deliberates on the roles and functions that the IDIP is expected to play.

## 2. The Appointment of the Executive Director

Currently the Bill states that the Minister appoints the Executive Director of the IPID following which the parliamentary committee is informed. The legislation implies that parliament may reject the successful candidate as section 3 states that "in the event of the appointment being confirmed - ..."

To strengthen the impartiality and independence of the Executive Director of the IDIP and the public perception thereof, we propose the following amendment:

- The Minister must, subject to the laws governing the public service, appoint the Executive Director *following consultation with the parliamentary committee during which public submissions with respect to the shortlisted candidates should be allowed.*

Such a process will enhance the independence and impartiality of the Executive Director and emphasise the expectation that the appointee is there to serve the broader public. Such a process will also allow for greater public knowledge and acceptance of the person who is appointed to investigate police abuses on their behalf.

## 3. Reporting on Cases

That the Directorate will be expected to report its findings and recommendations to the Secretariat on an ongoing basis is a welcome addition to the legislation. It is also positive that the Secretariat must monitor the implementation of recommendations made by the Directorate and provide the Executive Director with regular reports on steps taken to ensure compliance.

However, we believe that the legislation could be substantially strengthened by inserting a clause that would compel the police to report to both the National Secretary of the Police and the Executive Director of the IPID on the implementation of recommendations made to it by the IPID.

Research undertaken in partnership between the ISS and the ICD found that there have been significant shortcomings in relation to SAPS compliance with ICD recommendations. This research found that of 761 letters written to the SAPS by the ICD aimed at determining progress with referrals and recommendations to the SAPS to institute disciplinary action against police officials where evidence of misconduct had been found, only 439 letters were received in reply.<sup>1</sup> In 143 specific cases, there was no written response at all from the police to ICD inquiries.

The research found that the relatively weak level of compliance and response to the ICD “clearly undermines the *raison d’être* of the ICD as an independent complaints mechanism and compliance body.”<sup>2</sup> Moreover, the lack of response or cooperation of the SAPS with the work of the ICD serves to undermine public confidence the Directorate.

The draft legislation can address this shortcoming by inserting the following clauses:

- ***Upon the receipt of written recommendations by the directorate, the police agency concerned has 30 days within which to report to the National Secretary of Police and the Executive Director of the Directorate in writing on the extent to which the recommendations have been implemented.***
- ***If the Head of the police agency to whom the recommendations are addressed is of the opinion that there good reasons why they should not institute the recommendations, written reasons, including possible alternative action must be sent to Executive Director within 30 days for consideration by the Management Committee***
- ***If the Management Committee of the Directorate does not accept the reasons given by the police management as to why certain recommendations should not be implemented, and/or if the proposed alternative action is not acceptable to the IPID, the matter should be referred to the Minister for a final decision.***

#### **4. Matters that the IPID must investigate**

Currently, in addition to any complaint referred to it by the Minister or an MEC, the ICD is only compelled by legislation to investigate all deaths as a result of police action or in police custody. The current draft legislation broadens the scope of the investigations that the Directorate “shall” undertake to include:

- “Rape by a police officer, whether the police officer is on or of duty;
- Rape of a complainant by other detainees (which should preferably read “*any rape of a person that occurs while they are in police custody*”);
- Any complaint of torture which is referred to it by a Station Commissioner, Magistrate, Judge, legal representative or the complainant in the case where the complainant is unrepresented.”

The inherent assumption of the Bill is that allegations of rape and torture against police officials are unlikely to be rigorously investigated by their colleagues and therefore require investigation by an

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<sup>1</sup> Burger, J and Adonis C, (2007) “South African Police Service Compliance with recommendations by the Independent Complaints Directorate.” A Joint Research Project conducted by the Independent Complaints Directorate (ICD) and the Institute for Security Studies (ISS).

<sup>2</sup> Ibid, p. 18

independent agency. We therefore welcome the additional mandate but think that the legislation should be strengthened in six key respects if it is to achieve its desired objective of holding police officials effectively accountable for serious abuses. The six additional elements are as follows:

1. Ensuring that all police officials are compelled to report all deaths, rape or torture related to police action or in custody to the IPID immediately and that any failure to do so results in sanction;
2. That policing agencies provide immediate and unfettered support to IPD investigations;
3. That the term “torture” is further defined in the Act;
4. That the IPID are able to proactively investigate any allegation of torture committed by police officials it receives from any source;
5. That the IPID is ensured of the necessary capacity to undertake investigations into rape and torture;
6. That arrangements are made to encourage the prioritisation of any cases referred by the IPID to the National Prosecuting Authority

Each of the above points will be considered here in a bit more detail.

#### **4.1 Reporting rape or torture to the IPID:**

Compelling the new Directorate to investigate rape by police officials does not appear on the surface of it a too onerous challenge. The ICD reported that for 2008/09, it investigated 25 rape cases involving members of the SAPS. However, in that the SAPS is currently not obliged to report such cases to the ICD, this is by no means a reflection of the number of rape cases opened against the country’s police each year. In addition, there are no accurate figures of the numbers of rapes that take place in police cells and it can be assumed that these cases will be substantially underreported.

The situation in relation to torture is very similar, if not more problematic than rape. Torture is most likely to occur in the course of police investigations. This is because some police officials see it as an effective tool for obtaining information from a suspect or someone linked to a suspect. The Truth and Reconciliation Commission found that torture was routinely used during apartheid and there is evidence that it continues to be used by some individuals and units the South African Police Service.<sup>3</sup>

It is inappropriate for police officials to investigate their colleagues for using torture. This will particularly be the case, if the victim is a criminal suspect. Hence, such cases should be investigated by the IPID. However, for the same reasons that police officials may not be eager to investigate allegations against their colleagues, they will not be eager to report such allegations against their colleagues unless there is a specific requirement for them to do so by law.

For this reason we propose that the following clause is inserted:

- ***Any incidents of death as a result of police action or while in police custody and all allegations of rape or torture as described in this Act, that comes to the attention of a police official must immediately be reported to the IPID.***

In the section of the Bill dealing with offences and penalties, we believe that an additional clause should be included that makes the willful non-reporting of such cases an offence that may be accompanied by a specific sanction. We deal with this further in part six of this document.

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<sup>3</sup> See Dissel, A., Jensen, S. and Sandra, R. (2009) Torture in South Africa. Exploring torture and cruel and inhuman degrading treatment or punishment through the media. Centre for the Study of Violence and Reconciliation. July 2009.

## **4.2 Police agencies immediate and unfettered cooperation with IPID investigations**

Amongst key challenges that face those involved with external investigations of the policing agencies is the lack of support or active hindrance of the investigation. The ICD has experienced problems where police officials have not been willing to cooperate with their investigations. Lack of cooperation can take the form of not providing all the available documentation and information related to the case to the ICD investigators and not making the police officials available for identification parades, to name a couple of examples.

It is therefore proposed that the legislation be specific about the powers that investigators have and the support that is required from policing agencies. The following clause is suggested:

- *All policing agencies whose members are subject to an investigation by the Directorate have to provide unfettered cooperation. This includes but is not limited to ensuring that all information relevant to the case and requests for identification parades is acceded to within 48 hours of a request made by the Directorate.*

It may also be worthwhile considering providing the IPID with the powers of subpoena to prevent the lack of cooperation by subject officers.

## **4.3 Defining Torture**

Torture is not specified as an offence in South African criminal law. Typically, cases involving torture are prosecuted as assault with intention to commit grievous bodily harm (GBH) or attempted murder. The lack of a legal definition may make it difficult for the IPID to identify specific allegations of torture as opposed to allegations of serious assault committed by police officials. Indeed, a vast majority of the complaints made to the ICD involved allegations of common or serious assault committed by police officials.

In 1998, South Africa ratified the UN Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment of Punishment (CAT). This convention defines torture as:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is a suspected of committing, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful actions.”

It is recommended that an amendment based on this definition is included in the legislation to guide the IPID in identifying and investigating incidents of torture. Moreover, that the legislation instructs the IPID to adhere to the relevant UN protocols for investigating torture.

## **4.4 Receiving allegations of torture**

It is not clear why the Bill limits the IPID to investigating allegations of torture to specific categories of people. The experience of torture may be deeply traumatic for the victim who may not want to or be able to report it. Moreover, victims of torture committed by police officials may not have legal representatives or know that they can report it. Such cases may be reported through other channels such as social workers, psychologists, community volunteers, or even journalists.

We propose that to ensure that the IPID can effectively tackle the problem of torture committed by police officials, the clause be changed as follows:

- *Any complaint or allegation of torture committed by a police official which is received from any source.*

#### **4.5 Ensuring the capacity to investigate torture and rape**

Crimes such as rape and torture require investigators to have specific skills and capacity if they are to be adequately equipped to gather sufficient evidence to present to the prosecuting authorities. It is for this reason that the SAPS established a specific unit called the Family Violence, Child Protection and Sexual Offences Unit (FCS). The crime of rape is particularly sensitive and officials need to be specially trained to ensure that they do not cause secondary victimisation and to ensure that they are able to collect the necessary evidence.

Both torture and rape rarely occur in the presence of independent witnesses who can assist investigations or be called to give evidence to prove the case in court. It is for this reason that forensic support becomes a vital to the investigators of these types of crimes so as to be able to corroborate victim testimony that the incident actually happened and to link a particular suspect to the scene of the crime. However, it has become apparent that although the IPID will require additional resources given its extended mandate, the recent allocation to the ICDs is not encouraging. The ICDs budget was reduced by 3% compared to the previous financial year which saw the ICDs budget decrease to only 2.34% of the budget of the SAPS in 2008/09.

It is therefore proposed that the draft legislation stipulate that the investigators working for the IPID are provided with the necessary skills and forensic support to effectively investigate allegations of rape and torture. It could be stated as follows:

- *The Minister must ensure that the Directorate has the specific resources required to adequately investigate deaths, rape and torture by police or in police custody.*

#### **4.6 Prioritising cases investigated by the IPID**

One of the reasons that the ICD is sometimes seen as a “toothless watchdog” is because of the length of time it takes to finalise the cases that it has worked on. However, this has not always been the fault of the ICD itself. In some cases it is because of the length of time that it takes the National Prosecuting Authority to make a decision on whether or not to prosecute a case it has receive from the ICD.

A recent example of this was the investigation of the highly publicised death of Olga Kekana at the hands of police officials on Sunday, 11 October 2009. In July 2010, accusations were leveled at the ICD that they were failing the victim’s family by taking too long to finalise the case, which was still unresolved nine months after the incident. During a radio interview on Khaya FM on 13 July 2010, the ICD spokesperson told interviewer John Perlman that their investigation into the shooting only took a few weeks to finalise. The case was then handed to the NPA for a decision on whether or not to prosecute. The reason why there had been no movement on the case for a period of nine months is because the NPA had yet to make a decision on the matter.

Although this case is presented only as single high profile example, it serves to demonstrate the public impression that is caused if there is inadequate coordination between the investigating body and the prosecuting authority. Ideally, all serious criminal cases should be acted on speedily by the

NPA, however, investigations against police officials should always be prioritised. There are two important reasons for this.

1. Criminal cases against police officials severely undermine the public perception of the police organisation. If the allegations against a police official are true, the case should be investigated as quickly as possible to convey the message to the public that the government takes the integrity of its police officials seriously; and that those guilty of criminal conduct will be acted against speedily so as to protect the integrity of the police organisation.
2. If a police official the allegations against a police official are untrue, it is unfair for the official to have investigations hanging over his or her head for a protracted period of time. Prioritising cases against police officials also sends a message that government is concerned with the well-being of police officials given the important role they play and will be dealt with speedily. This may serve to boost morale and discipline in the police.

It is proposed that the legislation include a clause that will result in a representative of the NPA becoming part of the Consultative Forum presented in Chapter 4 of the Bill. Clause 16 could be amended to include:

- *(c) a senior representative appointed by the National Director of Public Prosecutions to represent the National Prosecuting Authority*

## **5. Matters that the IPID may investigate**

The memorandum to the Bill states that the “thrust of the work of the Directorate, in the process of conducting investigations, is to address systemic problems within the police service with a view to recommending appropriate interventions”.

Specifically, the new Bill states that the “may” investigate:

- Systemic corruption involving police;
- Corruption matters within the police referred to it by select government officials;
- Inefficiency of the police to carry out its duties.

### **5.1 The challenge of addressing systemic problems**

At this point it is unclear what is meant by the word “systemic.” This word which is not defined in the Bill may saddle the IPID with an onerous responsibility that it will not be adequately equipped to deal with.

While the IPID will hopefully have the capacity to investigate specific cases of police abuse, this will not necessarily allow it to make pronouncements on the systemic reasons as to why this abuse takes place. The reason for this is because the s mandate is primarily to investigate specific allegations against particular police officials. The primary objective of these investigations is to gather evidence that supports or refutes the allegation. This required different capacity and approach to identifying systemic challenges within a policing organisation.

It may instructive to consider the relationship between a systemic organisational challenge confronting a policing agency and the abusive behaviour that occurs as a result. For example, flawed recruitment practices, inadequate training, poor management and a weak internal disciplinary system would be the types of systemic problems that could result in high levels of corruption, misconduct and abusive behaviour on the part of police officials.

To be able to recommend appropriate interventions to solve the systemic problems confronting the organisation, the IPID would be required to investigate a range of issues beyond the specific allegations of corruption or criminality. This means that the IPID would have to develop the

capacity to assess a variety of organisational policies, processes and systems, and at the very least management practices.

Ensuring that these organisational processes and practices are effective is the direct responsibility of the leaders of the policing agency and should flow from the policies developed under the guidance of the Minister. It is for this reasons that it is recommended that the responsibility for assessing the systemic problems confronting the police may be better placed with the Secretariat of Police. As the Executive oversight agency responsible for developing and monitoring policy, the Secretariat may be better placed to perform such a task.

## **5.2 Tackling Police Corruption**

Given the substantial challenge of police corruption confronting our policing agencies, it is a positive sign that the IPID is given a particular role to play in addressing this problem. However, it must be recognised that there is relatively little that the IPID or any other external civilian oversight agency can do to ensure that corruption within policing agencies is effectively dealt with.

The ICD already has experience in investigating allegations of police corruption. The ICD established an Anti-Corruption Command (ACC) in 2004 following the closure of the acclaimed SAPS Anti-Corruption Unit by the previous National Commissioner Jackie Selebi. During 2001, the year before the closure of the SAPS ACU, this unit had made over 1000 arrests of police officials on charges of corruption. Sufficient anti-corruption activity within the SAPS has not been experienced since that time. The apparent lack of dedication to proactively tackling corruption in the SAPS should be of grave concern to all those who support the many honest police officials whose work is made more difficult and whose reputations are tarnished because of their colleagues who regularly commit corruption unimpeded.

The closure of the SAPS Anti-Corruption Unit was a significant mistake and its effect can be seen on the work of the ICD. During the years when the ACU was in operation, the ICD only received an average of 43 cases of police corruption annually. However, following the closure of the SAPS ACU unit, the ICD started to receive an average of 125 cases per year, an increase of 190%. The requirement for dedicated and specialised capacity to investigate police corruption was the reason the ICD established its ACC. However, the ICD has found it particularly difficult to investigate the corruption cases against police officials as it does not have the resources and skills required to do so.

As with other systemic challenges facing policing organisations, corruption cannot be substantially addressed by external oversight agencies. International experience demonstrates that the primary responsibility for developing and implementing effective anti-corruption strategies has to lie squarely with the Chief of the Police and his or her senior management. Unless it is directly driven from this level, challenges with police corruption will not be effectively dealt with.

Fortunately, there is substantial evidence available as to what types of policies, structures and systems need to be in place for a policing agency to effectively reduce levels of corruption. Most of this is captured in the Department of Public Service and Administrations (DPSA) Minimum Anti-Corruption Guidelines. For many years now the SAPS has not progressed much beyond developing a Corruption and Fraud Prevention Plan (recently renamed the “Anti-Corruption Strategy”). It is time that the implementation of this plan is driven by the National Commissioner of Police. This is the only way the SAPS will be truly transformed into an organisation that is widely respected as a model of professionalism and integrity in which all communities can take pride.

## **6. Offences and Penalties**

If the committee agrees that policing agencies should be compelled to report all incidents of deaths, rape and torture related to police action or in custody, then it is proposed that the legislation be clear on the sanction that may be imposed for failure to do so. A proposed inclusion could be as follows:

- ***Failure of a police official to immediately report any matter as presented in section 25 of this Act to the Directorate is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.***

Furthermore, it will be necessary to include sanction for those police officials who do not provide immediate and unfettered cooperation to IPID investigations. It is recommended that the following clause be considered for inclusion:

- ***Failure of any police official to provide the support or cooperation requested by the IPID within 48 hours of receiving such a request is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.***

## **7. Conclusion**

The ISS thanks the committee for the opportunity to make this submission. We reiterate that we are willing to assist the committee further in any way we can. We have attached an annexure to this submission that presents various research papers relevant to the issues under consideration in relation to this Bill. These documents are freely available from our website at [www.issafrica.org](http://www.issafrica.org) or we can make hard copies available upon request. We wish the committee all the best in its deliberations on these important pieces of legislation.

## APPENDIX A

1. Burger, J and Adonis C. "South African Police Service Compliance with recommendations by the Independent Complaints Directorate." A Joint Research Project conducted by the Independent Complaints Directorate (ICD) and the Institute for Security Studies (ISS). December 2007
2. Faull, A. Chapter 18, "Corruption" in the book, "Behind the badge: the untold stories of South Africa's Police Service members", Zebra Press: Cape Town, 2010
3. Faull, A. & Mtsolongo, T. "From stings to wings: integrity management and the directorate for priority crime investigations" in Crime Quarterly No 29, September 2009
4. Faull, A. "Need or Greed: Corruption and integrity management in a Gauteng police station" in Crime Quarterly No 28, June 2009
5. Faull, A. "Taking the Test: policing integrity in South Africa's MPDs" in Crime Quarterly 27, March 2009
6. Faull, A. "City Blues: corruption and corruption management in South Africa's metropolitan police departments", ISS Occasional Paper 170, November 2008
7. Faull, A. "Bring them into line: managing corruption in the SAPS and metro police departments" in Crime Quarterly 23, March 2008
8. Faull, A. "Corruption and the South African Police Service: a review and its implications", ISS Occasional Paper 150, November 2007